

**High Valley Designs Ltd. v Bruno Frustaci Contr.  
Inc.**

2022 NY Slip Op 32479(U)

July 26, 2022

Supreme Court, New York County

Docket Number: Index No. 451293/2022

Judge: Melissa Crane

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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. MELISSA CRANE PART 60M**

*Justice*

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HIGH VALLEY DESIGNS LTD.,

Plaintiff,

- v -

BRUNO FRUSTACI CONTRACTING INC., FAC 6309  
FOURTH AVENUE HOUSING DEVELOPMENT FUND  
CORPORATION, FAC 6309 FOURTH AVENUE L.P.,  
LIBERTY MUTUAL INSURANCE COMPANY

Defendant.

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INDEX NO. 451293/2022

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 56, 57, 58, 59, 60, 61, 62, 63, 71

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is

This action arises from a construction project at 6309 Fourth Avenue, 414 63<sup>rd</sup> Street, and 416 63<sup>rd</sup> Street in Brooklyn, New York (the project). Defendants moved to dismiss the second, third, and fourth causes of action in the original complaint pursuant to CPLR 3211 (a) (1) and (a) (7). Subsequently, plaintiff filed an amended complaint as of right and submitted opposition to the motion. Defendants applied their pending motion to the now-amended complaint.

**Background**

Defendant Bruno Frustaci Contracting Inc. (defendant or BFCI) served as the project’s general contractor for the property owners, defendants FAC 6309 Fourth Avenue Housing Development Corporation and FAC 6309 Fourth Avenue L.P. (together, FAC 6309). Defendant engaged plaintiff High Valley Designs Ltd. (plaintiff or High Valley) to perform certain masonry work for the project.

This is a “mirror image” action related to *Bruno Frustaci Contracting Inc. v High Valley Designs Ltd.*, Index No. 656709/2021 (the Related Action). In the Related Action, BFCI alleges that High Valley breached the subcontract agreements in connection with the project. High Valley could have, but did not, raise its claims in this action in the Related Action.

Initially, under the May 5, 2020 subcontract (First Subcontract), as modified by the change order dated August 5, 2021, plaintiff agreed to perform work relating to the “New Building” and “EIFS” for \$2.85 million. Subsequently, under the September 5, 2020 subcontract (Second Subcontract), as modified by a change order dated October 21, 2020, plaintiff agreed to perform “Townhouse Masonry” for \$257,650.

Plaintiff alleges that it performed under the two agreements, but that defendant paid only \$81,507.41 of the aggregate \$3,107,650.00 owed under the contracts. Plaintiff’s foreman allegedly walked off the project site on August 2, 2021 due to nonpayment, but plaintiff resumed working on the project from August 4, 2021. Plaintiff asserts that it “sever[ed] and terminate[d] its relationship with [defendant] on August 27, 2021” (Doc 58 [amended complaint]).

In its first cause of action for breach of contract, plaintiff asserts that defendant owes it \$3,026,142.59 for its work on the project. Plaintiff also asserts claims for quantum meruit against defendant (second cause of action), unjust enrichment against defendant (third cause of action), to foreclose a mechanic’s lien against defendant as well as FAC 6309 (fourth cause of action), and to foreclose against a surety lien against defendant and defendant Liberty Mutual Ins. Co.

### **Discussion**

On a motion to dismiss pursuant to CPLR 3211(a) (7), the court must “accept the facts as alleged in the complaint as true, accord [plaintiff] the benefit of every possible favorable

inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, bare legal conclusions and “factual claims which are either inherently incredible or flatly contradicted by documentary evidence” are not “accorded their most favorable intendment” (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995]). On a motion to dismiss under CPLR 3211(a) (1), “dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” (*Leon*, 84 NY2d at 88).

1. Quantum Meruit and Unjust Enrichment

In support of its quantum meruit and unjust enrichment claims, plaintiff alleges in the amended complaint that it performed services “outside the ambit and scope of the Subcontracts on an overtime and accelerated basis . . . for which work Defendant . . . promised to pay to Plaintiff” (Doc 58, ¶ 25). Plaintiff also alleges that “FAC 6309 refused to sign off and pay for the Overtime and Accelerated Basis Work” (*id.* ¶ 26). Plaintiff seeks \$2,253.84 for these services. In opposition to the motion, plaintiff contends that the overtime and accelerated basis work is outside the scope of the subcontracts because FAC 6309 failed to “approve” it, and therefore the court should not dismiss the quantum meruit and unjust enrichment claims.

Defendant replies that the second and third causes of action, as amended, should be dismissed because all subcontract work, even that on an overtime or accelerated basis, fall within the changes, claims, and dispute provisions of the contracts (*see* Docs 3-4 [subcontracts]).

In Paragraph 5, the subcontracts state:

“Changes: Contractor may order changes in the Work. The Subcontract Price shall not be increased for changes in the Work unless the amount is agreed upon in writing by Contractor, and where applicable, by Subcontractor, in advance. Change Orders are subject to the terms of the Contract Documents, including with respect to permissible Subcontractor mark-ups for Overhead and Profit, and these amounts shall not be exceeded.”

In Paragraph 6 (a), the subcontracts state:

“If Subcontractor shall claim compensation for any damage or additional expense sustained by reason of any act or omission of Contractor or Owner, or should Subcontractor claim that any work is not required by this Subcontract, or constitutes extra work, Subcontractor must, within three (3) days after sustaining such damage or within three (3) days after being directed to perform such work, deliver to Contractor a written statement of the nature and basis of its claim and, by the tenth day of the calendar month succeeding, deliver to Contractor a verified and itemized statement of the details and amount of such damage or extra work. . . . Unless such written notices and data shall be delivered within the specified times as aforesaid, all claims for such compensation may be deemed waived at the discretion of Contractor.”

In Paragraph 9 (e), the subcontracts state:

“Should Subcontractor’s performance of this Subcontract be delayed, impacted, disrupted or accelerated by any acts of Contractor, or its other subcontractors, or the Subcontractor’s suppliers, or delayed, impacted or disrupted by any acts or causes which would entitle Contractor to an extension of time under the Owner Contract, Subcontractor shall request an equitable extension of time for the performance of this Subcontract, but shall not be entitled to any increase in the Subcontract Price or to damages or additional compensation as a consequence of such delays, impacts, disruptions, or acceleration resulting therefrom.”

The subcontracts’ only mention of “overtime” is in Paragraph 9 (c), which requires plaintiff to “work overtime or increase its work force, or both,” if plaintiff falls behind in its work. Plaintiff is also required to submit a “written recovery plan” in connection with any overtime work within 48 hours of written notice from defendant.

Finally, the subcontracts contain a merger clause that states:

“No Oral Modifications: This Subcontract is complete and constitutes the entire agreement between the parties, superseding and merging all prior agreements with respect to the subject matter hereof. No provision of this Subcontract shall be changed or modified, nor discharged, except by an agreement in writing signed by both parties. No action or failure to act by Contractor shall constitute a waiver of a right or duty afforded it under the Subcontract, nor shall such action or failure to act constitute approval or acquiescence in a breach hereunder, except as may be expressly agreed by Contractor.”

Plaintiff’s allegations of “overtime and accelerated work” constitute, at most, extra work and/or accelerated work within the meaning of the extra work and delay provisions of the subcontracts. Plaintiff does not allege that it complied with Paragraphs 6 or 9 of the agreements.

Further, plaintiff's alleged side agreement with defendant to perform any additional or accelerated work on the project is barred by the subcontracts' merger clauses.

Thus, the subcontracts preclude plaintiff's quasi-contract claims (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388-389 [1987] [dismissing quasi-contract claims where the "relationship between the parties was defined by a written contract, fully detailing all applicable terms and conditions, and specifically providing for project design changes with adjustments in compensation contemplated in light of those changes"]). Accordingly, plaintiff's quantum meruit and unjust enrichment claims are dismissed.

## 2. Mechanic's Lien

Plaintiff's fourth cause of action to foreclose plaintiff's lien against the property is also dismissed. Defendant and its surety, Liberty Mutual Ins. Co., discharged plaintiff's mechanic's lien against FAC 6309 (Doc 6). Defendants move to dismiss the fourth cause of action against FAC 6309, only. They do not seek to dismiss the fourth cause of action against defendant BFCI (*see e.g.* Doc 63 at 3).

Plaintiff argues that the law is unsettled as to whether the property owner remains a necessary party to a lien foreclosure claim and urges the court not to dismiss FAC 6309 from this action. Defendants contend that, upon bonding and discharging the lien, the lien was replaced with the bond as the relevant security and the owner is no longer a necessary party.

Under Lien Law § 44 (3), the property owner is a necessary party to a lien foreclosure claim. Where a lien has been discharged by the filing of a bond, Lien Law § 37 (7) applies, and the necessary parties do not include the property owner (*see e.g. Doma Inc. v 885 Park Ave. Corp.*, 59 Misc 3d 703, 706 [Sup Ct, NY County 2018]). The *Doma* court determined that the property owner was not a necessary party where a lien had been discharged, reasoning:

“Since the owner of the building ceases to have a stake in an action by a contractor against a tenant following the posting of a bond, wherein any subsequent action deals with the surety and not the real property, from a public policy perspective, there is no purpose in keeping the owner in the caption. Indeed, to keep the owner of the building in the action would only serve to needlessly increase the costs associated with the ownership and management of real property in this State. The only considerations articulated in *Harlem Plumbing Supply co., Inc. v. Handelsman*, 40 A.D.2d 768, 337 N.Y.S.2d 329 in support of keeping the owner in the action were purely technical. Given, however, that the two other departments of the Appellate Division have disagreed with this technical reasoning, relying on Lien Law Sec. 37(7); that other motion courts in New York County have followed the Second and Third Departments and avoided the technical problem; inasmuch as this Court can discern no public policy reason to keep the owner in the action under these circumstances; and noting that the First Department has not had occasion to revisit this proposition in many years; this Court follows the rule that, upon the filing of a bond discharging a mechanic’s lien, Lien Law Sec 37(7) supplants Lien Law Sec. 44(3) in prescribing the necessary parties to the action and causes the owner to no longer be a necessary party”

(*id.*).

This court concurs with that reasoning. Accordingly, plaintiff’s fourth cause of action is dismissed as against FAC 6309.

The court has considered the parties’ remaining contentions and finds them unavailing.

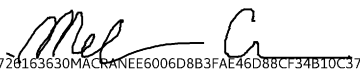
Accordingly, it is

**ORDERED** that defendants’ motion for partial dismissal is granted; and it is further

**ORDERED** that plaintiff’s second and third causes of actions in the amended complaint (quantum meruit and unjust enrichment) are dismissed in their entirety; and it is further

**ORDERED** that plaintiff’s fourth cause of action (lien foreclosure) is dismissed as against defendants FAC 6309 Fourth Avenue Housing Development Corporation and FAC 6309 Fourth Avenue L.P., but not as against defendant Bruno Frustaci Contracting Inc.; and it is further

**ORDERED** that the parties must appear for a compliance conference on October 4, 2022 at 10:45 a.m. by Microsoft Teams.

  
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7/26/2022  
DATE

MELISSA CRANE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION