

**Pavarini McGovern, LLC v VBGO Collegiate Tower
LLC**

2024 NY Slip Op 32806(U)

August 2, 2024

Supreme Court, New York County

Docket Number: Index No. 653023/2021

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. NANCY M. BANNON **PART** **61M**

Justice

-----X

PAVARINI MCGOVERN, LLC,

Plaintiff,

- v -

VBGO COLLEGIATE TOWER LLC,

Defendant.

-----X

INDEX NO. 653023/2021

MOTION DATE _____

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 48, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100

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

INTRODUCTION

In this breach of contract action, the plaintiff seeks to recover \$14,172,093.43 allegedly owed to it by the defendant under a pair of agreements (the “First and Second Performance Letters”) for construction work the plaintiff performed at a construction project (the “Project”) located at 11 West 29th Street, 9 West 29th Street, and 3 West 29th Street in Manhattan (the “Subject Property”). The plaintiff now moves pursuant to CPLR 3212 for partial summary judgment awarding it a portion of the total damages it seeks, in the sum of \$10,086,661.56. The defendant opposes the motion and cross-moves, unopposed, to consolidate this action, pursuant to CPLR 602(a) with a related mechanic’s lien foreclosure action currently pending in this court (Pavarini McGovern, LLC v. HFZ Kik 30th Street Owner, LLC et al., Index No. 160556/2020 [Headley, J.]) (the “Lien Foreclosure Action”), or, in the alternative, to stay this action pursuant to CPLR 2201 pending a final disposition of the Lien Foreclosure Action. The plaintiff’s motion is granted and the defendant’s cross-motion is denied.

BACKGROUND

The Project was financed, at least in part, by a loan from the defendant pursuant to a Mezzanine Loan Agreement with non-party HFZ KIK 30th Street LLC (“KIK”). The loan was

secured by KIK's one hundred percent (100%) membership interest in non-party HFZ KIK 30th Street Owner, LLC ("KIK Owner"), the owner of the Subject Property. Pursuant to the Mezzanine Loan Agreement, the defendant periodically advanced loan funds in response to draw requests submitted to it by either KIK or KIK Owner, which funds were required to be used to pay outstanding amounts owed to the plaintiff and other contractors performing work on the Project. The draw requests submitted to the defendant generally contained a Construction Manager's Waiver and Release Lien Agreement, signed by the plaintiff, along with waivers of mechanic's liens from various subcontractors working on the Project (collectively, the "Lien Waivers"), in which the plaintiff and/or the subcontractors represented and acknowledged their receipt of certain specified payments and agreed to waive, release and discharge certain claims, including mechanic's liens claims, relating to the Project.

The plaintiff served as the general contractor/construction manager for portions of the Project. In August 2018, it executed a contract with KIK Owner for what was denominated as Phase 1 of the Project (the "Phase 1 Contract"), which was followed in March 2019 by a second contract with KIK Owner for Phase 2 and 3 of the Project (the "Phase 2/3 Contract"). In May 2019, the plaintiff executed a contract with KIK, rather than KIK Owner, to perform work on Phase 4 of the Project (the "Phase 4 Contract"). Also in May 2019, to protect its collateral under the Mezzanine Loan Agreement, the defendant entered into the First Performance Letter agreement with the plaintiff, pursuant to which the defendant secured an option to elect to have the plaintiff continue performance of its work under the Phase 1 Contract for the benefit of the defendant in the event of KIK's default on the loan, a foreclosure on the collateral securing the loan, or KIK's insolvency. The defendant agreed that, upon such an election, it would pay the plaintiff for all work and services rendered, whether performed prior to or subsequent to such election, for which the plaintiff had not otherwise received payment. In March 2020, the defendant entered into the Second Performance Letter agreement with the plaintiff, which was essentially identical to the First Performance Letter except that it provided for payment upon the defendant's election to have the plaintiff continue performance of its work under the Phase 2/3 Contract. Both Performance Letters identified KIK as the "Borrower" on the defendant's loan and as the sole member of KIK Owner. No Performance Letter was executed with respect to the Phase 4 Contract.

In November 2020, the defendant sent the plaintiff a letter (the "Election Letter") formally exercising its right under the First and Second Performance Letters to have the plaintiff continue

performance of its work under the Phase 1 and Phase 2/3 Contracts, which the plaintiff did. Soon thereafter, based upon KIK's failure to make payments due on the loan, the defendant noticed a UCC sale of the loan collateral—KIK's one hundred percent (100%) membership interest in KIK Owner. The UCC sale took place in April 2021. The defendant was the successful bidder and thereafter assumed control of the Project.

In December 2020, prior to filing the complaint herein, the plaintiff commenced the related Lien Foreclosure Action against KIK, KIK Owner, and others, alleging, *inter alia*, a failure to pay for work it performed on the Project. In January 2022, the defendant herein moved to intervene in the Lien Foreclosure Action, filing a proposed intervenor complaint that asserted counterclaims against the plaintiff for common law fraud, promissory estoppel, equitable estoppel, aiding and abetting a fraud, and tortious interference with contract, for which it sought damages in excess of \$20 million. The defendant's motion to intervene was granted in April 2022. In its counterclaims in the Lien Foreclosure Action, the defendant alleged, as relevant here, that the Lien Waivers submitted by the plaintiff to obtain the release of loan funds were materially false and fraudulent in that they repeatedly overstated the amount of the payments the plaintiff had already received, thereby concealing underpayments by KIK and/or KIK Owner and the diversion of loan funds advanced to make those payments. The defendant further alleged that it advanced loan funds in reliance on the plaintiff's false and fraudulent Lien Waivers, and that, had the plaintiff submitted accurate Lien Waivers, the defendant would have realized much earlier that loan funds were being improperly diverted, ceased advancing additional loan funds, declared KIK in breach of the Mezzanine Loan Agreement, and noticed the sale of KIK's membership interest in KIK Owner, thereby limiting its losses by taking control of the Project before the plaintiff performed significant additional work upon which it now seeks payment.

Meanwhile, on May 7, 2021, the plaintiff commenced this action asserting two causes of action for breach of contract—one for each of the Performance Letters—seeking payment of the unpaid balances guaranteed by the defendant for the plaintiff's work on the Phase 1 and Phase 2/3 Contracts. The defendant answered in July 2021, asserting nine boilerplate and conclusory affirmative defenses and no counterclaims. Discovery ensued and a Note of Issue was filed on September 9, 2022.

The plaintiff filed the instant motion in March 2022 in response to the counterclaims and associated allegations in the defendant's proposed intervenor complaint in the Lien Foreclosure Action. The plaintiff seeks partial summary judgment awarding \$10,086,661.56, representing the total amount it is owed under the First and Second Performance Letters, less any amounts cast in dispute by the defendant's counterclaims in the Lien Foreclosure Action. The defendant opposes the motion and cross-moves to consolidate this action with the related Lien Foreclosure Action, or, in the alternative, to stay this action pursuant to CPLR 2201 pending a final disposition of the Lien Foreclosure Action.

DISCUSSION

A. The Plaintiff's Motion

The proponent of a motion for summary judgment pursuant to CPLR 3212 must establish prima facie entitlement to judgment as a matter of law by submitting proof in admissible form demonstrating the absence of triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985); Zuckerman v City of New York, 49 NY2d 557 (1980). Should the movant meet that burden, it then becomes incumbent upon the party opposing the motion to come forward with proof in admissible form sufficient to raise a triable issue of fact. See Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, *supra*; O'Halloran v City of New York, 78 AD3d 536 (1st Dept. 2010). The elements of a cause of action for breach of contract are (1) the existence of a contract, (2) the plaintiffs' performance under the contract; (3) the defendant's breach of that contract, and (4) resulting damages. See Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445 (1st Dept. 2016); Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010).

The plaintiff establishes the existence of the subject contracts and its performance thereunder by submitting copies of the First and Second Performance Letters, the underlying Phase 1 and Phase 2/3 Contracts, and the affidavit of one of its Executive Vice Presidents, Marc DePaul, who was involved with administration of the plaintiff's work on the Project. The plaintiff further demonstrates, *prima facie*, the defendant's breach and resulting damages via its submission of the defendant's Election Letter, the plaintiff's payment requisitions for work performed on Phases 1, 2, and 3 of the Project, and DePaul's Affidavit, in which he avers that the defendant has not paid the plaintiff for all work performed pursuant to the Phase 1 and Phase 2/3 Contracts, as required by the Performance Letters.

With regard to the calculation of the partial damages sought on this motion, the plaintiff relies on its payment requisitions for the subject work and further submits the affidavit of Nigel Modeste, one of its accountants, who details adjustments to the total unpaid balance owed under the Performance Letters to account for any amounts cast in dispute by the defendant's counterclaims in the Lien Foreclosure Action. This proof establishes that the plaintiff is entitled to damages of \$10,086,661.56.

In opposition, the defendant fails to raise a triable issue of fact. The defendant does not even attempt to oppose the plaintiff's motion on the issue of liability, instead limiting the scope of its opposition solely to the issue of damages. Relying on the copies of the plaintiff's Lien Waivers and requisition logs, the defendant principally argues, in effect, that its counterclaims in the Lien Foreclosure Action are meritorious, and that, had the plaintiff submitted accurate Lien Waivers, it would have realized as early as mid-March 2020 that loan funds were being improperly diverted, ceased advancing additional loan funds, declared KIK in breach of the Mezzanine Loan Agreement, noticed a sale of KIK's membership interest in KIK Owner, and taken control of the Project before the plaintiff performed nearly \$10 million of additional work upon which it now seeks payment.

This and the defendant's other related arguments are unavailing because the counterclaims that form the basis for these arguments are not before this court. The subject counterclaims are asserted only in the Lien Foreclosure Action and have not been pleaded in this action either as counterclaims or, as the plaintiff at one point suggests in its moving papers, as affirmative defenses. The merits of these counterclaims will be adjudicated in the Lien Foreclosure Action and do not directly bear on the limited issue presented in this action—whether the defendant breached its contractual obligation to pay the outstanding balance due to the plaintiff for work it performed pursuant to the Phase 1 and Phase 2/3 Contracts. Whether the plaintiff engaged in fraudulent or tortious conduct, and whether the defendant is therefore entitled to damages of its own, are not issues that are properly before this court to decide.

Therefore, the plaintiff's motion for partial summary judgment is granted.

B. The Defendant's Cross-Motion

The branch of the defendant's cross-motion that seeks to consolidate this action with the Lien Foreclosure Action pursuant to CPLR 602(a) is denied, even though unopposed.

“Consolidation is generally favored in the interest of judicial economy and ease of decision-making where cases present common questions of law and fact, ‘unless the party opposing the motion demonstrates that a consolidation will prejudice a substantial right’” (Raboy v McCrory Corp., 210 AD2d 145 [1st Dept. 1994] quoting Amtorg Trading Corp. v Broadway & 56th St. Assoc., 191 AD2d 212, 213 [1st Dept. 1993]), though consolidation. While the two actions sought to be consolidated arise from the same set of underlying transactions, they do not present common questions of law and fact for the reasons already discussed above. To the extent the cross-motion seeks to transfer the plaintiff’s summary judgment motion pursuant to CPLR 2217(c), that provision is inapposite because the motion was not “made to a judge who is ... unable to hear it[.]”

The branch of the defendant’s cross-motion that seeks, in the alternative, to stay this action pursuant to CPLR 2201 pending a final disposition of the Lien Foreclosure Action is likewise denied. CPLR 2201 vests the court in which an action is pending with the discretion to “grant a stay of proceedings in a proper case, upon such terms as may be just.” See CPLR 2201; Lauria v Kriss, 147 AD3d 575 (1st Dept. 2017); Simoni v Napoli, 101 AD3d 487 (1st Dept. 2012); Mourtil v Korman & Stein, P.C., 33 AD3d 898 (2nd Dept. 2006). The court finds that a stay is not warranted here because the defendant has not established “complete identity of the parties, causes of action and of the relief sought in the two actions or that a determination in the [Lien Foreclosure Action] will necessarily determine and dispose of all the issues in both actions[.]” Guilden v Baldwin Sec. Corp., 189 AD2d 716 (1st Dept. 1993).

CONCLUSION

For the foregoing reasons, the plaintiff’s motion is granted and the defendant’s motion is denied, leaving the balance of the plaintiff’s claims in this action for trial or settlement.

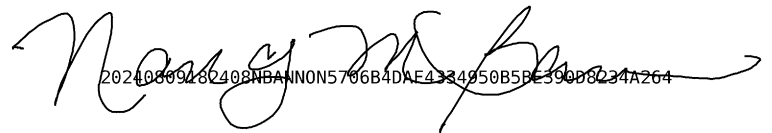
Accordingly, it is

ORDERED that the motion of the plaintiff, Pavarini McGovern, LLC, for partial summary judgment is granted and the cross-motion of the defendant, VBGO Collegiate Tower LLC, is denied; and it is further

ORDERED that the Clerk shall enter judgment in favor of the plaintiff, Pavarini McGovern, LLLC, and against the defendant, VBGO Collegiate Tower, Inc., in the sum of \$10,086,661.56, plus costs and statutory interest from May 7, 2021, and it is further

ORDERED that the parties shall appear for a pre-trial conference on September 26, 2024, at 2:30 p.m., to be conducted by Microsoft Teams.

This constitutes the Decision and Order of the court.



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8/2/2024
DATE

NANCY M. BANNON, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE