361 Broadway Assoc. Holdings, LLC v Blonder Bldrs. Inc.
2019 NY Slip Op 33278(U)
September 30, 2019
Supreme Court, Nassau County
Docket Number: 607002/19
Judge: John M. Galasso
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ORIGINAL

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - COUNTY OF NASSAU
PRESENT: HONORABLE JOHN M. GALASSO, J.S.C.

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361 BROADWAY ASSOCIATES HOLDINGS, LLC,

Plaintiff,

- against -

BLONDER BUILDERS INC.,

Defendant/Third-Party Plaintiff,

-against-

JOURDAN KRAUSS and FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

Third-Party Defendants.

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Index No. 607002/19
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Upon the foregoing papers, the motion of the plaintiff, 361 Broadway Associates Holding, LLC, (hereinafter "361") and third-party defendants, Jourdan Krauss and Fidelity and Deposit Company of Maryland (hereinafter "Krauss" and "Fidelity" respectively), seeking an Order dismissing the Second, Third, Fourth, Fifth and Sixth Counterclaims as against 361; dismissing the First and Second Causes of Action as against Krauss; and dismissing the First Cause of Action as against Fidelity, as contained in the 'Verified Answer with Affirmative Defenses, Counterclaims and Third-Party Complaint' of defendant/third-party-plaintiff, Blonder Builders, Inc. (hereinafter "Blonder"), pursuant to CPLR § 3211(a)(1) and (7), is determined as set forth below.

This is an action in which plaintiff seeks a money judgment against defendant for breach of a contract related to a construction project to renovate and convert an existing building into condominiums at real property located at 361 Broadway, New York, New York (hereinafter "construction project"), wherein on or about May 25, 2017, plaintiff, as owner of the construction project, entered into an agreement with defendant to assign and plaintiff assume a subcontract for the performance of the construction project at the aforementioned location. Plaintiff alleges that defendant failed to perform certain contractual obligations in accordance with the subcontract and seeks damages for the costs incurred to complete defendant's scope of work required for the construction project.

Blonder's 'Verified Answer with Affirmative Defenses, Counterclaims and Third-Party Complaint' asserts counterclaims for breach of contract (first counterclaim), quantum meruit (second counterclaim), unjust enrichment (third counterclaim), accounted stated (fourth counterclaim), New York lien law enforcement (fifth counterclaim) and trust diversion (sixth counterclaim) as and against plaintiff; and causes of action for New York lien law enforcement (first cause of action) as against third-party defendants, Krauss, the alleged owner of 361, and Fidelity, the alleged insurance company acting as a surety for the construction project, and trust fund diversion (second cause of action) as against Krauss. Blonder seeks damages from 361 in the amount of $50,150.00, together with interest thereon, said amount representing the remaining sum due and owing to Blonder for the fair and reasonable value of the materials, equipment, labor and services furnished and provided by Blonder for 361, and/or compensation in quantum meruit for the value of the work performed. As and against Krauss and Fidelity, Blonder seeks the lien amount of $47,231.50 for enforcement of the lien and/or satisfaction of the surety bond.

Movants, 361, Krauss and Fidelity, seek dismissal of all of Blonder's counterclaims and causes of action contained in the third-party complaint with the exception of the first counterclaim for breach of contract as and against 361. Movants contend that Blonder's quasi-contract claims sounding in quantum meruit, unjust enrichment and account stated are barred wherein the assignment agreement between plaintiff and Blonder is a valid written contract; that Blonder fails to state a cause of action for trust fund diversion pursuant to the requirements of CPLR § 3016(b) based upon the allegations contained in the complaint for breach of trust, as well as pursuant to the requirements of Article 3-A of Lien Law for such claims. Lastly, Blonder contends that the lien associated with the construction project was released and as such the requested relief is moot, and additionally, that the foreclosure action is facially improper as against Krauss, as there exists no privity with Blonder concerning the construction project.

In support of its motion, the Movants submit, *inter alia*, copies of the Summons and Compliant, Third-Party Summons and 'Verified Answer with Affirmative Defenses, Counterclaims and Third-Party Complaint', and the Affidavit of Jourdan Krauss, authorized representative for 361, inclusive of exhibits attached thereto as follows: copies of the agreement between Foundations Group, Inc. and Blonder, dated October 10, 2016, the agreement for assignment and assumption of subcontract between 361 and Blonder, dated May 25, 2017, Notice of Private Improvement Mechanic's Lien, dated and filed with the County Clerk, New York County on September 6, 2017, along with the Discharge of Mechanic's Lien, dated November, 2017, and Release of Mechanic's Lien on a Private Improvement, dated June 15, 2018.

In opposition, the defendant/third-party plaintiff contends that a breach of contract claim does not preclude a cause of action for account stated; that the quasi-contract unjust enrichment and quantum meruit claims are mutually exclusive from the breach of contract claim where the third-party complaint alleges that extra work was performed outside the terms of the contract; that the lien foreclosure cause of action should not be dismissed pending Blonder's motion to reargue the New York Supreme Court decision discharging the lien currently pending in the Appellate Division, First Department; and that the strict pleading requirements of CPLR § 3016(b) does not apply to a trust fund diversion claim and the complaint alleges that Krauss knowingly diverted trust assets and/or consented to diversion of trust fund assets.

In support of its opposition, Blonder submits, *inter alia*, the Affidavit of Mitchell Blonder, President of Blonder, copies of the Notice of Private Improvement Mechanic's Lien, dated and filled with the County Clerk of New York County on June 8, 2018

It is undisputed by the parties that 361 is the owner of the construction project and initially entered into an agreement with Foundations Group I, LLC (hereinafter "Foundations") for Foundations to act as general contractor for the construction project at the subject premises, that Foundations entered into a contract with Blonder to act as subcontractor for the provision of carpentry and related services and materials in connection wit the construction project, that 361 terminated its contract with Foundations for cause, and that thereafter, on May 25, 2017, 361 and Blonder entered into an Agreement for Assignment and Assumption of Subcontract.

A motion to dismiss pursuant to CPLR 3211(a)(1) "may appropriately be granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" *(Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858, 774 N.E.2d 1190; see Leon v. Martinez, 84 N.Y.2d 83, 88, 614 N.Y.S.2d 972, 638 N.E.2d 511; Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, 38 A.D.3d 34, 38, 827 N.Y.S.2d 231). Cervini v. Zononi, 95 A.D.3d 919, 944 N.Y.S.2d 574 [2d Dept. 2012].* "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" *Fontanetta v. John Doe 1, 73 A.D.3d 78, 86, 898 N.Y.S.2d 569 [2d Dept. 2010].*

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court should "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" *(Leon v. Martinez, 84 N.Y.2d at 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511).* Such a motion should be granted where, even viewing the allegations as true, the plaintiff cannot establish a cause of action. *(see Morales v. Copy Right, Inc., 28 A.D.3d 440, 441, 813 N.Y.S.2d 731; Hartman v. Morganstern, 28 A.D.3d 423, 424, 814 N.Y.S.2d 169). v. Cain, 96 A.D.3d 812, 948 N.Y.S.2d 72 [2d Dept. 2012].)*

Quantum meruit & Unjust enrichment claims

"To state a cause of action based on quantum meruit, a plaintiff must allege (1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services *(see Fulbright & Jaworksi, LLP v. Carucci, 63 A.D.3d 487, 488–489, 881 N.Y.S.2d 56; Soumayah v. Minnelli, 41 A.D.3d 390, 391, 839 N.Y.S.2d 79)." Goldstein v. Derecktor Holdings, Inc., 85 A.D.3d 728, 924 N.Y.S.2d 804 (2d Dept. 2011).*

"The basis of a claim for unjust enrichment is that the defendant has obtained a benefit which in "equity and good conscience" should be paid to the plaintiff *(Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d 173, 182, 919 N.Y.S.2d 465, 944 N.E.2d 1104 [2011], quoting Paramount Film Distrib. Corp. v. State of New York, 30 N.Y.2d 415, 421, 334 N.Y.S.2d 388, 285 N.E.2d 695 [1972]).* In a broad sense, this may be true in many cases, but unjust enrichment is not a catchall cause of action to be used when others fail. It is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff. Typical cases are those in which the defendant, though guilty of no wrongdoing, has received money to which he or she is not entitled *(see Markwica v. Davis, 64 N.Y.2d 38, 484 N.Y.S.2d 522, 473 N.E.2d 750 [1984]; Kirby McInerney & Squire, LLP v. Hall Charne Burce & Olson, S.C., 15 A.D.3d 233, 790 N.Y.S.2d 84 [2005]).* An unjust enrichment claim is not available where it simply duplicates, or

replaces, a conventional contract or tort claim *(Clark–Fitzpatrick, Inc. v. Long Is. R.R. Co., 70 N.Y.2d 382, 388–389, 521 N.Y.S.2d 653, 516 N.E.2d 190 [1987]; Samiento v. World Yacht Inc., 10 N.Y.3d 70, 81, 883 N.E.2d 990 [2008]; Town of Wallkill v. Rosenstein, 40 A.D.3d 972, 974, 837 N.Y.S.2d 212 [2d Dept.2007])." Corsello v. Verizon N.Y., Inc., 18 N.Y.3d 777, 790 (2012)*

"As a general rule, the existence of a valid and enforceable written contract governing a particular subject matter precludes recovery in quasi-contract on theories of quantum meruit and unjust enrichment for events arising out of the same subject matter" *Yenrab, Inc. v. 794 Linden Realty, LLC, 68 A.D.3d 755, 892 N.Y.S.2d 105 (2d Dept. 2009) (citations omitted).*

Blonder's 'Verified Answer with Affirmative Defenses, Counterclaims and Third-Party Complaint' contain allegations that plaintiff and Blonder "agreed to additional work in connection with the Subcontract in exchange for additional payments." The affidavit of Blonder sets forth that additional work was performed outside the scope of the subcontract. While it remains undisputed by the parties that a written agreement exits, this Court cannot discern, at this stage in the action and prior to discovery, whether obligations were imposed by defendants' actions that occurred outside of the written agreement and/or prior to the assignment of the Blonder's agreement with by Blonder and assumed by 361, wherein causes of action for quantum meruit and unjust enrichment may exist.

Accordingly, defendant/third-party plaintiff having sufficiently plead causes of action for quantum meruit and unjust enrichment, defendant's motion to dismiss is denied with regard to these counterclaims.

Account stated

'"An account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due" *(Jim–Mar Corp. v. Aquatic Constr., 195 A.D.2d 868, 869, 600 N.Y.S.2d 790; see M & A Constr. Corp. v. McTague, 21 A.D.3d 610, 800 N.Y.S.2d 235)*. "The agreement may be express or ... implied from the retention of an account rendered for an unreasonable period of time without objection and from the surrounding circumstances" *(Jim–Mar Corp. v. Aquatic Constr., 195 A.D.2d at 869, 600 N.Y.S.2d 790).' Fleetwood Agency, Inv., v. Verde Elec. Corp. 85 A.D.3d 850, 925 N.Y.S.2d 576 (2d Dept. 2011)*

Applied herein, the 'Verified Answer with Affirmative Defenses, Counterclaims and Third-Party Complaint' adequately pleads a claim for account stated wherein the defendant/third-party plaintiff alleges that invoices which detailed the total due and owing was accepted by plaintiff without objection and without payment thereof, based upon a written agreement between the parties.

Accordingly Movants motion to dismiss the fourth counterclaim for account stated, as against 361 is denied.

Lien foreclosure

Upon this Court's review of the parties' submissions, there is no evidence before this Court that Blonder sought relief from the Appellate Division, First Department, to stay the Order of New York Supreme Court, dated November 2, 2018, terminating and cancelling the subject lien, and directing the County Clerk of New York County to vacate and cancel the subject lien, pending the determination of its

appeal before the Appellate Division, First Department. While there exists no lien upon which enforcement can be based, defendant/third-party plaintiff fails to state a cause of action for lien foreclosure.

Accordingly Movants motion to dismiss the fifth counterclaim/first cause of action for lien foreclosure, as against 361, Krauss and Fidelity, is granted.

Trust diversion

"Lien Law article 3–A "was designed to create trust funds out of certain construction payments or funds to assure payment of subcontractors, suppliers, architects, engineers, laborers, as well as specified taxes and expenses of construction" *(Caristo Constr. Corp. v. Diners Fin. Corp., 21 N.Y.2d 507, 512, 289 N.Y.S.2d 175, 236 N.E.2d 461).* "Lien Law article 3–A mandates that once a trust comes into existence its funds may not be diverted for non-trust purposes. Use of trust assets for any purpose other than the expenditures authorized in Lien Law § 71 before all trust claims have been paid or discharged constitutes an improper diversion of trust assets, regardless of the propriety of the trustee's intentions" *(Matter of RLI Ins. Co. v. New York State Dept. of Labor, 97 N.Y.2d 256, 740 N.Y.S.2d 272, 766 N.E.2d 934)." Aspro Mechanical Contracting, Inc., v. Fleet Bank, N.A. 293 A.D.2d 97, 742 N.Y.S.2d 361 (2d Dept. 2002).*

Upon this Court's review of the parties' submissions and affidavits associated therewith, Blonder's sixth counterclaim against 361 and second cause of action against Kraus contain conclusory allegations that funds were diverted for non-trust purposes. In reading the allegations in a light most favorable to the third-party plaintiff, the allegations fail to adequately plead, absent allegations that Krauss had authority to control the trust fund assets and that funds contained therein were diverted.

Accordingly Movants motion to dismiss the sixth counterclaim/second cause of action for trust diversion, as against 361, Krauss and Fidelity, is granted.

The motion of the plaintiff, 361 Broadway Associates Holding, LLC, and third-party defendants, Jourdan Krauss and Fidelity and Deposit Company of Maryland, is granted to the extent that the fifth counterclaim/first cause of action for lien foreclosure, and the sixth counterclaim and second cause of action for trust diversion are granted only, pursuant to CPLR § 3211(a)(7).

This constitutes the decision and Order of this Court. Any relief not expressly granted herein is denied.

Dated: September 30, 2019

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Hon. John M. Galasso, J.S.C.

ENTERED
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NASSAU COUNTY
COUNTY CLERK'S OFFICE