Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Jenco Associates, Inc.,

Plaintiff,

-against-

Versa Cret Contracting Company Inc., Asharoken Avenue (2008) LLC, A. Paul LaRuccia Construction Corp., Orlando Martins and "John Doe One" through "John Doe Ten",

Defendants.

Index No.: 18085/2011

Attorneys [See Rider Annexed]

Motion Sequence No.: 001; MD
Motion Date: 10/31/12
Submitted: 12/19/12

Motion Sequence No.: 002; XMD
Motion Date: 10/31/12
Submitted: 12/19/12

Upon the following papers numbered 1 to 47 read upon this motion for summary judgment: Notice of Motion and supporting papers, 1 - 22; Notice of Cross Motion and supporting papers, 23 - 32; 33 - 37; Answering Affidavits and supporting papers, 38 - 39; Replying Affidavits and supporting papers, 40 - 41; 42 - 32; Other, Affidavit, 44 - 45; Memorandum of Law, 46 - 47; it is

ORDERED that the cross motion by defendant Asharoken Avenue (2008) LLC for an order granting summary judgment in its favor on the complaint and on its counterclaim, and cancelling the notice of pendency is denied.

Plaintiff Jenco Associates commenced this action to recover money allegedly owed for ready mix concrete delivered to defendant Versa Cret Contracting Company (hereinafter Versa Cret). Defendant Asharoken Avenue (2008) LLC (hereinafter Asharoken) entered into a contract with defendant A. Paul Laruccia Construction Corp. (hereinafter Laruccia Construction), a general contractor, to construct a new house at premises known as 235 Asharoken Avenue in Northport, New York. Laruccia Construction hired Versa Cret as a subcontractor to provide concrete work at the premises, and Versa Cret purchased ready mix concrete from plaintiff. On December 14, 2009, the retaining wall along the pathway to the rear of the premises was damaged when a truck owned by plaintiff traversed the pathway to deliver ready mix concrete to the subject premises. The complaint

alleges that plaintiff delivered ready mix concrete to the subject premises from December 8, 2009 through June 2, 2010, and that Versa Cret failed to pay the balance in the amount of $15,519. It further alleges that on June 17, 2010, plaintiff filed a notice of mechanic's lien on the subject property for the balance due and owing. Asharoken asserts a counterclaim against plaintiff pursuant to § 39 of Lien Law, alleging that plaintiff willfully exaggerated the amount of the lien.

Plaintiff now moves for summary judgment in its favor against Versa Cret and Orlando Martins, president of Versa Cret. Plaintiff argues that the terms of its delivery agreement provides that the customer assumes all risk for damages caused when the customer requests that the driver cross the curb line during delivery. In support of its motion, plaintiff submits, among other things, copies of the pleadings, invoices it sent to Versa Cret, transcripts of the deposition testimony of Orlando Martins and Angelo Paul Laruccia, president of Laruccia Construction, and an affidavit of Michael Lochren, Vice President of Jenco. Versa Cret and Orlando Martins oppose the motion, arguing that the damage to the retaining wall was caused solely by the negligence of plaintiff's truck driver and that Martins did not direct the driver to enter the property. In opposition, they submit an affidavit of Martins.

Asharoken moves for summary judgment dismissing the complaint against it. It also moves pursuant to CPLR 6514 for an order directing the Notice of Pendency be canceled against the premises located at 235 Asharoken Avenue, and awarding summary judgment in its favor on its counterclaim against plaintiff. In support of its cross motion, Asharoken submits, among other things, a copy of the pleadings, a list of payments to Laruccia Construction, and an affidavit of Anthony Sbarro, a member of Asharoken Avenue (2008) LLC. Laruccia Construction opposes the cross motion by Asharoken, arguing that it was not paid in full for work it completed at the time plaintiff filed the mechanic's lien. Plaintiff also opposes the cross motion, arguing that Asharoken has not established that it paid all sums due to the general contractor.

Lochren's affidavit states that plaintiff provided ready mix concrete to Versa Cret at two different job sites: the subject property in Northport and a property in Riverhead. It states that between December 8, 2009 and June 2, 2010, plaintiff delivered ready mix concrete to Versa Cret at the Asharoken site having an agreed price of $26,810. It states that Versa Cret never rejected the materials, complained about the quality or disputed the prices. The affidavit states that Versa Cret made payments and/or received credits totaling $11,290, leaving a balance due and owing of $15,519. It states that Martins refused to pay the balance due because the general contractor back-charged Versa Cret approximately $15,000 for damage allegedly done to a retaining wall by one of plaintiff's trucks. The affidavit states that the Jenco truck did not hit the retaining wall, but the weight of the truck passing over the dirt next to the retaining wall caused the wall to buckle. Lochren's affidavit further states that the delivery ticket contains the following statement:

> Drivers are prohibited from delivering concrete except under the truck's own power and where site conditions permit the safe and proper operation of his equipment. Drivers are not permitted to go beyond the curb line, except upon authorization of the customer and his acceptance of risk for any loss or damage.

> The customer must provide and will be responsible for safe and sure access to the site. On-site towing charges will be the customer's responsibility.

The affidavit states that curb side delivery is standard in the concrete delivery industry, as the size and weight of the trucks and the unknown site conditions may result in damage to the property. It further states that if the customer wants Jenco drivers to enter the property, it is the customer's responsibility to provide proper and adequate access to the job location. The affidavit states that the truck went beyond the curb line at the request of Martins. It states that the Versa Cret defendants also owe $5,513 for deliveries of concrete by plaintiff to another job site located in Riverhead. It also states that Martins executed a credit application with plaintiff on May 3, 2004 which provides for finance charges for unpaid balances which are 30 days or more past due.

At his examination before trial, Martins testified that he is in the concrete construction building business, and that he was hired as a subcontractor by Laruccia Construction to provide concrete work at the Asharoken Avenue site. He testified that he contracted with plaintiff to deliver concrete at the subject location, and that a driver employed by plaintiff came to deliver concrete on December 14, 2009. He testified that he told the driver to back up the truck to the pump, which is located at the back of the house, and that the truck traveled between the house and the retaining wall to get to the pump. He testified that while the truck did not hit the retaining wall, the weight of the truck as it passed close to the retaining wall caused the wall to bend. He testified that when he informed Lochren about the damage to the wall, Lochren told him to credit the amount Versa Cret owed to plaintiff for the damage to the wall. He states that Laruccia Construction had a mason repair the retaining wall and sent the invoice to Versa Cret for about $15,000, which was forwarded to plaintiff. He further states that when Lochren learned of the amount for the repair, he refused to credit that amount to Versa Cret.

Sbarro's affidavit states that he is a member of Asharoken and that Asharoken hired Laruccia Construction as the general contractor to build a single-family home at the subject premises. It states that Asharoken did not hire Versa Cret, and that Laruccia Construction was responsible to ensure Versa Cret was paid for services and materials provided on the construction project. Sbarro's affidavit further states that Asharoken did not hire plaintiff, who was a subcontractor or supplier to Versa Cret. It states that on the date of the filing of plaintiff's mechanics lien against the premises, Asharoken had paid Laruccia Construction the sum of $2,430,969, which was payment in full of all sums it owed to Laruccia Construction at that time. It states that from June 17, 2010 through April 11, 2011, Asharoken made additional payments to Laruccia Construction for a total amount paid of $4,823,266, when it left the job. It further states that Laruccia Construction did not claim that it was owed any money from Asharoken when it left the job.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden shifts to the opposing party to demonstrate that there are material issues of fact, however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v***

City of New York, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]). The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

Plaintiff's moving papers failed to establish its *prima facie* entitlement to summary judgment as a matter of law. While plaintiff's delivery agreement states that the customer accepts the risk of loss or damages which may occur if the truck driver is directed by the customer to make a delivery past the curb line, the deposition testimony of Martins states that plaintiff agreed to credit the account for the costs of repairing the damaged retaining wall. Thus, a triable issue of fact exists as to whether there was an oral modification of the agreement or a separate agreement wherein plaintiff waived the requirements of the delivery agreement (*see* ***Marin v Roosevelt Island Assocs.***, 282 AD2d 719, 724 NYS2d 329 [2d Dept 2001]; ***Dauman Displays, Inc. v Masturzo***, 168 AD2d 204, 562 NYS2d 89 [1st Dept 1990]). Having determined that plaintiff failed to establish its *prima facie* burden on the motion, it is unnecessary to consider the sufficiency of defendants' papers in opposition (*see* ***Zambri v Madison Sq. Garden, L.P.***, 73 AD3d 1035, 901 NYS2d 377 [2d Dept 2010]). Accordingly, plaintiff's motion for summary judgment in its favor is denied.

As to the cross motion by Asharoken, Lien Law § 3 provides, in relevant part, that a "contractor . . . who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof" is entitled to a mechanic's lien for the value or agreed price of the unpaid materials. A mechanic's lien by a subcontractor is a statutory creation, operating much like attachment and garnishment, to make sure that a subcontractor who supplies labor or materials for a construction project and does not have a contractual relationship with the owner of the property will receive the amount due to himself or herself (***Matter of Northside Tower Realty LLC v Klin Constr. Group***, 23 Misc3d 1116(A), 886 NYS2d 68 [Sup Ct, Kings County 2009]). The mechanic's lien secures the amount due to the subcontractor by a lien on the real property improved (Lien Law § 3; ***Modern Era Constr., Inc. v Shore Plaza, LLC***, 51 AD3d 990, 858 NYS2d 783 [2d Dept 2008]; ***Zimmerman v Carlson***, 293 AD2d 744, 741 N.Y.S.2d 118 [2d Dept 2002]).

Furthermore, pursuant to statute, a mechanic's lien is valid to the extent of "the sum earned and unpaid on the contract at the time of filing the notice of lien, and any sum subsequently earned thereon" (Lien Law § 4). In the case of a subcontractor, the lien will only attach to those funds due and owing to the general contractor at the time of its filing, or which may thereafter become due and owing (***Albert J. Bunce, Ltd. v Fahey***, 73 AD2d 632, 423 NYS2d 58 [2d Dept 1979]; *see* ***SMI Bldg. Sys., LLC v West 4th St. Dev. Group, LLC***, 83 AD3d 687, 920 NYS2d 397 [2d Dept 2011]). However, in either event, the lien will not be defeated by the subsequent abandonment of the project by the general contractor even though payments to third parties in excess of the original contract price may be required by the owner to complete the construction (*see* ***Albert J. Bunce, Ltd v Fahey***, *supra*).

The branch of Asharoken's cross motion for summary judgment dismissing plaintiff's first cause of action to enforce its mechanic's lien is denied, as a triable issue of fact exists as to whether there were funds due and owing to the general contractor when plaintiff filed its mechanic's lien (*see* ***M& V Concrete Contr. Corp. v Modica***, 76 AD3d 614, 906 NYS2d 601 [2d Dept 2010]; *c.f* ***Perma Pave Contracting Corp. v Paerdegat Boat & Racquet Club***, 156 AD2d 550, 549 NYS2d 57 [2d Dept 1989]). Here, while Sbarro stated in his affidavit that Asharoken had paid Laruccia Construction in full at the time plaintiff filed the mechanic's lien, the affidavit of Laruccia Construction in opposition states that it was not paid in full at that time. Thus, there is an issue of credibility which may not be resolved on a summary judgment motion (*see* ***Ahr v Karolewski,*** 48 AD3d 719, 853 NYS2d 172 [2d Dept 2008]; ***Gordan v Honig,*** 40 AD3d 925, 837 NYS2d 197 [2d Dept 2007]).

Finally, Asharoken's applications to cancel the notice of pendency and for summary judgment in its favor on its counterclaim against plaintiff are denied, as Asharoken failed to submit any arguments in support of these applications. Moreover, there are insufficient facts to find that the amount of the lien had been deliberately and intentionally exaggerated by plaintiff as a matter of law (***Park Place Carpentry & Bldrs., Inc. v DiVito***, 74 AD3d 928, 901 NYS2d 866 [2d Dept 2010]; ***Capogna v Guella***, 41 AD3d 522, 836 NYS2d 441 [2d Dept 2007]; ***East Hills Metro, Inc. v J.M. Dennis Constr. Corp.***, 277 AD2d 348, 717 NYS2d 202 [2d Dept 2000]). Accordingly, defendant Asharoken's cross motion is denied.

Dated: 4/11/2013

William B Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**

RIDER

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Clerk of the Court

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