SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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BERTO CONSTRUCTION INC.,

Plaintiff(s),

-against-

PERGAMENT MALL OF STATEN ISLAND LLC, NY CONSTRUCTION AND PAVING INC.,

Defendant(s).

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NY CONSTRUCTION AND PAVING INC.,

Third-Party Plaintiff(s),

-against-

A.J.S. PROJECT MANAGEMENT, INC.,

Third-Party Defendant(s).

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DCM PART 5

Present:
HON. JUDITH N. MCMAHON

DECISION AND ORDER

Index No. 101254/2006
Motion Nos. 001, 002

Index No. A101254/2006

The following papers numbered 1 to 6 were used on this motion this 17th day of July, 2008

Notice of Motion [Plaintiff](Affirmation in Support)	**1**
Affirmation in Opposition [NY Constr. Affirmation in Support]	**2**
Reply Affirmation [Plaintiff]	**3**
Notice of Cross Motion [Pergament Affirmation in Support]	**4**
Affirmation in Opposition [Plaintiff]	**5**
Reply Affirmation [Pergament]	**6**

Plaintiff, Berto Construction Inc. [hereinafter "Berto"] commenced this action on or about April 10, 2006, to recover monies allegedly due and owing for asphalt, paving work performed on defendant Pergament Mall of Staten Island LLC's [hereinafter "Pergament"] property. It is undisputed that Pergament hired third-party defendant A.J.S. Project Management Inc., [hereinafter "AJS"] as general contractor for its construction project on its property. AJS thereafter contracted with defendant NY Construction and Paving Inc. [hereinafter "NY Paving"] to perform asphalt, paving and

sidewalk work on the site. NY Paving subsequently entered into a contract with plaintiff Berto, in July 2004, for the paving and sidewalk work. Shortly thereafter, Berto began work on the site but stopped after payment from NY Paving ceased. NY Paving concedes that payment did in fact, cease. Berto now brings this motion for summary judgment against defendant NY Paving on the ground that the debt for work performed is due and owing. Separately, defendant Pergament brought a motion for summary judgment seeking to dismiss plaintiff's complaint on the ground that no privity of contract exists between the parties.

It is well settled that a "proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Alvarez v. Prospect Hosp., 68 NY2d 320, 324 [1986]). Once the movant has satisfied this burden, "the burden shifts to the [opponent] to lay bare his or her proof and demonstrate the existence of a triable issue of fact" (Chance v. Felder, 33 AD3d 645, 645-646 [2d Dept 2006]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). In this regard, the court is enjoined to accept the evidence tendered by the opposing party as true, and "must deny the motion if there is even arguably any doubt as to the existence of a triable issue" (Fleming v. Graham, 34 AD3d 525 [2d Dept 2006] quoting Barker v. Briarcliff School Dist., 205 AD2d 652, 653 [2d Dept 1994] [internal quotation marks omitted]).

I. Berto v. NY Paving (Motion No. 001)

While the instant contract is not alleged to have a "pay-when-paid" clause, plaintiff alleges that NY Paving has failed to perform under the contract because codefendant Pergament has failed to remit payment to NY Paving. The law is clear that where a "pay-

when-paid" defense is utilized it "does not establish a condition precedent for payment but merely fixes a time for payment" (Otis Elevator Co v. George A. Fuller Co., 172 AD2d 732, 733 [2d Dept., 1991]; William H. Lane v. Am. Druggists' Ins. Co., 111 AD2d 970, 971 [3d Dept., 1985]). Further, the Court of Appeals has ruled that "pay-when-paid" clause are generally unenforceable [as] against public policy" and while they may delay payment for a 'reasonable time' to give the subcontractor time to obtain payment from the general contractor, it does not preclude payment indefinitely or act as a condition precedent (West-Fair Elec. Constr. v. Aetna Cas & Sur. Co., 87 NY2d 148 [1995]; Action Interiors, Inc., v. Component Assembly Sys. Inc., 144 AD2d 606, 607 [2d Dept., 1988]).

Here, the plaintiff has made a prima facie showing of entitlement to summary judgment by establishing that defendant NY Paving has yet to pay under the terms of the contract for the completed work (Alvarez v. Prospect Hosp., 68 NY2d 320, 324 [1986]; Action Interiors, Inc., v. Compnent Assembly Sys. Inc., 144 AD2d 606, 607 [2d Dept., 1988]). However, in opposition, the defendant NY Paving has successfully raised a triable issue of fact by presenting this Court with enough admissible evidence of whether the work performed by Berto was satisfactory (Otis Elevator Co. v. George A. Fuller Co., 172 AD2d 732 [2d Dept., 1991][finding that questions of fact regarding defendant's alleged damages preclude granting summary judgment]). Specifically, NY Paving has established, *inter alia*, that some of the sidewalks were "spalling" and the concrete had too much "cream" on top causing it to peel. These alleged defects, along with the letters mentioning them, creates a triable issue of fact regarding whether NY Paving is withholding payment because of faulty workmanship which requires resolution by a jury. Therefore, Berto's summary judgment

motion is hereby denied.

II. Pergament v. Berto (Motion No. 002)

New York Lien Law § 44(3) specifically requires "[a]ll persons appearing by the records in the office of the county clerk or registered to be owners of such real property or any part thereof" must be joined as necessary parties in an action to enforce upon a mechanic's lien (Martiano Constr. Corp. v. Briar Contr. Corp., 104 AD2d 1028, 1030 [2d Dept., 1984]).

Therefore, here, plaintiff's sixth cause of action to foreclose the mechanics lien on defendant Pergament's property requires defendant Pergament be joined as a necessary party (NY Lien Law§ 44(3); Martiano Constr. Corp. v. Briar Contr. Corp., 104 AD2d at 1030). However, the remaining causes of action, sounding in negligence and breach of contract, against defendant Pergament are inappropriate must be dismissed (Martiano Constr. Corp. v. Briar Contr. Corp., 104 AD2d at 1030 [finding that "a subcontractor may not assert a cause of action which is contractual in nature against parties with whom it is not in privity . . . no tort liability rests without privity to the subcontractor either"]; Outrigger Constr. Co. v. Bank Leumi Trust Co. of New York, 240 AD2d 382, 382 [2d Dept., 1997][holding that where no contractual privity exists, no cause of action does either]).

Accordingly, it is

ORDERED that plaintiff Berto Construction Inc.'s, motion for summary judgment is hereby denied, and it is further

ORDERED that defendant Pergament Mall of Staten Island LLC's motion for summary judgment is denied with respect to plaintiff's sixth cause of action ONLY, and

granted as to plaintiff's remaining causes of action against defendant Pergament ONLY.

THIS IS THE DECISION AND ORDER OF THE COURT.

Dated: July 22, 2008 **E N T E R,**

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Hon. Judith N. McMahon
Justice of the Supreme Court