

New Age Gen. Contr. v 1882 Third, LLC
2016 NY Slip Op 30888(U)
May 13, 2016
Supreme Court, New York County
Docket Number: 150220/2016
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD
J.S.C.
Justice

PART 35

Index Number : 150220/2016
NEW AGE GENERAL CONTRACTING
vs.
1882 THIRD, LLC
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE 4/25/16
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

The motion by defendant 1882 Third, LLC ("1882") pursuant to CPLR 3211(a)(1) and (a)(7) to dismiss the complaint of the plaintiff New Age General Contracting, Inc. is decided as follows:

In determining a motion to dismiss a complaint 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 AD3d 204, 968 NYS2d 459 [1st Dept 2013]; *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, 960 NYS2d 404 [1st Dept 2013]). On a motion to dismiss made pursuant to CPLR § 3211, 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, Inc. v East 149th Realty Corp.*, 104 AD3d 401, *supra*; *Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972, 638 NE2d 511 [1994]). However, "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not" presumed to be true or accorded every favorable inference (*David v Hack*, 97 AD3d 437, 948 NYS2d 583 [1st Dept 2012]; *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861, 731 NE2d 577 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279, 675 NE2d 1232 [1996]), and the criterion becomes "whether the

Dated: _____, J.S.C.

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proponent of the pleading has a cause of action, not whether he has stated one” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17 [1977]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150, 730 NYS2d 48 [1st Dept 2001]; *WFB Telecom., Inc. v NYNEX Corp.*, 188 AD2d 257, 259, 590 NYS2d 460 [1st Dept], *lv denied* 81 NY2d 709, 599 NYS2d 804, 616 NE2d 159 [1993] [CPLR 3211 motion granted where defendant submitted letter from plaintiff’s counsel which flatly contradicted plaintiff’s current allegations of prima facie tort]). “In deciding such a preanswer motion, the court is not authorized to assess the relative merits of the complaint’s allegations against the defendant’s contrary assertions or to determine whether or not plaintiff has produced evidence to support his claims” (*Salles v Chase Manhattan Bank*, 300 AD2d 226, 228 [1st Dept 2002]).

Pursuant to CPLR 3211 [a] [1], 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” (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]; *Mill Financial, LLC v. Gillett*, 122 A.D.3d 98, 992 N.Y.S.2d 20 [1st Dept 2014]). “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” (*Mill Financial, LLC v. Gillett, supra, citing Art and Fashion Group Corp. v. Cyclops Production, Inc.*, 120 A.D.3d 436, 992 N.Y.S.2d 7 [1st Dept 2014]).

Here, plaintiff’s complaint asserts four causes of action against 1882: (1) money judgment on, and an adjudication that the lien is valid; (2) breach of contract; (3) unjust enrichment; and (4) account stated.

In support of dismissal, 1882 submitted the complaint, notice of mechanic’s lien, RLI Insurance Company “Bond Discharging Mechanic’s Lien,” and email requesting that plaintiff withdraw the action against 1882. In opposition, plaintiff points out that other causes of action exist against 1882 independent from the lien cause of action. Further, the managing member of 1882 is the same managing member of co-defendant Manhattan Restoration LLC, which caused plaintiff to believe that 1882’s credit was also being extended to pay for the services performed. In reply, 1882 argues, *inter alia*, that the plaintiff failed to submit any documentary evidence to support its remaining causes of action, and that plaintiff’s contract was with co-defendant solely.

Contrary to 1882’s contention, “The effect of the bond discharging the lien does not change the fact that the lien must still be established judicially, as requested in the plaintiff’s verified complaint” (*Romar Sheet Metal, Inc. v F.W. Sims, Inc.*, 8 Misc. 3d 1021(A), 803 N.Y.S.2d 20 (Table) [Supreme Court, New York County 2005] (finding that the “owner of the property upon which the lien is filed, must remain a party to the action”), *citing Harlem Plumbing Supply Co. v. Handelsman*, 40 A.D.2d 768, 768 [1st Dept. 1972]; *Spitz v. M. Brooks & Son, Inc.*, 210 A.D. 438, 440 [1st Dept. 1924]; *Von Den Driesch v. Rohrig*, 45 A.D. 526, 527 [1st Dept 1899]; *Morton v. Tucker*, 145 N.Y. 244, 248 [1895]).

In *Harlem Plumbing Supply Co. v Handelsman (supra)*, plaintiff filed a mechanic’s lien upon property then owned by 48th Street Associates related to materials furnished to a

subcontractor in connection with alterations to the premises of a tenant of the property. “Prior to the commencement of the instant action to foreclose said lien, the tenant made a deposit, pursuant to Lien Law s 20, and obtained a discharge of the lien.” The First Department held:

“The nature and character of the pending action has not changed; the deposit was merely substituted as security for the lien which must still be judicially established. . . . Plaintiff had alternative means to enforce its rights, including an action at law. However, since it elected to bring this equitable action to enforce its lien, as it had a right to do, defendant 48th Street Associates is a necessary party defendant The fact that this lien was discharged by a deposit (Lien Law s 20) rather than by an undertaking (id. s 19(4)) is of no consequence. Where, as here, the lienor has elected to proceed in equity to enforce its lien, both sections envision the establishment of the validity of such lien before further rights accrue. Under such circumstances, the owner of the property is a necessary party defendant”

Similarly, in *Romar Sheet Metal, Inc. v F.W. Sims, Inc.* (8 Misc 3d 1021(A), 803 NYS2d 20 [Supreme Court, New York County]), the Supreme Court held:

the filing of surety bonds to discharge mechanic's liens does not extinguish the requirement that plaintiff bring an action for the enforcement of the lien. . . . To recover on a lien, a plaintiff must bring an action for the enforcement of the lien, obtain a judgment as if the lien still existed, and such judgment would then be paid by the surety for the amount found due on the lien. . . . The effect of the bond discharging the lien does not change the fact that the lien must still be established judicially, as requested in the plaintiff's verified complaint. *Thus NJTC, as owner of the property upon which the lien is filed, must remain a party to the action.*

(Emphasis added).

In light of the above, 1882's reliance on caselaw from the Second and Third Departments to the contrary is misplaced (*M. Gold & Son v A.J. Eckert, Inc.*, 246 A.D.2d 746, 667 N.Y.S.2d 460 [3d Dept 1998] (“Where the lien no longer attaches to real property due to the filing of a bond under the Lien Law, it has been held that the owners of the real property are no longer necessary parties to the action”; *Norden Elec. v Ideal Elec. Supply Corp.*, 154 A.D.2d 580, 546 N.Y.S.2d 409 [2d Dept 1989]; *Danica Group LLC v Atlantic Ct. LLC*, 23 Misc. 3d 1111(A), 885 N.Y.S.2d 711 [Supreme Court, Kings County 2009] (dismissing action to foreclose the mechanic's liens against the unit owners where a bond had been filed); *212 Servs., LLC v J. Anthony Enters. Inc.*, 50 Misc.3d 33918 N.Y.S.3d 830 [Supreme Court, Nassau County 2015]). Although “Upon the filing of such a discharge bond the [] lien previously filed attaches to the bond, which is substituted for the liened property (*Tri-City Elec. Co. v People*, 63 N.Y.2d 969, 473 N.E.2d 240, 483 N.Y.S.2d 990 [1984]), plaintiff's cause of action to enforce the lien requires that 1882 remain a party (*see Romar Sheet Metal, Inc., supra*).

Furthermore, dismissal of the Complaint against 1882 is unwarranted in light of the remaining causes of actions asserted against, which 1882's motion did not address. The

complaint alleges, *inter alia*, that plaintiff entered into an agreement with 1882 to perform construction, that plaintiff performed construction services for 1882 at 1882's special insistence, that the reasonable value for such work remain unpaid, and that 1882 failed to timely reject plaintiff's billing invoices for such payment. The documentation submitted by defendant with its motion fail provide a complete defense to such allegations. Further, the proposal contract between plaintiff and co-defendant Manhattan Restoration LLC, submitted by 1882 for the first time in reply, even if considered, fail to establish a complete defense to the allegations in the complaint.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendant 1882 Third, LLC pursuant to CPLR 3211(a)(1) and (a)(7) to dismiss the complaint of the plaintiff is denied; and it is further

ORDERED that defendant 1882 Third, LLC shall serve and file its Answer within 30 days of the date of this order; and it is further

ORDERED that the parties shall appear for a preliminary conference on July 19, 2016, 2:15 p.m.; and it is further

ORDERED that defendant 1882 Third, LLC shall serve a copy of this order with notice of entry within 20 days of entry.

This constitutes the decision and order of the Court.

DATED: 5/13/16



HON. CAROL R. EDMEAD
J.S.C.

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