

**New York Pile & Concrete Structures Corp. v 9
Vandam Assoc. II, LLC**

2024 NY Slip Op 31650(U)

May 10, 2024

Supreme Court, New York County

Docket Number: Index No. 650549/2023

Judge: Lori S. Sattler

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 02M

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<p>NEW YORK PILE AND CONCRETE STRUCTURES CORP.,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> <p>9 VANDAM ASSOCIATES II, LLC,9 VANDAM STREET BORROWER 2, LLC,SURETEC INSURANCE COMPANY, EMILIO BARLETTA, BARLETTA CONSTRUCTION LLC,MAXIM CREDIT GROUP LLC</p> <p style="text-align: center;">Defendant.</p>	<p>INDEX NO. <u>650549/2023</u></p> <p>MOTION DATE <u>07/11/2023</u></p> <p>MOTION SEQ. NO. <u>002</u></p> <p style="text-align: center;">DECISION + ORDER ON MOTION</p>
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HON. LORI S. SATTLER:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 41, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72

were read on this motion to/for DISMISSAL.

In this action alleging breach of contract, Defendants move to dismiss the Verified Complaint pursuant to CPLR §§ 3211(a)(1) and (7) and for sanctions pursuant to 22 NYCRR Part 130-1.1. Plaintiff opposes the motion and cross-moves to file an amended complaint pursuant to CPLR §§ 2001 and 3025. Defendants oppose the cross-motion.

In 2019, Plaintiff entered a contract with 9 Vandam Associates II, LLC (“9 Vandam Associates”) (NYSCEF Doc. No. 25) whereby Plaintiff was to perform excavation and concrete work as part of the installation of a swimming pool in a townhouse located at 9 Vandam Street in Manhattan (“the Property”) for a fee of \$1,323,600. The Complaint alleges that Plaintiff fully performed the work through January 27, 2021, but was only paid \$541,000.

On March 17, 2021, Plaintiff filed a mechanic’s lien against the Property’s then-owner, defendant 9 Vandam Associates, for \$685,000 which was later reduced to \$645,000 (NYSCEF

Doc. No. 29). 9 Vandam Associates was the owner until November 29, 2021, when the Property was transferred without consideration to Defendant 9 Vandam Borrower 2, LLC (“9 Vandam Borrower”). Plaintiff alleges this transfer was designed to frustrate its mechanic’s lien, while Defendants claim it occurred after a lender foreclosed on the mortgage on the Property (NYSCEF Doc. No. 23, Barletta aff ¶¶ 21-23).

On December 27, 2022, 9 Vandam Associates and 9 Vandam Borrower petitioned to vacate the lien and cancel the lien bond (*9 Vandam Street Borrower 2, LLC et al v New York Pile & Concrete Structures Corp.*, Index No. 161057/2022). In a decision dated February 14, 2023, the Court (Kraus, J.) vacated the mechanic’s lien pursuant to Lien Law 17 (NYSCEF Doc. No. 9). In that decision, the Court found that the Property is a single-family dwelling (*id.*).

Plaintiff commenced this action on January 27, 2023. The Complaint asserts causes of action for breach of contract, quantum meruit, account stated, unjust enrichment, enforcement of a constructive trust under Lien Law § 77, to enforce and extend a mechanic’s lien, and attorney fees. At the time Plaintiff filed the Summons and Complaint, it also filed a Notice of Pendency of its mechanic’s lien. The Court (Kraus, J.) cancelled the Notice of Pendency in June 2023, finding that there was no valid and existing lien on the Property and reiterating its finding that the Property is a single-family home (NYSCEF Doc. No. 19).

Defendants now move to dismiss the Complaint pursuant to CPLR 3211(a)(1) and (7). On a motion to dismiss pursuant to CPLR 3211, the Court must accept as true the facts as alleged in the complaint and grant the plaintiff every possible inference (*Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409, 414 [2001]). Such favorable inferences “may be properly negated by affidavits and documentary evidence” (*Wilhelmina Models, Inc. v Fleisher*, 19 AD3d 267, 269 [1st Dept 2005] [quotation omitted]) in accordance with CPLR 3211(a)(1) “where the

documentary evidence utterly refutes a plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326 [2002]).

The causes of action for breach of contract, quantum meruit, account stated, and unjust enrichment must be dismissed. Administrative Code of City of NY § 20-387(a) requires that "[n]o person shall solicit, canvass, sell, perform or obtain a home improvement contract as a contractor from an owner without a license therefor." CPLR 3015(e) requires that a plaintiff whose "cause of action against a consumer arises from the plaintiff's conduct of a business which is required by state or local law to be licensed" must allege in its complaint that it was so licensed. The complaint must include the name and number of the license and the government agency that issued the license (CPLR 3015[e]). The Court has found that the Property is a single-family residence, thus the parties' contract is a home improvement contract and Plaintiff is required to plead that it possessed the requisite license (Administrative Code § 20-386[6]; *KSP Constr. LLC v LCV Prop. Two, LLC*, 204 NYS3d 54, 59 [1st Dept 2024]). The Complaint fails to do so. This failure is fatal to its breach of contract, quantum meruit, account stated, and unjust enrichment causes of action (*see id.*; *Chosen Constr. Corp. v Syz*, 138 AD2d 284, 285 [1st Dept 1988]; *Vatco Contr., Ltd. v Kirschenbaum*, 73 AD3d 1163, 1164 [2d Dept 2010]; *J.M. Bldrs. & Assoc., Inc. v Lindner*, 67 AD3d 738, 741 [2d Dept 2009]).

The Lien Law § 77 cause of action is dismissed as time barred. Plaintiff alleges that it performed its work by January 27, 2021 (Complaint ¶¶ 13, 15). This action was commenced on January 27, 2023. Lien Law § 77(2) requires that an action to enforce a trust cannot be maintained "if commenced more than one year after the completion of such improvement."

Plaintiff cross-moves for leave to file an amended complaint which would withdraw its causes of action to foreclose and extend a mechanic's lien and add a cause of action for

fraudulent conveyance. The proposed pleading also adds factual allegations about putative “change orders” that modified the contract and increased the sum to which Plaintiff was entitled.

Leave to amend pleadings pursuant to CPLR 3025 should be freely granted so long as there would be no surprise or prejudice to the nonmoving party (*Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 [1st Dept 2011]). However, leave to amend will be denied when the proposed pleading fails to state a cause of action, is palpably insufficient as a matter of law, or is devoid of merit (*Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005]; *Perrotti v Becker, Glynn, Melamed & Muffly LLP*, 82 AD3d 495, 498 [1st Dept 2011], quoting *MBIA Ins. Corp v Greystone & Co., Inc*, 74 AD3d 499, 500 [1st Dept 2010]).

Plaintiff’s motion for leave to amend is denied. The proposed pleading fails to state a cause of action on any of the claims asserted therein. It does not allege that Plaintiff possessed a valid license at the time it entered the contract, nor does it allege any facts that would render its Lien Law claim timely. As to the proposed fraudulent conveyance claim, Plaintiff alleges that the November 29, 2021 transfer of the Property was done in an attempt to frustrate Plaintiff’s mechanic’s lien. In opposition, Defendants submit a Certificate of Discharge of Mechanic’s Lien showing that the mechanic’s lien was bonded and discharged on November 29, 2021 (NYSCEF Doc. No. 35). The debt owed by 9 Vandam Associates to Plaintiff under the mechanic’s lien therefore ceased to exist as of that date (*see Holt Constr. Corp. v Grand Palais, LLC*, 108 AD3d 593, 596 [2d Dept 2013]). Plaintiff does not allege that it had any other judgments or other debts against any of the Defendants at the time of the transfer that could have been frustrated by a fraudulent conveyance. Therefore, the cross-motion is denied.

Accordingly, it is hereby:

ORDERED that Defendants' motion is granted to the extent that the Complaint is dismissed in its entirety.

All other relief sought is denied. This constitutes the Decision and Order of the Court.

5/10/2024

DATE



LORI S. SATTLER, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE