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| <b>Construction Resources Corp. Of N.Y. v Empire<br/>Outlet Bldrs. LLC</b>                                                                                                                                                              |
| 2019 NY Slip Op 32263(U)                                                                                                                                                                                                                |
| June 27, 2019                                                                                                                                                                                                                           |
| Supreme Court, Richmond County                                                                                                                                                                                                          |
| Docket Number: 153004/2018                                                                                                                                                                                                              |
| Judge: Jr., Orlando Marrazzo                                                                                                                                                                                                            |
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| This opinion is uncorrected and not selected for official<br>publication.                                                                                                                                                               |

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

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**CONSTRUCTION RESOURCES CORP. OF NEW YORK**, on behalf of itself and as a representative for all others who may be deemed beneficiaries of a certain Trust created pursuant to Lien Law Article 3-A,

**Present:**

**HON. ORLANDO MARRAZZO, JR.**

**DECISION AND ORDER**

**Index No: 153004/2018**

**Motion No: 1547-001**

**Plaintiff,**

**-against -**

**EMPIRE OUTLET BUILDERS LLC, ST. GEORGE OUTLET DEVELOPMENT, LLC, DONALD A. CAPOCCIA, FIDELITY AND DEPOSIT COMPANY OF MARYLAND, BRANDON BARON, JOSEPH FERRARA, BFC PARTNERS, L.P., and JOHN DOE #1 through JOHN DOE #25, the names of the "John Doe" defendants being fictitious and unknown to Plaintiff, such persons intended to be the entities, if any, having or claiming interest in or lien upon the lien law trust funds described herein,**

**Defendants.**

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The following papers numbered 1 to 3 were fully submitted on the 21<sup>st</sup> day of May, 2019:

|                                                                                                                                                                                                                                  | Papers<br>Numbered |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------|
| Defendants' Notice of Motion to Dismiss Amended Complaint<br>(Affidavit in Support of Brandon Baron, Defendants' Memorandum of Law<br>in Support of Motion to Dismiss, with Supporting Exhibits)<br>(Dated: April 5, 2019).....  | 1                  |
| Affirmation of Donovan L. Wickline in Opposition to Motion to Dismiss<br>(Affidavit of Dawn Varrone, Memorandum of Law in Opposition to<br>Defendants' Motion to Dismiss, with Supporting Exhibits)<br>(Dated: May 7, 2019)..... | 2                  |
| Defendants' Reply Memorandum of Law in Support of Motion to Dismiss<br>(Dated: May 20, 2019).....                                                                                                                                | 3                  |

Upon the foregoing papers, the motion of defendants Empire Outlet Builders LLC,

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LLC, et. al.,**

St. George Outlet Development, LLC, Donald A. Capoccia, Fidelity and Deposit Company of Maryland, Brandon Baron, Joseph Ferrara and BFC Partners, L.P., (hereinafter collectively “Empire Outlet”) for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the Second, Fourth, Fifth<sup>1</sup>, Sixth, Seventh, Eighth<sup>2</sup> and Ninth<sup>3</sup> causes of action as pleaded in Construction Resources Corp. of New York’s (hereinafter “plaintiff”) Amended Complaint (*see* Empire Outlet’s Exhibit A) is denied, without prejudice to renewal, pending the continuing course of discovery.

This matter arises out of the alleged breach of a May 16, 2016 subcontractor agreement between plaintiff and the general contractor, Empire Outlet, whereby plaintiff agreed to perform general labor, punch list work, debris removal and clean-up in connection with the construction of a 350,000 square foot outlet mall near the Staten Island ferry, in return for payment of \$38,399,561.08 from Empire Outlet. Plaintiff claims that pursuant to the contract there remains due and owing the sum of \$1,105,351.53, which it duly demanded from Empire<sup>4</sup>.

In its Amended Complaint plaintiff initially set forth nine causes of action for compensatory and punitive damages arising from Empire’s alleged breach, but later withdrew its eighth cause of action (*i.e.*, unjust enrichment). Defendants now move, pre-answer and pre-

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<sup>1</sup> Defendants have failed to set forth any argument in support of dismissing plaintiff’s Fifth Cause of Action (*i.e.*, “Breach of Fiduciary Duty Against Empire Outlet Builders LLC, St. George Outlet Development, LLC, Brandon Baron, Joseph Ferrara and Donald A. Capoccia”), apparently conceding the viability of this claim (*see* April 5, 2019 Defendants’ Memorandum of Law in Support of Motion to Dismiss).

<sup>2</sup> Plaintiff has withdrawn its Eighth Cause of Action (*i.e.*, “Unjust Enrichment Against St. George”) (*see* May 7, 2019 Memorandum of Law in Opposition to Defendants’ Motion to Dismiss; p. 1, footnote 2).

<sup>3</sup> Defendants have withdrawn so much of their dismissal motion as relates to the Ninth Cause of Action (*i.e.*, “Alter-Ego Liability Against defendants BFC Partners, L.P. and St. George Outlet Development, LLC”), “without prejudice” (*see* May 20, 2019 Defendants’ Reply Memorandum of Law in Support of Motion to Dismiss; p. 1 footnote 1).

<sup>4</sup> The Court notes that a related action, commenced by Empire Outlet Builders, LLC against the plaintiff *sub judice* is pending in Supreme Court, New York County, under Index No. 656074/2017, wherein Empire seeks damages for alleged fraud, bad faith and willful disregard of the terms of the subcontractor agreement (*i.e.*, failure to procure liability insurance) from Construction Resources Corp. of New York.

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discovery, to dismiss plaintiff's eight count Amended Complaint pursuant to CPLR 3211(a)(1) ["a defense is founded upon documentary evidence"] and CPLR 3211 (a)(7) ["the pleading fails to state a cause of action"].

Plaintiff's First, Third, Fifth, Eighth and Ninth Causes of action are not in issue on this motion. The remaining four causes of action, three of which are brought pursuant to New York State Lien Law (*i.e.*, Fourth, Fifth and Sixth) as well as plaintiff's Second Cause of Action (*i.e.*, "Account Stated Against Empire Outlets") will stand until discovery is completed, at which time defendants may again move for dismissal of the Amended Complaint.

It is well settled that in deciding a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211 (a)(7) the allegations in the complaint must be liberally construed in favor of the plaintiff and all the facts alleged must be accepted as true (*see Leon v. Martinez*, 84 NY2d 83, 87 [1994]; *Zellner v. Odyll, LLC* 117 AD3d 1040 [2d Dept. 2014]). "The motion 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. 232<sup>nd</sup> Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*Ginsburg Dev. Cos., LLC v. Carbone*, 85 AD3d 1110, 1111 [2d Dept. 2011] *quoting EBCI, Inc. v. Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

Here, plaintiff has not only set forth facts in support of a breach of contract claim (*see Dee v. Rakower*, 112 AD3d 204, 208-209 [2d Dept. 2013]), but has alleged its submission of invoices in support of the Second Cause of Action, as well as violations of Articles 2 and 3-a of the Lien Law by virtue of, *inter alia*, defendants' utilization of those invoices to secure funding for the project.

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Accordingly, it is

ORDERED, that the motion by defendants to dismiss plaintiff's complaint is denied without prejudice to renewal pending the continuing course of discovery; and it is further

ORDERED, that the parties appear before IAS Part 21 located at 26 Central Avenue, Staten Island, New York, on Sept. 24, 2019 at 9:30 for a conference.

Dated:

6/27/19

ENTER,

J. S. C.

Hon. Orlando Marrazzo, Jr.  
Acting Supreme Court Justice