

**Brightside Home Improvements, Inc. v Northeast Home Improvement Servs.**

2017 NY Slip Op 30888(U)

April 11, 2017

Supreme Court, Nassau County

Docket Number: 608059/2016

Judge: Arthur M. Diamond

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. ARTHUR M. DIAMOND**  
**Justice Supreme Court**

-----X  
**BRIGHTSIDE HOME IMPROVEMENTS, INC.,**  
**and others similarly situated,**

**Plaintiff,**

**-against-**

**NORTHEAST HOME IMPROVEMENT SERVICES,**  
**PERRI LOGAN EQUITY, INC. A/K/A PERRI**  
**LOGAN GROUP, STEVE NEMIROFF, INDIVIDUALLY,**  
**AND CHARLES LACHMAN, MILANKA LACHMAN,**  
**AMERICAN BUILDERS & CONTRACTORS SUPPLY**  
**CO, INC., D/B/A ABC SUPPLY CO, INC., KLEET**  
**LUMBER CO, INC., AND JOHN DOES 1 TO 10 WHO**  
**ARE CORPORATE OFFICERS WITH A DUTY TO**  
**PROTECT LIEN LAW ART. 3-A TRUST FUNDS, AND**  
**JOHN DOES 11-20 WHO ARE YET UNKNOWN**  
**NECESSARY PARTIES.**

**Defendants.**

-----X  
**The following papers having been read on this motion:**

**Notice of Motion ..... 1**  
**Cross-Motion & Opposition ..... 2**  
**Reply ..... 3**

Defendants Northeast Home, Perri Logan Equity, and Nemiroff (hereinafter "moving Defendants") request an order of this Court to dismiss the complaint in its entirety pursuant to CPLR §3211, to vacate and cancel Plaintiff's lien pursuant to Lien Law §59, and for sanctions against Plaintiff. It should be noted that moving Defendants have not specified under which section of the dismissal statute they are moving under, and thus the Court will assess the request under CPLR §3211(a)(7). Plaintiff herein cross-moves to consolidate the within action with a related one filed under Supreme Court Nassau County Index Number 608219-16 and also opposes the moving Defendant's' application. Based upon the following, both motions herein are denied in their entirety.

**TRIAL PART: 7**

**NASSAU COUNTY**

**INDEX NO: 608059/2016**

**MOTION SEQ #: 1, 2**

**SUBMIT DATE: 4/6/17**

As a preliminary matter, both counsel for moving Defendants and Plaintiff have written the Court at the time of submission with regard to Plaintiff's Reply dated April 5, 2017. In reviewing the within motion, moving Defendants' Reply papers dated April 4, 2017, do not oppose or even discuss at all Plaintiff's cross-motion to consolidate; rather, moving Defendants' Reply papers only discuss its own application to dismiss the complaint. Thus, although Plaintiff has cross-moved and would be entitled to reply to any opposition submitted by moving Defendants, moving Defendants failure to submit opposition to Plaintiff's cross-motion leaves this court with no other alternative but to deem Plaintiff's papers a sur-reply, and will not consider this submission in deciding the within motions.

On a motion to dismiss the complaint pursuant to CPLR §3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. Clarke v. Laidlaw Transit, Inc., 125 AD3d 920 (2<sup>nd</sup> Dept. 2015). Thus, a motion to dismiss made pursuant to CPLR § 3211(a)(7) will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law. Id.

In the instant case, moving Defendants have failed to satisfy their burden to warrant dismissal of the within complaint. Moving Defendants sole argument for dismissal is the doctrine of law of the case, stating that the court's decision in a related action under Supreme Court Nassau County Index Number 608219-16. Although related, that action had not been consolidated with the within action, and thus the decision rendered in that instance could not properly be considered law of this case. Furthermore, this Court finds that Plaintiff has properly pled its causes of action for breach of contract (Palmetto Partners, L.P. v. AJW Qualified Partners, LLC, 83 AD3d 804, 921 NYS2d 260 [2<sup>nd</sup> Dept., 2011]), account stated (Ross v. Sherman, 57 AD3d 758, 870 NYS2d 383 [2<sup>nd</sup> Dept., 2008]), unjust enrichment (Mandarin Trading Ltd. V. Wildenstein, 16 NY3d 173, 919 NYS2d 465 [2011], *citing* Citibank, N.A. v. Walker, 12 AD3d 480, 787 NYS2d 48 [2<sup>nd</sup> Dept., 2004]), issuing a bad check (*see* GOL §11-104), diverting trust funds (Atlas Building Systems, Inc. v. Rende, 236 AD2d 494, 653

NYs2d 694 [2<sup>nd</sup> Dept., 1997]; South Carolina Steel Corp. v. Miller, 170 AD2d 592, 566 NYs2d 368 [2<sup>nd</sup> Dept., 1991]), and foreclosing a mechanics lien (Lien Law §24). Accordingly, moving Defendants motion to dismiss is properly denied.

Turning now to Plaintiff's motion to consolidate the within action with the related action filed under Supreme Court Nassau County Index Number 608219-16, that application must also be denied at this time. Moving Defendants commenced Supreme Court Nassau County Index Number 608219-16 to vacate a mechanic's lien and for sanctions; shortly thereafter, they moved by order to show cause for the ultimate relief requested in that complaint. Upon the Court's denial of the motion, the court effectively dismissed the complaint at issue. Therefore, there is no pending matter to consolidate with the instant case. Furthermore, although Plaintiff (the defendant in the related action), filed an answer that contained counterclaims, such filing should be deemed a nullity, particularly since the counterclaims alleged are identical to the relief sought in the within action. The plaintiff (moving Defendants in this action) in that action having amended their complaint outside the statutory period and without leave of Court should also be deemed a nullity. Thus, Plaintiff's motion is properly denied.

However, this Court is without knowledge as to the status of service of the Amended Complaint in the instant proceeding, which does appear to have been timely filed without leave of Court; in addition, Defendants have yet to serve an Answer to either the original complaint or the Amended Complaint. Therefore, Plaintiff is hereby directed to serve the Defendants in the instant case and file proof of same on or before May 31, 2017. Defendants, both the moving Defendants and those who have not yet participated in the within action, shall file and serve an appropriate Answer to the Amended Complaint on or before July 15, 2017. No further extensions shall be given.

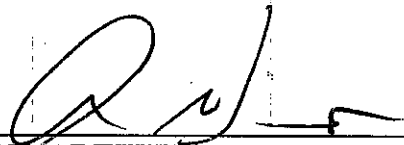
The parties shall appear for a preliminary conference in the lower level of Supreme Court, Nassau County, to complete a discovery schedule in the instant matter on August 21, 2017, at 9:30am.

The Court declines to award sanctions at this time.

This hereby constitutes the decision and order of this Court.

Dated: April 11, 2017

ENTER



HON. ARTHUR M. DIAMOND, J.S.C.

**ENTERED**

APR 12 2017

NASSAU COUNTY  
COUNTY CLERK'S OFFICE