

**Jaydee Group USA Inc. v Metropolitan Enters., Inc.**

2020 NY Slip Op 31706(U)

May 14, 2020

Supreme Court, New York County

Docket Number: 850324/2015

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 2EFM

*Justice*

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JAYDEE GROUP USA INC.,

Plaintiff,

- v -

METROPOLITAN ENTERPRISES, INC., NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY, JANE ADDAMS HIGH SCHOOL FOR ACADEMIC CAREERS, SEWARD PARK CAMPUS, METROPOLITAN CORPORATE ACADEMY HIGHSCHOOL, THE BOARD OF EDUCATION OF THE CITY OF BROOKLYN, THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, CITY OF NEW YORK, CORBEX INC., BILTMORE GENERAL CONTRACTORS, INC., HILT CONSTRUCTION, INC.

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 136

were read on this motion to/for

JUDGMENT - SUMMARY

In this action seeking to foreclose on certain mechanical liens, defendant Biltmore General Contractors, Inc. (“Biltmore”) moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff Jaydee Group USA Inc.’s (“Jaydee”) sixth cause of action (unjust enrichment) (Docs. 118-120). Jaydee opposes the motion (Docs. 122-128). After oral argument and a review of the motion papers and the relevant case law and statutes, the motion is **granted**.

**FACTUAL AND PROCEDURAL HISTORY:**

The underlying facts of this case are set forth in detail in the decision and order of this Court entered May 26, 2017 (“the 5/26/17 order”), which, *inter alia*, granted defendant Metropolitan Enterprises Inc.’s (“Metropolitan”) motion for summary judgment seeking dismissal of certain causes of action, as well as in its decision and order entered March 28, 2019 (“the 3/28/19 order”), which, *inter alia*, granted Jaydee’s motion, pursuant to CPLR 3126, to strike Metropolitan’s answer and counterclaims (Docs. 87-88, 115). However, the relevant facts of this case are briefly summarized as follows.

In October 2015, Jaydee commenced this action against defendants by filing a summons and complaint (Doc. 1). In the complaint, Jaydee alleged, *inter alia*, that, in or about August 2014, Jaydee and Metropolitan, a company that installs scaffolding and related services for construction projects, entered into a contract whereby Jaydee promised to supply Metropolitan with materials for certain public improvement contracts (Doc. 1). Defendant New York City School Construction Authority allegedly hired Metropolitan to provide materials and services for several projects, including Seward Park (“the project”), for which Biltmore was the general contractor (Doc. 1). When Metropolitan failed to pay Jaydee for the materials pursuant to their agreement, Jaydee commenced the instant action (Doc. 1).

Jaydee asserted seven causes of action, including foreclosure of mechanic’s lien (first, second and third causes of action); breach of contract (fourth cause of action); account stated (fifth cause of action); unjust enrichment (sixth cause of action); and goods sold and delivered (seventh cause of action) (Doc. 1).

In March 2016, Metropolitan moved, pursuant to CPLR 3212, for summary judgment seeking dismissal of the first three causes of action on the ground that the materials supplied by Jaydee were not lienable (Doc. 45). This Court agreed and dismissed the three causes of action

(Doc. 87-88). In so holding, this Court reasoned, *inter alia*, that Jaydee failed to show that the materials were adaptable only to the work in question and that it failed to establish that the materials fell within the scope of the Lien Law (Doc. 87-88). In the 3/28/19 order, this Court struck Metropolitan's answer and counterclaims due to its failure to comply with court-ordered discovery, awarding Jaydee a judgment on its remaining claims (fourth through seven causes of action) as to liability, and directing that an inquest on damages be held at the time of trial (Doc. 115).

In June 2019, Biltmore, the only defendant remaining in this action, filed the instant motion seeking dismissal of Jaydee's sixth cause of action, the only surviving cause of action against it (Doc. 118-120). In support of its motion, Biltmore submits, *inter alia*, an attorney affirmation; letters of intent establishing its contractual relationship with Metropolitan; a copy of the verified summons and complaint; and a copy of the 5/26/17 order (Doc. 120).

Additionally, Biltmore submits the affidavit of Kenneth Martinez, president of Metropolitan, which Metropolitan submitted in support of its motion for summary judgment in 2016 (Doc. 120). Biltmore argues, *inter alia*, that this Court relied, at least in part, on Martinez's affirmation when it dismissed the mechanic's lien against the project (Doc. 119). Specifically, Martinez affirmed that:

“[b]etween May, 2014 and October, 2014, Metropolitan, from time to time, ordered various miscellaneous supplies for purchase from Jaydee, including items such as latex gloves, rope and duct tape” (Doc. 120). Further, averred Martinez, “[t]he supplies were delivered to Metropolitan's yard”; “the supplies ordered from Jaydee were for Metropolitan's general use and not for any specific project(s)”; and “Metropolitan did not advise Jaydee that the supplies were for use at any specific project(s)” (Doc. 120).

Since “Jaydee is unable to establish that the materials were used at the project or for Biltmore in any respect,” Biltmore argues that Jaydee's unjust enrichment claim must be dismissed (Doc. 119). Biltmore also claims that Jaydee's unjust enrichment claim cannot survive summary

judgment because, although there was an agreement between Metropolitan and Biltmore (Doc. 120), no relationship existed between Biltmore and Jaydee so as to cause reliance or inducement (Doc. 119). Additionally, claims Biltmore, “Jaydee’s contract with Metropolitan precludes its quasi-contract claim for unjust enrichment” against it, limiting its remedy to “breach of contract claims against Metropolitan” (Doc. 119).<sup>1</sup>

In opposition, Jaydee argues, *inter alia*, that the motion must be denied because Biltmore only provided an attorney affirmation and not an affidavit from someone with personal knowledge on behalf of Biltmore (Doc. 122). Moreover, it claims that Martinez’s affidavit is insufficient to establish that Biltmore is not liable under a theory of unjust enrichment since it only addressed whether Jaydee’s materials were lienable (Doc. 122). Jaydee also claims that it is unclear whether this Court relied on Martinez’s affidavit in dismissing the first three causes of action since there is no reference to the affidavit in the 5/26/17 order (Doc. 122). Further, Jaydee maintains that its contract with Metropolitan does not bar its unjust enrichment claim against Biltmore because, although Biltmore cites to Second Department case law for this argument, “the First Department case law appears to be in disagreement with the Second Department on this issue” (Doc. 122).<sup>2</sup>

## LEGAL CONCLUSIONS:

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<sup>1</sup> Although Biltmore submits the affidavit of Frank Geiser (“Geiser”), its president, and invoices reflecting that materials were billed and shipped directly from Jaydee to Metropolitan, this Court will not consider this proof insofar as it was submitted for the first time in reply to Jaydee’s opposition papers (*see Rhodes v City of New York*, 88 AD3d 614, 615 [1st Dept 2011]; *Voytek Technology, Inc. v Rapid Access Consulting, Inc.*, 279 AD2d 470, 471 [2d Dept 2001]).

<sup>2</sup> In support of this argument, Jaydee cites to *Mandarin Trading Ltd. v Wildenstein*, 17 Misc 3d 1118(A), \*8 (Sup Ct, NY County 2007), *affd* 16 NY3d 173 (2011), which stated, in pertinent part, that “[w]hile privity is a required element for an unjust enrichment claim in the Second Department, the law in the First Department appears contrary, at least in some instances.”

It is well-established that “[t]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]; see CPLR 3212 (b); *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If the moving party makes a prima facie showing of entitlement to judgment as a matter of law, the burden then shifts to the party opposing the motion to present evidentiary facts in admissible form which raise a genuine, triable issue of fact (see *Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]). If, after viewing the facts in the light most favorable to the non-moving party, the court concludes that a genuine issue of material fact exists, then summary judgment will be denied (see *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

“The essential inquiry in any action for unjust enrichment is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered” (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [internal quotation marks, ellipsis and citations omitted]). To establish a claim for unjust enrichment, a plaintiff must establish “that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered” (*Board of Managers of 28 Cliff Street Condominium v Maguire*, 65 Misc 3d 737, 745 [Sup Ct, NY County 2019] [internal quotation marks and citations omitted]; see *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d at 182). Further, it is well-established that “unjust enrichment is not a catchall cause of action to be used when others fail” and that “[i]t is available only in unusual situations” (*Belle Lighting LLC v Artisan Construction Partners LLC*, 178 AD3d 605, 605 [1st Dept 2019] [internal quotation marks and citation omitted]).

This Court grants Biltmore's motion for summary judgment dismissing the unjust enrichment claim. It is undisputed that the underlying contract giving rise to this action for the non-payment of the subject materials was executed between Metropolitan and Jaydee (Doc. 1). This is supported by the complaint verified by Joel Rosenbaum, Jaydee's officer, which, [p]ursuant to CPLR 105 (u), . . . qualifies as an affidavit for the purposes of a motion for summary judgment" (*Cartagena v Rhodes 2 LLC*, 2020 NY Slip Op 30290[U], 2020 NY Misc LEXIS 458, \*12 [Sup Ct, NY County 2020]; *see* CPLR 105 [u]).

Although privity is not required for an unjust entrenchment claim (*see Sperry v Crompton Corp.*, 8 NY3d 204, 215 [2007]), it is well-established that such "a claim will not be supported unless there is a connection or relationship between the parties that could have caused reliance or inducement on the plaintiff's part" (*Georgia Malone & Co., Inc. v Ralph Rieder*, 86 AD3d 406, 408 [1st Dept 2011]). However, Jaydee's argument regarding privity is foreclosed by case law holding that "there can be no quasi-contract claim against a third-party nonsignatory to a contract that covers the subject matter of the claim" (*Maor v Blu Sand Intl. Inc.*, 143 AD3d 579, 579 [1st Dept 2016]; *see Mueller v Michael Janssen Gallery Pte. Ltd.*, 225 F Supp 3d 201, 208 [SDNY 2016]; *Randall's Is. Aquatic Leisure, LLC v City of New York*, 92 AD3d 463, 464 [1st Dept 2012]; *see also Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 383, 388 [1987]). Based on the foregoing, Biltmore has satisfied its entitlement to judgment as a matter of law, and Jaydee has failed to raise an issue of material fact to preclude such relief.

The remaining arguments are either without merit or need not be addressed given the findings above.

Therefore, in accordance with the foregoing, it is hereby:

**ORDERED** that defendant Biltmore General Contractors, Inc.’s motion for summary judgment seeking dismissal of plaintiff Jaydee Group USA Inc.’s sixth cause of action for unjust enrichment is granted, and the complaint is dismissed; and it is further

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

**ORDERED** that defendant Biltmore General Contractors, Inc. is to serve a copy of this order with notice of entry upon plaintiff Jaydee Group USA Inc. within 30 days; and it is further

**ORDERED** that this constitutes the decision and order of this Court.

5/14/2020

DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE