

Billd Exch., LLC v Gold Lion Steel, LLC

2023 NY Slip Op 30400(U)

February 6, 2023

Supreme Court, New York County

Docket Number: Index No. 653265/2022

Judge: Arlene P. Bluth

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 14

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BILLD EXCHANGE, LLC,

Plaintiff,

- v -

GOLD LION STEEL, LLC, ROBERT REBIMBAS, TRINITY
NYC HOTEL, LLC

Defendant.

INDEX NO. 653265/2022

MOTION DATE 01/24/2023,

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON
MOTION**

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HON. ARLENE P. BLUTH:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 58, 59, 60

were read on this motion to/for AMEND CAPTION/PLEADINGS.

Motion sequence number 001 and 002 are consolidated for disposition. Defendants’ Gold Lion Steel, LLC and Robert Rebimbas motion for summary judgment (MS 001) is granted only to the extent that plaintiff’s claim for unjust enrichment is severed and dismissed. Plaintiff’s motion to amend the caption (MS 002) is granted.

Background

This action arises out of a breach of contract claim after plaintiff, claiming to be a materialman on a construction project, filed a mechanic’s lien and brought this suit alleging several causes of action. Defendants, the owner (Trinity NYC Hotel, LLC) and general contractor (Gold Lion Steel [“Gold”]) on the project, claim that plaintiff was not a materialman

at all—rather, they claim that plaintiff merely financed the purchase of construction materials and acted more as a middleman between them and the real material supplier.

On or about August 26, 2019, plaintiff and Gold entered into a Master Contractor Agreement (“MCA”) requiring plaintiff to supply materials to Gold for the project. Defendant Robert Rebimbas, a member of Gold, executed a personal guaranty related to the MCA. According to the MCA, plaintiff supplied the materials to Gold on “trade credit,” and Gold would pay for the materials in installments according to the terms of the MCA and a collection of Purchase Statements signed by Gold.

According to the MCA, if Gold failed to make a regularly scheduled payment within three days of the scheduled due date or failed to make a full payment of all amounts due, then Gold would be in default. Plaintiff alleges that Gold failed to make its scheduled payments and owes approximately \$104,997.33. On July 5, 2022, plaintiff filed a mechanic’s lien on the Trinity property.

Plaintiff’s complaint alleges breach of contract, account stated, unjust enrichment, violation of the Prompt Payment Act, and foreclosure of mechanic’s lien. Defendants Gold and Rebimbas answered with counterclaims for declaratory judgment and willful exaggeration of the mechanic’s lien.

Gold and Rebimbas (defendants) move for partial summary judgment (MS 001) on their counterclaims for declaratory judgment and willful exaggeration of the lien and to also to dismiss plaintiff’s three causes of action for unjust enrichment, violation of Prompt Payment Act, and foreclosure of mechanic’s lien. In support of their motion, they contend that plaintiff has no valid lien because it did not perform any labor or furnish any material in connection with the subject project. Specifically, they claim that because plaintiff bought the material from a third party and

then sold it to them, this gives plaintiff the status of a creditor, not a supplier or materialman with standing to file a valid lien against a party. Furthermore, defendants contend that there was no consent by the property owner to have plaintiff add any improvements to the property.

They also assert that plaintiff willfully exaggerated the lien because plaintiff does not have the right to file a mechanic's lien and allegedly is fraudulently attempting to utilize Lien Law to recoup payments owed. Defendants further contend that plaintiff does not have a claim pursuant to the Prompt Payment Act because that Act contemplates protection only for contractors, subcontractors, and material suppliers, whereas plaintiff is a financing company. Finally, they argue that plaintiff's claim for unjust enrichment is duplicative because plaintiff also includes a claim for breach of contract.

In response, plaintiff contends that summary judgment is premature as the parties have not engaged in any discovery. Despite sending written discovery requests, plaintiff asserts it has not received any responses and there has been no exchange of discovery. Additionally, plaintiff argues that pursuant to Lien Law § 19, this Court is not authorized to vacate or discharge a mechanic's lien, specifically a lien for labor or materials. Moreover, plaintiff asserts its lien is valid according to the MCA and the applicable Lien Law provisions. Plaintiff claims it bought materials from the originating supplier, took title of the materials and then sold them, making plaintiff a materialman and proper lienor. Plaintiff maintains that the MCA further recognizes plaintiff's authority to assert a lien and the originating supplier agrees that plaintiff is the valid lienor. Additionally, plaintiff asserts that Defendants offer no proof that the property owner did not consent to plaintiff's work being performed. Plaintiff argues that willful exaggeration of a lien can only be determined at trial and is inappropriate for summary judgment. Plaintiff claims that it is entitled to recover under the Prompt Payment Act because it qualifies as a materialman.

Finally, plaintiff argues its cause for unjust enrichment is proper because it is making this claim in the alternative.

In reply, defendants maintain that plaintiff does not have lien rights and claim that plaintiffs' only involvement in the construction project was providing financing to Gold so Gold could purchase building materials. They argue that plaintiff is unable to prove the third-party supplier consented to or even sent the terms and conditions alleged by plaintiff, providing no proof of the existence of such terms and conditions. Moreover, they claim that regardless of whether the third-party supplier consents to the terms and conditions, Lien Law § 14 precludes assignment of lien rights.

Defendants also assert that plaintiff has no rights under the Prompt Payment Act aside from remitting funds to the third-party supplier because the invoices they received regarding the materials purchased did not mention plaintiff at all, only the third-party supplier from whom plaintiff bought the materials. Moreover, they claim they had a relationship with the third-party supplier long before they dealt with plaintiff, only seeking approval of financing from plaintiff regarding the products later on, thus precluding plaintiff from seeking relief under the Prompt Payment Act as a material supplier. They claim summary judgment is not premature because the basis for all of plaintiff's arguments are the contracts in question—all of which have been provided and indicate that no further discovery is necessary.

Additionally, defendants contend that willful exaggeration does not need to be determined at trial because all of the facts of plaintiff's willful exaggeration are present—plaintiff is wrongfully listing itself as a material supplier to utilize Lien Law to recover amounts owed. And defendants repeat their position that unjust enrichment cannot be pled with breach of

contract because here the contracts are admitted and because there is no dispute as to the written contracts applicable, plaintiff's claim for unjust enrichment is duplicative.

Plaintiff subsequently filed a motion to amend the caption (MS 002) to include Westchester Fire Insurance Company ("WFIC") as a defendant. Plaintiff claims that on December 20, 2022, defendants bonded the mechanic's lien, requiring that plaintiff add WFIC as a necessary defendant and that would not result in prejudice to the other defendants.

In opposition to plaintiff's motion, defendants Gold and Rebimbas claimed that by adding WFIC, one of the causes of action would change from "Foreclosure of Mechanic's Lien" to "Notice of Mechanic's Lien Bond Foreclosure." Gold and Rebimbas assert that their partial summary judgment motion seeks to dismiss plaintiff's cause of action to foreclose the mechanic's lien, and, if successful, would render plaintiff's need to amend the caption moot.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make 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 from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City*

of *New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v. Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

Plaintiff's Seventh Cause of Action--Foreclosure of Mechanic's Lien

Pursuant to Lien Law § 3, “a contractor, subcontractor, laborer, materialman... who performs labor or furnishes materials for the improvement of real property with the consent...of his agent, contractor or subcontractor... shall have a lien for the principal and interest, of the value, or the agreed price of such ... materials upon the real property improved or to be improved and upon such improvement, from the time of filing a notice of such lien as prescribed in his chapter.”

“An entity that merely advances money for the completion of a contract, as opposed to furnishing labor or material, is not protected by the state mechanics' lien statute which--similar to payment bonds--protects labor and material suppliers,” (*Tri-State Empl. Servs. v Mountbatten Sur. Co.*, 99 NY2d 476, 483, 758 NYS 2d 595 [2003]).

On summary judgment without any discovery, the court cannot decide whether plaintiff supplied materials or merely financed them. According to affidavits submitted by defendant Rebimbas and plaintiff, there is a factual dispute regarding the role of plaintiff and the original third-party supplier. Defendants would have this Court believe that they contacted a third-party

supplier, procured steel for their project, and then contacted plaintiffs in order to foot the bill. On the other hand, plaintiff insists it bought the materials and then resold it to defendants allowing defendants to pay pursuant to a payment plan. The Purchase Agreement indicates that Defendants procured materials from plaintiff "on trade credit," but the invoices supplied by plaintiff are too vague on this point to make a determination on the papers alone. Clearly, more discovery is needed. And plaintiff's status matters as the distinction is one of a materialman versus a financier. Only the former possesses lienor rights (*see Tri-State Empl Servs.* 99 NY2d 476 [finding that an entity supplying financing as opposed to labor and materials is not entitled a valid lien claimant]).

Therefore, the Court cannot grant this branch of Defendants' motion as there is a material issue of fact to be determined. Discovery is required to explore the exact role of plaintiff and whether it qualifies to assert such a cause of action under the Lien Law.

Plaintiff's Sixth Cause of Action--Violation of Prompt Payment Act

The PPA provides that "[i]t is the policy and purpose of this article to expedite payment of all monies owed to those who perform contracting services pursuant to construction contracts" (*Bank of Am., NA v ASD Gem Realty LLC*, 205 Ad3d 1, 9, 164 NYS3d 566 [1st Dept 2022]).

There is a material issue of fact as to whether plaintiff acted as a materialman. As previously stated, neither party supplies overtly convincing evidence of the factual scenarios the parties allege. Therefore, the Court denies this branch of Defendants' motion and this cause of action remains.

Plaintiff's Fifth Cause of Action--Unjust Enrichment

“The basis of a claim for unjust enrichment is that the defendant has obtained a benefit which in ‘equity and good conscience’ should be paid to the plaintiff. In a broad sense, this may be true in many cases, but unjust enrichment is not a catchall cause of action to be used when others fail. It is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff. Typical cases are those in which the defendant, though guilty of no wrongdoing, has received money to which he or she is not entitled. An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim” (*Corsello v Verizon New York, Inc.*, 18 NY3d 777, 790, 944 NYS2d 732 [2012]).

Here, there is no dispute that the parties entered into at least three written contracts—the MCA and the two Purchase Agreements. A claim for unjust enrichment is appropriate where there is no express agreement to which a Court can refer; that is not present here. These sophisticated parties negotiated and drafted written contracts regarding their agreement for construction materials; defendants readily admit they agreed to those terms. Under these circumstances, a claim for unjust enrichment is duplicative of a claim for breach of contract. Therefore, the Court grants this branch of defendants’ motion and dismisses plaintiff’s claim for unjust enrichment.

Defendants’ Counterclaim—Discharge Mechanic’s Lien

Lien Law § 19 (6) provides that a Mechanic's Lien may be summarily discharged "where it appears from the face of the notice of lien that the claimant has no valid lien by reason of the character of the labor or materials furnished and for which a lien is claimed, . . . ". (*Potamkin*

Dev. Co. II LLC v Greyhawk N. Am. LLC, 2006 NY MISC LEXIS 4010 * 3 [Sup Ct, NY County 2006]).

The crux of defendants' argument for discharge of the mechanic's lien is plaintiff's lack of lienor rights due to the allegation that plaintiff did not furnish materials. As already noted, whether plaintiff is a materialman or not is an issue of fact. This Court cannot opine on the inclusion of Section 5 to the MCA until plaintiff's status is clarified with discovery. Therefore, summary judgment on this counterclaim is denied.

Defendants' Counterclaim--Willful Exaggeration of Mechanic's Lien

Lien Law § 39-a provides "Where in any action or proceeding to enforce a mechanic's lien upon a private or public improvement the court shall have declared said lien to be void on account of willful exaggeration the person filing such notice of lien shall be liable in damages to the owner or contractor." Furthermore, the First Department has recognized that "although Lien Law § 39 provides that a willfully exaggerated lien is void, the issue of willful or fraudulent exaggeration is one that also ordinarily must be determined at the trial of the foreclosure action," (*Aaron v Great Bay Contr., Inc.*, 290 AD2d 326, 326, 736 NYS2d 359 [1st Dept 2002]).

Here, defendants contend there is no issue of fact that requires a trial as it is clear plaintiff is not a materialman and does not have lienor rights. Again, because this counterclaim rests on the claim that plaintiff is not a materialman, and that is an issue of fact, this Court must deny summary judgment on this claim.

Amendment of Caption (MS 002)

Pursuant to CPLR § 3025(b), a party may amend the caption “at any time by leave of court or by stipulation of all parties.” Absent prejudice, amendments should be freely given (*Viacom Intl. Inc. v Midtown Realty Co.*, 193 AD2d 45, 52, 602 NYS2d 326 [1st Dept 1993]).

Plaintiff’s motion to amend the caption to add Westchester Fire Insurance Company is opposed. However, the basis of the opposition depends on the success of defendants’ summary judgment motion. Because the Court found issues of fact relating to the summary judgment motion and the Court finds no risk of prejudice to the defendants should WIFC be included in the caption, the motion by plaintiff to amend the caption is granted.

Accordingly, it is hereby

ORDERED that the branches of defendants’ motion for summary judgment as to plaintiff’s claims for foreclosure of mechanic’s lien, and violation of the Prompt Payment Act are denied; and it is further

ORDERED that branch of defendants’ motion for summary judgment as to plaintiff’s claim for unjust enrichment is granted, and that claim is severed and dismissed; and it is further

ORDERED that defendants’ motion for summary judgment on their counterclaims for declaratory judgment discharging the mechanic’s lien and willful exaggeration of a lien are denied; and it is further

ORDERED that plaintiff’s motion to amend the caption to add Westchester Fire Insurance Company is granted; and it is further

ORDERED that an amended summons and amended complaint with the new caption and allegations against the new party shall be served, within thirty days after service of a copy of this order with notice of entry, upon the new party in this action (WESTCHESTER FIRE

INSURANCE COMPANY) by service in accordance with the CPLR, upon the parties who have already appeared via NYSCEF, and upon all parties who have not yet appeared pursuant to the CPLR; and it is further

ORDERED that the caption shall be amended to add WESTCHESTER FIRE

INSURANCE COMPANY; and it is further

ORDERED that the caption of this action will be:

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 14**

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BILLD EXCHANGE, LLC,

Plaintiff,

- v -

**GOLD LION STEEL, LLC, ROBERT
REBIMBAS, TRINITY NYC HOTEL, LLC, and
WESTCHESTER FIRE INSURANCE
COMPANY**

Defendants.

-----X

; and it is further

ORDERED that within 21 days from entry of this order, counsel for the plaintiff shall serve a copy of this decision and order with notice of entry upon the Clerk of the Trial Support Office (Room 158) and the County Clerk (Room 141B) via e-filing who are hereby ordered and directed to enter the new caption in the court’s records; and it is further


ORDERED that such service upon the County Clerk and the Clerk of the General Clerk’s Office 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/suptmanh)].

Discovery conference: May 15, 2023 at 11:30 a.m.

By May 8, 2023, the parties shall upload 1) a stipulation about discovery signed by all parties, 2) a stipulation of partial agreement that identifies the areas in dispute or 3) letters explaining why no agreement about discovery could be reached. The Court will then assess whether a conference is necessary (i.e., if the parties agree, then an in-person conference may not be required).

If nothing is uploaded by May 8, 2023, the Court will adjourn the conference.

<u>2/6/2023</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 checked="" type="checkbox"/> GRANTED IN PART <input checked="" 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