SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ENGORON **PART** 37
Justice

NOVA BROTHERS, INC.

-v-

JAMES G. KENNEDY & CO., INC.

INDEX NO. 653271/2012
MOTION DATE 5/3/16
MOTION SEQ. NO. 007

The following papers, numbered 1 to 3, were read on this motion to/for summary judgment

Notice of Motion/~~Order to Show Cause~~ — Affidavits — Exhibits + Cross-Motion No(s). 1
Answering Affidavits — Exhibits No(s). 2
Replying Affidavits No(s). 3

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

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 10/14/16

, J.S.C.
HON. ARTHUR F. ENGORON

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☑ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

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NOVA BROTHERS, INC. a/k/a AVON CONTRACTORS,

Plaintiff,

Index Number: 653271/2012

- against -

Sequence Number: 007

JAMES G. KENNEDY & CO., INC., 200 PARK, L.P., PBC 200 PARK AVENUE, LLC, d/b/a CARR WORKPLACES, JAMES G. KENNEDY, JR., CHRISTOPHER VAN DER LINDE, RLI INSURANCE COMPANY, COURTHOUSE MANUFACTURING LLC, TNA ARCHITECTURAL PRODUCTS, INC., CIROCCO & OZZIMO, INC., CENTURY CARPET, INC., and NEWPORT PAINTING & DECORATING CO., INC.,

Decision & Order

Defendants.

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Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 3, were used on the motion by certain defendants, and plaintiff's cross-motion, pursuant to CPLR 3212, for summary judgment:

Papers Numbered:

Notice of Motion - Affirmation - Affidavit - Exhibits 1
Notice of Cross-Motion & Affirmation in Opposition - Affirmation - Affidavit - Exhibits 2
Reply Affirmation 3

Upon the foregoing papers, (1) defendants 200 Park, L.P. and PBC 200 Park Avenue, LLC d/b/a Carr Workplaces' motions for summary judgment are granted, and (2) defendant, RLI Insurance Company, and plaintiff, Nova Brothers, Inc. a/k/a Avon Contractors', motions for summary judgment are denied.

Background

Plaintiff, Nova Brothers, Inc. a/k/a Avon Contractors ("Nova") sues to recover damages in the sum of $157,685.09 for breach of a construction contract, and to foreclose its mechanics lien. Nova, as subcontractor, entered into a construction contract dated November 16, 2011 ("Subcontract") with defendant James G. Kennedy & Co., Inc. ("JGK"), the general contractor, pursuant to which Nova agreed to supply labor and materials for the improvement of an executive office suite ("Project") on the 17th Floor of 200 Park Avenue in Manhattan ("Premises"). Defendant 200 Park, L.P. ("200 Park"), owns the Premises, and defendant PBC 200 Park Avenue, LLC d/b/a Carr Workplaces ("Carr") was the commercial tenant. The agreement between 200 Park and Carr, as owner, and JGK, as general contractor, provide that if JGK and its subcontractors are in "substantial breach," the owner may recoup costs to cure and finish the defective work ("Agreement"). Pursuant to the Agreement, JGK was to complete the Project by December 19, 2011.

Carr and 200 Park allege that by January 2012, the work still had not been substantially completed. Carr was unable to take occupancy of the space until the first week of January 2012, and even then, a preliminary punchlist of over 400 items had yet to be completed or corrected. By April 5, 2012, Carr served on JGK a

Notice of Default and Cure Demand, with seven days notice to cure. In August 2012, after Carr had completed much of the physical work remaining to be completed on the Project, Carr notified JGK of two deficient items of work that remained to be remedied. Carr and 200 Park allege that despite the notices, JGK did not correct the deficiencies and never completed the work.

During the course of the Project, JGK submitted six Application and Certificates for Payment ("Payment Applications"), and Carr paid each in full for a total sum of $3,128,309.24. The remaining contract balance of $160,220.90 allegedly did not become due to JGK because it defaulted on its obligations under the Agreement.

By mid-2012, Carr became aware that certain JGK subcontractors were filing mechanic's liens against the Project property. The mechanic's liens included those of: Nova; Courthouse Manufacturing LLC ("Courthouse"); TNA Architectural Products, Inc. ("TNA"); Cirocco & Ozzimo, Inc. ("C&O"); Century Carpet, Inc.; and Newport Painting & Decorating Co., Inc. ("Newport").

Pursuant to Section 5.4 of Carr's lease agreement with 200 Park ("Lease"), Carr filed lien discharge bonds, issued by defendant RLI Insurance Company ("RLI"), the surety bond company, with the New York County Clerk's office, in connection with the mechanic's liens, including Nova's liens, and these liens have been bonded since 2012. Carr continues to pay bond premiums on these lien discharge bonds each year; Carr alleges it has expended $11,413 to bond these subcontractor liens.

The Instant Action

On September 19, 2012, Nova commenced this action. During a September 18, 2013 preliminary conference, the court was notified that on or about August 31, 2012, JGK had filed a voluntary bankruptcy petition with the United States Bankruptcy Court, Southern District of New York and was not a proper party to this action. On September 19, 2013, this court issued an order staying the action as against JGK and severing it from the main action. On September 24, 2013, Nova e-filed and served a second amended complaint asserting six causes of action: (1) lien foreclosure as against all defendants; (2) breach of contract as against JGK; (3) unjust enrichment as against 200 Park, Carr, and JGK; (4) reasonable expectation of payment for equipment and services provided as against all defendants; (5) breach of constructive trust against defendants that have been dismissed from the action; (6) collection of surety bond as against RLI. Following the completion of discovery, Nova filed a note of issue on January 21, 2016. Following pre-trial motion practice, the following defendants remain: 200 Park; Carr; RLI; Courthouse; TNA; C&O; and Newport.

Defendants 200 Park, Carr, and RLI (collectively, "Moving Defendants") now move for summary judgment, pursuant to CPLR 3212, dismissing the complaint. Nova opposes the motion and cross-moves for summary judgment, pursuant to CPLR 3212, against the Moving Defendants. The record before the Court contains, inter alia: deposition transcripts, the Agreement, the Subcontract, third party proposals, affidavits, and affirmations.

Discussion

A court may grant summary judgment where there is no genuine issue of material fact, and the moving party has made a prima facie showing of entitlement to a judgment as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); see generally American Sav. Bank v Imperato, 159 AD2d 444, 444 (1st Dept 1990) ("The presentation of a shadowy semblance of an issue is insufficient to defeat summary judgment"). The moving party's burden is to tender sufficient evidence to demonstrate the absence of any material issue of fact. See Ayotte v Gervasio, 81 NY2d 1062 (1993). Once this initial burden has been met, the burden then shifts to the party opposing the motion to submit evidentiary proof sufficient to create material issues of fact requiring a trial; mere conclusions and unsubstantiated allegations are insufficient. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980).

Defendants 200 Park and Carr are Entitled to Summary Judgment Dismissing Plaintiff's Claims

It is well-settled in New York that once a mechanic's lien has been discharged from real property by a bond, the lienor no longer has a cause of action against the owner of the property for lien foreclosure. See Bryant Equip. Corp. v A-1 Moore Contr. Corp., 51 AD2d 792, 792 (2d Dept 1976) ("there is no longer in existence an action to enforce a lien against real property. The bond has replaced the real property as the security to be attached and attacked"). Here, when RLI discharged the liens by issuing bonds in 2012, the bonds replaced the real property as the security to which the lien attaches, and this claim became not one against the property, but against the bond. As the owner and landlord of the property, 200 Park is no longer a proper party to the lien foreclosure action. See Norden Elec., Inc. v Ideal Elec. Supply Corp., 154 AD2d 580, 581 (2d Dept 1989) ("substitution of bond for mechanic's lien discharged lien and there no longer existed any claim against the real property, so that the owner was not a necessary party to litigation in which claimant sought to recover on the bond").

There are also no amounts due to Nova under the theory of unjust enrichment. In order to state a claim for unjust enrichment, a relationship must exist between the parties adequate to cause reliance or an inducement to perform. See Georgia Malone & Co., Inc. v Rieder, 19 NY3d 511, 516 (2012) ("a plaintiff cannot succeed on an unjust enrichment claim unless it has a sufficiently close relationship with the other party"). The record establishes that neither Carr nor 200 Park entered into any agreement or subcontracts with JGK's subcontractors, including Nova. Furthermore, Carr paid for JGK's six Payment Applications in full, and neither JGK nor Nova performed work subsequent to the last payment Carr submitted. Under these circumstances, there never having been any sums due and owing to the general contractor upon or after the date of the filing of the plaintiff's lien, there was never a fund to which the lien might attach").

Carr and 200 Park have not established their entitlement to indemnification for attorney's fees as the cited provisions in the Agreement and the Subcontract do not cover damages and claims arising out of breach of contract. Rather, the cited indemnification provisions cover, generally speaking, third party personal injury and other damage claims arising out of the negligent performance of the Project work.

Accordingly, 200 Park and Carr are entitled to summary judgment dismissing plaintiff's claims for lien foreclosure and unjust enrichment.

Neither Defendant RLI nor Plaintiff are Entitled to Summary Judgment

A defaulting general contractor is not entitled to recover the balance of its contract, in contract or quantum meruit, if it failed substantially to complete the contract and if the default was inexcusable. See Pecker Iron Works, Inc. v New York Trades Council Assn. of N.Y.C. Health Ctr. Inc., 22 AD3d 259, 260 (1st Dept 2005) ("The damages far exceeded the retainage funds, which under the contract were rightfully held by the owner pending completion of the work. The contractor never having completed the work, the funds remain in the owner's possession"). To constitute substantial performance, Nova must establish that any defects were insubstantial and any failure to complete the work was unintentional and inadvertent. On this record, it cannot be said, as a matter of law, whether there was a "substantial breach." On one hand, Moving Defendants allege that JGK and its subcontractors defaulted on over 400 punchlist items, and as JGK and Nova failed to address and remedy any of these items, they failed to substantially complete the contract. On the other hand, Nova claims that it completed all the construction work it was contracted to perform.

Questions of fact exist as to whether or not JGK or Nova substantially completed the Project work. RLI is subrogated to all of the defenses that Carr and 200 Park would have had. See RLI Ins. Co. v New York State Dept. of Labor, 97 NY2d 256, 266 (2002) ("this Court has long held that a completing surety succeeds under equitable subrogation principles to all rights that the obligee/owner has against the contractor"). Thus, neither side is entitled to summary judgment on the lien foreclosure and unjust enrichment claims.

Conclusion

Defendants 200 Park, L.P. and PBC 200 Park Avenue, LLC d/b/a Carr Workplaces' motion for summary judgment dismissing plaintiff's complaint as against them is hereby granted in all respects, and plaintiff Nova Brothers, Inc. a/k/a Avon Contractors's cross-motion for summary judgment against the aforementioned defendants is hereby denied. Accordingly, the clerk is hereby directed to enter a judgment of dismissal of the case as against said defendants only.

Defendant RLI Insurance Company and plaintiff Nova Brothers, Inc. a/k/a Avon Contractors' motions for summary judgment as against each other are hereby denied.

Dated: October 14, 2016

Arthur F. Engoron, J.S.C.