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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

KABACK ENTERPRISES, INC.

Plaintiff,

- against -

OXFORD CONSTRUCTION DEVELOPMENT, INC. and THE PRESBYTERIAN HOSPITAL IN THE CITY OF NEW YORK,

Defendants.

INDEX NO. 102441/10

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers were read on this Motion by defendant Presbyterian Hospital in the City of New York to dismiss pursuant to Section 3211 of the Civil Practice Law and Rules.

	PAPERS NUMBERED
Notice of Motion — Affidavits — Exhibits	1, 2
Answering Affidavits — Exhibits (Memo)	3, 4
Replying Affidavits (Reply Memo)	5

Cross-Motion: ☐ Yes ■ No

In this action for non-payment of fees due pursuant to the performance of a construction contract, plaintiff seeks to enforce a mechanics' lien on property owned by the New York Presbyterian Hospital (hereinafter "NYPH"), the successor in interest to defendant the Presbyterian Hospital in the City of New York (hereinafter "Presbyterian"), or alternatively to obtain a judgment against each of the defendants in the amount of $67,278.50.

On or about March 8, 2006, the defendants entered into an agreement with each other, in which defendant Oxford Construction Development, Inc. (hereinafter "Oxford") was to serve as construction manager and constructor of a certain project on the subject property. In the performance of this agreement, Oxford subcontracted certain work to plaintiff, a heating, ventilation and air conditioning contractor. A Final Payment Directive, authorizing a final

payment on the project in the amount of $245,261.66, was apparently signed by both the defendants on or about October 21, 2009. Presbyterian made the final payments pursuant to the Final Payment Directive via checks dated November 2, 2009.

On or about February 24, 2010, plaintiff commenced the suit underlying this motion with the filing of a summons and complaint against the defendants named hereinabove. An amended complaint to add a "John Doe" defendant was filed on or about March 29, 2010. Plaintiff's first cause of action seeks to collect the amount allegedly outstanding by enforcing a mechanics' lien upon the subject property. Plaintiff's second and fourth causes of action, respectively alleged against Oxford and Presbyterian, allege that each defendant received statements from plaintiff without rejecting same, and therefore seeks damages from each defendant based on the account stated. Plaintiff's third cause of action alleges that "the agreed price and fair and reasonable value of the work, labor, and services performed and the materials furnished was $1,654,882.00, no part of which balance has been paid or credited, except the sums of $1,587,103.50, leaving a balance due and owing of $67,278.50 . . ." (Amended Complaint at ¶21).

NYPH now makes this CPLR 3211(a) motion to dismiss based upon documentary evidence and failure to state a cause of action. As a defense to the first cause of action, NYPH presents evidence that Presbyterian paid the contract in full several months before the plaintiff filed its mechanics' lien. As a defense to the third cause of action, NYPH presents the construction contract between Presbyterian as owner and Oxford as construction manager constructor, and argues that there is no privity between Presbyterian and plaintiff. NYPH also presents evidence, as a defense to the fourth cause of action, indicating that plaintiff submitted its payment applications to Oxford.

In opposition, plaintiff notes the distinction between a general contractor and a construction manager, and argues that a construction manager acts as the owner's agent.

Plaintiff also gives a lengthy explanation of the standards on a 3211(a) motion and a breach of contract action, and then conclusorily states that "the defendant has provided no documentary evidence to warrant a dismissal of the action. The motion papers are devoid of any person with personal knowledge of the facts and circumstances" (Plaintiff's Memorandum at 7-8). In reply, NYPH notes the distinction between a construction manager advisor and a construction manager acting as constructor, in that the construction manager acts as the owner's agent when contracted in the advisor role but not when acting as a constructor.

CPLR 3211(a) Motion to Dismiss Standards

CPLR 3211(a) provides:

> (a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> 1. A defense is founded on documentary evidence; . . .
> 7. the pleading fails to state a cause of action[.]

Pursuant to CPLR 3211(a)(1), in order to "prevail on a motion to dismiss based on documentary evidence, the documents relied upon must definitively dispose of plaintiff's claim" (*Bronxville Knolls v Webster Town Ctr. Pshp.*, 221 AD2d 248 (1st Dept. 1995); *Juliano v McEntee*, 150 AD2d 524 [2d Dept 1989]; *Demas v 325 W. End Ave. Corp.*, 127 AD2d 476 [1st Dept 1986]). A CPLR 3211(a)(1) "motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326-27 [2002]).

Upon a 3211(a)(7) motion to dismiss for failure to state a cause of action, the "question for us is whether the requisite allegations of any valid cause of action cognizable by the state courts 'can be fairly gathered from all the averments" (*Foley v D'Agostino*, 21 AD2d 60, 65 [1st Dept. 1964], quoting *Condon v Associated Hosp. Serv.*, 287 NY 411, 414 [1942]). In order to defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory. *(Bonnie & Co.*

Fashions, Inc. v. Bankers Trust Co., 262 A.D.2d 188 [1st Dept.1999].)

When determining a CPLR 3211(a) motion, "we liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion" (*511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144, 151-52 [2002]; *Leon v Martinez*, 84 NY2d 83, 87, [1994]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, [2001]; *Wieder v Skala*, 80 NY2d 628, [1992]). "We also accord plaintiffs the benefit of every possible favorable inference" (*511 W. 232nd Owners Corp.*, 98 NY2d at 152; *Sokoloff v Harriman Estates Dev. Corp*, 96 NY2d at 414).

Discussion

First Cause of Action

NYPH has shown a valid defense, based upon documentary evidence, clearly justifying dismissal of the first cause of action, which seeks to foreclose on the mechanics' lien. NYPH has submitted the subject project's Final Payment Directive, signed by both Presbyterian and Oxford, as well as the cancelled checks showing that payment upon the Final Payment Directive was made. In that the contracts governing the subject project set a specific Guaranteed Maximum Payment to the project, Presbyterian was only obligated to Oxford to the extent of that Guaranteed Maximum Payment. Presbyterian was not obligated to pay plaintiff at all.

Pursuant to Lien Law §3, subcontractors do have an unqualified right to place a mechanics' lien, even if the totality of the liens exceeds the amount then owing on the contract (*see In re 101 Park Ave. Associates*, 99 AD2d 428, 429 [1st Dept 1984] [holding that a contractor and subcontractor can file duplicative liens]). However, Lien Law §4(1) expressly provides that "the lien shall not be for a sum greater than the sum earned and unpaid on the contract . . . In no case shall the owner be liable to pay . . . a sum greater than the value . . .

remaining unpaid, at the time of filing notices of such liens[.]" In other words, no individual mechanics' lien can exceed the amount owed by the owner to the general contractor at the time of filing the lien. This provision was enacted "to limit the liability of the owner in the aggregate to the amount which he had contracted to pay" (*Heckmann v Pinkney*, 81 NY 211 [1880]).

Because of Lien Law §4(1), it has been consistently held that "[a] subcontractor's lien attaches only to funds due and owing to the general contractor at the time of filing or due to become owing thereafter" (*Bast Hatfield, Inc. v Joseph R. Wunderlich, Inc.*, 2010 WL 4342196 [3d Dept 2010]; *accord Timothy Coffey Nursery/Landscape, Inc. v Gatz*, 302 AD2d 652, 653-54 [2d Dept 2003] ["subcontractor's lien must be satisfied out of funds due and owing from the owner to the general contractor at the time the lien is filed"]; *Curtis Partition Corp. v HRH Const., LLC*, 2009 WL 415550 [Sup Ct, NY County 2009] [subcontractor may only foreclose lien upon a "lien fund"]). Here, "in the absence of any balance due to [the general contractor] from the owners, plaintiff is required to look to the contractor that engaged its services for payment" (*Blake Elec. Contracting Co., Inc. v Paschall*, 222 AD2d 264, 266 [1st Dept 1995]). As plaintiff did not contract directly with Presbyterian, and Oxford has been fully paid, plaintiff cannot now enforce a lien upon NYPH.

Third Cause of Action

Plaintiff does not clearly state whether its third cause of action is based in breach of contract or in quasi-contract theory. The cause of action necessarily fails in either case. Plaintiff cannot recover for unjust enrichment in quasi-contract because plaintiff contracted with Oxford to perform the subject work, and "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" (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572 [2005], quoting *Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 382, 388 [1987]; see also *Bradkin v Leverton*, 26 NY2d 192, 196 [1970] ["Briefly stated, a quasi-contractual

obligation is one imposed by law where there has been no agreement or expression of assent, by word or act, on the part of either party involved."]; *cf Joseph Sternberg, Inc. v Walber 36th Street Associates*, 187 AD2d 225 [1st Dept 1993] [First Department held that, where there is a dispute as to the existence of a contract, there is an exception to the ordinary rule that the existence of a contract precludes quasi-contractual claims, and in such cases contractual and quasi-contractual claims can be pursued simultaneously]). Since there is no question that the contract between plaintiff and Oxford was valid, plaintiff cannot recover in quasi-contract for work done pursuant to that contract.

Plaintiff argues that Oxford, as a construction manager and not a general contractor, had agency authority to bind Presbyterian to construction contracts with third parties. Plaintiff reasons that its contract for this project was actually made directly with Presbyterian, and Oxford merely acted as Presbyterian's agent in binding Presbyterian to the agreement. A review of the contract between plaintiff and Oxford, however, reveals that Presbyterian was never a party to that contract. The contract states that it was made between "the Subcontractor and the Construction Manager" (Plaintiff's Affidavit in Opposition, Exhibit A at 3), rather than the subcontractor and the owner, and only Oxford was given a right to terminate the agreement upon default (*id*, Exhibit A at 7, Article 11). Without a contractual or quasi-contractual theory under which plaintiff could possibly prevail, the contested issue regarding whether Oxford had agency authority is irrelevant.[1]

Fourth Cause of Action

[1]Even if the contract between the plaintiff and Oxford could be construed to include Presbyterian as a party, and the agency issue had been at all relevant, the result would be the same. Presbyterian and Oxford used a standardized contract form, and the clear intention of that contract is for the construction manager as constructor to act as a general contractor with additional responsibilities, particularly in the design phase and coordination of the project with the architect. Plaintiff contends that a construction manager cannot simultaneously act as a general contractor, and cites as support *Blanford Land Clearing v National Union Fire Insurance Co.*, 260 AD2d 86 (1st Dept 1999). However, *Blanford* actually states that a general contractor that controls a subcontractor's work cannot merely be an agent for payment to the owner, as then there would be no bilateral agreement between the general contractor and the subcontractor. *Blanford* does not support plaintiff's stated proposition in any way.

As this is a motion to dismiss, we must treat as true all allegations in the amended complaint and the papers opposing the motion to dismiss. Here, plaintiff has alleged that it sent statements to NYPH that were not rejected. In opposition, NYPH has submitted an exhibit showing that work by plaintiff was included as a line item in a schedule apparently appended to an AIA G702 Application and Certificate for Payment submitted by Oxford to NYPH. Another exhibit submitted by NYPH is a Final Waiver of Lien and Release, signed by Kaback, with a release date of March 2, 2009. NYPH's affidavit states that these exhibits "illustrate" that "Kaback's applications were addressed and rendered directly to Oxford."

Defendant's documentary evidence argument fails, because the exhibits merely suggest, and do not conclusively establish, that plaintiff never sent any account statements to Presbyterian. Nevertheless, the Court has reviewed the record and finds that dismissal of the fourth cause of action is appropriate, as plaintiff has failed to state a cause of action. "An account stated assumes the existence of some indebtedness between the parties, or an agreement to treat the statement as an account stated. It cannot be used to create liability where none otherwise exists" (*Ryan Graphics, Inc. v Bailin*, 39 AD3d 249, 251 [1st Dept 2007], quoting *M. Paladino, Inc. v J. Lucchese & Son Contracting Corp.*, 247 AD2d 515, 516 [2d Dept. 1998]; *see Gurney, Becker & Bourne, Inc. v Benderson Development Co., Inc.*, 47 NY2d 995, 996 [1979]). As the submitted exhibits show, plaintiff contracted with Oxford, and there was no contract or agreement between plaintiff and Presbyterian. In the absence of an agreement or prior transactions to which the allegedly rendered statements could apply, an account stated is meaningless, and the fourth cause of action must therefore be dismissed.

It is therefore,

ORDERED, that the motion by defendant the Presbyterian Hospital in the City of New York to dismiss the amended complaint herein is granted, and the amended complaint is dismissed in its entirety as against said defendant, and the Clerk of the Court is directed to

enter judgment accordingly in favor of said defendant; and it is further,

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the Court bear the amended caption; and it is further

ORDERED that defendant Presbyterian Hospital in the City of New York shall serve a copy of this order upon the County Clerk (60 Centre Street, Room 141B) and the Trial Support Office (60 Centre Street, Room 158), who are directed to mark the court's records to reflect the change in the caption herein; and it is further,

ORDERED that plaintiff and the remaining defendant are directed to appear for a preliminary conference in Room 320, 80 Centre Street, on February 2, 2010, at 11:00 A.M.; and it is further

ORDERED that the defendant shall serve a copy of this order with notice of entry upon all parties.

This constitutes the Decision and Order of the Court.

Dated: December 27, 2010

Enter:

PAUL WOOTEN J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: : ☐ **DO NOT POST** ☐ **REFERENCE**