

**Precision Interior Constr. v Candor Constr. Group**

2010 NY Slip Op 32252(U)

August 16, 2010

Supreme Court, Suffolk County

Docket Number: 21485/2008

Judge: Emily Pines

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SHORT FORM ORDER

Index Number: 21485-2008

**COPY****SUPREME COURT - STATE OF NEW YORK  
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY****COPY****Present: HON. EMILY PINES**  
J. S. C.Original Motion Date: 04-06-2010  
Motion Submit Date: 06-04-2010  
Motion Sequence No's.: 002 MOTD[ ] FINALDISP  
[ x ] NON - FINAL DISP

\_\_\_\_\_ X

**PRECISION INTERIOR CONSTRUCTION,  
FEINSTEIN IRONWORKS, INC., AJA  
LANDSCAPING AND MAINTENANCE d/b/a FRONT  
LINE MASONRY, GORDON L. SEAMAN, INC.  
AND ALL COUNTY PAVING CORP.,****Plaintiff,****-against-****CANDOR CONSTRUCTION GROUP, J.P. MORGAN  
CHASE BANK, FIV GREENLAWN PLAZA, LP.,  
SAFECO INSURANCE COMPANY OF AMERICA,  
SIGNATURE PAINTING SERVICES, PATRICK  
BREEN, STATE OF NEW YORK JOHN DOE 1  
THROUGH JOHN DOE 10, representing tenants or  
persons who may be in possession or have an interest in  
the liened premises,****Defendants.**

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The Court is considering herein the following:

1. Motion by plaintiffs, Precision Interior Construction Corp. ("Precision") and Gordon L. Seaman, Inc. ("Seaman") brought on by Order to Show Cause (PINES, J.) dated March 10, 2010, to set the priority of certain mechanics liens and vacate and discharge other liens; and
2. Motion by defendant and interpleading plaintiff, JP Morgan Chase Bank, N.A. ("JP Morgan") and defendants Safeco Insurance Company of America ("Safeco") and FLV Greenlawn Plaza, L.P. ("FLV") brought on by Order to Show Cause (PINES, J.) dated

May 5, 2010, setting lien liability and authorizing the payment of the amount directly into the Court, and for summary judgment dismissing certain causes of action.

### Background

This consolidated action arises out of a construction project wherein JP Morgan contracted with defendant Candor Construction Group (“Candor”) for certain work to be performed at 777 Pulaski Road Road, Greenlawn, New York (the “subject premises”).<sup>1</sup> FLV is the owner of the subject premises and JP Morgan is the tenant at that location. Candor was the general contractor on the project and pursuant to the terms of its agreement with JP Morgan, dated February 20, 2007, Candor hired several subcontractors to perform work on the project. The submissions reflect that Candor failed to pay the entire amounts due and owing the subcontractors, numerous mechanics’ liens have been filed against the subject premises and several of the subcontractors commenced actions to foreclose their liens. The outstanding actions were consolidated by the Court by Order (PINES, J.) dated February 18, 2010. JP Morgan commenced an interpleader action seeking a determination of its lien liability and ancillary relief by the filing of an Interpleader Summons and Complaint on August 6, 2009. Safeco and JP Morgan have executed bonds for the discharge of the liens filed by the subcontractors. JP Morgan alleges that the total remaining balance due and owing under its agreement with Candor is \$356,806.30. Therefore, it seeks to set its liability at that amount and deposit the funds into the Court to discharge it from this case. Precision and Seaman seek to establish the priority of certain mechanics liens and discharge and vacate other liens.

### The Lien Law

The following provisions of the Lien Law are relevant to the motions *sub judice*:

#### §10. Filing of notice of lien

1. Notice of lien may be filed at any time during the progress of the work and the furnishing of materials, or, within eight months after the completion of the contract, or the final performance of the work, or the final furnishing of the materials, dating from the last item of work performed or materials furnished; ... .

#### §13. Priority of liens

(1) A lien for materials furnished or labor performed in the improvement of real property shall have priority over a conveyance, mortgage, judgment or other claim against such property not recorded, docketed or filed at the time of the filing of the notice of such lien, except as hereinafter in this chapter provided; ... . Persons shall have no priority on account

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<sup>1</sup> The subject premises is more particularly described on the tax map as district 0400, section 112.00, block 02.00, lot 005.003.

of the time of filing of their respective notices of liens, but all liens shall be on parity except as hereinafter in section fifty-six of this chapter provided; ... .

#### §17. Duration of lien

No lien specified in this article shall be a lien for a longer period than one year after the notice of lien has been filed, unless within that time an action is commenced to foreclose the lien, and a notice of the pendency of such action, whether in a court of record or in a court not of record, is filed with the county clerk of the county in which the notice of lien is filed, containing the names of the parties to the action, the object of the action, a brief description of the real property affected thereby, and the time of filing the notice of lien; or unless an extension to such lien, is filed with the county clerk of the county in which the notice of lien is filed within one year from the filing of the original notice of lien, continuing such lien and such lien shall be redocketed as of the date of filing of such extension. Such extension shall contain the names of the lienors and the owner of the real property against whose interest therein such lien is claimed, a brief description of the real property affected by such lien, the amount of such lien, and the date of filing the notice of lien. No lien shall be continued by such extension for more than one year from the filing thereof. In the event an action is commenced to foreclose the lien within such extended period, such lien shall be extinguished unless an order be granted by a court of record or a judge or justice thereof, continuing such lien, and such lien shall be redocketed as of the date of granting such order and a statement made that such lien is continued by virtue of such order. ... . If lienor is made a party defendant in an action to enforce another lien, and the plaintiff or such defendant has filed a notice of the pendency of the action within the time prescribed in this section, the lien of such defendant is thereby continued. Such action shall be deemed an action to enforce the lien of such defendant lienor. The failure to file a notice of pendency of action shall not abate the action as to any person liable for the payment of the debt specified in the notice of lien, and the action may be prosecuted to judgment against such person. The provisions of this section in regard to continuing liens shall apply to liens discharged by deposit or by order on the filing of an undertaking. Where a lien is discharged by deposit or by order, a notice of pendency shall not be filed.

A lien, the duration of which has been extended by the filing of a notice of the pendency of an action as above provided, shall nevertheless terminate as a lien after such notice has been canceled as provided in section sixty-five hundred fourteen of the civil practice law and rules or has ceased to be effective as constructive notice as provided in section sixty-five hundred thirteen of the civil practice law and rules.

#### §19. Discharge of lien for private improvement

A lien other than a lien for labor performed or materials furnished for a public improvement specified in this article, may be discharged as follows:

(2) By failure to begin an action to foreclose such lien or to secure an order continuing it, within one year from the time of filing the notice of lien, unless an action be begun within the same time period to foreclose a mortgage or another mechanic's lien upon the same property or any part thereof and a notice of pendency of such action is filed according to law, but a lien, the duration of which has been extended by the filing of a notice of the pendency of an action as herein provided, shall nevertheless terminate as a lien after such notice has been cancelled or has ceased to be effective as constructive notice.

(4) Either before or after the beginning of an action by the owner or contractor executing a bond or undertaking in an amount equal to one hundred ten percent of such lien conditioned for the payment of any judgment which may be rendered against the property for the enforcement of the lien:

a. The execution of any such bond or undertaking by any fidelity or surety company authorized by the laws of this state to transact business, shall be sufficient.

#### §23. Construction of article

This article is to be construed liberally to secure the beneficial interests and purposes thereof. A substantial compliance with its several provisions shall be sufficient for the validity fo a lien and to give jurisdiction to the courts to enforce same.

#### Motion to Set Priority

Plaintiff Precision filed a mechanic's lien against the subject premises on June 4, 2008 and filed an extension of same on June 3, 2009. Precision filed a notice of pendency in a lien foreclosure action on June 4, 2008. Plaintiff Seaman filed a mechanic's lien on March 20, 2009, an extension on March 5, 2009 and a notice of pendency in a foreclosure action on July 1, 2009. Plaintiff AJA Landscaping Maintenance Inc. d/b/a Frontline Masonry ("AJA Landscaping") filed a mechanic's lien against the subject premises on June 19, 2008, an extension on June 4, 2009, and a notice of pendency in a foreclosure action on July 19, 2009. Finally, Condos Brothers Construction Corp. ("Condos Brothers") filed a mechanic's lien on May 30, 2008 and an extension on May 27, 2009. The record reflects that the following defendants/subcontractors filed mechanics' liens on the dates listed herein.

<b>Subcontractor</b>	<b>Lien Filed</b>
All County Paving	May 25, 2008
Architectural Hardware Inc.	March 17, 2008
Black Hawk Inc.	June 10, 2008
Carpet Resources, Ltd.	June 19, 2008
East Rutherford Roofing Co., Inc.	July 1, 2008
Feinstein Iron Works Inc.	February 13, 2008
JKB Services Inc.	May 8, 2008
Kaback Enterprises Inc.	May 13, 2008
Lakeville Pace Mechanical, Inc.	May 2, 2008
Mid-Hudson Specialties Co., Inc.	August 12, 2008
Quest Concrete Corp.	April 15, 2008
The Ridgeway Corporation	April 16, 2008
Douglas S. Plotke Jr., d/b/a Roof Services	July 24, 2008
Sean's Landscaping, Inc.	August 18, 2008
Sherry Mica Products	May 1, 2008

No mechanic's liens were filed by defendants American Bank Equipment & Millwork LLC, Signature Painting Services or Patrick Breen. Feinstein Iron Works, Inc. ("Feinstein") has a judgment dated December 4, 2008, entered in its favor against Candor in the amount of \$108,129.84.

Precision and Seaman seek an Order, *inter alia*, determining that the mechanic's liens filed by AJA Landscaping, Seaman, Precision and Condos Brothers are valid and subsisting liens pursuant to Lien Law §13(1) & 19 and that the mechanic's lien and judgment filed by Feinstein on December 8, 2009 are entitled to a priority in certain funds held by JP Morgan. The moving parties further seek an Order declaring that the liens of the following defendants are subordinate to the foregoing liens: All County Paving Corp., Architectural Hardware, Inc., Black Hawk, Carpet Resources, East Rutherford Roofing, JKB Services, Kaback Enterprises, Lakeville Pace Mechanical, Mid-Hudson Specialties, Preferred Applicators, Quest Concrete, The Ridgeway Corporation, Douglas S. Plotke, Sean's Landscaping, Sherry Mica Products, Tile Doctor, American Bank Equipment & Millwork, Signature Painting Services and Patrick Breen. Finally, Precision and Seaman seek a declaration the judgment entered by C.B. Strain & Son, Inc. is not a valid lien and is subordinate to the claims of plaintiffs.

The gravamen of plaintiffs' argument is that the foregoing lien holders failed to continue their mechanics' liens by court order or by the commencement of a foreclosure action and were further not named in the notice of pendency filed by any of the other lien holders. Thus, pursuant to Lien Law §19, plaintiffs argue that these liens were terminated by operation of law. With regard to American Bank Equipment, Signature Painting Services and Patrick Breen, plaintiffs claim no mechanics' liens were filed by these subcontractors. As such, plaintiffs assert that any claims are subordinate to those of valid lien holders. Plaintiffs further argue that C.B. Strain does not have a valid claim against the JP Morgan funds because its judgment against Candor is for a different project and not the one at the subject premises. Plaintiffs concede however that Feinstein has a claim

to share *pari pasu* with the mechanics' lien holders because of its judgment against Candor entered December 4, 2008. Thus, based on the foregoing, plaintiffs seek a declaration of the priority of the liens.

Condos Brothers submits an affirmation of counsel in support of the motion for a declaration of the priority of the mechanic's liens.

Carpet Resources submits an affirmation of counsel in opposition and asserts that it extended its lien by filing an extension with the County Clerk an extension on June 16, 2009 which extended the June 19, 2008 mechanic's lien for one year.

All County submits an affirmation of counsel in opposition and asserts that on February 13, 2009 it filed a notice of pendency and summons and complaint seeking to foreclose its May 25, 2008 mechanic's lien. Thus, its lien is also entitled to priority with other valid mechanic's lien creditors.

Douglas S. Plotke, Jr., d/b/a Roof Services also submits an affirmation of counsel in opposition to the motion. Plotke argues that he holds a valid mechanic's lien by virtue of an extension filed July 9, 2009, which extended the mechanic's lien filed on July 24, 2008 in the office of the Suffolk County Clerk.

Black Hawk opposes the motion by affirmation of counsel and argues that its mechanic's lien is not subordinate to the lien of plaintiffs because on or about October 17, 2008, it commenced an action to foreclose its June 10, 2008 mechanic's lien.

Lakeville submits an affirmation by its counsel in partial opposition to plaintiffs' motion. Lakeville concedes that it did not extend its mechanic's lien and thus it has expired pursuant to Lien Law §19, but argues that it is entitled to share in the trust fund proceeds. Lakeville annexes an Order (MOLIA, J.) granting it a default judgment in its action against Candor. No Judgment was entered in the Suffolk County Clerk's office.

Finally, Kaback Enterprises opposes the motion by affirmation of counsel. Kaback explains that its mechanic's lien was filed May 13, 2008 and would have expired on May 13, 2009. However, since plaintiffs commenced the within action in June of 2008, Kaback's mechanic's lien was still valid and pursuant to Lien Law §19 its lien survives even though plaintiffs did not name Kaback as a defendant. All of the pending foreclosure actions have been consolidated and therefore Kaback's lien should be deemed valid.

JP Morgan submits a Memorandum of Law in response to plaintiffs' motion wherein it does not oppose the request for a determination of the validity of the subordinate liens. However, JP Morgan seeks to reserve its right to a determination of the total amount unpaid under the project.

In reply, plaintiffs concede that Douglas Plotke and Carpet Resources have valid mechanics' liens on the subject premises by virtue of the extensions filed in the Suffolk County Clerk's office. With regard to the claim of Lakeville that it has priority by virtue of the Order granting it a default judgment, plaintiffs argue such is without merit because no judgment was filed and thus Lakeville's

claim has no priority. Plaintiffs also challenge Kaback's claim to priority status. Plaintiffs assert that its commencement of a foreclosure action did not extend Kaback's claim because it was not named as a party to the action pursuant to Lien Law §17. Therefore, plaintiffs argue that Kaback's lien expired and it is not entitled to priority pursuant to Lien Law §13.

Plaintiffs do not address the claims by All County that it extended its mechanic's lien or by Black Hawk that it timely commenced a foreclosure action and filed a *lis pendens*.

All County submits a supplemental affirmation in opposition by its counsel who challenges plaintiffs' claim that the Feinstein judgment is entitled to be treated *puri passu* with the mechanic's lien creditors. All County argues that because the Feinstein judgment was filed on December 4, 2008, after the filing of all the mechanic's liens, it is not entitled to priority over the earlier filed liens. In response, Feinstein submits an affirmation of counsel and argues that pursuant to Lien Law §17, it timely commenced a foreclosure action and thus discharged its duty to renew its mechanic's lien. Since it commenced the foreclosure action, the original mechanic's continues and has not been terminated. Feinstein claims it was not required to file a *lis pendens* because Safeco bonded off the lien and thus it is entitled to share *pari passu* with the other mechanic's lien creditors.

Plaintiffs submit a further reply affirmation of counsel who now agrees with All County that the Feinstein judgment is not entitled to priority because it was filed after the mechanics' liens. Plaintiffs also assert that the Black Hawk lien is not entitled to priority because it failed to file a notice of pendency within thirty (30) days of commencing the foreclosure action. Thus, plaintiffs assert these liens are subordinate to the liens *aforescribed*.

Initially, the Court notes that plaintiffs have agreed that the mechanics' liens of Douglas Plotke and Carpet Resources have been extended and therefore, the motion to subordinate these claim is denied. Likewise, All County and Black Hawk have submitted proof that they extended their mechanic s' liens by the timely filing of lien foreclosure actions and plaintiffs have failed to address this issue in their opposition papers. Therefore, the request to subordinate All County's and Black Hawk's liens is also denied. Plaintiffs' motion is granted to the extent of subordinating the claims of the following lienors who have not opposed this motion: Architectural Hardware, Inc., East Rutherford Roofing, JKB Services, Mid-Hudson Specialties, Preferred Applicators, Quest Concrete, The Ridgeway Corporation, Sean's Landscaping, Sherry Mica Products, Tile Doctor, American Bank Equipment & Millwork, Signature Painting Services and Patrick Breen.

Turning to Kaback, plaintiffs' request to subordinate its lien is denied. Here, it is indisputable that Kaback timely filed a mechanic's lien on the subject premises. Although Lien Law §17 would serve to protect its lien by Precision's commencement of the foreclosure action and filing of the notice of pendency if it was named as a party defendant, Precision failed to do so. Such failure is despite the proscription of Lien Law §44 which requires that all lienors are to be named as party defendants. *D.M.I. v. Eastern Long Island Hospital*, 74 A.D.2d 838, 425 N.Y.S.2d 633 (2d Dept. 1980). Kaback's lien was still valid at the time Precision commenced its foreclosure action, Kaback was named in the interpleader action by JP Morgan and all of the actions have been consolidated. As Lien Law §23 provides that substantial compliance with the provisions of the Lien Law shall be sufficient to uphold the validity of the lien, the Court finds that Kaback's lien is not subordinate to

that of the plaintiffs and other lienors mentioned herein. *See, e.g., Reliance Federal Savings & Loan v. Venet Homes, Inc.*, 57 A.D.3d 830, 394 N.Y.S.2d 61 (2d Dept. 1977). For the same reason, i.e., its substantial compliance with the Lien Law and its commencement of an action and receipt of an order, the Court declines to subordinate the lien of Lakeville.

Lastly, the Feinstein judgment is not subordinate to the other valid liens as it timely filed its mechanic's lien, and commenced a foreclosure action within the requisite one year period. Thus, Feinstein complied with Lien Law §17 and was not obligated to extend its mechanic's lien to protect its rights. Moreover, since Safeco bonded the lien, Feinstein was not required to file a notice of pendency pursuant to Lien Law §17. *See, Ward v. Kilpatrick*, 85 N.Y. 413 (1881).

#### Motion to Determine Amount of Lien Liability

JP Morgan moves for an Order, *inter alia*, pursuant to Lien Law §20, determining its liability on the construction project, setting the lien liability at an amount equal to or less than \$356,806.30 and authorizing it to pay that amount into the Court to discharge (1) all outstanding lien claims filed; (2) all lien foreclosure claims or lien bond claims; (3) all claims by Candor judgment creditors. JP Morgan also moves pursuant to CPLR §3212 for an order granting summary judgment dismissing all equitable claims sounding in unjust enrichment and quantum meruit and undefined claims. In support of the motion, JP Morgan submits a Rule 19 Statement of Material Facts, a Memorandum of Law, an affidavit of Christopher Belmonte and an affidavit of Stephen Marr, together with exhibits annexed thereto.

JP Morgan commenced its interpleader action by the filing of a Summons and Complaint on August 6, 2009. JP Morgan alleges that pursuant to the terms of its February 20, 2007 agreement with Candor, the total amount due and owing on the project (including amounts due to change orders) was \$1,857,622.00. JP Morgan paid Candor the total of \$1,500,815.70, leaving the sum of \$356,806.30 due and owing. JP Morgan seeks to establish its total lien liability at this amount and deposit same into the Court to discharge the lien. It argues that pursuant to Lien Law §4(1), JP Morgan's liability only extends to the amount due and owing to the general contractor. However, JP Morgan further claims that Candor actually owes it money as Candor was terminated for cause and misappropriated progress payments. JP Morgan has a \$3.6 million dollar judgment against Candor relating to projects in New York. Nevertheless, JP Morgan seeks to set its liability at the \$356,806.30 amount and deposit said funds with the Court. At that point, it seeks dismissal of the claims against JP Morgan, Safeco and FLV.

JP Morgan also moves for summary judgment dismissing the quasi-contract claims asserted against it in the interpleader action as there was a contractual relationship between the parties and Candor. Specifically, Condos Brothers, in its cross-claim dated November 3, 2009 and AJA Landscaping, in its Complaint, seek damages based upon unjust enrichment. Since there was a written agreement between these parties and Candor, JP Morgan argues that the equitable claims are barred. Additionally, JP Morgan seeks dismissal of what it has termed "undefined claims". These are claims by Seaman and Precision alleging that JP Morgan and FLV are jointly and severally liable with Candor to plaintiffs based on Candor's failure to pay. JP Morgan argues these claims fail to state a cause of action and must be dismissed.

All County submits an affirmation in response to JP Morgan's motion and asserts that none of the parties are able to verify JP Morgan's claim of the extent of their lien liability and discovery has not been conducted on this issue. Additionally, All County argues that JP Morgan has not factored interest into the amount it seeks to deposit and such should be included from February 13, 2008 (the date the last payment application was made). Pursuant to Lien Law §3, All County asserts that the subcontractors are entitled to a lien including principal and interest at 9% per annum (which it calculates at \$72,143.30).

Feinstein opposes the motion by affirmation of counsel and argues that pursuant to Lien Law §4, JP Morgan could only discharge the liens by depositing with the Court sums equal to the amounts owed to each lienor at the time of the filing of its lien. Moreover, Feinstein claims that it filed its notice of lien on February 13, 2008, and notwithstanding this fact, JP Morgan paid Candor on February 27, 2008 the sum of \$138,408.75. Feinstein argues that it has a right to funds paid to Candor after the date of the filing of its mechanic's lien. Additionally, Feinstein asserts that such payment to Candor after it filed its mechanic's lien constituted a trust fund diversion and that it asserted a counterclaim alleging such. Feinstein urges the Court to deny JP Morgan's motion.

Precision and Seaman submit an affirmation of counsel in response to JP Morgan's motion. These plaintiffs consent to the relief requested by JP Morgan to the extent that JP Morgan agrees that it owes the sum of \$356,806.30.

Condos Brothers submits an affirmation of counsel in partial opposition to the motion and consents to the deposit of the funds into the Court. However, it contests JP Morgan's claim that its lien liability is equal to or less than \$356,806.30 and argues that JP Morgan owes interest on these funds at the statutory rate. Additionally, Condos Brothers asserts that the amount owed must be at least \$356,806.30, if not greater. The exact amount is not known because there has not been discovery in this case. Thus, it argues the motion should be denied except to the extent that JP Morgan could be permitted to deposit the sum of \$356,806.30 plus interest.

In reply, JP Morgan reiterates that pursuant to Lien Law §4(1), liens attach only to those funds due and owing to a general contractor or which may become due and owing and thus, its liability cannot exceed the amount of \$356,806.30. With regard to Feinstein's claim that JP Morgan paid Candor after Feinstein filed its mechanic's lien, JP Morgan asserts that Feinstein failed to serve JP Morgan as evidenced by the affidavit of service demonstrating only FLV was served. Since Feinstein failed to serve JP Morgan, the owner, the payment to Candor after the date of the mechanic's lien was not improper.

JP Morgan also denies that it is required to pay interest on the \$356,806.30. It argues that while Lien Law §3 allows the subcontractor to seek interest, that provision does not require the owner to pay the interest on the unpaid contract balance. Rather, as JP Morgan emphasizes, its lien liability is limited solely to the unpaid contract balance. Although the Court has discretion to award pre-judgment interest, JP Morgan argues that the exercise of such discretion is not warranted in this case, since it was Candor who breached the contract, misappropriated progress payments, failed to pay the subcontractors and the amount due and owing is substantially less than the total project

amount.

Feinstein's Article 3-A trust fund diversion claim must also be dismissed according to JP Morgan since Feinstein was already denied permission to amend its complaint to assert such claim. JP Morgan advises that prior to the consolidation of these related actions, Justice Emerson, in Feinstein's case, denied Feinstein's application to amend its complaint to include this claim, finding that JP Morgan was not a trustee. Now, Feinstein interposed this cause of action as a counterclaim in the interpleader action. JP Morgan argues that the law of the case doctrine bars Feinstein from relitigating this issue. Finally, JP Morgan asserts that, contrary to the opposing papers submitted by the various lienors, the Court could establish its lien liability in an amount less than \$356,806.30, based upon a finding that a lesser amount is actually due and owing to Candor. JP Morgan asserts that the Court could consider Candor's misappropriation of funds, termination for cause and the \$3.6 million judgment, in setting a lower amount of liability.

Lien Law §4 limits an owner's liability for payment of liens to an amount which equals "the value or agreed price of the labor and materials remaining unpaid, at the time of filing notices of such liens". That is, a subcontractor's rights are derivative of the rights of the general contractor and a subcontractor's lien must be satisfied out of the funds due and owing from the owner to the general contractor at the time the lien is filed. *Timothy Coffey Nursery/Landscape, Inc.*, 304 A.D.2d 652, 757 N.Y.S.2d 596 (2d Dept. 2003). *See also, Perma Pave Contracting Corp. v. Paerdegat Boat and Racquet Club, Inc.*, 156 A.D.2d 550, 549 N.Y.S.2d 57 (2d Dept. 1989). The burden is on the subcontractor to establish that there was money due and payable to the general contractor from the owner. *Franco Belli Plumbing v. Imperial Development & Construction Corp.*, 45 A.D.3d 634, 845 N.Y.S.2d 446 (2d Dept. 2007). In this case, JP Morgan has demonstrated, by the submission of its agreement with Candor, together with an affidavit from Steven Marr, Vice President and Market Director of Construction for the Retail Real Estate Division of JP Morgan, that the outstanding amount due Candor was \$356,806.30. The fact that the subcontractors' claims exceed this amount does not increase JP Morgan's liability. Moreover, while the individual subcontractor's may be entitled to interest on the amount owed by Candor pursuant to Lien Law §3, JP Morgan's liability is limited to the amount remaining unpaid to Candor. Finally, Feinstein's claim regarding JP Morgan's alleged diversion of trust funds is barred by the law of the case doctrine as Justice Emerson has already ruled on this issue prior to the action being transferred to the undersigned.

Based on the foregoing, JP Morgan's motion is granted to the extent that its lien liability is set at \$356,806.30, and all outstanding lien claims, lien foreclosure claims, lien bond claims and claims in the consolidated action are discharged.

That portion of JP Morgan's motion to dismiss the quasi-contract claims (counts three and four asserted in the cross-claim filed by interpleader plaintiff Condos Brothers and count three filed by plaintiff AJA Landscaping) are dismissed. The law is well settled that these claims, sounding in quantum meruit and unjust enrichment are barred as there was a written contract governing the relationship between the parties and the subject matter of this action. *See, Hamlet at Willow Creek Development Co., v. Northeast Land Development Corp.*, 64 A.D.3d 85, 878 N.Y.S.2d 97 (2d Dept. 2009); *Mucci v. Munsey Park Assoc.*, 231 A.D.2d 501, 647 N.Y.S.2d 247 (2d Dept. 1996).

Finally, the “undefined claims” of Seaman and Precision are dismissed for failure to state a cause of action without opposition by these plaintiffs.

Counsel are reminded that a status conference is scheduled for September 7, 2010 at 9:30 a.m. before the undersigned.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: August 16, 2010  
Riverhead, New York

  
**EMILY PINES**  
J. S. C.

FINAL DISP  
 NON - FINAL DISP

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