

**Trinchese Iron Works & Constr., Inc. v Vanguard
Constr. & Dev. Co., Inc.**

2021 NY Slip Op 31936(U)

February 3, 2021

Supreme Court, Queens County

Docket Number: 717545/2020

Judge: Robert J. McDonald

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.

**FILED
2/3/2021
12:53 PM
COUNTY CLERK
QUEENS COUNTY**

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- - - - - x

TRINCHESE IRON WORKS & CONSTRUCTION, Index No.: 717545/2020
INC,

Motion Date: 1/28/21

Plaintiffs,

Motion Seq.: 1

- against -

VANGUARD CONSTRUCTION AND
DEVELOPMENT COMPANY, INC., MICHAEL
J. STRAUSS, MARK EKWALL,
RA, THE JOSEPH P. ADDABBO FAMILY
HEALTH CENTER, INC., ADDABBO CENTER
FUTURE HOME, INC., PCDE HEALTH
OPPORTUNITIES FUND XIX LLC, BACDE
NMTC FUND 13, LLC, BANK OF AMERICA,
N.A. and FIDELITY AND DEPOSIT
COMPANY OF MARYLAND

Defendant.

- - - - - x

The following electronically filed documents read on this motion
by defendants Vanguard Construction and Development Company, Inc,
Michael J. Strauss, Mark Ekwall, and Fidelity and Deposit Company
of Maryland for an Order dismissing plaintiff's First, Fourth,
Fifth, Seventh, and Eighth Causes of Action:

Papers
Numbered

Notice of Motion-Affirmation-Exhibits-Memo. of Law..EF 27-34

This action arises from a contract between plaintiff,
Trinchese Iron Works & Construction, Inc., and defendant
Vanguard, in which Trinchese was subcontracted to provide
structural steel labor and material for the Addabbo Family Health
Center located at 62-00 Channel Drive, Arverne, NY 11692. On
November 26, 2019, Trinchese filed a mechanic's lien against the
property in the amount of \$443,042. On October 1, 2020 plaintiff

filed the complaint in this action.

On October 19, 2020, after being advised that it had improperly named certain defendants who no longer were proper plaintiffs after the posting of the Bond, Trinchese voluntarily discontinued its action against the following defendants: (1) The Joseph P. Addabbo Family Health Center, Inc.; (2) Addabbo Center Future Home, Inc., together with the Addabbo Family Health Center, the "Addabbo Family" (3) PCDE Health Opportunities Fund XIX LLC ("PCDE"); (4) BACDE NMTF Fund 13 ("BACDE"); and (5) Bank of America ("BOA"). The sole remaining defendants are the movants herein.

First Cause of Action

The first cause of action is to foreclose on a mechanic's lien against defendants Addabbo Family, PCDE, BACDE, and BOA.

"To succeed on a motion to dismiss based upon documentary evidence pursuant to CPLR 3211 (a) (1), the documentary evidence must utterly refute the plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (Gould v Decolator, 121 AD3d 845, 847 [2d Dept 2014]).

Here, plaintiff's first cause of action was only against the Addabbo Family, PCDE, BACDE, and BOA. A stipulation of discontinuance was filed on NYSCEF against the non-moving defendants.

Thus, the first cause of action shall be dismissed.

Fourth Cause of Action

The fourth cause of action is for trust fund diversion against defendants Strauss Ekwall and Vanguard.

Strauss and Ekwall

"In considering a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), the court should accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (Scialdone v Stepping Stones Assoc., L.P., 148 AD3d 953, 954 [2d Dept 2017]).

Under Lien Law Article 3-A

The application, transfer, or payment of any trust asset for any purpose other than a

trust purpose, by any transaction before the payment or discharge of all trust claims with respect to the trust, constitutes a diversion of trust assets whether or not there are trust claims in existence at the time of the transaction² and regardless of the propriety of the trustee's intention

16 Carmody-Wait 2d § 97:203

Here, plaintiff fails to make anything more than unsupported conclusory allegations that Strauss and Ekwall knowingly diverted trust assets, and alleges no facts to support its claim. Thus, this cause of action shall be dismissed against defendants Strauss and Ekwall (see Zelenski v Inc. Vil. of Patchogue, 51 AD2d 1055, 1057 [2d Dept 1976]).

Improper form

Lien Law 77 provides that an action under this section must be brought by the beneficiary of a trust or a representative of said trust.

Plaintiff has failed to state in it's pleadings that it is a beneficiary of a trust or a representative of said trust.

Thus, the fourth cause of action shall also be dismissed against defendant Vanguard.

Fifth Cause of Action

The fifth cause of action is against defendant Vanguard for a violation of the New York Prompt Pay act which is codified into law as General Business Law 756-a.

General Business Law 756-a requires contractors to pay subcontractors "seven days after receipt by the owner of good funds" except when it s superseded by any conflicting contract terms.

Here, plaintiff alleges in the complaint that defendant Vanguard was required to pay the plaintiff within seven days of receiving funds. However, plaintiff does not plead whether the construction contract supersedes General Business Law, which invoices remain unpaid, and whether such invoices were properly submitted. As a result of the these bald and conclusory allegations, the fifth cause of action shall also be dismissed.

Seventh and Eighth Causes of Action

The seventh cause of action is for unjust enrichment, and the eight cause of action is for quantum meruit.

"[T]he theory of unjust enrichment lies as a quasi-contract claim and contemplates an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties" (Cortazar v Tomasino, 150 AD3d 668, 669-70 [2d Dept 2017]) A cause of action predicated on a theory of implied contract or quasi-contract is not viable where there is an express agreement that governs the subject matter underlying the action" (Scott v Fields, 92 AD3d 666, 669 [2d Dept 2012]). Similarly, "the existence of a valid and enforceable written contract governing the disputed subject matter precludes plaintiffs from recovering in quantum meruit" (Sheiffer v Shenkman Capital Mgt., Inc., 291 AD2d 295 [1st Dept 2002]).

Here, in the complaint there is repeated references to an express contract between the plaintiff and defendant Vanguard. Thus, as a matter of law both the seventh and eighth causes of action shall be dismissed.

Accordingly, and without opposition, the motion is granted, and it is further

ORDERED, that the first, fourth, fifth, and seventh causes of action in the complaint are dismissed, and it is further

ORDERED, that the moving defendants time to file a responsive pleading is extended until twenty days after entry of this Order by the Clerk of the Court.

Dated: February 3, 2021
Long Island City, NY



ROBERT J. MCDONALD
J.S.C.

FILED
2/3/2021
12:53 PM
COUNTY CLERK
QUEENS COUNTY

