

Care Sec. Sys., Inc. v 109 W. 27th St. Realty LLC
2022 NY Slip Op 34251(U)
December 15, 2022
Supreme Court, New York County
Docket Number: Index No. 155288/2022
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

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CARE SECURITY SYSTEMS, INC.,
Plaintiff,

INDEX NO. 155288/2022

MOTION DATE 12/13/2022

MOTION SEQ. NO. 001 002

- v -

109 WEST 27TH STREET REALTY LLC, ICON REALTY
MANAGEMENT LLC, SIGNATURE BANK, N.A., JOHN
DOES NO. 1-10

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19
were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 20, 21, 22, 23, 24,
25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39
were read on this motion to/for DISMISSAL.

The motion¹ by defendants 109 West 27th Street Realty LLC (“109 West 27th”) and Icon
Realty Management LLC (“Icon”) (collectively, the “Moving Defendants”) to dismiss the
amended complaint is granted in part and denied in part.

Background

Plaintiff brings this action to foreclose a mechanic’s lien related to purportedly unpaid
labor and materials plaintiff provided to defendants. It claims that it is owed \$65,896.52.

The Moving Defendants seek dismissal of this action on the grounds that plaintiff failed
to state a cause of action and that plaintiff failed to properly serve defendants. They complain
that the amended complaint is a “group pleading” and that plaintiff made no effort to

¹ As discussed below, this decision resolves both motion sequence numbers 001 and 002.

differentiate the allegations between the defendants. The Moving Defendants insist that the pleading does not give them notice about the claims against them.

They assert that, at a minimum, the amended complaint should be dismissed as against defendant Icon because the only allegation against this defendant is that it is a joint enterprise with 109 West 27th. The Moving Defendants also insist that plaintiff failed to properly serve them with the amended complaint.

In opposition, plaintiff submits an affidavit from its director of business development, who insists that plaintiff sent its proposal for the work it did to defendant Icon and that Icon approved this bid (NYSCEF Doc. No. 24, ¶ 12). He explains that plaintiff and defendant 109 West 27th entered into a contract in which it provided security equipment and related labor for the subject property (*id.* ¶ 13). Plaintiff insists it performed all of its work pursuant to this contract and that it stopped receiving payments.

Plaintiff adds that the Moving Defendants were part of a joint venture and that it submitted invoices to defendant Icon, who plaintiff insists is the registered agent for the owner (109 West 27th). Plaintiff contends that it did properly serve defendants with the amended complaint.

In reply, the Moving Defendants insist that there is no basis to keep defendant Icon in this case and that plaintiff did not sufficiently establish a veil piercing theory. They also argue that plaintiff failed to raise an issue of fact about service. It observes that defendant Icon was not served properly (it was not included in the initial pleading and so had to be served pursuant to CPLR 3021[a]). With respect to the rest of the motion, the Moving Defendants insist that the opposition “fails to substantively address” the arguments raised in the moving brief.

Defendant Icon

The Court grants the branch of the motion to dismiss the claims against defendant Icon.

““On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the [pleading] as true, accord [the proponent of the pleading] 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, 614 NYS2d 972 [1994] [citations omitted]). “At the same time, however, allegations consisting of bare legal conclusions . . . are not entitled to any such consideration” (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141, 75 NE3d 1159 [2017] [citation and internal quotations omitted]).

Plaintiff failed to allege a cognizable cause of action against Icon. The contract states it is between plaintiff (as the contractor) and 109 West 27th (as the owner) (NYSCEF Doc. No. 27). Icon is not mentioned at all in the contract. And the nature of this case is that plaintiff allegedly performed under the contract and did not receive the full amount due under the contract. There is no basis to find that Icon had any obligation to pay plaintiff. That Icon may have acted as the owner’s agent does not transform Icon into a contracting party with an obligation to plaintiff.

To the extent that plaintiff argues that Icon and 109 West 27th are unified, that argument is completely without merit and it is not sufficiently pled. The Moving Defendants attached a corporate registration for Icon (NYSCEF Doc. No. 39) that demonstrates that it is, in fact, a separate entity. 109 West 27th merely uses Icon as its registered agent and property manager. That does not make Icon a proper defendant. This Court is unable to find that plaintiff sufficiently alleged a corporate veil piercing theory to hold Icon potentially liable under the subject pleading.

Although not dispositive, the Court observes that plaintiff properly served Icon with the amended pleading by serving it via the Secretary of State (NYSCEF Doc. No. 34 at 4). That satisfied CPLR 3012(a) and improper service is not a basis for Icon's dismissal.

Remaining Claims

That Court finds that plaintiff stated a valid cause of action to foreclose on a mechanic's lien. That plaintiff did not include a statutory ground for the first cause of is not a basis to dismiss this claim. It is abundantly clear that this claim arises out of the Lien Law and plaintiff identified the goods and services it provided by attaching the proposal bid (NYSCEF Doc. No. 26) which it says was accepted. That document defines the precise scope of work, which included various security equipment and monitoring (*id.*).

For similar reasons, the second cause of action for breach of contract states a cognizable cause of action as it references a contract for which plaintiff says it was not fully compensated. And the third cause of action for goods sold and delivered also survives this motion to dismiss. The Moving Defendants assert that this claim is duplicative, but plaintiff is entitled to plead claims in the alternative at the pleading stage.

The fourth cause of action for account stated also remains. Plaintiff contends it sent invoices that were not paid. This claim is not duplicative of the breach of contract claim as it has different elements and requires a distinct evidentiary showing.

However, the Court severs and dismisses the unjust enrichment claim as duplicative of breach of contract claim as it is based on the same facts as that cause of action (*Corsello v Verizon New York, Inc.*, 18 NY3d 777, 790, 944 NYS2d 732 [2012]). Finally, the Court finds that plaintiff properly pled a cause of action under the Prompt Payment Act, a statutory scheme found under the General Business Law. Although the Moving Defendants claim that plaintiff


cannot seek relief under this act because it is a security company, the broad definitions of both contractor and subcontract implicate plaintiff's contract with 109 West 27th (see General Business Law § 756[2], [4]).

The Court observes that this decision resolves motion sequence 001 (a motion to dismiss by the Moving Defendants) which seems to have been filed in error. The moving papers appear to be identical (compare NYSCEF Doc. No. 16 with 21).

Accordingly, it is hereby

ORDERED that the motion to dismiss by defendants 109 West 27th Street Realty LLC and Icon Realty Management LLC is granted to the extent that the claims against defendant Icon Realty Management LLC are severed and dismissed and that the unjust enrichment claim is also severed and dismissed, and defendant 109 West 27th Street Realty LLC shall answer pursuant to the CPLR.

Conference: February 27, 2023 at 11:30 a.m. By February 20, 2023, the parties must upload 1) a stipulation about discovery signed by all parties, 2) a stipulation of partial agreement that identifies areas in dispute or 3) letters explaining why no agreement could be reached. Based on these submissions, the Court will assess whether an in-person conference is required. The failure to upload anything by February 20, 2023 will result in an adjournment of the conference.

<u>12/15/2022</u> DATE			 ARLENE P. BLUTH, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
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