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SHORT FORM ORDER

ORIGINAL

INDEX No. 22358-11

SUPREME COURT - STATE OF NEW YORK
I.A.S. COMMERCIAL PART 45 - SUFFOLK COUNTY

PUBLISH

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 8/30/13
ADJ. DATES 11/011/13
Mot. Seq. # 003 - MG
CDISP Y____ N X

SEARS READY MIX, LTD.,

Plaintiff,

-against-

LIGHTHOUSE MARINA, INC., VMA CONCRETE CONSTRUCTION, INC., and PIERRO- GALASSO, INC. f/k/a, DEMARCO-GALASSO INC.,

Defendants.

GEORGE C. VLACHOS & ASSOC.
Attys. For Plaintiff
320 Carleton Ave.
Central Islip, NY 11722

MARSHALL M. STERN, PC
Attys. for Moving Defendants
17 Cardiff Ct.
Huntington Sta., NY 11746

Upon the following papers numbered 1 to 7 read on this motion for summary judgment by certain defendants dismissing the plaintiffs's complaint ; Notice of Motion/Order to Show Cause and supporting papers 1 - 3 ; Notice of Cross Motion and supporting papers ; Answering papers 4-5 ; Reply papers 6-7 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (003) by defendants, Lighthouse Marina, Inc., Larry's Lighthouse Marina, Inc., and Pierro-Gallaso, Inc., for summary judgment dismissing all claims interposed against them in this action by the plaintiff is considered under CPLR 3212 and is granted.

This action arises out of the non-payment of monies owing to the plaintiff by virtue of its performance of concrete work in July of 2010 at premises owned by defendant Pierro-Gallaso, Inc. [hereinafter "PGI"]. Defendants, Lighthouse Marina, Inc., Larry's Lighthouse Marina, Inc. [hereinafter collectively referred to as "Lighthouse"]were in possession of the premises and allegedly retained defendant, VMA Concrete Construction, Inc. [hereinafter "VMA"], to improve the premises. VMA hired the plaintiff to pour concrete at the site, for which work the plaintiff has not received payment in full.

Two causes of action are advanced in the complaint served by the plaintiff. In the First cause of action, the plaintiff seeks recovery of the value of the work, labor and services it performed from all defendants under theories of unjust enrichment. In its Second cause of action, only defendant VMA is targeted in a claim sounding in an account stated. Cross claims against defendant VMA were asserted in the joint answer served by the moving defendants. The record reflects that defendant VMA defaulted in appearing in this action by answer or otherwise and both the moving defendants and the plaintiff obtained separate orders fixing VMA's default with respect to the cross claims and direct claims interposed against it by moving defendants and the plaintiff (*see* prior orders entered in August and September of 2012). Inquests to determine amounts recoverable by the moving defendants, if any, and by the plaintiff from VMA were held in abeyance pending discovery and resolution of the claims pending between the moving defendants and the plaintiff.

By the instant motion, Lighthouse and PGI jointly move to dismiss the claim sounding in unjust enrichment that is advance against them in this action by the plaintiff. The plaintiff opposes on grounds that a principal of the Lighthouse defendants knew about the work performed by the plaintiff and acquiesed therein. The plaintiff further alleges that such principal offered or represented that one or moer of the Lighthouse defendants were interested in settling the matter by payment, in part, of amounts owing from VMA to the plaintiff. By virtue of such conduct, the plaintiff claims that questions of fact exist regarding the moving defendants' knowledge of and acquiescence in receipt of the benefits of the work, performed by the plaintiff and/or that it assumed an obligation to pay therefor, the existence of which, precludes an award of summary judgment in favor of the moving defendants. In addition, the plaintiff claims that the motion is premature, due to a need for further discovery. For the reasons stated below, the motion is granted.

That a subcontractor retained by a general contractor cannot collect the value of work, labor and services performed at premises from the owner or possessor of such premises due to the absence of privity is clear since " 'it 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 the subcontractor's performance' " (***Capital Heat, Inc. v Buchheit***, 46 AD3d 1419, 848 NYS.2d 481[4th Dept], quoting ***Perma Pave Contr. Corp. v Paerdegat Boat & Racquet Club***, 156 AD2d 550, 551, 549 NYS2d 57 [2d Dept 1989]; *see Delta Elec. v Ingram & Greene,* 123 A.D.2d 369, 370–371, 506 NYS2d 594 [2d Dept 2990]; ***Contelmo's Sand & Gravel v J & J Milano***, 96 A.D.2d 1090, 467 N.Y.S.2d 55 [2d Dept 1983]). Nor can a subcontractor recover from such owner or possessor under quasi contractual theories such as unjust enrichment merely because the owner or possessor consented to the improvements and received some benefit therefrom (*see* ***Yellowstone Industries, Inc. v Vinco Marine Management, Inc.***, 305 AD2d 587, 762 NYS2d 496 [2d Dept 2003]; ***Hampton Living v Carltun on the Park***, 286 AD2 664, 729 NYS2d 773 [2d Dept 2001]). Instead, the plaintiff must demonstrate it was working for the owner or possessor at the time of performance and received a benefit therefrom (see ***Magnum Real Estate Services, Inc. v. 133-134-135 Associates, LLC***, 103 AD3d 453, 962 NYS2d 15 [1st Dept 2013]; ***Hampton Living v Carltun on the Park***, 286 AD2 664, *supra*), or that the owner or possessor assumed an obligation to pay the plaintiff (see ***Yellowstone Industries, Inc. v Vinco Marine Management, Inc.***, 305 AD2d 587, *supra*; ***Amana Elevation Corp. v Ydrohoos-Aquarius, Inc.***, 244 AD2d 371, 664 NYS2d 88 [2d Dept 1997; ***M. Paladino, Inc. v J. Lucchese & Son Contracting Corp.***, 47 AD2d 515, 669 NYS2d 318 [2d Dept. 1998]).

The rationale behind the general rule of non-liability is that any services performed by the subcontractor were performed pursuant to its contract with the general contractor, and thus were done "for the benefit of the general contractor ... not for the benefit of the owner (see ***Sybelle Carpet and Linoleum of Southampton, Inc. v East End***, 167 AD2d 535, 562 NYS2d 205 [2d Dept 1990]). Recovery under quasi contract is thus allowed only if the subcontractor demonstrates that the owner expressly consented to pay for the subcontractor's performance or the circumstances demonstrate that such an obligation arose in law (*see* ***CPN Mechanical, Inc. v Madison Park Owner LLC***., 94 AD3d 626, 942 NYS2d 527 [1st Dept 2012]; ***Perma Pave Contracting Corp. v Paerdegat Boat & Racquet Club. Inc,*** 156 AD2d 550, *supra*; ***Westinghouse Elec. Supply Co. v R.P. Brosseau & Co.,*** 156 AD2d 851, 549 NYS2d 851 [3d Dept1989]; ***Schuler–Haas Electric Corp. v Wager Construction Corp***., 57 AD2d 707, 395 NYS2d 272, 274 [4th Dept 1977]).

In determining whether an obligation to pay has arisen, courts must inquire whether the landowner acted in such a way as to incur obligations to the subcontractor outside the contractual structure (*see e.g.* ***Metropolitan Elec. Mfg. Co. v Herbert Constr.*** *Co.*, 183 AD2d 758, 759, 583 N.Y.S.2d 497, 498 [2d Dept.1992]; (*neither general contractor or landowners could be liable to subcontractor because "there is nothing in the record to establish, that [the general contractor] or the owners ..., by their actions, assumed an obligation to pay for the goods ordered by [the subcontractor*); ***Perma Pave Contr. Corp. v Paerdegat Boat & Racquet Club***, 156 AD2d 550, *supra*; (*no evidence that owner expressed willingness to pay subcontractor for its work*); see aslo ***Contelmo's Sand & Gravel, Inc. v. J & J Milano, Inc.***, 96 A.D.2d 1090, 1091, *supra*). Such action must necessarily have occurred while the work was ongoing in order for the plaintiff have had the requisite relationship with the owner or possessor that "could have caused reliance or inducement" which is necessary to state a claim for unjust enrichment (***Mandarin Trading Ltd. v Wildenstein***, 16 NY3d 173, 182, 919 NYS2d 465 [2011]; *see* ***Georgia Malone & Co., Inc. v. Rieder***, 19 NY3d 511, 950 NYS2d 333 [2012]; *see also* ***MBL Contracting Corp. v King World Productions, Inc.***, 98 F.Supp.2d 492 [S.D.N.Y. 2000]). While that relationship need not rise to the level required for a finding of privity, it must be of a sufficient magnitude to warrant invocation of the court's equity power so as to impose liability on a non-contracting party (*see* ***Georgia Malone & Co., Inc. v Rieder***, 19 NY2d 511, *supra*).

Here, the moving papers sufficiently demonstrated, prima facie, the moving defendants' non-liability to the plaintiff for amounts sued upon due to absence of a contract between them and/or any evidence that the moving defendants assumed, by consent or otherwise, to pay the plaintiff for its work under the subcontract. It was thus incumbent upon the plaintiff to demonstrate, by due proof in admissible form, that one or more genuine questions of fact exist on the issue of the moving defendants' liability and require a trial. A review of the opposing papers reveals, however, that no such question of fact was raised. The moving defendants' mere knowledge and receipt of the benefit of the work performed by the plaintiff are insufficient to give rise to liability for payment of thereof of the work.

Nor was there proof of any existing relationship between the plaintiff and the moving defendants that could have caused a reasonable reliance on the part of the plaintiff of the type necessary to sustain a claim of unjust enrichment. The plaintiff's reliance upon the moving defendants' expressions of protest and dismay following the surface failure of the concrete floor poured by the plaintiff and its reliance upon

offers of payment relayed in connection with a possible settlement of the plaintiff's claims, do not constitute an agreement to pay or an assumption of VMR's obligation to pay by the moving defendants upon which the plaintiff was entitled to reasonably rely, as all such expressions post-date the work's completion. In any event, expressions, if any, of a possible payment which may have been advanced during settlement negotiations are insufficient to raise questions of fact as to liability due to the inadmissible nature of such expressions (*see* CPLR 4547).

Also unavailing are the plaintiff's claims of prematurity due to the absence of depositions of the moving defendant under CPLR 3212(f) which provides for a denial or adjournment of a motion for summary judgment where "facts essential to oppose the motion "exist but cannot then be stated" (CPLR 3212[f])) A party claiming the safe harbor of this rule is required to demonstrate upon an evidentiary basis that discovery might lead to relevant evidence or the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant (*see* CPLR 3212 [f]; ***Princetel, LLC v Buckley***, 95 AD3d 855, 944 NYS2d 191 [2d Dept 2012]; ***IRB-Brasil Resseguros S.A. v Portobello Intern. Ltd.***, 84 AD3d 637, 923 NYS2d 508 [1st Dept 2011]). No such showing was advanced in the opposing papers submitted by the plaintiff.

In view of the foregoing, the instant motion (#003) by the Lighthouse defendants and defendant PGI for summary judgment dismissing the claims of the plaintiff interposed in this action against them is granted. The plaintiff's first cause of action against the moving defendants is thus severed from all others unaffected by this award of summary judgment. The moving defendants may settle, upon a copy of this order, a judgment reflecting the severance of plaintiff's claims against them herein directed and reflecting the award of summary judgment dismissing those claims in accordance with the terms of this order (*see* CPLR 3212 (e)).

The court shall schedule an inquest on the claims remaining in this action, namely, those asserted by the plaintiff and the cross moving defendants, if any, against defendant, VMA, at the next compliance conference, as the conditions the court imposed upon the holding of such inquest in its prior orders have now been satisfied.

Dated: November 19, 2013

THOMAS F. WHELAN, J.S.C.