

Allure Metal Works, Inc. v JRM Constr. Mgt., LLC

2017 NY Slip Op 31686(U)

August 9, 2017

Supreme Court, New York County

Docket Number: 154956/2016

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED, J.S.C.
Justice

PART 2

-----X

ALLURE METAL WORKS, INC.,
Plaintiff,

INDEX NO. 154956/2016

MOTION DATE _____

MOTION SEQ. NO. 001

- v -

JRM CONSTRUCTION MANAGEMENT, LLC, ORCA
MECHANICAL, INC., 3 COLUMBUS CIRCLE, LLC, VIGILANT
INSURANCE COMPANY

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

were read on this application to/for Dismissal

Upon the foregoing documents, it is
ordered that the motion is denied.

In this action by plaintiff Allure Metal Works, Inc. seeking damages for breach of contract and an account stated and to foreclose on a mechanic's lien filed May 2, 2016, defendants JRM Construction Management, LLC ("JRM"), ORCA Mechanical, Inc. ("ORCA"), 3 Columbus Circle, LLC ("3 Columbus"), and Vigilant Insurance Company ("Vigilant") move, pursuant to CPLR 3211(a)(1) and (a)(7), to dismiss the complaint and declare the lien null and void. Plaintiff opposes the

motion. After oral argument, and after a review of the parties' motion papers and the relevant statutes and case law, the motion is denied.

FACTUAL AND PROCEDURAL BACKGROUND:

This action was commenced on June 14, 2016. Ex. F to Englander Aff. In the complaint, plaintiff alleged that, between February 7, 2015 and November 26, 2015, it provided labor and materials consisting of the fabrication of duct work at ORCA's request in connection with a project at 3 Columbus Circle, New York, New York for the price of \$380,424. Id. Plaintiff claimed that, of the \$380,424 owed, only \$191,579 has been paid, leaving a balance due to plaintiff of \$188,845. Id. Plaintiff alleged that the balance was due from ORCA under breach of contract and account stated theories. Id. Plaintiff further alleged that, on May 2, 2016, a mechanic's lien was filed against 3 Columbus Circle and was served on the defendants. Id. On or about May 5, 2016, JRM filed an undertaking pursuant to Lien Law section 19 in the amount of \$207,729.50. Id. The undertaking was allegedly executed by JRM as principal and Vigilant as surety and this resulted in the discharge of the lien. Id.

On the first and second causes of action, for breach of contract and account stated, respectively, plaintiff sought \$188,845 from ORCA. Id. On the third cause

of action against JRM, ORCA, 3 Columbus Circle and Vigilant, plaintiff sought, inter alia, a declaration that it had a lien on the premises in the amount of \$188,845, plus interest from November 26, 2015, and a declaration that Vigilant was liable for the amount of the lien. Id.

Defendants now move, pursuant to CPLR 3211(a)(1) and (a)(7), to dismiss the complaint and to declare the lien null and void and to vacate the same.

CONTENTIONS OF THE PARTIES:

In support of the motion, defendants' attorney argues, inter alia, that the total amount of plaintiff's contract was \$270,098.50 and not the \$380,424 alleged by plaintiff in the complaint. Englander Aff., at par. 8. Defendants assert that, between April 6, and June 30, 2015, ORCA paid plaintiff the sum of \$184,500, leaving a balance on the contract of \$85,598.50. Id., at pars. 9, 14. Due to plaintiff's failure to properly perform its work, JRM issued back charges as negative change orders to ORCA in the amount of \$59,314.50. Id., at par. 10. ORCA in turn passed these back charges on to plaintiff. Id., at par. 11. Due to JRM's dissatisfaction with the project and plaintiff's deficient performance of the work, ORCA allegedly spent

\$27,500 to fix and complete plaintiff's work. Id., at par. 12.¹ Counsel maintains that, once the back charges and costs to repair and complete plaintiff's work were factored in, plaintiff owed ORCA \$766. Id., at par. 14.

Defendants' counsel argues that, since the documentary evidence refutes plaintiff's factual allegations and conclusively disposes of the same as a matter of law, the complaint must be dismissed pursuant to CPLR 3211(a)(1). Further, defendants' counsel asserts that the complaint must be dismissed pursuant to CPLR 3211(a)(7) since it fails to state a cause of action. In support of this argument, defendants' counsel maintains that the lien incorrectly represents that the contract value was \$380,424, which amount was incorrect, since it should have been \$270,098.50, and that plaintiff misrepresented in the lien that it worked through November of 2015 when it actually finished its work in July of that year.

Joseph Kulic, owner and president of ORCA, states in an affidavit in support of the motion that, in February, 2015, defendant JRM, as general contractor, and ORCA entered into a contract pursuant to which ORCA was to perform labor and provide materials in connection with a ductwork project on the 14th, 16th, and 17th

¹ Although counsel represents that the expenditure of \$27,500 is documented by Ex. E to her affirmation, the documents provided comprising that exhibit yield a sum of \$27,050.

floors at 3 Columbus Circle. Kulic Aff., at par. 4. On or about February 7, 2015, plaintiff and ORCA entered into a subcontract for the amount of \$225,000 pursuant to which plaintiff was to perform a portion of the ductwork on the project. Id., at par. 5. According to Kulic, plaintiff performed its work at the project from February, 2015 until July, 2015. Id., at par. 8. At some time between April 6, 2015 and June 30, 2015, ORCA paid plaintiff \$184,500, leaving a balance of \$85,598.50. Id., at par. 12.

At a July 2015 meeting with Richard Kerns, an employee of plaintiff, Kerns and Kulic allegedly agreed that plaintiff was due change orders in the amount of \$45,098.50 and that the total amount of plaintiff's contract, including change orders, was \$270,098.50. Id., at pars. 10-11.

Kulic further maintains that, according to an affidavit in support of the motion submitted by Joseph Romano, a member of JRM, JRM issued back charges as negative change orders to ORCA in the amount of \$59,314.50 due to plaintiff's failure to properly perform its work. Id., at par. 13. He maintains that, as a result of JRM's dissatisfaction with the project and due to plaintiff's deficient performance of its work, ORCA spent \$27,500 to repair and complete plaintiff's work. Id., at par. 15. Kulic maintains that, considering the contract amount, less payments, back

charges and the costs of repairing plaintiff's work, plaintiff owes ORCA \$766.00.

Id., at par. 17.

Romano states in an affidavit in support of the motion that ORCA's work was substantially completed as of July of 2015. Romano Aff., at par. 4. However, JRM then discovered that the ductwork was deficient and "issued back charges in the form of negative change orders in the amount of \$53,536.00 and a deductive change order in the amount of \$5,778.50 for a total reduction of the subcontract in the amount of \$59,314.50." Romano Aff., at par. 5.

In opposition to the motion, plaintiff's counsel argues that plaintiff has stated claims upon which relief can be granted and that defendants have failed to submit documentary evidence which conclusively establishes a defense as a matter of law. Counsel's opposition to the motion is supported by the affidavit of plaintiff's employee Richard Kerns.

Kerns states in his affidavit in opposition to the motion that he helped supervise plaintiff's work during the project. Kern Aff., at par. 1. According to Kerns, ORCA was JRM's HVAC subcontractor and plaintiff was hired to perform sheet metal work as a subcontractor for ORCA. Id., at par. 2. Kerns states that,

although Kulic refers to a contract annexed to his affidavit, the said contract contains no signatures and, in any event, the contract between plaintiff and ORCA consisted of work orders for the installation of duct work totaling \$225,000. Id., at par. 3. According to Kerns, plaintiff had to perform extra work during the project at a cost of \$155,355. Id., at par. 4. The work and extra work were performed and plaintiff was owed a total of \$188,845. Id., at par. 4. Kerns insists that, although defendants maintain that their Exhibit B was, inter alia, an agreement to accept back charges, it was actually prepared in connection with settlement negotiations between he and Kulic and the men agreed that, for settlement purposes, plaintiff would “close out” the extra claim conditioned on immediate payment of \$45,090.50, which never occurred. Id., at par. 5. He further maintains that defendants’ Exhibit B had nothing to do with contract balances, but only pertained to closing out “extras”. Id., at par. 6.

Further, Kerns claims that defendants have no documentary proof of back charges. Id., at par. 7. Kerns says that plaintiff has proof of only one back charge, in the amount of \$3,800 for damage to glass. Id. He maintains that the back charges referred to by defendants were not back charges to plaintiff but rather from the general contractor to ORCA. Id. ORCA never passed the said back charges, other than the \$3,800 charge, to plaintiff. Id., at pars. 7-8. Kerns also states that plaintiff

continued working through November of 2015. Id., at par. 9; Ex. D to Kerns' Aff.² Kerns maintains that the total price for the work plaintiff performed is \$380,355; that defendant concededly paid plaintiff only \$184,500, plaintiff agreed to a back charge of \$3,800, and thus plaintiff is entitled to a credit of \$188,300. Id., at par. 10. Kerns claims that that "the difference between the total amount due plaintiff for work, labor and services and the amount paid plus credits amounts to \$192,055", which "sum actually exceeds the amount plaintiff is suing for by approximately \$4,000." Id., at par. 10.

In reply, defendants submit, inter alia, the affidavit of Kulic, in which he denies that defendants' Exhibit B was intended for settlement purposes. Kulik Reply Aff., at par. 4. Rather, he maintains that Exhibit B is an agreement regarding the amount due and owing for back charges on the project. Id. Kulic also maintains that plaintiff incorrectly asserts that it is owed \$188,845. Kulic asserts that a statement provided by ORCA to plaintiff on November 19, 2015 establishes that a balance of \$93,403.50 remained due to plaintiff as of that date. Id., at par. 5; Ex. A to Kulic Reply Aff.

² Ex. D to Kerns' affidavit is a report entitled "Allure Metal Works Inc. Time by Job Detail February 15 through November 30, 2015". However, it is unclear from this document whether it represents time worked by ORCA.

LEGAL CONCLUSIONS:

Under CPLR 3211(a)(1), dismissal is warranted where the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law. See Ellington v EMI Music, Inc., 24 NY3d 239, 997 N.Y.S.2d 339, 21 N.E.3d 1000 (2014); Leon v Martinez, 84 NY2d 83, 638 N.E.2d 511, 614 N.Y.S.2d 972 (1994). To determine whether a complaint adequately states a cause of action, the court must "liberally construe the complaint," accept the facts alleged in it as true, and accord the plaintiff "the benefit [*7] of every possible favorable inference." 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-152, 773 N.E.2d 496, 746 N.Y.S.2d 131 (2002); see [**7] Romanello v Intesa Sanpaolo, S.p.A., 22 NY3d 881, 998 N.E.2d 1050, 976 N.Y.S.2d 426 (2013); CPLR 3026. A motion to dismiss must be denied "if from the pleading's four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." 511 W. 232nd Owners Corp. v Jennifer Realty Co., *supra*, at 152 (internal quotation marks omitted); Guggenheimer v Ginzburg, 43 NY2d 268 275, 372 N.E.2d 17, 401 N.Y.S.2d 182 (1977). Where the court considers evidentiary material, the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one" (Guggenheimer v Ginzburg, *supra*, at 275), but it must be "shown that a material fact as claimed by the pleader to be one is not a fact at all" and that "no significant dispute exists regarding it" (*id.*) for dismissal to ensue.

(*Metro 765, Inc. v Eighth Ave. Sky, LLC*, 2017 NY Slip Op 30898[U], *6-7 [Sup Ct, NY County 2017].)

Viewing the allegations in the complaint in the light most favorable to plaintiff, this Court finds that they spell out claims for breach of contract, an account

stated, and to foreclose on the lien. Further, defendants “failed to present documentary evidence that either flatly contradicts the allegations in the complaint so as to warrant dismissal pursuant to CPLR 3211(a)(7) (*see Maas v Cornell Univ.*, 94 NY2d 87, 91 [1999]) or conclusively establishes a defense as a matter of law so as to warrant dismissal pursuant to CPLR 32119(a)(1) (*see Leon v Martinez*, 84 NY2d [at 88]).” *Constellation Energy Servs. Of N.Y., Inc. v New Water St. Corp.*, 146 AD3d 557, 557 (1st Dept 2017).

Even a cursory review of the affidavits submitted in support of, and in opposition to, the motion reflect that they are contradictory and raise issues of fact precluding the granting of this motion. *See Constellation Energy Servs. Of N.Y., Inc. v New Water St. Corp.*, 146 AD3d, at 557; *High Definition MRI, P.C. v Travelers Cos., Inc.*, 137 AD3d 602, 602 (1st Dept 2016). These contradictions include, but are not limited to, the conflicting interpretations by the affiants of the documents submitted to this Court in connection with the motion, such as when plaintiff’s work was completed; the total amount of plaintiff’s contract; the amount owed to plaintiff for its work; and whether back charges were issued and, if so, in what amount. Thus, the motion must be denied.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion is denied in all respects; and it is further

ORDERED that defendants shall serve and file an answer within thirty (30) days of service of a copy of this order with notice of entry; and it is further

ORDERED that the parties shall appear for a preliminary conference in Room 280, 80 Centre Street, on the 3rd day of October, 2017 at 2:15 p.m. at 80 Centre Street, New York, New York, Room 280; and it is further

ORDERED that this constitutes the decision and order of the court.

**HON. KATHRYN FREED
JUSTICE OF SUPREME COURT**



8/9/2017
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	DO NOT POST	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	