

**F.R.P. Sheet Metal Contr. Corp. v Georgetown
Eleventh Ave. Owners, LLC**

2022 NY Slip Op 34200(U)

December 13, 2022

Supreme Court, New York County

Docket Number: Index No. 151259/2018

Judge: Joel M. Cohen

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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<p>F.R.P. SHEET METAL CONTRACTING CORP. (COUNTERCLAIM-DEFENDANT),</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> <p>GEORGETOWN ELEVENTH AVENUE OWNERS, LLC (COUNTERCLAIM PLAINTIFF) (CROSSCLAIM- PLAINTIFF), MANHATTAN MECHANICAL CONTRACTORS, INC. (CROSSCLAIM-DEFENDANT), J.T. MAGEN & COMPANY INC. (CROSSCLAIM- DEFENDANT), ATLANTIC SPECIALTY INSURANCE COMPANY, GOLDMAN SACHS BANK USA,</p> <p style="text-align: center;">Defendants.</p>	<p>INDEX NO. <u>151259/2018</u></p> <p>MOTION DATE <u>09/06/2022,</u> <u>09/06/2022</u></p> <p>MOTION SEQ. NO. <u>002 003</u></p> <p style="text-align: center;">DECISION + ORDER ON MOTION</p>
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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 202, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 292

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 290, 291

were read on this motion for SUMMARY JUDGMENT.

This is a case to, among other things, foreclose a sub-subcontractor's mechanic's lien (NYSCEF 112 [the "Lien"]) against a property owner. Plaintiff-Counterclaim Defendant F.R.P. Sheet Metal Contracting Corp. ("FRP" or "Plaintiff") moves for summary judgment against Defendant-Counterclaim Plaintiff Georgetown Eleventh Avenue Owners, LLC ("Georgetown"), Defendant Manhattan Mechanical Contractors, Inc. ("MMC") and Defendant J.T. Magen &

Company (“JTM”). FRP also moves to dismiss Georgetown’s counterclaim for fraud. Georgetown and Defendant Atlantic Specialty Insurance Company (“Atlantic” and, with Georgetown, “Moving Defendants”) move for summary judgment dismissing FRP’s claim to foreclose its Lien.

For the reasons that follow, FRP’s motion is GRANTED solely as to (1) sustaining FRP’s breach of contract claim against MMC in the amount of \$508,719.91; and (2) dismissing Georgetown’s counterclaim for fraud, but is otherwise DENIED. Moving Defendants’ motion is GRANTED and FRP’s claims to foreclose the Lien against Georgetown and Atlantic are dismissed and the Lien is declared void.

BACKGROUND

The Project

This case concerns the Lien filed by FRP for \$508,719.91 arising out of materials it provided and work it completed at 787 Eleventh Avenue in Manhattan (the “Premises”). The Premises are owned by Georgetown and are used as a multi-brand automobile dealership (NYSCEF 119 [Deed]). The Premises were leased to non-parties BICOM NY, LLC (“BICOM”) and Nissan North America, which in turn sub-leased its portion of the Premises to affiliates of BICOM (NYSCEF 134, 135, 138). BICOM’s agreement with Georgetown entitled it to receive tenant improvement allowances (“TIA”) for work completed at the Premises subject to certain conditions, including Georgetown’s receipt of unconditional lien waivers indicating that contractor invoices had been fully paid (NYSCEF 134 §§ 3.03, 3.04).

BICOM solicited proposals from and ultimately hired JTM as a general contractor to oversee the construction (“Project”) at the Premises. JTM hired MMC as a sub-contractor in a contract dated April 27, 2016 (NYSCEF 90 at Ex. B). FRP, as sub-subcontractor to MMC,

fabricated and installed sheet metal ductwork on the Project pursuant to a contract with MMC dated May 5, 2016 (“Contract”) valued at \$1,050,000 (NYSCEF 115 at Ex. A). Georgetown is not a party to any contract with MMC or FRP.

FRP worked on the Project from June 17, 2016 to April 14, 2017, during which time it billed \$904,719.91 to MMC of which, according to FRP, \$508,719.91 remains due (NYSCEF 115 at Exs. B-C [invoices]). On August 25, 2017, JTM filed a lien against the Premises (NYSCEF 127). FRP filed its Lien against Georgetown, MMC and JTM on December 13, 2017. On January 31, 2018, MMC filed a lien for its work on the Project as a sub-contractor to JTM (NYSCEF 126).

On January 8, 2018, FRP responded to Georgetown’s request for a verified statement under Section 38 of the Lien Law by providing copies of the Contract between FRP and MMC along with copies of FRP’s invoices paid by MMC, FRP’s unpaid invoices and back-up for FRP’s cost incurred on the Project (NYSCEF 115).

The Related Actions

Georgetown and JTM are engaged in a related litigation before the Court in which summary judgment was granted in favor of Georgetown on, among other grounds, that JTM and BICOM engaged in a fraudulent scheme to defraud Georgetown by submitting false lien waivers from JTM and certain of its subcontractors on the Project to obtain TIA funds (*J.T. Magen & Co. Inc. v Nissan N. Am., Inc.*, 2022 WL 17574023 [N.Y. Sup Ct, New York County Dec 8, 2022][“JTM Action”]). FRP did not submit such a lien waiver.

MMC also sued to foreclose its mechanic’s lien dated January 30, 2018 against, among others, Moving Defendants (*Manhattan Mechanical Contractors, Inc. v. Nissan North America, Inc. et al.*, Index. 154742/2018 [“MMC Action”]). MMC’s lien included the “ductwork”

completed on the Project (MMC Action NYSCEF 2). On January 28, 2019, the Court dismissed MMC's complaint and discharged MMC's lien on the grounds that it was untimely (MMC Action NYSCEF 111).

Moving Defendants argue that (1) FRP's Lien is subrogated to MMC's discharged lien and that dismissal is required; (2) that there is no privity between FRP and Moving Defendants; and (3) the Lien is not valid because (a) FRP did not substantially perform the work on the Project and (b) Georgetown did not provide consent to FRP to complete the work that is the subject of the Lien. FRP argues that it can seek to foreclose its Lien against Georgetown absent privity of contract and that there is no dispute that it completed work on the Project.

DISCUSSION

To demonstrate entitlement to summary judgment under CPLR 3212(b), the movant must establish that they are entitled to prevail on their claim or defense through "evidence in admissible form" as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980][citations omitted]). If the moving party makes a *prima facie* showing, the opponent must establish that a triable issue of material fact exists (*Id.*, *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [collecting cases]).

A. FRP's Claim to Foreclose the Lien Against Georgetown and Atlantic is Dismissed

"A mechanic's lien is a means of obtaining satisfaction for unpaid services; however, where a subcontractor is the lienor, it is based upon the subrogation theory and is only valid up to the amount, if any, still due and unpaid to the contractor. If there are no monies due then there is no fund to which the subcontractor's lien can attach" (*Ace Contr. Co., a Div. of Cell-San Const. Co., Inc. v Garfield & Arma Assoc.*, 148 Misc 2d 475, 477 [Sup Ct New York County 1990] [collecting cases]; *Peri Formwork Sys., Inc. v Lumbermens Mut. Cas. Co.*, 112 AD3d 171, 176

[2d Dept 2013] *citing* 8–92 Warren's Weed New York Real Property § 92.11[1], [4]; 34 New York Practice: Mechanics Liens in New York § 2:3 [“In addition to a lienor's right to recover being limited by the contract price or reasonable value of the materials provided, it is further limited by the principle of subrogation”).

Principles of subrogation apply “to all tiers of subcontractor liens” (*Id.*). “The burden is on the subcontractor to establish a fund subject to his lien, namely, money available from the owner and owing to the contractor” (*Kaback Enterprises, Inc. v Austin Bros., Inc.*, 26 Misc 3d 1235(A) [Sup Ct New York County 2009] [citations omitted]). Thus, FRP’s rights to recover under its Lien are “wholly derivative” of MMC’s rights and there can be no recovery absent a *prima facie* showing that MMC is entitled to payment (*IMP Plumbing and Heating Corp. v 317 E. 34th St., LLC*, 89 AD3d 593, 594 [1st Dept 2011]).

There is no dispute that FRP was a sub-subcontractor to MMC, which was in turn a subcontractor to JTM. FRP has not sought to distinguish the *Ace Contr. Co.*, and *Peri Formwork Sys., Inc.* cases, among others, holding that its Lien is subrogated to MMC’s, which was discharged. The bottom line is that the Lien cannot be enforced against Georgetown when the lien a tier above, MMC’s, has been discharged.

Moreover, FRP has not demonstrated that Georgetown independently consented to the work as required by Section 3 of the Lien Law (*Joson Iron Works, Inc. v Staten Is. Majors Realty Corp.*, 164 F3d 618 [2d Cir 1998] [collecting cases and applying New York law]). Further, FRP lacks privity with Georgetown (*Trofien Steel & Const. Inc. v Rybak*, 26 Misc 3d 1223(A) [Sup Ct Kings County 2010] [case citations omitted]). Finally, as explained in the Court’s summary judgment decision in the JTM Action, FRP cannot recover against funds payable to JTM because

JTM's lien claims are dismissed (*Id. citing* Lien Law §4; *Ace Contr. Co.*, 148 Misc.2d at 477, *supra*). Accordingly, FRP's claim to foreclose its Lien is dismissed.

B. Georgetown's Counterclaim for Fraud is Dismissed

Although the record here and in the JTM Action indicates that JTM undertook efforts to defraud Georgetown (*J.T. Magen*, 2022 WL 17574023), there is no evidence in the summary judgment record in this case to support a finding that FRP was aware of or participated in the fraud as would be necessary "to connect [FRP]. . .with an otherwise actionable tort" (*Alexander & Alexander of New York, Inc. v Fritzen*, 68 NY2d 968, 969 [1986]). The facts and evidence cited by Georgetown (Georgetown Rule 19-a Counterstatement ¶¶ 75-122, 171-174 [NYSCEF 288]) concern the misdeeds of JTM and MMC, but do not implicate FRP. The assumption that FRP had a motive to participate in the fraudulent scheme perpetrated by others to obtain funds that would otherwise be lawfully owed is not sufficient to demonstrate a triable issue of fact (Opp. Brief at 21 [NYSCEF 287]) (*Banner Indus., Inc. v Key B.H. Assoc., L.P.*, 170 AD2d 246, 246 [1st Dept 1991] *citing New York Fruit Auction Corp. v City of New York*, 81 AD2d 159, 161 [1st Dept 1981], *aff'd*, 56 NY2d 1015 [1982]). There is no evidence that FRP, which did not submit a false lien waiver, had anything to do with JTM's conduct.

Accordingly, Georgetown's counterclaim against FRP for fraud is dismissed.¹

C. FRP's Breach of Contract Claims Against MMC and JTM

Finally, there is no dispute that MMC entered into the Contract with FRP and thereafter received invoices from FRP with a balance remaining of \$508,719.91. FRP has filed the

¹ New York does not recognize a cause of action for conspiracy to commit fraud (*Empire Outlet Builders LLC v Constr. Resources Corp. of New York*, 170 AD3d 582, 583 [1st Dept 2019] [collecting cases]).

affidavit of Jeffrey D. Thompson (NYSCEF 111) and deposition transcript of Ciaran Collis (NYSCEF 121), MMC's corporate representative, to establish that MMC did not pay FRP the balance due on the Contract. Thus, on this record, FRP's unopposed motion for summary judgment against MMC for breach of contract is granted.

However, FRP has not stated a *prima facie* claim for judgment against JTM, with which it had no contract. Accordingly, summary judgment must be denied (*O'Halloran v City of New York*, 78 AD3d 536, 537 [1st Dept 2010] ["If this burden is not met, summary judgment must be denied, regardless of the sufficiency of the opposition papers"]).

* * * *

Accordingly, it is

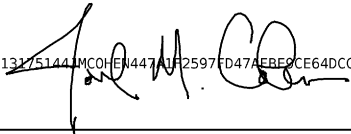
ORDERED that Plaintiff FRP's motion is **GRANTED IN PART** insofar as FRP is awarded summary judgment (1) on its breach of contract claim against MMC in the amount of \$508,719.91 plus interest and costs as taxed by the Clerk; and (2) dismissing Georgetown's counterclaim for fraud. FRP's motion is otherwise **DENIED**; it is further

ORDERED that Moving Defendants' motion for summary judgment is **GRANTED** and FRP's claim to foreclose the Lien against Georgetown and Atlantic is dismissed with prejudice and the Lien is declared void and unenforceable; it is further

ORDERED that the remaining parties appear for a telephonic initial pre-trial conference to discuss trial timing and logistics on January 11, 2023 at 10:30 am and circulate dial-in information to sfc-part3@nycourts.gov in advance of the conference.

This constitutes the decision and order of the Court.

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JOEL M. COHEN, J.S.C.

12/13/2022

DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE