

**Key Restoration Corp. v Union Theological  
Seminary**

2014 NY Slip Op 30437(U)

February 20, 2014

Sup Ct, New York County

Docket Number: 155981/13

Judge: Melvin L. Schweitzer

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 45

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KEY RESTORATION CORP.,

Index No. 155981/13

Plaintiff,

- against -

UNION THEOLOGICAL SEMINARY, THE TRUSTEES OF  
COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK,  
ENVIRONMENTAL CONTROL BOARD OF THE CITY  
OF NEW YORK, THE PEOPLE OF THE STATE OF  
NEW YORK, THE PEOPLE OF THE CITY OF NEW YORK,  
and "JOHN DOES 1 through 25," said names being fictitious  
and unknown to plaintiff, the persons or parties intended being  
the tenants, occupants, persons or corporations, if any, having  
or claiming an interest in, or lien upon the subject premises  
described in the complaint,

Defendants.

----- X

**MELVIN SCHWEITZER , J.:**

Defendant Union Theological Seminary (UTS) moves, pursuant to CPLR 3211 (a) (1)  
and (a) (7), for dismissal of the complaint on the grounds that it is barred by contract and fails to  
state a cause of action.

**Background**

The following is taken from the complaint. The allegations contained therein are  
assumed to be true for purposes of this pre-answer motion to the extent that it seeks dismissal on  
the ground of failure to state a cause of action (*Madison Apparel Group Ltd. v Hachette  
Filipacchi Presse, S.A.*, 52 AD3d 385, 385 [1st Dept 2008]).

UTS owns the land and premises, known as 3041 Broadway and 121st Street, New York,  
New York 10027 (Property) (complaint, ¶ 6). Defendant The Trustees of Columbia University in

the City of New York is a tenant under a lease with UTS. Defendant Environmental Control Board of the City of New York is a judgment creditor of UTS. Defendants “John Does 1 through 25 inclusive” are made defendants to exclude them from any right, title, lien, or interest which they may have in the subject real property (*id.*, ¶¶ 3-5).

From May 2008 through January 2013, plaintiff Key Restoration Corp. (Key) performed labor and furnished materials for the improvement of the Property, which included supplying and installing steel, stone, caulking, mortar, and rods for the agreed price of \$1,903,536. Of the agreed price, \$377,587 is unpaid, thereby entitling Key to a mechanic’s lien in that amount pursuant to section 3 of the Lien Law (*id.*, ¶ 7).

On January 31, 2013, Key filed with the New York County Clerk a notice of mechanic’s lien against the Property in the sum of \$377,587. Pursuant to section 17 of the Lien Law, within one year after filing the notice of mechanic’s lien, Key commenced this action, and filed a notice of pendency of this action. Defendants have, or claim to have, some interest in, or lien upon, the Property, which interest or lien, if any, is subsequent and subordinate to Key’s lien (*id.*, ¶¶ 8, 11-12).

The complaint contains three causes of action. On the first cause of action, Key seeks: (1) judgment finding that it acquired a valid mechanic’s lien on the Property in the sum of \$377,587, with interest, costs, and disbursements of this action, and adjudging that Key’s mechanic’s lien has priority over any other claims of any of defendants against the Property; (2) judgment foreclosing defendants subsequent to the commencement of this action or to the filing of the notice of pendency from all interest in the Property; and (3) judgment decreeing that the Property may be sold, and, from the sale proceeds, Key be paid the amount of its mechanic’s lien, together

with a judgment for any deficiency remaining after such payment against UTS.

The second and third causes of action, each seek to recover \$377,587 on theories of breach of contract and unjust enrichment, respectively.

In support of its motion, UTS argues that Key failed to comply with a contractual dispute resolution provision, which required good faith negotiation and submission to mediation before an experienced construction mediator prior to the commencement of litigation.

Key argues that the motion should be denied as moot because the payment issue is based on a dispute between UTS and the subcontractor David Kucera Inc. (DKI) concerning work on the Property's spires. According to Key, UTS and DKI have now resolved their dispute. Hence, because of the absence of a disputed issue requiring mediation between it and UTS, Key should not be directed to perform a futile act. In the alternative, Key argues that the court should, at most, stay the action, especially because Key is limited in time as to when to commence its action for foreclosure of its mechanic's lien.

### **Discussion**

The motion is granted. "Dismissal under CPLR 3211 (a) (1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal quotations marks and citations omitted]). Such is the case here.

UTS, as "Owner," and Key, as "Contractor," are parties to a contract, dated April 7, 2011, entitled the "AIA Document A101- 2007," subtitled "Standard Form of Agreement Between Owner and Subcontractor where the form of payment is a Stipulated Sum" (AIA contract). The AIA contract provides:

“In the event of a dispute between the Owner and the Contractor the Field Engineer will advise and make recommendations to the Owner which are consistent or reasonably inferable from the Contract Documents. The Owner and the Contractor agree to undertake good faith negotiations to resolve all disputes.”

(§ 6.1). The AIA contract also provides:

“For any Claim subject to, but not resolved by, good faith discussions between the parties or mediation pursuant to Section 15.3 of AIA Document A201-2007, the method of dispute resolution shall be as follows:

“The parties shall submit their dispute to a construction mediator familiar with the type of work of the Project. Said mediator shall make recommendations as to a resolution of the issues.”

(§ 6.2).

The “General Conditions of the Contract for Construction,” pertaining to the AIA contract, provides that the Field Engineer’s decision is subject to mediation:

“The Initial Decision Maker will provide a recommendation with respect to the Claim, or indicate that the Initial Decision Maker is unable to make a recommendation with respect to the Claim. This initial decision shall (1) be in writing; (2) state the reasons therefor; and (3) notify the parties of any recommended change in the Contract Sum or Contract Time or both. The initial decision is subject to mediation and, if the parties fail to resolve their dispute through dispute resolution as defined in the AIA-101 Agreement between Owner and Contractor.”

(§ 15.2.5).

Key’s causes of action, for foreclosure of a mechanic’s lien, breach of contract, and unjust enrichment, are based on contract. Therefore, the dispute is subject to the contractual provisions quoted above. As such, Key failed to satisfy the AIA contract’s conditions precedent to commencing litigation (*MCC Dev. Corp. v Perla*, 81 AD3d 474, 474 [1st Dept] [“Supreme Court correctly dismissed the complaint, discharged the mechanic’s lien and cancelled the notice of pendency on the ground that plaintiff failed to satisfy the contract’s conditions precedent to

commencing litigation”], *lv denied* 17 NY3d 715 [2011]).

It should be noted that there is a difference between the relevant contract language in *MCC Development Corp. v Perla* and the language presented here. There, the operative contract provided, pursuant to paragraph 4.5.1, that: “[a]ny Claim arising out of or related to the Contract . . . shall, after initial decision by the Architect . . . be subject to mediation as a *condition precedent* to arbitration or the institution of legal or equitable proceedings” (81 AD3d at 474 [emphasis added]). Here, the parties’ contract - AIA Document A101-2007 - does not contain the words “condition precedent.” Nevertheless, it can be reasonably inferred that the parties intended the provisions quoted above as to dispute resolution before a construction mediator to operate as a condition precedent.

Moreover, “the public policy of New York State favors and encourages arbitration and alternative dispute resolutions” and “[t]hese mechanisms are well recognized as an effective and expeditious means of resolving disputes between willing parties desirous of avoiding the expense and delay frequently attendant to the judicial process” (*Westinghouse Elec. Corp. v New York City Tr. Auth.*, 82 NY2d 47, 54-55 [1993] [internal quotation marks and citation omitted]).

Significantly, Key does not dispute the assertion that mediation is a condition precedent to litigation. Instead, Key argues that the motion to dismiss should be denied because there is no longer any matter to mediate. The reasons it gives are as follows:

- (1) Key has made a good faith effort to resolve the dispute without a good faith effort by UTS to do so;
- (2) Mediation is moot, because the third-party subcontractor, DKI, has agreed to make the modifications that UTS requested;
- (3) Mediation would be futile, because Key has no responsibility under the AIA

contract for the acts of DKI, whose acts were the only ones in dispute, and which dispute has now been resolved; and

(4) The project covered by the AIA contract is closed as of December 20, 2012; all of the work has been accepted. Any defects cited will fall within the warranty terms between DKI and UTS, to which Key is not a party.

There *is* a dispute, however, as to payment, and, pursuant to the parties' contract, mediation is to occur prior to litigation. Key has not indicated that it took any steps toward initiating mediation.

According to David Kramer, Key's vice president, Key is owed \$378,587 with interest at the contract rate of 12% per annum, together with legal fees (affidavit of David Kramer, sworn to October 13, 2013, ¶ 17). Kramer states that, at first, UTS claimed that it did not have the money to pay Key. In November 2012, Kramer met with Richard Madonna, the UTS official in charge of the project, who stated that payment would be made within 30 days, which did not occur. The reason given was that the UTS board had rejected the payment request. Kramer attempted to resolve the issue in good faith, but to no avail (*id.*, ¶¶ 18-21).

Kramer states further that UTS sought to use the withheld payment to coerce Key to become involved in the dispute between it and DKI, despite UTS's knowledge that Key had no obligation to repair, replace, or indemnify for any loss, cost or damage (*id.*, ¶ 23). UTS's counsel was unable to identify an issue to mediate, and there is nothing in the AIA contract or in Key's performance to discuss. Kramer opines that UTS was unhappy with its position, and withheld money from Key without justification. He asserts that the objection to payment raised by UTS no longer exists, and that payment to Key should be made without further delay (*id.*, ¶¶ 24-25).

Based on the Key's own rendition of the facts and issues, described above, the court

cannot conclude that mediation would be futile, as asserted by Key. UTS's allegations that it attempted to resolve the matter in good faith could be presented to the mediator, if so advised.

In the alternative, Key argues that the court should, at most, stay the action, not dismiss it. However, failure to comply with a condition precedent requires dismissal of the complaint (*see MCC Dev. Corp. v Perla*, 81 AD3d at 474 ["Supreme Court correctly dismissed the complaint . . . on the ground that plaintiff failed to satisfy the contract's conditions precedent to commencing litigation"]; *David Fanarof, Inc. v Dember Constr. Corp.*, 195 AD2d 346, 348 [1st Dept 1993] ["Since the condition precedent to plaintiff's right to receive payment under the subcontracts did not take place, without fault on defendant's part, plaintiff was not entitled to summary judgment; rather defendant's cross motion for summary judgment dismissing the complaint should have been granted"]).

The cases cited by Key, in support of its alternate request for a stay of the action, pertain to instances where arbitration replaces litigation as the agreed-upon means of dispute resolution. In *Allied Bldg. Inspectors Intl. Union of Operating Engrs., Local Union No. 211, AFL-CIO v Office of Labor Relations of City of N.Y.* (45 NY2d 735 [1978]), the Court of Appeals held that "[n]either the dismissal of the petition nor the direction to proceed to arbitration, however, can stand" because "[a]n agreement to arbitrate is not a defense to an action" (*id.* at 738). However, the Court was applying CPLR 7503 (a), which provides that, where the parties have agreed to arbitrate their dispute, the appropriate remedy is a stay of the judicial proceeding (*see id.* at 738-739; *see also C & M 345 N. Main St., LLC v Nikko Constr. Corp.*, 96 AD3d 794, 795 [2d Dept 2012] ["an agreement to submit a dispute to mediation and arbitration is not a defense to an action, and, thus, may not be the basis for a motion to dismiss a complaint based on documentary

evidence”)).

This is not applicable to the situation presented here which does not involve an action brought pursuant to Article 75 of the CPLR (*cf. Nolan v DynCorp Intl. LLC*, 108 AD3d 436 [1st Dept 2013] [affirming the granting of motion to stay action and compel arbitration of plaintiff's second cause of action pursuant to CPLR 7503]). UTS acknowledges that, subsequent to mediation, Key would be entitled to commence litigation (*see* affirmation of Harold A. Kurland, Esq., ¶ 26).

The Complaint is dismissed as to all defendants. The Cross-Claim by Columbia against UTS is not affected by the dismissal of the Complaint.

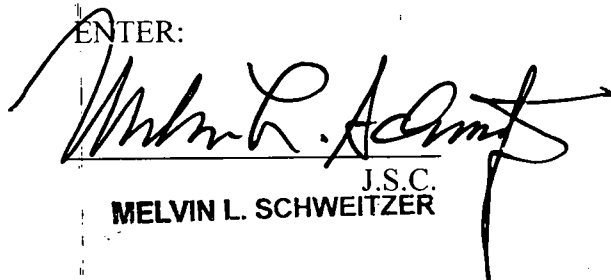
Accordingly, it is

ORDERED that the motion by defendant Union Theological Seminary is granted, and the complaint is dismissed as to all defendants, with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the Cross-Claim by Columbia against UTS is severed and shall continue.

DATED: February 20, 2014

ENTER:

  
J.S.C.  
MELVIN L. SCHWEITZER