SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **IAS MOTION 42EFM**

Justice

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KMA CONSTRUCTION CORP

Plaintiff,

- v -

ARISTA IRON WORKS INC.,

Defendant.

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INDEX NO. 652040/2020

MOTION DATE 09/14/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9 were read on this motion to/for JUDGMENT - DEFAULT.

In this action arising from an alleged breach of a construction contract, the plaintiff moves pursuant to CPLR 3215 for leave to enter a default judgment against the defendant. No opposition is submitted. The motion is granted inasmuch as the plaintiff has submitted proof of proper service of the summons and complaint upon the defendant, proof of the facts constituting the claim of willful exaggeration of a lien, and proof of the defendant's failure to answer or appear. See CPLR 3215(f); Atlantic Cas. Ins. Co. v RJNJ Services, Inc., 89 AD3d 649 (2nd Dept. 2011).

The plaintiff's proof includes the complaint, which seeks $25,000.00 in damages upon, *inter alia*, theories of breach of contract, unjust enrichment and quantum meruit, as well as a cause of action for willful exaggeration of a mechanic's lien in violation of Lien Law § 39, which seeks discharge of the lien and attorney's fees. Also submitted is an affidavit of Steven Terranova, principal of the plaintiff, a general contractor that hired the defendant, a subcontractor, to install hollow tube steel partitions on three floors of the building located at 220 Fifth Avenue in Manhattan. Terranova alleges that the plaintiff paid the defendant $42,300.00 of the total $54,700.00 contract price for work performed, that the defendant failed to meet the project schedule deadlines during the final phase of the project, and that this required the plaintiff to hire and pay a replacement subcontractor $12,400.00 to install the steel fabricated by

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the defendant. The plaintiff did not pay the defendant the remainder of the contract price, $12,400.00.

On April 11, 2019, the defendant filed a Notice of Mechanics Lien against the plaintiff in the sum of $38,000.00, in the Office of the County Clerk, New York County. On April 16, 2019, the plaintiff contacted the defendant to request documentation to substantiate the amount. The defendant did not respond. On March 25, 2020, in response to a communication by the plaintiff's' attorney, the defendant sent the plaintiff an invoice for $38,000.00, which is dated November 16, 2018, and described the work invoiced as "12 Frames, 16 Doors, 14p Tubing – Fabricate Only." Terranova alleges that the plaintiff never received the invoice prior to March 25, 2020, and the listed items were not within the agreed upon scope of work. The plaintiff also submits a series of checks dated from March 2018 to March 2019, showing payment to the defendant in the total sum of $42,300.00, and a copy of the lien filed by the defendant. No contract is submitted.

It is well settled that a lienor who willfully exaggerates a lien risks the court declaring the entire lien void. Lien Law § 39 provides, in pertinent part:

> "In any action or proceeding to enforce a mechanic's lien upon a private or public improvement or in which the validity of the lien is an issue, if the court shall find that a lienor has wilfully exaggerated the amount for which he claims a lien as stated in his notice of lien, his lien shall be declared to be void and no recovery shall be had thereon. No such lienor shall have a right to file any other or further lien for the same claim."

"A determination of willful exaggeration of a mechanic's lien requires proof that the lienor deliberately and intentionally exaggerated the lien amount." J. Sackaris & Sons, Inc. v Terra Firma Constr. Mgt & Gen. Contr., LLC, 14 AD3d 538, 541 (2nd Dept. 2005). While "[t]he fact that a lien may contain improper charges" alone does not establish a willful exaggeration (Minelli Constr. Co. v Arben Corp., 1 AD3d 580, 581 [2nd Dept. 2003]), it has been held that cost and expense mark-ups by a subcontractor (see Inter Metal Fabricators, Inc. v HRH Constr. LLC, 94 AD3d 529 [1st Dept. 2012]) or a discrepancy between the lien amount and agreed contract price

may provide such proof. See LMF-RS Contr., Inc. v Kaljic, 126 AD3d 436 (1st Dept. 2015); Strongback Corp. v N.E.D. Cambridge Ave. Dev. Corp., 25 AD3d 392 (1st Dept. 2006). Further, where the evidence conclusively establishes that the amount of the lien was willfully exaggerated, summary disposition is warranted. See Inter Metal Fabricators, Inc. v HRH Constr. LLC, supra; Northe Group, Inc. v Spread NYC, LLC, 88 AD3d 557 (1st Dept. 20111); Strongback Corp. v N.E.D. Cambridge Ave. Dev. Corp., supra.

Here, the plaintiff has established entitlement to relief under Lien Law § 39, and discharge of the lien as void. Its undisputed facts show that the total contract price was $54,700.00, that it paid the defendant $42,300.00 of that amount for the first stages of the work as they were completed, and that the defendant failed to meet the deadlines in the final phase, necessitating the hiring of another contractor to complete the job for the plaintiff. Thus, only $12,400.00 of work remained at the time the new contractor was hired. The defendant's belated demand, and lien, for $38,000.00 is inexplicable and unsupported by anything more than a belated invoice with little detail. Indeed, the affidavit of the plaintiff's principal establishes that the items that were listed were outside the scope of the parties' agreement. Having failed to answer, the defendant is "deemed to have admitted all factual allegations in the complaint and all reasonable inferences that flow from them." Woodson v Mendon Leasing Corp., 100 NY2d 62, 70-71 (2003).

In addition to Lien Law § 39, the defendant has not complied with Lien Law § 38, which provides that "[a] lienor who has filed a notice of lien shall, on demand in writing, deliver to the owner or contractor making such demand a statement in writing which shall set forth the items of labor and/or material and the value thereof which make up the amount for which he claims a lien, and which shall also set forth the terms of the contract under which such items were furnished." "The purpose of the itemization is to apprise the owner of details of the lienor's claim." F.J.C. Cavo Constr., Inc. v. Robinson, 81 AD2d 1005, 1005 (4th Dept. 1981); see Assoc. Bldg. Servs., Inc. v Pentecostal Faith Church, 112 AD3d 1130 (3rd Dept. 2013). It is well established that where a contract has not been substantially completed or where extra work and materials are claimed, "[a] bare specification of a certain sum for labor and another sum for material listed under a general description of the work performed will not suffice ... the statement served by the lienor should set forth the description, quantity and costs of various kinds of materials and the details as to the nature of labor, time spent and hourly or other rate of labor charges." Matter of 819 Sixth Ave Corp. v. T. & A. Assocs., Inc., 24 AD2d 446, 446 (1st Dept.

1965); see Matter of Burdick Assocs. Owners Corp. v Karlan Constr. Corp., 131 AD2d 672 (2nd Dept. 1987). As set forth above, the plaintiff's undisputed proof show that this was not done. Furthermore, the lien is subject to being discharged on a further ground, in that it appears that no action has been timely commenced to foreclose the lien. Lien Law §§ 17 and 19(2) provide that a mechanic's lien is limited to one year and may be discharged by the lienor's "failure to begin an action to foreclose such lien or to secure an order continuing it, within one year from the time of filing the notice of lien."

The plaintiff's motion is denied as to the remaining causes of action of the complaint. As to the breach of contract claim, while the plaintiff established that the defendant failed to perform some of its obligations under the contract, it did not establish that it was damaged in the sum of $25,000.00 (the minimal jurisdictional amount for Supreme Court), or in any amount. Indeed, its proof shows that it withheld the final payment of $12,400.00 from the defendant and paid that amount to the newly hired contractor to complete the same work. No other contract damages are alleged or established.

Since the plaintiff alleges that the parties had a valid contract, the remaining, equitable, causes of action are not viable. "The 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). Indeed, where such additional claims arise from the same facts and seeks the same damages for the alleged breach, dismissal is warranted. See Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce, 70 AD3d 423 (1st Dept. 2010); see Netologic, Inc. v Goldman Sachs Grp., Inc., 110 AD3d 433 (1st Dept. 2013).

The plaintiff's claim for attorney's fees pursuant to Lien Law § 39-a is granted on the issue of liability only. That statute provides that a lien that is declared to be "void on account of willful exaggeration, the person filing such notice of lien shall be liable in damages to the owner of contractor" which damages shall include "attorney's fees for services in securing the discharge of the lien." See Fiberglass Fabricators, Inc. v C.O. Falter Constr. Corp., 117 AD3d 1540 (4th Dept. 2014); Strongback Corp. v N.E.D. Cambridge Ave. Dev. Corp., supra. Generally, attorneys' fees are merely incidents of litigation and are not recoverable absent a specific contractual provision or statutory authority. See Flemming v Barnwell Nursing Home and Health Facilities, Inc., 15 NY3d 375 (2010); Coopers & Lybrand v Levitt, 52 AD2d 493

(1st Dept 1976). Here, there is statutory authority, and relief was granted under Lien Law §39. However, the proper amount was not established by the papers submitted. The plaintiff may file an attorney's affirmation, billing records or other supplemental papers on the issue of attorney's fees, within 60 days.

Accordingly, and upon the papers submitted, it is

ORDERED that the plaintiff's motion pursuant to CPLR 3215 for leave to enter a default judgment against the defendant is granted as to the cause of action alleging willful exaggeration of a lien in violation of Lien Law § 39, and is otherwise denied, and it is further,

ORDERED that the County Clerk of the County of New York is directed, upon receipt of a copy of this order with notice of entry, to vacate and cancel the mechanic's lien filed by Arista Iron Works, Inc. on April 11, 2019, against KMA Construction Corp. designated as Block 828, Lot 35, and to record the vacatur of the lien on the lien docket, and that lien is hereby discharged; and it is further,

ORDERED that the plaintiff's application for attorney's fees pursuant to Lien Law § 39-a is granted on the issue of liability only, and the plaintiff may submit supplemental papers within 60 days of the date of this order and shall notify the court of any such filing, and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

9/28/2020
DATE

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	