

**Bradshaw Mech. Co., Inc. v Henick-Lane, Inc.**

2015 NY Slip Op 31886(U)

October 13, 2015

Supreme Court, New York County

Docket Number: 154004/15

Judge: Cynthia S. Kern

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

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BRADSHAW MECHANICAL CO., INC.,

Plaintiff,

Index No. 154004/15

-against-

**DECISION/ORDER**

HENICK-LANE, INC., LIBERTY MUTUAL  
INSURANCE COMPANY and "JOHN DOE 1" through  
"JOHN DOE 10," defendants being unknown to plaintiff  
And having or claiming an interest in or lien upon the  
Improvement known as 51 Astor Place, New York,  
New York,

Defendants.

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**HON. CYNTHIA KERN, J.S.C.**

**Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :** \_\_\_\_\_

| Papers   | Numbered |
|--|----------|
| Notice of Motion and Affidavits Annexed.....       | 1        |
| Notice of Cross-Motion and Affidavits Annexed..... | 2        |
| Affidavits in Opposition.....                      | 3        |
| Replying Affidavits.....                           | 4        |
| Exhibits.....                                      | 5        |

Plaintiff Bradshaw Mechanical Co., Inc. ("Bradshaw") commenced the instant action against defendants Henick-Lane, Inc. ("HLI") and Liberty Mutual Insurance Company ("Liberty Mutual") alleging causes of action for breach of contract, unjust enrichment and foreclosure of a mechanic's lien arising out of an agreement between plaintiff and HLI to provide labor and materials for a certain project. Liberty Mutual and HLI now move for an Order pursuant to CPLR §§ 3211(a)(1) and (7) dismissing the complaint's second and third causes of action. Plaintiff cross-moves for an Order pursuant to New York Lien Law ("Lien Law") § 10(2) correcting the block designation on the mechanic's lien filed in this matter. The motions are

resolved as set forth below.

The relevant facts according to the complaint are as follows. On or about November 16, 2011, plaintiff and HLI entered into a written agreement pursuant to which plaintiff agreed to furnish labor, materials and equipment for the mechanical work at a project located at 51 Astor Place, New York, New York (the "Project") for the agreed price of \$2,170,000.00 (the "Contract"). Thereafter, at HLI's request, plaintiff performed and furnished additional and/or extra labor, materials and equipment in the amount of \$262,837.75. Plaintiff asserts that after it fully performed, HLI paid it the sum of \$2,091,300.00 leaving a balance of \$341,537.75 due and owing.

Thus, on or about August 28, 2013, plaintiff filed a Notice of Mechanic's Lien on the property for the amount owed to plaintiff (the "Lien"). Plaintiff also served a copy of said Lien upon F.J. Sciamè Construction LLC ("Sciamè"), the general contractor, and HLI, as subcontractor. On or about September 6, 2013, HLI allegedly filed Bond Number 015042340 with the County Clerk to discharge the Lien (the "Lien Discharge Bond"), which was executed by HLI, as principal, and Liberty Mutual, as HLI's surety. On or about August 27, 2014, the Lien was extended for one year from the date of filing. Thereafter, plaintiff commenced the instant action against HLI and Liberty Mutual asserting causes of action for breach of contract, unjust enrichment and foreclosure of the Lien. Thereafter, HLI and Liberty Mutual brought the instant pre-answer motion to dismiss the complaint's second and third causes of action and plaintiff cross-moved for leave to correct the block designation on the Lien.

However, after the cross-motion was filed, plaintiff realized that the Lien Discharge Bond, purportedly filed by defendants, was not stamped by the County Clerk. After reaching

out to defendants to confirm that the Lien Discharge Bond had been properly filed, defendants informed plaintiff that despite its service upon plaintiff, the Lien Discharge Bond had never been filed with the County Clerk, and thus, the Lien was never discharged. Based on the new information, plaintiff filed and served an amended summons and complaint adding two additional defendants - Sciamé and JSM Associates I LLC, the owner of the property – as pursuant to Lien Law § 44-b, where no bond has been filed to discharge a lien, the owner of the foreclosed property as well as the general contractor are necessary parties to a lien foreclosure action. Additionally, plaintiff filed a Notice of Pendency to continue its Lien, which was filed on August 27, 2015.

At the outset, the court notes that defendants have opted to apply their motion to dismiss to the amended complaint. As an initial matter, that portion of defendants' motion for an Order pursuant to CPLR § 3211 dismissing the amended complaint as against Liberty Mutual is granted without opposition. Indeed, plaintiff has conceded that it only commenced the action against Liberty Mutual because it was under the impression that Liberty Mutual was the surety on the bond that was filed to discharge the Lien. However, as it is undisputed that defendants never filed the bond discharging the Lien and the amended complaint does not assert any cause of action against Liberty Mutual, the action should be dismissed in its entirety as against Liberty Mutual.

However, that portion of defendants' motion for an Order pursuant to CPLR § 3211 (a)(7) dismissing the amended complaint's second cause of action for unjust enrichment is denied. On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481

(1980). Moreover, "a complaint should not be dismissed on a pleading motion so long as, when plaintiff's allegations are given the benefit of every possible inference, a cause of action exists." *Rosen v. Raum*, 164 A.D.2d 809 (1<sup>st</sup> Dept. 1990). "Where a pleading is attacked for alleged inadequacy in its statements, [the] inquiry should be limited to 'whether it states in some recognizable form any cause of action known to our law.'" *Foley v. D'Agostino*, 21 A.D.2d 60, 64-65 (1<sup>st</sup> Dept 1977) (quoting *Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956)).

In the instant action, defendants' motion to dismiss the amended complaint's second cause of action for unjust enrichment on the ground that it is duplicative of the amended complaint's first cause of action for breach of contract is denied. It is well settled that "the existence of a valid contract governing the subject matter generally precludes recovery in quasi contract for events arising out of the same subject matter." *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 23 (2005); *see also Clerk-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y.2d 382 (1987). However, here, defendants have not established that the unjust enrichment cause of action is duplicative of the breach of contract cause of action as it is not clear that the Contract governs the entirety of the dispute in this action. Indeed, the Contract expressly provides that plaintiff would perform certain work for a specified sum and the amended complaint alleges that plaintiff performed certain extra and/or additional work, which was not covered by the Contract. Thus, at this stage of the litigation, plaintiff may not be barred from recovering for unjust enrichment.

Additionally, that portion of defendants' motion for an Order pursuant to CPLR § 3211(a)(1) dismissing the amended complaint's third cause of action to foreclose on the Lien is denied. In order to prevail on a defense founded on documentary evidence pursuant to CPLR §

3211(a)(1), the documents relied upon must definitively dispose of plaintiff's claim. See *Bronxville Knolls, Inc. v. Webster Town Partnership*, 221 A.D.2d 248 (1<sup>st</sup> Dept 1995).

Additionally, the documentary evidence must be such that it resolves all factual issues as a matter of law. *Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314 (2002).

In the instant action, defendant's motion to dismiss the complaint's third cause of action for foreclosure of the Lien is denied on the ground that the documentary evidence on which defendants rely does not definitively dispose of plaintiff's claim. Defendants request that the court take judicial notice of a printout of the County Clerk's lien docket for the property, which purportedly establishes that the Lien does not exist. Specifically, defendants point to the fact that the lien docket lists seven liens on the property, 51 Astor Place, and that the only lien filed on behalf of Bradshaw was filed on August 27, 2013 in the amount of \$163,039.83, which is not the Lien at issue here. Additionally, defendants point to the fact that the lien docket printout does not show that the Lien was ever extended. However, Bradshaw has provided the Notice of Lien, Affidavit of Service and Extension of Lien, all of which are clearly stamped as being filed by the County Clerk, along with a computer printout from the County Clerk's "Mechanic's Lien Book Update" and "Judgment Docket and Lien Book System Remarks Update" for the property, which establish that the Lien does indeed exist and that it was extended for one year on August 27, 2014.

Additionally, defendants' motion to dismiss the amended complaint's third cause of action for foreclosure of the Lien on the ground that it is untimely is denied. Pursuant to Lien Law § 17, a foreclosure action must be filed as well as a notice of pendency, unless the lien is bonded, within one year of the filing of the lien or within the one year of the extension of that

lien. Here, the Lien was filed on August 28, 2013 and was extended on August 27, 2014. Additionally, plaintiff commenced the foreclosure action in April 2015 and filed the Notice of Pendency on August 27, 2015.

Defendants' assertion that the Lien was defective from the start and thus, it is invalid, is without merit. Specifically, defendants assert that the original Lien as filed was defective because it was not properly indexed to the correct lot and block numbers and that thus, any extension of the Lien was also defective because it did not have the correct lot and block numbers. However, the Lien Law allows for the party filing the lien, who designated the wrong lot and block numbers, to remedy such error. Pursuant to Lien Law § 10(2),

*Where the county clerk indexes liens in a block index, every notice of lien presented to the clerk of a county of filing, in order to entitle the same to be file, shall contain in the body thereof, or shall have endorsed thereon, a designation of the number of every block, on the land map of the county, which is affected by the notice of lien. The county clerk shall cause such notice of lien to be entered in the block index suitably ruled to contain the columns listed in the preceding paragraph, under the block number of every block so designated. In cases where a notice of lien shall have been filed without such designation or with an erroneous designation, the county clerk, on presentation of proper proof thereof, shall enter such instrument in the proper index, under the proper block number of every block in which the land is affected is situated, and shall, at the same time, make a note of such entry and of the date thereof in every place in which such instrument may have been erroneously indexed, opposite the entry thereof, and also upon the instrument itself, if the same be in his possession or produced to him for the purpose, and the filing of such instrument shall be constructive notice as to property in the block not duly designated at the time of such filing only from the time when the same shall be properly indexed.*

(emphasis added). As the above statute contains no express time limitation for a party to correct the lot and/or block number of the Lien, plaintiff may do so at any time.

