

**Permasteelisa N. Am. Corp. v JDS Constr. Group  
LLC**

2022 NY Slip Op 32480(U)

July 22, 2022

Supreme Court, Kings County

Docket Number: Index No. 502680/18

Judge: Larry D. Martin

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At an IAS Term, Part 10 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 22<sup>nd</sup> day of July, 2022.

PRESENT: Larry D. Martin, J.S.C.

PERMASTEELISA NORTH AMERICA CORP.,

No. 502680/18

*Plaintiff,*

-against-

**DECISION & ORDER**  
Motion Sequence No. 001

JDS CONSTRUCTION GROUP LLC, 9 DEKALB OWNER LLC, JAROS, BAUM & BOLLES CONSULTING ENGINEERS, LLP, and BANK OF THE OZARKS,

*Defendants.*

This dispute arises out of preconstruction negotiations between Defendant JDS Construction Group LLC's ("JDS") and Plaintiff Permasteelisa North America Corp. ("Permasteelisa") in the development of 9 DeKalb Avenue, a mixed commercial and residential building (the "Project"). The parties began negotiating JDS' retention of Permasteelisa as a contractor, however, they were unable to agree on terms. Plaintiff subsequently filed a mechanic's lien against the Project for \$1,939,148.00 (the "Lien") and commenced this suit to foreclose on the Lien with claims sounding in breach of contract, quantum meruit, unjust enrichment, and account stated. *See* Complaint, ECF No. 1.<sup>1</sup>

JDS and 9 DeKalb Owner LLC (collectively, "Defendants"), now move pursuant to CPLR § 3212, for summary judgment dismissing the Complaint and granting their counterclaim that Plaintiff willfully exaggerated the Lien in violation of Lien Law § 39. Said counterclaim seeks

1. Permasteelisa discontinued the action against Defendant Jaros, Baum & Bolles Consulting Engineers, LLP with prejudice. *See* Discontinuance, ECF No. 8.

\$1,939,148.00 in damages, plus \$127,984.00 in Lien discharge bond premiums paid to date. See Notice of Mot., ECF No. 27.

### STANDARD OF REVIEW

On a motion for summary judgment, the proponent “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.” *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 852 (1985). Because summary judgment is a drastic remedy, in reviewing the motion, the facts must be viewed in the light most favorable to the non-movant. *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Ortiz v. Varsity Holdings, LLC*, 18 NY3d 335, 339 (2011). The movant’s failure to make a prima facie showing of entitlement requires denial, regardless of the sufficiency of the opposing papers. *Vega v. Restani Constr. Corp.*, 18 NY3d 499, 503 (2012). However, where the movant has made the requisite showing, the burden shifts to the opposant, who must produce sufficient evidence to establish material issues of fact to survive dismissal. *Alvarez*, *supra* at 324.

### DISCUSSION

Plaintiff’s first claim for foreclosure of the Lien is asserted against both Defendants, while its remaining four claims sounding in breach of contract, quantum meruit, unjust enrichment, and account stated are asserted against JDS alone. Defendants counter that Plaintiff willfully exaggerated the Lien.

#### I. Breach of Contract

New York courts operate with a “strong presumption against finding a binding and enforceable obligation” where an agreement contains open terms, calls for future approval, and expressly anticipates future preparation and execution of contract documents. *Carmon v. Soleh Boneh Ltd.*, 206 AD2d 450, 450 (2d Dept 1994). In that event, the Second Department considers

it merely an agreement to agree. *410 BPR Corp. v. Chmielecki Asset Mgmt., Inc.*, 51 AD3d 715 (2d Dept 2008). Moreover, “if the parties to an agreement do not intend it to be binding upon them until it is reduced to writing and signed by both of them, they are not bound and may not be held liable until it has been written out and signed.” *223 Sam, LLC v. 223 15th St., LLC*, 161 AD3d 716, 717 (2d Dept 2018). *See also* Gen. Obl. Law 5-703 (New York’s “Statute of Frauds”).

Here, Plaintiff argues in opposition to Defendants’ motion that they had made a “handshake deal” entitling it to \$1,939,148.<sup>2</sup> Plaintiff concedes that there was no written contract for it to serve as the “curtainwall” contractor for the Project,<sup>3</sup> and that neither party intended to enter into any contract until its potential terms were negotiated, reduced to writing and signed. Plaintiff’s claims are merely buttressed by one set of meeting minutes and a few agendas, none of which indicate a contract was entered into (Aff. Victor Rivera, Esq., ECF No. 56). Accordingly, Plaintiff’s proffered evidence appears consistent with Defendants’ Letter of Award (“LOA”), which states that neither party would be bound “unless and until the parties actually execute [a] Subcontract.” *See* LOA, ECF No. 43. These admissions and testimony show that there was never a contract between the parties and the purported “handshake deal” was merely to attempt to negotiate acceptable terms. Thus, Plaintiff’s breach of contract cannot stand.

## II. Quasi-Contract Claims

The elements of a cause of action sounding in quantum meruit are (1) performance of services in good faith, (2) acceptance of services by the person to whom they are rendered,

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<sup>2</sup> *See* Defs.’ Statement of Undisputed Facts (“SUF”), ¶¶ 12–31, ECF No. 28; Pl.’s Resp. to SUF, ¶¶ 6–13, ECF No. 55.

<sup>3</sup> Curtainwall is the non-structural, outer covering of a building, and does not carry any structural load from the building other than its own weight. The invention of curtainwall technology, shifting away from traditional masonry exterior wall which support most or all of the load of the entire building, was a vital development in the fields of engineering and architecture resulting in the ability to create high performance, energy efficient façade systems ideal for large skyscrapers.

(3) expectation of compensation therefor, and (4) reasonable value of the services rendered. *Evans-Freke v. Showcase Contr. Corp.*, 85 AD3d 961, 962 (2d Dept 2011).

Here, there is no evidence that Defendants either expressly consented to, or otherwise assumed, an obligation to pay the plaintiff and it appears that Plaintiff did not perform much of the itemized services and/or work. Plaintiff's witnesses admitted in depositions that, e.g., the visual mock-up and die drawings were not complete or provided to JDS; that the performance mock-up and materials and fabrication for the performance mock-up had not been started; that sample submittals provided to JDS were rejected; and that Plaintiff had yet to obtain insurance for the Project. Thus, Plaintiff has not shown that Defendants accepted services and has failed to show that its itemization is the reasonable value of services rendered.

Likewise, to recover for unjust enrichment, a plaintiff must show that (1) the defendant was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. *W. Park Associates, Inc. v. Everest Nat. Ins. Co.*, 113 AD3d 38, 45 (2d Dept 2013). This "is not an appropriate remedy for recovery of the expenses of a failed negotiation." *See Chatterjee Fund Mgt L.P. v. Dimensional Media Assocs.*, 260 AD2d 159 (1st Dept 1999); *Metal Cladding, Inc. v. Brassey*, 159 AD2d 958 (4th Dept 1990). Here, given that nothing became of the parties' negotiations, it has hard to argue that Defendants were enriched or that it is against equity and good conscience to permit Defendants to retain what is sought to be recovered, because, on the evidence before this Court, it does not appear that Defendants retained anything. Instead, both parties negotiated in good faith and failed to reach a deal.

### III. Account Stated

As to Plaintiff's claim for an account stated, an "account stated assumes the existence of some indebtedness between the parties, or an express agreement to treat the statement as an account

stated. It cannot be used to create liability where none otherwise exists.” *M. Paladino, Inc. v. J. Lucchese & Son Contracting Corp.*, 247 AD2d 515, 516 (2d Dept 1998). As set forth in II., it is not clear on what basis Defendants are indebted to Plaintiff.

#### IV. The Lien

Lien Law § 39 provides that where a mechanic’s “lienor has willfully exaggerated the amount for which he claims a lien as stated in his notice of lien, his lien shall be declared to be void” and that “[n]o such lienor shall have a right to file any other or further lien for the same claim.” In an appropriate case, the owner or contractor subject to a willfully exaggerated is entitled to damages including the “any premium for a bond given to obtain the discharge of the lien.” Lien Law § 39–a.

Here, Plaintiff’s submission of payment requisitions to JDS that were based upon the schedule of amounts payable pursuant to a mere proposed contract. Pl.’s Resp. to SUF, ¶¶ 22–49, ECF No. 55. Plaintiff’s notice of lien includes \$118,000 for insurance that Defendants allege, and that Plaintiff’s witness averred, was not procured. But the “fact that a lien may contain improper charges does not, in and of itself, establish that a plaintiff willfully exaggerated a lien.” *Minelli Const. Co., Inc. v. Arben Corp.*, 1 AD3d 580, 581 (2d Dept 2003). Because Lien Law § 39–a is “penal in nature,” it “is strictly construed in favor of the party against whom the penalty is sought.” *Exec. Towers at Lido, LLC v. Metro Const. Servs., Inc.*, 303 AD2d 545, 545–46 (2d Dept 2003). Thus, the issue of willful exaggeration of lien is inappropriate for summary disposition.

#### CONCLUSION

Defendants’ motion is granted to the extent of discharging the Lien and dismissing all of Plaintiffs’ claims except those sounding in *quantum meruit*, which claims are referred to a Referee of this Court for calculation.

Summary judgment is denied, without prejudice, with respect to Defendants' counterclaim for \$1,939,148.00 in damages that Plaintiff willfully exaggerated the Lien in violation of Lien Law § 39, and Defendants' claims for \$127,984.00 in Lien discharge bond premiums paid to date. *See* Notice of Mot., ECF No. 27.

Dated: July 22, 2022  
Brooklyn, New York



Hon. Larry D. Martin  
Supreme Court of the State of New York

**HON. LARRY MARTIN**  
**JUSTICE OF THE SUPREME COURT**