

Mark Wholesale Inc. v Sky Materials Corp.
2021 NY Slip Op 30869(U)
March 9, 2021
Supreme Court, Kings County
Docket Number: 508134/2020
Judge: Carl J. Landicino
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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 9th day of March, 2021.

PRESENT:

CARL J. LANDICINO, J.S.C.

-----X
MARK WHOLESALE INC.,

Index No.: 508134/2020

Plaintiff,

- against -

DECISION & ORDER

Motion Sequence #1

SKY MATERIALS CORP., THE RINALDI GROUP, LLC, 215 WEST 28TH STREET PROPERTY OWNER LLC, 225 WEST 28TH STREET PROPERTY OWNER LLC, 213-227 WEST 28TH STREET LLC, HAP INVESTMENTS LLC,

Defendants.

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Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion:

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	11-15, 25-27
Opposing Affidavits (Affirmations).....	23
Reply Affidavits (Affirmations)	25-27
Memorandum of Law	16, 28

After a review of the papers and oral argument the Court finds as follows:

This proceeding is an action related to damages allegedly suffered by the Plaintiff, Mark Wholesale, Inc., (hereinafter referred to as the "Plaintiff"). The Plaintiff pleads causes of action for (i) breach of contract, (ii) account stated, (iii) quantum meruit, and (iv) trust fund diversion. The Plaintiff alleges that it entered into an agreement with the Defendants whereby the Plaintiff furnished labor and materials in relation to the construction performed at 215-225 West 28th Street, New York, New York (hereinafter the "Subject Property"). The Plaintiff further alleges that the parties agreed that the Defendants would pay the

Plaintiff \$125,014.70 for labor and materials, and there remains due to the Plaintiff the sum of \$118,440.60.

Defendants 215 West 28th Street Property Owner LLC, 225 West 28th Street Property Owner LLC, 213-227 West 28th Street LLC, and HAP Investments LLC (hereinafter referred to collectively as the "Owner Defendants") now move (motion sequence #1) for an order, pursuant to CPLR 3211(a)(1) and (7), dismissing the Plaintiff's complaint against them. The Owner Defendants contend that they never entered into a contract with the Plaintiff regarding labor and materials. Specifically, the Owner Defendants argue that the construction management contract they have annexed to their motion (hereinafter the "Contract") is documentary proof sufficient to dismiss the Plaintiff's complaint pursuant to CPLR 3211(a)(1). The Owner Defendants argue that the Contract proves that they have not entered into an agreement with the Plaintiff but rather have contracted with co-defendant The Rinaldi Group, LLC (hereinafter "Defendant Rinaldi"). The Owner Defendants also argue that the Plaintiff's complaint is defective, in as much as it fails to sufficiently specify the details of any contract that the Plaintiff allegedly had with the Owner Defendants. The Owner Defendants contend that the Plaintiff's Complaint is not sufficient to survive an application to dismiss, pursuant to CPLR 3211(a)(7). Also, the Owner Defendants contend that the Plaintiff's claim for *quantum meruit* should be dismissed as the Owner Defendants did not assume an obligation to pay. Finally, the Owner Defendants contend that the Plaintiff cannot maintain its claims made pursuant to Lien Law Article 3-A because such a claim requires the existence of an obligation on the part of the Owner Defendants to pay the Plaintiff and that obligation does not exist.

In opposition, the Plaintiff contends that the motion by the Owner Defendants should be denied. The Plaintiff contends that the instant motion does not meet the standard required by CPLR 3211(a)(1). The Plaintiff contends that the Contract proffered by the Movants is not the agreement that the Plaintiff is referring to in its complaint. Further, the Plaintiff contends that the only support for the proposition that

the Owner Defendants did not enter into an agreement with the Plaintiff is the statement made by Eran Polack in his affidavit. The Plaintiff argues that this statement is not sufficient to sustain a motion made pursuant to CPLR 3211(a)(1). The Plaintiff also contends that the Owner Defendants have failed to make a valid argument regarding the sufficiency of the Complaint pursuant to CPLR 3211(a)(7). Finally, the Plaintiff argues that an existing mechanic's lien is not a condition precedent to a viable claim for trust fund diversion.

On a CPLR 3211 motion to dismiss, the court will accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove his or her claims, of course, plays no part in the determination of a pre-discovery CPLR 3211 motion to dismiss.

Kinnear v. Cefoli, 184 A.D.3d 628, 123 N.Y.S.3d 509, 510 [2d Dept 2020].

Pursuant to CPLR §3013, “[s]tatements in a pleading should be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense” Furthermore, “[a]lthough on a motion to dismiss plaintiff’s allegations are presumed to be true and accorded every favorable inference, conclusory allegations - claims consisting of bare legal conclusions with no factual specificity - are insufficient to survive a motion to dismiss.” *Godfrey v. Spano*, 13 N.Y. 3d 358, 373, 892 N.Y.S.2d 272, 278 [2009].

“[W]here evidentiary material is adduced in support of the motion, the court must determine whether the proponent of the pleading has a cause of action, not whether the proponent has stated one” (*Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 46 AD3d 530, 530 [2007]; see *Meyer v. Guinta*, 262 AD2d 463, 464 [1999]). A motion to dismiss based on documentary evidence 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. Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; see *Leon v. Martinez*, 84

NY2d at 88, *Lucia v. Goldman*, 68 AD3d 1064, 1065 [2009]; *Mazur Bros. Realty, LLC v. State of New York*, 59 AD3d 401, 402 [2009]).

Feggins v. Marks, 171 AD3d 1014, 1015-6, 99 N.Y.S.3d 45, 47 [2d Dept 2019]

The Court denies the Owner Defendants' application made in relation to the Plaintiff's causes of action for breach of contract and account stated. "A party seeking dismissal on the ground that its defense is founded on documentary evidence under CPLR 3211(a)(1) has the burden of submitting documentary evidence that 'resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim.'" *Sullivan v. State*, 34 AD3d 443, 445, 824 N.Y.S.2d 135, 136 [2d Dept 2006], quoting *Nevin v. Laclede Prof'l. Prod., Inc.*, 273 AD2d 453, 711 N.Y.S.2d 735 [2d Dept 2000]. Further, "[a] motion to dismiss pursuant to CPLR 3211(a)(7) must be denied "unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it.'" *Sokol v. Leader*, 74 AD3d 1180, 1182, 904 N.Y.S.2d 153, 156 [2d Dept 2010].

In the instant matter, the Owner Defendants contend that the Contract annexed to the papers, in conjunction with the affidavit of Eran Pollack, is sufficient to meet this burden. However, "[n]either affidavits, deposition testimony, nor letters are considered 'documentary evidence within the intendment of CPLR 3211(a)(1)'" *Granada Condo. III Ass'n v. Palomino*, 78 A.D.3d 996, 997, 913 N.Y.S.2d 668, 669 [2d Dept 2010]. In the instant proceeding, the fact that the Contract was not with the Plaintiff is not sufficient to prove that there was no agreement between the Owner Defendants and the Plaintiff as a matter of law.

The Court also denies the Owner Defendant's application to dismiss the Plaintiff's Trust Fund Diversion claim made pursuant to Lien Law Article 3-A. The Owner Defendants argue in their motion that the Plaintiff's Trust Fund Diversion Claim requires the existence of either a mechanic's lien or contract. "Lien Law article 3-A 'was designed to create trust funds out of certain construction payments

or funds to assure payment of subcontractors, suppliers, architects, engineers, laborers, as well as specified taxes and expenses of construction.” *Aspro Mech. Contracting, Inc. v. Fleet Bank, N.A.*, 293 A.D.2d 97, 99, 742 N.Y.S.2d 361, 362–63 [2d Dept 2002], *affd*, 1 N.Y.3d 324, 805 N.E.2d 1037 [2004], *quoting Caristo Const. Corp. v. Diners Fin. Corp.*, 21 N.Y.2d 507, 236 N.E.2d 461 [1968]. The Owner Defendants argue that the Plaintiff cannot sustain this cause of action because the Plaintiff no longer has a valid mechanic’s lien and is not in privity with the Owner Defendants. However, the cases cited by the Owner Defendants were in relation to applications pursuant to CPLR 3212. A motion pursuant to CPLR 3212 carries a different standard. As stated above, the Owner Defendants have not shown that either the pleading is insufficient or the documents annexed utterly refute the Plaintiff’s factual allegations. Although the mechanic’s lien may have expired, the Plaintiff alleges that it has a contract with the Owner Defendants.

However, the Court grants that aspect of the motions made by the Owner Defendants made pursuant to CPLR 3211(a)(7) seeking to dismiss the Plaintiff’s causes of action for quantum meruit as duplicative of the Plaintiff’s cause of action for breach of contract. The existence of an express contract precludes recovery under a theory of quantum meruit. The Plaintiff has alleged the existence of a contract. *See Cooper, Bamundo, Hecht & Longworth, LLP v. Kuczinski*, 14 AD3d 644, 646, 789 N.Y.S.2d 508, 510 [2d Dept 2005]; *Battery Park Realty, Inc. v. RKO Delaware, Inc.*, 18 AD3d 680, 681, 795 N.Y.S.2d 351, 352 [2d Dept 2005].

Based upon the foregoing, it is hereby ORDERED as follows:

The motion by the Owner Defendants (motion sequence #1) is granted solely to the extent that the third cause of action for quantum meruit is dismissed.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.

FILED
MAR 17 2021
KINGS COUNTY CLERK'S OFFICE