SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SABRINA KRAUS **PART** 57TR

Justice

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ACIES GROUP, LLC,

Plaintiff,

- v -

STEVEN A. KIRSCHENBAUM, 320 WEST 115TH REALTY, LLC, ALL BUILDING CONSTRUCTION,

Defendant.

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INDEX NO. 150142/2018

MOTION DATE 10/31/2022

MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 125, 126, 127, 128, 129, 130, 132, 133, 134, 135, 136, 137, 138, 139, 140

were read on this motion to/for SUMMARY JUDGMENT.

BACKGROUND

This action seeks two enforce two contracts entered into between the owner of a building and subcontractor who did work on the building, but was not paid in full for the work. Rather than have a lien filed, the owner agreed to pay the subcontractor by a date certain but then defaulted on the payments due.

Pending before the court a motion and cross-motion for summary judgment. For the reasons stated below the motion is denied and the cross-motion is granted.

ALLEGED FACTS

This action is based on a straightforward breach of contract matter and the material facts are not disputed in the underlying papers. Plaintiff is a subcontractor who was not paid in full for work it did on a project located at 318-320 West 115th Street, New York, New York.

Plaintiff had not been paid the full amount owed under its subcontracts with defendant All Building Construction (ABC), in accordance with the New York Prompt Payment Act and

New York Lien Law Article 3A. Therefore, plaintiff was within its right to file a lien on the subject property which was owned by 320 West 115th Street Realty LLC (320 West). Steven Kirschenbaum (Kirschenbaum) was a principal of said entity.

In recognition of plaintiff's entitlement to file a lien for the unpaid work, 320 West and Kirschenbaum agreed that plaintiff would waive its lien rights in exchange for defendants' commitment to pay the total amount owed of $38,341.00 no later than June 30, 2017 (the "Agreements"). Kirschenbaum personally guaranteed the obligations of his company, 320 West which, as it turns out, was never operating legally in the State of New York, and which Kirschenbaum then promptly caused to convey the underlying property to others and abandon the Delaware corporation (320 West) . Kirschenbaum transferred ownership of the property just a few weeks after this action was filed.

This action was commenced by way of a motion for summary judgment in lieu of complaint. (NYSCEF Doc. 7). An affidavit was filed by Kirschenbaum opposing the motion where Kirschenbaum's claimed defense to payment was the work was allegedly not performed, or was performed defectively. Kirschenbaum never denied that he personally guaranteed the payment and Kirschenbaum submits no affidavit on the motion or cross-motion currently pending before the court.

Each Agreement specifically recites that "Payment will be made no later than 6/30/2017 and is guaranteed by Steven Kirshenbaum, Owner, 320 West 115th Realty LLC." While Kirschenbaum only signed the agreement one time it is clear that the intent was that Kirschenbaum was personally guaranteeing payment.

DISCUSSION

A motion for summary judgment pursuant to CPLR § 3212 must be granted where the moving party makes "a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Ayotte v. Gervasio*, 81 N.Y.2d 1062, 1063 (1993). The opposing party must "rebut that prima facie showing, by producing contrary evidence in admissible form sufficient to require a trial of material factual issues." *Matter of 91st St. Crane Collapse Litig.*, 2014 NY Slip Op 32054(U), (Sup. Ct.).

In order to recover for breach of contract, a plaintiff must establish "(1) the existence of a contract; (2) the plaintiff's performance under the contract; (3) the defendant breached the contract; and (4) resulting damages". *HTRF Ventures, LLC v. Permasteelisa N. Am. Corp.*, 2019 NY Slip Op 32095(U), (Sup. Ct.). "Upon the existence of a written contract, a claimant must specify the contractual provisions that were violated in order to posit a claim for breach of contract." *Ovsyannikov v. Monkey Broker, LLC*, 2011 NY Slip Op 33909(U), (Sup. Ct.), *citing Kraus v. Visa Int'l Serv. Ass'n*, 304 A.D.2d 408, 408 (1st Dept. 2003). Here, a valid contract exists, as there was an offer, acceptance, consideration, and mutual intent to be bound. *See Ovsyannikov*, 2011 NY Slip Op 33909(U). It is not dispute by defendants that plaintiff accepted defendants' offer of the Agreements, evidenced by plaintiff's signature, and that defendants displayed mutual intent to be bound, evidenced by Kirshenbaum's signature and the specific language in the agreement that Kirschenbaum was guaranteeing payment. *See Sacks v. Knolls at Pinewood, LLC*, 2016 NY Slip Op 32849(U), (Sup. Ct.) ("When the parties' intent to be bound by a contractual obligation "is determinable by written agreements, the question is one of law").

Additionally, consideration was established by the exchange of plaintiff's right to file a lien for the payment of $38,341.00 by June 30, 2017. *See Apfel v. Prudential-Bache Sec., Inc.*, 81 N.Y.2d 470, 476 (1993).

It is undisputed that the contracts exist and are valid. Similarly, it is undisputed that plaintiff performed under the contract by fulfilling the requirement that plaintiff not file a lien against the project site, in accordance with the terms of the Agreements. Defendants clearly breached the Agreements by failing to perform, since the payment of $38,341.00 was never made. *Chapman v. Davis*, 75 Misc. 3d 360, 370 (Town Ct. 2022), *citing Awards.com v. Kinko's, Inc.*, 2002 NY Slip Op 30025(U), (Sup. Ct.). Defendants do not dispute this lack of performance, and do not provide any justification for their failure to perform in their motion for summary judgment.

Plaintiff has suffered damages by not being paid the contracted amount in the Agreements, while simultaneously losing its ability to file a lien. As a result of defendants' nonpayment, plaintiff has not received the agreed-upon $38,341.00 for over five years since the Agreements' completion date of June 30, 2017. Furthermore, plaintiff has lost the ability to lien due to the passage of time since plaintiff's last day providing services to the subject project, thereby reducing plaintiff's avenues of recovery. As such, plaintiff has been damaged in the amount of $38,341.00, and can only be made whole by recovery of the full amount promised in the Agreements. *See Brushton-Moira Cent. Sch. Dist. v. Fred H. Thomas Assocs., P.C.*, 91 N.Y.2d 256, 262 (1998).

Kirschenbaum's counsel cites to *Georgia Malone & Co. v. Ralph Rieder*, 86 A.D.3d 406, 408, 926 N.Y.S.2d 494 (2011) and related cases to argue that he should not be bound individually by the Agreements. However, the facts of this case are distinguishable. Unlike the

cases relied on by defendants, in this case there are stand-alone provisions in the Agreements themselves clearly reflecting an intention by Kirschenbaum to be personally bound. The Agreements provide that "[p]ayment will be made no later than 6/30/2017 **and is guaranteed by Steven Kirshenbaum**, Owner, 320 West 115th Realty LLC". (emphasis added).

The concerns expressed in *Georgia Malone* of an unsuspecting officer, with no real ownership interest in the underlying entity, being held to corporate obligations "he never dreamed of assuming," are not present in the case at bar. If it were true that Kirschenbaum had no intention of binding himself personally, he would not have said the opposite in the language of the Agreements. Additionally, this statement of guarantee is not a "single sentence in a long contract" but is instead the crucial clause outlining plaintiff's due consideration for foregoing the filing of a lien against a property.

Kirschenbaum never once claimed in his earlier affidavit filed with the Court that he was not personally bound, nor did he raise this claim in his Answer. Instead, he acted quickly after this action was filed to convey the real property to a third party, and then allowed 320 West to be dissolved for failure to pay taxes. In sum, Kirschenbaum is not a mere officer in 320 West who would be subjected to a "very large obligation which he never dreamed of assuming". Instead, Kirschenbaum operated a Delaware company in New York City for years without any legal authority; succeeded in getting Plaintiff to hold off on filing a lien with a promise to pay; then conveyed the real estate away from the corporate entity, only to later claim through counsel that he is not bound by an agreement he clearly executed.

Assuming *arguendo* the lack of a second signature was fatal to the claim against Kirschenbaum individually, he would nevertheless be liable under the asserted claims of *quantum meruit* and unjust enrichment.

Here, there is undisputed evidence in the pleadings and on the record that Kirschenbaum offered to pay plaintiff for work done on the project site, which plaintiff duly relied upon by not filing a lien to preserve a right to payment. "In order to prevail on either an unjust enrichment or a quantum meruit claim, plaintiff would have to establish, inter alia, that it had a reasonable expectation that it would be compensated by defendant for its performance of the services which are the subject of the claim", among other factors. *Katselnik & Katselnik, Inc. v. Silverman*, 2009 NY Slip Op 32529(U) (Sup. Ct.). *Quantum Meruit* is established where: (1) plaintiff conferred a benefit upon defendant; (2) defendant accepted the benefit of plaintiff's services; (3) it would be inequitable for defendant to retain that benefit without paying the agreed-upon value of the services. Unjust enrichment is established where: (1) plaintiff rendered services for defendant's benefit in good faith; (2) defendant accepted the benefit of plaintiff's services; (3) plaintiff and defendant shared an expectation that plaintiff would be compensated for the services rendered; (4) defendant has been unjustly enriched; (5) it would be against equity and good conscience to permit defendant to retain that amount. These elements are clearly established in this action.

Finally, defendants argue in reply that the cross-motion should be denied as untimely. The Court disagrees. The Court finds that as it is a cross-motion, it is timely. Even if the Court were to considered it has having been made 30 days after the deadline for dispositive motions, the Court would excuse said delay as *de minimis* where as here, plaintiff's prior counsel was disbarred, there was a stay as a matter of law, and plaintiff's new counsel filed the cross-motion within weeks of filing the notice of appearance in this action.

WHEREFORE it is hereby:

ORDERED that Kirschenbaum's motion for summary judgment is denied; and it is further

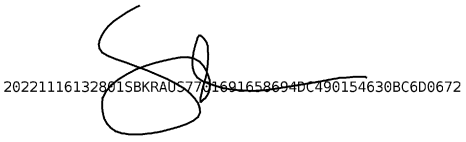
ORDERED that plaintiff's cross-motion for summary judgment on the complaint herein is granted and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendants STEVEN A. KIRSCHENBAUM, and 320 WEST 115TH REALTY, LLC, in the amount of $ 38,341.00 , together with interest at the statutory rate, as calculated by the Clerk, from June 30, 2017, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh);]; and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.



11/16/2022
DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED		DENIED	X GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE