

**H. Clarke Indus. Corp. v Prince Carpentry, Inc.**

2010 NY Slip Op 33443(U)

December 13, 2010

Sup Ct, NY County

Docket Number: 601816/2007

Judge: Marcy S. Friedman

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

PRESENT: MARCY S. FRIEDMAN, J.S.C.

PART 57

Justice

Index Number : 601816/2007

H. CLARKE INDUSTRIES

VS.

PRINCE CARPENTRY

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT

INDEX NO.

601816/2007

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

this motion is/for summary judgment

PAPERS NUMBERED

1, 1A, 1B

2

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

Answering Affidavits -- Exhibits

Replying Affidavits

Cross-Motion:  Yes  No

*pages M1, M2 of law*

Upon the foregoing papers, it is ordered that this motion *is decided as per decision/order dated 12-13-10*

**FILED**

DEC 15 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: 12-13-10

*[Signature]*  
**MARCY S. FRIEDMAN, 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):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

\_\_\_\_\_  
H. CLARKE INDUSTRIES CORP., D/B/A GCG

*Plaintiff,*

- against -

PRINCE CARPENTRY, INC., and BARCLAY  
STREET REALTY, LLC, and LIBERTY  
MUTUAL INSURANCE COMPANY

*Defendants.*

Index No.:601816/2007

DECISION/ORDER

**FILED**

DEC 15 2010

NEW YORK  
COUNTY CLERK'S OFFICE

Index No.:601817/2007

\_\_\_\_\_  
H. CLARKE INDUSTRIES CORP., D/B/A GCG

*Plaintiff,*

- against -

PRINCE CARPENTRY, INC., and  
PARTNERSHIP 92 WEST L.P. and LIBERTY  
MUTUAL INSURANCE COMPANY,

*Defendants.*

DECISION/ORDER

\_\_\_\_\_  
H. CLARKE INDUSTRIES CORP., D/B/A GCG

*Plaintiff,*

- against -

PRINCE CARPENTRY, INC., and CRP/EXTELL  
99 WEST SIDE L.P., and LIBERTY MUTUAL  
INSURANCE COMPANY,

*Defendants.*

Index No.:601818/2007

DECISION/ORDER

In these actions, plaintiff H. Clarke Industries Corp., d/b/a GCG (“GCG”), a subcontractor of defendant Prince Carpentry, Inc. (“Prince”), sues Prince for breach of contract, unjust enrichment, and quantum meruit, arising out of taping and spackling work performed by GCG for Prince at three locations. In the first action, Index No. 601816/2007 (“Barclay St. Action”), plaintiff also sues defendants Barclay Street Realty, LLC, (“Barclay”) and Liberty Mutual Insurance Company (“Liberty Mutual”). In the second action, Index No. 601817 (“25th St. Action”), plaintiff also sues Partnership 92 West L.P. (“Partnership 92”) and Liberty Mutual. In the third action, Index No. 601818/2007 (“99th St. Action”), plaintiff also sues CRP/Extell 99 West Side L.P. (“CRP/Extell”) and Liberty Mutual. Barclay, Partnership 92, and CRP/Extell are the alleged owners of the three locations, and plaintiff brings a claim against each entity for unjust enrichment. Plaintiff sues Liberty Mutual in each case on a claim against a bond issued by Liberty Mutual to discharge a mechanic’s lien filed by plaintiff for each project.

Defendants’ Answers in the three actions contain two counterclaims in common: for breach of contract and willful exaggeration of lien.<sup>1</sup> By a separate motion in each action, defendants seek summary judgment dismissing the complaint, and awarding defendants damages on their counterclaims for breach of contract and willful exaggeration of lien.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action “sufficiently to warrant the court as a matter of law in directing judgment.” (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) “Failure to make such showing requires denial of the motion, regardless of the

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<sup>1</sup>Defendants’ Answer in the Barclay St. Action contains a further counterclaim alleging damages incurred due to poor workmanship at an additional site, 217 East 96th Street. This counterclaim is not addressed in the instant motions.

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sufficiency of the opposing papers.” (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment “the opposing party must ‘show facts sufficient to require a trial of any issue of fact’ (CPLR 3212, subd. [b]).” (Zuckerman, 49 NY2d at 562.)

It is further settled that in order to prevail on a cause of action for breach of contract, the movant must prove the existence of a valid contract, performance, breach by the other party, and damages. (See Morgan Stanley Altabridge Ltd. v ESE Funding SPC Ltd., 60 AD3d 497 [1st Dept 2009].)

The undisputed facts are as follows. The parties entered into a master subcontract agreement in August of 2005. (Affs. of Barbara Record [Secretary and Treasurer of defendant Prince], Barclay St. Action, Ex. A; 25th St. Action, Ex. A; 99th St. Action, Ex. A.) In each case, the parties signed purchase orders that provided that GCG agreed to “provide labor and materials to complete taping and spackling operations” at the subject locations. (Record Affs., Ex. B.)

From the start of the Barclay Street and 25<sup>th</sup> Street projects until February 2007, GCG performed work on each of the projects and was paid by Prince. For the 99<sup>th</sup> Street project, GCG was paid by Prince through March 2007. More particularly, for Barclay Street, from September 2006 through February 2007, GCG submitted to Prince payment requisitions and estimates of the work to be completed through the end of each month. (Record Aff., Barclay St. Action, ¶¶11, 14.) Prince paid GCG on the basis of these estimates and, in consideration for payment, Gary DiMaggio, as President of GCG, signed an Affidavit and Waiver of Lien. (Id., ¶15.) The final Waiver of Lien for Barclay Street waived all liens for work, labor, or materials furnished through February 28, 2007. (Id., Ex. E.) Similarly, work was performed, payment requisition requests were made, payments were made, and Affidavits and Waivers of Lien were signed for work

performed from May 2006 through February 28, 2007 for the 25th Street project (Record Aff., 25<sup>th</sup> St. Action, Ex. E [waiver of lien]), and for work performed through March 31, 2007 for the 99th Street project. (Record Aff., 99<sup>th</sup> St. Action, Ex. L [waiver of lien].)

It is further undisputed that by letter dated April 12, 2007, Prince terminated each of the contracts, based on the claim that GCG had provided "inadequate manpower" on each of the projects. (Record Aff., Barclay St. Action, Exs. F, G; 25<sup>th</sup> St. Action, Ex. H; 99th St. Action, Ex. I.) GCG then filed notices of lien, claiming that \$207,617.91 was due on the Barclay Street project, \$39,888.68 was due on the 25th Street project, and \$41,690.40 was due on the 99th Street project. (Aff. Of Suzanne Fertig [Ds.' Attorney] In Support, Ex. A.) On May 8, 2007 Prince secured bonds with Liberty Mutual, as surety, to discharge the mechanic's liens.

In support of their motions for summary judgment, defendants contend that GCG overestimated the percentage of work that it claimed it had performed on the projects; that Prince overpaid for work; that Prince had to enter into contracts with other subcontractors to complete the work; and that Prince paid GCG's workers for wages that GCG had failed to pay. Defendants claim that as a result of these payments, they are entitled to damages from GCG.

Defendants fail to demonstrate as a matter of law that they are entitled to judgment dismissing the complaint or awarding damages on their counterclaims. Defendants' assertions that Prince overestimated the percentage of work and inadequately staffed the projects are based principally on the affidavits of their secretary/treasurer, Barbara Record. As the affidavits are wholly conclusory and fail to state the basis for Prince's downward adjustment of the completed percentages, they are insufficient to shift the burden to GCG of raising a triable issue of fact in this regard. In any event, GCG's president disputes the bona fides of Prince's claim that GCG

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overstated its completion percentages for the projects.<sup>2</sup> Moreover, it is undisputed that GCG continued to work on the projects after the February 28, 2007 lien waiver date in the case of the Barclay Street and 25<sup>th</sup> Street projects, and after the March 31, 2007 lien waiver date in the case of the 99<sup>th</sup> Street project. It is also undisputed that GCG has not been paid for such work. Defendants claim that they paid the GCG workers for the weeks they worked after the lien waiver dates. However, they fail to show that GCG was not entitled to payment for items other than labor for those weeks.

As to defendants' claim that GCG inadequately staffed the projects, defendants cite the acknowledgment of GCG's president, Gary DiMaggio, that GCG had complaints from Prince about understaffing in early 2007, and that Prince took over the payrolls because GCG was unable to pay its workers for certain weeks. (See DiMaggio Dep. at 208.) Defendants' reliance on this testimony ignores that DiMaggio also testified that he was unable to pay GCG's workers because Prince had wrongfully stopped paying GCG. (Id. at 340.) Defendants also submit invoices showing that Prince entered into contracts with, and made payments to, other contractors after GCG was terminated from the projects. (See Record Aff., Barclay St. Action, Exs. J-L; 25<sup>th</sup> St. Action, Exs. I-M ; 99<sup>th</sup> St. Action, Exs. N, P-R.) However, given defendants' failure to show that GCG failed to perform under the contract and that it was properly terminated, the mere fact that Prince entered into contracts with other contractors cannot serve to establish GCG's liability.

The court accordingly holds that defendants' motions for summary judgment dismissing GCG's breach of contract claims must be denied. The branch of defendants' motion for

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<sup>2</sup>GCG contends that Prince acted in bad faith in claiming that GCG's completion percentages were overstated, so that it could resume business with a contractor whose principal had pled guilty to a felony charge but was back in business. (See DiMaggio Aff. In Opp., Barclay St. Action, ¶¶ 13-23.)

summary judgment on their counterclaims for breach of contract and willful exaggeration of lien must also be denied. These counterclaims are premised on the same claims – namely, that GCG overstated its completion percentages and that the contracts were properly terminated – on which this court has found triable issues of fact.

The branch of defendants’ motions for summary judgment dismissing plaintiff’s claims against Liberty Mutual must also be denied, based on the existence of triable issues of fact as to plaintiff’s claims for breach of contract and, hence, entitlement to liens.

The branch of defendants’ motions for summary judgment dismissing plaintiffs’ claims against defendant owners for unjust enrichment will be granted for good cause shown and without opposition. Defendants have demonstrated that none of the owners made any agreement with GCG to compensate it directly for the work performed. (See Contelmo’s Sand & Gravel, Inc. v J & J Milano, Inc., 96 AD2d 1090 [2d Dept 1983].) In addition, defendant Partnership 92 has made an unopposed showing that it is not the owner of the 25<sup>th</sup> Street project.

The branch of defendants’ motions for summary judgment dismissing plaintiff’s claims for unjust enrichment and quantum meruit will also be granted. It is well settled that the existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter. (Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co., 70 NY2d 382, 388 [1987].) Here, the existence of a contract for each project is undisputed.

Accordingly, it is hereby ORDERED in the Barclay St. Action, Index No. 601816/2007, that defendants’ motion for summary judgment is granted only to the extent of dismissing plaintiff’s second and third causes of action against Prince for unjust enrichment and quantum meruit, and its fourth cause of action against Barclay for unjust enrichment; and it is further

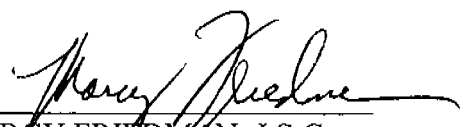
ORDERED in the 25th Street action, Index No. 601817/2007, that defendants’ motion for

summary judgment is granted only to the extent of dismissing plaintiff's second and third causes of action against Prince for unjust enrichment and quantum meruit, and its fourth cause of action against Partnership 92 for unjust enrichment; and it is further

ORDERED in the 99th Street Action, Index No. 601818/2007, that defendants' motion for summary judgment is granted only to the extent of dismissing plaintiff's second and third causes of action against Prince for unjust enrichment and quantum meruit, and its fourth cause of action against CRP/Extell for unjust enrichment

This constitutes the decision and order of the court.

Dated: New York, New York  
December 13, 2010

  
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MARCY FRIEDMAN, J.S.C.

**FILED**  
DEC 15 2010  
NEW YORK  
COUNTY CLERK'S OFFICE