

<b>CPN Mech., Inc. v Madison Park Owner LLC</b>
2011 NY Slip Op 32216(U)
August 3, 2011
Supreme Court, New York County
Docket Number: 601276/10
Judge: Emily Jane Goodman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. EMILY JANE GOODMAN, Justice

PART 17

CPP Mechanical

v.

Madison Park

INDEX NO. 601276/10

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

MOTION SEQ. NO. 002

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

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Papers Numbered

Notice of Motion/Order to Show Cause — Affidavits— Exhibits \_\_\_\_\_

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

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

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*is decided for attached*

**FILED**

**AUG 12 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 8/3/11

New York, New York

EMILY JANE GOODMAN

J.S.C.

- 1. Check one: .....  Case Disposed  Non-Final Disposition
- 2. Check as Appropriate: ..... Motion Is:  Granted  Denied  Granted in Part  Other
- 3. Check If Appropriate: .....:  Settle Order  Submit Order
- Do Not Post  Fiduciary Appointment  Reference

FOR THE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 17

-----X  
CPN MECHANICAL, INC., EVA MECHANICAL,  
INC., EVA SALES, INC., APN AIR CONDITIONING,  
INC., AP HEATING & A/C, INC. and YVONNE  
SALES, INC.,

Plaintiffs,

Index No.  
601276/10

-against-

MADISON PARK OWNER LLC, G BUILDERS IV  
LLC, LEADER ELECTRIC CO., INC., BP AIR  
CONDITIONING CORP., and MOTTOLA-RINI  
ENGINEERS, P.C., and JOHN DOE #1 through JOHN  
DOE #25 inclusive, the last names being fictitious and  
unknown to plaintiffs such persons intended to be  
tenants, occupants, persons, corporations, or other  
entities, if any, having or claiming an interest in or lien  
upon the premises described in the complaint,

Defendants.

**FILED**

**AUG 12 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
**EMILY JANE GOODMAN, J.S.C.:**

The motion by Defendant Madison Park Owner LLC (Madison Park) to reargue the Court's Decision and Order, dated January 11, 2011 (the Decision), which is actually a premature second summary judgment motion, is denied.<sup>1</sup> The Court did not misapprehend any fact or law, and the arguments merely evidence that Madison Park disagrees with the Court's Decision, and advance new arguments to do so. Although Madison Park maintains that, as a matter of law, the Court should have dismissed Plaintiffs' First Cause of Action to foreclose the lien, because the lien notice was allegedly not timely filed, and should have dismissed the quantum meruit and unjust enrichment claims (the Ninth and Tenth Causes of Action), the Court

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<sup>1</sup>In the prior decision, the Court granted leave to renew the motion for summary judgment (on a limited issue) after Plaintiffs filed the Note of Issue. This motion is an improper vehicle to renew, prior to the filing of the Note of Issue, and is a waste of limited court resources.

properly found that Madison Park failed to meet its high burden to prove its entitlement to dismissal.<sup>2</sup>

As to the timeliness of the lien, the Court noted Madison Park's argument on page 4-5 of the Decision: "According to Madison Park, effective November 4, 2008, G Builders terminated CPN and the Related Entities. As of that date, according to Madison Park, none of the plaintiffs had completed the contract work under their respective P.O.'s. Madison Park asserts that G Builders later retained another contractor to complete all of the plaintiffs' remaining work. Thus, Madison Park asserts that the Lien, filed more than 16 months after all of the plaintiffs were terminated in November 2008, was untimely" and noted the same argument later on page 5, based on CPN's termination "by G Builders on November 4, 2008." At no point did Madison Park raise the argument that it now raises--that the work done was service and maintenance work, under a separate contract; the prior argument was that no work at all was performed after November 4, 2008. In fact, in claiming that it the allegations (and therefore arguments) are not new, it cites to statements in paragraph 47-51 of Plaintiffs' Nikolis' Affidavit. Madison Park's position, that the Court is supposed to divine its argument, which now has its own heading in the Table of Contents based on statements<sup>3</sup> made by Plaintiffs (not Defendants) in a 13 page affidavit, is unreasonable.

In any event, even if the argument had been previously made, Madison Park still has not established entitled to relief, as a matter of law, in light of the emails previously referenced by

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<sup>2</sup>The original page 6 to the Affirmation in support of the motion is not part of the file, but the court accepts the copy, which was submitted, as the original.

<sup>3</sup>The statements include reference to work involving "reviewing" and "balancing" due to intense air flow and the replacement of filters and strainers.

the Court in its Decision. As noted on page 7 of the Decision “CPN provides evidence in support of the timeliness of the Lien as to its work. Although Madison Park submits a November 4, 2008 letter terminating plaintiffs from the Project, Nikolis contends in his affidavit, and multiple e-mails among the parties suggest, that CPN performed work or furnished materials to the Project until the HVAC work was completed, on or about September 10, 2009, and therefore within eight months of filing the Lien.” Although Madison Park attempts to characterize all of the emails as being limited to service and maintenance work, under a separate contract, the Court cannot determine that context as a matter of law.

As to the causes of action for quantum meruit and unjust enrichment, although Madison Park argues that the checks which list the names of both G Builders and one of the Plaintiffs are not tantamount to proof that it assumed the obligation that both payees on the check be paid (beyond the check amount)<sup>4</sup>, the Court cited the correct legal standard and the evidence sufficient to deny summary judgment on page 9-10 of the Decision:

The ninth and tenth causes of action, sounding in quasi contract, survive the instant motion. “[I]t is a firmly established principle 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 subcontractor’s performance.” *Perma Pave Contr. Corp. v Paerdegat Boat & Racquet Club*, 156 AD2d 550, 551 (2d Dept 1989). “The owner’s mere consent to and acceptance of improvements placed on his property by the subcontractor, without more, does not render it liable to the subcontractor.” *Id.* In the

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<sup>4</sup>Madison Park cites to the contract’s provision that required it to list subcontractors as payees, and to the provision which states that by doing so, no obligations are assumed. However, Madison Park does not indicate where this argument was previously made, and Plaintiffs state that it was never made, and to the Court’s recollection it was not. In response to this new argument, Plaintiffs point to a 10/21/09 email from Andrew Manton to Dino Nikolis confirming that Madison Park would be paying one of CPN’s subcontractors directly, as well as other emails demonstrating that Madison Park expressly consented to making payments directly to Plaintiffs or their subcontractors, even after G Builders was terminated. Madison Park counters that such isolated proof is not sufficient. The Court will not rehash the evidence, and properly found that Madison Park did not meet its high burden to dismiss.

instant case, however, all of the payments to the plaintiffs for their work on the Project came not from G Builders, but from Madison Park's agent, Walter & Samuels. Each of the checks submitted to the court was from the account of Walter & Samuels and was written out to two payees, G Builder and one or another of the plaintiffs. Thus, because there is evidence that Madison Park consented to pay, and did pay, for plaintiffs' performance, the ninth and tenth causes of action are not dismissed.

Further, on page 7 of the Decision the Court stated:

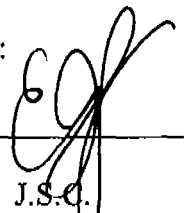
Although Madison Park denies that it ever consented to CPN performing all of the work, the Nikolis affidavit paints a different picture. He claims that Madison Park always knew that CPN was to perform all of the work, even though some contracts were with the Related Entities and not CPN, because it would avoid the cost of providing payment and performance bonds, required by Madison Park's lender, for work over one million dollars, by splitting the contracts in amounts of less than one million dollars. Nikolis also discusses certain circumstances which led him to believe that this scheme was, as his attorney states, "concocted by Madison Park with the assistance of GB." Although Madison Park explains away those circumstances, at this stage in the action, where absolutely no discovery has taken place, Madison Park has not met its burden on summary judgment.

Moreover, Plaintiffs correctly notes that Madison Park incorrectly lumps together the causes of action for unjust enrichment and quantum meruit as both requiring "express" consent to payment when in fact, unjust enrichment only requires enrichment, at the other's expense, for which equity and good conscience do not permit that other party to retain what is sought to be recovered. Thus, even if express consent was lacking (which Madison Park has not demonstrated), it still may be possible that a cause of action for unjust enrichment may be established. Accordingly, it is

ORDERED that the motion to reargue is denied.

**This constitutes the Decision and Order of the Court.**

Dated: August 3, 2011

ENTER:   
\_\_\_\_\_  
J.S.C.

**EMILY JANE GOODMAN**

**FILED**  
**AUG 12 2011**  
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