

**Aish Mech. Corp. v 329 LLC**

2024 NY Slip Op 30268(U)

January 16, 2024

Supreme Court, Kings County

Docket Number: Index No. 502853/2023

Judge: Joy F. Campanelli

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS:IAS Part 6

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AISH MECHANICAL CORP.,

Plaintiff,

Index No.: 502853/2023

-against-

**DECISION AND ORDER**

THE 329 LLC, PARKVIEW BUILDERS LLC,  
LAWRENCE GERSTEIN, YIDEL KLEIN a/k/a JUDA  
KLEIN and “JOHN DOE” and “JANE DOE” 1- 10, the  
names being fictitious and are intended to be the owners,  
officers & directors of each of the LLC defendants whose  
names are currently unknown to Plaintiff but will be  
discovered during the course of discovery in this action,  
Defendants.

Hon. Joy F. Campanelli, J.S.C.

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The following e-filed papers read herein:

NYSCEF Nos.:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	10-17 _____
Opposing Affidavits (Affirmations) _____	20 _____
Affidavits/ Affirmations in Reply _____	21 _____
Other Papers: <u>Affidavits/Affirmations in Support</u> _____	_____

In this action, *inter alia*, for breach of contract and foreclosure on a mechanic’s lien, Defendants THE 329 LLC (hereinafter “329 LLC”) and YIDEL KLEIN a/k/a JUDA KLEIN (hereinafter “KLEIN”) , move via motion seq. 001 for an Order (i) pursuant to CPLR § 3211(a)(1) and (7) dismissing the claims against 329 LLC and KLEIN in the complaint of Plaintiff AISH MECHANICAL CORP. (hereinafter “AISH”) in their entirety with prejudice and (ii) vacating the notice of pendency filed by Plaintiff in this action.

The complaint alleged that 329 LLC is the owner of the real property located at 329 Broadway, Brooklyn, New York. (hereinafter “Property”) They hired Defendants PARKVIEW

BUILDERS LLC (hereinafter “PARKVIEW”) as the general contractor for a construction project on the property. KLEIN is the principal and manager of both 329 LLC and PARKVIEW.

On August 15, 2019, PARKVIEW entered into an agreement (hereinafter the “Broadway agreement”) with AISH for AISH to construct and install fire sprinklers at the Property. PARKVIEW were to pay AISH \$876,985.00 for the work performed and material provided.

A dispute arose between the parties, and, on November 17, 2021, AISH, filed a mechanic’s lien against the Property, which they extended for an additional year on or about November 7, 2022. AISH alleged that the sum of \$118,030.09 is due and owed to them.

In their complaint, AISH alleged that 329 LLC and PARKVIEW breached their Broadway agreement. In addition, the complaint alleged that Defendants PARKVIEW and 329 LLC received building loan proceeds from its lenders, and said funds constituted trust funds that were required to be used towards the project pursuant to Article 3-A of the New York State Lien Law. However, AISH averred that Defendants failed to pay trust funds to AISH and failed to maintain an accounting of said funds.

In the meantime, on March 14, 2022, 329 LLC commenced a special proceeding pursuant to Lien Law Section 38 against AISH under Index no. 507495/2022, requesting an itemized statement of the mechanic’s lien.

On July 28, 2022, 329 LLC moved under Index no. 507495/2022, to have the mechanic’s lien discharged and cancelled. On January 27, 2023, AISH filed a Notice of Pendency against the Defendants, giving notice that the Property was affected. On February 6, 2023, the Honorable Peter P. Sweeney granted 329 LLC’s motion on default and discharged and cancelled the mechanic’s lien of record.

On June 30, 2023, AISH moved under Index no. 507495/2022 pursuant to CPLR 5015(a)(4) to vacate Judge Sweeney's prior order on the grounds that 329 LLC failed to properly serve its application, and to dismiss 329 LLC's application. On September 11, 2023, Judge Sweeney granted AISH's motion and directed the Kings County Clerk's office to redocket the Notice of Mechanic's lien.

*i. Foreclosure of the lien*

In the instant action, 329 LLC moved to dismiss AISH's cause of action for foreclosure of the lien arguing that the lien has been discharged and cancelled of record prior to the issuance of Judge Sweeney's September 11, 2023, order. Said order reinstated that lien; therefore, Defendants' argument is rendered moot. Consequently, the portion of Defendants' motion seeking foreclosure of the lien is denied.

*ii. Breach of contract as against 329 LLC, quantum meruit and unjust enrichment*

329 LLC contends that there is no contractual privity between AISH and 329 LLC as 329 LLC entered into a general contractor agreement with PARKVIEW and PARKVIEW entered into a subcontract with AISH. 329 LLC further argues that since there is no contract between AISH and 329 LLC, Plaintiff's cause of action on quantum meruit and unjust enrichment is legally improper and should be dismissed.

AISH concedes that the current Complaint "does not plead sufficient facts to impose liability as against [329 LLC under a breach of contract theory, quantum meruit and unjust enrichment theories]." AISH anticipates filing an Amended Complaint alleging sufficient facts to support their claims. Since no responsive pleading to the complaint has been filed, Plaintiff is entitled to amend the complaint as of right pursuant to CPLR Section 3025. Therefore, Defendants'

portion of the motion to dismiss the causes of action for breach of contract, quantum meruit and unjust enrichment is granted.

**iii. Trust fund diversion**

A motion to dismiss a complaint pursuant to CPLR §3211(a)(1) can be granted “only when the documentary evidence [submitted by the movant] utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law”. *Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314 (2002); *Goldman v. Nationstar Mortgage LLC*, 205 A.D.3d 1008 (2d Dep’t., 2022); *Marinelli v. Sullivan Pavin Block McGrath & Cannavo, P.C.*, 205 A.D.3d 714 (2d Dep’t., 2022). The documentary evidence must “resolve all factual issues and conclusively dispose of plaintiff’s claim.” *Rigwan v. Neus*, 205 A.D.3d 1062 (2d Dep’t., 2022); *Hoeg Corp. v. Peebles Corp.*, 153 A.D.3d 607 (2d Dep’t., 2017); *Elow v. Svenningsen*, 58 A.D.3d 674 (2d Dep’t., 2009). “To be considered documentary, evidence must be unambiguous and of undisputed authenticity, that is, it must be essentially unassailable” (*Bath & Twenty, LLC v. Federal Sav. Bank*, 198 A.D.3d 855, 855–856, 156 N.Y.S.3d 316; see *Cives Corp. v. George A. Fuller Co., Inc.*, 97 A.D.3d 713, 714, 948 N.Y.S.2d 658). “Judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case” (*Bath & Twenty, LLC v. Federal Sav. Bank*, [*supra* at 856,] [internal quotation marks omitted]; see *JPMorgan Chase Bank, N.A. v. Klein*, 178 A.D.3d 788, 790, 113 N.Y.S.3d 741). “Affidavits, deposition testimony, and letters are not considered documentary evidence within the intendment of CPLR 3211(a)(1)” (*Bonavita v. Government Empls. Ins. Co.*, 185 A.D.3d at 893, 127 N.Y.S.3d 577; see *Rodolico v. Rubin & Licatesi, P.C.*, 114 A.D.3d 923, 925, 981 N.Y.S.2d 144). *U.S. Bank National Association v Kahn Property Owner, LLC*, 206 A.D.3d 855 (2d Dep’t., 2022).

On a motion to dismiss a complaint pursuant to CPLR §3211(a)(7), the pleading must be afforded a liberal construction, the Court must accept the facts alleged in the complaint as true, “accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit into any cognizable legal theory.” *Leon v. Martinez*, 84 N.Y.2d 83 (1994); *Goshen v. Mutual Life Ins. Co. of N.Y.*, *supra*; *Marinelli v. Sullivan Pavin Block McGrath & Cannavo, P.C.*, *supra*; *Lopez-Lobo v. U.S. Nonwovens Corp.*, 180 A.D.3d 771 (2d Dep’t., 2020); *Kupersmith v. Winged Foot Golf Club, Inc.*, 38 A.D.3d 847 (2d Dep’t., 2007). “Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus in determining a motion to dismiss.” *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11 [2005]. It is the movant who has the burden to demonstrate that the pleading states no legally cognizable cause of action. (*see Leon*, 84 N.Y.2d at 87-88; *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

329 LLC avers that AISH’s trust fund diversion cause of action against them as the Owners is improper as AISH fails to state a claim that 329 LLC holds any funds for AISH’s benefit. 329 LLC contends that AISH has admitted in the complaint that PARKVIEW received funds from 329 LLC as payment for work performed and materials provided by Plaintiff for the project. AISH, in opposition, argues that Defendants misconstrue the complaint, as the complaint does not make allegations “about money solely owned by 329 LLC to PARKVIEW, [but] about building loan proceeds held by PARKVIEW”. AISH also argues that the complaint at Paragraph 46 alleges that 329 LLC received building loan proceeds from its lender and that said funds constituted trust funds in accordance with the Lien Law and that “[i]t is well settled that “[p]roceeds from a building loan, received by the owner of a construction project, constitute trust funds for the benefit of contractors, subcontractors, laborers and materialmen for claims arising from improvement to the project.

[(Lien Law §§ 70, 71.)]” *Ben Soep Co. v. Highgate Hall of Orange County, Inc.*, 142 Misc. 2d 45, 49 (Sup Ct, Monroe County 1988)[.]”

Defendants’ argument that the trust funds are only for the benefit of the trustee, in this case PARKVIEW, is unavailing. See *Delco Electrical Corp. v. Wells Fargo Capital Finance, Inc.*, 265 F. Supp.3d 213 (2017) In *Delco, supra*, the Court held that, “[b]y virtue of the Lien Law, those [funds] were trust fund money, over which Plaintiffs had an interest as beneficiaries. Lien Law Article 3–A is “designed to protect subcontractors ... who expend labor or extend financing in construction projects, by impressing with a trust any funds paid to a contractor or received by an owner in connection with an improvement of real property in the state.” *Interworks Sys. Inc. v. Merch. Fin. Corp.*, 604 F.3d 692, 695 (2d Cir. 2010) (citing N.Y. Lien Law § 71(5)). “[A] trust arises automatically by operation of law when fees are paid to the contractor or received by the owner in connection with an improvement of real property.” *Id.*” See *Delco*, at 220.

Moreover, as to Plaintiff’s trust fund diversion cause of action against KLEIN, Defendants contend that KLEIN does not hold any funds for the benefit of AISH and AISH has failed to state a claim to pierce the corporate veil. AISH argues that the complaint sufficiently alleges that KLEIN received funds from 329 LLC as payment for the work and materials provided by Plaintiff and improperly diverted those funds. AISH admits that the complaint does not state any claims relating to corporate veil piercing, but such claims will be forthcoming in the Amended Complaint.

In the instant matter, the Court finds that the complaint sufficiently alleges causes of action sounding in trust diversion against Defendants. Moreover, the arguments and evidence proffered by Defendants did not utterly refute AISH’s allegations or conclusively establish a defense as a matter of law. (See *Goshen v. Mutual Life Ins. Co. of NY, supra*). Therefore, dismissal at this time

is not warranted. Accordingly, the portion of Defendants' motion seeking dismissal of the cause of action for trust diversion as against 329 LLC and KLEIN is denied.

Accordingly, it is

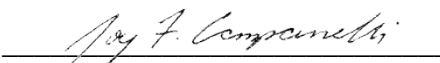
**ORDERED** that the portion of Defendants' motion to dismiss AISH's cause of action for foreclosure of the lien has been rendered moot and, consequently, is DENIED.

**ORDERED** that the portion of Defendants' motion to dismiss AISH's causes of action for breach of contract, quantum meruit and unjust enrichment is GRANTED without prejudice.

**ORDERED** that the portion of Defendants' motion to dismiss AISH's causes of action for trust diversion as against 329 LLC and KLEIN is DENIED.

This constitutes the decision and order of the Court.

Dated: January 16, 2023  
Brooklyn, NY

  
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Hon. Joy F. Campanelli, J.S.C.