

**United Concrete Mix of Brooklyn, Inc. v Parkside
Constr. Bldrs. Corp.**

2020 NY Slip Op 32848(U)

August 31, 2020

Supreme Court, New York County

Docket Number: 158225/2018

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: <u>HON. ARLENE P. BLUTH</u>	PART	IAS MOTION 14
<i>Justice</i>		
-----X	INDEX NO.	<u>158225/2018</u>
UNITED CONCRETE MIX OF BROOKLYN, INC.,	MOTION DATE	<u>08/27/2020</u>
Plaintiff,	MOTION SEQ. NO.	<u>004</u>

- v -

PARKSIDE CONSTRUCTION BUILDERS CORP., ONE
BEEKMAN OWNER, LLC, T.G. NICKEL & ASSOCIATES
LLC, FEDERAL INSURANCE COMPANY, ABC
COMPANIES 1-100 (FICTITIOUS ENTITIES), JOHN DOES
1-100 (FICTITIOUS PERSONS)

**DECISION + ORDER ON
MOTION**

Defendant.

-----X
The following e-filed documents, listed by NYSCEF document number (Motion 004) 58, 59, 60, 61, 62,
63, 68, 69

were read on this motion to/for DISMISS DEFENSE.

The motion by defendants T.G. Nickel & Associates, LLC (“TG”) and One Beekman
Owner, LLC (“One Beekman”), collectively (“Movants”) to dismiss the first, second and third
causes of action against TG and all causes of action against One Beekman is granted.

Background

Plaintiff, a concrete supplier, claims that it was working on a construction project at a
property owned by One Beekman and it was not paid for the materials it provided. Plaintiff
claims it is owed \$1,124,555.39. TG operated as a contractor at the site.

Movants seek to dismiss the first three causes of action against TG and all claims against
One Beekman on the ground that they never entered into any contracts with plaintiff. They
assert that plaintiff entered into a subcontractor agreement with defendant Parkside and that they
are not in privity of contract with plaintiff. Movants stress that any alleged verbal assurances

they may have made to plaintiff concerning materials supplied to Parkside is not a basis to hold them liable under a breach of contract theory.

Movants argue that plaintiff has admitted to the existence of contracts and these constitute documentary evidence that plaintiff cannot allege a breach of contract theory against them. Movants also insist that the Statute of Frauds bars plaintiff from recovering against them because an oral promise to pay for the debt of another is not sufficient and must be in writing.

Movants contend that plaintiff's second cause of action for unjust enrichment must also be dismissed due to the agreement with Parkside. And Movants add that the third claim for account stated is also barred by the existence of plaintiff's contract with Parkside. Movants claim that the remaining cause of action, brought under Lien Law § 44 (3), should be dismissed against One Beekman because it is not a necessary party. Movants point out that plaintiff previously discontinued the case against One Beekman after TG bonded plaintiff's mechanic's lien, but subsequently named One Beekman in the First Amended Complaint, then discontinued against them only to rename One Beekman in the instant Second Amended Complaint.

In opposition, plaintiff stresses that One Beekman and TG made oral promises that "Plaintiff should have no concerns regarding payment and that TG and OBO would pay Plaintiff for Materials delivered to the Property for the Project, thereby creating a contract by and between Plaintiff and TG and OBO" (NYSCEF Doc. No. 55, ¶ 14 [Second Amended Complaint]). Plaintiff also alleges that "TG once again assured Plaintiff that Plaintiff would be paid, in full for the Materials delivered to the Property for the Project" (*id.* ¶ 15).

Plaintiff acknowledges it entered into a contract with Parkside but says the oral promises were agreed to after the contract with Parkside. With respect to the second cause of action for

unjust enrichment, plaintiff claims that this can be pled in the alternative. It also asserts that the account stated claim should remain because of the oral promises.

Discussion

“On a CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true. Further, on such a motion, the complaint is to be construed liberally and all reasonable inferences must be drawn in favor of the plaintiff” (*Alden Global Value Recovery Master Fund L.P. v Key Bank Natl. Assoc.*, 159 AD3d 618, 621-622, 74 NYS3d 559 [1st Dept 2018] [internal quotations and citations omitted]).

“In assessing a motion under CPLR 3211(a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one” (*Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972 [1994]).

The Court grants the motion in its entirety. Although plaintiff attempts to characterize the alleged oral promises made by TG and One Beekman to plaintiff as a separate contract, the second amended complaint clearly shows that these assurances were made in the context of the agreement with Parkside. In other words, assuming plaintiff’s allegations are true (as the Court must on a motion to dismiss) TG and One Beekman were agreeing to pay plaintiff in the event that Parkside did not fulfill its obligations in its agreement with plaintiff. Plaintiff did not assert that it provided materials at the direction of TG or One Beekman; rather, the allegations suggest that One Beekman and TG agreed to jump in if Parkside did not pay.

That theory requires dismissal of the first three causes of action against these defendants pursuant to the Statute of Frauds. “An oral promise to guarantee the debt of another is

unenforceable pursuant to General Obligations Law § 5-701(a)(2). However, under a long-standing exception to the statute, the promise need not be in writing if it is (1) supported by new consideration moving to the promisor and beneficial to him, and (2) the promisor has become in the intention of the parties a principal debtor primarily liable” (*Carey & Assoc. v Ernst*, 27 AD3d 261, 263, 810 NYS2d 475 [1st Dept 2006]).

Here, the oral promises allegedly made by TG and One Beekman were not reduced to writing and are therefore unenforceable. And plaintiff did not establish that the exception to the statute should apply here. In fact, plaintiff only mentioned the Statute of Frauds once in its opposition and claimed it was inapplicable. The Court disagrees.

The Court also grants the portion of Movants’ motion to dismiss the fourth cause of action against One Beekman as plaintiff did not offer opposition on this issue.

Summary

Plaintiff’s second amended complaint alleges that it entered into an agreement with Parkside to provide materials and that it did not get paid. It alleges that TG and One Beekman orally promised to step in and make sure plaintiff got paid if Parkside failed to pay plaintiff. That allegation is an oral promise to pay for the debt of another (Parkside). Plaintiff does not claim that One Beekman or TG asked for more materials or did anything other than purportedly promise to pay if Parkside did not.

Under these circumstances, the Statute of Frauds compels dismissal of the breach of contract, unjust enrichment and account stated causes of action against One Beekman and TG. Plaintiff admits it had a contract and is suing based on the contract. It simply did not sufficiently explain how it could assert breach of contract or quasi-contract claims against entities that were not parties to that contract or why the Court should ignore the Statute of Frauds.

Accordingly, it is hereby

ORDERED that the motion to dismiss the first, second and third causes of action against defendant T.G. Nickel & Associates, LLC and to dismiss all causes of action alleged against defendant One Beekman Owner, LLC is granted and these claims are severed and dismissed.

Remote Conference: September 18, 2020 at 4 p.m.

8/31/2020

DATE



ARLENE F. BLUTH, 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