SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN **PART** IAS MOTION 58EFM

Justice

----------X

ALBA SERVICES, INC.,

Plaintiff,

- v -

55 LIBERTY OWNERS CORP., MERCHANTS HOSPITALITY, INC., ABC CORP. 1-10, JOHN AND JANE DOE 1-10

Defendant.

----------X

INDEX NO. 151294/2020

MOTION DATE 10/16/2020

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, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24

were read on this motion to/for DISMISS.

Plaintiff Alba Services, Inc., ("Alba"), a contractor allegedly employed by Defendant Merchants Hospitality, Inc. ("Merchants"), with the consent of Defendant 55 Liberty Owners Corp. ("Liberty") (collectively "Defendants"), to perform demolition services at 55 Liberty Street, New York, New York (the "Premises"), brings this action against Defendants arising from their alleged failure to pay its services (Doc. 1). Plaintiff's complaint asserts the following claims against Defendants: (1) foreclosure on its Mechanic's Lien and related relief, (2) breach of contract, and (3) account stated, with interest, costs and disbursements (*Id.*). Defendant Merchants moves, pre-answer: (1) to dismiss Alba's First Cause of Action pursuant to Lien Law § 19(6), and summarily vacate Alba's Notice of Mechanic's Lien recorded on May 8, 2020 and allegedly extended in untimely fashion on May 22, 2020, and (2) to dismiss Plaintiff's Second and Third Causes of Action pursuant to CPLR 3211 (a)(7) for failure to state a cause of action and pursuant to CPLR 3211(a)(1) based on documentary evidence. Alba opposes the motion. For the following reasons, Defendant Merchants' motion to dismiss is denied in full.

BACKGROUND

In its complaint, Plaintiff alleged that Liberty was the owner of the Premises and Merchants, a domestic corporation, was a tenant at the Premises (Doc. 1). Alba performed demolition services at the Premises, which it completed on November 5, 2018 (*Id.*).[1] Alba was owed $16,000 for the work completed and was paid a partial payment of $1,000 by an entity named Liberty Knights, LLC d/b/a Pound & Pence ("Pound & Pence") in April 2019 (Docs. 1 & 10). Alba demanded from Merchants payment for the remainder of the sum owed, which has been refused and rejected several times (Docs. 11-21).

Consequently, Alba filed a notice of lien in New York County Clerk's Office on May 8, 2019 (Doc. 5). The notice reflected that the property subject to the lien was the Premises at 55 Liberty Street New York, NY and known as "Pound & Pence" (*Id.*). The lien further indicated that it was for demolition services performed at the Premises; that it was against Liberty as the owner of the Premises and against Merchants as lienor's employer; that the agreed price and value of the labor performed was $16,000; that this amount was unpaid; that the time when the first item of work was performed was October 3, 2018; and that the time when the last item of work was performed was October 5, 2018 (*Id.*).

Although an extension of this lien appears to have been signed by Mark Nash as an agent of Alba and notarized on April 21, 2020, it was not file-stamped in the New York County Clerk's Office until May 22, 2020 (*Id.* at 5-6).

[1] Alba admits that the complaint incorrectly states that the date of the last work performed was November 5, 2018 and supplements the record with its Mechanic's Lien and email exchanges demonstrating that the date on which the last item of work was performed was on or around October 3, 2018 (Docs. 5, 10 ¶ 16, & 21).

1. The Parties' Contentions

Merchants argues, in sum and substance, that Alba's notice of lien is facially defective, that Alba did not timely extend its lien rights, that it did not employ Alba and did not benefit from its labor, that it never agreed to a price for labor performed, that it never had a contract with Alba, and that it never had an account with Alba (Doc. 4). Merchants further argues that the party which actually entered into said agreement with Alba was Pound & Pence, and that Merchants simply managed that company (*Id.*). Merchants also submitted as an exhibit a check drafted by Pound & Pence with a business address of 1 World Trade Center, Ste 47A in the amount of $1,000 made out to Alba on April 25, 2019 (Doc. 8). The memo line was left blank.

In opposition, Alba argues, *inter alia*, that its notice of lien is not facially defective and that it was filed promptly (Doc. 10). Alba further argues, based on the emails that it submits with its opposition papers, that it entered into a contractual relationship with Merchants (*Id.* ¶ 16). Alba further argues that it completed the demolition services on or about October 3, 2018; that there is "not one email that mentions [Pound & Pence];" and that all the emails exchanged were with Merchants (*Id.* ¶¶ 16, 17).

In reply and further support, Merchants reiterates that it did not employ Alba or otherwise benefit from its services, all of which were purportedly performed for the benefit of Pound & Pence (Doc. 22). Merchants again states that it is only the management company for Pound & Pence, handling payroll, human resources, and administrative concerns such as scheduling work with vendors such as Plaintiff Alba (*Id.* ¶ 14). Merchants further argues that it cannot be held liable for Alba's failure to discern the entity with which it was dealing (*Id.* ¶¶ 15-18).

DISCUSSION & LEGAL CONCLUSIONS

1. Legal Standard for Motion to Dismiss

CPLR 3211(a), entitled "Motion to dismiss cause of action," states, in relevant part, that:

> A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
> (1) a defense is founded upon documentary evidence; or …
> (7) the pleading fails to state a cause of action[.]

(CPLR 3211[a]).

On a motion to dismiss under CPLR 3211(a), the pleadings are afforded a liberal construction and the facts as alleged in the complaint are accepted as true. Moreover, the plaintiff is to be accorded the benefit of every possible inference (*Hsu v Liu & Shields LLP*, 127 AD3d 522, 523 [1st Dept 2015] [internal citations omitted]). Thus, in a determination of legal sufficiency under 3211(a)(7), the facts alleged in the complaint will be assumed to be true, given all favorable inferences, and only then considered to see if they fit "within any cognizable legal theory" (*Leon* v *Martinez*, 84 NY2d 83, 87-88 [1994]). The plaintiff may submit affidavits and evidentiary material on a CPLR 3211 (a)(7) motion "to remedy defects in the complaint" (*Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159, 162 [2d Dept 1997] [internal quotations marks and citations omitted]; *see also Warberg Opportunistic Trading Fund, LP. v GeoResources, Inc.*, 112 AD3d 78, 84 [1st Dept 2013]).

"On a pre-answer motion to dismiss pursuant to CPLR 3211(a)(1), a dismissal is proper only when the documentary evidence submitted establishes a defense to the asserted claims as a matter of law" (*Bonnie & Co. Fashions v Bankers Trust Co.*, 262 AD2d 188, 189 [1st Dept 1999] [internal quotation marks and citations omitted]). The party seeking dismissal has the burden of submitting documentary evidence resolving "all factual issues as a matter of law, and conclusively dispos[ing] of the plaintiff's claim" (*Sullivan v State*, 34 AD3d 443, 445 [2d Dept

2006] [internal quotation marks and citations omitted]). In order to prevail on a motion to dismiss based on documentary evidence, "the documents relied upon must definitively dispose of plaintiff's claim" (*Bronxville Knolls v Webster Town Ctr. Partnership.*, 221 AD2d 248, 248 [1st Dept 1995]). A CPLR 3211(a)(1) motion "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326 [2002]; *see also Sempra Energy Trading Co. v BP Prods. N. Am., Inc.*, 52 AD3d 350, 350 [1st Dept 2008] [holding that it was proper for the complaint to be dismissed because the documentary evidence—namely, the pre-discharge inspection report showing that the delivered fuel oil was in compliance with contract specifications— refuted the plaintiff's allegations for breach of contract]).

A. First Cause of Action (Foreclosure on Mechanic's Lien)

On a motion to summarily discharge a lien pursuant to Lien Law § 19(6), the defendant "is required to demonstrate that the notice of lien filed by plaintiff is in contravention of the requirements imposed by Lien Law § 19(6)" (*Care Sys., Inc. v Laramee*, 155 AD2d 770, 771 [3d Dept 1989].) As a general rule, "[i]n the absence of a defect upon the face of the notice of lien, any dispute regarding the validity of the lien must await trial of the foreclosure action" (*Pontos Renovation Inc. v Kitano Arms Corp.*, 204 AD2d 87, 87 [1st Dept 1994] [internal quotation marks omitted]; *Rivera v Dept. of Hous. Preserv. and Dev. of City of New York*, 130 AD3d 802, 802 [2d Dept 2015], *affd*, 29 NY3d 45 [2017]; *Di-Com Corp. v Active Fire Sprinkler Corp.*, 36 AD2d 20, 21 [1st Dept 1971] ["It is elementary that a lien may be summarily discharged only for defects appearing on its face."]). Further, Lien Law § 23 provides: "This article is to be construed liberally to secure the beneficial interests and purposes thereof. A substantial

compliance with its several provisions shall be sufficient for the validity of a lien and to give jurisdiction to the courts to enforce the same" (Lien Law § 23).

Lien Law § 19(6), entitled "Discharge of lien for private improvement," states, in relevant part, that:

> A lien other than a lien for labor performed or materials furnished for a public improvement specified in this article, may be discharged as follows:
>
> > Where it appears from the face of the notice of lien that the claimant has no valid lien by reason of the character of the labor or materials furnished and for which a lien is claimed, or where for any other reason the notice of lien is invalid by reason of failure to comply with the provisions of section nine of this article, … the owner or any other party in interest, may apply to the supreme court of this state … for an order summarily discharging of record the alleged lien. A copy of the papers upon which application will be made together with a notice setting forth the court or the justice thereof or the judge to whom the application will be made at a time and place therein mentioned must be served upon the lienor not less than five days before such time. If the lienor can not [sic] be found, such service may be made as the court, justice or judge may direct. The application must be made upon a verified petition accompanied by other written proof showing a proper case therefor, and upon the approval of the application by the court, justice or judge, an order shall be made discharging the alleged lien of record.

(Lien Law § 19).

Lien Law § 9, entitled "Contents of notice of lien," states, in relevant part, that the notice of lien shall state:

> 1. The name and residence of the lienor; …
> 1-a. The name and address of the lienor's attorney, if any.
> 2. The name of the owner of the real property against whose interest therein a lien is claimed, and the interest of the owner as far as known to the lienor.
> 3. The name of the person by whom the lienor was employed …; or, if the lienor is a contractor or subcontractor, the person with whom the contract was made.
> 4. The labor performed … and the agreed price or value thereof ….
> 5. The amount unpaid to the lienor for such labor….
> 6. The time when the first and last items of work were performed….
> 7. The property subject to the lien, with a description thereof sufficient for identification…. A failure to state the name of the true owner…, or a misdescription of the true owner, shall not affect the validity of the lien. …

(Lien Law § 9).

Lien Law § 17, entitled "Duration of lien," states, in relevant part, that:

> No lien specified in this article shall be a lien for a longer period than one year after the notice of lien has been filed, unless within that time an action is commenced to foreclose the lien, and a notice of the pendency of such action, … is filed with the county clerk of the county in which the notice of lien is filed, containing the names of the parties to the action, the object of the action, a brief description of the real property affected thereby, and the time of filing the notice of lien; or unless an extension to such lien, … is filed with the county clerk of the county in which the notice of lien is filed within one year from the filing of the original notice of lien, continuing such lien and such lien shall be redocketed as of the date of filing such extension.

(Lien Law § 17).

Lien Law § 54, entitled "Judgment in case of failure to establish lien," states that:

> If the lienor shall fail, for any reason, to establish a valid lien in an action under the provisions of this article, he may recover judgment therein for such sums as are due him, or which he might recover in an action on a contract, against any party to the action.

(Lien Law § 54).

Merchants' argument that the notice filed is facially defective is threefold. Initially, it argues that the notice is defective since it was extended in untimely fashion in violation of Lien Law § 17. This argument lacks merit. Pursuant to Lien Law § 17, the subject lien was valid for one year from its filing on May 8, 2019 until May 8, 2020. Although an extension of this lien was signed and notarized on April 21, 2020, which is within the statutory one-year time limit, the filing of the extension was not stamped until May 22, 2020. This Court takes judicial notice that, during the period between April 21 and May 22, 2020, Governor Cuomo's "New York State on PAUSE" Executive Order in response to COVID-19 allowed only essential in-office functions to be conducted. Further, Executive Order Number 202.8 tolled the filing of any legal action, notice, motion, or other process or proceeding effective from the date of the order until April 19,

2020 (Governor Andrew Cuomo's Executive Order Number 202.8; *see also* Chief Administrative Judge Lawrence Marks' Administrative Order AO/78/20). Therefore, the subject extension of the lien did not violate Lien Law § 17 under these unique circumstances.

Merchants' further contention that the notice is facially defective insofar as it provides for a different agreed upon price and date for the last item of work than that provided in the Complaint is likewise rejected (*Hurley v Tucker*, 128 AD 580, 585, 586 [1st Dept 1908], *affd*, 198 NY 534 [1910]).

Finally, Merchants' contention that the notice is facially defective, *inter alia*, in incorrectly stating that Merchants employed Alba for the demolition services at the Premises and that it was Pound & Pence, a tenant restaurant at the Premises, that employed Alba for its services and that Merchants "was simply a management company and disclosed agent of … Liberty Knights, LLC" likewise lacks merit since this contention merely raises issues of fact (*See Pontos Renovation Inc*, 204 AD2d at 87; *see also Care Sys., Inc.,* 155 AD2d at 771). Accordingly, Merchants' motion to dismiss Alba's First Cause of Action pursuant to Lien Law § 19(6) and to summarily vacate Alba' Notice of Mechanic's Lien is denied.

B. Second Cause of Action (Breach of Contract)

To establish a prima facie case of breach of contract, the plaintiff must plead facts that show: (1) the formation of a contract between the plaintiff and defendant, (2) the plaintiff's performance, (3) the defendant's breach, and (4) resulting damages (*Belle Light. LLC v Artisan Constr. Partners LLC*, 178 AD3d 605, 606 [1st Dept 2019] [internal quotations omitted]; *Biallas v Jack Simpson LLC*, 2011 N.Y. Slip Op. 34025[U] [N.Y. Sup Ct, New York County 2011]). "The requirements for formation of an enforceable contract are: (1) at least two parties with legal capacity to contract; (2) mutual assent to the terms of an agreement with reasonably certain

terms; and (3) consideration" (*Conception Bay, Inc. v Koenig Iron Works, Inc.*, 27 Misc 3d 1230(A) [Sup Ct 2010] [internal quotation marks and citations omitted]).

Alba has alleged all of these elements, claiming that: it entered into a contract with Merchants for the performance of demolition services; it performed its services; and, to date, it has not received a payment in full of the agreed-upon price of $16,000 (*See Harris*, 79 AD3d at 426; *Biallas*, 2011 N.Y. Slip Op. 34025[U] *4).

However, Merchants argues that Alba's claim for breach of contract must be dismissed against it since "Plaintiff [Alba] did not have an agreement with or perform work for [Merchants], and even received payment from the proper party [Liberty Knights LLC]" (Doc. 4., citing Doc. 8 [check]). Merchants further argues that it never had an agreement with Alba, and thus did not agree to a price with Alba for labor performed; that Alba cannot produce a contract or agreement with Merchants; that Alba's Complaint is inconsistent and vague as to the agreed upon price; and that the entity for which Plaintiff completed its work is another party whose name appears on the $1,000 check received and deposited by Alba in partial payment for the work it performed (Doc. 8). Merchants also argues that it was never a tenant at the Premises. Therefore, Merchants maintains that it has not formed a contract with Alba.

Alba submits the following emails in opposition to the motion and in support of its argument to establish that an enforceable contract was formed with Merchants.

An email from Gwyneth Hannagan ("Hannagan"), an Executive Assistant at Merchants Hospitality, to Alba, dated October 1, 2018, read:

> I was wondering if you could give me an estimate on the demo work for Pound and Pence at 55 Liberty Street? I know you met with [Abraham Merchant, the CEO of Merchants] there this past Friday, so if you could give me an estimate[,] I would appreciate it. Thanks!

(Doc. 12).

> Alba responded:
>
> Our price for the demolition of the ovens, vents, precipitators and bar equipment etc[.] will be $15,000.00[.] Price per full truck of debris to be removed under his instructions is $3,000,00[.] We can start immediately. I will write up a more formal proposal later.

(Doc. 13).

Hannagan, in turn, asked whether the "3K [was] included in the 15K" (Doc. 14.) Alba replied, "No[,] in addition to" (*Id.*).

Hannagan's follow-up email to Alba, dated October 2, 2018, with the subject line "**New Job** - Pound and Pence – 55 Liberty St[,]" read:

> Nice to talking [sic] to you earlier, and thank you for agreeing to bring the price down to 16K for all (demo + truck). Please let me know if you can get a team there tomorrow as we will need to be completely finished by October 4th (Thursday). Thank you!

(Doc. 15).

Alba responded: "Tomorrow will be hard to start. Rob will swing by. Can we pick up key[?]" (Doc. 16). Merchants' CEO replied: "[Hannagan], please give [Alba] keys … when do we have to be out of the space? Oct 4th or 5th?" (Doc. 17; *see also* Doc. 7 ¶ 1).

Alba's email to Hannagan, dated October 5, 2018, indicated that there was an invoice attached "for work complete" (Doc. 21). An invoice, attached to the same exhibit, showed an amount of $16,000 billed to Merchants for the demolition services at the Premises (*Id.*).

Alba's email to Hannagan, dated November 29, 2018, inquired: "Any progress on payment?" (*Id.*).

Alba's follow-up email to Hannagan, dated January 9, 2019, inquired: "Any update on payment? It's been a month & we have not heard from your accounting department" (Doc. 18).

In an undated email seemingly responsive to Alba's January 9 email, Hannagan wrote: "I have sent this request to our accounting department, as I don't work in that department. Please contact them directly for payment, their names and email addresses are … Kyle Guenter kyle@merchantshospitality.com [and] Daniel Hannagan dhannagan@merchantshospitality.com (Doc. 19).

On February 4, 2019, Alba emailed Kyle Guenter and Daniel Hannagan asking them to "please advise on the status of payment as this invoice [was] now over 120 days old" (Doc. 19).

An email from Alba to Kyle Guenter and Daniel Hannagan, on which Hannagan was copied, dated April 29, 2019, warned that Alba would "be placing a lien on the property as I have tried on many occasions to get this resolved, I stopped by your office on Thursday (5/25) and still have yet to get a response" (Doc. 20).

In reply and further support of its motion, Merchants denies that it contracted for Alba's services and further argues, *inter alia*, that it was merely the management company for the tenant at the Premises named Pound & Pence. Merchants further argues that Alba must have been aware that it was working on a restaurant, since its email showed that it was going to perform demolition work on "ovens… and bar equipment etc" and that, unlike Pound & Pence, Merchants was not a restaurant but a management company (Doc. 22 ¶ 7).

Alba has pleaded a prima facie cause of action for breach of contract for the following reasons. The emails show that Alba met with Abraham Merchant, the CEO of Merchants, to tour the Premises. The emails also show that, the next day, Hannagan of Merchants followed up with Alba for an estimate. While the reasonableness of Alba's reliance on any apparent authority with which Pound & Pence invested Merchants may be at issue, especially given that the partial payment came from another entity (*see Edinburg Volunteer Fire Co., Inc v Danko Emergency*

Equip. Co., 55 AD3d 1108 [3d Dept 2008]), this is a factual determination unsuited for resolution on a motion to dismiss (*Biallas*, 2011 N.Y. Slip Op. 34025[U] *4; *see also Vertical Progression, Inc. v Canyon-Johnson Urban Funds*, 126 AD3d 784, 787 [2d Dept 2015]; *Kolchins v Evolution Markets, Inc.*, 128 AD3d 47, 63 [1st Dept 2015], *affd*, 31 NY3d 100 [2018]).

Further, Hannagan, when responding to Alba's emails regarding payment, represented on behalf of Merchants that: "I have sent this request to our accounting department, as I don't work in that department. Please contact them directly for payment[.]" One can infer from this email that Merchants acknowledged or at least suggested that is was responsible for making the subject payments.

Also, Hannagan's email to Alba, dated October 2, 2018, entitled "**New Job** - Pound and Pence – 55 Liberty St" is open to interpretation. One could infer from the subject line that the two companies may be separate companies, or that Merchants is part of Pound & Pence (or vice versa), or simply that Pound & Pence in the title was referring to the Premises, which was known as Pound & Pence, as indicated in the notice of lien (Doc. 5 at 2).

Thus, Alba has successfully pleaded a cause of action for breach of contract. "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11,19 [2005]). Accordingly, Merchants' motion to dismiss Alba's Second Cause of Action for breach of contract is denied.

C. Third Cause of Action (Account Stated)

An account stated exists where a party to a contract receives bills or invoices and does not protest within a reasonable time (*Russo v Heller*, 80 AD3d 531, 532 [1st Dept 2011]). "[T]he very meaning of an account stated is that the parties have come together and agreed upon the

balance of indebtedness…so that an action to recover the balance as upon an implied promise of payment may thenceforth be maintained" (*Herrick, Feinstein LLP v Stamm*, 297 AD2d 477, 478 [1st Dept 2002]).

According to the complaint, on November 5, 2018, Alba allegedly sent Merchants an account stated of $17,000, which Merchants accepted without objection. To the extent that plaintiff's only billing in the record shows a statement of account in the amount of $16,000, this discrepancy is not fatal to the cause of action but goes to the measure of damages. The exhibit submitted by Merchants in support of their motion, a check dated April 2019 in the amount of $1,000 made payable to Alba, fails to refute Alba's factual allegations. Therefore, the Court finds that Alba has sufficiently pleaded a cause of action for an account stated. Accordingly, Merchants' motion to dismiss Alba's Third Cause of Action for an account stated is denied.

The Court has considered the parties' remaining contentions and finds them either unavailing or unnecessary to address in light of the conclusions above.

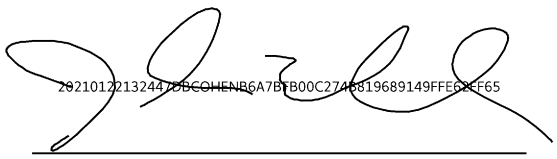
CONCLUSION

Accordingly, it is hereby:

ORDERED that the motion by Defendant Merchants Hospitality, Inc., seeking to dismiss Plaintiff Alba's First Cause of Action (Foreclosure on Mechanic's Lien), and summarily vacating Plaintiff Alba's Notice of Mechanic's Lien; seeking to dismiss Plaintiff's Second Cause of Action (Breach of Contract); and seeking to dismiss Plaintiff's Third Cause of Action (Account Stated) is denied in all respects; and it is further

ORDERED that Defendant Merchants Hospitality, Inc., is directed to respond to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the parties are to appear for a virtual Preliminary Conference on February 22, 2021, at 2 PM via Microsoft Teams.



1/22/2021
DATE

DAVID BENJAMIN COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE