

<b>MLB Constr. Servs., LLC v Lake Ave. Plaza, LLC</b>
2016 NY Slip Op 32824(U)
December 16, 2016
Supreme Court, Saratoga County
Docket Number: 2015-781
Judge: Robert J. Chauvin
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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

A.E. ROSEN ELECTRICAL CO., INC.,

Plaintiff,

-against-

MLB CONSTRUCTION SERVICES, INC.

Defendant/Third-Party Plaintiff,

-against-

LAKE AVENUE PLAZA, LLC and M&T Bank,

Third-party Defendants.

**ORIGINAL**

**DECISION and ORDER**

**Index No: 2015-781**

**RJI No: 45-1-2015-0791**

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MLB CONSTRUCTION SERVICE, LLC,

Plaintiff,

-against-

CREATIVE MATERIALS CORPORATION,

Defendant.

TABS WALL SYSTEMS, LLC,

Defendant/Third-Party Plaintiff,

-against-

FRANKLIN INTERNATIONAL, INC., and  
FRANKLIN INTERNATIONAL CORPORATION,

Third-Party Defendants.

LAKE AVENUE PLAZA, LLC,

Plaintiff,

-against-

TABS WALL SYSTEMS, LLC,

Defendant.

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**Before:**

**Hon. Robert J. Chauvin, J.S.C.**

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As a preliminary matter the court notes that the above actions have been consolidated for purposes of further proceedings as each action and/or third-party action arises out of allegations concerning a certain construction project in the City of Saratoga Springs, New York.

Specifically as set forth in prior decisions and orders of this court plaintiff/defendant, MLB Construction Services LLC (hereinafter referred to as MLB), and defendant, Lake Avenue Plaza, LLC (hereinafter referred to as Lake), in or about July, 2012, 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.

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, defendant, Lake, despite having been distributed funds pursuant to a building loan agreement, ceased making payments under and pursuant to the contract. Following the cessation of payments numerous mechanics liens were filed by subcontractors, vendors and suppliers and the above referenced actions commenced.

As in prior decisions and orders of the court, there are presently pending before the court numerous motions and cross-motions by various parties. Such motions include a motion by plaintiff, MLB, seeking the bifurcation of various claims and reference to a referee for determination; a motion by defendant, Lake, seeking the discharge of certain numerated mechanic's liens and the replacement of numerous bonds posted by said defendant into one bond in a reduced amount to match the amounts of the now outstanding claims; a motion by defendants Brookside Farms, Inc. (hereinafter referred to as Brookside) and Peter G. Palmier (hereinafter referred to as Palmier) seeking an order permitting the amendment of their answer; a motion by defendant, M&T Bank (hereinafter referred to as M&T) seeking an order granting summary judgment dismissing the cross-claims of defendants, Brookside and Palmier; and a motion by defendant R.J.Graves Construction, Inc. (hereinafter referred to as Graves) seeking summary judgment as against defendant, Lake, and dismissing the cross-claims of defendants

[\* 6] Advance Glass (hereinafter referred to as Advance) and Dorrough Construction, Inc. (hereinafter referred to as Dorrough).

It is noted that initially defendants Allerdice Building Supply Inc., Louis Petraccione & Sons, Inc., R.J. Graves Construction, Inc. and A. E. Rosen Electrical Co. Inc. had each moved for summary judgment as against MLB. However as each of the defendants' claims as against MLB have been settled and discontinued such motions are being marked as withdrawn by the court. In this regard it is also noted that MLB had initially made a cross-motion seeking some form of indemnification as against defendant, Lake, which was previously withdrawn.

Each motion will be discussed separately below.

**I. MOTION BY PLAINTIFF, MLB, FOR AN ORDER BIFURCATING CERTAIN CLAIMS AND AN ORDER OF REFERENCE.**

By notice of motion dated July 18, 2016 plaintiff, MLB, seeks an order of the court pursuant to CPLR § 4317 (b) bifurcating and referring the various counterclaims and cross-claims of the subcontractor, vendor and supplier defendants, in the initial action commenced by MLB, to a referee for determination and resolution. In support of said motion plaintiff submitted the affidavit of Michael L. Costello, Esq. dated July 18, 2016 along with exhibits marked A through FF. In addition plaintiff submitted the affidavit of James M. Dawsey dated July 18, 2016 along with annexed exhibit A. Plaintiff also submitted a memorandum of law dated July 18, 2016.

In partial opposition defendant, Brookside, submitted the affirmation of Jesse P. Schwartz, Esq. dated July 28, 2016. In partial support of said motion defendant, A.D.W., Inc. (hereinafter referred to as ADW) submitted the affirmation of Joseph A. Churgin, Esq. dated August 2, 2016. In support of said motion defendant, Graves, submitted the affirmation of Erika C. Browne, Esq. dated August 3, 2016. In opposition defendant, Tabs Wall Systems, LLC (hereinafter referred to as Tabs), submitted the affirmation of Matthew G. Petrosino, Esq. dated August 19, 2016 and defendant, Lake, submitted the affidavit of Christopher M. McDonald, Esq. dated August 2, 2016, along with annexed exhibits A through H. It further appears that

[\* 7]  
defendant, Louis Petraccione & Sons, Inc. also submitted the affirmation in opposition of Maria C. Tebano, Esq. dated August 3, 2016 along with numerous exhibits.

The motion was initially returnable August 30, 2016. Upon the request of plaintiff, the motion was adjourned until September 30, 2016.

Factually, as a result of that set forth above, the instant action was commenced by plaintiff, MLB, by the filing of a summons with notice on March 9, 2015. Two months later on May 5, 2015 plaintiff, MLB, interposed a verified complaint which was later supplemented by an amended complaint. Since the interposition of the amended complaint, upon motion(s) of the plaintiff, the primary action commenced by plaintiff, MLB, has been consolidated with various other actions.

However, by prior decision and order of the court, numerous causes of action in plaintiff's primary action have been dismissed. More importantly, although plaintiff's amended complaint still sets forth various causes of action as against defendant, Lake, the remaining defendants named in the primary action, as expressly set forth in the complaint and amended complaint, have been named simply based upon their interest in the property by way of mechanics liens filed and claims as subcontractors, suppliers and/or vendors upon the project.

Further, although there have been numerous conferences and extensive preliminary motion practice, the parties have not engaged in substantive discovery, although as noted by plaintiff in support of the motion herein, the claims of the subcontractors, by way of amount, are not greatly in dispute.

Finally it is also noted by the court that the instant action is not the first action commenced upon the underlying factual circumstances. As previously noted an initial action commenced by plaintiff was discontinued in lieu of mediation, which mediation was unsuccessful.

As pertinent to the instant motion CPLR § 4317 permits the court, over objection or on its own initiative, to refer an action or a portion of an action to an appointed referee for purposes of determination. A court may order a reference to determine a cause of action or an issue where

\* 8] a trial will require the examination of a long account, including actions to foreclose a mechanic's lien, or to determine an issue of damages not requiring trial by jury, or where otherwise authorized by law. In this regard for a matter to be considered a long account the issues must be so numerous and tedious that it would be impossible for a jury to resolve them within the reasonable time constraints of a trial (*Schanback v Schanback*, 130 AD2d 332 [2d Dept. 1987]). Moreover the determination of the nature of the action is determined by examination of the plaintiff's complaint (*Thibaudeau v City of Niagra Falls*, 239 App. Div. 644 [4th Dept. 1934]).

In addition, in determining a request for a compulsory order of reference the court should be mindful that such an order deprives a party of trial by jury or judge.

In making a determination upon MLB's motion the court first notes that in the instant matter the remaining causes of action in MLB's amended complaint, in its primary action, as well as the causes of actions in the consolidated cases and associated counterclaims and cross-claims, essentially deal with contentions of breach of contract, as opposed to any form of intricate financial determination. In fact, the supporting papers submitted by MLB upon the instant motion indicate that the financial claims are not greatly in dispute and plaintiff has submitted a spreadsheet which reflects that of the 52 claims pending the amounts in less than ten remain in dispute.

Next, as set forth in the complaint, having been named in the action the various subcontractors, suppliers and vendors have alleged various counter and cross-claims which have been denied by plaintiff, again raising issues of liability, as opposed to monetary determinations. As such the primary determination, at present, is one of fundamental liability or breach of contract. The determination of the monetary claims are, at best, premature. Moreover, the various and numerous cross-claims and counterclaims are so intertwined that it would be almost impossible and of little, if any, benefit to bifurcate the primary claim for any sort of determination.

Third, as noted herein, there has been little, if any, substantive discovery conducted.

Fourth, despite the repeated assertions of plaintiff, the refusal to consent to an arbitration proceeding has been on the part of both MLB and defendant, Lake. Moreover, as noted above, mediation has already been attempted and failed.

Finally, as noted by defendant, Brookside, there has been no delineation of the issues to be referred nor even the parties whose claims should be referred. Rather, plaintiff has merely made a conclusory and overly broad request based upon conclusory assertions.

As such, plaintiff's motion to bifurcate and refer, at this time, is in all respects **DENIED**.

## **II. MOTION OF DEFENDANT LAKE, TO DISCHARGE CERTAIN LIENS AND REDUCE THE AMOUNT OF THE BOND(S).**

Next by notice of cross-motion dated August 2, 2016 defendant, Lake, seeks an order of the court discharging the mechanic's liens of defendants, The Lighting Place, Inc. (hereinafter referred to as Lighting Place), Marjam Supply Co., Inc. (hereinafter referred to as Marjam) and JR Builders Supply Corp. (hereinafter referred to as JR Builders) and an order permitting Lake to substitute a single bond in a lesser amount in place of the multiple bonds presently posted by said defendant. In support of said motion defendant, Lake, submitted the affidavit of Christopher M. McDonald dated August 2, 2016 along with annexed exhibits A through H, the affidavit of Dean Devito dated August 1, 2016 along with annexed exhibits A through C and a memorandum of law dated August 2, 2016.

In opposition defendants, Brookside and Palmier, submitted the affidavit of Joseph M. Walsh, Esq. dated September 20, 2016 along with annexed exhibits A through D; the affidavit of Ian C. Murray dated September 16, 2016 with annexed exhibits and the affidavit of Peter G. Palmier dated September 20, 2016 with annexed exhibits; and a memorandum of law dated September 20, 2016. Plaintiff, MLB, submitted the affidavit of James M. Dawsey dated September 28, 2016 along with annexed exhibits A through D and a memorandum of law dated September 2, 2016.

In reply defendant, Lake, submitted the reply affidavit of Christopher M. McDonald, Esq. dated September 29, 2016 along with annexed exhibits A through I and a memorandum of law.

The motion was initially returnable August 10, 2016 but was not fully submitted until receipt of the reply papers on September 30, 2016.

As pertinent to the above mentioned cross-motion, it is asserted by documents presented and uncontested that the defendant, Lighting Place, filed a notice of mechanics lien on or about August 25, 2014 and has taken no further action to foreclose upon or extend its lien. In addition, it is uncontested that in response to a demand for an itemized statement of lien, that said defendant indicated that its claim had been satisfied. In fact, it is uncontested that said defendant has never appeared in the action and that they were provided notice of the instant application and have not interposed any opposition thereto. As such, defendant, Lake's, motion to discharge the lien of defendant, Lighting Place, is **GRANTED**.

In regard to defendant, Marjam, it is asserted by documents presented and uncontested that said defendant filed a notice of mechanics lien on or about October 29, 2014 and has taken no further action to foreclose upon or extend its lien. In addition, it is uncontested that said defendant has failed to respond to a demand for an itemized statement concerning said lien and has failed to appear in the action. Moreover defendant, Marjam, was provided notice of the instant application and has not interposed any opposition thereto. As such, defendant, Lake's, motion to discharge the lien of defendant, Marjam, is **GRANTED**.

In regard to defendant, JR Builders, it is asserted by documents presented and uncontested that said defendant filed a notice of mechanics lien on or about December 11, 2014 and has taken no further action to foreclose upon or extend its lien. In addition, it is uncontested that said defendant has failed to respond to a demand for an itemized statement concerning its lien and has failed to appear in the action. Moreover defendant, JR Builders, was provided notice of the instant application and has not interposed any opposition thereto. As such, defendant, Lake's, motion to discharge the lien of defendant, JR Builders, is **GRANTED**.

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The only opposition interposed to defendant, Lake's, cross-motion was in regard to its application to substitute a new bond for the several bonds already posted. In this regard defendant, Lake, argues that there were several bonds posted early on in the proceedings to comply with its building loan agreement with M&T Bank. Such bonds were posted pursuant to the provisions of Lien Law § 19. However, since that time, Lake asserts that the bonds posted now greatly exceed the amount of all remaining claims and that the court should permit it to post one bond in a lesser amount, almost \$1.5 million less, pursuant to Lien Law § 37. Such is premised upon the amount alleged by plaintiff, MLB, claimed to be due upon all remaining claims.

In opposition defendants, Brookside and Palmier, argue that such relief should not be granted in that they have made a cross-motion to amend their answers to assert, by way of counterclaims, a direct action as against defendant, Lake, and that such may alter the amount of the remaining claims. In further opposition plaintiff, MLB, argues that the motion should be denied in that the total amount alleged to be due upon the outstanding claims does not include certain change orders which may alter the amount of the overall remaining claims.

Initially the court notes that Lien Law § 37 provides that an owner or contractor, either before or after commencement of a project concerning an improvement to real property, may execute as a principal, a bond to essentially cover all claims for labor performed or materials furnished upon the project. In that event the subcontractors, vendors and suppliers have an action upon the bond in accordance with the other provisions of Lien Law § 37. However in the present action defendant, Lake, has already posted bonds to discharge liens filed pursuant to Lien Law § 19.

Moreover, and more importantly, it appears as though, although not greatly in dispute, there does remain a factual issue concerning the amount of the remaining outstanding claims of the subcontractors, vendors and suppliers. Not only has factual opposition been presented concerning the amount of the outstanding claims, but as in the motion to bifurcate and refer, there has been little, if any, discovery and any determination as to the amount of the remaining

outstanding claims. Thus this request is premature and, at the very least, presents a factual issue.

However, such does not mean that the court is without authority to reduce the amount of the required bond. In this regard, as noted above, the court has been made aware of the settlement of numerous claims of subcontractors as against MLB and the court does recognize that the resolution of such claims may well effect the required amount of any bond or bonds posted by defendant, Lake. As such the court herein reserves decision upon defendant, Lake's, motion to post a new bond subject to a hearing before the court to address what claims have been resolved and the reduction in the remaining outstanding claims effectuated by such settlements.

### **III. MOTION BY DEFENDANTS, BROOKSIDE AND PALMIER TO AMEND THEIR RESPECTIVE ANSWERS.**

By notice of motion dated September 20, 2016, defendants, Brookside and Palmier, have moved for an order pursuant to CPLR § 3025 permitting each defendant to amend its answer to permit the interposition of additional cross-claims as against defendant, Lake. In support of the motion said defendants submitted the affidavit of Joseph M. Walsh, Esq. dated September 20, 2016 along with annexed exhibits A through D, as well as, the affidavit of Ian C. Murray, on behalf of defendant, Brookside, dated September 16, 2016 along with annexed exhibits A and B and the affidavit of Peter G. Palmier, on behalf of defendant, Palmier, dated September 20, 2016 along with annexed exhibits A and B. The defendants also submitted a memorandum of law dated September 20, 2016.

In opposition to such motion defendant, Lake, submitted the affidavit of Christopher M. McDonald, Esq. dated October 13, 2016 along with annexed exhibits A through J and the affidavit of Dean Devito dated October 13, 2016 along with annexed exhibits A through D. Defendant, Lake, also submitted a memorandum of law dated October 13, 2016.

Finally defendants, Brookside and Palmier, submitted the reply affidavit of Joseph M. Walsh, Esq. dated October 19, 2016.

The motion was returnable October 20, 2016.

Defendants, Brookside and Palmier, were both subcontractors upon the underlying project. Defendant, Brookside, was engaged to install a rooftop garden upon the building and defendant, Palmier, was engaged to install the HVAC for the building.

Although both subcontractors were formally engaged upon the project through a written contract signed by each defendant and MLB, in affidavits submitted upon the instant application both defendants have very similarly alleged that they were initially contacted by a representative of defendant, Lake, the owner upon the project. It is further alleged that the same representative of defendant, Lake, reviewed and requested changes upon their work and that said representative assured both defendants that they would be paid. Upon such basis the defendants now move to amend their respective answers to interpose a further breach of contract action directly as against defendant, Lake. They both argue that such is properly plead based upon both a theory that MLB, in contracting with each of them, was acting as an agent on behalf of defendant, Lake, and that the direct contact and representations of Lake establish a sufficient factual foundation to allege a direct contractual relationship.

In opposition defendant, Lake, asserts that the subcontractor defendants only had a contract with MLB and as they were not in privity to the underlying construction agreement between MLB and Lake, that they cannot maintain any form of direct breach of contract action as against defendant/owner, Lake. In accordance with such argument defendant, Lake, argues that the proposed additional cross-claim lacks merit and, as such, the motion should be denied. In addition, defendant, Lake, argues that it would be greatly prejudiced by the passage of time since commencement of the various actions and the paper discovery already completed to date.

To begin the court notes that CPLR § 3025 permits the amendment of a pleading upon court order at any time during the pendency of an action. Not only has it clearly been held, but such statute expressly sets forth, that such leave shall be freely given, and particularly where there is no surprise or prejudice (*McCaskey, Davies and Assoc. v New York City Health & Hosps. Corp.*, 59 NY2d 755, 757 [1983]). Further, such leave has been held to be more likely permitted where the only change is in the theory of liability (*Rife v Union Coll.*, 30 AD2d 504,

However, it has also been held that permission to amend a pleading is within the sound discretion of the court and should be denied wherein there is no merit to the proposed amendment (*Gersten-Hillman Agency, Inc. v Heyman*, 68 AD3d 1284 [3d Dept. 2009]; *Trupia v Lake George Cent. School Dist.*, 62 AD3d 67 [3d Dept. 2009], *affirmed* 14 NY3d 392 [2010]). In this regard, as pertinent to the instant action, the court notes that it has clearly been held that a subcontractor may not assert a contractual cause of action as against parties with whom it is not in privity (*IMS Engrs.-Architects, P.C. v State of New York*, 51 AD3d 1355 [3d Dept. 2008], leave to appeal denied 11 NY3d 706 [2008]; *Matirano Const. Corp. v Briar Cont. Corp.*, 104 AD2d 1028 [2d Dept 1984]). Further, and more importantly, the court notes that the existence of an express, written contract in most circumstances precludes a quasi-contractual claim arising from the factual circumstances covered by the written contract (*Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382 [1987]).

In the present action the defendants, Brookside and Palmier, have presented factual affidavits which allege various forms of direct contact by and between them and a representative of defendant, Lake. Such allegations include the initial solicitation of their participation in the project, directions concerning changes to be made to the work being conducted and representations assuring their payment for the work performed upon the project. Based upon such they now seek to interpose a direct cause of action as against defendant, Lake, based upon an agency theory, i.e. that MLB was acting as Lake's agent in contracting with them for the work that they performed upon the project.

However such factual contentions are not sufficient to establish that MLB merely acted as Lake's agent in acting upon its subcontract with the moving defendants. More importantly, the work that both moving defendants performed upon the project was covered by their written contracts with MLB and neither moving defendant had a written contract with defendant owner, Lake. In this regard neither defendant has a direct claim against defendant owner, Lake. Further the moving defendants cannot assert a direct claim as against, Lake, based upon a quasi-

contractual cause of action the circumstances of which were clearly covered by their express contracts with MLB. Finally, in accordance with that set forth below and previously held, the general and vague assurances of payment alleged are not sufficient to establish any form of a third-party beneficiary claim. In each regard the court finds that the proposed additional causes of action lack merit.

As such, the motion of defendants, Brookside and Palmier, to amend their respective answers are **DENIED**.

**IV. MOTION OF DEFENDANT, GRAVES, FOR SUMMARY JUDGMENT UPON ITS CROSS-CLAIM AS AGAINST DEFENDANT, LAKE, AND TO DISMISS THE CROSS-CLAIMS OF DEFENDANTS, ADVANCE AND DORROUGH.**

Next by notice of motion dated August 24, 2016 defendant, Graves, seeks an order of summary judgment upon its cross-claim as against defendant, Lake, as well as, an order dismissing the cross-claims of defendants, Advance and Dorrough. In support of said motion the moving defendant submitted the unsigned affirmation of Erika C. Browne, Esq. and the affidavit of Roland J. Graves, Sr. dated August 23, 2016 along with annexed exhibits 1 through 26. Thereafter the moving defendant submitted an amended notice of motion seeking the same relief dated September 9, 2016. In support of the amended notice of motion said defendant submitted the amended affirmation of Erika C. Browne, Esq. dated September 9, 2016 along with annexed copies of exhibits 1 through 28. The court notes that the moving papers submitted in support of the amended notice of motion do not contain the affidavit of Roland Graves, Sr.. However as such was served with the initial notice of motion and served upon all parties, the court will consider same as having been submitted upon the instant motion.

In opposition defendant, Lake, submitted the affidavit of Christopher M. McDonald, Esq. dated September 23, 2016 and the affidavit of Dean Devito also dated September 23, 2016 along with annexed exhibits A through C. Defendant, Lake, also submitted a memorandum of law dated September 23, 2016.

No other opposition was interposed by any party.

Defendant, Graves, was a subcontractor who performed carpentry work upon the underlying project. As such, it has interposed a cross-claim of unjust enrichment as against defendant, Lake. In support of its instant motion it has submitted a copy of its contract with the general contractor, MLB, as well as revisions thereof and invoices submitted to the general contractor. Further said defendant has submitted affidavits attesting to the fact that the work pursuant to the contract was performed and that defendant, Lake, is reaping the benefit of such work performed.

In regard to its motion to dismiss the cross-claims of defendants, Advance and Dorrough, which merely seek some form of priority based upon the filing of their respective liens, said defendant has submitted uncontested proof that the mechanics liens filed by defendants, Advance and Dorrough, have been discharged by the posting of a bond by defendant, Lake.

First, as concerns defendant, Graves', motion for summary judgment as against defendant, Lake, as noted above, defendant, Graves, has settled its counterclaims as against MLB. As defendant, Graves', cross-claim as against defendant, Lake, appears to be based upon the same claim such may be subject to dismissal. However, irrespective of such settlement, the court notes that such claim actually arises from the work performed pursuant to the moving defendant's subcontract with MLB and, as such, its cross-claim premised upon the quasi contractual cause of action of unjust enrichment, in accordance with the authority set forth above, is subject to dismissal.

As concerns the motion to dismiss the cross-claims of defendants, Advance and Durrough, defendant, Graves, has presented sufficient evidence of its prima facie entitlement to summary judgment and nothing has been submitted in opposition.

As such, the defendant, Graves', motion for summary judgment upon its cross-claim for unjust enrichment as against defendant, Lake, is **DENIED**, and in turn, the cross-claim is dismissed; and the defendant, Graves', motion to dismiss the cross-claims of defendants, Advance and Dorrough, is in all respects **GRANTED**.

**V. MOTION OF DEFENDANT, M&T BANK, TO DISMISS THE CROSS-CLAIMS OF DEFENDANTS, BROOKSIDE AND PALMIER.**

By notice of cross-motion dated October 12, 2016 defendant, M&T, seeks an order pursuant to CPLR § 3211 (a) (1) and (7) dismissing the cross-claims of defendants, Brookside and Palmier. In support of such motion defendant, M&T, submitted the affirmation of Earl T. Redding, Esq. dated October 12, 2016 along with annexed exhibits A through E. Said defendant also submitted a memorandum of law also dated October 12, 2016.

In opposition defendants, Brookside and Palmier, submitted the affidavit of Joseph M. Walsh, Esq. dated October 19, 2016.

The motion was returnable October 20, 2016.

By its answers in the underlying action both defendants, Brookside and Palmier, have interposed cross-claims as against defendants, Lake and M&T, premised upon the contention that the proceeds of the building loan agreement by and between defendants, Lake and M&T, constitute trust assets pursuant to Article 3-A of the Lien Law (Lien Law §§ 70-79-a). Based upon such contention defendants, Brookside and Palmier, seek various forms of relief including a declaration that any proceeds of the building loan agreement, to the extent of the claims of said defendants for the work performed upon the project, being held by either defendant, Lake or M&T, are trust assets. They request an order requiring the disposition of said trust assets to said defendants and essentially restraining either defendant, Lake or M&T, from dissipation or distribution of said assets.

Defendant, M&T, in accordance with prior rulings of this court asserts that defendants, Brookside and Palmier, are not third party beneficiaries of the building loan agreement between it and defendant, Lake, nor are said defendants entitled to any relief by way of direct payment pursuant to such building loan agreement and have no claim as against defendant, M&T. Further defendant, M&T, more specifically argues that defendants, Brookside and Palmier, do not have a cognizable claim as per the Lien Law.

Initially in response to the claims of defendants, Brookside and Palmier, that the instant motion is untimely or has been waived, the court notes that a motion pursuant to CPLR § 3211 (a) (7) may be made at any time and further that although a defendant may have made a prior motion to dismiss pursuant to CPLR § 3211 addressed to the complaint, such does not prohibit a subsequent motion addressed to a cross-claim contained in a co-defendant's answer (CPLR § 3211 (e); *Nassau Roofing and Sheet Metal Co. v Celotex Corp.*, 74 AD2d 679 [3d Dept. 1980]). As such the motion of defendant, M&T, at least as brought pursuant to CPLR § 3211 (a) (7), is timely and was not waived by the making of defendant's prior motion addressed to the complaint.

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 (cross-claim) as true and provide the plaintiff (co-defendant) every possible favorable inference. Further, it has been held that the test to be applied in considering the adequacy of a complaint (cross-claim) is whether the complaint (cross-claim) 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].)

However, as noted by the court in its prior ruling, 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] ).

As concerns Article 3-A of the Lien Law, which sets forth that funds received in connection with the improvement of real property constitute trust assets, such article essentially prohibits the diversion of trust assets for non trust purposes, prior to satisfaction of all trust claims, and, more importantly, as pertinent to the instant motion, is expressly applicable only to funds received by an owner, contractor or subcontractor.

Again, as found by the court in its prior decision and order as applicable to plaintiff, MLB, the underlying building loan agreement does not create a sufficient foundation by which to find defendants, Brookside or Palmier, third-party beneficiaries of the underlying building loan agreement between defendants, Lake and M&T, nor do the provisions of Article 3-A of the Lien Law establish a viable cause of action on behalf of defendants, Brookside and Palmier, as against defendant, M&T.

First the cross-claims of defendants, Brookside and Palmier, are expressly premised upon Lien Law § 77 and not upon a contention that said defendants have an action as against defendant, M&T, as third party beneficiaries to the building loan agreement. However, even if the court were to consider such a contention within the four corners of the cross-claim, the underlying building loan agreement is by and between defendants, Lake and M&T Bank, and said defendants, Brookside and Palmier, are 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 building loan 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, as noted by the court previously, the associated contractor's consent document 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. Thus there is no sufficient basis for such a claim.

Further, again, the cross-claims of defendants, Brookside and Palmier, are expressly premised upon the contention that the funds being held, if any, by defendant, M&T, pursuant to the building loan agreement, are recoverable as trust assets pursuant to Article 3-A of the Lien Law. However, there is no contention that any of the money from the loan is being misappropriated nor that it is being misapplied prior to the satisfaction of all trust claims. Most importantly defendant, M&T, is neither an owner, contractor nor subcontractor upon the instant project nor are any funds being held by defendant, M&T, such as those set forth in Lien Law § 70 (5), (6) or (7).

Thus even giving defendants, Brookside and Palmier, every favorable inference to the allegations as plead in their cross-claims, there is simply no basis for a cause of action as plead.

As such the motion of defendant, M&T, to dismiss the cross-claims of defendants, Brookside and Palmier, is in all respects **GRANTED**.

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 constitute notice of entry under CPLR § 2220.

DATED: December 16, 2016  
Ballston Spa, NY 12020

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

Craig A. Hayner

*Craig A. Hayner*

Saratoga County Clerk

2016 DEC 19 AM 8:52  
SARATOGA COUNTY  
CLERK'S OFFICE  
BALLSTON SPA, NY

ENTERED

The following papers were read and considered:

1. Notice of Motion dated July 18, 2016
2. Affidavit of Michael L. Costello, Esq. dated July 18, 2016 with attached exhibits "A" through "FF";

3. Affidavit of James M. Dawsey dated July 18, 2016 with attached exhibit "A";
4. Memorandum of Law dated July 18, 2016;
5. Affirmation of Jesse P. Schwartz, Esq. dated July 28, 2016;
6. Affirmation of Joseph A. Churgin, Esq. dated August 2, 2016;
7. Affirmation of Erika C. Browne, Esq. dated August 3, 2016;
8. Affirmation of Matthew G. Petrosino, Esq. dated August 19, 2016;
9. Notice of Cross Motion dated August 2, 2016;
10. Affidavit of Christopher M. McDonald dated August 2, 2016 with attached exhibits "A" through "H";
11. Affidavit of Dean Devito dated August 1, 2016 with attached exhibits "A" through "C";
12. Memorandum of Law dated August 2, 2016;
13. Affidavit of Joseph M. Walsh, Esq. dated September 20, 2016 with attached exhibits;
14. Affidavit of Ian C. Murray dated September 16, 2016 with attached exhibits;
15. Affidavit of Peter G. Palmier dated September 20, 2016 with attached exhibits "A" and "B";
16. Memorandum of Law dated September 20, 2016;
17. Affidavit of James M. Dawsey dated September 28, 2016 with attached exhibits "A" through "D";
18. Memorandum of Law dated September 28, 2016;
19. Affidavit of Christopher M. McDonald, Esq. dated September 29, 2016 with attached exhibits "A" through "I";
20. Memorandum of Law dated September 29, 2016;
21. Notice of Motion dated September 20, 2016;
22. Affidavit of Joseph M. Walsh, Esq. dated September 20, 2016 with attached exhibits "A" through "D";
23. Affidavit of Ian C. Murray dated September 16, 2016 with attached exhibits "A" and "B";
24. Affidavit of Peter G. Palmier dated September 20, 2016 with attached exhibits "A" and "B";
25. Memorandum of Law dated September 20, 2016;

26. Affidavit of Christopher M. McDonald, Esq. dated October 13, 2016 with attached exhibits "A" through "J";
27. Affidavit of Dean Devito dated October 13, 2016 with attached exhibits "A" through "D";
28. Memorandum of Law dated October 13, 2016;
29. Reply Affidavit of Joseph M. Walsh, Esq. dated October 19, 2016;
30. Notice of Motion dated August 24, 2016;
31. Unsigned Affirmation of Erika C. Browne, Esq.;
32. Affidavit of Roland J. Graves, Sr. dated August 23, 2016 with attached exhibits "1" through "26";
33. Amended Notice of Motion dated September 9, 2016;
34. Amended Affirmation of Erika C. Browne, Esq. dated September 9, 2016 with attached exhibits "1" through "28";
35. Affidavit of Christopher M. McDonald, Esq. dated September 23, 2016;
36. Affidavit of Dean Devito dated September 23, 2016 with attached exhibits "A" through "C";
37. Memorandum of Law dated September 23, 2016;
38. Notice of Cross Motion dated October 12, 2016;
39. Affirmation of Earl T. Redding, Esq. dated October 12, 2016 with attached exhibits "A" through "E";
40. Memorandum of Law dated October 12, 2016;
41. Affidavit of Joseph M. Walsh, Esq. dated October 19, 2016;
42. Notice of Motion dated September 1, 2016;
43. Affidavit of Conor E. Brownell, Esq. dated September 1, 2016;
44. Affidavit of Adam Rosen dated August 26, 2016 with attached exhibits "1" through "9";
45. Affidavit of James M. Dawsey dated October 31, 2016 with attached exhibits "A" through "F";
46. Affidavit of Michael K. Sullivan, P.E. dated October 31, 2016; and
47. Memorandum of Law dated October 31, 2016.