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SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 8

STRUCTURAL GROUP, INC.,

Plaintiff,

INDEX NO.: 020522/2009
MOTION DATE: 04/22/2009
MOTION SEQUENCE: 001

-against-

CLK/HOULIHAN-PARNES, LLC, HP LAKE SUCCESS, LLC, MARCUS AVENUE ACQUISITION, LLC, FEIGA-SADDLEBACK/MARCUS AVENUE, LLC, and LASALLE BANK NATIONAL ASSOCIATION, as Trustee for the Registered Holders of Greenwich CCFC commercial Mortgage Trust 2005-GG5, Commercial Mortgage Pass-through Certificates, Series 2005-GG5, SUPERIOR AIR CONDITIONING & HEATING SYSTEMS, INC., WEBCO INTERIORS, INC., ABC CORP., and XYZ CORP., fictitious names,

Defendants.

WEBCO INTERIORS, INC.,

Crossclaim-Plaintiff,

-against-

STELLAR STRONG ISLAND, LLC, RP GATEWAY MEMBER, LLC, and WOODBURY OFFICE CONSTRUCTION, LLC,

Additional Cross-Claim Defendants.

The following papers read on this motion:

Notice of Motion, Affidavit, Affirmation & Exhibits Annexed	1
Affidavit of Stephen Camisa in Opposition & Exhibits Annexed	2
Affirmation of Robert T. Lawless in Opposition	3
Reply Affirmation of Fred G. Daniels & Affidavit of Joseph Baglio	4

PRELIMINARY STATEMENT

Defendants move to dismiss the complaint in its entirety pursuant to Civil Practice Law and Rules § 3211 against CLK/Houlihan-Parnes, LLC, HP Lake Success, LLC, Marcus Avenue Acquisition, LLC, Feiga-Saddleback/Marcus Avenue, LLC and Feiga-Olive Tree/Marcus Avenue, LLC, and pursuant to Lien Law §19(6), for an Order lifting the Mechanics Lien filed on July 1, 2009.

BACKGROUND

The moving defendants, other than CLK/Houlihan-Parnes, LLC, acquired title to premises 1981 — 1983 Marcus Avenue, Lake Success, New York ("premises") on or about October 5, 2006. The prior owners, RP Gateway Members, LLC, and Stellar Strong Island, LLP)"RP Stellar"), contracted with Structural Group, Inc. ("Structural") on November 10, 2005, revised November 23, 2005) for provision of material and equipment for garage rehabilitation at the premises. There is no written agreement for the assumption of the contract by purchaser, but there is significant documentation regarding performance of the contract and change orders signed after the acquisition of title.

Defendants claim that the lack of a written assumption of the contract with Structural Group, which called for performance in one day more than one year, requires compliance with the Statute of Frauds; that the assumption of such an agreement by new owners also required a writing; and that there is no such written agreement.

They point out that there are five causes of action stated against CLK/Houllihan-Parnes:

a. Foreclosure of Mechanic's Lien;

b. Breach of Contract;

c. Neglect to pay book account;

d. Quantum meruit;

e. Account stated.

There is, however, only one cause of action for foreclosure of a mechanic's lien against defendants HP Lake Success, LLP, Marcus Avenue Acquisition, LLC, Feiga-Saddleback/Marcus Avenue, LLC, and Feiga-Olive Tree/Marcus Avenue, LLC.

Defendants seek dismissal of all causes of action against CLK/Houllihan-Parnes, LLC, as well as the claims to foreclose the mechanics liens against the four owners of the property, and a vacatur of the Mechanics' Lien filed with the Nassau County Clerk on July 1, 2009.

DISCUSSION

By seeking dismissal of all causes of action against each of the moving defendants pursuant to undesignated sections of Civil Practice Law and Rules § 3211, they are in reality requesting summary judgment.

When presented with a motion for summary judgment, the function of a court is "not to determine credibility or to engage in issue determination, but rather to determine the existence or non-existence of material issues of fact." *(Quinn v. Krumland,* 179 A.D.2d 448, 449 — 450 [1st Dept. 1992]); See also, (*S.J. Capelin Associates, Inc. v. Globe Mfg. Corp.* 34 N.Y.2d 338, 343, [1974]).

To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented. *(Stillman v. Twentieth Century-Fox Corp.,* 3 N.Y.2d 395, 404 [1957]). It is a drastic remedy, the procedural equivalent of a trial, and will not be granted if there is any doubt as to the existence of a triable issue. *(Moskowitz v. Garlock,* 23 A.D.2d 94 [3d Dept. 1965]); *(Crowley's Milk Co. v. Klein,* 24 A.D.2d 920 [3d Dept. 1965]).

The evidence will be considered in a light most favorable to the opposing party. (*Weill v. Garfield,* 21 A.D.2d 156 [3d Dept. 1964]). The proof submitted in opposition

will be accepted as true and all reasonable inferences drawn in favor of the opposing party. *(Tortorello v. Carlin,* 260 A.D.2d 201, 206 [1st Dept. 2003]). On a motion to dismiss, the court must " ' accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory' ". *(Braddock v. Braddock,* 2009 WL 23307 [N.Y.A.D. 1st Dept. 2009]), (*citing Leon v. Martinez,* 84 N.Y.2d 83, 87 — 88 [1994]). But this rule will not be applied where the opposition is evasive or indirect. The opposing party is obligated to come forward and bare his proof, by affidavit of an individual with personal knowledge, or with an attorney's affirmation to which appended material in admissible form, and the failure to do so may lead the Court to believe that there is no triable issue of fact. (*Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 [1980]).

The motion to dismiss the claim for foreclosure of a mechanic's lien against CLK/Houllihan-Parnes, LLC is granted. This defendant is not an owner of the property, and therefore there can be no mechanic's lien filed against it. As to the true owner-defendants, however, " . . . the dispute as to the validity of the mechanic's lien goes beyond the face of the notice of lien it cannot be resolved on motion to discharge the lien prior to trial". (*Ramos v. 145 Bleeker Street Corp.,* 26 Misc.3d 1237(A) [Sup. Ct., New York County, 2010]), citing, *Hi-Mike Water Systems, Inc. v. President Maintenance Corp.,* 2001 N.Y.Slip Op. 5013 (Sup.Ct., New York County, 2001).

The motion to dismiss the action to foreclose the mechanic's lien as to the four other moving defendants is denied. Lien Law § 3 provides in part as follows:

> A contractor, subcontractor, laborer, materialman, landscape gardener, nurseryman or person or corporation selling fruit or ornamental trees, roses, shrubbery, vines and small fruits, who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof, or of his agent, contractor or subcontractor, and any trust fund to which benefits and wage supplements are due or payable for the benefit of such laborers, shall have a lien for the principal and

> interest, of the value, or the agreed price, of such labor, including benefits and wage supplements due or payable for the benefit of any laborer, or materials upon the real property improved or to be improved and upon such improvement, from the time of filing a notice of such lien as prescribed in this chapter.

Defendants contend that the work done work done on the garage renovation, from October 5, 2006, the date the defendants acquired title, through the completion of the work in early 2008 was without the knowledge or consent of the defendants. This is despite some 66 change orders executed by CLK, typically as Agent, and periodic payments by the owners, including Marcus Avenue Acquisition, LLC. At the very least, the relationship of CLK to the title holders, the extent of their authority, and the knowledge or consent of the owners to the work done by plaintiff, present questions of fact which cannot be determined by motion. The motion to dismiss the claims to foreclose the mechanic's liens as to the four owner-defendants is denied.

Defendants also seek dismissal of all causes of action against CLK. At this stage of the proceedings, the motions to dismiss the claims for breach of contract, quantum meruit and account stated are denied. There are factual questions as to whether or not CLK assumed the responsibilities of the prior owners under the November 10 and November 23, 2005 agreements. The contract, which called for the work to be completed one day after the first anniversary of the execution, does not necessarily make the agreement subject to the Statute of Frauds, since it is not incapable of completion prior to the expiration of one year. A significant question in determining whether an agreement requires a writing, is whether or not it is conceivable that the contract can be completed within one year. (*Americana Petroleum Corp. v. Northville Industries Corp.*, 200 A.D.2d 646 [2d Dept. 1994]). The mere statement that the contract had a duration of one year and one day does not mean that it is inconceivable, or even highly unlikely, that the work could not be completed within one year.

It is certainly unclear based on the papers submitted whether plaintiff continued to perform under a contract which under its terms expired in 2006, but may have been orally extended, or whether it proceeded under a new contract, agreed upon orally with CLK, either as agent for the true owner-defendants, or on their own behalf. There is certainly documentary evidence that after the sale of the premises CLK continued, either on its own behalf, or as agent

for the owners, to coordinate work with the plaintiff, agree to various change orders, and cause payment to be made for some of the work performed after October 5, 2006.

For this reason the motion s to dismiss the causes of action for breach of contract, quantum meruit, and account stated are denied. Factual questions as to the relationship among the parties precludes the grant of relief.

The motion to dismiss the cause of action for "neglect to pay book account" is granted. There is no such cause of action recognized by the Court. To the extent that one is entitled to recover damages where they are otherwise incapable of measurement, this is a measure of damages. Thus, for example, the loss of an item of particular sentimental value, but without a ready market, entitles the owner to reimbursement from the party whose negligence or intentional misconduct led to the loss. It does now, however, constitute an independent cause of action.

This constitutes the Decision and Order of the Court.

Dated: July 6, 2010

J.S.C.