

A. Russo Wrecking, Inc. v GLSC 48 LLC

2011 NY Slip Op 30832(U)

April 5, 2011

Supreme Court, New York County

Docket Number: 603835/09

Judge: Michael D. Stallman

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

PRESENT: Hon. MICHAEL D. STALLMAN, Justice

PART_21

Index Number : 603835/2009

INDEX NO. 603835/09

A. RUSSO WRECKING

MOTION DATE 2/3/2011

vs

MOTION SEQ. NO. 001

GLSC 48

MOTION CAL. NO. 1

Sequence Number : 001

SUMMARY JUDGMENT

FOR THE

The following papers, numbered 1 to 4 were read on this motion

	<u>Papers Numbered</u>
Notice of Motion— Affirmation — Affirmation—Affidavit—Exhiblts A-K	<u>1-4</u>
Answering Affirmation — Exhiblts	<u>NONE</u>
Replying Affirmation — Exhiblts	<u></u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that plaintiff's motion is decided in accordance with the annexed memorandum decision and order.

FILED

APR 06 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/5/11
New York, New York

[Signature], J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE SETTLE/SUBMIT ORDER/JUDG.

HON. MICHAEL D. STALLMAN

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21**

-----X
A. RUSSO WRECKING, INC.,

Plaintiff,

- against -

Index No. 603835/2009

GLSC 48 LLC, TRITEL CONSTRUCTION GROUP, LLC, 540
WEST 48TH STREET CORP., NEW YORK STATE
DEPARTMENT OF TAXATION AND FINANCE, NEW
YORK CITY DEPARTMENT OF FINANCE AND "JOHN
DOE ONE" THROUGH "JOHN DOE TEN",

Defendants.
-----X

Decision and Order

FILED

APR 06 2011

HON. MICHAEL D. STALLMAN, J.:

NEW YORK
COUNTY CLERK'S OFFICE

In this action seeking to foreclose on a mechanic's lien and other relief, plaintiff A. Russo Wrecking Inc. moves for: (1) summary judgment in its favor against defendants; (2) a default judgment against the New York State Department of Taxation and Finance; and (3) to strike defendants' answer pursuant to CPLR 3126. The motion is unopposed.

BACKGROUND

According to the verified complaint, plaintiff A. Russo Wrecking entered into an agreement in January 2009 with defendant Tritel Construction Group, LLC (Tritel) for plaintiff to perform demolition work and services at a building located at 540 West 48th Street in Manhattan, Block 1076 and Lot 51. Russo Aff., Ex B [Verified Complaint] ¶ 26.

On August 18, 2009, plaintiff apparently filed a notice of mechanic's lien against the building, alleging that its last item of work was performed on April 21, 2009, and that the unpaid amount of the labor performed was \$569,550. Russo Aff., Ex I.

On December 22, 2009, plaintiff commenced this action against defendants GLSC 48 LLC, Tritel, 540 West 48th Street Corp., the New York State Department of Taxation and Finance, and the New York City Department of Finance. GLSC 48 LLC, Tritel, and 540 West 48th Street Corp. collectively answered the complaint. Russo Aff., Ex C [Verified Answer]. With certain exceptions, the City of New York (Department of Finance) waived service of all papers in this action. Russo Aff., Ex D. Plaintiff asserts that the New York State Department of Taxation and Finance never answered the complaint. Anne L. Russo Affirm. ¶ 7.

Defendant 540 West 48th Street Corp. admitted that it is the owner in fee of real property located at 540 West 48th Street in Manhattan. *See* Verified Complaint ¶ 9; Verified Answer ¶ 2. According to the Verified Answer, 540 West 48th Street Corp. “as owner and Defendant GLSC 48 LLC (“GLSC”), as lessee, entered into a ground lease (the “Lease”) in connection with the Premises. . . .” Verified Answer ¶ 5.

DISCUSSION

I. Summary Judgment

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.”

Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986)(internal citations omitted).

[* 4]

A. First Cause of Action: Foreclosure on Plaintiff's Mechanics Lien

Lien Law § 24 provides that a mechanics lien “may be enforced against the property specified in the notice of lien and which is subject thereto and against any person liable for the debt upon which the lien is founded . . .”

Here, plaintiff submits a copy of its subcontract, made as of December 15, 2008, with Tritel Russo Aff., Ex H. According to the subcontract’s recital, Tritel entered into a contract with GLSC 48 LLC “to furnish certain work, labor and services necessary for the construction of 540 West 48th ST. New York, NY 10036.” *Id.* The subcontract does not mention 540 West 48th Street Corp., the property owner.

“A contractor who performs work for, or provides equipment to, a tenant may nonetheless impose a mechanic’s lien against the premises where the owner of the premises affirmatively gave consent for the work or equipment directly to the contractor, but not where the owner has merely approved or acquiesced in the undertaking of such work or the provision of such equipment. To sustain the lien, “the owner must either be an affirmative factor in procuring the improvement to be made, or having possession and control of the premises assent to the improvement in the expectation that he [or she] will reap the benefit of it.”

Elliott-Williams Co., Inc. v Impromptu Gourmet, Inc., 28 AD3d 706, 707 (2d Dept 2006) (citation omitted); *Tri-North Bldrs. v Di Donna*, 217 AD2d 886 (3d Dept 1995); *Paul Mock, Inc. v 118 E. 25th St. Realty Co.*, 87 AD2d 756, 756 (1st Dept 1982).

Here, plaintiff has not met its burden of demonstrating that 540 West 48th Street Corp., the admitted property owner, had affirmatively given its consent for plaintiff’s work. The affidavit of plaintiff’s president, Ann Marie Russo, does not mention 540 West 48th Street Corp. Neither do the exhibits evidence 540 West 48th Street Corp.’s affirmative consent to plaintiff’s work. Therefore, summary judgment is denied as to the first cause of action.

B. Second, Third, Fourth, and Fifth Causes of Action against GLSC 48 LLC and Tritel

These four causes of action contain appear to assert alternative theories of liability sounding in breach of contract and quasi-contract (unjust enrichment, quantum meruit), and an account stated. On this motion, plaintiff are pressing only a breach of contract theory. *See* Ann M. Russo Aff. ¶ 6.

Plaintiff's subcontract is only with Tritel, not GLSC 48 LLC. *See* Russo Aff., Ex H. Therefore, plaintiff is not entitled to summary judgment against GLSC 48 LLC based on a theory of breach of contract. Moreover, "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 Island R. Co.*, 70 NY2d 382, 388 (1987). Thus, plaintiff would not be able to recover the unpaid balance from GLSC 48 LLC based on a quasi-contract theory. "It is impermissible . . . to seek damages in an action sounding in quasi contract where the suing party has fully performed on a valid written agreement, the existence of which is undisputed, and the scope of which clearly covers the dispute between the parties." *Id.* at 389. Accordingly, the Court grants reverse summary judgment dismissing the second, third, fourth, and fifth causes of action as against GLSC 48 LLC.

As to Tritel, plaintiff has established prima facie entitlement to judgment as a matter of law against Tritel, by submitting a copy of plaintiff's subcontract with Tritel, and by the affidavit of plaintiff's president, who avers that the contract has been fully performed and that the remaining balance of the subcontract remains unpaid. Russo Aff. ¶¶ 6-10. Because defendants have not opposed plaintiff's motion, plaintiff is motion is granted against Tritel for breach of contract, which was alleged in the second and third causes of action of the complaint. Given the undisputed existence of ^{the} subcontract with Tritel, the Court grants reverse summary judgment dismissing the

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fourth and fifth causes of action, which sound in an account stated and unjust enrichment. See *Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 382, *supra*.

Plaintiff is entitled to prejudgment interest against Tritel for plaintiff's unpaid services. CPLR 5001 (a). Prejudgment interest on the unpaid balance shall be calculated from May 20, 2009. Based on paragraphs 5.01 (a) and 10.04 of plaintiff's contract with Tritel, May 20, 2009 was the date when Tritel should have made final payment of the unpaid balance of the contract sum to plaintiff. In the absence of any agreed-upon rate of interest, interest shall run at the statutory rate of 9 per cent. See *Music Sales Corp. v Mark Music Service, Ltd.*, 194 AD2d 470, 471 (1st Dept 1993).

C. Sixth Cause of Action against GLSC 48 LLC and Tritel for Lien Law Article 3A Violations

Plaintiff's motion for summary judgment is denied as to this cause of action. Plaintiff submitted no evidence that these defendants diverted trust proceeds in violation of Article 3A of the Lien Law.

Default Judgment against the New York State Department of Taxation and Finance

The complaint alleges that the New York State Department of Taxation and Finance "is the possible holder of a lien and/or a claim and/or other security interest in the property known as 540 West 48th Street, New York, N.Y., Block 1076 and Lot 51, the property being foreclosed herein."

Verified Complaint ¶ 12. The complaint does not seek any specific money damages against this defendant, but the prayer for relief generally requests that the Court "adjust[] and determin[e] the equities of all parties to this action and determin[e] the validity, extent and priority of each and all

of the liens and claims which may be presented and asserted herein.”

The branch of plaintiff’s motion for a default judgment against the New York State Department of Taxation and Finance is denied. First, it is not clear that personal jurisdiction was acquired over it.

“A state agency may be served with process under CPLR 307 (2) by either of two methods: (1) personal delivery to the chief executive officer of the agency (or the chief executive officer’s designee); or (2) certified mail, return receipt requested, to the chief executive officer of the agency at a principal office of the agency, plus service on the State in the manner provided in CPLR 307 (1).”

Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C307:3; *cf. Conciatori v Office of Secretary of State*, 15 AD3d 397 (2d Dept 2005), *lv denied* 5 NY 3d 701 (2005) (service upon Attorney General of the State of New York alone did not confer personal jurisdiction over New York State Department of State).

Here, according to the affidavit of service, the summons and complaint were served on this defendant upon “Megan Suprenant, Keyboard Specialist” at “State Campus, 1220 Washington Avenue, Building 9, Albany, NY 12226.” It is not clear that this individual was the designee of the chief executive officer of the New York State Department of Finance. Service upon an employee of the state agency who was not a designated agent would be insufficient. *Duroseau v Johnson*, 289 AD2d 489, 490 (2d Dept 2001) (service of the petition upon an employee of the New York State Office of Children and Family Services, who had not been designated pursuant to CPLR 307 (2) to receive service of process on behalf of the Commissioner of the New York State Office of Children and Family Services and the State agency, did not constitute service upon the proper designated agent).

Second, because plaintiff has not provided any details about the alleged lien of this defendant,

if any, the Court is unable to determine the validity, extent, and priority of this alleged lien in relation to plaintiff's lien.

Therefore, plaintiff's motion for a default judgment against defendant New York State Department of Taxation and Finance is denied.

Striking Defendants' Answer

Pursuant to CPLR 3126, plaintiff seeks to strike defendants' answer because defendants did not respond to plaintiff's combined demands for discovery and inspection dated March 17, 2010.

Russo Aff., Ex G. As plaintiff indicates, the preliminary conference order dated September 23, 2010 directed "Δ's [*sic*] to respond to Πs discovery requests within 2 weeks." *Id.*, Ex A.

The branch of plaintiff's motion seeking to strike defendants' answer is denied. Given that the Court has granted plaintiff judgment against Tritel, it would appear that plaintiff would no longer need the remedy of striking defendants' answer, as it applies to Tritel. Moreover, plaintiff has not demonstrated that the remaining defendants' failure to respond to plaintiff's combined discovery demands was wilful or contumacious. The fact that defendants did not comply with the preliminary conference order does not, by itself, give rise to a presumption of wilful or contumacious behavior.

However, the Court does not exercise its discretion to compel, *sua sponte*, the remaining defendants to comply with plaintiff's combined demands. Many of the items in the combined demands, which span 20 pages, do not appear to be relevant or reasonably calculated to lead to admissible evidence as to the two remaining causes of action, the first and sixth causes of action. To compel defendants to comply with those permissible items of discovery would require too much pruning of the combined demands. "[I]t is not the court's obligation to prune those pre-litigation

devices.” *Kimmel v Paul, Weiss, Rifkind, Wharton & Garrison*, 214 AD2d 453, 454 (1st Dept 1995);
see also Haszinger v Praver, 12 AD3d 485, 486 (2d Dept 2004).

CONCLUSION

Accordingly, it is hereby

ORDERED that plaintiff’s motion is granted only to the extent that summary judgment is granted to plaintiff on the second and third causes of action as against defendant Tritel Construction Group, LLC, and the motion is otherwise denied; and it is further

ORDERED that the second and third causes of action are severed, and the Clerk is directed to enter judgment in favor of plaintiff and against defendant Tritel Construction Corp. in the amount of \$569,550, together with interest at the rate of 9% per annum from the date of May 20, 2009 until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that plaintiff’s third, fourth, and fifth causes of action are dismissed; and it is further

ORDERED that the remainder of the action shall continue.

FILED

APR 06 2011

NEW YORK
COUNTY CLERK’S OFFICE

Dated: April 5 2011
New York, New York

ENTER:



J.S.C.

HON. MICHAEL D. STALLMAN