SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 42EFM

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OLEK, INC.,

Plaintiff,

- v -

MERRICK REAL ESTATE GROUP INC.,12 E 72ND LLC, and JANSONS ASSOCIATES, INC.

Defendants.

INDEX NO. 652181/2017

MOTION DATE 03/03/2021,

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

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HON. NANCY M. BANNON:

I. INTRODUCTION

In this action seeking to, *inter alia*, recover damages for breach of contract and to foreclose on a mechanic's lien, the plaintiff moves to extend the duration of the Notice of Pendency it filed on November 9, 2017. The defendants Merrick Real Estate Group, Inc., and 12 E 72nd, LLC, (together, "defendants") oppose the motion and cross-move to cancel the Notice of Pendency and dismiss the complaint pursuant to CPLR 3211(a)(1), (4), (7) and (10). The plaintiff opposes the cross-motion. Oral argument was held. For the following reasons, the plaintiff's motion is granted and the defendants' cross-motion is granted in part.

II. BACKGROUND

The complaint alleges that on October 15, 2014, the plaintiff, as subcontractor, entered into a written subcontract (the "subcontract") with Merrick Real Estate Group, Inc. ("Merrick"), as general contractor. Pursuant to the subcontract, the plaintiff was to perform work in

connection with a construction project at 12-14 East 72nd Street in Manhattan (the "premises") for a base amount of $122,000.00 plus sales tax. The subcontract further provided that any overdue balances would accrue finance charges of 2% per month, and that any legal costs of collection or other collection costs of the plaintiff would be payable by Merrick. The premises are owned by 12 E 72nd, LLC ("12 E 72nd").

According to the plaintiff, certain modifications, change orders, and/or "extras" were subsequently agreed upon such that the total amount owed to the plaintiff by Merrick was $352,669.22. Merrick paid the sum of $281,188.00 to the plaintiff. However, $71,481.22, plus finance charges through October 31, 2016, in the amount of $10,053.26, remain outstanding. On December 9, 2016, within eight months of the plaintiff's performance under the subcontract, the plaintiff filed a Notice of Mechanic's Lien in the amount of $81,534.48 against the premises. The plaintiff asserts that prior to its own filing, on June 24, 2016, Jansons Associates, Inc. ("Jansons"), filed a mechanic's lien against the premises in the amount of $104,497.00.

On April 24, 2017, the plaintiff commenced this action, stating claims sounding in breach of the subcontract, *quantum meruit*, account stated, and foreclosure on its mechanic's lien. Jansons was included as a defendant in this action as a possible prior lienholder but has not been served. On November 9, 2017, the plaintiff filed the Notice of Pendency against the premises in connection with its cause of action sounding in foreclosure on its mechanic's lien. Upon the completion of discovery, the plaintiff filed the Note of Issue on June 13, 2019. Over a year later, the instant motion and cross-motion ensued. Interim orders extended the Notice of Pendency until a further order of the court. The motions were briefly held in abeyance during a stay imposed pending substitution of counsel for the defendants.

III. DISCUSSION

The court turns first to the plaintiff's motion and the portion of the defendants' cross-motion seeking to dismiss the fourth cause of action, which seeks to foreclose on the plaintiff's mechanic's lien, pursuant to CPLR 3211(a)(10) and to cancel the Notice of Pendency. Each of the foregoing turns predominantly upon whether the plaintiff may properly pursue foreclosure on its mechanic's lien against the premises without having served Jansons, a prior lienor, with process. The defendant contends that Jansons is a necessary party under the Lien Law and that, since Jansons has been named, but not served, CPLR 3211(a)(10) compels dismissal.

Lien Law § 44 provides:

> In an action in a court of record to enforce a lien against real property or a public improvement, the following are necessary parties defendant:
>
> 1. All lienors having liens notices of which have been filed against the same real property or public improvement, or any part thereof, prior to the filing of the notice of lis pendens in such action, where by law the filing of a notice of lis pendens is proper or required ...

While the plaintiff named Jansons as a party defendant, it did not effectuate service of the summons and complaint on Jansons. The plaintiff explains that it did not serve Jansons because Jansons' lien expired and was extinguished on June 24, 2017, pursuant to Lien Law § 17. Lien Law § 17 provides, in relevant part, that a lien expires one year after the notice of lien has been filed unless, *inter alia*, an action is commenced to foreclose on the lien within that time and a notice of pendency of such action is filed.

Importantly,

> If a lienor is made a party defendant in an action to enforce another lien, and the plaintiff or such defendant has filed a notice of the pendency of the action within the time prescribed in this section, the lien of such defendant is thereby continued. Such action shall be deemed an action to enforce the lien of such defendant lienor.

Lien Law § 17. The defendants assert that, because the plaintiff commenced this action approximately two months prior to the expiration of Jansons' lien and named Jansons as a defendant, Jansons' lien was continued and remains alive.

The defendants' attempt to argue both that the foreclosure action must be dismissed because Jansons *was not* joined as a party defendant and that Jansons' lien survives precisely because Jansons *was* named as a party defendant is a strained one. In any event, naming Jansons in the caption did not render Jansons a party to the action or the Notice of Pendency filed by the plaintiff because Jansons had not also been served with process. See Assay Partners v Econowatt Corp., 176 AD2d 180 (1st Dept. 1991); Gately v Gately, 103 Misc 16 (Sup. Ct. Nassau Cty. Special Term 1918). There is no dispute that Jansons was never served with a summons or complaint. Moreover, Jansons' lien expired well before the time the plaintiff had to serve Jansons with a summons expired. Finally, though it does not preclude the defendants from making an application pursuant to CPLR 3211(a)(10), the court notes that the defendants did not raise the issue of Jansons' joinder in their answer or at any other point in over three years between the inception of this action and their filing of the instant cross-motion.

In light of the foregoing, the court concludes that Jansons is not a necessary party to this action and that the fourth cause of action is not subject to dismissal on the basis of Jansons' absence. Furthermore, since the fourth cause of action survives, the action remains on the trial calendar, the delay in this action does not appear to be attributable to the plaintiff, and the plaintiff made its motion to extend prior to the expiration of the Notice of Pendency, the court finds that the plaintiff demonstrates good cause to extend the Notice of Pendency for an additional period of three years. See CPLR 6513; Knopf v Sanford, 110 AD3d 502 (1st Dept. 2013); L & L Painting Co., Inc. v Columbia Sussex Corp., 225 AD2d 670 (2nd Dept. 1996). The

defendants' speculative challenges as to the sufficiency of the plaintiff's proof that it filed a valid mechanic's lien are without merit.

The court turns next to the remainder of the defendants' cross-motion, which seeks dismissal of the second and third causes of action. As a preliminary matter, the defendants' blanket assertion that motions pursuant to CPLR 3211 are not subject to time restrictions is incorrect. Motions pursuant to CPLR 3211(a) are generally required to be made prior to service of the responsive pleading. CPLR 3211(e). It is only motions made pursuant to subsections 2, 7, and 10 of CPLR 3211(a) that can be made at "any subsequent time." Id.; M & E 73-75, LLC v 57 Fusion LLC, 189 AD3d 1 (1st Dept. 2020); GMAC Mortgage, LLC v Coombs, 191 AD3d 37 (2nd Dept. 2020).

The defendants' cross-motion is denied as untimely to the extent it seeks relief pursuant to CPLR 3211(a)(1) and (a)(4). To the extent the defendants move pursuant to CPLR 3211(a)(7), they do so years after joinder of issue, the completion of discovery, and the filing of the Note of Issue. In making their arguments in favor of dismissal, they rely on extrinsic evidence, including the subcontract, which was not attached to the complaint. The foregoing factors raise concerns that the defendants have disguised a motion for summary judgment pursuant to CPLR 3212 as a motion to dismiss pursuant CPLR 3211(a)(7) in order to circumvent the time restrictions in CPLR 3212, which are long expired. Nonetheless, since the plaintiff does not object to the timeliness of the motion and no party seeks to convert the motion to one for summary judgment, the court may properly consider the defendants' arguments in favor of dismissal pursuant CPLR 3211(a)(7). The court limits its analysis in this respect to the four corners of the complaint and does not rely on any documentary evidence to decide the motion. See M & E 73-75, LLC v 57 Fusion LLC, supra.

On a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7), the pleading is to be afforded a liberal construction and the court should accept as true the facts alleged in the complaint, accord the pleading the benefit of every reasonable inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory. See Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994). The defendants assert that the second and third causes of action, sounding in *quantum meruit* and account stated, respectively, are inadequately pleaded because they are duplicative of the plaintiff's first cause of action, which seeks to recover for breach of contract. The defendants further assert that those causes of action must be dismissed as against 12 E 72nd because no contractual privity exists between the plaintiff and that entity.

Generally, parties may not recover in *quantum meruit* if they have a valid, enforceable contract that governs the same subject matter as the *quantum meruit* claim. See Clark-Fitzpatrick, Inc. v Long Island Rail Road Co., 70 NY2d 382 (1987); Ellis v Abbey & Ellis, 294 AD2d 168 (1st Dept. 2002); Cooper, Bamundo, Hecht & Longworth, LLP v Kuczinski, 14 AD3d 644 (2nd Dept. 2005). This prohibition against quasi-contractual claims where a valid contract exists also applies to non-contracting parties such as 12 E 72nd. See Feigen v Advance Capital Mgt. Corp., 150 AD2d 281 (1st Dept. 1989). However, a plaintiff is permitted to proceed in the alternative upon a quasi-contractual theory such as *quantum meruit* where, as here, there is a question as to whether a valid and enforceable contract existed. See Forman v Guardian Life Ins. Co. of America, 76 AD3d 866 (1st Dept. 2010). Since the defendants dispute the validity of the subcontract and subsequent modifications thereto and fail, even in the papers they submit on this cross-motion, to affirm that a contract between the parties existed, the plaintiff's second cause of action survives.

As to the third cause of action, "a claim for an account stated may not be utilized simply as another means to attempt to collect under a disputed contract." Martin H. Bauman Associates, Inc. v H & M Intern. Transport, Inc., 171 AD2d 479, 485 (1st Dept. 1991); see Hagman v Swenson, 149 AD3d 1 (1st Dept. 2017); Sabre Intern. Sec., Ltd. v Vulcan Capital Management, Inc., 95 AD3d 434 (1st Dept. 2012). "If plaintiff can prove an enforceable contract, then it will be able to recover under [that] cause of action," and the account stated claim should be dismissed. Martin H. Bauman Associates, Inc. v H & M Intern. Transport, Inc., supra at 485. Here, the plaintiff seeks exactly the same damages based on an account stated theory as it alleges it is entitled to under the terms of its subcontract with the defendants. The third cause of action must therefore be dismissed.

IV. CONCLUSION

Accordingly, it is

ORDERED that the plaintiff's motion to extend the duration of the Notice of Pendency filed on November 9, 2017, is granted; and it is further

ORDERED that the Notice of Pendency filed against the real property located at 12-14 East 72nd Street, New York, N.Y., described as Block 1386, Lot 62, in the Office of the County Clerk of New York County on or about November 9, 2017, is hereby extended for a period of three years as measured from November 9, 2020; and it is further

ORDERED that this order shall be filed, recorded, and indexed by the County Clerk of New York County against the aforementioned property; and it is further

ORDERED that the defendants' cross-motion is granted to the extent that the third cause of action of the complaint, sounding in account stated, is dismissed pursuant to CPLR 3211(a)(7), and the cross-motion is otherwise denied, and it is further

ORDERED that the parties shall notify the ADR Coordinator of this order.

This constitutes the Decision and Order of the court.

Dated: April 15, 2021 **ENTER:**

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