

**Pro Design, Inc. v Greenacres Mgt., LLC**

2011 NY Slip Op 33774(U)

May 10, 2011

Sup Ct, NY County

Docket Number: 109429/10

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN  
*Justice*

PART 7

PRO DESIGN, INC.,

Plaintiff,

- against -

GREENACRES MANAGEMENT, LLC,

Defendant.

INDEX NO. 109429/10

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

MOTION SEQ. NO. 001

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

The following papers were read on this motion by defendant Greenacres Management, LLC to dismiss pursuant to Section 3211 of the Civil Practice Law and Rules.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1, 2</u>
Answering Affidavits — Exhibits (Memo) _____	<u>3, 4</u>
Replying Affidavits (Reply Memo) _____	<u>5, 6</u>

**FILED**

Cross-Motion:  Yes  No

JUN 13 2011

NEW YORK COUNTY CLERK'S OFFICE

In this action for breach of contract, plaintiff alleges that defendant, "acting through its contractor," Wise Construction, LLC [hereinafter "Wise"], entered into a contract providing for plaintiff to perform certain construction work, referred to as the "stone package" in the relevant motion exhibits, on a site located at 212 East 63rd Street. Plaintiff alleges that it performed the construction work and has not been paid therefor. Plaintiff has not attached a copy of the subject contract to its pleadings or motion papers.

Defendant now makes a pre-answer motion to dismiss based upon CPLR 3211(a)(1), as a defense is founded upon documentary evidence, and upon CPLR 3211(a)(7), for failure to state a cause of action upon which relief can be granted. Defendant argues that Wise never had any agency authority to enter into a contract on defendant's behalf, and that therefore there

was no contract between the parties hereto. Defendant appends to its motion papers, as Exhibit A, portions of an executed American Institute of Architects ("AIA") A101-2007 "Standard Form of Contract between Owner and Contractor" document indicating that Wise was to be the contractor on the subject project, and that an AIA A201-2007 document is adopted into the agreement by reference. Also appended as Exhibit B are two pages of the AIA A201-2007 document. Paragraph 1.1.2 of the A201-2007 document contains a merger and integration clause, and also states that, "[t]he Contract Documents shall not be construed to create a contractual relationship of any kind . . . between the Owner and a Subcontractor or a Sub-subcontractor." Defendant also supports the motion with an affidavit averring that defendant never conferred any authority upon Wise to enter into agreements on defendant's behalf, that "an independent contractor relationship at all times was sought" by defendant, and that, "[u]pon information and belief, Plaintiff was contracted directly by Wise, not Greenacres . . ." (Affidavit of Walter H. Buck at ¶¶ 6-8)

Plaintiff opposes the motion, contending that the four pages of "a larger contract," to which plaintiff is not a party, are insufficient to satisfy the requirements of CPLR 3211(a)(1). Plaintiff also maintains that the cause of action for breach of contract was properly plead. In an affidavit supporting the opposition papers, plaintiff's president refers to the affidavit supporting the motion, averring that, "[t]he words 'upon information and belief' confirms that even the defendant itself is not certain that the contract was with Wise Construction.<sup>1</sup> I am certain that the work we performed was for the defendant, with the latter acting through its agent, Wise Construction."

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<sup>1</sup>Plaintiff's reading of that sentence is mistaken. The "upon information and belief" clause clearly modifies the portion of the sentence concerning the contractual relationship between the plaintiff and Wise. Defendant, a stranger to that contractual relationship, could not possibly have averred anything regarding that relationship except upon information and belief.

### 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, 151-152 [2002]; *Leon v Martinez*, 84 NY2d 83, 87, [1994]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, [2001]; *Wiøder 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**

As this is a pre-answer motion to dismiss, it must be treated as fact that Wise acted as defendant's agent in contracting the plaintiff, and that defendant was a party to the contract with plaintiff. Plaintiff's claim should survive an unsupported pre-answer motion even without producing the contract alleged to have been made between the parties herein.

Defendant has attempted to produce documentary evidence in the form of a portion of an AIA form A101-2007 contract between defendant as owner and Wise as general contractor. This portion submitted by defendant contains a merger and integration clause as well as a provision indicating that the contract would not create any contractual relationship between the defendant and any subcontractors. However, defendant has not produced the entire contract. As plaintiff was not a party to that contract, defendant must provide the entire contract as a motion exhibit to allow plaintiff, and the Court, to review the contract. The contract therefore is not an acceptable submission of documentary evidence for a 3211(a)(1) pre-answer motion to dismiss.

**FILED**

**JUN 13 2011**

**NEW YORK COUNTY CLERK'S OFFICE**

It is therefore,

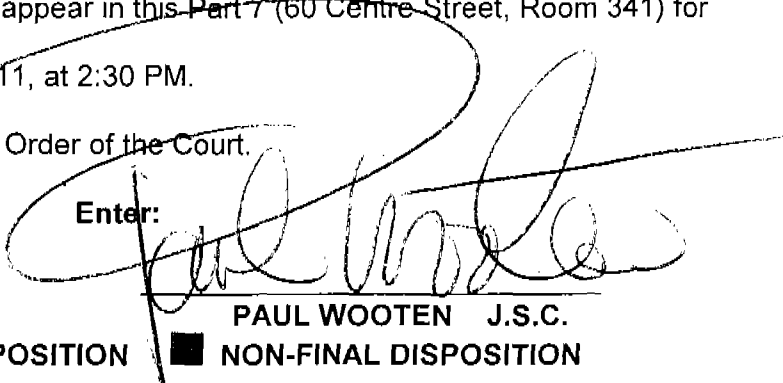
ORDERED, that the motion to dismiss by defendant Greenacres Management LLC is denied without prejudice; and it is further,

ORDERED, that the parties shall appear in this Part 7 (60 Centre Street, Room 341) for a preliminary conference on June 15, 2011, at 2:30 PM.

This constitutes the Decision and Order of the Court.

**Dated: May 10, 2011**

Enter:



**PAUL WOOTEN J.S.C.**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check If appropriate:  DO NOT POST  REFERENCE