

Green Ready Mixx LLC. v 19 Kent Acquisition, LLC

2020 NY Slip Op 31500(U)

April 14, 2020

Supreme Court, Kings County

Docket Number: 503475/2019

Judge: Carl J. Landicino

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

0

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, On the 14th day of April, 2020.

PRESENT:

CARL J. LANDICINO, J.S.C.

-----X

GREEN READY MIXX LLC.,

Plaintiff,

Index No., 503475/2019

DECISION AND ORDER

-against-

19 KENT ACQUISITION, LLC, ALL ISLAND MASONRY & CONCRETE INC. and NATIONWIDE MUTUAL INSURANCE COMPANY,

Motion Sequence #1

Defendants.

-----X

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion:

	<u>Papers Numbered</u>
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	<u>1/2</u>
Opposing Affidavits (Affirmations).....	<u>3, 6,</u>
Reply Affidavits (Affirmations)	<u>4, 7,</u>
Memorandum of Law.....	<u>5</u>

After a review of the papers and oral argument the Court finds as follows:

Defendant 19 Kent Acquisition, LLC (hereinafter "19 Kent") moves for an order dismissing Plaintiff's 1st, 4th, 5th and 6th causes of action, pursuant to CPLR 3211(a)(1) and (7) as follows: 1) dismissing the first cause of action to foreclose the mechanic's lien filed against the premises purportedly owned by 19 Kent and located at 25 Kent Avenue, Brooklyn, New York (the "Premises") because the lien has expired by operation of law and is no longer valid; 2) that if it is determined that the Mechanic's Lien has not expired, then dismissing the first cause of action pursuant to Lien Law §44-b; 3) dismissing the fourth cause of action against Defendant 19 Kent in quasi-contract; 4) dismissing the fifth cause of action against 19 Kent for diversion of trust funds in violation of Article 3-A of the Lien Law; and 5) dismissing the sixth cause of action against 19 Kent for violation of New York's Prompt

Payment Act. On November 27, 2019, as part of a So Ordered Stipulation between the parties, 19 Kent's motion was converted to a motion for summary judgment. In furtherance thereof, as part of that stipulation the parties agreed to submit supplemental papers, which have been considered in review of this motion.

Plaintiff, Green Ready Mixx, LLC (hereinafter "the Plaintiff" or "Green") opposes the motion. The Plaintiff alleges that a representative of 19 Kent requested that construction materials be delivered to the Premises. As a result, the Plaintiff alleges that it reasonably expected that 19 Kent would pay the invoices associated with these materials and that 19 Kent assumed the obligation to pay for these materials. The remaining Defendants have apparently appeared after this motion was made.

As an initial matter, the Plaintiff does not specifically oppose 19 Kent's application as to the 1st cause of action as against 19 Kent. Since the mechanic's lien was not extended it has expired by operation of law and no timely action was commenced. Accordingly, the 1st cause of action is dismissed and the lien shall be discharged. See *Matter of Flintlock Realty and Const. Corp.*, 188 A.D.2d 532, 591 N.Y.S.2d 439 [2nd Dept 1992].

"A motion to dismiss pursuant to CPLR 3211(a)(1) will be granted only if the 'documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim.'" *Fontanetta v. Doe*, 73 A.D.3d 78, 83, 898 N.Y.S.2d 569, 573 [2nd Dept 2010], quoting *Fortis Fin. Servs., LLC v. Fimat Futures USA, Inc.*, 290 A.D.2d 383, 383, 737 N.Y.S.2d 40, 41 [1st Dept 2002]. "Neither affidavits, deposition testimony, nor letters are considered 'documentary evidence' within the intendment of CPLR 3211(a)(1)." *Granada Condo. III Ass'n v. Palomino*, 78 A.D.3d 996, 997, 913 N.Y.S.2d 668, 669 [2nd Dept 2010].

"On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the complaint a liberal construction, accept all facts as alleged in the complaint to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Jannetti v. Whelan*, 97 A.D.3d 797, 797, 949 N.Y.S.2d 129, 130 [2nd Dept 2010]. To convert such a motion to one for summary judgment pursuant to CPLR 3212 a Court is "required to give 'adequate notice to the parties' that the motion was

being converted into one for summary judgment.” *Wesolowski v. St. Francis Hosp.*, 108 A.D.3d 525, 968 N.Y.S.2d 181 [2nd Dept 2013], quoting CPLR 3211(c).

19 Kent contends that Plaintiff’s claim as reflected in its 4th cause of action for Quasi Contract/Unjust Enrichment is not a viable claim. 19 Kent contends that as there is no requisite privity between it and the Plaintiff. 19 Kent argues that the mere fact that 19 Kent may have benefitted from improvements is insufficient to permit the Plaintiff to maintain a quasi-contract or unjust enrichment claim against it. The Plaintiff says very little in response. The Court agrees that 19 Kent has shown as a matter of law that the Plaintiff does not have such a claim. *See Sperry v. Crompton Corp.*, 26 A.D.3d 488, 489, 810 N.Y.S.2d 498 [2nd Dept 2006], *aff’d*, 8 N.Y.3d 204, 863 N.E.2d 1012 [2007]; *M. Paladino, Inc. v. J. Lucchese & Son Contracting Corp.*, 247 A.D.2d 515, 515, 669 N.Y.S.2d 318 [2nd Dept 1998]. As such, the Plaintiff’s 4th Cause of action as against 19 Kent is dismissed.

19 Kent contends that the Plaintiff has no diversion of trust fund claim against it. 19 Kent argues that it lacks requisite privity with the Plaintiff and the mechanics lien has expired. The expiration has not been contested and the application to dismiss has been granted. 19 Kent contends that in order to be a beneficiary of trust funds there must be privity of contract or a valid and existing mechanic’s lien.

A review of the record in the instant case establishes that the plaintiff is not a beneficiary of the trust assets held by the respondent Commack Center Associates (hereinafter Commack). There is simply no proof showing a claim by the plaintiff as the subcontractor for which Commack, the owner, was obligated. Not only was the mechanic’s lien of the plaintiff dismissed as defective, but the plaintiff also failed to controvert, through the submission of an affidavit of a person with personal knowledge, the sworn statement of Ralph E. Cusano, the chief financial officer of Commack’s asset manager, that Commack was never contractually obligated to the plaintiff. Absent proof of a claim by the plaintiff for which Commack obligated itself, there is no basis for a finding that the plaintiff was a beneficiary with a trust claim against Commack.

Innovative Drywall, Inc. v. Crown Plastering Corp., 224 A.D.2d 664, 638 N.Y.S.2d 722 [2nd Dept 1996].

“Although an owner’s liability pursuant to Lien Law article 3-A requires the existence of an obligation on the part of the owner (*see* Lien Law § 71 [3]), the obligation may be one either imposed by

contract 'or as the result of a mechanic's lien.'" *Spectrum Painting Contractors, Inc. v. Kreisler Borg Florman Gen. Const. Co.*, 64 A.D.3d 565, 576, 883 N.Y.S.2d 262 [2nd Dept 2009].

Notwithstanding the Plaintiff's opportunity to provide further submissions, including affidavits, in furtherance of the instant motion having been converted to a summary judgment motion, Plaintiff has provided an attorney affirmation. There is no proof that serves to raise a question of fact. The Plaintiff has not rebutted the *prima facie* showing made by 19 Kent that there was no relationship between the Plaintiff and 19 Kent in order for 19 Kent to be determined to be a trustee for payments to Plaintiff. Accordingly, the Plaintiff's 5th Cause of action as against the moving 19 Kent is dismissed.

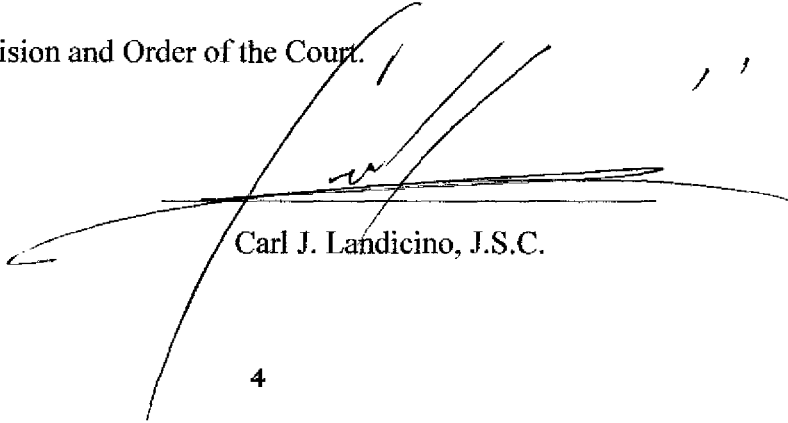
19 Kent also contends that General Business Law 756 (the Prompt Payment Act) does not serve as a basis for a viable claim. 19 Kent argues that this is because the parties lack privity of contract. "That statute simply provides that certain provisions with respect to payments shall be incorporated into existing construction contracts to the extent that they are not inconsistent with the terms and conditions of such contracts (*see Hugh O'Kane Elec. Co., LLC v MasTec N. Am., Inc.*, 19 AD3d 126 [1st Dept 2005]). The statute does not create privity of contract or create a cause of action between a subcontractor and the owner of property where no construction contract exists between the parties." *Curtis Partition Corp. v. HRH Const., LLC*, 22 Misc. 3d 1124(A), 880 N.Y.S.2d 223 [Sup. Ct. 2009]. Accordingly, the Plaintiff's 6th Cause of action as against 19 Kent is dismissed.

Based on the foregoing, it is hereby ORDERED as follows:

Defendant 19 Kent Acquisition LLC's motion (motion sequence #1) is granted. The Plaintiff's 1st, 4th, 5th and 6th causes of action against 19 Kent are dismissed, and as such the Complaint is dismissed as against the Defendant 19 Kent Acquisition, LLC., and the subject mechanic's lien shall be discharged. Defendant 19 Kent, LLC shall settle an order reflecting the relief granted, on notice, together with a copy of this Decision and Order, with notice of entry, within 60 days of entry.

This Constitutes the Decision and Order of the Court.

ENTER:



Carl J. Landicino, J.S.C.