

<b>A Equip., Inc. v Mulberry Grand Owner, LLC</b>
2022 NY Slip Op 33679(U)
October 25, 2022
Supreme Court, New York County
Docket Number: Index No. 654027/2020
Judge: Debra A. James
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. DEBRA A. JAMES**

**PART 59**

*Justice*

-----X

A EQUIPMENT, INC.,

Plaintiff,

- v -

MULBERRY GRAND OWNER, LLC, BMNY  
CONTRACTING CORP., ISRAEL DISCOUNT BANK OF  
NEW YORK, and THE GUARANTEE COMPANY OF  
NORTH AMERICA USA,

Defendants.

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INDEX NO. 654027/2020

MOTION DATE 01/06/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48

were read on this motion to/for DISMISS.

ORDER

Upon the foregoing documents, it is

ORDERED that to the extent of the first cause of action for breach of contract as against defendant BMNY Construction Corp. only, the cross motion of plaintiff A Equipment, Inc, to amend the First Amended Complaint in accordance with the Proposed Second Amended Complaint is GRANTED; and it is further

ORDERED to the extent of the first cause of action for breach of contract and the second cause of action for fraud against Mulberry Grand Owner LLC of the Proposed Second Amended Complaint; the third cause of action for an account stated as against Mulberry Grand Owner, LLC of the Proposed Second Amended

Complaint; and the fifth cause of action to foreclose on a mechanic's lien against moving defendant The Guarantee Company of North America of the Proposed Second Amended Complaint, such cross motion of plaintiff is DENIED, and those causes of action are stricken; and it is further

ORDERED that the plaintiff shall serve and file a copy of the Proposed Second Amended Complaint, in accordance with the above, within ten (10) days of service of a copy of this order with notice of entry; and it is further

ORDERED that the defendants shall answer the second amended complaint or otherwise respond thereto within thirty (30) days from the date of such service; and it is further

ORDERED that counsel are directed to post on NYSCEF a proposed preliminary conference order or competing proposed preliminary conference orders at least two days before December 6, 2022, on which date counsel shall appear on Microsoft Teams, unless such appearance be waived by the court.

#### DECISION

The moving defendants' reply/opposition to plaintiff's cross motion to serve the Proposed Second Amended Complaint enable this court to treat such proposed second amended pleading as the subject of defendants' initial motion to dismiss. See Bankers Consec Life Insurance Company v Egan-Jones Ratings Company, 193 AD3d 5 (1<sup>st</sup> Dept 2021).

The subcontract between plaintiff A Equipment, Inc. and defendant BMNY Construction Corp. dated March 15, 2019 (NYSCEF Document Number 16), and the letter agreement between plaintiff A Equipment, Inc, Nexus Building Group, Inc and BMNY Construction Corp dated October 3, 2019 (NYSCEF Document Number 17), upon which plaintiff founds its Proposed Second Amended Complaint against moving defendant Mulberry Grand Owner, LLC (NYSCEF Document Number 44) constitute irrefutable documentary evidence that defeats the first cause of action asserting breach of contract and the third cause of action asserting an account stated as against such moving defendant, as defendant Mulberry Grand Owner, LLC, is not a signatory to either contract. See Liberty Marble, Inc v Elite Stone Setting Corp, 248 AD2d 302 (1<sup>st</sup> Dept 1998) and DL Marble & Granite Inc v Madison Park Owner, LLC, 105 AD3d 479 (1<sup>st</sup> Dept 2013).

The second cause of action captioned "Fraud against [defendant] Mulberry Grand [Owner, LLC]", alleged in the Proposed Second Amended Complaint, likewise lacks merit. This court concurs with the moving defendants that, even assuming arguendo defendant Mulberry Grand was a signatory to either of the contracts with plaintiff, allegations of misrepresentation as to a "future intention to perform" are insufficient to state a cause of action for fraud. See Wyle Inc v ITT Corp, 130 AD3d 438, 439 (1<sup>st</sup> Dept 2015).

Finally, as to the fifth cause of action to foreclose on a mechanic's lien allegedly attached to the bond issued by moving defendant The Guarantee Company, moving defendants have refuted same based upon documentary evidence. The Replacement Contract between Nexus Building Group, Inc. and International Concrete Corp (replacing BMNY, as general contractor) dated December 5, 2019 (NYSCEF Document Number 19); the letter agreement dated October 3, 2019, among Nexus Building Group, Inc, defendant BMNY Construction Corp (general contractor vis á vis plaintiff) and plaintiff A Equipment Inc (NYSCEF Document Number 17); and defendant BMNY's Application and Certification for Payment dated October 24, 2019 (NYSCEF Document Number 21), constitute irrefutable documentary evidence that "the cost of completion [i.e., the price set in the December 5, 2019 Replacement Contract] exceed[ed] the balance due under the [the BMNY/Nexus Building Group/A Equipment] contract, [and thus,] there [was] no surplus upon which the lien would attach." Philan Dept of Borden Co v Foster-Lipkins Corp, 39 AD2d 633 (4<sup>th</sup> Dept 1972).

*Debra A. James*

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10/25/2022			DEBRA A. JAMES, J.S.C.	
<b>DATE</b>				
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE