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| <b>Meridian Design Assoc., Architects v Gross</b>  |
| 2014 NY Slip Op 31454(U)   |
| May 19, 2014   |
| Sup Ct, NY County  |
| Docket Number: 55698/12  |
| Judge: Nancy M. Bannon   |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART ~~8~~ 48

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MERIDIAN DESIGN ASSOCIATES, ARCHITECTS,  
A PROFESSIONAL CORPORATION,

Plaintiffs,

Index No.: 155698/12  
Motion Seq. Nos.: 002  
**DECISION AND ORDER**

-against-

BRADLEY STEWART GROSS a/k/a LAW OFFICE  
OF BRADLEY S. GROSS, 80-90 MAIDEN LANE  
DEL LLC, MG ENGINEERING P.C., WELLS FARGO  
BANK, N.A. As Trustee For The Registered Holders of  
CREDIT SUISSE FIRST BOSTON MORTGAGE  
SECURITIES CORP., COMMERCIAL MORTGAGE  
PASS-THROUGH CERTIFICATES, SERIES 2005-C3,  
and JOHN DOES 1-10,

Defendants.

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NANCY M. BANNON, J.S.C.:

In a case involving an architectural firm's claim for an unpaid bill, plaintiff Meridian Design Associates, Architects, A Professional Corporation (Meridian), moves, pursuant to CPLR 3126, for an order striking the answer and affirmative defenses of defendant Bradley Stewart Gross (Gross). Meridian also moves, pursuant to CPLR 3212, for summary judgment as to liability against Gross on its second, fourth, and sixth causes of action. Meanwhile, Gross cross-moves for summary judgment dismissing the complaint as against him.

**Background**

Meridian alleges that, on October 14, 2011, it entered into a contract with Gross to perform architectural and project management services for improvements to the fourth floor of a building located at 80-90 Maiden Lane in Manhattan. The property was owned at the time by defendant 80-90 Maiden Lane Del LLC (80-90 Maiden Lane) and the complaint alleges that

Gross was a leaseholder of the property at the time Meridian performed its services. The improvements were made in view of opening a methadone clinic. On December 5, 2011, Meridian emailed an invoice to Gross for \$17,635. By an email dated December 8, 2011, Gross told Meridian to stop all work on the project. Meridian filed a notice of mechanic's lien in the amount of the invoice on July 27, 2012.

On August 28, 2013, Meridian served its summons and complaint seeking the \$17,635. The complaint alleges that MG Engineering P.C. and Wells Fargo Bank, N.A. are named as defendants, as they hold liens against 80-90 Maiden Lane and are, thus, necessary parties pursuant to Lien Law § 44. The first cause of action seeks to foreclose the mechanic's lien against 80-90 Maiden Lane and Gross. The second cause of action alleges breach of contract against Gross, while the third cause of action is for services rendered against Gross, and the fourth cause of action is for account stated against Gross. Meridian brings the fifth cause of action, for unjust enrichment, against Gross and 80-90 Maiden Lane. Finally, the sixth cause of action alleges that Gross violated the Prompt Payment Act.

While Gross does not deny dealing with Meridian, he claims that he only negotiated with Meridian as "an agent for disclosed principals" (Gross November 13, 2013 affidavit, ¶ 17). More specifically, Gross swears that:

"Plaintiff knew at all times that he was dealing with a corporation. At best I was working to coordinate the work to be done at the premises, but I never manifested any intent or led the Plaintiff to believe that I was assuming any personal liability—or for that matter—that I was anything other than a representative party for the entity who was ultimately to have gone forward with the project . . . . In the early stages of the Project, as an agent, and only as an agent for a clinic seeking to operate in the Premises, I was referred to and approached Plaintiff in regards to the Project. I repeatedly asked Plaintiff for a proposal and a cost estimate for architectural services to be rendered in connection with the Project. At the time, a

corporation named Metropolitan Corporation for Life Skills was operating a substance abuse center in the space.

(*id.*, ¶¶ 12, 14-16).

## Discussion

### I. Meridian's Motion to Strike

Meridian alleges that it served Gross with discovery demands on March 28, 2013. As of the filing of this motion, Gross had not responded to the demands, despite Meridian's emails to Gross, urging him to do so, on July 16, 2013 and August 2, 2013. Meridian also alleges that it called Gross about the responses on April 20, 2013, June 17, 2013 and July 16, 2013.

Meridian cites to *Kihl v Pfeffer* (94 NY2d 118 [1999]) in seeking an order striking Gross's answer and awarding Meridian summary judgment on its second cause of action, for breach of contract, as well its fourth cause action for account stated, and its sixth cause of action, alleging that Gross is liable under the Prompt Payment Act. *Kihl* held that "when a party fails to comply with a court order and frustrates the disclosure scheme set forth in the CPLR, it is well within the Trial Judge's discretion to dismiss the complaint" (*id.* at 122).

In opposition, Gross submits an affidavit in which he states that he has, since Meridian filed the motion, provided responses and 377 pages of document discovery (Gross November 13, 2013 affidavit, ¶¶ 4-5). Gross also contends that Meridian is not entitled to relief under CPLR 3126 because it did not seek a conference to resolve the issue before bringing the motion.

Gross is correct that Meridian is not entitled to an order striking Gross's answer and affirmative defenses under CPLR 3126. Here, where Meridian has not tried to resolve the dispute at a discovery conference prior to bringing its motion, it has not shown that Gross

frustrated the disclosure scheme set forth in the CPLR. Moreover, Meridian has not made a clear showing that Gross's delay in responding to demands was willful or contumacious (*see Holloway v Station Bar Corp.*, 112 AD3d 784, 785 [2d Dept 2013] [holding that "(a) court may invoke the drastic remedy of striking a pleading, however, only upon a clear showing that the failure to comply with court-ordered discovery was willful and contumacious"] [internal citation omitted]).

## II. Gross's Cross Motion for Summary Judgment

"Summary judgment must be granted if the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a prima facie showing, the court must deny the motion, "regardless of the sufficiency of the opposing papers" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

### A. Mechanic's Lien

Gross argues that Meridian's first cause of action to foreclose its mechanic's lien should be dismissed as against it because he is not a proper party under the Lien Law. Specifically, he contends that he is not necessary party under Lien Law § 44, and he is not "a person liable for the debt" under Lien Law § 41. Lien Law § 41, "Enforcement of mechanic's lien on real property," provides:

"A mechanic's lien on real property may be enforced against such property, and against a person liable for the debt upon which the lien is founded, by an action, by the lienor, his assignee or legal representative, in the supreme court or in a county court otherwise having jurisdiction, regardless of the amount of such debt, or in a court which has jurisdiction in an action founded on a contract for a sum of

money equivalent to the amount of such debt.”

Gross contends that he is not a necessary party since he does not own or have a leasehold on the property. In support, Gross submits his own affidavit, in which he states: “This action concerns a contemplated alteration of the fourth floor of 90 Maiden Lane . . . . I do not have a lien, leasehold, claim or any other interest in the Premises” (Gross November 13, 2013 affidavit, ¶ 13). As to Lien Law § 41, Gross argues that he is not a person liable for the debt because he was not a proper party to the contract.

In addition to his affidavit, Gross submits two emails sent after October 14, 2011, the date on which Meridian claims that it entered into a contract with Gross, in order to show that he never contracted personally with Meridian. The first email, sent by Bice Wison (Wilson), Meridian’s principal, on October 24, 2011, listed “[n]ext steps,” including “[m]aking an agreement between Metropolitan and our firm & getting a retainer in place.” Wilson concluded by writing: “I’m traveling on business for the rest of the week. In the course of those travels I expect to write your workplan and proposal.”

The second email, from November 18, 2011, is from Michael Fink, whose role in the project is never defined, to Alan Friedman, whose role in the project is also undefined. Wilson and Gross are both copied on the email. It refers to a new client taking over the project: “As per our conversation I am providing you with the following information . . . The client name for billing (they are taking over the operation) is: 90 Maiden Lane Holding Corp.” Gross also submits a document, dated November 30, 2011, bearing Meridian’s insignia and allegedly generated by Meridian, entitled “Maiden Lane Clinic – Issued for Filing & Construction.” Under “contact information” on the document, Meridian is listed as the architect, while 90 Maiden Lane

Holding Corp. is listed as the owner and Gross is listed as the owner's representative.

In its opposition/reply, Meridian drops all references to CPLR 3126 and bases its opposition to Gross's cross motion, as well as its own entitlement to summary judgment, on an affidavit from Wilson submitted in support of motion seq. No. 001.<sup>1</sup> In the affidavit, Wilson swore:

On or about October 14, 2011, Plaintiff entered into a contract with Gross pursuant to which Plaintiff was to provide certain professional architectural and project management services for improvements at the Premises all with knowledge and consent of Defendant 80-90 Maiden Lane Del LLC, the owner of the Premises

(Wilson November 8, 2012 affidavit, ¶ 4).

Meridian cites to *J.P. Endeavors v Dushaj* (8 AD3d 440, 442 [2d Dept 2004]) for “[t]he general rule . . . that the agent for an undisclosed principal is liable on any contracts that he or she made on behalf of the principal,” and argues that Gross fails to submit any evidence that Gross disclosed himself as an agent. As to the emails submitted by Gross, Meridian notes that they were sent after October 14, 2011, when it alleges the contract was formed, and therefore did not address the question of whether Gross disclosed his agency.

However, Meridian does not address Gross's affidavit, which clearly states that he disclosed his agency. As Wilson's affidavit and Gross's affidavit contradict one another as to whether Gross disclosed his agency, there is an issue of fact as to the existence of a contract between Meridian and Gross. Thus, as Gross argues that he is not a “person liable for the debt” under Lien Law § 41 because there was no such contract, he is not entitled to summary judgment dismissing the first cause of action for foreclosure of the mechanic's lien.

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<sup>1</sup> Gross does not object to the consideration of Wilson's affidavit.

## B. Account Stated

Gross cites to *M. Paladino, Inc. v Lucchese & Son Contr. Corp.* (247 AD2d 515, 516 [2d Dept 1998] [internal citation omitted]) for the proposition that “[a]n account stated assumes the existence of some indebtedness between the parties,” thus “[i]t cannot be used to create liability where none otherwise exists.” Gross argues that since he, as an individual, did not form a contract with Meridian, he has no indebtedness to Meridian. As such, Gross argues that the account stated cause of action must be dismissed. Moreover, Gross, citing to *Sabre Intl. Sec., Ltd. v Vulcan Capital Mgt., Inc.* (95 AD3d 434 [1st Dept 2012]), argues that Meridian’s invoice for the same amount claimed under the contract cannot support a separate claim for account stated, as it is duplicative of the contract claim. *Sabre* held that “[a]llegedly unfulfilled contractual conditions precedent to [a] defendant’s payment obligation negate any inference of an implied agreement by [the] defendant that the amounts claimed in plaintiff’s invoices were then due, and preclude the existence of an account stated” (*id.* at 438 [internal quotation marks and citation omitted]).

Meridian argues that while Gross, in his affidavit, states that he disputed the invoice, he failed to do so with specificity (Gross November 13, 2013 affidavit, ¶ 24). However, Meridian fails to address Gross’s arguments contending that its breach of contract and account stated claims are duplicative. Here, as in *Sabre*, the account stated cause of action is duplicative of the breach of contract action. Here, instead of a condition precedent, Meridian and Gross differ over whether they ever actually entered into a contract with each other. As in *Sabre*, the damages and legally determinative issues are coextensive. As such, Gross is entitled to dismissal of Meridian’s account stated cause of action.

### C. Services Rendered and Unjust Enrichment

Gross argues that Meridian's causes of action for services rendered and unjust enrichment are also duplicative. In support, Gross cites to *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.* (70 NY2d 382, 388 [1987]), which held that "[t]he 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." Here, there is no written contract. Moreover, Meridian and Gross do not agree as to whether there was a contract between them at all. Thus, Gross is not entitled to dismissal of these causes of action. As *Sabre*, which Gross cited to in another context, holds:

"Although [t]he 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, where there is a bona fide dispute as to the existence of a contract or the application of a contract in the dispute in issue, a plaintiff may proceed upon a theory of quasi contract as well as breach of contract, and will not be required to elect his or her remedies"

(95 AD3d at 438-439 [internal quotation marks and citation omitted]).

As there is a dispute as to the existence of a contract between Meridian and Gross, Gross fails to make a prima facie showing entitling him to dismissal of Meridian's services rendered and unjust enrichment causes of action.

### D. The Prompt Payment Act

Gross argues that Meridian's claim under the Prompt Payment Act, General Business Law § 756-a, should be dismissed because the project did not meet the minimum dollar amount required by the statute. In support, Gross cites to the definitions section of the Prompt Payment Act, which provides that a project is only a "construction contract" under the statute where the aggregate cost equals or exceeds \$150,000 (GBL § 756 [1]). Additionally, Gross submits a cost

affidavit filed by Meridian's Wilson with the New York City Department of Buildings that lists the total cost of the project as \$100,000. Meridian fails to respond to this argument.

Thus, Gross makes an unchallenged showing of entitlement to judgment dismissing Meridian's cause of action under the Prompt Payment Act by submitting evidence showing that the project did not meet statute's cost requirements.

### **III. Meridian's Application for Summary Judgment**

Meridian seeks summary judgment against Gross on its second cause of action, for breach of contract, its fourth cause of action, for account stated, and its sixth cause of action, alleging liability under the Prompt Payment Act. As Gross is entitled to dismissal of the account stated and Prompt Payment Act causes action, Meridian's application for summary judgment on these causes of action is denied. As to the breach of contract claim, there is, as discussed above in context of the mechanic's lien, a question of fact as to the existence of a contract between Gross and Meridian. Thus, Meridian is not entitled to summary judgment on its breach of contract claim against Gross.

### **Conclusion**

Accordingly, it is

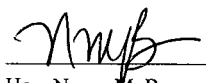
ORDERED that plaintiff Meridian Design Associates, Architects, A Professional Corporation's motion for an order striking the answer and affirmative defenses of defendant Bradley Stewart Gross, and for summary judgment, is denied; and it is further

ORDERED defendant Bradley Stewart Gross's cross motion for summary judgment is granted only to the extent that plaintiff's third cause of action, for services rendered, and its sixth cause of action, alleging liability under the Prompt Pay Act, are dismissed.

**HON. NANCY M. BANNON**

Dated: *May 19, 2014*

ENTER:



Hon. Nancy M. Bannon, J.S.C.