

Belle Light. LLC v USA Legwear, Inc.

2019 NY Slip Op 31231(U)

April 16, 2019

Supreme Court, New York County

Docket Number: 655053/2016

Judge: Kathryn E. Freed

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

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2

Justice

-----X INDEX NO. 655053/2016

BELLE LIGHTING LLC,

Plaintiff,

MOTION SEQ. NO. 002

- v -

USA LEGWEAR, INC., BASIC RESOURCES, LLC, WESTCHESTER FIRE INSURANCE COMPANY, AMERICO GROUP, INC., 1411 IC-SIC PROPERTY LLC C/O THE BLACKSTONE GROUP 1411 OC-SIC PROPERTY LLC, ARTISAN CONSTRUCTION PARTNERS, LLC, ARTISAN CONSTRUCTION, ARTISAN PARTNERS LLC, JAMES GALVIN, INDIVIDUALLY., A. LISS & CO., INC., ABSOLUTE WOODWORK, LLC, CANNON MECHANICAL, INC., CELTIC BUILDING SUPPLIES, INC., COOPER FRIEDMAN ECLECTIC SUPPLY CO., INC., CORE FLOORING INTERNATIONAL CONTRACTING, CRESTCON CONSTRUCTION, INC., DANTON HEATING AND PLUMBING, CORP., DFN Y DRYWALL & ACOUSTICS, INC., EDGE KRAFT, LLC, EVEREST SCAFFOLDING, INC., GLENWOOD MANAGEMENT SERVICES, INC., GROUND EFFECTS, INC., JACOBY ELECTRICAL CORP., HSBC BANK USA, J.G. ELECTRICAL INSTALLATIONS, INC., JLH INDUSTRIES, INC., MASPETH WELDING, INC., NATIONAL ASSOCIATION, NORDIC INTERIOR, INC., PEACE OF MIND TECHNOLOGIES, LLC, SEA BREEZE MECHANICAL CORP., STATE PAINTING AND DECORATING CO., INC., WING PARTNERS, LLC, JOHN DOE 1 THROUGH 10, JANE DOE 1 THROUGH 10

DECISION AND ORDER

Defendants.

-----X
The following e-filed documents, listed by NYSCEF document number (Motion Sequence 002) 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 168, 171, 172, 173, 174, 175, 176, 186, 187, 188, 189, 190, 195, 200

were read on this motion for SUMMARY JUDGMENT

Upon the foregoing documents, it is ordered that the motion is decided as follows.

In this consolidated lien foreclosure action, defendants USA Legwear, LLC, Basic Resources, Inc., Westchester Fire Insurance Company, and Americo Group, Inc. move, inter alia, for summary judgment pursuant to CPLR 3212. Plaintiff Belle Lighting and defendants Nordic Interior, Inc., Cannon Mechanical, Inc., and Danton Heating & Plumbing Corp. oppose the motion. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

In May of 2015, defendants Basic Resources, Inc. (“Basic”) and USA Legwear LLC (“USA”) (collectively “owners”) entered into a commercial sublease pursuant to which they rented the entire second floor and a portion of the third floor at 1411 Broadway, New York, New York, also known as Block 815, Lot 1 (“the premises” or “the project site”). Doc. 69 at par. 3; Doc. 70.¹ In October of 2016, USA entered into a contract (“the contract”) with Artisan Construction Partners, LLC (“ACP”), a general contractor, pursuant to which ACP was to perform certain construction at the premises. Doc. 71. The contract price was \$9,988,845.00. Doc. 69 at par. 6; Doc. 71 at par. 4.1. During the project, change orders totaling \$570,549.14 were approved, thereby increasing the contract price to \$10,559,334.14. Doc. 69 at pars. 8-9; Doc. 72.

Pursuant to the contract, all applications for payment had to be submitted by ACP to the project’s architect and the architect had to approve the payments. Doc. 71, at pars. 5.1.1 and 5.1.3. From October 2015 until May 2016, the project’s architect received six applications for payment from ACP and approved all of the same. Doc. 69 at par. 13; Doc. 73. By June 7, 2015, USA had

¹ The contract refers to the project as “AmeriCo Group”. Doc. 71 at 1. However, movants maintain that Americo Group, Inc. (“Americo”), although affiliated with USA, was not a party to the contract with ACP and has never been a tenant at the premises. Doc. 69 at par. 4.

paid ACP \$9,371,968.92, representing the amount of the approved payments submitted as of that time, plus a \$75,000 advance, for a total of \$9,446,968.92. Doc. 69 at pars. 14-15; Doc. 74.

Sometime later in June 2015, when no amounts were due and owing under the contract, ACP abandoned the project, absconding with the money it had been paid by USA instead of paying its subcontractors the money they were owed. Doc. 69 at pars. 16, 22.² USA did not continue work on the project as an agent of ACP, but rather retained a new contractor and various subcontractors to complete the project. Doc. 69 at par. 31. The subcontractors who were not paid as a result of ACP's conduct thereafter filed liens against the premises totaling \$4,132,633.53. Doc. 144 at 3.

On June 2, 2016, Jacoby Electrical Corp. ("Jacoby"), a subcontractor on the project hired by ACP, filed a lien ("the Jacoby Lien") in the amount of \$238,960 against the premises for amounts allegedly unpaid on its subcontract with ACP. Doc. 79 at par. 22; Doc. 81. At the owners' request, its surety, defendant Westchester Fire Insurance Company ("WFIC"), issued bond number K09304629, Index Number 101157/16, to bond and discharge the Jacoby Lien. Doc. 79 at par. 24. On July 20, 2016, owners filed the bond with the New York County Clerk under the foregoing Index Number and the property was marked discharged by bond. Doc. 79 at par. 24.

On June 15, 2016, Cannon Mechanical Inc. ("Cannon"), a subcontractor on the project hired by ACP, filed a lien ("the Cannon Lien") in the amount of \$430,036.50 against the premises for amounts allegedly unpaid on its subcontract with ACP. Doc. 79 at par. 22; Doc. 83. At the owners' request, WFIC issued bond number K09304605, Index Number 101159/16, to bond and discharge the Cannon Lien. Doc. 79 at par. 30. On July 20, 2016, owners filed the bond with the

² In April 2017, ACP and its principal, James Galvin, were indicted in New York County for defrauding at least 17 subcontractors out of \$2.9 million in connection with nine projects in Manhattan, including the project at the premises. Doc. 69 at par. 23; Doc. 75.

New York County Clerk under the foregoing Index Number and the property was marked discharged by bond. Doc. 79 at par. 31.

On June 30, 2016, Everest Scaffolding Inc. ("Everest"), a subcontractor on the project hired by ACP, filed a lien ("the Everest Lien") in the amount of \$8,000 against the premises for amounts allegedly unpaid on its subcontract with ACP. Doc. 79 at par. 34; Doc. 85. At the owners' request, WFIC issued bond number K09304617, Index Number 101158/16, to bond and discharge the Everest Lien. Doc. 79 at par. 36. On July 20, 2016, owners filed the bond with the New York County Clerk under the foregoing Index Number and the property was marked discharged by bond. Doc. 79 at par. 37.

On August 2, 2016, State Painting & Decorating Co. Inc. ("State Painting"), a subcontractor on the project hired by ACP, filed a lien ("the State Painting Lien") in the amount of \$22,084.21 against the premises for amounts allegedly unpaid on its subcontract with ACP. Doc. 79 at par. 40; Doc. 87. At the owners' request, WFIC issued bond number K095045098, Index Number 101442/16, to bond and discharge the State Painting Lien. Doc. 79 at par. 42. On September 7, 2016, owners filed the bond with the New York County Clerk under the foregoing Index Number and the property was marked discharged by bond. Doc. 79 at par. 43.

On August 5, 2016, Nordic Interior Inc. ("Nordic"), a subcontractor on the project hired by ACP, filed a lien ("the Nordic Lien") in the amount of \$348,290.61 against the premises for amounts allegedly unpaid on its subcontract with ACP. Doc. 79 at par. 46; Doc. 89. At the owners' request, WFIC issued bond number K09545104, Index Number 101432/16, to bond and discharge the Nordic Lien. Doc. 79 at par. 48. On September 7, 2016, owners filed the bond with the New York County Clerk under the foregoing Index Number and the property was marked discharged

by bond. Doc. 79 at par. 49. Nordic also filed a claim against the Lien Law § 37 bond on January 20, 2017. Doc. 79 at par. 52; Doc. 91.

On August 5, 2016, Danton Plumbing & Heating Corp. (“Danton”), a subcontractor on the project hired by ACP, filed a lien (“the Danton Lien”) in the amount of \$370,061.29 against the premises for amounts allegedly unpaid on its subcontract with ACP. Doc. 79 at par. 53; Doc. 92. At the owners’ request, WFIC issued bond number K095045074, Index Number 101737/16, to bond and discharge the Danton Lien. Doc. 79 at par. 55. On September 7, 2016, owners filed the bond with the New York County Clerk under the foregoing Index Number and the property was marked discharged by bond. Doc. 79 at par. 56.

On August 8, 2016, Ground Effects Inc. (“Ground Effects”), a subcontractor on the project hired by ACP, filed a lien (“the Ground Effects Lien”) in the amount of \$242,470 against the premises for amounts allegedly unpaid on its subcontract with ACP. Doc. 79 at par. 59; Doc. 94. At the owners’ request, WFIC issued bond number K095045050, Index Number 101436/16, to bond and discharge the Ground Effects Lien. Doc. 79 at par. 61. On September 7, 2016, owners filed the bond with the New York County Clerk under the foregoing Index Number and the property was marked discharged by bond. Doc. 79 at par. 62.

On August 9, 2016, Celtic Building Supplies, Inc. (“Celtic”), a subcontractor on the project hired by ACP, filed a lien (“the Celtic Lien”) in the amount of \$17,204.99 against the premises for amounts allegedly unpaid on its subcontract with ACP. Doc. 79 at par. 65; Doc. 96. At the owners’ request, WFIC issued bond number K095045001, Index Number 101439/16, to bond and discharge the Celtic Lien. Doc. 79 at par. 67. On September 7, 2016, owners filed the bond with the New York County Clerk under the foregoing Index Number and the property was marked discharged by bond. Doc. 79 at par. 68.

On August 19, 2016, plaintiff Belle Lighting LLC (“Belle”), a subcontractor on the project hired by ACP, filed a lien (“the Belle Lien”) in the amount of \$414,278.94 against the premises for amounts allegedly unpaid on its subcontract with ACP. Doc. 79 at par. 71; Doc. 98. At the owners’ request, WFIC issued bond number K095045025, Index Number 101440/16, to bond and discharge the Belle Lien. Doc. 79 at par. 73. On September 7, 2016, owners filed the bond with the New York County Clerk under the foregoing Index Number and the property was marked discharged by bond. Doc. 79 at par. 74.

On September 14, 2016, DFNY Drywall & Acoustics Inc. (“DFNY”), a subcontractor on the project hired by ACP, filed a lien (“the DFNY Lien”) in the amount of \$231,442.50 against the premises for amounts allegedly unpaid on its subcontract with ACP. Doc. 79 at par. 77; Doc. 100.³

On September 27, 2016, Nouveau Elevator Industries Inc. (“Nouveau”), a subcontractor on the project hired by ACP, filed a lien (“the Nouveau Lien”) in the amount of \$65,185.64 against the premises for amounts allegedly unpaid on its subcontract with ACP. Doc. 79 at par. 83; Doc. 102. At the owners’ request, surety WFIC issued bond number K09545244, Index Number 101828/16, to bond and discharge the Nouveau Lien. Doc. 79 at par. 85. On September 23, 2016, owners filed the bond with the New York County Clerk under the foregoing Index Number and the property was marked discharged by bond. Doc. 79 at par. 86.

On October 31, 2016, Crestcon Construction Inc. (“Crestcon”), a subcontractor on the project hired by ACP, filed a lien (“the Crestcon Lien”) in the amount of \$6,486.12 against the premises for amounts allegedly unpaid on its subcontract with ACP. Doc. 79 at par. 89; Doc. 104.

³ DFNY commenced a lien foreclosure action styled *DFNY Drywall & Acoustics, Inc. v Artisan Construction Partners, LLC, 1411 IC-SIC Property LLC, Americo Group Inc. and James Galvin*, filed in this Court under Index Number 650107/17. In that action, which was not consolidated with the captioned action, this Court issued a decision, order and judgment entered March 20, 2019 discharging the DFNY lien as well as the bond securing the same. Doc. 25 filed under Ind. No. 650107/17.

At the owners' request, WFIC issued bond number K0954527A, Index Number 101855/16, to bond and discharge the DFNY Lien. Doc. 79 at par. 91. On November 9, 2016, owners filed the bond with the New York County Clerk under the foregoing Index Number and the property was marked discharged by bond. Doc. 79 at par. 92.

On August 11, 2016, Core Flooring International Contracting Corp. ("Core"), a subcontractor on the project hired by ACP, filed a lien ("the Core Lien") in the amount of \$281,108.67 against the premises for amounts allegedly unpaid on its subcontract with ACP. Doc. 79 at par. 95; Doc. 142. At the owners' request, WFIC issued bond number K09504013, Index Number 101438/16, to bond and discharge the DFNY Lien. Doc. 79 at par. 97. On September 7, 2016, owners filed the bond with the New York County Clerk under the foregoing Index Number and the property was marked discharged by bond. Doc. 79 at par. 98.

On July 25, 2016, EdgeKraft, LLC ("EdgeKraft"), a subcontractor on the project hired by ACP, filed a lien ("the EdgeKraft Lien") in the amount of \$43,386.00 against the premises for amounts allegedly unpaid on its subcontract with ACP. Doc. 79 at par. 101; Doc. 106. At the owners' request, WFIC issued bond number K095045062, Index Number 101435/16, to bond and discharge the EdgeKraft Lien. Doc. 79 at par. 103. On September 7, 2016, owners filed the bond with the New York County Clerk under the foregoing Index Number and the property was marked discharged by bond. Doc. 79 at par. 104.

On August 16, 2016, Maspeth Welding, Inc. ("Maspeth"), a subcontractor on the project hired by ACP, filed a lien ("the Maspeth Lien") in the amount of \$83,000 against the premises for amounts allegedly unpaid on its subcontract with ACP. Doc. 79 at par. 107; Doc. 108. At the owners' request, WFIC issued bond number K09545049, Index Number 101433/16, to bond and discharge the Maspeth Lien. Doc. 79 at par. 109. On September 7, 2016, owners filed the bond

with the New York County Clerk under the foregoing Index Number and the property was marked discharged by bond. Doc. 79 at par. 110.

On August 22, 2016, J.G. Electrical Installations, Inc. ("JGE"), a subcontractor on the project hired by ACP, filed a lien ("the JGE Lien") in the amount of \$32,500 against the premises for amounts allegedly unpaid on its subcontract with ACP. Doc. 79 at par. 113; Doc. 110. At the owners' request, WFIC issued bond number K095045086, Index Number 101434/16, to bond and discharge the JGE Lien. Doc. 79 at par. 115. On September 7, 2016, owners filed the bond with the New York County Clerk under the foregoing Index Number and the property was marked discharged by bond. Doc. 79 at par. 116.

On September 23, 2016, Belle commenced the captioned action against USA, Basic, and WFIC seeking to foreclose on its lien by filing a summons and verified complaint. Doc. 79 at par. 121; Doc. 112. Belle filed an amended complaint on November 18, 2016. Doc. 31. In its amended complaint, Belle alleged that, in or about January, 2016, it had entered into an agreement with ACP pursuant to which it was to sell and deliver lighting fixtures to the project site; that it delivered the fixtures but was never paid by ACP and that, as a result, ACP owed it \$414,278.94. Doc. 31 at pars. 8-11. Belle further claimed that, on or about September 6, 2016, USA and Basic, as principals, and WFIC, as surety, bound themselves under surety bond number K09545025 in the amount of \$455,106.83 to discharge a mechanic's lien filed by Belle to ensure that it (Belle) would be paid for the work it performed at 1411 Broadway, New York, New York, Block: 815, Lot: 1. Doc. 31 at par. 6.⁴

⁴ In its amended complaint, Belle did not state when it contracted with ACP to sell and deliver the fixtures or when it filed a mechanic's lien. Nor does it address the discrepancy between the amount it is allegedly owed by ACP (\$414,278.94) and the amount of the surety bond (\$455,106.83).

USA, Basic and WFIC joined issue by their verified answer to the amended complaint filed December 8, 2016. Doc. 34. As first and second counterclaims, they alleged that, since USA paid all sums due and owing to ADC prior to the time ADC abandoned the project, they were entitled to a judgment declaring: 1) that they were not liable to plaintiff or WFIC on the bond for any amount sought to be recovered by the lien and that, in any event, there is no lien fund to which plaintiff's lien can attach; 2) plaintiff's lien is a nullity and must be discharged; 3) WFIC's bond securing plaintiff's lien must be cancelled and WFIC, as surety, should be discharged; and 4) Belle's complaint must be dismissed with prejudice. Id. at 5-11.

On or about September 23, 2016, Belle commenced an action ("the related action") in this Court under Index Number 655050/16 sounding in fraud, conversion, and unjust enrichment against general contractor ACP and its principal Galvin. Ind. No. 655050, Doc. 1. In the complaint in that action, verified by Belle's principal, Larry Hong, Belle alleged, inter alia, that it conducted an investigation which "confirmed that [general contractor and Galvin] have been paid for and on account of the work performed by Belle" at projects in Queens and New York Counties and that they used the money for their own benefit instead of paying Belle. Id., at par. 9.

On October 14, 2016, Cannon commenced an action against Galvin, ACP, and WFIC seeking to foreclose its lien on the premises. Doc. 79 at par. 125; Doc. 115.

On October 17, 2016, State Painting commenced an action against, inter alia, ACP, Americo, WFIC, and 1411 IC-SIC Property LLC ("1411"), the owner of the premises, seeking to foreclose its lien. Doc. 79 at par. 129; Doc. 118.

On November 15, 2016, Nordic commenced an action against ACP and WFIC seeking to foreclose its lien on the premises. Doc. 79 at par. 133; Doc. 121.

On November 18, 2016, USA and Basic commenced a special proceeding against Celtic, Danton, EdgeKraft, Everest, Ground Effects, JGE, Maspeth and Nordic, under Index Number 656063/16, seeking to vacate mechanic's liens filed by those lienors and to cancel bonds discharging their liens due to the failure by the said lienors to commence actions seeking to enforce their liens after being served by USA and Basic with notices pursuant to Lien Law § 59. Ind. No. 656063/16, Doc. 1. The proceeding was discontinued against Nordic. Ind. No. 656063/16, Doc. 43. As discussed below, the special proceeding was consolidated with this action pursuant to the order of this Court entered February 6, 2017. Doc. 45.

On November 30, 2016, Ground Effects commenced an action against, inter alia, USA, Basic, Americo and numerous lienors seeking to foreclose its lien. Doc. 79 at par. 138; Doc. 124.

On January 6, 2017, DFNY commenced an action against, inter alia, ACP, Americo and Galvin seeking to foreclose its lien. Doc. 79 at par. 157; Doc. 135. The two causes of action asserted as against Americo were quantum meruit and unjust enrichment. Doc. 135 at pars. 34-41. In its answer, Americo asserted as counterclaims that was entitled to a declaratory judgment that it was not liable to plaintiff on the ground, inter alia, that there was no lien fund against which plaintiff could attach.

On October 12, 2016, Everest commenced an action against 1411 and ACP seeking to foreclose its lien. Doc. 79 at par. 163; Doc. 137.

By order dated October 31, 2016 and entered May 25, 2017, this Court (Kornreich, J.) granted an application by USA and Basic for an order fixing the amount of a bond to discharge all liens and claims that might be filed against the premises arising from the contract. Doc. 141. Justice Kornreich fixed the amount of the bond as \$1,112,426.14 and directed that said bond be filed with the New York County Clerk. Id.

On or about November 16, 2016, Belle served USA, Basic and WFIC with a “First Request for Production of Documents”. Doc. 147.⁵ Belle maintains, and USA, Basic and WFIC do not deny, that there was no response to the demand.

On or about November 18, 2016, USA and Basic (but neither Americo nor WFIC) filed a petition, pursuant to Lien Law § 59 and under New York County Index Number 656063/16, against Celtic, Danton, EdgeKraft, Ground Effects, JGE, Maspeth and Nordic seeking to discharge their liens. Doc. 79 at par. 165; Doc. 138.

On or about January 24, 2017, USA entered into a contract with a new contractor and various subcontractors in order to complete the work remaining pursuant to ACP’s contract. Doc. 69 at pars. 40 and 42; Doc. 76. As of May 22, 2017, USA had paid its new contractor and various subcontractors \$483,081.92 for their work and materials and had incurred \$91,036 in bond fees to discharge the mechanic’s liens filed against the premises as a result of the abandonment of the project by ADP. Doc. 69 at par. 42; Docs. 77-78. The fees and expenses incurred thus far for the extra work totaled \$574,117.92 as of May 22, 2017 (Doc. 69, at par. 43) and will cost at least an additional \$295,846.81, a total of \$778,928.73. Doc. 69 at par. 43.; Doc. 76.

By order entered February 6, 2017, this Court granted an application by USA, Basic and WFIC to consolidate the captioned action with any “pending or future actions which may have been or will be commenced by lienors seeking payment and/or to foreclose mechanic’s liens and the bonds securing same” which were filed against the premises, as well as “any claims concerning the Lien Law § 37 bond . . .” Doc. 45 at 1. All such claims were consolidated under the index number in the captioned action and the caption of the action was amended to reflect the consolidation. *Id.*

⁵ No affidavit of service is annexed to the demand.

In a reply affirmation in further support of their petition, filed March 3, 2017, movants' attorney asserted, inter alia, that, since Celtic, EdgeKraft, JGE and Maspeth did not oppose the motion, the liens filed by those parties should be discharged and the bonds securing the liens cancelled. Doc. 52.

A preliminary conference was held in the consolidated matter on April 25, 2017. Doc. 62. The preliminary conference ("PC") order directed, inter alia, that all parties were to serve discovery demands within 30 days and that responses to the demands were due "30 days after receipt of discovery and will be provided on a continuous basis." The PC order further directed that summary judgment motions were to be filed "on or before 60 days from following filing [sic] [note of issue]."

By order entered May 24, 2017, this Court directed the Clerk to discharge the Celtic Lien, the EdgeKraft Lien, the JGE Lien, and the Maspeth Lien, as well as to cancel the bonds issued by WFIC securing the same. Doc. 66.

On May 25, 2017, USA, Basic, Americo and WFIC ("movants") moved for summary judgment in the consolidated action. Doc. 68. Specifically, they moved:

1. pursuant to CPLR 3212, for summary judgment on their first and second counterclaims and cross claims for a declaratory judgment that there is no lien fund upon which Belle or any codefendant lienor can attach, and discharging each claim, crossclaim or counterclaim by Belle and the codefendant lienors and cancelling each of the bonds securing their liens; or, in the alternative,
2. For summary judgment, pursuant to CPLR 3212, granting a judgment declaring that USA's maximum liability to Belle and the subcontractor lienors be capped, reducing each lien on a pro rata basis, and cancelling each of the bonds securing their liens and replacing them with a single bond covering all liens in their reduced amounts;

3. pursuant to Lien Law § 44, discharging all mechanic's liens filed by the non-appearing defendants and cancelling each of the bonds issued by WFIC securing the same;
4. pursuant to Lien Law § 37, discharging Nordic's claim against the § 37 bond;
5. pursuant to CPLR 6514, discharging the lis pendens filed by Ground Effects against the property;
6. pursuant to CPLR 3211(a)(7) and 3212, dismissing State Painting's cause of action for legal fees against movants;
7. pursuant to CPLR 3211(a)(3) and (a)(7), CPLR 3212, and Lien Law Article 3A, dismissing Cannon's cause of action pursuant to Lien Law Article 3A as against movants;
8. pursuant to CPLR 3211(a)(7), dismissing all claims, counterclaims and cross claims in quantum meruit as against movants;
9. pursuant to CPLR 3211(a)(7) and CPLR 3212, dismissing all claims, counterclaims, and cross claims as against Americo on the ground that it is not a proper party; and
10. for such other relief as this Court deems just and proper.

Doc. 68.

In support of the motion, movants submitted, inter alia, the affidavit of Aaron Harari, President of USA (Doc. 69), the contract (Doc. 71), the architect's certified payment authorizations, as well as cancelled checks and wire transfer confirmations (Docs. 74 and 77) demonstrating that USA paid all money it owed prior to the filing of the subcontractors' liens.

On October 10, 2017, the action and all cross claims against 1411 were discontinued. Doc. 195.

By stipulation filed April 4, 2019, Belle, Cannon, Danton, Ground Effects, and Nordic settled with USA, Basic, Americo and WFIC, the lienors which opposed the motion ("the settling

lienors"). Doc. 210. Pursuant to the stipulation of settlement, the settling lienors agreed that USA, Basic, Americo and WFIC were entitled to the relief they sought in the instant motion. Doc. 210 at p. 5, par. 3.

CONTENTIONS OF THE PARTIES:

In support of the motion, movants argue, inter alia, that they are entitled to summary judgment because they have established that USA and Basic were "owners" within the meaning of the Lien Law and that, as of the time the liens were filed, there was no money due and owing from USA to ACP. They further assert that Americo was not an owner and is thus entitled to dismissal of the complaint.

In a reply affirmation submitted before the action was resolved with the settling lienors, USA, Basic, Americo and WFIC argue, inter alia, that, since Core, Crestcom, Everest, Jacoby, Nouveau, and State Painting ("the defaulting subcontractors") failed to oppose the motion, their claims against movants should be dismissed, their liens discharged, and the bonds securing their liens cancelled.

LEGAL CONCLUSIONS:

Pursuant to Lien Law § 4(1), "a mechanic's lien is valid to the extent of 'the sum earned and unpaid on the contract at the time of filing the notice of lien, and any sum subsequently earned thereon.'" *Albert J. Bunce, Ltd. v. Fahey*, 73 A.D.2d 632 (2d Dept 1979). Where no direct relationship exists between an owner and a subcontractor, "the rights of a subcontractor [must be] satisfied out of funds due and owing from the owner to the general contractor at the time the lien is filed." *Kamco Supply Corp. v JMT Bros. Realty, LLC*, 98 AD3d 891 (1st Dept 2012) quoting

Penava Mech. Corp. v Afgo Mech. Servs., Inc., 71 AD3d 493, 495 (1st Dept 2010) (internal quotation marks omitted). “[I]n the absence of any balance due to [a general contractor] from the owners, [a subcontractor] is required to look to the contractor that engaged its services for payment.” *Blake Elec. Contracting Co. v Paschall*, 222 AD2d 264, 267 (1st Dept 1995) (citations omitted).

Here, movants have established their prima facie entitlement to summary judgment dismissing the defaulting subcontractors’ claims that they are entitled to foreclose on their respective liens. See *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Specifically, by submitting, inter alia, the affidavit of Aaron Harari, President of USA (Doc. 69), the contract (Doc. 71), the architect’s certified payment authorizations, as well as cancelled checks and wire transfer confirmations (Docs. 74 and 77) movants have demonstrated that no funds were due and owing from owners to ACP prior to the filing of the defaulting subcontractors’ liens. See *3-G Servs. Ltd. v SAP V/Atlas 845 WEA Assoc. NF L.L.C.*, 162 AD3d 487, 488 (1st Dept 2018); *Matros Automated Elec. Constr. Corp. v Libman*, 37 AD3d 313 (1st Dept 2007).

Although movants’ showing shifted the burden to the defaulting subcontractors to raise an issue of fact (see *Kamco*, 98 AD3d at 891) by submitting documentary evidence or an affidavit of an individual with personal knowledge of the facts contradicting movants’ proof that the owners did not owe ACP any money as of the date the subcontractors’ liens were filed, they failed to do so. See *3-G Servs. Ltd.*, 162 AD3d at 488; *Matros*, 37 AD3d at 313. Thus, the motion is granted on default as against the defaulting subcontractors, Core, Crestcom, Everest, Jacoby, Nouveau, and State Painting.

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

ORDERED that the branch of the motion by defendants USA Legwear, LLC, Basic Resources, Inc., Westchester Fire Insurance Company, and Americo Group, Inc. seeking summary judgment pursuant to CPLR 3212 as against Celtic Building supplies, Inc., EdgeKraft, LLC, J.G. Electrical Installations, Inc., and Maspeth Welding, Inc. is denied as moot given the order of this Court, entered May 24, 2017 (Doc. 66), discharging the liens filed by said lienors and canceling the bonds issued by Westchester Fire Insurance Company securing the same; and it is further

ORDERED that the branch of the motion by defendants USA Legwear, LLC, Basic Resources, Inc., Westchester Fire Insurance Company, and Americo Group, Inc. seeking summary judgment pursuant to CPLR 3212 as against plaintiff Belle Lighting LLC and defendants Cannon Mechanical, Inc., Danton Heating & Plumbing Corp., Ground Effects, Inc., and Nordic Interior, Inc. is granted upon consent pursuant to the settlement between these parties (Doc. 210); and it is further

ORDERED that the branch of the motion by defendants USA Legwear, LLC, Basic Resources, Inc., Westchester Fire Insurance Company, and Americo Group, Inc. seeking summary judgment pursuant to CPLR 3212 is granted upon default as against defendants Core Flooring International Contracting, Crestcon Construction, Inc., Everest Scaffolding, Inc., Jacoby Electrical Corp., Nouveau Elevator Industries, Inc., and State Painting and Decorating Co., Inc.; and it is further

ORDERED that counsel for the movants shall serve a copy of this order, with notice of entry, upon all parties, as well as on the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that the Clerk of the Court is to enter judgment accordingly; and it is further

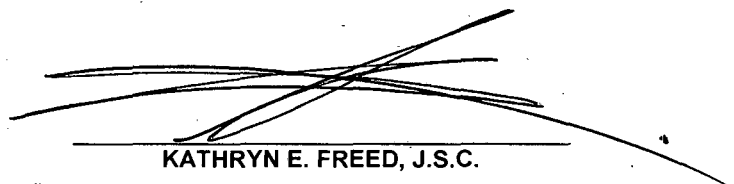
ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that this action is disposed in accordance with the accompanying order and judgment dated April 16, 2019; and it is further

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

4/16/2019

DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: