

**MCM Prods. USA, Inc. v Aliusta Design**

2015 NY Slip Op 32326(U)

December 9, 2015

Supreme Court, New York County

Docket Number: 651475/2015

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 15

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MCM PRODUCTS USA, INC.,

Plaintiff,

- v -

ALIUSTA DESIGN, A&M ELECTRIC, ARCH  
MILL SPECIALTIES INC., CHINATOWN  
PLUMBING & HEATING INC., CERTIFIED  
CUSTOM INTEGRATORS, LLC, FIVE STAR  
FINISHES CORP., GRYPHON CONTRACTING  
CORP., HUDSON CONCRETE POLISHING,  
INC., JUST RIGHT AIR CONDITIONING  
SERVICES, LITE BRITE NEON STUDIO, LLC,  
NEWCO IRON WORKS, ROCKLAND  
FLOORING, INC., SKYLINE GROUP CORP.,  
SKYLINE SCAFFOLDING GROUP, INC.,  
TOPCOAT ART, INC., TRI STATE EXQUISITE  
ROOFING LLC, ULTRA CARPET, INC.,  
VANQUISH CONTRACTING CORP., WARNER  
CONCEPT CONSULTING INC., AND WILLIS  
AVE CONSTRUCTION CORP.,

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

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**DECISION  
and ORDER**

Mot. Seq. #004

Plaintiff, MCM Products USA, Inc. (“Plaintiff” or “MCM”), brings this action for a declaratory judgement, discharge of lien and release of bond, and wrongful filing of a mechanic’s lien placed on the property located at 100 Greene Street, New York, NY 10012 (the “Property”). Plaintiff claims to have leased the Property from non-party VCW Associates, pursuant to a lease agreement dated February 27, 2014 (the “Lease”), and that non-party Teliman Holding Corp. (“Teliman”) is the current owner of the Property. Plaintiff claims to have hired non-party A.J.S. Project Management Inc. (“A.J.S.”) as general contractor on a renovation project (the “Project”) for the Property pursuant to a contract dated June 10, 2014, and that A.J.S.

hired various subcontractors, including defendant, Certified Custom Integrators, LLC (“CCI”) to assist with the Project on the Property. Plaintiff claims that certain of these subcontractors improperly filed mechanic’s liens on the Property, and that any monies due and owing to defendants-subcontractors (collectively, “Defendants”) in connection with the Project are due and owing from A.J.S only. Plaintiff seeks a declaratory judgment declaring that Plaintiff is not liable to Defendants for any money due and owing between Defendants and A.J.S. regarding the Project.

Plaintiff commenced this action on May 1, 2015, by Summons and Complaint. On September 3, 2015, CCI interposed an Answer to Plaintiff’s Complaint with Counterclaims for unjust enrichment, accounting and pro rata distribution of trust funds, and diversion of trust funds.

On September 4, 2015, CCI filed a Mechanic’s Lien in the amount of \$29,505.02 (the “Lien”) concerning work allegedly performed on the Property. Plaintiff received notice of such Lien on September 18, 2015. On September 22, 2015, Plaintiff filed a bond discharging lien (the “Bond”) to discharge the Lien.

Plaintiff now moves, by Order to Show Cause, for an Order, discharging the Lien filed by CCI; enjoining CCI from filing subsequent mechanic’s liens on the Property; releasing the Bond; and, pursuant to CPLR § 3211(a)(7), dismissing CCI’s counterclaims for failure to state a cause of action. In support, Plaintiff submits: the attorney affirmation of Lauren J. Talan (“Talan”) dated September 22, 2015 and exhibits annexed thereto; and, the affidavit of Doris Artale (“Artale”), the director of Operations, Store Planning & Construction for Plaintiff, dated September 22, 2015.

CCI opposes.

Oral argument was heard on Plaintiff’s motion October 20, 2015. Thereafter, additional documentary submissions were provided to the Court, as requested. No minutes from the oral argument on October 20, 2015, however, were provided to the Court.

Turning first to Plaintiff’s motion to discharge the Lien, Section 3 of New York’s Lien Law provides, in relevant part:

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, or of his agent, contractor or subcontractor, . . . 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 as prescribed in this chapter. . . .*

(Lien Law § 3 [emphasis added]). A notice of lien may be filed “within eight months after the completion of the contract”, and the lienor must serve a copy of the notice of lien upon the owner, if a natural person, “within five days before or thirty days after filing the notice of lien.” (Lien Law §§ 10-11).

In order to constitute a “consent” within the meaning of this statute, “the owner must either be an affirmative factor in procuring the improvement to be made, or having possession and control of the premises assent to the improvement in the expectation that he will reap the benefit of it.” (*Paul Mock, Inc. v. 118 East 25th Street Realty Co.*, 448 N.Y.S.2d 693, 694 [1st Dep’t 1982], quoting, *Rice v. Culver*, 172 N.Y. 60, 65-66 [1902]). “The consent contemplated by the statute is not a consent given to the tenant, but a consent given to the materialman; it is a holding out of the owner as acquiescing in the giving of credit which is at the foundation of the right to a lien against the owner of the fee.” (*Id.*). Thus, “[t]he consent required by this section is not a mere acquiescence by the owner to improvements by a lessee in possession at his own expense. There must be some affirmative act by the owner.” (*P. Delany & Co. v. Duvoli*, 278 N.Y. 328, 331 [1938]).

Generally speaking, where an owner’s consent to improvements performed at the tenant’s convenience and request is “merely a consent required under the lease to avoid forfeiture of the tenant’s interest”, such consent does not constitute a consent within the meaning of Section 3 of the Lien Law. (*Paul Mock, Inc. v. 118 East 25th Street Realty Co.*, 448 N.Y.S.2d 693, 694 [1st Dep’t 1982]; *Interior Bldg. Servs., Inc. v. Broadway 1384 LLC*, 73 A.D.3d 529, 529 [1st Dep’t 2010]). By contrast, if a lease agreement requires the tenant to effect certain improvements to the premises, and those improvements become part of the demised premises and ultimately inure to the owner, the owner’s consent to improvements in the lease agreement may constitute a consent under Section 3 of the Lien Law. (*City of New York v. N.Y. Iron Works, Inc.*, 738 N.Y.S.2d 202, 202-03 [1st Dep’t 2002]). This is particularly so where the owner deals directly with the contractor or subcontractor in connection with the work performed. (*Id.*). In such circumstances, the absence of

contractual privity between the owner and the party seeking payment under a mechanic's lien does not necessarily vitiate the lien. (*Id.* at 203).

Plaintiff argues that the Lien is not proper because Teliman did not consent to the work for which payment is sought under the Lien. In the affidavit of Artale, Artale avers that, “[p]ursuant to the terms of the Lease, MCM must discharge any liens placed on the Property as a result of any labor or materials furnished or delivered to the Property to or for the [sic] MCM.” (Artale Aff. ¶ 5). Artale further avers that “[t]he Lease entered into between [Plaintiff] and VCW allowed [Plaintiff] to make renovations on the Property”, and that, “[t]he property owner, Teliman, was not a signatory to the Lease.” (*Id.* ¶¶ 6-7). Artale avers that, “[n]either Teliman nor VCW were involved in negotiating MCM’s contract with A.J.S. and neither of them are parties to the general contractor contract or have any responsibilities or obligations thereunder.” (*Id.* ¶ 12).

However, Plaintiff does not provide a copy of the Lease. Although Plaintiff claims that the Lease “allowed” Plaintiff to make renovations on the Property, Plaintiff fails to show that this permission was “merely a consent required under the lease to avoid forfeiture of the tenant’s interest”, and that the benefits such renovations would yield would not inure to VCW, or to Teliman, under the Lease. Furthermore, while Teliman, the Property’s current owner, is not a signatory to Plaintiff’s Lease agreement with VCW, the Property’s prior owner, Plaintiff does not make any showing to suggest that Teliman did not assume VCW’s interest in the Lease, as CCI claims.

Accordingly, Plaintiff fails to make a sufficient showing to discharge the Lien filed by CCI, to release the Bond, or to enjoin CCI from filing any subsequent mechanic’s liens on the Property.

Turning now to Plaintiff’s motion to dismiss Counterclaims, CPLR § 3211 provides, in relevant part:

(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(7) the pleading fails to state a cause of action;

(CPLR §§ 3211[a][7]). In determining whether dismissal is warranted for failure to state a cause of action, the court must “accept the facts alleged as true . . . and

determine simply whether the facts alleged fit within any cognizable legal theory.” (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dep’t 2003] [internal citations omitted]; CPLR § 3211[a][7]).

To prevail on a claim for unjust enrichment, the “plaintiff must show that the other party was enriched, at plaintiff’s expense, and that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered.” (*Georgia Malone & Co., Inc. v. Rieder*, 86 A.D.3d 406 [1st Dep’t 2011]). An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim. (*Corsello v. Verizon N.Y., Inc.*, 18 N.Y.3d 777, 790 [2012]). It is the general rule that, “the 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.” (*Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y. 2d 382, 399 [1987]). This general rule extends to claims against non-signatories; thus, “there can be no quasi-contract claim against a third-party non-signatory to a contract that covers the subject matter of the claim.” (*Randall’s Is. Aquatic Leisure, LLC v. City of New York*, 92 A.D.3d 463, 464 [1st Dep’t 2012]; *Melcher v. Apollo Med. Fund Mgt. L.L.C.*, 105 A.D.3d 15, 27-28 [1st Dep’t 2013] [rejecting argument that, because plaintiff had no breach of contract claim against non-party to written agreement covering subject matter of plaintiff’s complaint, plaintiff could properly assert quasi-contract claim against such non-signatory, “*Clark-Fitzpatrick* did not draw that distinction”] [listing cases]).

To recover under a theory of quasi contract, “[i]t is not enough that the defendant received a benefit from the activities of the plaintiff; if services were performed at the behest of someone other than the defendant, the plaintiff must look to that person for recovery.” (*Kagan v. K-Tel Entm’t*, 172 A.D.2d 375, 376 [1st Dep’t 1991]). “Where there is an express contract . . . between the general contractor and the subcontractor, the owner of the subject premises may not be held directly liable to the subcontractor on a theory of implied or quasi-contract, unless he has in fact assented to such an obligation”. (*Contelmo’s Sand & Gravel, Inc. v. J & J Milano, Inc.*, 96 A.D.2d 1090, 1091 [2d Dep’t 1983]). “[T]he mere fact that [the owner of the subject premises] has consented to the improvements provided by the subcontractor and accepted their benefit does not render him liable to the subcontractor, whose sole remedy lies against the general contractor.” (*Id.*).

CCI’s first counterclaim alleges that, “by contract dated June 10, 2014, MCM Products hired [A.J.S.] as general contractor to perform work at the [Property]” and that “[A.J.S.] entered into a subcontract with [CCI] pursuant to which [CCI] agreed

to perform services and provide material for the Project (the ‘Subcontract’).” (CCI Ans. ¶¶ 3-4). CCI’s first counterclaim alleges that CCI, “provided services and materials to MCM Products for the Project”, and “performed its work for the Project in a proper and workmanlike manner”. (CCI Ans. ¶¶ 8-9). CCI’s first counterclaim alleges that MCM “benefited from the provision of work by [CCI] on the project,” and that, “[u]nder the principles of equity and good conscience, MCM Products should be required to pay for the services and materials received by it from [CCI]”. CCI does not allege any agreement or direct contractual relationship between CCI and Plaintiff.

Even accepting CCI’s allegations as true and drawing all inferences in favor of the non-moving party, CCI’s first counterclaim seeks payment for services performed under the Subcontract between CCI and A.J.S. Therefore, CCI’s claims for work performed under the Subcontract, as alleged, are governed by the Subcontract. Accordingly, even viewing CCI’s pleadings in the light most favorable to CCI, CCI’s first counterclaim fails to plead a cause of action for unjust enrichment against Plaintiff. (*Clark-Fitzpatrick, Inc.*, 70 N.Y. 2d at 399).

As for CCI’s second and third counterclaims, for an accounting and pro rata distribution of Trust Funds for the Project, and diversion of Trust Funds for the Project, respectively, Article 3-A of New York’s Lien Law governs the enforcement of statutory trusts that are “designed for the protection of materialmen and laborers.” (*Scriven v. Maple Knoll Apartments, Inc.*, 46 A.D.2d 210, 213 [3d Dep’t 1974]; Lien Law § 70). “[T]he primary purpose of the Lien Law is to ensure that ‘those who have directly expended labor and materials to improve real property at the direction of the owner or a general contractor’ receive payment for the work actually performed.” (*Canron Corp. v. City of New York*, 89 N.Y.2d 147, 155 [1996], quoting, *West-Fair Elec. Contrs. v. Aetna Cas. & Sur. Co.*, 87 N.Y.2d 148, 157 [1995]).

This statutory trust “springs to life” at the time when any qualifying asset comes into existence. (*City of New York v. Cross Bay Contr. Corp.*, 93 N.Y.2d 14, 19 [1999]; Lien Law § 70[3]). Pursuant to Lien Law § 70(5), such qualifying assets are: funds received under a building loan contract; funds received under a building loan mortgage or a home improvement loan; funds received under a mortgage recorded subsequent to the commencement of the improvement and before the expiration of four months after completion of the improvement; funds received as consideration for a conveyance recorded subsequent to the commencement of the improvement and before the expiration of four months after the completion thereof; funds received as consideration for, or advances secured by, an assignment of rents

due or to become due under an existing or future lease or tenancy of the premises that are the subject of the improvement, or of any part of such premises, if the assignment is executed subsequent to the commencement of the improvement and before the expiration of four months after the completion of the improvement or if it is executed before the commencement of the improvement and an express promise to make an improvement, or an express representation that an improvement will be made, is contained in the assignment or given in the transaction in which the assignment is made; funds received as proceeds of any insurance payable because of the destruction of the improvement or its removal by fire or other casualty, except that the amount thereof required to reimburse the owner for premiums paid by him out of funds other than trust funds shall not be deemed part of the trust assets; and, funds received under an executory contract for the sale of real property and the improvement thereof by the construction of a building thereon. (Lien Law § 70[5][a]-[f]).

Here, even accepting CCI's allegations as true and drawing all inferences in favor of the non-moving party, CCI's second and third counterclaims do not plead funds originating from any of the sources described in Lien Law § 70(5). Accordingly, CCI's second and third counterclaims fail. (*Bristol, Litynski, Wojcik, P.C. v. Elliott*, 107 Misc. 2d 1005, 1006 [Sup. Ct. Albany Cnty. 1981]).

Wherefore, it is hereby

ORDERED that Plaintiff's motion is granted only to the extent that CCI's counterclaims are severed and dismissed and the clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: December 9, 2015

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 EILEEN A. RAKOWER, J.S.C.