

**Corporate Design of Am., P.C. v Jako Realty Group  
LLC**

2014 NY Slip Op 33179(U)

November 3, 2014

Supreme Court, Queens County

Docket Number: 704395/2013

Judge: Duane A. Hart

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DUANE A. HART  
Justice

IA Part 18

CORPORATE DESIGN OF AMERICA, P.C.,

Index

Number 704395/2013

Plaintiff,

Motion

Date March 11, 2014

-against-

JAKGO REALTY GROUP LLC, AGIASOS  
REALTY LLC, EAGLE REALTY LLC, ARCHER  
CAPITAL FUND L.P., PARAGON  
DEVELOPMENT GROUP LLC.,

Motion Seq. No. 1

Cal No.: 38

Defendants.

**FILED**  
NOV - 6 2014  
COUNTY CLERK  
QUEENS COUNTY

The following numbered papers read on this motion by defendant Archer Capital Fund, L.P. (Archer) pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint insofar as asserted against it, to cancel the notice of pendency, and for an award of reasonable attorneys' fees and costs.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits .....	EF 6-21, 23, 24, 25
Answering Affidavits - Exhibits .....	EF 26-34
Reply Affidavits .....	EF 36-38

Upon the foregoing papers it is ordered that the motion is determined as follows:

On November 10, 2008, defendant Archer commenced a mortgage foreclosure action with respect to the real property known as 178-02 Hillside Avenue, Queens, New York (Block 9913, Lots 25, 35 and 41) (the subject property) entitled *Archer Capital Fund, L.P. v Eagle Realty, LLC* (Supreme Court, Queens County, Index No. 27400/2008) (the *Archer*

action), and filed a notice of pendency. Defendant Archer alleged therein that Eagle Realty LLC (Eagle), the fee owner of the subject property, had defaulted under the building loan mortgage from Eagle to Archer dated February 28, 2008 in the principal amount of \$12,233,544.33, and the Consolidated, Modified, Extended and Restated Mortgage (CMER mortgage) dated February 28, 2008 from Eagle to Archer in the principal amount of \$13,016,455.67 (the *Archer* mortgages). Defendant Archer obtained a judgment of foreclosure and sale dated April 4, 2012, and was the successful bidder at the foreclosure sale held on February 1, 2013. Plaintiff was not a party to the *Archer* action.

Plaintiff, an architectural and design firm, commenced this action on October 11, 2013, asserting a first, fourth and fifth cause of action against defendant Archer to foreclose the mechanic's lien, pursuant to article 3-A of the Lien Law, and for unjust enrichment, respectively. Plaintiff allegedly performed work, labor and services relative to the planned construction and improvement of the subject property from May 31, 2011 through June 17, 2013 for the benefit of defendant Eagle. The agreed upon value of the work, labor and services was allegedly \$75,295.00. Plaintiff alleges that while it was performing work, labor and services for defendant Eagle, defendants received monies or funds for the purpose of applying the funds to the work, labor and services performed and materials furnished. Plaintiff also alleges it was not paid for the work, labor and services rendered despite due demand. Plaintiff further alleges that defendant Archer was the mortgagee of the premises pursuant to a building mortgage loan, and plaintiff filed a mechanic's lien against the property on July 23, 2013, which remains a valid lien against the property, having not been paid, cancelled or discharged.

In lieu of answering the complaint, defendant Archer made the instant motion pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint insofar as asserted against it.

Defendant Archer argues that plaintiff's mechanic's lien was extinguished by virtue of the foreclosure sale in the *Archer* action, and therefore, plaintiff may not seek foreclosure of such mechanic's lien herein. Defendant Archer additionally asserts it filed a building loan agreement between it and defendant Eagle, which includes an affidavit in compliance with Lien Law § 22, stating the consideration paid or to be paid for the Archer mortgages, the expenses incurred or to be incurred in connection with the loan, and the net sum available for the construction project. Defendant Archer argues that plaintiff has failed to show it engaged plaintiff's services, and asserts it has not received the benefit of any alleged work, labor or services provided by plaintiff. Defendant Archer also asserts no construction occurred at the subject premises, and contends the claim against it pursuant to article 3-A of the Lien Law therefore fails to state a cause of action. Defendant Archer submits in support of its motion, among other things, a copy of the complaint, the Archer mortgages, a copy of the affidavit dated February 27, 2008 signed by George Lamrakis, Alexander Lamrakis and

Gregory Lamrakis, as members of Eagle, filed as part of the building loan agreement between Archer and Eagle with the clerk on May 19, 2008, the notices of pendency filed in the *Archer* action, and the judgment of foreclosure and sale in *Archer*.

In opposition to the motion, plaintiff contends its mechanic's lien survived the foreclosure proceedings in *Archer*, and that it is entitled to enforce it herein. Plaintiff acknowledges that its mechanic's lien was filed after the recording of the Archer mortgages (on May 6, 2008), the building loan agreement and Lien Law § 22 affidavit, and the notice of pendency in the *Archer* action. Plaintiff, however, asserts the Lien Law § 22 filing was untimely because it was made thirteen days after the recording of the Archer mortgages. Plaintiff contends therefore the Archer mortgages are subject to the so-called "subordination penalty" imposed by virtue of Lien Law § 22 for Archer's having failed to strictly comply with that statute. According to plaintiff, the subordination penalty operates to cause the Archer mortgage liens to lose their priority in time to its mechanic's lien, which is prior in law. Plaintiff asserts that it therefore is not bound by the outcome of the *Archer* action, notwithstanding its mechanic's lien was filed after Archer's filing of the notice of pendency. Plaintiff further asserts that its mechanic's lien has priority over any interest of defendant Archer in the subject property whether as the mortgage holder of the Archer mortgages or as the successful bidder at foreclosure.

A foreclosure sale is effective to vest the purchaser with the interests of the mortgagee, the named defendants and persons or entities acquiring interests from the named defendants after the filing of the notice of pendency (*see* RPAPL 1353; *Polish Nat. Alliance of Brooklyn, U.S.A. v White Eagle Hall Co., Inc.*, 98 AD2d 400 [2d Dept 1983]). Plaintiff seeks to vary such rule here, due to the subordination penalty imposed by Lien Law § 22.

Section 22 of the Lien Law requires that a building loan contract, with or without the sale of land and before or simultaneously with the recording of a building loan mortgage made pursuant to it, must be filed in the clerk's office of the county where land subject to the contract is located, along with a borrower's affidavit stating the consideration paid or to be paid for the loan, any expenses incurred or to be incurred in connection with the loan, and the net sum available for the construction project. Section 22 also mandates the filing of any subsequent modifications of a building loan contract within 10 days after their execution.

Non-compliance with the filing requirements of Lien Law § 22 results in a change in the ordinary priority of liens, with a properly filed mechanic's lien taking priority over the interests of the parties to the building loan contract. As explained by the Court of Appeals

in *Altshuler Shaham Provident Funds, Ltd. v GML Tower, LLC*, (21 NY3d 352, 362-363 [2013]), a “construction lender must file the building loan contract in order to achieve lien priority, or put the opposite way, the statute imposes a so-called ‘subordination penalty’ on a lender who does not do this.”

The purpose of Lien Law § 22 is “to acquaint prospective contractors with the fact that they furnish labor and materials subject to claims prior to theirs against the property, so far as advances thereunder are prior to their liens when filed (Lien Law, § 13), and also to inform such contractors of the amounts to be advanced and the times of such advances” (*McDermott v Lawyers Mtge. Co.*, 232 NY 336, 341-342 [1922]). The filings pursuant to Lien Law § 22 allow an interested contractor, subcontractor or material supplier to discover the level of financing available for construction so that they might guide its actions accordingly (see *Nanuet Natl. Bank v Eckerson Terrace*, 47 NY2d 243, 247 [1979]).

In this case, defendant Archer failed to file the building loan contract and borrower’s affidavit on or before the building loan mortgage and CMER mortgage, as required under Lien Law § 22. However, imposition of the subordination penalty on defendant Archer herein, to alter the order of record priority so to allow plaintiff to seek foreclosure of its mechanic’s lien, would not promote the legislative purpose of Lien Law § 22. Plaintiff indicates in its mechanic’s lien that the first item of work was not performed until May 31, 2011, which date is three years after defendant Archer made its Lien Law § 22 filing. Plaintiff makes no allegation that notwithstanding it performed the work three years later, it actually was retained to perform the architectural work during the thirteen-day gap period. Under such circumstances, it would be unjust to impose the subordination penalty upon defendant Archer. Plaintiff, therefore, is bound by the outcome of the *Archer* action as if it had been a party thereto, since plaintiff acquired its interest in the property through defendant Eagle after the filing of the notice of pendency. Hence, defendant Archer, as the successful bidder at foreclosure its mechanic’s lien, is vested with plaintiff’s interest.

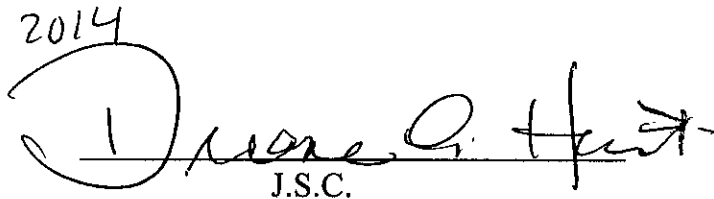
Plaintiff has failed to present any opposition to the branch of the motion by defendant Archer to dismiss the causes of action asserted against it based upon violation of Article 3-A of the Lien Law and for unjust enrichment. In addition, plaintiff claims in its complaint that “[u]pon information and belief,” defendants received advances and monies for the purpose of applying them to the work, labor and services performed, and materials furnished in connection with the construction and improvement of the premises. Plaintiff’s allegations, however, do not make out any claim against defendant Archer under Article 3-A of the Lien Law because they do not allege that any person or entity had a right of action against the lender regarding the funds under the building loan mortgage and CMER mortgage (*cf. Mazeh Const. Corp. v VNB New York Corp.*, 35 Misc 3d 1237[A] [Kings County, Sup Ct 2012]).

Nor has plaintiff stated a cause of action against defendant Archer for unjust enrichment. The elements of an unjust enrichment claim are “that (1) the other party was enriched, (2) at that party’s expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered” (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [internal quotation marks and citation omitted]; see *Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012]). While privity is not required for an unjust enrichment claim, a claim will not be supported if the connection between the parties is too attenuated (see *Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516-518 [2012]; *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182–183 [2011]).

In this instance, plaintiff has failed to plead facts sufficient to show a relationship between itself and defendant that would make the retention of the enrichment, i.e. the amount of proceeds of the foreclosure sale by which plaintiff’s architectural and design services have improved the property, unjust or inequitable (see *Mazeh Const. Corp. v VNB New York Corp.*, 35 Misc 3d 1237[A]). The complaint fails to indicate a relationship between plaintiff and defendant Archer that could have caused reliance or inducement. Those branches of the motion by defendant Archer to dismiss the complaint insofar as asserted against it, and to cancel the notice of pendency, are granted. The County Clerk of Queens County is directed, upon the payment of any fees which may be due and owing, to cancel the notice of pendency filed in this action against the property located at 178-02 Hillside Avenue, Queens, New York, and indexed under Block 9913, Lots 25, 35 and 41. The Clerk shall enter upon the margin of the record a notice of cancellation referring to this order.

To the extent defendant Archer seeks an award of reasonable attorneys’ fees pursuant to CPLR 6514(c), the court has discretion to award costs and expenses incurred by the filing and cancellation of the notice of pendency, in addition to any costs of the action. An award of costs and expenses pursuant to CPLR 6514(c) is not warranted under the circumstances herein (see *DeCaro v East of East, LLC*, 95 AD3d 1163 [2d Dept 2012]; *Rabinowitz v Larkfield Bldg. Corp.*, 231 AD2d 703 [2d Dept 1996]; cf. *Josefsson v Keller*, 141 AD2d 700 [2d Dept 1988]). In addition, to the extent defendant Archer seeks an award of sanctions, the court declines to impose sanctions upon plaintiff in an exercise of this court’s discretion (22 NYCRR 130-1.1[a]; see *Wagner v Goldberg*, 293 AD2d 527 [2002]). That branch of the motion by defendant Archer for an award of reasonable attorneys’ fees as necessary to defend this motion is denied.

Dated: NOVEMBER 3, 2014

  
J.S.C.