| **Empire Outet Bldrs. LLC v NYC Fire Sprinkler Corp.** |
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| 2020 NY Slip Op 32062(U) |
| June 23, 2020 |
| Supreme Court, New York County |
| Docket Number: 655572/2019 |
| Judge: Andrew Borrok |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** HON. ANDREW BORROK **PART** IAS MOTION 53EFM

*Justice*

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EMPIRE OUTLET BUILDERS LLC,

Plaintiff,

- v -

NYC FIRE SPRINKLER CORP., ROBERT MOONEY,

Defendant.

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**INDEX NO.** 655572/2019

**MOTION DATE** 06/22/2020

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON MOTION**

NYC FIRE SPRINKLER CORP.

Plaintiff,

-against-

ST. GEORGE OUTLET DEVELOPMENT, LLC, DONALD A. CAPOCCIA, BRANDON BARON, JOSEPH FERRARA, BFC PARTNERS, L.P.

Defendant.

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Third-Party
Index No. 595961/2019

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 34, 35, 38

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, Empire Outlet Builders LLC (**Empire**) and St. George Outlet Development, LLC (**St. George**), Donald A. Capoccia, Brandon Baron, Joseph Ferrara, and BFC Partners, L.P.'s (**BFC Partners**, and together with St. George, and Messrs. Capoccia, Baron, and Ferrara, collectively, the **Third-Party Defendants**) motion pursuant to CPLR §§ 3211 (a) (1) and (7) to dismiss NYC Fire Sprinkler Corp. and Robert Mooney's (Mr. Mooney and NYC Fire Sprinkler Corp., collectively, **Fire Sprinkler**) Second (Account Stated), Third (Lien Law § 5), Fifth (Unjust Enrichment), and Sixth (Quantum Meruit) Counterclaims and to dismiss the Fourth Counterclaim (Lien Law § 79-a) in part is granted in its entirety.

## I. THE FACTS RELEVANT TO THE MOTION

This case is one of a series of lawsuits arising out work performed by contractors and subcontractors on the St. George Waterfront Redevelopment Project in Staten Island (the **Project**). The property at issue is 55B Richmond Terrace, Staten Island, New York (the **Property**), which is owned by the City of New York (the **City**).

Reference is made to a certain Memorandum of Lease (the **Lease**), dated December 27, 2013, by and between the City and St. George, pursuant to which the City leased the Property to St. George for an initial term of 49 years, with certain rights of extension as set forth in the Lease (NYSCEF Doc. No. 18). In connection with the Lease, Messrs. Capoccia, Baron, and Ferrara, each of whom is a principal of Empire and St. George, executed a Standby Completion Guaranty (the **Standby Guaranty**), dated March 31, 2015, to and for the benefit of the City, which guaranteed the substantial completion of construction on the Project and the removal or discharge of any liens placed on the Property (NYSCEF Doc. No. 20). Empire, as the Project's general contractor, entered into two subcontracts with Fire Sprinkler, both dated March 21, 2016, to provide work, labor, and services in connection with the retail and garage spaces of the Property (the retail and garage subcontracts, collectively, the **Subcontracts**) (NYSCEF Doc. No. 22).

On September 3, 2019, Fire Sprinkler filed a Notice of Mechanic's Lien in the amount of $579,913.31 against the Property (NYSCEF Doc. No. 23). St. George filed a bond pursuant to Sections 19 (4) and 21 (5) of the New York Lien Law (NYSCEF Doc. No. 24). On September 17, 2019, Fire Sprinkler filed a Discharge of Mechanic's Lien (NYSCEF Doc. No. 25). Empire

subsequently filed a complaint against Fire Sprinkler and its principal, Mr. Mooney, asserting six causes of action sounding in breach of contract and fraud (NYSCEF Doc. No. 2). Fire Sprinkler filed Counterclaims against Empire and a Third-Party Complaint against St. George, BFC Partners, and Messrs. Capoccia, Baron, and Ferrara, asserting contract and quasi-contract causes of action as well as statutory claims under Lien Law §§ 5 and 70 (NYSCEF Doc. No. 17).

## II. DISCUSSION

A party may move for judgment dismissing one or more causes of action on the ground that the pleadings fail to state a cause of action for which relief may be granted (CPLR § 3211 [a] [7]). On a motion to dismiss pursuant to CPLR § 3211 (a) (7), the court must afford the pleadings a liberal construction and accept the facts alleged in the complaint as true, according the plaintiff the benefit of every favorable inference (*Morone v Morone*, 50 NY2d 481, 484 [1980]). The court's inquiry on a motion to dismiss is whether the facts alleged fit within any cognizable legal theory (*id.*). Bare legal conclusions are not accorded favorable inferences, however, and need not be accepted as true (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999]). A party may also move to dismiss based on documentary evidence pursuant to CPLR § 3211 (a) (1). A motion to dismiss pursuant to CPLR § 3211 (a) (1) will be granted only where the documentary evidence conclusively establishes a defense to the plaintiff's claims as a matter of law (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]).

### A. Second Counterclaim (Account Stated)

A cause of action for an account stated "exists where a party to a contract receives bills or invoices and does not protest within a reasonable time" (*Bartning v Bartning*, 16 AD3d 249, 250

[1st Dept 2005]). As the First Department has explained, however, "[a] claim for an account stated may not be utilized simply as another means to attempt to collect under a disputed contract" (*Martin H. Bauman Assoc. v H & M Intl. Transp.*, 171 AD2d 479, 485 [1st Dept 1991]).

Here, Empire argues that the Second Counterclaim for an Account Stated must be dismissed as duplicative of the First Counterclaim for Breach of Contract, which is based on the same factual allegations and seeks the same damages. In its opposition papers, Fire Sprinkler argues that the claims are not duplicative because the Account Stated Counterclaim is based on change orders and adjustments that were not contemplated by the parties in the Subcontracts, and because they seek different damages. Fire Sprinkler's arguments, however, fail.

The Account Stated counterclaim covers the same issues and seeks the same damages as the Breach of Contract Counterclaim and Fire Sprinkler fails to allege any specific work that was performed that was outside the scope of the Subcontracts. The Second Counterclaim is, as Fire Sprinkler states in its opposition papers, intended to recover "the balance of the amount owed under the Subcontract[s]" (Def. Mem. at 8). In other words, Fire Sprinkler's Account Stated Counterclaim is simply another means to recover under the Subcontracts. Accordingly, the Second Counterclaim is dismissed as duplicative of the First Counterclaim (*Hagman v Swenson*, 149 AD3d 1, 4 [1st Dept 2017] [affirming dismissal of account stated claim where the claim was merely asserted as another means to collect under a disputed contract]).

For the avoidance of doubt, to the extent that Fire Sprinkler argues that the Account Stated Counterclaim does not seek the same damages as the Breach of Contract Counterclaim because the Account Stated Counterclaim also includes change orders that were not contemplated by the parties in the formation of the Subcontract, the argument is unsupported by the allegations in the Counterclaims and Third-Party Complaint. In any event, Fire Sprinkler does not dispute the enforceability of the Subcontracts, and the Subcontracts include a procedure for change orders. Accordingly, any alleged change orders were contemplated in the Subcontracts. Additionally, to the extent that Fire Sprinkler argues that the Account Stated Counterclaim is different from the Breach of Contract Counterclaim because the Breach of Contract Counterclaim also seeks attorneys' fees and costs, the argument is without merit. A review of the pleadings reveals that the Breach of Contract claim does not seek attorneys' fees or any other damages. It seeks $579,931.31, i.e., the identical amount as the Account Stated claim.

In letters submitted to the court after the motion was fully briefed, the parties refer to *A.J. McNulty & Co., Inc. v Empire Outlet Builders LLC et al.* (2020 NY Slip Op 30746[U], Sup Ct, NY County 2020) and *St. George Outlet Development, LLC et al. v Casino Mechanical Corp. et al.* (2020 NY Slip Op 50516[U], Sup Ct, NY County 2020) – two actions currently pending in the Commercial Division, Supreme Court, New York County. In *A.J. McNulty*, the court (Sherwood, J.) dismissed similar Lien Law claims but denied the motion to dismiss the account stated claim and in *St. George*, the court (Ostrager, J.) dismissed both the Lien Law claims and the account stated claim. Both decisions are consistent with this court's analysis.

In *A.J. McNulty*, Empire subcontracted with A.J. McNulty & Co., Inc. (**A.J. McNulty**) to perform all retail steel construction and installation and all related subcontract work for the total adjusted sum of $10,729,213.83 (*A.J. McNulty*, 2020 NY Slip Op 30746[U], *1-2). A.J. McNulty alleged that Empire only paid $8,915,700.07 (*id.* at *2). Significantly, A.J. McNulty also alleged that Empire requested that it provide certain additional trucking services that were outside of the scope of its subcontract with Empire and A.J. McNulty sought $23,298 with respect to its account stated claim for such additional trucking services and $1,813,513.76 in damages with respect to its breach of contract claim (*id.*). The court denied Empire's motion to dismiss with respect to the account stated claim on the ground that the complaint sufficiently alleged that the additional trucking services on which the account stated claim was based were outside of the subcontract (*id.* at *4).

In *St. George*, on the other hand, Empire entered into subcontracts with Casino Mechanical Corp. (**Casino**) to provide certain work, labor, and services in connection with the retail facility, garage facility, and the Staten Island Rapid Transit Operating Authority facility, for a total of nearly $13 million (*St. George*, 2020 NY Slip Op 50516[U], *2). Casino opposed dismissal of its account stated claim, arguing that it was based on certain change orders and adjustments to the subcontract prices (*id.* at *4). The court disagreed and dismissed the account stated claim, reasoning that the change orders were contemplated in the subcontracts and the claim otherwise covered the same issues and sought the same damages as the breach of contract claim (*id.*). Simply put, and as stated above, the allegations in the case before this court make clear that the account stated claim is merely for damages sought in respect of, and not outside of, the breach of contract claim.

Accordingly, the Account Stated counterclaim is dismissed.

**B. Third Counterclaim (Lien Law § 5)**

Lien Law § 5 provides, in relevant part:

> Where no public fund has been established for the financing of a public improvement with estimated cost in excess of two hundred fifty thousand dollars, ***the chief financial officer of the public owner shall require the private entity for whom the public improvement is being made to post, or cause to be posted, a bond or other form of undertaking*** guaranteeing prompt payment of moneys due to the contractor, his or her subcontractors and to all persons furnishing labor or materials to the contractor or his or her subcontractors in the prosecution of the work on the public improvement.

(NY Lien Law § 5 [emphasis added]).

Empire and the Third-Party Defendants argue that Section 5 obligates the "public owner" of a public improvement project to act but does not place any obligation on the private entity for whom the public improvement is being made, i.e., here, St. George. In its opposition papers, Fire Sprinkler argues that it has a private right of action under Lien Law § 5, and that the Standby Guaranty is the equivalent of a "bond or other form of undertaking" and, as an intended beneficiary of the Standby Guarantee, Fire Sprinkler is permitted to bring a claim to recover under the Standby Guaranty. The arguments are unpersuasive.

Lien Law § 5 expressly requires the "public owner" to require the private entity for whose benefit the project is made to post a bond or other undertaking, but it places no affirmative obligation on the private entity and it does not authorize a private right of action.

For the avoidance of doubt, to the extent that Fire Sprinkler now argues that the Third Cause of action seeks only to assert a claim under the Standby Guaranty as a third-party beneficiary, the argument still fails. The Third Counterclaim, as pled, is premised on the theory that Fire Sprinkler has a private right of action under Lien Law § 5 and they do not. Nor are they a third party beneficiary. The Standby Guaranty was made to and for the benefit of the City and Fire Sprinkler is not a party or otherwise identified as a third-party beneficiary (NYSCEF Doc. No. 20; *A.J. McNulty*, 2020 NY Slip Op 30746[U], *2-3; *St. George*, 2020 NY Slip Op 50516[U], *4-8). Accordingly, the Third Counterclaim is dismissed.

**C. Fourth Counterclaim (Lien Law § 79-a)**

Lien Law § 79-a provides, in relevant part:

> 1. Any trustee of a trust arising under this article, and any officer, director or agent of such trustee, who applies or consents to the application of trust funds received by the trustee as money or an instrument for the payment of money for any purpose other than the purposes of that trust, as defined in section seventy-one, is guilty of larceny and punishable as provided in the penal law if
>
> (a) such funds were received by the trustee as owner, as the term "owner" is used in article three-a of this chapter, and they were so applied prior to the payment of all trust claims as defined in such article three-a, arising at any time; or
>
> (b) such funds were received by the trustee as contractor or subcontractor, as such terms are used in article three-a of this chapter, and the trustee fails to pay, within thirty-one days of the time it is due, any trust claim arising at any time

Critically, however, "the Lien Law does not create a strict liability crime, and therefore a conviction of larceny by misappropriation of trust funds pursuant to Lien Law § 79-a requires proof of larcenous intent" (*ARA Plumbing & Heating Corp. v Abcon Assoc., Inc.*, 44 AD3d 598, 599 [2d Dept 2007]).

In support of their motion to dismiss, Empire and the Third-Party Defendants argue that the portion of the Fourth Counterclaim alleging larceny pursuant to Lien Law § 79-a should be dismissed because the allegations fail to support an inference of larcenous intent. In its opposition papers, Fire Sprinkler argues that the Fourth Counterclaim sets forth specific allegations of intentional wrongdoing sufficient to sustain the Lien Law § 79-a portion of the Fourth Counterclaim at this stage in the proceedings. This argument also fails.

Fire Sprinkler's conclusory allegations that Empire and St. George knowingly diverted trust funds by using the proceeds for purposes other than paying subcontractors do not support the inference of larcenous intent (Answer and Counterclaims, NYSCEF Doc. No. 5 ¶¶ 91-109). Fire Sprinkler merely alleges that despite having actual knowledge of unpaid invoices due and owing to Fire Sprinkler, the Third-Party Defendants knowingly made improper payments and diversions and "have violation [sic] the New York Lien Law, and are presumed by law, to have committed an act which constitutes larceny under the New York Lien Law (*id.*, ¶ 107). But such allegations are conclusory at best and even given the most liberal reading, they fail to support an inference of larcenous intent. Because Fire Sprinkler fails to allege the requisite *mens rea* to establish the crime of larceny, the portion of the Fourth Counterclaim alleging a violation of Lien Law § 79-a is dismissed. (*St. George*, 2020 NY Slip Op 50516[U], *7).

Additionally, to the extent that Fire Sprinkler seeks an award of punitive damages, the court notes that "the standard for imposing punitive damages is a strict one and punitive damages will be awarded only in exceptional cases" (*Marinaccio v Town of Clarence*, 20 NY3d 506, 511

[2013]). Here, there are insufficient allegations of "spite or malice, or a fraudulent or evil motive . . . , or such a conscious and deliberate disregard of the interests of others that the conduct may be called willful or wanton" to support an award of punitive damages (*Dupree v Giugliano*, 20 NY3d 921, 924 [2012] [citation and internal quotation marks omitted]; (*St. George*, 2020 NY Slip Op 50516[U], *8). Accordingly, the portion of the Fourth Counterclaim seeking punitive damages in dismissed.

**D. Fifth (Unjust Enrichment) and Sixth (Quantum Meruit) Counterclaims**

Fire Sprinkler's Fifth and Sixth Counterclaims are based on the quasi-contractual theories of unjust enrichment and quantum meruit. Significantly, however, "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]).

Empire argues that the existence of the written Subcontracts precludes Fire Sprinkler's claims for Unjust Enrichment and Quantum Meruit. Fire Sprinkler argues that it is not required to elect its remedies at this stage of the proceedings as the terms and the scope of work contemplated by the Subcontracts are in dispute. Fire Sprinkler fails, however, to identify any allegations that would support the inference that the parties disagree as to the terms or the applicability of the Subcontracts. Indeed, Fire Sprinkler does not dispute the existence and enforceability of the Subcontracts, which cover the subject matter of the issues in this case. Therefore, the Fifth and Sixth Counterclaims are dismissed.

Accordingly, it is

ORDERED that Empire Outlet Builders LLC, St. George Outlet Development, LLC, Donald A. Capoccia, Brandon Baron, Joseph Ferrara, and BFC Partners, L.P.'s motion to dismiss is granted and the Second (Account Stated), Third (Lien Law § 5), Fifth (Unjust Enrichment), and Sixth (Quantum Meruit) Counterclaims are dismissed and the Fourth Counterclaim (Lien Law § 79-a) is dismissed in part to the extent set forth herein.

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6/23/2020
DATE

ANDREW BORROK, J.S.C.

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| CHECK ONE: | | CASE DISPOSED | | | X | NON-FINAL DISPOSITION | |
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