

Alpine Ready Mix Inc. v Happy Living Dev., LLC

2023 NY Slip Op 34223(U)

November 20, 2023

Supreme Court, Kings County

Docket Number: Index No. 528218/2021

Judge: Ingrid Joseph

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Part 83 of the Supreme Court of the State of New York held in and for the County of Kings at 360 Adams Street, Brooklyn, New York, on the 20th day of November 2023.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF
NEW YORK COUNTY OF KINGS

Index No: 528218/2021

-----X
ALPINE READY MIX INC.,

Plaintiff(s)

-against-

ORDER

HAPPY LIVING DEVELOPMENT, LLC
A/K/A 834 PACIFIC HOLDINGS LLC,
WESTCHESTER FIRE INSURANCE
COMPANY C/O ACE USA, AND RISE
DEVELOPMENT PARTNERS, LLC, A/K/A
RISE CONCRETE, LLC,

Defendant(s)

-----X
The following e-filed papers read herein:

NYSCEF Nos.:

Notice of Motion/Petition/Affidavits Annexed

1-25; 34

Exhibits Annexed/Reply.....

26-33

Affirmation in Opposition/Affidavits Annexed/Exhibits Annexed.....

In this matter, Happy Living Development, LLC A/K/A 834 Pacific Holdings LLC (“HLD”) and Westchester Fire Insurance Company C/O/ Ace USA (“WFIC”) (Collectively “Defendants”) move (Motion Seq. 1) to dismiss Alpine Ready Mix Inc.’s (“Plaintiff”) Complaint with prejudice pursuant to CPLR 3211(a)(1) and (7), discharging the May 12, 2020 Notice Under Mechanic’s Lien Law filed by the Plaintiff against the property located at 834 Pacific Street, Brooklyn, New York 1130 Lot 11 (the “Subject Premises”); and to cancel the June 25, 2020 bond bearing Bond # K15488980. Plaintiff has opposed the motion.

This action arises out of a contractual business relationship between Plaintiff and Defendants. Upon information and belief, Saint John’s Roman Catholic Church was the fee simple owner of the Subject Premises and 834 Pacific Holdings, LLC was the leasee. At some point prior to May of 2019, Defendant HLD was hired by 834 Pacific Holdings, LLC as the general contractor to perform work for a construction project on the property. On or about April 29, 2019, Defendant Rise Development Partners, LLC A/K/A Rise Concrete LLC (“Rise”) was hired by HLD as a subcontractor to perform a portion of the work for the project. In May of 2019, Plaintiff and Rise entered into a sub-subcontractual agreement wherein Plaintiff was to supply concrete ready mix for the project as a material supplier. In the Complaint, Plaintiff states that all of the subject construction equipment and/or services were provided pursuant to the agreement but that as of March 20, 2020, Defendants have failed to pay Plaintiff for monies due in the amount of \$321,069.17. Plaintiff further alleges in the Complaint that on March 18,

2020, within seven months of the last performance of work done for the project, it filed a Mechanic's Lien in the amount of \$321,069.17. and proof of service with the Office of the Clerk of Kings County. On or about June 25, 2020, in order to discharge the lien, WFIC as surety issued a bond pursuant to Mechanic's Lien Law 19(4) conditioned on the payment of any judgment which might be rendered in an action to enforce the lien.

In support of its motion, Defendants argue that Plaintiff failed to timely file the proof of service with the Clerk of Kings County within 35 days, evidencing that the Defendants were served with a copy of the Notice of the Mechanic's Lien that was filed on May 12, 2020, pursuant to Mechanic's Lien Law 11 and 11-b, and therefore, the lien must be discharged and the bond issued must be cancelled and returned. Defendant HLD contends that Plaintiff's second cause of action against it for either breach of contract or to enforce a quasi-contract must be dismissed because there was never any privity of contract between it and Plaintiff nor was HLD unjustly enriched. Defendant HLD states that Plaintiff only entered into a contract with Rise and thus cannot allege the existence of a contract with it. Furthermore, Defendant HLD states that Plaintiff's Complaint fails to state a cause of action for breach of contract because it fails to assert any allegations that identify which provisions of the contract were allegedly breached. Defendants also argue that Plaintiff cannot allege that a quasi-contract existed with HLD making it liable simply because it accepted the benefit rendered by Plaintiff and that Plaintiff's sole remedy is against Rise, the party it actually contracted with as evidenced by submitted invoice receipts.

In opposition, Plaintiff argues that the Mechanic's Lien was filed and served properly on the Defendants. Plaintiff states that on March 18, 2020, it attempted to file the Mechanic's Lien with the Clerk of Kings County via overnight mail, however due to the COVID-19 pandemic, the court was closed until May 12, 2020, which is when the documents were stamped "received" and officially filed. Plaintiff states that it served the Defendants on March 19, 2020, and that had the court not been closed it would have been filed on March 19, 2020, the same day that Defendants were served via certified mail. Plaintiff claims that since Defendants were served, they have not suffered any prejudice and clearly were aware that the lien was filed since they filed a bond to discharge it and therefore it should not have been expected that Plaintiff would have to re-serve all Defendants once the courts reopened. Furthermore, Plaintiff argues that HLD consented to Plaintiff providing materials for the project and therefore may be liable. Plaintiff alleges that HLD and Plaintiff did have an agreement as evidenced by a bounced check that HLD issued to Plaintiff on behalf of Rise on January 1, 2020, for \$51,154.02 and that HLD fired Rise which creates privity between it and Plaintiff. Additionally, Plaintiff claims that HLD is actually a lessee of the Subject Premises and is also known as 834 Pacific Holdings LLC and operated by the same individual, therefore, they must have consented to the work provided by Plaintiff. Plaintiff states that the lease between Saint John's Roman Catholic Church and 834 Pacific Holdings LLC was signed by Levi

Balkany who also signed HLD's affidavit in this action and HLD and 834 Pacific Holdings LLC both have the same address located at 884 Eastern Parkway Brooklyn, New York 11213. Plaintiff claims that HLD has not provided evidence that it is a separate entity from 834 Pacific Holdings LLC which is an issue of fact that should be litigated and even if they are, HLD received the benefit of the improvement of the property.

Under Lien Law 11, a lienor within five days before or thirty days after filing the notice of lien shall serve a copy of such notice upon the owner. Additionally, under Lien Law 11-b, within five days before or thirty days after filing a notice of lien in accordance with section ten of this chapter or the filing of an amendment of notice of lien in accordance with section twelve-a of this chapter the lienor shall serve a copy of such notice or amendment by certified mail on the contractor, subcontractor, assignee or legal representative for whom he was employed or to whom he furnished materials or if the lienor is a contractor or subcontractor to the person, firm or corporation with whom the contract was made. Failure to file proof of such a service with the county clerk within thirty-five days after the notice of lien is filed shall terminate the notice as a lien.

Here the court finds that Plaintiff's lien was filed timely. Pursuant to the Kings County Clerk's Office Judgment Docket and Lien Book System Remarks Inquiry, Plaintiff's lien was received on March 23, 2020, and was noted to have been accepted by mail during the COVID-19 pandemic. New York Executive Order 202.67, enacted on March 20, 2020, in pertinent part, suspended the statute of limitations "for any civil cases...until November 3, 2020." The court in *Brash v Richards*, 195 AD3d 582 [2021] held that the Executive Order created a tolling period of 288 days, which was not intended to add a blanket 228 days to Plaintiffs' time to file, but rather that any time that remained on the limitations period as of March 20, 2020, would be added back and start to run again once the limitations period resumed on November 4, 2020. Contrary to Defendants' contention, even if Plaintiff filed the lien on March 18, 2022 or May 12, 2020 as Defendants claim, and served the notice of the lien on Defendants on March 19, 2022, Plaintiff would have had a remaining 33 days to file the proof of service with the Kings County Clerk resuming on November 4, 2020. Plaintiff's documents, however, were all received and officially filed before then on May 12, 2020.

Accordingly, that branch of Defendant's motion to dismiss is denied and Defendants are not entitled to the cancellation and return of the bond filed.

When a party moves to dismiss a complaint pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action (*Leon v. Martinez*, 84 NY2d 83, 87 [1994]; *Skefalidis v China Pagoda NY, Inc.*, 210 A.D. 3d 925 [2d Dept. 2022]); *Oluwo v Sutton*, 206 A.D.3d 750 [2d Dept. 2022]; *Sokol v Leader*, 74 A.D.3d 1180 [2d Dept. 2010]). Whether a plaintiff can ultimately establish its allegations is not part of the calculus in

determining a motion to dismiss (*Eskridge v Diocese of Brooklyn*, 210 A.D.3d 1056 [2d Dept. 2022]; *Zurich American Insurance Company v City of New York*, 176 A.D.3d 1145 [2d Dept. 2019]; *EBC I Inc. v Goldman, Sachs & Co.*, 5 NY3d [2005]).

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the burden never shifts to the non-moving party to rebut a defense asserted by the moving party (*Sokol* at 1181; *Rovello v Orofino Realty Co. Inc.*, 40 NY2d 970 [1976]). CPLR 3211 allows a plaintiff to submit affidavits, but it does not oblige him or her to do so on penalty of dismissal (*Id.*; *Sokol* at 1181). Affidavits may be received for a limited purpose only, serving normally to remedy defects in the complaint and such affidavits are not to be examined for the purpose of determining whether there is evidentiary support for the pleading (*Id.*; *Rovello* at 635; *Nonon* at 827). Thus, a plaintiff will not be penalized because he has not made an evidentiary showing in support of its complaint.

Unlike on a motion for summary judgment, where the court searches the record and assesses the sufficiency of evidence, on a motion to dismiss, the court merely examines the adequacy of the pleadings (*Davis v. Boenheim*, 24 NY3d 262, 268 [2014]). The appropriate test of the sufficiency of a pleading is whether such pleading gives sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments (*V. Groppa Pools, Inc. v. Massello*, 106 AD3d 722, 723 [2d Dept 2013]; *Moore v Johnson*, 147 AD2d 621 [2d Dept 1989]).

To plead a cause of action for unjust enrichment, a plaintiff must show (1) the defendant was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered (*Mobarak v Mowad*, 117 A.D.3d 998 [2d Dept. 2014]; *Mandarin Trading Ltd. v Wildenstein*, 16 N.Y.3d 173 [2011]). The elements of a cause of action for quantum meruit are (1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation, and (4) the reasonable value of the services (*Stephen B. Gleich & Associates v Grisipis*, 87 A.D.3d 216 [2d Dept. 2011]; *AHA Sales, Inc. v Creative Bath Products, Inc.*, 58 A.D.3d 6 [2d Dept. 2008]). In instances where the complaint contains two counts for the same services, one under contract and one on quantum meruit, the plaintiff is not compelled on motion in advance of the trial to elect upon which count he will proceed, since plaintiff is entitled to plead inconsistent causes of action in the alternative (see generally CPLR § 3014; *Katcher v Browne*, 19 A.D.2d 744 [2d Dept. 1963]; *Gold v 29-15 Queens Plaza Realty, LLC*, 43 A.D. 3d 866 [2d Dept. 2007]; *Pickering v State*, 30 A.D.3d 393 [2d Dept. 2006]; *Perkins v Volpe*, 146 A.D.2d 617 [1989]; *Breslin Realty Dev. Corp. v 112 Leaseholds*, 270 A.D.2d 299 [2d Dept. 2000]; *Rubin v Cohen*, 129 A.D. 395 [1908]).

Accordingly, that branch of the motion for an order pursuant to CPLR § 3211(a)(7) dismissing Plaintiff's second cause of action under a theory of unjust enrichment and/or quantum meruit is denied as Plaintiff's Complaint adequately states a cause of action for unjust enrichment and/or quantum meruit, inter alia, paragraphs 22-31 of the Complaint.

To plead a cause of action for breach of contract, a plaintiff must allege (1) the existence of a contract, (2) plaintiff's performance pursuant to the contract, (3) defendant's breach of the contractual obligations; and (4) damages resulting from that breach (*34-06 73, LLC v Seneca Insurance Company*, 39 NY3d 44 [2022]). Plaintiff's allegations must identify the provisions of the contract that were breached (*Id.*). Here, the Complaint does not set forth the particular terms of the contract upon which Plaintiff's claim is based, nor were the particular terms specified in the Affidavit of Marcangelo Cotoia. The allegations made are vague and speculative and therefore are insufficient to support a claim for breach of contract.

Accordingly, that branch of the motion for an order pursuant to CPLR § 3211(a)(7) dismissing Plaintiff's second cause of action under a theory of breach of contract is granted as Plaintiff's Complaint and submitted affidavit fails to identify specific provisions of the contract that were breached.

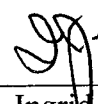
Accordingly, it is hereby,

ORDERED, that Defendants' Happy Living Development, LLC A/K/A 834 Pacific Holdings LLC and Westchester Fire Insurance Company C/O/ Ace USA motion (Motion Seq. 1) to discharge the Notice Under Mechanic's Lien Law filed by Plaintiff and against the property located at 834 Pacific Street, Brooklyn, New York, 834 Pacific Street, Brooklyn, New York, Block 1130, Lot 11 with prejudice pursuant to CPLR 3211(a)(7), and to cancel the June 25, 2020 bond bearing bond #K15488980 of record is denied, and it is further

ORDERED, that Defendants' motion to dismiss Plaintiff's second causes of action pursuant to CPLR 3211(a)(7) under theories of quantum meruit and/or unjust enrichment are denied, and it is further

ORDERED, that Defendant's motion to dismiss Plaintiff's second causes of action pursuant to CPLR 3211(a)(7) under a theory of breach of contract is granted.

This constitutes the decision and order of the court.



Hon. Ingrid Joseph, J.S.C.

**Hon. Ingrid Joseph
Supreme Court Justice**