

Ultimate 1 Constr. Inc. v 325 Quincy LLC

2021 NY Slip Op 30246(U)

January 25, 2021

Supreme Court, Kings County

Docket Number: 515111/16

Judge: Lawrence S. Knipel

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part NJTRP of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 25th day of January, 2021.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

-----X

ULTIMATE 1 CONSTRUCTION, INC. a/k/a ULTIMATE 1 CONSTRUCTION CORP.,

Plaintiff,

- against -

Index No. 515111/16

325 QUINCY LLC, FARHOUD JABER, JUBER JABER, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, THE STATE OF NEW YORK, MAHOPAC NATIONAL BANK, PLUMBING WORKS, INC. and TITAN CAPITAL ID LLC,

Defendants.

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

94-105
108-109, 114-123, 127
124-126

Upon the foregoing papers in this action to foreclose a mechanic's lien for labor and materials supplied to improve the mixed-use property at 325 Quincy Street in Brooklyn (Property), plaintiff Ultimate 1 Construction, Inc. a/k/a Ultimate 1 Construction Corp. (Ultimate) moves (motion sequence [mot. seq.] five) for an order: (1) granting it summary judgment, pursuant to CPLR 3212; (2) dismissing and striking defendants 325

Quincy LLC and Farhoud Jaber's (Farhoud) affirmative defenses, answer and counterclaims, pursuant to CPLR 3211 (a) (6) and 3212 (b); and (3) granting it a default judgment against the non-appearing defendants.

Background

On August 29, 2016, Ultimate commenced this action by filing a summons, a verified complaint and a notice of pendency against the Property. On January 11, 2019, the complaint was amended. The amended complaint asserts three causes of action: (1) to foreclose a \$108,000.00 mechanic's lien against the Property for labor and materials supplied to improve the Property asserted against all defendants; (2) for breach of contract against defendants 325 Quincy, Farhoud and Juber Jaber (Juber); and (3) for unjust enrichment against 325 Quincy, Farhoud and Juber. Essentially, the amended complaint alleges that Ultimate supplied work, labor, services and materials to improve the Property, pursuant to a written agreement with its predecessor, and that \$108,000.00 is due and owing to it, despite its demands for payment. The amended complaint alleges that Ultimate filed a notice of mechanic's lien with the Kings County Clerk on or about April 12, 2016, and that the \$108,000.00 mechanic's lien has not been paid, cancelled or discharged.

Defendants 325 Quincy and Farhoud collectively answered, asserted several affirmative defenses and asserted the following three counterclaims against Ultimate: (1) negligence based on the allegations that Ultimate "negligently failed to perform its duties and obligations pursuant to the agreement and otherwise in a satisfactory and

workmanlike manner” and “was not properly licensed as a general contractor”; (2) willful exaggeration and malicious filing of the \$108,000.00 mechanic’s lien; and (3) for an order voiding the mechanic’s lien on the ground that no amounts are owed to Ultimate.

Defendant Titan Capital ID, LLC (Titan) answered and asserted an affirmative defense that it has an interest in the Property by virtue of a \$1.2 million mortgage encumbering the Property made by 325 Quincy, as mortgagor, to Titan, as mortgagee, which was recorded with the City Register’s office on February 17, 2016 at CRFN¹ 201600053123. Titan alleges that Ultimate’s interest in the Property is subject and subordinate to its interest in the Property.

All of the other defendants, including Juber, who Ultimate served with process on July 3, 2019, failed to answer or otherwise respond to the amended complaint.

Ultimate’s Summary Judgment Motion

Ultimate now moves for summary judgment, dismissal of 325 Quincy and Farhoud’s answer, affirmative defenses and counterclaims and a default judgment against the non-appearing defendants, including defendant Juber.

Ultimate submits an affidavit from Arben Zenelaj (Arben), the President of Ultimate, who attests that Ultimate is the successor to Ultimate One Construction Corp. (UOCC). Arben attests that Ultimate “at the request and insistence of the Defendants, Farhoud, Juber and 325 [Quincy]” supplied work, labor, services and materials to improve the Property, pursuant to an October 3, 2009 construction agreement between

¹ City Record File Number.

UOCC, as “Builder,” and Farhoud, as “Owner.” Arben further attests that “the agreed upon price and value of said labor and materials, in accordance with the agreement of the parties, and ‘change orders,’ was in the sum of \$423,000.00.” Copies of the construction contract and the change orders are annexed to Ultimate’s motion. Arben attests that “only the sum of \$315,000.00 was paid . . . leaving a balance due to the Plaintiff for improvement of the Premises in the sum of \$108,000.00.”

Arben asserts that “Juber, Farhoud and 325 [Quincy] have offered nothing in support of their contention that the work was not completed, that the work was not done in a workmanlike manner, or that the amount owed to Plaintiff has been paid or that it is otherwise not owed to Plaintiff.” Arben submits a copy of a June 23, 2011 email from EAB Consultants, the engineer on the construction job, stating that there were only a few ministerial items open before the final certificate of occupancy would be issued, and that a temporary certificate of occupancy had been issued. Arben also submits a June 29, 2011 email that he received from defendant Farhoud asking him to finalize certain “punch list” items to complete the job. Arben asserts that “[a]s can be plainly seen from these two emails, in or about June of 2011, only small, immaterial tasks were not completed . . . in connection with the subject contract and the subsequent change orders.” Arben also asserts that the issuance of a temporary certificate of occupancy is “further evidence that the work conducted was in accordance with New York City building codes and done in a workmanship like manner.”

Arben argues that if Farhoud or 325 Quincy thought that Ultimate breached the

construction contract, they had a specific remedy under paragraph 11 of the construction contract, which allowed them to terminate the contract if Ultimate failed to cure any default after receiving written notice. Arben attests that he never received a notice to cure a default. Finally, Arben attests that “[a]t all material times, herein, I was and am a licensed New York City Buildings Construction Superintendent, among other licenses and certification I hold” and “[a]ny allegation that I was not licensed to conduct the work pursuant to the contract and change orders is a mere distraction to the Court.”

Ultimate also submitted an affidavit from Munzer Elayyan (Munzer), Farhoud and Juber’s cousin, who attests that “Farhoud held himself out to me as the manager/owner of the Premises and later the manager owner of 325 Quincy LLC” and “Farhoud requested that I (Munzer) accept a position as a construction manager for the project of renovating the Premises and I accepted.” Regarding his duties and authority, Munzer attests that:

“As part of my duties as construction manager, I was: (1) to hire . . . contractors; (2) oversee the contractors’ work; (3) negotiate with and hire professionals (i.e., architect, engineer, etc.); (4) execute agreements with contractors and professionals to perform the work at the Premises; and (5) ensure that the renovations were performed pursuant to Farhoud’s specifications. I was also authorized to have contractors perform work pursuant to change orders.

“During the construction process, I was given direct and actual authority to handle all construction matters. This authority was never revoked at any time while the construction was being completed. . . .”

Munzer further attest that in October 2009, he obtained bids from contractors for the renovation project, and he ultimately executed the construction contract with UOCC on

Farhoud's behalf. The construction contract annexed to Ultimate's motion reflects that it was executed by Munzer as "Owner Agent."

Munzer attests that Ultimate "did perform the renovations to the Premises under my supervision as per [the] construction contract" and "[w]hen Plaintiff was finished with its work at the Premises, construction was essentially completed and only minor detail ('punch list') work was outstanding, if anything at all." Munzer further attests that the construction contract was for \$333,355.00 plus any additional work or change orders, which "were discussed and approved by Jaber." Munzer attests that there were several change orders and that "[t]he final amount owed to Plaintiff after all change orders was \$423,000.00."

Titan's Opposition

Titan, in opposition, asserts that summary judgment is not appropriate against Titan. Defense counsel notes that paragraph 18 of the amended complaint alleges that Ultimate's mechanic's lien was recorded on April 12, 2016, and that exhibit E to the amended complaint "accurately states that Titan's mortgage in the original principal amount of \$1,200,000 encumbering the subject realty (the 'Titan Mortgage') is dated February 6, 2016 and was recorded in the office of the City Register of Kings County on February 17, 2016 at CRFN 2016000053123, *approximately 2 months prior* to the filing of Plaintiff's Lien." Defense counsel further notes that there is no allegation in the amended complaint or in Ultimate's motion that the Titan Mortgage is subject or subordinate to Plaintiff's mechanic's lien.

325 Quincy, Farhoud and Juber's Opposition

325 Quincy, Farhoud and Juber, in opposition, submit a memorandum of law arguing that “the cause of action to foreclose on the mechanic’s lien is void because the notice of pendency, and with it the mechanic’s lien, have expired.” Defendants argue that under Lien Law § 17 where a mechanic’s lien “has been extended by the filing of a notice of pendency of an action [and] such notice has . . . ceased to be effective as constructive notice [because it expired after three years]” the mechanic’s lien “terminate[s] as a lien.”

Regarding Ultimate’s breach of contract claim, defendants’ memorandum of law asserts that “[t]he contract produced by Plaintiff under which it seeks relief was not signed by any Defendant or by an authorized agent of any Defendant” and, thus, is not a binding contract. The memorandum of law also contends that “the construction work performed for Defendants was defective and caused thousands of dollars in damages to Defendants’ building.” In addition, defendants’ memorandum of law challenges Ultimate’s right to enforce the construction contract against Juber and 325 Quincy since the construction contract is only between Farhoud and UOCC, which was dissolved on June 22, 2011. Essentially, defendants contend that issues of fact regarding the validity of the construction contract and damages allegedly caused by Ultimate’s defective construction work at the Property preclude summary judgment.

Defendants, however, fail to submit any admissible, factual evidence in opposition to Ultimate’s summary judgment motion. Farhoud submits an affidavit, which is neither

signed nor notarized. Juber submits an affidavit in opposition to Ultimate's summary judgment motion in which he does not address or even mention the fact that he is in default because he failed to answer or otherwise respond to the amended complaint.

Ultimate's Reply

Ultimate, in reply to 325 Quincy, Farhoud and Juber's opposition, asserts that "Defendants fail to submit any evidence in admissible form in opposition to Plaintiff's motion for summary judgment . . ." since their opposition "relies solely on the unsigned and unnotarized affidavit of [Farhoud] and the affidavit of [Juber] who is in default." Ultimate notes that Juber has not moved to vacate his default and, for that reason, argues that Juber's affidavit should not be considered. Ultimate asserts that defendants do not offer any evidence to support their allegations that Munzer did not have actual or apparent authority to enter into the construction contract on their behalf, that the construction at the Property was not completed in a workmanlike manner or that defendants do not owe it \$108,000.00.

In response to defendants' claim that Ultimate does not have privity of contract with them, Ultimate asserts that defendants failed to submit admissible evidence that Munzer was an unauthorized agent for the property owner. Ultimate also argues that defendants ratified and assumed the construction contract with UOCC, Ultimate's predecessor, by allowing Ultimate to perform work at the Property, receiving the benefit thereof and paying Ultimate for some of the construction services. Alternatively, Ultimate contends that it has demonstrated its entitlement to summary judgment on its

cause of action against defendants for unjust enrichment.

Ultimate submits a reply affidavit from Arben, who attests that “[o]n October 3, 2009, when the subject contract was entered into, I was the sole shareholder and President of UOCC.” Arben further attests that after UOCC was dissolved, he formed Ultimate in March 2013 as the successor in interest to UOCC. Arben attests that Ultimate “maintained and continued the same books and records . . . and continued the same jobs and work as UOCC.” Arben further attests that defendants never objected to Ultimate doing work at the Property, and that defendants agreed to change orders on May 5, 2015 and May 20, 2015, both of which were made in Ultimate’s name. Arben further attests that from October 2009, when he signed the construction contract, until the end of 2015, when construction was completed, Juber and Farhoud “always acknowledged Munzer . . . as the construction manager at the Premises.” Arben also attests that on December 7, 2015, defendants “did draft and execute a Trade Contractor’s Partial Release, Waiver of Lien Affidavit in the name of [Ultimate] admitting Defendants owed [Ultimate] the sum of \$108,000.00 on that date . . .”

Discussion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should, thus, only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; see also *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). “The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment, as a matter of

law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Manicone v City of New York*, 75 AD3d 535, 537 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; see also *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If it is determined that the movant has made a prima facie showing of entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof *in admissible form* sufficient to establish the existence of material issues of fact which require a trial of the action” (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [1989] [emphasis added]).

Here, Ultimate has failed to demonstrate its entitlement to summary judgment on its first cause of action to foreclose on its mechanic’s lien. Pursuant to Lien Law § 17, a mechanic’s lien expires one year after filing unless an extension is filed with the County Clerk or an action is commenced to foreclose the lien within that time and a notice of pendency is filed in connection therewith” (*Aztec Window & Door Mfg., Inc. v 71 Vil. Rd.*, 60 AD3d 795, 796 [2009]). CPLR 6513 further provides that “[a] notice of pendency shall be effective for a period of three years from the date of filing.” Defendants 325 Quincy, Farhoud and Juber correctly argue in their memorandum of law that the notice of pendency that Ultimate filed against the Property on August 29, 2016 expired three years later, on August 29, 2019. Ultimate failed to file a subsequent notice of pendency, and therefore, Ultimate’s mechanic’s lien on the Property also expired, as a matter of law. (*Thompson Brothers Pile Corp. v Rosenblim*, 134 AD3d 1020, 1021-1022

[2015]). For that reason, Ultimate is not entitled to summary judgment on its first cause of action to foreclose on its mechanic's lien.

However, Ultimate has demonstrated its entitlement to summary judgment on its second and third causes of action for breach of the construction contract and unjust enrichment without opposition. Ultimate has submitted admissible evidence that it is the successor to UOCC, which entered into the construction contract with Munzer, the authorized construction manager at the Property. Ultimate has also demonstrated through admissible documentary and testimonial evidence that defendants 325 Quincy, Farhoud and Juber never objected to Ultimate doing work at the Property and explicitly issued change orders to Ultimate, which completed the construction project at the Property without objection. Finally, Ultimate has demonstrated that \$108,000.00 was due and owing, and that defendants executed a Trade Contractor's Partial Release, Waiver of Lien Affidavit in which they admit that they owe Ultimate that amount.

Defendants failed to submit any admissible evidence sufficient to raise an issue of fact to preclude summary judgment in Ultimate's favor. This court has not considered defendant Farhoud's opposing affidavit, since it was neither signed nor notarized (*see Suntrust Bank v Morris*, 169 AD3d 951, 952 [2019]). Similarly, the court has not considered defendant Juber's opposing affidavit, since Juber failed to appear in this action and has never moved to vacate his appearance default. Notably, Juber failed to address or even mention his appearance default, and thus, Ultimate's motion for a default judgment against Juber is also granted. Accordingly, it is hereby

ORDERED that Ultimate's motion (mot. seq. five) is only granted to the extent that: (1) Ultimate is entitled to summary judgment on its second cause of action for breach of the construction contract and its third cause of action for unjust enrichment as against defendants 325 Quincy and Farhoud; (2) Ultimate is entitled to a default judgment against the non-appearing defendants, Juber, New York City Environmental Control Board, the State of New York, Mahopac National Bank and Plumbing Works, Inc.; and (3) defendants' counterclaims are dismissed. The motion is otherwise denied.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE