

**Atlantic Line Constr. LLC v Marstan Dev. Corp.**

2011 NY Slip Op 31686(U)

June 20, 2011

Supreme Court, New York County

Docket Number: 602173/2009

Judge: Jeffrey K. Oing

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

PRESENT: \_\_\_\_\_

PART 48

Justice

Index Number : 602173/2009

**ATLANTIC LINE CONSTRUCTION LLC**

vs.

**MARSTEN DEVELOPMENT**

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

**FILED**

JUN 23 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

~~This~~ motion is decided in accordance with the annexed decision and order of the Court.

Dated: 6/20/11

  
**JEFFREY K. OING J.S.C.**  
 J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 48

-----x

ATLANTIC LINE CONSTRUCTION LLC,

Plaintiff,

-against-

MARSTAN DEVELOPMENT CORP., AB DESIGN  
BUILD CORP., ARGYLE DEVELOPMENT LLC,  
STANLEY HILLELSOHN, SILVESTAR MARCEC,  
and ALI BHUTTA,

Defendants.

-----x

Index No. : 602173/09

Mtn Seq. No. 003

DECISION AND ORDER

**FILED**

JUN 23 2011

JEFFREY K. OING, J. :

**Background**

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Defendant, Argyle Development LLC ("Argyle") and defendant Marstan Development Corp. ("Marstan") in August 2007 entered into an AIA Standard Form of Agreement whereby Argyle, as Owner, hired Marstan, as a general contractor, to supervise and perform certain construction services at the Manhattan premises located at 753 St. Nicholas Avenue (the "premises"). In early 2008, plaintiff, Atlantic Line Construction LLC ("Atlantic Line") entered into contracts with defendant AB Design Build Corp. ("AB Design") and Marstan to perform carpentry work, and provide other labor and materials (Cross-motion, Exs. 8 and 9). Plaintiff claims that AB Design owes it \$34,000 and that Marstan owes it \$82,300. Consequently, on June 11, 2009, plaintiff filed two mechanic's liens against the premises (Moving Papers, E and F). This action ensued.

### Complaint

Plaintiff asserts six causes of action: 1) foreclosure of a \$34,000 mechanic's lien against AB Design and Argyle; 2) foreclosure of a \$82,3000 mechanic's lien against Marstan and Argyle; 3) Lien Law § 790-a trust fund violation against defendants Stanley Hillelsohn ("Hillelsohn") and Silvestar Marcec ("Silvestar"); 4) Lien Law § 790-a trust fund violation against defendant Ali Bhutta; 5) accounting against defendants Marstan, Hillelsohn and Silvestar; 6) payment guarantee against defendant Argyle.

### Relief Sought

Defendant Argyle moves, pursuant to CPLR 3212, for summary judgment dismissing as asserted against it the first, second and sixth causes of action.

Plaintiff Atlantic Line cross-moves for omnibus relief. Plaintiff seeks summary judgment for its first and second causes of action on the issue of liability against defendants Argyle and Marstan. Plaintiff also seeks summary judgment on its third cause of action on the issue of liability against defendants Hillelsohn and Marcec. In addition, plaintiff seeks to amend the first and second cause of action's ad damnum clause to assert joint and several liability. Lastly, plaintiff seeks entry of a default judgment on its first cause of action against AB Design.

### Discussion

Turning to Argyle's instant summary judgment motion seeking dismissal of the first and second causes of action to foreclose

on the mechanic's lien, Argyle refers to its agreement with Marstan wherein Argyle was to make progress payments to Marstan based upon applications of payment made by Marstan to Argyle (Moving Papers, Ex. A, Article 5). Pursuant to the terms of the agreement, Argyle made payments to Marstan totaling \$311,568.78 for work performed through May 29, 2009 (Alexander Aff., ¶ 4; Ex. C).

On June 9, 2009, Marstan provided Argyle with an affidavit & waiver of lien (the "lien affidavit & waiver"). In the lien affidavit & waiver, Marstan acknowledged receipt of all sums due from Argyle for all work performed and materials furnished through May 29, 2009 (Moving Papers, Ex. D).

Argyle contends that due to Marstan's failure to perform its obligations under the agreement it had to replace Marstan as the general contractor. By letter dated June 12, 2009, Argyle terminated Marstan from the project. Thereafter, Marstan commenced an action against Argyle, Marstan Development Corp. v Argyle Development, LLC, Index No. 110968/09.

In July 2009, Argyle moved, pursuant to CPLR 3211(a)[1], to dismiss the instant complaint on the basis that the documentary evidence established that Argyle did not owe Marstan any money and that, as such, plaintiff's two mechanic's liens against the premises were invalid. The Court (Justice Marylin G. Diamond), by a decision and order entered on December 3, 2009, denied Argyle's motion. In that regard, the Court determined that given Marstan's allegations in its separate action against Argyle that Argyle "failed to make timely payment on various requisitions"

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which "curtailed Marstan's ability to pay its vendors and other suppliers" and that because Marstan, at that juncture, had not indicated to the Court whether Argyle owed it any monies, the "waiver form submitted herein is not conclusive and that it would be inappropriate, at this time, to dismiss plaintiff's claims for foreclosure of the liens" (Moving Papers, Ex. H).

Subsequent to Argyle's motion, plaintiff served a supplemental summons and amended complaint in the instant action (Moving Papers, Ex. I). Argyle then interposed an answer containing a cross-claim against Marstan for indemnification based on Marstan's lien affidavit & waiver.

Argyle moved for summary judgment on its cross-claim against Marstan. Argyle, again, relied on the lien affidavit & waiver as evidence that it paid all monies due Marstan as of June 11, 2009, the date the two mechanic's liens were filed. Argyle also submitted copies of checks and wire transfers totaling \$311,568.78 for work performed through May 29, 2009 (Moving Papers, Ex. C). The last wire transfer is dated June 9, 2009.

In her decision and order, entered August 6, 2010, Justice Diamond found that, despite Marstan's opposition and its principal's, Silvestar Marcec, affidavit denying that all monies had been paid, Marcec was being disingenuous, and determined that Argyle was entitled to enforce the lien affidavit & waiver. Accordingly, Justice Diamond granted Argyle's motion for summary judgment on its cross-claim against Marstan for indemnification (Moving Papers, Ex. K).

The principle is well settled that "the rights of a subcontractor are derivative of the rights of the general contractor and a 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" (Timothy Coffey Nursery/Landscape, Inc. v Gatz, 304 AD2d 652 [2<sup>nd</sup> Dept 2003] [internal quotation marks omitted]).

Here, the record demonstrates that Argyle paid Marstan all the monies due for Marstan's work by submission of the lien affidavit & waiver, together with canceled checks and wire transfers. Moreover, Justice Diamond determined that the documentary evidence clearly showed that Argyle was entitled to enforce the lien affidavit & waiver.

Plaintiff's argument that Justice Diamond's decision was determinative on the issue of Marstan's indemnification of Argyle and not whether further monies were owed from Argyle to Marstan is contrary to the Court's analysis of the documentary evidence submitted in that motion. In addition, Marstan's bare assertion, found in a footnote on the last page of Stanley Hillelsohn's affirmation, that the lien affidavit & waiver was procured by fraud and that it has filed an appeal of Justice Diamond's decision, is insufficient to raise a factual issue that Argyle has not made full payment to Marstan.

Accordingly, that branch of Argyle's motion for summary judgment dismissing the first and second causes of action is granted, and they are hereby dismissed.

As for the sixth cause of action, plaintiff alleges that Argyle's principal, Ryan Alexander ("Alexander"), directed plaintiff's work, was on the work site every work day, reviewed plaintiff's work with plaintiff's principal, and gave directions. As such, plaintiff alleges that Argyle cannot claim lack of privity between plaintiff and Argyle. Plaintiff further alleges that Alexander "guaranteed payment to plaintiff in order to obtain [plaintiff's] continuance on the contract" (Moving Papers, Ex. I).

The principle is well settled that "a property owner who contracts with a general contractor does not become liable to a subcontractor on a quasi contract theory unless it expressly consents to pay for the subcontractor's performance" (Perma Pave Contracting Corp. v Paerdegat Boat & Racquet Club, Inc., 156 AD2d 550 [2<sup>nd</sup> Dept 1989]).

Here, however, while plaintiff's president, Mohamed A. Asskr, argues that Alexander's e-mails indicate that he inquired of Asskr how much money was due to plaintiff (Asskr Aff., ¶ 4), he never puts forth the clear statement that Alexander expressly consented to paying for plaintiff's performance. Further, although Alexander's EBT testimony indicates that he was questioned on e-mails between himself and Asskr and that e-mails were exchanged concerning plaintiff's payment, nowhere in that EBT testimony does Alexander say that he told or represented to plaintiff that Argyle would pay plaintiff for performance of the work. Under these circumstances, plaintiff cannot rely on a

quasi-contract theory. As such, plaintiff's sixth cause of action must be dismissed.

#### **Plaintiff's Cross-motion**

Plaintiff's branch of the cross-motion for summary judgment against defendants Argyle and Marstan on its first and second causes of action on the issue of liability is denied given that these causes have been dismissed herein. As to those branches of the cross-motion to amend the ad damnum clause in the amended complaint with respect to the first and second causes of action and for a default judgment against AB Design on its first cause of action, they are denied for the same reasons.

Plaintiff also seeks summary judgment on its third cause of action on the issue of liability against defendants Hillelsohn and Marcec. In that regard, to support its claim against these defendants based on their alleged violations of the trust fund provisions of Lien Law § 79-a, plaintiff relies Hillelsohn's EBT testimony wherein he testified that Marstan did not maintain separate bank accounts for each project it handled, that it deposited all payments made by Argyle to Marstan into the same operating account, that Marstan had other projects going on at the same time, and that the same operating account was used for daily business expenses, including salaries (Cross-motion, Ex. 13, p. 21). This EBT testimony, standing alone, is insufficient to demonstrate plaintiff's entitlement to summary judgment on its third cause of action against Hillelsohn and Marcec for violating Lien Law § 79-a. Indeed, Lien Law § 75 provides that a "trustee

shall not be required to keep in separate bank accounts or deposits the funds of the separate trusts ... provided his books of account shall clearly show the allocation to each trust of the funds deposited in his general or special bank account or accounts." Accordingly, that branch of plaintiff's summary judgment motion with respect to the third cause of action on the issue of liability is denied.

Accordingly, it is

ORDERED that Argyle's motion for summary judgment dismissing the first, second and sixth causes of action is granted, and they are hereby dismissed; and it is further

ORDERED that plaintiff's cross-motion for summary judgment is denied.

Counsel are directed to telephone Part 48 at 646-386-3298 to schedule a status conference.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 6/20/11



HON. JEFFREY K. OING, J.S.C.

**FILED**

JUN 23 2011

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