

**Carsen Constr., Inc. v County-Wide Masonry Corp.**

2022 NY Slip Op 30914(U)

March 22, 2022

Supreme Court, New York County

Docket Number: Index No. 160305/2020

Judge: William Perry

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. WILLIAM PERRY PART 23**

*Justice*

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CARBEN CONSTRUCTION, INC.,  
Plaintiff,

INDEX NO. 160305/2020

MOTION DATE 07/23/2021

MOTION SEQ. NO. 001

- v -

COUNTY-WIDE MASONRY CORP., CLARITY 47, LLC, TB  
USA, LLC, TRIBEACH HOLDINGS, LLC, U.S. SPECIALTY  
INSURANCE COMPANY, JOHN DOES (1-10), ABC  
CORPS. (1-10)

**DECISION + ORDER ON  
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60

were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff Carben Construction, Inc. brings this action against Defendants County-Wide Masonry Corp. ("CW"), Clarity 47 LLC ("Clarity"), TB USA, Tribeach Holdings LLC, and US Specialty Insurance Company ("USSIC") (excluding CW, collectively, the "Non-CW Defendants"), seeking to recover unpaid sums allegedly owed for construction work performed pursuant to a 2019 contract.

In motion sequence 001, the Non-CW Defendants move for summary judgment dismissal of the three causes of action set forth against them and for an order discharging Plaintiff's mechanic's lien. The motion has been fully submitted.

**Background**

Defendant Clarity is the owner of real property located at 145 West 47th Street, New York, NY (the "premises"), upon which a hotel is being constructed by RIU Hotels & Resorts company.

Clarity hired non-party Transom as a construction manager, who in turn hired CW as a masonry contractor.

Plaintiff alleges that it entered into a contract with CW in 2019 to furnish work, labor, and construction services for a total price of \$1,725,000.00, but that it was not paid in full. (NYSCEF Doc No. 17, Am. Complaint, at 3.) As a result, on November 16, 2020, Plaintiff filed a mechanic's lien in the amount of \$1,193,126.65 against the premises. (*Id.* at 8.)

Plaintiff commenced this action on November 30, 2020 and filed the operative amended complaint pursuant to a stipulation, in which Plaintiff sets forth the following causes of action: 1) breach of contract against CW; 2) violation of the New York Prompt Payment Act against CW; 3) breach of implied contract/quantum meruit/unjust enrichment; 4) trust fund violations against CW; 5) mechanic's lien foreclosure/action on the bond; and 6) conversion. (Am. Complaint at 3-12.)

The Non-CW Defendants answered, setting forth a counter-claim against Plaintiff for willful exaggeration of mechanic's lien pursuant to New York Lien Law § 39. (NYSCEF Doc No., Non-CW Answer, at 6-11.) They allege that they served a demand for an itemized statement of lien, pursuant to Lien Law § 38, to which Plaintiff responded belatedly and in a manner that was unsatisfactory to the Non-CW Defendants. (*Id.* at ¶¶ 46-49; NYSCEF Doc Nos. 21, Demand; 22, Response.)

CW also sets forth a counter-claim against Plaintiff for willful exaggeration of mechanic's lien. (NYSCEF Doc No. 23, CW Answer, at 9.)

The Non-CW Defendants now move for summary judgment dismissal of the causes of action set forth against them (breach of implied contract/quantum meruit/unjust enrichment; mechanic's lien foreclosure/action on the bond; and conversion), on the grounds that Plaintiff "never provided any services or materials to the construction project" and that Clarity has paid

CW for the work that CW had performed. (NYSCEF Doc No. 40, Defs.' Memo at 6-7.) In support, the Non-CW Defendants submit the affidavit of Jaime Palmer, an officer of Clarity, who avers that Clarity never hired Plaintiff, that Plaintiff never performed any work or provided materials, and that Clarity had paid CW the full sum that CW was owed, as evidenced by two lien waivers evidencing payments from Clarity to CW in the sums of \$139,795.20 and \$218,850.75. (NYSCEF Doc No. 39, Palmer Aff.)

In opposition, Plaintiff argues that it did perform work on the premises and summary judgment must be denied because material issues of fact still exist. (NYSCEF Doc No. 41, Opposition.) In support, Plaintiff submits a contract between CW and RVB Construction, which Plaintiff alleges was its predecessor-in-interest (NYSCEF Doc No. 43), a certificate of liability insurance taken out by Plaintiff for construction work at 145 West 47th Street (NYSCEF Doc No. 45), a March 26, 2020 letter from CW to Plaintiff terminating a construction contract (NYSCEF Doc No. 46), meeting minutes (NYSCEF Doc No. 47), and a purchase order placed by RVB Construction for materials to be shipped to 145 West 47th Street (NYSCEF Doc No. 49). Plaintiff argues that it does not have a copy of the successor agreement made between CW and itself after it succeeded RVB, and that further discovery is needed because CW is in sole possession.

The Non-CW Defendants argue in reply that Plaintiff's evidence is insufficient to establish a material issue of fact, and that, in any event, Clarity did not know or approve of CW's retainer of Plaintiff as a subcontractor, and thus Clarity has no obligation to provide additional payment. (NYSCEF Doc Nos. 53, Palmer Reply Aff.; 58, Reply.)

### **Discussion**

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." (*Dallas-*

*Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) The court must view the evidence in the light most favorable to the nonmoving party and must give the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence. (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012].)

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact. (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bona fide issues of fact and not to delve into or resolve issues of credibility. (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 [2012].) Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue. (*Rotuba Extruders v Ceppos*, 46 NY2d 223 [1977].)

The motion is denied. The Non-CW Defendants fail to meet their burden of demonstrating that there are no existing material issues of fact, as the only evidence submitted in support of the motion are two lien waivers pertaining to CW. (NYSCEF Doc No. 39.) This is insufficient to demonstrate, as a matter of law, that the Non-CW Defendants are entitled to summary judgment dismissal of Plaintiff's causes of action set forth in the amended complaint under the theory that Plaintiff "never provided any services or materials to the construction project[.]" Plaintiff has raised issues of fact related to its work on the project. As such, it is hereby

ORDERED that motion sequence 001 for summary judgment is denied in its entirety.

3/22/22  
DATE



WILLIAM PERRY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: