

Swing Staging Inc. v Whitehall Props. LLC

2013 NY Slip Op 33529(U)

November 18, 2013

Supreme Court, New York County

Docket Number: 101283/11

Judge: Nancy M. Bannon

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Nancy Bannon
Justice

PART 42

Index Number : 101283/2011
SWING STAGING, INC.
vs
WHITEHALL PROPERTIES LLC.
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO. 101283-11
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for Summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits + memo of law | No(s). 1, 2, 3

Answering Affidavits — Exhibits _____ | No(s). 4

Replying Affidavits _____ | No(s). 5

Upon the foregoing papers, it is ordered that this motion is

*granted in part, in accordance with
the attached Decision and Order dated
November 18, 2013*

FILED
NOV 25 2013
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 11-18-13

NMB, 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

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

-----X
SWING STAGING INC.,

Plaintiff,

- against-

WHITEHALL PROPERTIES LLC, AND
JOHN DOES 1 through 10 being and intended
to be those persons or entities with an interest
in the real property,

Defendants,

-----X
NANCY M. BANNON, J.

DECISION AND ORDER
Index No: 101283/11

FILED

NOV 25 2013

NEW YORK
COUNTY CLERK'S OFFICE

In this action for unjust enrichment, the plaintiff seeks to recover \$28,106.47 from the defendant and to foreclose on a subcontractor's lien in the same amount. The defendant moves, pursuant to CPLR 3212, for summary judgment dismissing the plaintiff's complaint.

Factual Background

This case arises from a construction project to renovate a building located at 3 New York Plaza in New York, New York. The owner of the building, defendant Whitehall Properties LLC, hired Moore Street Developers LLC to serve as construction manager and general contractor. Moore Street then entered into a subcontract with Alumilex, which was to provide window designs for the renovation. Alumilex subsequently entered into a subcontract with City Window Contracting, Inc. to install the window designs. City Window then subcontracted with plaintiff Swing Staging Inc., which was to furnish and install scaffolding equipment to be used at the project. The plaintiff claims that, after City Window stopped working on the project, its scaffolding equipment remained at the site and was used by others for the defendant's benefit.

Since it was owed money by City Window for labor and lease charges, on February 10, 2009 the plaintiff applied for and was granted a lien on the defendant's property in the amount of \$93,089.64.

**The Defendant's Motion for Summary Judgment on the
Plaintiff's Claim for Unjust Enrichment**

It is well established that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law. See Alvarez v Prospect Hospital, 68 N.Y.2d 320, 324 (1986). A proponent makes such a showing by tendering sufficient evidence to eliminate any material issues of fact. Id. Once the proponent has satisfied this burden, the opposing party must produce admissible evidence sufficient to require a trial of material questions of fact. Zuckerman v City of New York, 49 N.Y.2d 557, 562 (1980). An opposing party cannot satisfy this requirement by submitting mere conclusions, expressions of hope, or unsubstantiated assertions. Id.

The defendant has established its entitlement to summary judgment on the plaintiff's claim for unjust enrichment, or quasi contract. This is because the defendant has submitted sufficient evidence that it was not a party to the plaintiff's subcontract with City Window, and did not agree to pay any debt owed to the plaintiff. See CPN Mech., Inc. v Madison Park Owner LLC, 94 A.D.3d 626 (1st Dept. 2012).

It is well settled that "the existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." Clark-Fitzpatrick, Inc. v Long Island R. Co., 70 N.Y.2d 382, 388 (1987); See also Bellino Schwartz Padob Advertising v Solaris Mktg. Group, 222 A.D.2d 313 (1st Dept. 1995); Feigen v Advance Capital Management Corp., 150 A.D.2d

281, 283 (1st Dept. 1989). Based on this principle of law, in the event that a valid contract exists between a general contractor and a subcontractor, the owner of the subject premises cannot be held liable in quasi contract unless it is shown, either directly or by circumstantial evidence, that the owner agrees to pay the general contractor's outstanding debt. See Sky-Lift Corp. v Flour City Architectural Metals, Inc., 298 A.D.2d 214, 215 (1st Dept. 2002). The mere fact that the owner of the premises accepts the benefits provided by the subcontractor's labor or materials does not render the owner liable to the subcontractor in quasi contract. See CPN Mech., Inc., *supra* at 627; DL Marble & Granite Inc. v Madison Park Owner, LLC, 105 A.D.3d 479 (1st Dept. 2013); Abax Inc. v N.Y. City Hous. Auth., 282 A.D.2d 372, 373 (1st Dept. 2001).

In support of its motion for summary judgment, the defendant presents numerous invoices and correspondences between the plaintiff and City Window, which demonstrate that a valid written contract existed between those parties requiring the plaintiff to furnish and install scaffolding equipment at the defendant's premises. The documents contain no indication that the defendant was a signatory to the contract or was involved in any way with the drafting of the agreement. See Feigen, *supra* at 283. Further, the defendant submitted the affidavit of Larry Budabin, an employee of Newark Construction Services LLC and project executive at the construction project, who stated that the defendant was not a party to the contract between the plaintiff and City Window, and never agreed to pay the plaintiff the outstanding debt owed by City Window. See DL Marble & Granite Inc., *supra* at 479.

In opposition to the defendant's motion, the plaintiff failed to submit admissible evidence sufficient to require a trial of a material question of fact as to whether the defendant agreed to pay City Window's outstanding debt, and thus has failed to show that it would be entitled to recover

in quasi contract. Id. The plaintiff contended that it was entitled to recover in quasi contract because the defendant continued to use its scaffolding equipment after City Window was no longer working at the site. In support of its contention, the plaintiff submits only the self-serving affidavit of its president, John Pantanelli, who states that the defendant continued to use the scaffolding equipment. However, even if the defendant continued to use the equipment, such use, without more, does not entitle the plaintiff to recover under a theory of quasi contract. See DL Marble & Granite Inc., supra at 479; Perma Pave Contracting Corp. v Paerdegat Boat & Racquet Club, Inc. 156 A.D.2d 550, 551 (2nd Dept. 1989). The only evidence submitted by the plaintiff that the defendant agreed to pay the debt owed by City Window were the hearsay statements attributed to Mr. Budabin, and such evidence is insufficient to require a trial of material questions of fact. See Taylor v One Bryant Park, LLC, 94 A.D.3d 415, 416 (1st Dept. 2012); Rivera v GT Acquisition 1 Corp., 72 A.D.3d 525, 526 (1st Dept. 2010). Even if a benefit was retained by the defendant because the scaffolding equipment was left at the construction site after City Window's departure, the plaintiff's sole remedy still lies against City Window. See Capital Heat, Inc. v Buchheit, 46 A.D.3d 1419, 1421 (4th Dept. 2007); Contelmo's Sand & Gravel, Inc. v J & J Milano, Inc., 96 A.D.2d 1090, 1091 (2nd Dept. 1983).

**The Defendant's Motion for Summary Judgment Dismissing the Plaintiff's
Lien Foreclosure Claim**

The defendant has failed to establish its entitlement to summary judgment dismissing the plaintiff's lien foreclosure claim. See Alvarez, supra at 324. This is because the defendant has failed to make a prima facie showing that there is no money currently owed by Alumilex to City Window, and such a showing is required in order for the defendant to support its contention that there is no fund to which the plaintiff's lien can attach. See IMP Plumbing & Heating Corp. v

317 E. 34th Street., LLC., 89 A.D.3d 593, 594 (1st Dept. 2011); SMI Bldg. Sys., LLC v West 4th St. Dev. Group, LLC, 83 A.D.3d 687 (2nd Dept. 2011); Penava Mech. Corp. v Afgo Mech. Servs., Inc., 71 A.D.3d 493, 495-96 (1st Dept. 2010).

In support of its motion for summary judgment, the only evidence submitted by the defendant to show that Alumilex paid City Window in full was an amendment to the contract between Moore Street and Alumilex. While the defendant's counsel and Mr. Budabin assert that the amendment proves that City Window was paid in full, without other evidence regarding the terms of the original contract between City Window and Alumilex, the amendment is ambiguous as to both the amount originally owed to City Window by Alumilex and whether the amount stated in the amendment satisfied Alumilex's contractual obligations to City Window. See Kamco Supply Corp.v JMT Bros. Realty, LLC, 98 A.D.3d 891 (1st Dept. 2012).

Even assuming that the defendant established its prima facie entitlement to dismissal of the plaintiff's lien foreclosure claim, the plaintiff produced evidence sufficient to require a trial of material fact. See Zuckerman, supra at 562. In response to the defendant's motion for summary judgment, the plaintiff submitted the deposition testimony of Mr. Budabin, who testified that City Window not only failed to complete its work pursuant to its contract with Alumilex, but also that it did not receive all of the money it was owed for the work that it performed. Further, the plaintiff submitted documentary evidence, specifically an affidavit and waiver of lien form, that expressly contradicted the defendant's assertions regarding the amount that City Window was owed by Alumilex and its assertion that City Window was paid in full. See Vasquez v Urbahn Assoc. Inc., 79 A.D.3d 493, 494 (1st Dept. 2010); Marrero v Teller Dev. Corp., 303 A.D.2d 284, 318 (1st Dept. 2003). Thus, a material issue of fact exists as to whether

City Window was paid in full by Alumilex for the work it performed on the project. Penava Mech. Corp., *supra* at 493.

While a material issue of fact exists regarding whether City Window was paid in full by Alumilex, the evidence submitted by the parties establishes that, during the period between the issuance of the \$93,089.64 lien on the defendant's property and the plaintiff's commencement of this action, the plaintiff has received partial payment from City Window in the amount of \$64,983.17. Thus, while that branch of the defendant's summary judgment motion seeking dismissal of the lien foreclosure is denied, its request to reduce the lien to \$28,106.47, which represents the amount sought by the plaintiff for unpaid labor and lease charges, is granted.

Accordingly, it is:

ORDERED that that branch of the defendant's motion for summary judgment dismissing the plaintiff's cause of action for unjust enrichment is granted; and it is further,

ORDERED that that branch of the defendant's motion for summary judgment dismissing the plaintiff's lien foreclosure claim is granted to the extent that the amount of the lien is reduced from \$93,089.64 to \$28,106.47; and it is further,

ORDERED that the defendant's motion for summary judgment dismissing the plaintiff's lien foreclosure claim is otherwise denied.

FILED

This constitutes the Decision and Order of the court.
NOV 25 2013

Dated: November 18, 2013

NEW YORK
COUNTY CLERK'S OFFICE



NANCY M. BANNON, AJSC