

Prima Contr. Ltd. v Taktl LLC
2018 NY Slip Op 33983(U)
October 24, 2018
Supreme Court, Nassau County
Docket Number: 604172-18
Judge: Timothy S. Driscoll
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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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PRIMA CONTRACTING LTD.,

Plaintiff,

-against-

**TAKTL LLC, ADELPHI UNIVERSITY, and
EDA CONTRACTORS, INC.,**

Defendants.

TRIAL/IAS PART: 11

NASSAU COUNTY

Index No: 604172-18

**(formerly Queens County
Index No. 710802-16)**

Motion Seq. No. 3

Submission Date: 10/3/18

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The following papers having been read on this motion:

- Notice of Motion, Affidavit in Support and Exhibits.....x**
- Memorandum of Law in Support.....x**
- Memorandum of Law in Opposition and Affirmation in Opposition.....x**
- Reply Memorandum of Law.....x**

This matter is before the Court for decision on the motion filed by Defendant Adelphi University (“Adelphi”) on August 29, 2018 and submitted on October 3, 2018. For the reasons set forth below, the Court grants the motion and dismisses this action as asserted against Adelphi.

BACKGROUND

A. Relief Sought

Adelphi moves for an Order, pursuant to CPLR § 3212, granting summary judgment dismissing the action as against Adelphi.

Plaintiff Prima Contracting Ltd. (“Prima” or “Plaintiff”) concedes that the breach of contract, account stated, promissory estoppel and quantum meruit counts must be dismissed as against Adelphi. Plaintiff submits, however, the Court should deny Adelphi’s motion as it relates to the fourth cause of action alleging unjust enrichment (*see* P’s Memo. of Law in Opp. at p. 1).

B. The Parties' History

The parties' history is outlined in the prior decision ("Prior Decision") of the Court dated July 11, 2018 and the Court incorporates the Prior Decision by reference as if set forth in full herein. The Prior Decision addressed the following prior motions: 1) the prior motion by Defendants Taktl, LLC ("Taktl"), and EDA Contractors, Inc. ("EDA") for an Order consolidating the above-captioned action (the "Instant Action") with the matter titled *Prima Contracting Ltd. v. EDA Contractors, Inc. and U.S. Specialty Insurance Company*, Nassau County Supreme Court Index Number 601767/17 (the "Second Action" or "Foreclosure Matter"), and 2) Plaintiff's prior cross motion for an Order severing Taktl's counterclaims against Plaintiff. In the Prior Decision, the Court 1) granted Taktl and EDA's motion and directed that the Instant Action was joined for trial with the Second Action; and 2) denied Plaintiff's cross motion.

As noted in the Prior Decision, the complaint in the Instant Action ("Instant Complaint") alleges as follows:

Plaintiff is a New York corporation that provides operation, design and construction services. Defendant Taktl is a Pennsylvania corporation that provides designing and manufacturing services. Defendant Adelphi University ("Adelphi") is a private university in New York. Defendant EDA is a Pennsylvania corporation that provides exterior envelopes to all commercial, institutional and industrial buildings. Exterior envelopes provided include wall panels, accessories, roofing, waterproofing, air and vapor barriers, and vegetative root systems.

Prima provided Taktl with panel re-staining services. EDA is the general contractor in the matter who approved of and authorized the re-staining work on the panels. Adelphi is the owner of the property where the re-staining work was to be done. On October 14, 2015, Taktl and EDA approved re-staining work at the cost of \$60,121. On November 16, 2015, the first contract was amended to include more work at the cost of \$18,655. On February 23, 2016, Taktl and EDA approved a second contract for re-staining at the cost of \$54,547. On April 18, 2016, Prima completed all re-staining work.

On October 27, 2015 Prima submitted invoices to Taktl for 50% of the contract work. Plaintiff invoiced Taktl regarding payment without receiving payment back. Taktl has not made any valid payments towards this debt. Prima repeatedly advised Taktl of the balance, which remains unpaid. As of September 8, 2016, Defendants owe Plaintiff \$132,323.00 plus 1.5% interest for a total of \$134,307.85. As of September 8, 2016, Plaintiff provided \$132,323.00 in

panel re-staining services to Defendants, for which Defendants have failed to compensate Plaintiff. The First Complaint contains five (5) causes of action:

- 1) against all Defendants for breach of contract;
- 2) against all Defendants under the theory of account stated;
- 3) against all Defendants under the theory of promissory estoppel;
- 4) against all Defendants under the theory of unjust enrichment; and
- 5) against all Defendants under the theory of quantum meruit.

As also noted in the Prior Decision, the complaint in the Second Action (“Second Complaint”), which is titled “Verified Complaint to Foreclose a Discharge of Mechanic’s Lien Bond,” alleges as follows:

Adelphi was the owner in fee of premises located at 1 South Avenue, Garden City, New York (the “Property”). On or before October 14, 2015, Prima, as general contractor, entered into an agreement pursuant to which it was to provide panel re-staining services to EDA on a project (“Project”) located at Adelphi, with the knowledge and consent of the owner. Pursuant to the agreement, Prima agreed to provide the re-staining for the agreed sum of \$132,323.00. Prima performed under the agreement by furnishing the re-staining to EDA, thereby earning the sum of \$132,323.00, no part of which has been paid to Prima, despite demand.

On or about July 7, 2016, Prima filed a Notice of Mechanic’s Lien in the sum of \$143,855.03 with the State of New York, Nassau County, Clerk’s Office (“Nassau County Clerk”) in connection with the improvements made to Adelphi. Prima filed its Notice of Mechanic’s Lien based on labor provided on the Project in the amount of \$132,323.00, as well as approximately \$10,000.00 in work performed outside of the agreement for panels that needed to be re-stained, with the cost of labor determined based on prior dealings on a per-panel basis. Prima’s Mechanic’s Lien was served, and proof of service of said lien was filed with the Nassau County Clerk.

On or about August 2, 2016, EDA executed a Discharge of Mechanic’s Lien Bond in the sum of \$158,240.53 with the Nassau County Clerk, to discharge the lien from the Premises. Defendant’s Discharge of Mechanic’s Lien was served, and proof of service of said lien was filed with the Nassau County Clerk. The Discharge of Mechanic’s Lien Bond names Prima as obligee, EDA as Principal and U.S. Specialty as Surety.

By reason of the foregoing, and by filing and docketing of the Discharge of Mechanic’s Lien Bond and affidavits of service regarding the Discharge of Mechanic’s Lien Bond, Prima

acquired a good, valid, and subsisting lien on the Discharge Bond. Defendant U.S. Specialty is the surety on the undertaking to discharge Prima's Notice of Lien and, for that reason, is made a party hereto. No person has any subsequent liens or claims against said bond by way of judgment, mortgage or otherwise. Accordingly, Plaintiff alleges, Plaintiff is entitled to equitably foreclose its lien to recover the unpaid sum of \$132,323.00.

In the Second Complaint, Plaintiff seeks judgment 1) determining and adjudging Prima to have a valid and subsisting lien on the interest of EDA in the Discharge of Mechanic's Lien Bond; 2) in favor of Prima for the enforcement of said lien against the Discharge Bond, in form only for the purpose of satisfying the condition of said bond; 3) declaring the surety liable and awarding Prima judgment in the sum of \$132,323.00 against the surety; 4) in favor of Prima in the sum of \$132,323.00 with interest; 5) adjusting and determining the equities of all parties to the Instant Action and determining the validity, extent and priority of the claims and liens to be asserted herein; 6) directing EDA to pay over to Plaintiff the amount adjudicated as the amount of its lien and claim herein, with interest, and granting Plaintiff judgment for any deficiency, together with the costs and disbursements of the Instant Action; and 7) if it is determined that Plaintiff did not have a valid and subsisting lien, granting Plaintiff a personal judgment against EDA in the sum of \$132,323.00 with interest thereon, together with the costs and disbursements of the Instant Action.

As also noted in the Prior Decision, in Taktl's Verified Answer with Affirmative Defenses filed in the Instant Action, Taktl asserts five (5) counterclaims ("Counterclaims") against Plaintiff based on the following allegations:

In connection with the work that is the subject matter of the First Complaint, Plaintiff was to apply color coating to installed Taktl wall panels on the Property. On or about October 12, 2015, after the scope of installed panels at the Property requiring color remediation increased from the 407 estimated in August 2015 to 629 in October 2015, Plaintiff agreed to perform such work for \$60,121.00. Thereafter, on or about February 23, 2016, Plaintiff and Taktl entered into a second agreement pursuant to which Plaintiff agreed to perform similar remediation work on an additional 340 panels on the Property for \$53,547.00, and included in the \$53,547.00 quote from Plaintiff was a line item of \$10,500.00 for equipment rental, which was ultimately provided by EDA instead of Plaintiff. Consequently, the total contract price for the Project was \$103,168.00. On or about July 7, 2016, however, Plaintiff filed a "vastly exaggerated and unlawful" mechanic's lien in connection with the Project in the

amount of \$143,855.05 (Taktl counterclaim at ¶ 4).

Plaintiff and Taktl had ongoing contractual relationships involving not only the Project, but also other projects. In connection with those other projects, Plaintiff owed Taktl certain payments as a result of labor, drawings, materials and hardware provided to Plaintiff. In total, the amount owed by Plaintiff to Taktl equals \$182,282.86, which amount has not been paid by Plaintiff. The outstanding amount owed by Plaintiff to Taktl exceeds any amount owed by Taktl to Prima.

The five (5) Counterclaims asserted by Taktl are:

- 1) willful exaggeration of lien/violation of New York State Lien Law based on the allegation that Plaintiff willfully exaggerated its lien in connection with the Adelphi Project;
- 2) breach of contract based on the allegation that Taktl entered into various contracts with Plaintiff for work in connection with projects referred to as the 133 Greenwich, Embassy Suites, The Hub, 164 1st Street and Lakewood Professional Office (Counterclaims at ¶ 16) and that Plaintiff failed to compensate Taktl in connection with those other projects;
- 3) breach of the implied covenant of good faith and fair dealing in connection with Plaintiff's failure to make required payments on the other projects;
- 4) negligence/defective work at the Lakewood Professional Office Project; and
- 5) unjust enrichment based on Plaintiff's failure to compensate Taktl in connection with the other projects.

In support of the motion now before the Court, James J. Perrino ("Perrino"), an Executive Vice President of Finance and Administration at Adelphi, provides a copy of Adelphi's Verified Answer in the Instant Action (Ex. B to Perrino Aff. in Supp.).¹ In that Answer, Adelphi denied many of the allegations in the Instant Complaint and asserted numerous affirmative defenses.

Perrino addresses numerous allegations in the Instant Complaint, specifically the

¹ As noted in the Prior Decision, the Instant Action was initially filed in Queens County. On or about October 5, 2016, Adelphi filed a demand for change of venue of the Instant Action from Queens County to Nassau County. That motion was granted on or about February 1, 2017, and the Instant Action was thereafter assigned Nassau County Supreme Court Index Number 604172-18.

allegations that 1) Plaintiff is owed \$132,323.00 as a result of “panel re-staining services” that it provided to Taktl (Perrino Aff. in Supp. at ¶ 3, citing Instant Comp. at ¶ 9); 2) “EDA is the general contractor in the matter who approved of and authorized the re-staining work on the panels” (*id.*); and 3) the following allegation set forth at paragraph 11 of the Instant Complaint:

On October 14, 2015, re-staining work was approved by TAKTL and EDA at the cost of \$60,121. On November 16, 2015, the first contract was amended to include more work at the cost of \$18,655. On February 23, 2016, TAKTL and EDA approved a second contract for re-staining at the cost of \$54,547.

Perrino submits that Plaintiff’s allegations do not support any cause of action against Adelphi. Perrino notes that the Instant Complaint does not contain any allegation that Adelphi entered into any contract with Prima, received bills from Prima, directed Prima to perform work, or agreed to pay Prima any amount. Perrino affirms that the reason for this is that Adelphi never entered into a contract with Prima, never received bills from Prima, never directed Prima to perform any work, and never agreed to pay Prima any money. The only allegation involving Adelphi is that “Adelphi is the property owner where the re-staining work was to be done” (Perrino Aff. in Supp. at ¶ 5, quoting Instant Comp. at ¶ 10).

Perrino notes that in the Second Complaint, Prima acknowledges that EDA executed a Discharge of Mechanic’s Lien Bond in the amount of \$158,240.53, filed that document in the Nassau County Clerk’s Office on or about August 2, 2016, and effected service of that document. Thus, despite the fact that its Mechanic’s Lien had been bonded, Prima first elected not to seek to foreclose on the bond of its lien but, rather, to commence the Instant Action. Perrino submits that to the extent that Prima was not paid by EDA or Taktl for the work that EDA or Taktl agreed to pay for, Prima can seek relief in the Instant Action against EDA and/or Taktl. In light of the foregoing, Perrino submits that Prima does not have a valid claim against Adelphi.

In opposition, Jorge Ouvina (“Ouvina”), an executive of Prima, affirms that he was the primary lead on the Adelphi Project. Ouvina affirms that Prima contracted with EDA and Taktl to perform panel re-staining services at Adelphi. On October 14, 2015, Taktl and EDA approved re-staining work at the cost of \$60, 121. On November 16, 2015, the first contract was amended to include more work at the cost of \$18,655. On February 23, 2016, Taktl and EDA approved a second contract for re-staining at the cost of \$54,547.

Ouvina affirms that on April 18, 2016, Prima completed all of the re-staining work on the Adelphi campus. Around that same time, Ouvina had a meeting with Adelphi's architect, a project manager from EDA, a supervisor from EDA, and two representatives of Adelphia. Ouvina does not recall the names of the architect or the representatives of EDA or Adelphi. At this meeting, Adelphi's representatives stated that they wanted additional panels re-stained. Ouvina responded to this request with concerns over payment, as Taktl, EDA and Adelphi were substantially in arrears and the originally contracted work was complete. Ouvina affirms that the Adelphi representatives assured Ouvina that they would pay the amount in arrears if Taktl or EDA did not pay those sums.

C. The Parties' Positions

As noted herein, Plaintiff concedes that all of the causes of action except for the fourth cause of action, alleging unjust enrichment, should be dismissed. With respect to the fourth cause of action, Adelphi submits that this cause of action is not viable in light of case law holding that a property owner who contracts with a general contractor does not become liable to a subcontractor on a quasi-contract theory unless it expressly consents to pay for the subcontractor's performance, which did not occur in the Instant Action.

Plaintiff submits that the unjust enrichment claim is viable, notwithstanding the existence of an express contract governing the subject matter of this dispute, in light of Adelphi's promise to pay Plaintiff should Taktl and EDA fail to do so. Plaintiff cites the affidavit of Ouvina who affirms that on or about April 2016, Adelphi expressly consented to pay Plaintiff the amounts owed, and thereafter assured Plaintiff that it would be paid in full by Adelphi.

In reply, Adelphi submits that the Ouvina affidavit is legally and factually insufficient to defeat Adelphi's motion. Adelphi notes that Ouvina affirms that he does not recall the names of the architect or representatives to whom he spoke. Moreover, Adelphi submits, Ouvina's "conclusory and self-serving" statement that Adelphi assured him that it would pay the amount in arrears if Taktl or EDA did not do so (Adelphi Reply Memo. of Law at p. 3) is inadmissible, and insufficient to refute Adelphi's demonstration of its entitlement to summary judgment.

Adelphi contends, further, that even if the Ouvina affidavit contained evidence in admissible form, it would not be sufficient to support Plaintiff's unjust enrichment claim because the subcontractor must also demonstrate that it was working for the owner when it performed its

work resulting in unjust enrichment, which Plaintiff cannot do. Adelphi submits that, by Ouvina's own words, Prima complete all re-staining work on the Adelphi campus by April 18, 2016 (see Ouvina Aff. at ¶ 5). Ouvina, however, fails to allege, or prove, that at the time that Prima performed the re-staining work it was working for Adelphi. Moreover, Ouvina's affidavit is to the contrary. Adelphi notes that Ouvina alleges that the unnamed Adelphi representatives assured him that they would pay the amount in arrears if it was not taken care of by Taktl or EDA. Adelphi submits that any reference by an Adelphi representative to the "amount in arrears" must have been made after the work was completed and a bill had been issued; otherwise, there would have been no arrears at that time. Adelphi submits that Ouvina's affidavit asserting that "some unnamed persons at Adelphi promised to pay for work done for TAKTL or EDA" (Adelph Reply Memo. of law at p. 4) does not provide a basis for an unjust enrichment claim against Adelphi.

RULING OF THE COURT

A. Summary Judgment

On a motion for summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. *Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Taft LLP*, 26 N.Y.3d 40, 49 (2015), quoting *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action. *Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Taft LLP*, 26 N.Y.3d at 49, citing *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 503 (2012), quoting *Alvarez v. Prospect Hosp.*, 68 N.Y.2d at 324. Viewing the evidence in the light most favorable to the non-moving party, if the nonmoving party, nonetheless, fails to establish a material triable issue of fact, summary judgment for the movant is appropriate. *Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Taft LLP*, 26 N.Y.3d at 49, quoting *Ortiz v. Varsity Holdings, LLC*, 18 N.Y.3d 335, 339 (2011).

B. Property Owner's Liability to Subcontractor

A subcontractor may not assert a cause of action to recover damages for breach of contract against a party with whom it is not in privity. *Spectrum Painting Contrs., Inc. v.*

Kreiser Borg Florman Gen. Constr. Co., Inc., 64 A.D.3d 565, 576 (2d Dept. 2009), quoting *Perma Pave Contr. Corp. v. Paerdegat Boat & Racket Club*, 156 A.D.2d 550, 551 (2d Dept. 1989).

A property owner who contracts with a general contractor does not become liable to a subcontractor on a quasi contract theory unless it expressly consents to pay for the subcontractor's performance. *Sears Ready Mix, Ltd. v. Lighthouse Mar., Inc.*, 127 A.D.3d 845, 846 (2d Dept. 2015), quoting *Perma Pave Contr. Corp. v. Paerdegat Boat & Racket Club*, 156 A.D.2d at 551. The mere fact that the owner consented to the improvements and received some benefit from the subcontractor's activities is insufficient to recover on such a theory; the subcontractor must also show that it was working for the owner when it performed its work resulting in unjust enrichment. *Sears Ready Mix, Ltd. v. Lighthouse Mar., Inc.*, 127 A.D.3d at 846, quoting *Yellowstone Indus. v. Vinco Mar. Mgt.*, 305 A.D.2d 587, 588 (2d Dept. 2003).

C. Application of these Principles to the Instant Action

The Court grants the motion. In light of Plaintiff's concession that the breach of contract, account stated, promissory estoppel and quantum meruit counts must be dismissed as against Adelphi, the Court grants summary judgment dismissing those claims. The Court also dismisses the fourth cause of action, alleging unjust enrichment, based on the Court's conclusion that there is no credible evidence that Adelphi, the property owner that contracted with the general contractor, expressly consented to pay for the subcontractor's performance. The Ouvina affidavit, which contains inadequate specificity regarding Adelphi's alleged promises of payment, is legally and factually insufficient to defeat Adelphi's motion.

All matters not decided herein are hereby denied.

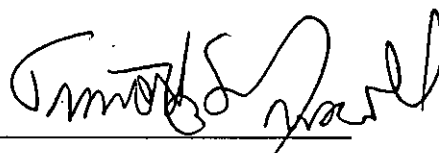
This constitutes the decision and order of the Court.

The Court reminds counsel for the remaining parties of their required appearance before the Court for a Certification Conference on November 30, 2018 at 11:00 a.m.

ENTER

DATED: Mineola, NY

October 24, 2018



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

OCT 25 2018

NASSAU COUNTY
COUNTY CLERK'S OFFICE