

**Diversified Indus., Inc. v 250 Bowery Project,
LLC**

2009 NY Slip Op 30700(U)

March 26, 2009

Supreme Court, New York County

Docket Number: 109673/08

Judge: Doris Ling-Cohan

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Doris Ling-Cohan

PART 36

Index Number : 109673/2008

DIVERSIFIED INDUSTRIES INC.

VS.

250 BOWERY PROJECT LLC

SEQUENCE NUMBER : 002

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for dismiss

1-4

PAPERS NUMBERED

1,2

3

4

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion to dismiss is granted
in accordance with the attached memorandum decision.

FILED

MAR 31 2009

COUNTY CLERK'S OFFICE
NEW YORK

HON. DORIS LING-COHAN

Dated: 3/27/09

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

[* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

-----X
DIVERSIFIED INDUSTRIES, INC.,

Plaintiff,

Index No.:
109673/08

- against -

Motion Seq.:
002

250 BOWERY PROJECT, LLC c/o PETER MOORE
ASSOCIATES, KBC CONCRETE CORP. d/b/a
AFFORDABLE CONSTRUCTION CO., FOUNDATIONS
GROUP, INC., M & B CONCRETE, NRFC WA
HOLDINGS II, LLC and WELLS FARGO BANK,
NATIONAL ASSOCIATION, AS TRUSTEE FOR THE
REGISTERED OWNERS OF N-STAR REL CDO VII,
GRANTOR TRUST, SERIES K,

Defendant.

-----X
DORIS LING-COHAN, J:

In this breach of contract action, defendants 250 Bowery Project LLC (250 Bowery) and Foundations Group, Inc. (FGI) (collectively moving defendants), move for an order, pursuant to: (1) CPLR 3211 (a) (1) and (7), dismissing the summons and amended complaint as against defendants 250 Bowery, FGI, M & B Concrete, NRFC Wa Holdings II, LLC and Wells Fargo Bank, National Association, as Trustee for the registered owners of N-Star Rel CDO VII, Grantor Trust, Series K (Wells Fargo); (2) Lien Law § 4, discharging the mechanic's lien; and (3) CPLR 6514, cancelling the notice of pendency. In the event the motion is denied, moving defendants move, pursuant to CPLR 3211 (f), for an order, granting them an extension of time to serve and file an answer.

For the reasons set forth below, moving defendant's motion

FILED

MAR 31 2009

COUNTY CLERK'S OFFICE
NEW YORK

[* 3]
is granted.

Background

250 Bowery is the owner of the premises located at 250-252 Bowery Street, New York, New York (the Premises). 250 Broadway hired FGI as general contractor, to perform construction work on a project (the Project) at the Premises. FGI, in turn, hired subcontractor, defendant KBC Concrete, Corp. d/b/a Affordable Concrete Construction, Co. (KBC) to perform excavation, underpinning and shoring work at the premises.

In March 2007, plaintiff, Diversified Industries, Inc. (Diversified) entered into an agreement with KBC, to perform excavation and related work on the Project. Pursuant to the agreement between Diversified and KBC, Diversified performed excavation and related work at the Project from March 2007 to October 2007.

Plaintiff claims it completed the required work, which totaled \$135,000.00 for labor and material, but was not paid by KBC. According to plaintiff, there is an outstanding balance of \$123,000.00 for its work on the project.

Moving defendants claim that KBC was paid in full by FGI for all work performed as of September 21, 2007. In fact, Chris Spirito, president and owner of KBC, affirmed that FGI made all payments due to KBC as of April 17, 2007, May 17, 2007, June 13, 2007, August 14, 2007 and September 21, 2007 (see waiver of lien

to date and checks tendered by FGI to KBC, Affidavit of Saif Sumaida, president of FGI, Exhs. G & H). By letter dated September 21, 2007, Spirito acknowledged that FGI had overpaid KBC for work performed as of September 20, 2007 in the amount of \$86,400.00 (see Sumaida Aff., Exh. I). Thereafter, KBC submitted two final applications for payment, dated September 12, 2007 in the amount of \$38,849.85 and November 8, 2007 in the amount of \$7,257.60 (see Sumaida Aff., Exh. F). Since KBC admitted that it had been overpaid, FGI simply deducted the aforementioned sums from the overpayment, leaving a credit to FGI in the amount of \$40,292.55 (see Sumaida Aff., ¶ 12).

Thereafter, on January 16, 2008, FGI fired KBC for failing to perform its duties under its agreement with FGI. On February 13, 2008, KBC filed a mechanic's lien (see Sumaida Aff., Exh. J) but has not foreclosed on the lien.

On March 26, 2008, Diversified filed a notice of mechanic's lien against the Premises to secure an alleged claim for labor and material in connection with the Project (see notice of mechanic's lien, affirmation in opposition, Exh. A). On July 1, 2008, Diversified filed a notice of pendency with the court (see Exh. C).

In the amended complaint, Diversified asserts the following causes of action: (1) breach of contract as against KBC in the amount of \$123,000.00 plus interest from October 2007 (first

cause of action); (2) unjust enrichment as against KBC, FGI and 250 Bowery (second cause of action); (3) enforcement of the mechanic's lien as against all defendants (third cause of action).

Discussion

"A complaint should not be dismissed on a pleading motion so long as, when the plaintiff's allegations are given the benefit of every possible inference, a cause of action exists" (*Rosen v Raum*, 164 AD2d 809, 811 [1st Dept 1990], [internal quotation marks omitted]; see also *Banc of Am. Sec. LLC v Solow Bldg. Co. II, L.L.C.*, 47 AD3d 239, 242 [1st Dept 2007]). Further, "the material allegations of the complaint must be deemed to be true and the proper inquiry is whether a cause of action exists, not whether it has been properly stated" (*Rosen*, 164 AD2d at 811; see also *Asgahar v Tringali Realty, Inc.*, 18 AD3d 408, 409 [2d Dept 2005]).

Under CPLR 3211 (a) (1), "[a] party may move from judgment dismissing one or more causes of action asserted against him on the ground that ... a defense is grounded upon documentary evidence." The court may grant dismissal when the "'documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law'" (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 571 [2005] [citation omitted]).

Moving defendants assert that plaintiff's second cause of

action for unjust enrichment should be dismissed as against such defendants because: (1) there is an express contract between Diversified and KBC; and (2) Diversified performed work at the request and benefit of KBC, and not moving defendants.

To prevail on a claim for the quasi-contractual remedy of unjust enrichment, Diversified must establish that: (1) defendants were enriched; (2) at Diversified's expense; (3) against the equity and good conscience to permit defendants to retain what they sought to be recovered (*see generally Manufacturers Hanover Trust Co. v Chemical Bank*, 160 AD2d 113, 117 [1st Dept 1990]). Where, however, there is a written agreement concerning the issues in dispute, Diversified would be precluded from pursuing any non-contractual remedies, irrespective of whether the party against whom the claims are asserted was a signatory to the agreement (*see Hunter v Deutsche Bank AG, New York Branch*, — AD3d —, 866 NYS2d 670, 671 [1st Dept 2008] ["claims for unjust enrichment ... are not viable since an express contract governs the subject matter"], citing *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 23 [2005]; *see also Vitale v Steinberg*, 307 AD2d 107 [1st Dept 2003]).

Diversified contends that it has properly stated a cause of action for unjust enrichment since it claims that it bestowed a benefit to defendants, i.e., excavation and related work on the Project, without receiving adequate compensation. However, such

assertions are not enough (see *Yellowstone Indus., Inc. v Vinco Marine Mgt., Inc.*, 305 AD2d 587, 588 [2d Dept 2003] ["[t]he mere fact that the appellants consented to the improvements and received some benefit from the plaintiff's activities is insufficient to recover on such a theory ..."]). Rather, Diversified must allege that "it was working for [defendants] when it performed its work..." (*id.*, citing *Hampton Living, Inc. v Carlton on the Park, Ltd.*, 286 AD2d 664 [1st Dept 2001] [other citation omitted]; see also *M. Paladino, Inc. v Flintock Constr. Servs., LLC*, 15 Misc 3d 127(A) [App Term, 1st Dept 2007]).

Here, Diversified, a subcontractor, contracted with KBC, a subcontractor of FGI, not with the moving defendants (see *Hampton Living, Inc.*, 286 AD2d 664, *supra* [upheld dismissal of unjust enrichment claim where plaintiff contracted with contractor and no proof that the owner assumed an obligation to pay the plaintiff]). The work was therefore performed for KBC's benefit (see *Sybelle Carpet & Linoleum of Southampton v East End Collaborative*, 167 AD2d 535 [1st Dept 1990]). There are no allegations or claims that Diversified contracted with anyone other than KBC, and Diversified has not alleged that defendants "assumed an obligation to pay" Diversified (*Yellowstone Indus. Inc.*, 305 AD2d 588, *supra* citing *Amana Elevation Corp. v Ydrohoos-Aquarius, Inc.*, 244 AD2d 371 [2d Dept 1997]). Moreover, although plaintiff alleges that it had performed work for KBC,

* 8]

FGI and 250 Bowery, the fact that there was no express contract with either FGI, nor 250 Bowery, precludes a cause of action for unjust enrichment (see Hampton Living, Inc., 286 AD2d 664). As such, the second cause of action for unjust enrichment is dismissed as against the moving defendants.

The court now turns to the issue regarding the mechanic's lien. Moving defendants assert that the amended complaint fails to allege that KBC, the party with whom Diversified was in privity of contract, performed its obligations under its contract with FGI, which they claim is fatal to Diversified's claim since the rights of a second-tier subcontractor are derivative to the rights of a first-tier subcontractor and general contractor.

Under Lien Law § 4 (1), a mechanic's lien is valid to the extent of "the sum earned and unpaid on the contract at the time of filing the notice of lien, and any sum subsequently earned thereon." The burden lies with the subcontractor, in this case the sub-subcontractor Diversified, to demonstrate "that there is money due and owing to the [subcontractor] from the owner based on the primary contract" (see *Matros Automated Elec. Const. Corp. v Libman*, 2005 WL 6066408 [Sup Ct, NY County 2005], *aff'd* 37 AD3d 313 [1st Dept 2007]). Here, as in *Matros*, the documentary evidence submitted by moving defendants reflects that all sums owed to the subcontractor KBC were paid before any of the liens were filed (*id.*). As such, there was no money due to Diversified

from 250 Bowery or FGI. Therefore, the mechanic's lien is vacated pursuant to Lien Law § 4 (1).

Moreover, the court notes that the notice of pendency is fatally defective in that Diversified failed to set forth the time of filing of the notice of mechanic's lien as required under Lien Law § 17. While Diversified filed an amended notice of pendency, such correction may not be filed nunc pro tunc (see Carmody-Wait 2d § 87:43 [2008], citing *L & J Plumbing & Heating Co., Inc. v Gateway Demolition Corp.*, 176 Misc 2d 277, 279 [Sup Ct, Queens County 1998]). Such a defect warrants cancellation of the notice of pendency and discharge of the mechanic's lien (*L & J Plumbing & Heating Co., Inc.*, 176 Misc 2d at 279).

Based on the foregoing, the motion to dismiss is granted in its entirety.

Conclusion

It is,

ORDERED that the motion to dismiss is granted as against defendants 250 Bowery Project LLC, Foundations Group, Inc., M & B Concrete, NREC Wa Holdings II, LLC and Wells Fargo Bank, National Association, as Trustee for the registered owners of N-Star Rel CDO VII, Grantor Trust, Series K (Wells Fargo) with costs and disbursements to defendant as taxed by the Clerk of the Court, and the third cause of action of the complaint is severed and dismissed; and it is further


ORDERED that the notice of pendency is cancelled and the Clerk of the Court is directed to discharge the mechanic's lien; and it is further

ORDERED that the remainder of the action shall continue as against defendant KBC Concrete Corp. d/b/a Affordable Construction Co.; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that within 30 days of entry of this order, movants shall serve a copy upon all parties.

Dated: 3/26/09



Hon. Doris Ling-Cohan, J.S.C.

J:\Dismiss\Diversified.250 bowery.wpd

FILED
MAR 31 2009
COUNTY CLERK'S OFFICE
NEW YORK