

MLB Constr. Servs., LLC v Lake Ave. Plaza, LLC
2015 NY Slip Op 32798(U)
November 10, 2015
Supreme Court, Seneca County
Docket Number: 2015-781
Judge: Robert J. Chauvin
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF SARATOGA

ORIGINAL

MLB CONSTRUCTION SERVICES, LLC,

Plaintiff,

-against-

LAKE AVENUE PLAZA, LLC; M&T BANK;
NGM INSURANCE COMPANY; WILLIAM DORROUGH
d/b/a DORROUGH CONSTRUCTION; PRO QUAL, LLC;
THE LIGHTING PLACE, INC.; NS ASSOCIATES, LTD;
BROOKSIDE FARMS, INC. a/k/a BROOKSIDE FARMS
NURSERY, INC. d/b/a/ BROOKSIDE NURSERY;
R.J. GRAVES CONSTRUCTION, INC.; ALLERDICE
BUILDING SUPPLY, INC.; PETER G. PALMIER d/b/a
COMFORT HVAC; UNICO FINISHING SYSTEMS, INC.;
PPG ARCHITECTURAL FINISHES, INC; MARJAM
SUPPLY CO., INC.; A.E. ROSEN ELECTRICAL CO., INC.;
EUROPEAN STUCCO AND STONE; ADVANCE GLASS,
INC.; JR BUILDERS SUPPLY CORP; D.S. SPECIALTIES,
LLC and LOUIS PETRACCIONE & SONS, INC.,

Defendants.

A.D.W., INC.,

Plaintiff,

-against-

MLB CONSTRUCTION SERVICES, LLC and
LAKE AVENUE PLAZA, LLC,

Defendants

Appearances:

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DECISION AND ORDER

Index No: 2015-781
RJI No: 45-1-2015-0701

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Before: Hon. Robert J. Chauvin, J.S.C.

By notice of motion dated May 22, 2015, filed May 26, 2015, (hereinafter referred to as "**Motion #1**"), defendant, Lake Avenue Plaza, LLC (hereinafter referred to as "Lake"), moves this court for an order pursuant to CPLR § 3211, dismissing the second, fourth, fifth, seventh and ninth causes of action as set forth in plaintiff, MLB Construction Services, LLC's (hereinafter referred to as "MLB"), initial verified complaint as against said defendant. Such motion is supported by the affidavit of Christopher M. McDonald, Esq. dated May 22, 2015 with attached exhibits "A" through "I", including copies of a notice of mechanic's lien; summons and verified complaint; stipulation of the parties; summons with notice; notice of appearance on behalf of defendant, Lake; verified complaint; amended third party complaint in the action *A.E. Rosen Electrical Co., Inc. v. MLB Construction* pending in Albany County Supreme Court index number 6362-14; summons and complaint in the action *A.D.W., Inc. V. MLB Construction Services, et al.* previously pending in Albany County Supreme Court index number 900409-15; and stipulation and order of the parties with attached e-mails.

The motion was also supported by the affidavit of Dean Devito dated May 20, 2015 with attached exhibits "A" through "C", including copies of the standard form agreement between

owner and construction manager respectively Lake Avenue Plaza, LLC and MLB Construction Services, LLC; and the building loan agreement between Lake Avenue Plaza, LLC and M&T Bank. Defendant, Lake, has also submitted a memorandum of law dated May 22, 2015.

By notice of motion dated June 12, 2015, filed June 15, 2015, (hereinafter referred to as "**Motion #2**"). defendant, M&T Bank, moves this court for an order, pursuant to CPLR § 3211, dismissing the initial verified complaint of plaintiff, MLB, as against said defendant. Such motion is supported by the affirmation of Earl T. Redding, Esq. dated June 12, 2015 with attached exhibits "A" through "D", including copies of the summons with notice; M&T Bank's notice of appearance and demand for complaint; verified complaint and M&T building loan agreement. A memorandum of law dated June 11, 2015 was also submitted.

By notice of motion dated June 24, 2015, filed June 26, 2015, (hereinafter referred to as "**Motion #3**"), plaintiff, MLB, moves this court for an order pursuant to CPLR § 602(b) removing the action pending before Albany County Supreme Court, *A.E. Rosen Electrical Co., Inc. v MLB Construction Services, LLC, et al.* index number 6362-14 to the instant action. Said motion is supported by the affidavit of Michael L. Costello, Esq. dated June 24, 2015 with attached exhibits "A" through "F", including copies of the verified complaint; amended verified complaint; summons and complaint, as well as, the third party summons and complaint and amended third party summons and complaint, in the *A.E. Rosen Electrical Co., Inc. v. MLB Construction Services, LLC* action; and verified answer with counterclaims. Submitted in opposition thereto on behalf of defendant, M&T Bank, is the affirmation of Earl T. Redding, Esq. dated July 8, 2015 and on behalf of the defendant, Lake, the affirmation of Christopher M. McDonald, Esq. dated July 8, 2015.

By notice of motion dated June 22, 2015, filed June 29, 2015, (hereinafter referred to as "**Motion #4**"), defendant Lake, moves this court for an order dismissing the complaint of plaintiff, A.D.W., Inc., as against defendant, Lake. In support thereof defendant, Lake, has submitted the affidavit of Christopher P. McDonald, Esq. dated June 22, 2015 with attached exhibits "A" through "C", including copies of the summons and complaint in *A.D.W., Inc. v. MLB Construction, et al.* action; stipulation and order filed in the Albany County Clerk's Office on June 18, 2015; and e-mails. The affidavit of Dean Devito dated June 22, 2015 with attached exhibits "A" and "B" and a memorandum of law dated June 22, 2015 have also been submitted in support thereof. In opposition thereto plaintiff, A.D.W., Inc., has submitted the affirmation of

Joseph Churgin, Esq. dated July 28, 2015 with attached exhibit "A" being a copy of the stipulation and order filed in the Albany County Clerk's Office on June 18, 2015, as well as, the affidavit of Barbara Bernstein dated July 28, 2015. Plaintiff, MLB, has also submitted the affidavit in opposition of Michael L. Costello, Esq. dated August 3, 2015 with attached exhibits "A" through "C". In reply thereto, defendant, Lake, has submitted the affidavit of Christopher M. McDonald, Esq. dated August 10, 2015 and a reply memorandum of law dated August 10, 2015.

By notice of motion dated July 1, 2015, filed July 7, 2015, (hereinafter referred to as "**Motion #5**"), defendant, Lake, moves this court for an order, pursuant to CPLR § 3211, dismissing the second, fourth, fifth, seventh, eighth, ninth and tenth causes of action set forth in plaintiff, MLB's, amended complaint as against said defendant. Submitted in support of said motion is the affidavit of Christopher M. McDonald, Esq. dated July 1, 2015 with attached exhibits "A" through "J" including copies of notice of mechanic's lien filed September 29, 2014; summons and verified complaint; stipulation of discontinuance without prejudice; summons with notice; notice of appearance and demand for complaint; verified complaint; amended verified complaint; amended third party complaint with attached exhibits "A" through "D"; summons and verified complaint in the *A.D.W., Inc. v. MLB Construction Services, LLC* action; and stipulation and order filed in the Albany County Clerk's Office on June 18, 2015. The affidavit of Dean Devito dated June 30, 2015 has also been submitted in support thereof with attached exhibits "A" through "C" including copies of the standard form agreement between owner and construction manager respectively Lake Avenue Plaza, LLC and MLB Construction Services, LLC; and the building loan agreement between Lake Avenue Plaza, LLC and M&T Bank. Defendant, Lake, has also submitted a memorandum of law dated July 1, 2015. In opposition thereto, plaintiff, MLB, has submitted the affidavit of Michael L. Costello, Esq. dated July 15, 2015 with attached exhibit "A", copy of contractor's consent, and a memorandum of law dated July 15, 2015. In reply defendant, Lake, has submitted the reply affidavit of Christopher M. McDonald, Esq. dated July 22, 2015 and a reply memorandum of law dated July 22, 2015.

Finally, by notice of motion dated July 24, 2015, filed July 28, 2015, (hereinafter referred to as "**Motion #6**"), plaintiff, MLB moves this court for an order, pursuant to CPLR § 2211, referring the various actions herein to mediation. The affidavit of Michael L. Costello, Esq. dated July 24, 2015 with attached exhibit "A" is submitted in support thereof. By letter dated

August 4, 2015 from attorney Joseph M. Walsh, Esq., defendants Brookside Farms, Inc. (a/k/a Brookside Farms Nursery, Inc. and a/k/a Brookside Nursery) and Peter G. Palmier d/b/a Comfort HVAC, indicated they were in support of plaintiff's motion. In opposition thereto, plaintiff, A.D.W., Inc., has submitted the affirmation of Joseph A. Churgin, Esq. dated July 28, 2015. In further opposition thereto, defendant, Lake, has submitted the affidavit of Christopher M. McDonald, Esq. dated August 12, 2015 with attached exhibits "A" through "C" including copies of the summons and verified complaint; defendant, Lake's, prior motion to dismiss dated October 16, 2014 with supporting memorandum and attorney affidavit; and stipulation of discontinuance without prejudice filed in the Albany County Supreme Court Clerk's Office on December 12, 2014. By letter dated August 12, 2015 from attorney Erika C. Browne, Esq., defendant, R.J. Graves Construction, Inc., has indicated it is in support of plaintiff's motion. By letter dated August 12, 2015 by attorney Justin R. Meyer, Esq., defendant, D.S. Specialities, Inc., has indicated it is in support of plaintiff's motion. By letter dated August 12, 2015 from attorney Brendan R. Wolf, Esq., defendant, William Dorrough d/b/a Dorrough Construction Inc., has indicated it is in support of plaintiff's application. By letter dated August 17, 2015 from Mark W. Couch, Esq., defendant, Advance Glass, Inc., has indicated it is in support of plaintiff's motion. Finally, the reply affidavit of Michael L. Costello, Esq. dated August 18, 2015 with attached exhibits "A" through "D" has also been submitted in further support of plaintiff's motion.

By letter dated July 30, 2015 the above referenced matter was reassigned to this Court from the Hon. Thomas D. Nolan, Jr. and all pending motions were adjourned by this court to August 3, 2015. Thereafter all parties appeared before the court on September 22, 2015 and were heard upon all pending motions

In or about July, 2012, plaintiff, MLB, and defendant, Lake, entered into a construction contract for the construction of The Pavilion Grand Hotel and related improvements on Lake Avenue and Henry Street in the City of Saratoga Springs. Pursuant to such agreement plaintiff, MLB, acted as the general contractor and construction manager for defendant, Lake. In accordance with that contract and to advance this project, defendant, M&T Bank, provided the financing pursuant to a building loan agreement and other related security instruments issued by and between defendants, Lake and M&T Bank. Defendant, NGM Insurance Company, provided the bonding for the project.

During the course of the construction project, purportedly during the spring and early summer months of 2014, significant issues developed concerning the course of conduct of the construction and it is undisputed that defendant, Lake, despite having been distributed funds from the building loan agreement, ceased making payments under and pursuant to the contract.

MLB initially filed a mechanic's lien in the sum of \$2,232,624.00 and commenced an action in September, 2014. That action was discontinued on stipulation, in accordance with a provision for dispute resolution. Thereafter, on March 19, 2015 MLB commenced a second action in which the amount in controversy has been alleged to be \$4,271,394.00. Above and beyond defendant, Lake, named as defendants in that proceeding, are the subcontractors and material men who have filed liens, the surety, NGM Insurance Company, and M&T Bank, the entity that provided the financing for the construction.

Thereafter, A.D.W., Inc. commenced a separate action against MLB and Lake in Albany County, which action has been consolidated, by stipulation, with this proceeding in Saratoga County. It should be noted that defendant, Lake, was substituted upon stipulation as a defendant therein, in place of the initial defendant, Prime Companies, LLC. Further the court notes that in plaintiff's complaint it is alleged that not only did they perform services upon the underlying construction project pursuant to a subcontract but also at the express direction, approval and promise of payment of Prime Companies, LLC, for which defendant, Lake, has now been substituted. In addition, the court recognizes the further affidavit of the vice president of plaintiff, A.D.W., Inc., in which she buttresses such contentions indicating that there was work performed at the express direction and approval of defendant, Lake, for which payment was promised.

Likewise a separate action was commenced by A.E. Rosen Electrical Co. Inc. against MLB in Albany County in December, 2014.

As noted above there are presently six (6) motions pending before the court, as follows:

1. The motion of defendant, Lake, to dismiss various causes of action in plaintiff's initial verified complaint as against said defendant;
2. The motion of defendant, M&T Bank, to dismiss all causes of action in plaintiff's initial verified complaint as against said defendant;
3. The motion of plaintiff, MLB, to remove the A.E. Rosen Electrical Co. Inc. action to the instant action;

4. The motion of defendant, Lake, to dismiss the action of A.D.W. Inc. as against said defendant;

5. The further motion of defendant, Lake, to dismiss various causes of action in plaintiff's amended verified complaint as against said defendant; and

6. The motion of plaintiff, MLB, to remand all actions to mediation.

As an initial matter and, in so far as, several of the pending motions are brought pursuant to CPLR § 3211 (a) (1) and (7) the court notes that in examining the sufficiency of the underlying documentary evidence such a motion must be made upon evidence which is documentary in nature and standing on its own is determinative of the factual issue(s) presented. Such evidence must "utterly refute" the allegations within the plaintiff's complaint and definitively dispose of the allegations in the complaint (*Goshen v Mutual Life Ins. Co. of N. Y.*, 98 NY2d 314 [2002]; *511 West 232nd Owners Corp. V Jennifer Realty Co.*, 98 NY2d 144 [June, 2002]).

Further the court is also cognizant that in considering a motion to dismiss pursuant to CPLR § 3211 (a) (7) the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide the plaintiff every possible favorable inference. Further, it has been held that the test to be applied in considering the adequacy of a complaint is whether the complaint gives sufficient notice of the transactions, occurrences or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known in law can be discerned from its averments. (*JP Morgan Chase v J. H. Elec. of N. Y., Inc.*, 69 AD3d 802 [2d Dept. 2010].)

Finally, a review of plaintiff's amended verified complaint reflects ten causes of action set forth therein: a first cause of action as against defendants, Lake and NGM, premised upon its mechanic lien; a second cause of action as against defendant, Lake, premised upon unjust enrichment; a third cause of action as against defendant, Lake, premised upon a breach of the underlying construction contract; a fourth cause of action as against defendant, Lake, premised upon quantum meruit; a fifth cause of action as against defendant, Lake, premised upon an account stated; a sixth cause of action as against defendant, M&T Bank, premised upon a breach of the underlying building loan agreement; a seventh cause of action as against defendant, Lake, for breach of the building loan agreement; an eighth cause of action as against defendants, Lake and M&T Bank, premised upon a negligent breach of the building loan agreement; a ninth cause of action as against defendant, Lake, premised upon negligent misrepresentation; and a tenth

cause of action as against defendant, Lake, premised upon a violation of the Lien Law.

Each of the various motions will be addressed below.

MOTIONS #1 and #5

As set forth above Motion #1, made by defendant, Lake, seeks dismissal of various causes of action in plaintiff, MLB's, initial verified complaint. However since the making of that motion plaintiff has interposed an amended verified complaint. Likewise since the interposition of the amended pleading defendant, Lake, has brought Motion#5 seeking similar relief. As such, Motion #1 **DENIED** as moot.

By Motion #5 defendant, Lake, seeks dismissal of the second, fourth, fifth, seventh, eighth, ninth and tenth causes of action set forth in plaintiff's amended verified complaint.

First, defendant, Lake, seeks dismissal of plaintiff's second and fourth causes of action premised upon unjust enrichment and quantum meruit due to the existence of a written agreement concerning the same circumstances. In this regard it has clearly been held that the existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery upon a quasi contractual cause of action for events arising out of the same subject matter (*Clark-Fitzpatrick, Inc. v Long Is. R. R. Co.*, 70 NY2d 382, 388 [1987]). In this particular action the relief sought in the second and fourth causes of action clearly arise from the same subject matter as the construction contract and, as such, are subject to dismissal.

Next, defendant, Lake, seeks dismissal of plaintiff's fifth cause of action premised upon an account stated in so far as defendant, Lake, submits that said defendant did contest and dispute the amounts due. In this regard the court notes that a cause of action upon an account stated fails wherein either an account is not presented or there is any dispute regarding the correctness of the account (*M&A Constr. Corp. v McTague*, 21 AD3d 610, 612 [3d Dept. 2005]). Although, as noted above, the court is limited in its present analysis to the four corners of the complaint, the factual contentions set forth in the complaint expressly allege that defendant, Lake, has refused to pay certain requisitions submitted by plaintiff and additionally hired an auditing firm and initiated a review and audit of the plaintiff's claims for payment. Such allegations alone clearly and factually establish a dispute as to the amounts owed and requires dismissal of plaintiff's cause of action upon an account stated.

Third, defendant, Lake, seeks dismissal of plaintiff's seventh cause of action contending that the building loan agreement upon which said cause of action is premised was by

and between defendants, Lake and M&T Bank, and that plaintiff lacks standing to pursue an action upon a contract to which they were not a party nor a third-party beneficiary. Such is made upon the documentary evidence of the underlying contractual documents. In this regard the court notes that it has consistently been held that in order to establish a claim as a third party beneficiary to a contract said beneficiary must be an intended beneficiary to such agreement and not merely an incidental beneficiary (*Lake Placid Club Attached Lodges v Elizabethtown Bldrs.*, 131 AD2d 159 [3d Dept. 1987]). Specifically, in factual matters as that involved herein, such is dependant upon whether the contract shows an intent to protect such persons by agreeing to ensure that they are paid and the intention of the parties manifested in the agreement is controlling (*National Wall Sys. v Bay View Towers Apts.*, 64 AD2d 417 [2d Dept. 1978]). In this regard it has specifically been held that contractual language that limits the conditions and benefits of a particular agreement to the contracting parties and which expressly excludes any third-party benefit or obligation does in fact defeat any action upon such a basis (*Howard Sav. Bank v Lefcon Partnership*, 209 AD2d 473 [2d Dept. 1994], *leave to appeal denied*, 86 NY2d 837 [1995]).

In the present matter the underlying building loan agreement does include language and terms concerning the payment of the general and subcontractors upon the project by the lender. However, the contract presented upon the instant motion is by and between defendants, Lake and M&T Bank, and plaintiff is not in privity to such agreement. Further, the language contained within the contract concerning advances and payment of costs by the lender is referenced in terms of the protection of the lender's interests, not that of a third party. In addition, the court notes that the agreement, paragraph 7.7, wherein the lender is at liberty to make direct payments is discretionary and not obligatory and the said agreement goes on, paragraph 7.8, to expressly state that nothing within said section shall be deemed to create any specific rights in favor of any third parties. Moreover the court notes that the associated contractor's consent document relied upon by plaintiff, actually states, paragraph 10, that nothing herein shall be construed to impose any obligation upon the lender to oversee, assure or verify the application of the proceeds of the building loan agreement and specifically states that the contractor acknowledges that the lender's obligations under the associated building loan agreement is only to the owner. As such, plaintiff's seventh cause of action is subject to dismissal.

Fourth, defendant, Lake, seeks dismissal of plaintiff's eighth cause of action premised upon a negligent breach of the underlying building loan agreement, based upon plaintiff's lack of privity to such agreement and that the breach of contract alleged is not subject to a negligence cause of action. Above and beyond that set forth above concerning the lack of privity and/or third party beneficiary claim, the court notes that it has clearly been held that a simple breach of a contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated (*Clark-Fitzpatrick, Inc.*, 70 NY2d 382, 389 [1987]). As such, plaintiff's eighth cause of action is subject to dismissal.

Fifth, defendant, Lake, seeks dismissal of plaintiff's ninth cause of action premised upon negligent misrepresentation. In this regard defendant argues that plaintiff has failed to adequately plead such a cause of action with sufficient specificity in accordance with CPLR § 3016 and argues a failure to allege or establish in the pleading the requisite element of the existence of a special relationship by and between the parties. In this regard, although the court recognizes that a cause of action based upon contentions of misrepresentation require that such be pleaded in detail and specificity, the court cannot say, as a matter of law, that the instant cause of action is not sufficiently detailed nor that it fails to allege a special relationship between the parties. The complaint clearly sets forth the monies claimed, the relevant time frames of demand and refusal and expressly alleges that during such times defendant, Lake, affirmatively represented that the monies had been approved, disbursed and paid for the benefit of the contractors, subcontractors, suppliers and vendor(s). Further the complaint alleges that such was not factual and that plaintiff relied upon such misrepresentation to their detriment. Moreover the complaint, taken as a whole, clearly alleges that there existed a special relationship between plaintiff and defendant, Lake, as owner and general contractor upon the construction project. As such plaintiff's ninth cause of action is not subject to dismissal.

Finally, defendant, Lake, seeks dismissal of plaintiff's tenth cause of action, and any other cause of action within the complaint, premised upon a violation of the Lien Law, in that, such requires an allegation that the monies held by defendant, Lake, pursuant to the building loan agreement, were not only wrongfully withheld, but misappropriated. In this regard the court notes that the provisions of the Lien Law concerning funds held by an owner or contractor pursuant to a building loan agreement or contract for the improvement of real property require such to be held and utilized only for payment of project expenses and until all such expenses

have been paid. Further such provisions only prohibit the misappropriation of such funds or the use of such funds for nontrust purposes. In this regard there is no allegation that defendant, Lake, misappropriated or misapplied any monies. Rather the only contention is that defendant, Lake, has failed to distribute such funds in payment of project expenses or failed to account for said funds. Such is simply insufficient on its face to establish a violation of the Lien Law and, as such, plaintiff's tenth cause of action is subject to dismissal.

In accordance with such defendant, Lake's, motion to dismiss the second, fourth, fifth, seventh, eighth and tenth causes of action set forth in plaintiff's amended verified complaint is **GRANTED**, and said defendant's motion to dismiss the ninth cause of action set forth in plaintiff's amended verified complaint is **DENIED**.

MOTION #2

As set forth above, Motion #2 seeks dismissal of plaintiff's complaint as against defendant, M&T Bank. Such seeks dismissal of the sixth and eighth cause of action set forth in plaintiff's initial verified complaint. However said motion has not been renewed since the interposition of plaintiff's amended verified complaint. In addition, it would appear that in accordance with correspondence with the court prior to reassignment, defendant, M&T Bank, and plaintiff have agreed that defendant's motion has been rendered moot by the service of the amended verified complaint. As such, defendant, M&T Bank's, motion to dismiss is **DENIED**, subject to resubmission.

MOTION #3

As set forth above, Motion #3 requests the removal of the *A.E. Rosen Electrical Co., Inc. v. MLB Construction Services, LLC v. Lake Avenue Plaza LLC and M&T Bank* action presently pending in Albany County Supreme Court to the present action. Based upon the fact that the primary action concerning the underlying construction project is pending before this court and the fact that all of the actions factually concern the same construction project and seek payment for work performed thereon, which physically occurred in Saratoga County, in accordance with the provisions of CPLR § 602, plaintiff's motion is hereby **GRANTED**.

MOTION #4

In Motion #4 defendant, Lake, seeks dismissal of the complaint of plaintiff, A.D.W., Inc., as against said defendant. Such motion is based upon the assertion that there was no contract by and between plaintiff, A.D.W., Inc., and defendant, Lake, and that the plaintiff's

quasi contractual cause of action is barred by its subcontract with MLB. However, as noted above the allegations set forth in the complaint expressly allege that, above and beyond the subcontract, work was performed by plaintiff at the express direction, approval and promise of payment of defendant, Lake. Again, in this regard, although the complaint speaks in terms of the prior defendant Prime Companies, LLC, by agreement defendant, Lake, was substituted into the action. In addition, as noted above, the allegations in the complaint are also supported by the affidavit of plaintiff's vice president who again asserts that work upon the project was performed at the express direction, approval and promise of payment of defendant, Lake. Thus the complaint sets forth factual contentions of a direct agreement between the plaintiff and defendant, Lake, and sets forth that services were provided which do not arise out of the same subject matter as the subcontract between A.D.W., Inc. and MLB and is not subject to dismissal. As such, defendant, Lake's, motion is **DENIED**.

MOTION#6

With regard to plaintiff, MLB's, motion to remand the entire proceeding to mediation, the court does not find any authority for the relief requested and, in the absence of agreement of all parties, will not order this matter to mediation. As such, plaintiff's motion seeking an order remanding the entire proceeding to mediation is **DENIED**.

This memorandum shall constitute the decision and order of the court. The original decision and order and the underlying papers are being delivered directly to the Saratoga County Clerk for filing. The signing of this decision and order and the delivery of this decision and order to the Saratoga County Clerk shall not constitute notice of entry under CPLR § 2220, and the parties are not relieved from the applicable provisions of that rule regarding service of notice of entry.

DATED: November 10, 2015
Ballston Spa, NY 12020

ENTERED

Craig A. Hayner

Craig A. Hayner

Saratoga County Clerk

Robert J. Chauvin
HON. ROBERT J. CHAUVIN
SUPREME COURT JUSTICE

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SARATOGA COUNTY
CLERK'S OFFICE
BALLSTON SPA, NY

ENTERED

*** The court notes the various submissions concerning the interposition of cross-claims and/or counterclaims by and between plaintiff and defendant, Lake. However due to the need for clarity, as well as, the lack of submission of all relevant pleadings, the court does not address such issues and any relief in that regard must be made subject to further formal motion(s).**

The following papers were read and considered:

1. Defendant Lake - Notice of Motion dated May 22, 2015;
2. Affidavit of Christopher M. McDonald, Esq. dated May 22, 2015 with attached exhibits "A" through "I";
3. Affidavit of Dean Devito dated May 20, 2015 with attached exhibits "A" through "C";
4. Memorandum of Law dated May 22, 2015;
5. Defendant - M&T Bank - Notice of Motion dated June 12, 2015;
6. Affirmation of Earl T. Redding, Esq. dated June 12, 2015 with attached exhibits "A" through "D";
7. Memorandum of Law dated June 11, 2015;
8. Plaintiff MLB - Notice of Motion dated June 24, 2015;
9. Affidavit of Michael L. Costello dated June 24, 2015 with attached exhibits "A" through "F";
10. Affirmation in Opposition of Earl T. Redding, Esq. dated July 8, 2015;
11. Affirmation in Opposition of Christopher M. McDonald, Esq. dated July 8, 2015;
12. Def Lake - Notice of Motion dated June 22, 2015;
13. Affidavit of Christopher M. McDonald, Esq. dated June 22, 2015 with attached exhibits "A" through "C";
14. Affidavit of Dean Devito dated June 22, 2015 with attached exhibits "A" and "B";
15. Memorandum of Law dated June 22, 2015;
16. Affirmation in Opposition of Joseph A. Churgin, Esq. dated July 28, 2015 with attached exhibit "A";
17. Affidavit in Opposition of Michael L. Costello dated August 3, 2015 with attached exhibits "A" through "C";
18. Reply Affidavit of Christopher M. McDonald, Esq. dated August 10, 2015;
19. Reply Memorandum of Law dated August 10, 2015;
20. Def Lake - Notice of Motion dated July 1, 2015;
21. Affidavit of Christopher M. McDonald, Esq. dated July 1, 2015 with attached exhibits "A" through "J";
22. Affidavit of Dean Devito dated June 30, 2015 with attached exhibits "A" through "C";
23. Memorandum of Law dated July 1, 2015;
24. Affidavit in Opposition of Michael L. Costello, Esq. dated July 15, 2015 with attached exhibit "A";
25. Memorandum of Law dated July 15, 2015;
26. Reply Affidavit of Christopher M. McDonald, Esq. dated July 22, 2015;

27. Reply Memorandum of Law dated July 22, 2015;
28. Plaintiff MLB - Notice of Motion dated July 24, 2015;
29. Affidavit of Michael L. Costello, Esq. dated July 24, 2015 with attached exhibit "A";
30. Letter of Joseph M. Walsh, Esq. dated August 4, 2015 on behalf of defendants, Brookside Farms, Inc. (a/k/a Brookside Farms Nursery, Inc. and a/k/a Brookside Nursery) and Peter G. Palmier d/b/a Comfort HVAC;
31. Affirmation in Opposition of Joseph A. Churgin, Esq. dated July 28, 2015;
32. Affidavit in Opposition of Christopher M. McDonald, Esq. dated August 12, 2015 with attached exhibits "A" through "C";
33. Letter of Erika C. Browne, Esq. dated August 12, 2015 on behalf of defendant, R.J. Graves Construction, Inc.;
34. Letter of Justin R. Meyer, Esq. dated August 12, 2015 on behalf of defendant, D.S. Specialties, Inc.;
35. Letter of Brendan R. Wolf, Esq. dated August 12, 2015 on behalf of defendant, William Dorrough d/b/a Dorrough Construction;
36. Letter of Mark W. Couch, Esq. dated August 17, 2015 on behalf of defendant, Advance Glass, Inc.; and
37. Reply Affidavit of Michael Costello, Esq. dated August 18, 2015 with attached exhibits "A" through "D".