

**ACC Concrete Corp. v Core Continental Constr.,  
LLC**

2013 NY Slip Op 31958(U)

August 8, 2013

Supreme Court, New York County

Docket Number: 600822/2010

Judge: Lucy Billings

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

PRESENT: LUCY BILLINGS  
J.S.C.  
Justice

PART 46

Index Number : 600822/2010  
ACC CONCRETE  
vs.  
CORE CONTINENTAL CONSTRUCTION  
SEQUENCE NUMBER : 002  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>1</u>
Answering Affidavits — Exhibits _____	No(s). <u>2-3</u>
Replying Affidavits _____	No(s). <u>4</u>

Upon the foregoing papers, it is ordered ~~that this motion is~~ and adjudged that:

*The court grants defendant Manigold LLC's motion for summary judgment in part and otherwise denies its motion, pursuant to the accompanying decision. C.P.L.R. § 3212 (d) and (e).*

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

# FILED

AUG 21 2013

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 8/8/13

Lucy Billings, 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

LUCY BILLINGS

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46  
-----x

ACC CONCRETE CORP.,

Index No. 600822/2010

Plaintiff

- against -

DECISION AND ORDER

CORE CONTINENTAL CONSTRUCTION, LLC,  
MARIGOLD LLC, and BANK OF EAST ASIA  
(USA) N.A.,

**FILED**

Defendants

AUG 21 2013

-----x

LUCY BILLINGS, J.S.C.:

COUNTY CLERK'S OFFICE  
NEW YORK

I. BACKGROUND

Plaintiff, an excavation and foundation subcontractor, sues defendants to recover \$183,000.00, \$18,000.00 for original work and \$165,000.00 for extra work and equipment, that plaintiff provided on a construction project on premises owned by defendant Marigold LLC, for which defendant Core Continental Construction, LLC (CCC), was the general contractor. Plaintiff claims four legal bases on which it is entitled to payment. The first claim seeks damages against CCC for breach of contract. The second claim seeks recovery against CCC, and the third claim seeks recovery against Marigold, both based on quantum meruit or unjust enrichment. The fourth claim is on behalf of a proposed class under New York Lien Law § 77 to recover funds held in trust for the project by defendant Bank of East Asia. The court previously granted Bank of East Asia's motion to dismiss and Marigold's cross-motion for summary judgment dismissing plaintiff's fourth

claim against these defendants. C.P.L.R. §§ 3211(a)(7); 3212(b) and (e). Therefore no claim remains against Bank of East Asia.

All remaining parties move for summary judgment. C.P.L.R. § 3212(b). Marigold moves for summary judgment dismissing the quantum meruit or unjust enrichment claim against Marigold: the complaint's third claim and only remaining claim against this defendant. Plaintiff separately moves for summary judgment on all the complaint's remaining claims, all against CCC. In response to plaintiff's motion, CCC cross-moves for summary judgment dismissing plaintiff's claims against this defendant. For the reasons explained below, the court grants Marigold's and plaintiff's motions and CCC's cross-motion in part, but otherwise denies the parties' motions and cross-motion.

## II. APPLICABLE STANDARDS

The moving parties, to obtain summary judgment, must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence eliminating all material issues of fact. C.P.L.R. § 3212(b); Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 503 (2012); Smalls v. AJI Indus., Inc., 10 N.Y.3d 733, 735 (2008); JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d 373, 384 (2005); Giuffrida v. Citibank Corp., 100 N.Y.2d 72, 81 (2003). If the moving parties satisfy this standard, the burden shifts to the opponent to rebut that prima facie showing, by producing evidence, in admissible form, sufficient to require a trial of material factual issues. Morales v. D & A Food Serv., 10 N.Y.3d 911, 913 (2008); Hyman v. Queens County Bancorp, Inc.,

3 N.Y.3d 743, 744 (2004). In evaluating the evidence for purposes of the parties' motions, the court construes the evidence in the light most favorable to the opponent. Vega v. Restani Constr. Corp., 18 N.Y.3d at 503; Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d 35, 37 (2004).

CCC alternatively moves to dismiss plaintiff's claims against it based on the complaint's failure to state a cause of action, C.P.L.R. § 3211(a)(7), but CCC nowhere identifies any defect in the claims as pleaded. For dismissal of the fourth claim, discussed below, CCC relies on the earlier decision concluding that Marigold never received any funds from Bank of East Asia. Otherwise, CCC contends that documentary evidence negates plaintiff's claims against this defendant. C.P.L.R. § 3211(a)(1). Because CCC supports its defense based on documentary evidence with deposition testimony, which is not documentary evidence under C.P.L.R. § 3211(a)(1), the court denies CCC's motion insofar as it seeks dismissal under C.P.L.R. § 3211(a)(7) or under § 3211(a)(1). Correa v. Orient-Express Hotels, Inc., 84 A.D.3d 651 (1st Dep't 2011); Weil Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc., 10 A.D.3d 267, 271 (1st Dep't 2004). See Flowers v. 73rd Townhouse LLC, 99 A.D.3d 431 (1st Dep't 2012).

### III. TIMELINESS OF THE MOTIONS

Since plaintiff filed a note of issue February 3, 2012, the deadline for summary judgment motions was Monday, June 4, 2012. C.P.L.R. § 3212(a). Marigold made its motion when it was served

timely May 30, 2012. C.P.L.R. § 2211; Esdaille v. Whitehall Realty Co., 61 A.D.3d 435, 436 (1st Dep't 2009); Gazes v. Bennett, 38 A.D.3d 287, 288 (1st Dep't 2007).

CCC's cross-motion for summary judgment served June 26, 2012, was untimely. C.P.L.R. § 3212(a). The court may consider CCC's cross-motion, however, because it was in response to plaintiff's timely motion for summary judgment and seeks summary judgment dismissing the same claims on which plaintiff seeks a judgment in plaintiff's favor. Alonzo v. Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc., 104 A.D.3d 446, 448-49 (1st Dep't 2013); Palomo v. 175th St. Realty Corp., 101 A.D.3d 579, 581 (1st Dep't 2012); Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp., 71 A.D.3d 538, 540 (1st Dep't 2010); Filannino v. Triborough Bridge & Tunnel Auth., 34 A.D.3d 280, 281 (1st Dep't 2006).

#### IV. BREACH OF CONTRACT CLAIM AGAINST CCC

To establish breach of a contract, plaintiff must show a contract, that plaintiff performed and CCC breached the contract, and that CCC's breach caused plaintiff to sustain damages. Harris v. Seward Park Hous. Corp., 79 A.D.3d 425, 426 (1st Dep't 2010). See Tutora v. Siegel, 40 A.D.3d 227, 228 (1st Dep't 2007). Plaintiff must plead the specific terms of the agreement that CCC breached. Marino v. Vunk, 39 A.D.3d 339, 340 (1st Dep't 2007); Giant Group v. Arthur Andersen LLP, 2 A.D.3d 189, 190 (1st Dep't 2003); Kraus v. Visa Intl. Serv. Assn., 304 A.D.2d 408 (1st Dep't 2003). The absence of agreement on a material term of the

contract renders it unenforceable even if the parties intended to be bound by it. Zheng v. City of New York, 93 A.D.3d 510, 512 (1st Dep't 2012); Gessin Elec. Contrs., Inc. v. 95 Wall Assoc., LLC, 74 A.D.3d 516, 519 (1st Dep't 2010).

A. EXCAVATION AND FOUNDATION WORK

The parties do not dispute an oral contract between CCC and plaintiff for the project's excavation and foundation work. Plaintiff's president Anthony Isola testified at one point in his deposition that the agreed cost for this work was \$138,000.00, but later in the same deposition that the agreed cost was only \$130,000.00. Aff. of Vincent Ieraci Ex. 6, at 28, 87. Although Chun Lin Chiang, one of CCC's two members, testified at his deposition that the agreed cost ranged from \$110,000.00 to \$120,000.00, id. Ex. 5, at 23, his later affidavit agrees with Isola's testimony that the cost was \$130,000.00.

While both CCC and Marigold contend that plaintiff failed to perform the full scope of the specified excavation work because plaintiff excavated only eight feet deep, instead of the ten feet in the plan specifications, CCC does not allege any defense or counterclaim based on plaintiff's nonperformance to undermine its breach of contract claim for the excavation. Dorfman v. American Student Assistance, 104 A.D.3d 474 (1st Dep't 2013); Sun Gold, Corp. v. Stillman, 95 A.D.3d 668, 669 (1st Dep't 2012); ASKL Enters., Inc. v. NYNEX Long Distance Co., 7 A.D.3d 424, 425 (1st Dep't 2004). See Sheridan v. Trustees of Columbia Univ. in City of N.Y., 296 A.D.2d 314, 315 (1st Dep't 2002). In any event, the

deposition testimony by Isola and Chiang establishes that Chiang advised plaintiff to excavate to only eight feet to save costs and that plaintiff credited CCC \$12,000.00 due to the shallower excavation.

Since plaintiff admits that the cost was as low as \$130,000.00, and CCC admits that the cost was as high as that amount, and both parties agree that CCC paid plaintiff \$100,000.00 and that plaintiff credited CCC \$12,000.00 against the agreed price, the record leaves no issue regarding plaintiff's entitlement to \$18,000.00 for the excavation and foundation work. Therefore the court grants plaintiff summary judgment on plaintiff's breach of contract claim against CCC for \$18,000.00, based on plaintiff's oral contract with CCC for that original work, and denies CCC's cross-motion for summary judgment dismissing that part of the first claim. C.P.L.R. § 3212(b) and (e).

B. ROCK REMOVAL WORK

Regarding the rock removal, Isola and Chiang both testified that plaintiff discovered rocks after it started work on the project, contrary to a soil boring report provided by Marigold that indicated the absence of rocks in the soil to be excavated. Because the parties did not expect to encounter rocks when plaintiff and CCC orally contracted for the excavation and foundation work, and that contract did not provide for additional or extra work, see A.H.A. Gen. Constr. v. New York City Hous. Auth., 92 N.Y.2d 20, 24-25 (1998), rock removal was beyond the

scope of plaintiff's and CCC's original contract.

The deposition testimony by Isola and Chiang reveals, however, that plaintiff continued removing rocks at CCC's direction and with its assurance of payment, but without establishing whether CCC, Marigold, or both would pay for the rock removal. The deposition testimony specifically shows that the parties never reached an agreement on the amount plaintiff would be paid for this rock removal, a material term necessary to form a contract. Schutty v. Speiser Krause P.C., 86 A.D.3d 484, 485 (1st Dep't 2011); John Anthony Rubino & Co., CPA, P.C. v. Swartz, 84 A.D.3d 599 (1st Dep't 2011); Tringle v. Tringle, 40 A.D.3d 353 (1st Dep't 2007).

While Isola presented invoices for the rock removal expenses to CCC, and Chiang presented a change order for rock removal expenses to Marigold's president Henry Ting, plaintiff does not claim an account stated, and Marigold never signed the change order to form a contract obligating Marigold to pay those expenses or otherwise allocating payment. Susko v. 337 Greenwich LLC, 103 A.D.3d 434, 436 (1st Dep't 2013); Yonkers Ave. Dodge, Inc. v. BZ Results, LLC, 95 A.D.3d 774, 775 (1st Dep't 2012); Joseph P. Day Realty Co. v. Chere, 308 A.D.2d 148, 156 (1st Dep't 2003). See A.H.A. Gen. Constr. v. New York City Hous. Auth., 92 N.Y.2d at 24-25; 225 Fifth Ave. Retail LLC v. 225 5th, LLC, 78 A.D.3d 440, 441-42 (1st Dep't 2010); Singer Asset Fin. Co., LLC v. Melvin, 33 A.D.3d 355, 357-58 (1st Dep't 2006). Nor does the evidence otherwise establish Marigold's express approval of the

extra work. See Tishman Constr. Corp. of N.Y. v. American Mfrs. Mut. Ins. Co., 303 A.D.2d 323, 324 (1st Dep't 2003).

The record thus fails to demonstrate an enforceable contract obligating any party to pay for any part this continued work. Schutty v. Speiser Krause P.C., 86 A.D.3d at 485; Jamaica Pub. Serv. Co. v. Compagnie Transcontinentale De Reassurance, 282 A.D.2d 227 (1st Dep't 2001). See Red Oak Fund, L.P. v. MacKenzie Partners, Inc., 90 A.D.3d 527, 528 (1st Dep't 2011); Edge Mgt. Corp. v. Crossborder Exch. Corp., 304 A.D.2d 422, 423 (1st Dep't 2003). Plaintiff's removal of the rock at CCC's request despite the absence of an agreement regarding the rock removal was at plaintiff's own peril, unless plaintiff establishes another basis for recovery. Jordan Panel Sys. Corp. v. Turner Constr. Co., 45 A.D.3d 165, 176 (1st Dep't 2007). Therefore the court grants CCC's cross-motion for summary judgment to the extent of dismissing the remainder of plaintiff's first claim and denies its motion for summary judgment on the remainder of that claim. C.P.L.R. § 3212(b) and (e).

#### V. QUANTUM MERUIT AND UNJUST ENRICHMENT CLAIMS

##### A. MARIGOLD'S SECOND SUMMARY JUDGMENT MOTION

Marigold previously moved for summary judgment dismissing plaintiff's third claim against Marigold based on quantum meruit or unjust enrichment. The court denied the motion in an order entered February 7, 2012, finding factual issues whether Marigold orally directed the work and agreed to pay for it at least in part. Nevertheless, because Marigold's new summary judgment

motion is based on evidence revealed through disclosure, the court may consider this second motion. Stevanovic v. T.U.C. Mgt. Co., 305 A.D.2d 133, 134 (1st Dep't 2003); Varsity Tr. v. Board of Educ. of City of N.Y., 300 A.D.2d 38, 39 (1st Dep't 2002). See Brown Harris Stevens Westhampton LLC v. Gerber, 107 A.D.3d 526, 527 (1st Dep't 2013); Sharon v. American Health Providers, 105 A.D.3d 508, 509 (1st Dep't 2013).

B. THE MERITS OF THE CLAIMS

Although there was an oral contract between plaintiff and CCC, the rock removal work was beyond the scope of that agreement, so plaintiff may proceed based on quasi-contract theories. Sabre Intl. Sec., Ltd. v. Vulcan Capital Mgt., Inc., 95 A.D.3d 434, 438-39 (1st Dep't 2012); Wellbilt Equip. Corp. v. Fireman, 303 A.D.2d 269 (1st Dep't 2003); Rab Contrs. v. Stillman, 266 A.D.2d 70 (1st Dep't 1999); Leroy Callender, P.C. v. Fieldman, 252 A.D.2d 468, 469 (1st Dep't 1998). See Henry Loheac, P.C. v. Children's Corner Learning Ctr., 51 A.D.3d 476 (1st Dep't 2008). To establish a quantum meruit claim, plaintiff must show that it performed services in good faith, which defendants accepted, and for which it reasonably expected to be compensated, and the services' reasonable value. Fulbright & Jaworski, LLP v. Carucci, 63 A.D.3d 487, 489 (1st Dep't 2009); Soumayah v. Minnelli, 41 A.D.3d 390, 391 (1st Dep't 2007); Freedman v. Pearlman, 271 A.D.2d 301, 304 (1st Dep't 2000). To establish an unjust enrichment claim, plaintiff must show that defendants were enriched at plaintiff's expense, and it is

inequitable and unconscionable to allow them to retain the enrichment. Georgia Malone & Co., Inc. v. Rieder, 19 N.Y.3d 511, 516 (2012); Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d 173, 182 (2011); Abacus Fed. Sav. Bank v. Lim, 75 A.D.3d 472, 473 (1st Dep't 2010). See Sterlacci v. Gurfein, 18 A.D.3d 229, 230 (1st Dep't 2005); Wiener v. Lazard Freres & Co., 241 A.D.2d 114, 119 (1st Dep't 1998). To sustain an unjust enrichment claim plaintiff also must also demonstrate a relationship with defendants that caused plaintiff's reliance or induced its performance. See Georgia Malone & Co., Inc. v. Rieder, 19 N.Y.3d at 518; Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d at 182. While contractual privity is not required, at minimum plaintiff must show defendants dealt with plaintiff and were aware it was conferring a benefit on them. Georgia Malone & Co., Inc. v. Rieder, 19 N.Y.3d at 518; Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d at 182; Murphy v. 317-319 Second Realty LLC, 95 A.D.3d 443, 445 (1st Dep't 2012).

A. Excavation and Foundation Work

Plaintiff also seeks \$18,000.00 for the unpaid remainder due under its agreement with CCC for the excavation and foundation work. The contract governing the dispute between plaintiff and CCC bars plaintiff's claims based on quantum meruit, Gordon v. Credno, 102 A.D.3d 584, 585 (1st Dep't 2013); Schutty v. Speiser Krause P.C., 86 A.D.3d at 485-86, and unjust enrichment. Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co., 70 N.Y.2d 382, 388 (1987); Accurate Copy Serv. of Am., Inc. v. Fisk Bldg. Assoc.

L.L.C., 72 A.D.3d 456 (1st Dep't 2010); Adelaide Prods., Inc. v. BKN Intl. AG, 38 A.D.3d 221, 225 (1st Dep't 2007); Theatre Row Phase II Assoc. v. National Rec. Studios, 291 A.D.2d 172, 175 (1st Dep't 2002). See Cox v. NAP Constr. Co., Inc., 10 N.Y.3d 592, 607 (2008); Russo v. Heller, 80 A.D.3d 531, 532 (1st Dep't 2011). As long as an oral agreement is enforceable, it is sufficient to impose the bar. Rashid B. V. Taxi Mgt. Inc., 107 A.D.3d 555, 556 (1st Dep't 2013); Schutty v. Speiser Krause P.C., 86 A.D.3d at 485-86; Brown v. Brown, 12 A.D.3d 176 (1st Dep't 2004).

Although a subcontractor is not always barred from recovering for its services from the owner of the property improved by those services, e.g., Blandford Land Clearing Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pa., 260 A.D.2d 86, 94 (1st Dep't 1999), the evidence here does not support Marigold's liability for the unpaid portion of plaintiff's contract with CCC based on quantum meruit or unjust enrichment. Marigold well may have been enriched by plaintiff's excavation and foundation work, but Ting attests without contradiction that Marigold paid CCC \$230,000.00 as compensation for all work on the project, including the subcontractors' work. No party disputes that this payment did not at minimum cover all the original work. Thus Marigold did not retain the benefit of this work unjustly, without paying for it. Dobroshi v. Bank of Am., N.A., 65 A.D.3d 882, 885 (1st Dep't 2009); CDR Creances S.A. v. Euro-American Lodging Corp., 40 A.D.3d 421, 422 (1st Dep't 2007); Shilkoff,

Inc. v. 885 Third Ave. Corp., 299 A.D.2d 253, 254 (1st Dep't 2002). See John Anthony Rubino & Co., CPA, P.C. v. Swartz, 84 A.D.3d 599; Rab Contrs. v. Stillman, 266 A.D.2d at 71; I.S. Design v. Planned Mgt. Constr. Corp., 243 A.D.2d 425, 426 (1st Dep't 1997).

Nor does plaintiff demonstrate any expectation that Marigold, instead of CCC, would compensate plaintiff directly for any part of the original work. Fulbright & Jaworski, LLP v. Carucci, 63 A.D.3d at 489; Jordan Panel Sys. Corp. v. Turner Constr. Co., 45 A.D.3d at 180. See Caribbean Direct, Inc. v. Dubset LLC, 100 A.D.3d 510, 511 (1st Dep't 2012); Balestriere PLLC v. Banxcorp, 96 A.D.3d 497, 498 (1st Dep't 2012); Panetta v. Kelly, 17 A.D.3d 163, 166 (1st Dep't 2005); Leroy Callender, P.C. v. Fieldman, 252 A.D.2d at 469. Therefore the court denies plaintiff's motion for summary judgment on its quantum meruit and unjust enrichment claims against CCC and Marigold for \$18,000.00 of the total \$183,000.00 claimed and grants CCC's cross-motion and Marigold's separate motion for summary judgment dismissing that part of the second and third claims against each of the two defendants. C.P.L.R. § 3212(b) and (e).

B. Rock Removal Work

Plaintiff supports its quantum meruit claim against both defendants for the rock removal work: plaintiff performed rock removal on the project; defendants were aware of plaintiff's efforts; and all parties expected that plaintiff was to be compensated for that work, which was worth \$165,000.00.

Balestriere PLLC v. Banxcorp, 96 A.D.3d at 498; Wilmoth v. Sandor, 259 A.D.2d 252, 255 (1st Dep't 1999); Leroy Callender, P.C. v. Fieldman, 252 A.D.2d at 469. Plaintiff likewise establishes that defendants were enriched by plaintiff's rock removal, performed without compensation, and that it would be unfair for defendants to retain that benefit without payment. John Anthony Rubino & Co., CPA, P.C. v. Swartz, 84 A.D.3d 599; Rab Contrs. v. Stillman, 266 A.D.2d at 71; I.S. Design v. Planned Mgt. Constr. Corp., 243 A.D.2d at 426.

Specifically, the deposition testimony by Isola and Chiang and the affidavit by Ting demonstrate both CCC's and Marigold's awareness of plaintiff's rock removal and of the issue regarding who would pay plaintiff. See Georgia Malone & Co., Inc. v. Rieder, 19 N.Y.3d at 518. Ting attests further that Marigold paid CCC \$230,000.00 for all work on the project, including the subcontractors' work, each component of which enabled the project to proceed to the point that warranted payment to CCC, thus supporting CCC's enrichment from plaintiff's work as well as Marigold's benefit from the improvement to its property.

CCC presents no evidence supporting any defense to plaintiff's quasi-contract claims. CCC simply maintains that it never contracted for or consented to the rock removal: the same defense as to plaintiff's breach of contract claim. Chiang's testimony not only demonstrates an awareness of plaintiff's continued work, but admits that Chiang was the impetus for it: he instructed plaintiff to continue--an admission that in turn

demonstrates the inequity of CCC retaining that benefit without payment. In reliance on CCC's instruction to undertake the necessary corrective removal measures for a foundation to be built for the construction, plaintiff performed the extra foundational work. Plaintiff was also in privity with CCC insofar as they had entered an oral agreement for the original work and then negotiated the rock removal work.

While both CCC and Marigold persist with their contention that plaintiff failed to perform the excavation and foundation work to its full depth specification as discussed above, neither defendant specifies any incompleteness in the extra rock removal work. The record reflects that work on the foundation for the construction began, further indicating that the rock removal was completed. Therefore the court grants plaintiff's motion for summary judgment on its quantum meruit and unjust enrichment claim against CCC for \$165,000.00, based on Isola's testimony and Chiang's affidavit acknowledging that plaintiff charged this amount for the rock removal and the absence of any dispute that this amount represented the services' value. C.P.L.R. § 3212(b) and (e); I.S. Design v. Planned Mgt. Constr. Corp., 243 A.D.2d at 426. See John Anthony Rubino & Co., CPA, P.C. v. Swartz, 84 A.D.3d at 599-600.

In contrast to CCC's acknowledged instruction to plaintiff in advance of plaintiff's additional work, the undisputed evidence supports only Marigold's acquiescence in and acceptance of the benefits from plaintiff's improvements to Marigold's

property. Contrary to the testimony by Isola and Chiang, Ting denies that Marigold promised to pay plaintiff directly for extra rock removal work, raising factual issues dependent on the witnesses' credibility, and precluding summary judgment either to plaintiff or to Marigold on plaintiff's quantum meruit or unjust enrichment claim against Marigold.

VI. LIEN LAW § 77 CLAIM AGAINST CCC

Plaintiff presents no support for plaintiff's claim pursuant to Lien Law § 77, which the court dismissed against Marigold and Bank of East Asia, but retained against CCC. While plaintiff, as a subcontractor, would maintain standing to seek relief under Lien Law § 77, plaintiff previously did not dispute, nor does it now dispute, that Marigold, the owner of the property to be improved, never received any of the funds Bank of East Asia had made available to Marigold. The funds remained with the Bank, so they neither became trust funds, nor passed through the owner's hands to any contractor such as CCC to be diverted as plaintiff claims.

Moreover, because that claim must be pursued on behalf of all beneficiaries of any such funds, were they in fact held in trust for the construction project, claimants must comply with the procedural requirements for a class action. N.Y. Lien Law § 77(1); West End Interiors v. Aim Constr. & Contr. Corp., 286 A.D.2d 250, 253 (1st Dep't 2001). Since plaintiff has not moved timely for class certification or demonstrated the merit of this classwide claim, the court denies plaintiff's motion for summary

judgment on this claim against CCC and grants summary judgment to CCC dismissing the claim against this defendant. C.P.L.R. §§ 902, 3211(a)(7), 3212(b). See West End Interiors v. Aim Constr. & Contr. Corp., 286 A.D.2d at 253; Matros v. Automated Elec. Const. Corp. v. Libman, 37 A.D.3d 313 (1st Dep't 2007); L.D. Wegner Constr. Co., Inc. v. UnBuildIt, Inc., 73 A.D.3d 864 (2d Dep't 2010).

#### VII. CONCLUSION

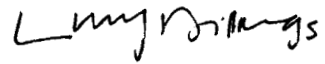
In sum, the court grants plaintiff's motion for summary judgment on its first claim based on breach of contract for \$18,000.00, only for the original excavation and foundation work, and on its second claim based on quantum meruit and unjust enrichment for \$165,000.00, only for the extra rock removal work, against defendant Core Continental Construction, LLC. C.P.L.R. § 3212(b) and (e). The court grants Core Continental Construction's cross-motion for summary judgment to the extent of dismissing the remainder of plaintiff's first and second claims and the fourth claim pursuant to Lien Law § 77. C.P.L.R. §§ 902, 3211(a)(7), 3212(b) and (e).

The court grants defendant Marigold LLC's separate motion for summary judgment dismissing plaintiff's third claim based on quantum meruit and unjust enrichment for \$18,000.00, only for the original excavation and foundation work. C.P.L.R. § 3212(b) and (e). The court denies the remainder of the parties' motions and cross-motion, leaving plaintiff's third claim based on based on quantum meruit and unjust enrichment for \$165,000.00, for the

extra rock removal work, against Marigold.

This decision constitutes the court's order. The court will provide copies to the parties' attorneys.

DATED: August 8, 2013



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LUCY BILLINGS, J.S.C.

LUCY BILLINGS

**FILED**

AUG 21 2013

COUNTY CLERK'S OFFICE  
NEW YORK