

<b>Bank of Am., N.A. v ASD Gem Realty LLC</b>
2020 NY Slip Op 34758(U)
September 9, 2020
Supreme Court, New York County
Docket Number: Index No. 850296/2015
Judge: Jennifer G. Schechter
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JENNIFER G. SCHECTER PART IAS MOTION 54EFM

Justice

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INDEX NO. 850296/2015

BANK OF AMERICA, N.A.,

MOTION SEQ. NO. 012 013

Plaintiff,

- v -

ASD GEM REALTY LLC, A.S. DIAMONDS INC., ALAIN SPIRA, THE 50 WEST 47TH STREET CONDOMINIUM, ARENSON OFFICE FURNISHINGS INC., ADVANCED PLUMBING MECHANICAL & SPRINKLERS CORP., AETNA ELECTRIC LLC, ROYAL ROSE BURTON KITCHEN SUPPLY LLC, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF FINANCE, JOHN DOE,

DECISION + ORDER ON MOTIONS & X-MOT

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 012) 559, 560, 561, 562, 563, 571, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 628, 629, 630

were read on this motion to/for LEAVE TO AMEND

The following e-filed documents, listed by NYSCEF document number (Motion 013) 564, 565, 566, 567, 568, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 631, 632, 633

were read on this motion for SJ & X-mot for SUMMARY JUDGMENT

Upon the foregoing documents, it is ORDERED that the motions by Arenson Office Furnishings Inc. (Arenson) for leave to amend its complaint and for summary judgment against Sweet Construction Corp. (Sweet) are GRANTED and Sweet's cross-motion for summary judgment is DENIED.

Arenson and Sweet are parties to a subcontract pursuant to which Arenson indisputably performed satisfactory work for which it was not paid (Dkt. 629 [the Subcontract]). The Subcontract provides that Arenson "understands that [Sweet] is acting as an agent for the Owner, and agrees to look only to funds actually received by [Sweet from the Owner] as payment for the work performed under the Subcontract" (id. at 7 [emphasis added]). This is known as a "pay-when-paid" clause and is unenforceable (West-Fair Elec. Contrs. v Aetna Cas. & Sur. Co., 87 NY2d 148, 158 [1995] ["We hold that a pay-when-paid provision which forces the subcontractor to assume the risk that the owner will fail to pay the general contractor is void and unenforceable as contrary to public policy"]);


*see Nevco Contr. Inc. v R.P. Brennan Gen. Contrs. & Bldrs., Inc.*, 139 AD3d 515, 516 [1st Dept 2016]; *see also J & K Plumbing & Heating Co. v William H. Lane, Inc.*, 13 AD3d 856, 856 [3d Dept 2004] ["The offending provisions provide that if Hartwick fails to pay Lane, then the subcontractors' sole recourse for nonpayment on their contracts is a claim against Hartwick directly without any recourse against Lane itself. Such provisions violate public policy under *West-Fair* in that they impermissibly transfer the risk of Hartwick's failure to pay from Lane to the subcontractors"]. Sweet's argument that it entered into the Subcontract as an agent for a disclosed principal--the Owner--is unavailing. The parties' relationship here is no different from other textbook cases where a general contractor seeks to avoid paying a subcontractor based on a pay-when-paid clause (*see Blandford Land Clearing Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 260 AD2d 86, 89 [1st Dept 1999] [granting judgment to party arguing that "agent for payment" provision was "merely a thinly disguised pay-when-paid provision that the Court of Appeals held to be void as against public policy in *West-Fair*"]). Sweet therefore must pay Arenson for the contracted work.

Sweet also must pay Arenson an additional 1% interest pursuant to General Business Law (GBL) § 756-b(1)(b) and Arenson's motion to amend its complaint to include the meritorious claim is granted there being no prejudice to Sweet, which had a full and fair opportunity to respond (*see Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 [1st Dept 2011]). Section 756-b(1)(b) expressly mandates that "notwithstanding any contrary agreement," a contractor must nevertheless pay its subcontractor additional interest if it makes late payment. In any event, the pay-when-paid clause is void as against Sweet and it cannot rely on that clause to evade its payment obligation, including statutorily mandated additional interest.

Finally, Sweet does not cite any authority supporting its contention that GBL § 756-a(3)(b)(i), which provides that "where a contractor enters into a construction contract with a subcontractor as agent for a disclosed owner, the payment obligation shall flow directly from the disclosed owner as principal to the subcontractor and through the agent," absolves it from paying. Though § 756-a(3)(b)(i) was enacted after *West-Fair* was decided (*see Hugh O'Kane Elec. Co. v MasTec N. Am., Inc.*, 19 AD3d 126, 127 [1st Dept 2005]), courts continue to hold that pay-when-paid provisions "are void in New York as against public policy" (*id.* at 126 [only enforcing provision because Florida law applied], *accord Welsbach Elec. Corp. v MasTec N. Am., Inc.*, 7 NY3d 624, 628-29 [2006] ["Both sides agree that the subcontract's pay-if-paid clause violates New York's public policy. Were we not dealing with choice of law, we would simply apply Lien Law § 34 as interpreted in *West-Fair* and the case would be closed"]). Additionally, § 756-a(3)(b)(i) further states, in no uncertain terms, that performance "by a subcontractor in accordance with the provisions of its contract shall entitle it to payment from the party with which it contracts." Both statutes and cases make plain that an unpaid subcontractor may have multiple sources for payment. Sweet has not shown that anything stops Arenson from obtaining payment from the party with whom it is in privity.

Because judgment is granted on Arenson’s breach-of-contract claim, its quasi-contract and account-stated claims are dismissed as duplicative and, as the parties agree, its claim to foreclose on a mechanic's lien is moot.

Accordingly, it is ORDERED that the Clerk is directed to enter judgment in favor of Arenson and against Sweet in the amount of \$108,570.38 plus 9% statutory pre-judgment interest from April 7, 2015 to the date judgment is entered plus an additional 1% monthly interest on \$108,570.38 pursuant to GBL § 756-b(1)(b) for the same time period.

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9/9/2020  
DATE

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JENNIFER G. SCHECTER, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
MOTIONS:	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART
CROSS MOTION:	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	