L&O Plumbing Supply Inc. v Flow Plumbing & Heating Inc.
2014 NY Slip Op 32076(U)
August 5, 2014
Sup Ct, NY County
Docket Number: 152186/14
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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L&O PLUMBING SUPPLY INC.,

Plaintiff,

-against-

FLOW PLUMBING & HEATING INC., CRP/CAPSTONE 14W PROPERTY OWNER LLC, ROZA 14W LLC, USG ENTERPRISES, LTD, APPLE BANK FOR SAVINGS, and AR BETA LLC,

Defendants.

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Index No.: 152186/14

Motion Seq. No. 001

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action to foreclose on a mechanic's lien, defendants CRP/Capstone 14W Property Owner LLC ("Capstone"), Roza 14W LLC ("Roza"), and AR Beta LLC ("Beta") move pursuant to CPLR 3211(a)(1) and (7) for dismissal of plaintiff L&O Plumbing Supply Inc.'s ("plaintiff") complaint.

Factual Background[1]

Plaintiff alleges that on or around June 29, 2009, Capstone, the then-owner of the premises located at 14 Wall Street, New York, New York (Block 46, Lot 9) (the "Premises"),[2] entered into an agreement with Flow Plumbing & Heating Inc. ("Flow") whereby Flow agreed to supply labor and materials at the Premises. Thereafter, at Flow's request, plaintiff sold and furnished plumbing supplies and equipment to Flow at a price of $24,488.09 to improve the Premises; no part of this sum has been paid. Then, plaintiff noticed a mechanic's lien in that

[1] The factual background is derived from the allegations contained in plaintiff's complaint, which, for the purposes of this decision, are assumed as true.

[2] Roza currently owns the Premises, and Beta is the mortgagee thereof.

amount against Capstone on the Premises on April 6, 2012. The lien was extended in March 2013.

Arguments

In the moving papers, Capstone, by an affidavit from its manager, Daniel Ghadamian ("Ghadamian"), attests that it never entered into an agreement with Flow, nor did it ever hire Flow to perform work on the Premises. Rather, Capstone retained non-party RP Builders Group LLC ("RP") "as general contractor, to perform work on [the Premises] during the time that [plaintiff] claims that Capstone hired Flow to perform work." Also, Capstone paid RP in full for the work it performed on the premises. Since Capstone paid RP, the general contractor it actually contracted with for all work performed at the Premises, in full, plaintiff's mechanic's lien is invalid and must be vacated.

In opposition, plaintiff argues that the lien was properly filed against the Premises for plumbing supplies it sold to Flow. Based on plaintiff's invoices to Flow, which show that plaintiff's supplies were delivered to the Premises, and New York City Department of Building ("DOB") work permits, Flow performed plumbing work at the Premises. A notice of mechanic's lien that is facially valid is not subject to summary cancellation, even if the lien was asserted partly over valid amounts and partly over non-lienable amounts. Plaintiff argues that defendants fail to provide any proof of the alleged payments to RP, or proof when the alleged payments were made to satisfy RP's invoice, which is telling since DOB records also indicate that RP continued to perform work at the Premises well after plaintiff filed the notice of lien. On this note, case law provides that a material issue of fact lies when there is a dispute as to whether a property owner owed a contractor money at the time the subcontractor filed the mechanic's lien or thereafter.

Additionally, the DOB records cast doubt on defendants' claim that Capstone did not hire Flow to perform any work at the Premises. The records show that Flow obtained work permits to perform plumbing work at the Premises.

Thus, since plaintiff's lien is sufficient on its face and meets all of the requirements under the Lien Law, any dispute regarding its validity must await trial thereof by foreclosure.

In reply, defendants argue that plaintiff has not met its burden of demonstrating there is money due and owing to RP, the general contractor hired by Capstone. The law requires that a subcontractor's lien must be satisfied out of funds due and owing from the owner to the general contractor at the time the lien is filed. And, as noted in the moving papers, RP was the general contractor and was paid in full.

Plaintiff's entire complaint rests on the factually incorrect allegation that Flow entered into a contract with Capstone. Here, the evidentiary material produced shows that plaintiff has no cause of action, as plaintiff's entire case rests on an alleged, yet nonexistent, contract between Flow and Capstone.

Plaintiff's claims that (a) defendants do not set forth when their general contractor completed its work and whether any additional monies were paid thereafter; and (b) defendants' purported general contractor continued to work at the Premises after the notice of lien was filed are irrelevant under the Lien Law -- the lien is restricted to the amounts unpaid to RP under the contract between the owner and RP at the time the lien was filed. Here, defendants have provided documentation and a sworn affidavit of Capstone's manager attesting to the fact that RP was paid in full for the period during which the lien was filed.

In fact, the DOB records make clear that *RP* was the general contractor at the Premises.

And, plaintiff's case law is distinguishable, as in plaintiff's cited case it was undisputed that the person alleged to be the general contractor was in fact the general contractor. Also, unlike in that case, defendants submitted checks and similar financial documents establishing full payments to RP. Additionally, the case relied upon by plaintiffs concerned a summary judgment motion, not a pre-answer motion to dismiss.

Further, the fact that DOB records show obtained work permits to work at the Premises does not entail that Capstone was the entity that hired Flow. On this note, defendants do not dispute that Flow performed work at the Premises. Moreover, plaintiff's president's attestation that Flow was retained by Capstone to perform the subject work was based "upon information and belief"; he does not actually know who contracted with Flow. In contrast, Ghadamian attested that Capstone did not hire Flow, and that Capstone paid RP, its actual general contractor, in full. Thus, plaintiff as subcontractor lacks a cause of action against the Premises' owners pursuant to the Lien Law.

Discussion

CPLR 3211(a)(1)

Pursuant to CPLR 3211 (a)(l), a party may move for judgment dismissing one or more causes of action asserted against him on the ground that "a defense is founded upon documentary evidence." A motion to dismiss on the basis of a defense founded upon documentary evidence may be granted "only where the documentary evidence utterly refutes [the complaint's] factual allegations, conclusively establishing a defense as a matter of law"(*DKR Soundshore Oasis Holding Fund Ltd. v. Merrill Lynch Intern.*, 80 AD3d 448, 914 NYS2d 145 [1st Dept 2011] *citing Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]). "Dismissal

pursuant to 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" (*VisionChina Media Inc. v Shareholder Representative VisionChina Media Inc. v Shareholder Representative Services, LLC*, 109 AD3d 49, 967 NYS2d 338 [1st Dept 2013]).

An affidavit does not constitute "documentary evidence" within the meaning of CPLR 3211(a)(1) (*see Regini v. Board of Managers of Loft Space Condominimum*, 107 A.D.3d 496, 968 N.Y.S.2d 18 [1st Dept 2013]; *Flowers v. 73rd Townhouse LLC*, 99 A.D.3d 431, 951 N.Y.S.2d 393 [1st Dept 2012]). As such, Ghadamian's affidavit cannot provide support for the motion under CPLR 3211(a)(1).

And, although defendants submitted, for the first time in reply, a printout of payments to RP purportedly showing that RP was "paid in full," such print out does not constitute documentary evidence that mandates dismissal, as it does not conclusively dispose of plaintiff's claims that Capstone hired Flow to furnish labor and materials to the Premises, and plaintiff, in connection therewith, delivered goods to the Premises to improve the Premises. The print out merely contains the name "RP Builders" with a list of payment amounts and dates. And, the printout is silent as to the relationship between Capstone and RP, and does not indicate (let alone establish conclusively) that RP was Capstone's general contractor.[3] Nor does the summons and complaint and notice of lien submitted in support of defendants' motion conclusively establish a defense to plaintiff's lien.

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[3] Moreover, the printout, which was submitted is inadmissible hearsay, as the reply is devoid of any showing of compliance with the business records exception (*see* CPLR 4518; *JPMorgan Chase Bank, N.A. v. Clancy*, 117 A.D.3d 472, 985 N.Y.S.2d 507 [1st Dept 2014]).

Because Ghadamian's affidavit and the printout submitted in reply do not constitute support for the motion under CPLR 3211(a)(1), the remaining documentary evidence submitted in support of the motion, are insufficient to defeat the Complaint, the branch of defendants' motion pursuant to CPLR 3211(a)(1) is denied.

CPLR 3211(a)(7)

In determining a motion to dismiss pursuant to CPLR 3211(a)(7), the Court's role is deciding "whether the pleading states a cause of action, and, if from its four corners factual allegations are discerned, which taken together, manifest any cause of action cognizable at law, a motion for dismissal will fail" (*African Diaspora Maritime Corp. v. Golden Gate Yacht Club*, 109 A.D.3d 204, 968 N.Y.S.2d 459 [1st Dept 2013]; *Siegmund Strauss, Inc. v. East 149th Realty Corp.*, 104 A.D.3d 401, 960 N.Y.S.2d 404 [1st Dept 2013]).

The standard on the motion is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v. Thom Rock Realty Co.*, 163 A.D.2d 46, 558 N.Y.S.2d 917 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v. Blumberg*, 242 A.D.2d 205, 660 N.Y.S.2d 726 [1st Dept 1997] (on a motion to dismiss for failure to state a cause of action, the court must accept factual allegations as true)). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see* CPLR 3026; *Siegmund Strauss*, *supra*) and the court must "accept the facts as alleged in the complaint as true, accord plaintiffs "the benefit of every possible favorable inference," and "determine only whether the facts as alleged fit into any cognizable legal theory" (*Siegmund Strauss, supra; Nonnon v.*

City of New York, 9 N.Y.3d 825 [2007]; *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 [1994]).

A subcontractor, in seeking to establish a mechanic's lien, has the burden of establishing that there was money due and owing to the general contractor from the owner of the subject property based on a primary contract (*see GCDM Ironworks, Inc. v. GJF Const. Corp.*, 292 A.D.2d 495, 739 N.Y.S.2d 193 [2d Dept 2002]). This follows the well-settled rule that a mechanic's lien depends for its validity on the owner's indebtedness to the contractor, and the burden rests on the lien claimant to prove the indebtedness (*see Brainard v. Kings Cty.*, 155 N.Y.538 [1898]; *East Hills Metro, Inc. v. J.M. Dennis Const. Corp.*, 183 Misc.2d 439, 703 N.Y.S.2d 897 [Sup Ct Nassau Cty 2000] (citing *Brainard*)).

Section 3 of the New York Lien Law provides, *inter alia*, that a subcontractor who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof, shall have a lien for the principal and interest, of the value, or the agreed price, of such labor, including benefits and wage supplements due or payable for the benefit of any laborer, or materials upon the real property improved or to be improved and upon such improvement, from the time of filing a notice of such lien. The rights of a subcontractor are derivative of the rights of the general contractor, and the subcontractor's lien must be satisfied out of funds due and owing from the owner to the general contractor at the time the lien is filed (*see Kamco Supply Corp. v. JMT Brothers Realty, LLC*, 98 A.D.3d 891, 950 N.Y.S.2d 701 [1st Dept 2012]).

Here, the complaint alleges, "upon information and belief," that money is due and owing to Flow, by Capstone, the Premises' owner, based on work and materials supplied by Flow pursuant to a contract between those two entities (Complaint, ¶11). Thus, plaintiff, as a

subcontractor pursuing a mechanic's lien, "states" a viable cause of action under the Lien Law (*see GCDM, supra*).

The next inquiry is to determine whether the above factual allegations, presumed to be true, are negated by defendants' evidentiary submissions. Unlike under CPLR 3211(a)(1), the court may consider affidavits when resolving a motion made under CPLR 3211(a)(7) (*see Leon v. Martinez*, 84 N.Y.2d 83 [1994]; *Wilhelmina Models, Inc. v. Fleisher*, 19 A.D.3d 267, 797 N.Y.S.2d 83 [1st Dept 2005]). Affidavits submitted in support of a 3211(a)(7) motion to dismiss will "almost never warrant dismissal" unless they "establish conclusively" that the plaintiff has no claim or cause of action (*see Lawrence v. Miller*, 11 N.Y.3d 588, 595 [2008]). However, when "evidentiary material is considered, the criterion is whether the proponent of the pleading 'has' a cause of action, not whether he has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again dismissal should not eventuate" (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 [1977]). In other words, "dismissal results only if the movant demonstrates conclusively that the plaintiff has no cause of action, or that 'a material fact as claimed by the pleader to be one is not a fact at all'" (*Laquila Group, Inc. v. Hunt Const. Group, Inc.*, 44 Misc.3d 1203(A), 2014 WL 2919334 [Sup Ct New York Cty 2014], *citing Sokol v. Leader*, 74 A.D.3d 1180, 1181-1182, 904 N.Y.S.2d 153 [2d Dept 2010]).

Here, Ghadamian attests that, contrary to the complaint's allegations, Capstone and Flow have never entered into a contract. He instead claims that Capstone hired RP for work on the Premises during the time that plaintiff claims Capstone hired Flow to perform work.

However, defendant failed to establish that plaintiff is precluded from asserting a valid

lien against the Premises in the absence of any contract between it and Flow, or based on the purported fact that RP was the general contractor. Plaintiff's submissions, *i.e.*, the DOB records, indicate that Flow provided plumbing services to the Premises. On each DOB work permit application plaintiff submits that was filed by Flow, Flow identifies itself as the "Master Plumber" with a box checked adjacent to this designation. Although the box designated as "General Contractor" is unchecked, indicating that Flow was not the general contractor, defendant failed to provide any caselaw indicating that any requirement that Flow be the general contractor at the time plaintiff supplied materials to the Premises, or that the subject lien is rendered invalid by virtue of the purported fact that Capstone had no direct contract with Flow.

Lastly, defendants' contention that plaintiff has not met its burden of demonstrating that there is money due and owing to RP is unavailing, as it is *defendants'* burden in this motion to demonstrate that plaintiff fails to state a cause of action. And, defendants do not dispute plaintiff's contention that the subject notice of lien is facially valid and, thus, it is not subject to summary cancellation. Defendants' remaining contentions are meritless.

Accordingly, defendants' motion is denied, without prejudice.

Conclusion

Based on the foregoing, it is hereby

ORDERED that defendants' motion is denied in its entirety; and it is further

ORDERED that defendants shall serve their Answer within 20 days of entry of this order; and it is further

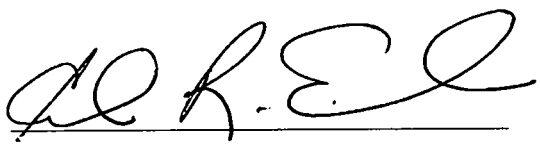
ORDERED that the parties shall appear for a preliminary conference on October 14,

ORDERED that the parties shall appear for a preliminary conference on October 14, 2014, at 2:15 p.m; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: August 5, 2014



Hon. Carol R. Edmead

HON. CAROL EDMEAD