Plumbing Works, Inc. v 8 Catherine St. LLC

2024 NY Slip Op 34105(U)

November 20, 2024

Supreme Court, New York County

Docket Number: Index No. 157078/2017

Judge: James d'Auguste

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **Hon. James d'Auguste** **PART 55**

Justice

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PLUMBING WORKS, INC.,

Plaintiff,

- v -

8 CATHERINE STREET LLC, TWIN CITY ENTERPRISE, INC., THE BOARD OF MANAGERS OF CHATHAM SQUARE TOWER CONDOMINIUM, PANG-KUEN REALTY COMPANY, INC., HENRY M. FONG, AMERASIA BANK, BANK OF AMERICA, N.A., CAPITAL ONE CONSTRUCTION GROUP CORP.,

Defendants.

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INDEX NO. 157078/2017

MOTION DATE

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 106, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 134

were read on this motion to/for SUMMARY JUDGMENT.

On this motion, defendants 8 Catherine Street LLC (Catherine), Twin City Enterprise, Inc. (Twin City), The Board of Managers of the Chatham Square Tower Condominium (Board), Pang-Kuen Realty Company, Inc. (Pang-Kuen), Henry M. Fong (Fong) and Capital One Construction Group Corp. (Capital) (collectively, defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint brought by plaintiff Plumbing Works, Inc. to foreclose on a mechanic's lien, among other claims. The motion is granted in part as set forth below.

FACTUAL BACKGROUND

On or about June 17, 2008, Capital entered into an agreement with plaintiff under which plaintiff would perform plumbing work at a new building under construction located at 8 Catherine Street, New York, New York (the Project), for $90,000 (NY St Cts Elec Filing [NYSCEF] Doc No. 1, complaint ¶¶ 17, 19-20). Plaintiff alleges that it duly performed its work, but Capital has

failed to pay (*id.*, ¶¶ 22 and 27). Plaintiff last worked on the Project on July 19, 2012 (NYSCEF Doc No. 103, Dempsey affirmation, exhibit O, Rocco Murdocca [Murdocca] tr at 20-21). On September 5, 2012, plaintiff filed a Notice of Mechanic's Lien for the unpaid sum of $90,000 (NYSCEF Doc No. 1, ¶ 23). The lien was extended on August 16, 2013, August 11, 2014, August 10, 2015, and August 10, 2016 (*id.*, ¶ 29).

A condominium declaration for the building was filed on January 20, 2016 (*id.*, ¶ 30). Catherine and Twin City were the owners, sponsors or selling agents of units 1A, 2A, 2B, 3A, 3B, 4A, 4B, 5A, 5B, 6A and 6B at the building (*id.*, ¶¶ 3-7), and the Board and defendants Amerasia Bank and Bank of America, N.A. are alleged to have an ownership interest in those units (*id.*, ¶¶ 9 and 13-14). Pang-Kuen is the fee owner of units 5A and 5B, having purchased those units from Catherine or Twin City on September 15, 2016 (*id.*, ¶¶ 11 and 32). Fong is the fee owner of unit 4A, having purchased the unit from Catherine or Twin City on March 30, 2017 (*id.*, ¶¶ 12 and 31).

PROCEDURAL HISTORY

Plaintiff commenced this action on August 7, 2017 by filing a summons and complaint asserting the following five causes of action: (1) foreclosure of the subject mechanic's lien against all defendants; (2) breach of contract against Capital; (3) unjust enrichment and quantum meruit against Capital, Catherine, Twin City, and the Board; (4) an account stated against Capital; and (5) recovery of plaintiff's attorneys' fees.

By order to show cause signed August 11, 2020, plaintiff moved to extend the notice of pendency filed in this action (NYSCEF Doc No. 69). Defendants cross-moved to cancel the notice of pendency on the ground that Catherine had filed a bond discharging plaintiff's lien and to dismiss the foreclosure cause of action against Twin City, the Board, Pang-Kuen and Fong (NYSCEF Doc No. 74). In a decision and order dated July 1, 2021, this court denied the motion

and granted the cross-motion, reasoning that on December 28, 2017, Catherine filed a bond in the amount of $99,000 from nonparty SureTec Insurance Company (SureTec) as surety, discharging the subject lien, and that Twin City, the Board, Pang-Kuen and Fong are no longer necessary parties on the foreclosure cause of action (NYSCEF Doc No. 107). Defendants now move for summary judgment dismissing the complaint.

THE PARTIES' CONTENTIONS

Defendants contend that the foreclosure claim must be dismissed because plaintiff's discovery responses do not include any documents evidencing the value of its labor or materials. Defendants maintain that plaintiff has no viable cause of action for breach of contract, unjust enrichment or quantum meruit, or an account stated in the absence of proof of a specific contract for $90,000, evidence establishing the value of the labor or materials provided, and evidence indicating that it billed Capital with any regularity. Last, defendants submit that the fifth cause of action must be dismissed because the recovery of attorneys' fees is not an independent cause of action. In support, defendants tender an affidavit from Shuai Yin (Yin), Murdocca's deposition transcript, proposals and invoices, cancelled checks and receipts, and email correspondence.

Yin, Capital's president until its dissolution in 2018, avers that Catherine hired Capital in May 2008 to provide general contracting services for the construction of an eight-story commercial building (the Project) located at 8 Catherine Street, which is also known as 17 Chatham Square (NYSCEF Doc No. 85, Yin aff, ¶¶ 1 and 3). On June 17, 2008, plaintiff submitted a proposal to Capital to perform water and sewer work for $85,000 and install detective check valves and meters for $10,000 (*id.*, ¶ 4). Yin attests that Capital hired plaintiff that same month to perform the water and sewer work for $70,000 pursuant to an oral agreement (*id.*, ¶ 5). In late 2009 or 2010, Capital hired plaintiff under a second oral agreement to perform sprinkler work for $80,000 (*id.*, ¶ 6).

Plaintiff performed the water and sewer work between 2009 and 2011 and submitted an invoice dated August 16, 2011 billing Capital $85,000 for that work and $14,500 for detector check valve and meter work (*id.*, ¶ 8; NYSCEF Doc No. 91, Yin aff, exhibit F). Although Capital had already paid plaintiff $75,000, plaintiff had not yet to begin the detector check valve and meter work (NYSCEF Doc No. 85, ¶ 8). In late 2011 or 2012, plaintiff began installing sprinkler heads (*id.*, ¶ 9).

Yin avers that Capital paid plaintiff $109,400 through December 2011, but plaintiff failed to progress the work in early 2012 and left the Project by June 2012 (*id.*, ¶¶ 10-11; NYSCEF Doc No. 90, Yin aff, exhibit E at 10). On June 27, 2012, plaintiff demanded $150,000 to finish the job (NYSCEF Doc No. 85, ¶ 12; NYSCEF Doc No. 92, Yin aff, exhibit F at 2). Plaintiff rejected Capital's proposed completion agreement on July 18, 2012, and forwarded a new proposal on July 26, 2012 to complete the detector check valve and meter work for $18,000 (NYSCEF Doc No. 85, ¶¶ 13-15; NYSCEF Doc No. 95, Yin aff, exhibit I). Yin avers that on August 1, 2012, plaintiff sent Capital a revised version of its August 16, 2011 invoice, now charging $75,000 for the water and sewer work and $80,000 for "Plumbing" (NYSCEF Doc No. 85, ¶ 16; NYSCEF Doc No. 96, Yin aff, exhibit J). One week later, Murdocca sent Yin an email that reads, in part, "i want $120000 to complete the job(meters/ddcv are seperate [sic] at $ 18000) … the grand total is 138000.00 … agree to this and your job moves forward" (NYSCEF Doc No. 97, Yin aff, exhibit K at 2-3). Capital hired a new plumbing company before September 2012 (NYSCEF Doc No. 85, ¶ 18).

Plaintiff, in opposition, submits Murdocca's affidavit, proposals, invoices, inspection records, payment records, the bond issued by SureTec, discovery and interrogatory responses, and Yin's deposition transcript. First, plaintiff argues that its lien is valid on its face, and as such, under Lien Law § 19, the lien cannot be discharged. Murdocca, plaintiff's president, avers that

there were multiple proposals, invoices and change orders increasing the scope of plaintiff's work, which were made at Capital's request and for which Yin promised payment (NYSCEF Doc No. 113, Murdocca aff, ¶¶ 1 and 11-12). He further avers that "[t]he proposals and invoices show that that plumbing work was provided pursuant to written agreements, and there is no ambiguity" (*id.*, ¶ 19). Murdocca claims that plaintiff is owed $90,000 for its work, which passed inspection by the New York City Department of Environmental Protection (*id.*, ¶¶ 3-4). Last, plaintiff asserts that its unjust enrichment/quantum meruit cause of action must be resolved at trial.

DISCUSSION

It is well settled that "the proponent of a summary judgment motion must make a facial showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Assuming the moving party meets its prima facie burden, "the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure so to do" (*Zuckerman v City if New York*, 49 NY2d 557, 560 [1980]).

A. First Cause of Action (Mechanic's Lien Foreclosure)

As an initial matter, the foreclosure cause of action has already been dismissed as against Twin City, the Board, Pang-Kuen and Fong since the subject mechanic's lien has been discharged (NYSCEF Doc No. 107). As it is the only cause of action pled against them, the complaint against Twin City, the Board, Pang-Kuen and Fong is dismissed.[1]

[1] When a mechanic's lien has been bonded and discharged, "the lien detaches from its original adherence (appropriated funds or property) and attaches to the substitute, the bond" (*Tri-City Elec. Co. v People*, 96 AD2d 146, 150 [4th Dept 1983], *appeal dismissed* 61 NY2d 833 [1984], *affd* 63 NY2d 959 [1984], *rearg denied* 64 NY2d 755 [1984]; *see also Harlem Plumbing Supply Co. v Handelsman*, 40 AD2d 768, 768 [1st Dept 1972]). To recover, the plaintiff must still establish the validity of its lien, since "[t]he undertaking filed to discharge the lien never admits validity" (*Tri-City Elec. Co.*, 96 AD2d at 150; *see also Worlock*

Lien Law § 3 allows a contractor, who provides labor or furnishes material for the improvement of real property at the owner's request or consent, to file a private mechanic's lien for the "value, or the agreed price, of such labor, … or materials upon the real property improved or to be improved." The lien extends to the "owner's right, title or interest in the real property and improvements, existing at the time of filing the notice of lien, or thereafter acquired" (Lien Law § 4 [1]). The amount on the lien should not exceed "the sum earned and unpaid on the contract at the time of filing the notice of lien, and any sum subsequently earned thereon" (*id.*). In addition, since a subcontractor's rights are derivative of the general contractor's rights (*Kamco Supply Corp. v JMT Bros. Realty, LLC*, 98 AD3d 891, 891 [1st Dept 2012]), "the lien will only attach to those funds due and owing to the general contractor at the time of its filing, or which may thereafter become due and owing" (*Albert J. Bunce, Ltd. v Fahey*, 73 AD2d 632, 632 [2d Dept 1979]).

A lienholder moving for summary judgment on a cause of action to foreclose on a mechanic's lien bears the burden of "establish[ing] the value or the agreed-upon price of the labor it contended that it was owed, as set forth in its mechanic's lien" (*Bryan's Quality Plus, LLC v Dorime*, 112 AD3d 870, 871 [2d Dept 2013]; *see also Strober Bros. v Kitano Arms Corp.*, 224 AD2d 351, 353 [1st Dept 1996] ["the burden of proving the existence of a lien fund and entitlement to recovery of a lien lies with the lienholder"]; *Falco Constr. Corp. v P & F Trucking*, 158 AD2d 510, 510 [2d Dept 1990] [the lienor bears the burden of "establishing the existence of a fund due and owing from the owner to the general contractor at the time of the filing of its mechanic's lien to which such lien could attach"]). An owner moving for summary judgment dismissing this cause

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Paving Corp. v Camperlino, 222 AD2d 1097, 1098, [4th Dept 1995] [stating that "[w]here a mechanic's lien on real property has been discharged by the filing of a security bond, a judgment in favor of the lienor in an action brought to enforce the lien, although not a judgment of foreclosure, is, nevertheless, a judgment against the property"]). The court observes that plaintiff has not sought to add SureTec as a party (*see* Lien Law § 37 [7]).

of action, however, bears the burden of demonstrating "prima facie ... that it did not owe any money to the general contractor when the lien was filed" (*3-G Servs. Ltd. v SAP V/Atlas 845 WEA Assoc. NF L.L.C.*, 162 AD3d 487, 488 [1st Dept 2018]; *see also Kamco Supply Corp.*, 98 AD3d at 891).

In this case, defendants argue that plaintiff cannot establish the validity of its lien because "there is no proof of the value of labor and materials" (NYSCEF Doc No. 85, ¶ 20), but this is insufficient to satisfy their prima facie burden. Defendants have not offered any admissible evidence demonstrating that no money was due and owing from Catherine to Capital at the time plaintiff filed the lien (*see SMI Bldg. Sys., LLC v West 4th St. Dev. Group, LLC*, 83 AD3d 687, 688 [2d Dept 2011] [owner failed to establish that there were no funds to which the plaintiff's lien could attach]; *Perma Pave Contracting Corp. v Paerdegat Boat & Racquet Club*, 156 AD2d 550, 552 [2d Dept 1989] [same]). Instead, defendants point to gaps in plaintiff's proof, but a defendant cannot obtain summary judgment by with such a limited showing (*Miah v Pipe Dreams Realty V Corp*, 214 AD3d 575, 576 [1st Dept 2023]). To the extent defendants rely on cancelled checks and receipts, which reflect Capital's payments to plaintiff, defendants "do not attempt to explain how these documents demonstrate that full payment to [Capital] had been made by [Catherine] prior to the filing of the lien, or ever" (*Penava Mech. Corp. v Afgo Mech. Servs., Inc.*, 71 AD3d 493, 496 [1st Dept 2010]).

Defendants' reliance on *DiSario v Rynston* (138 AD3d 672 [2d Dept 2016]) and *DHE Homes, Ltd. v Jamnik* (121 AD3d 744 [2d Dept 2014]) is misplaced. Those actions are distinguishable because both appeals stemmed from nonjury trials where the lienor plaintiffs "ha[d] the burden of establishing the amount of the outstanding debt by proffering proof either of the price of the contract or the value of labor and materials supplied" (*DiSario*, 138 AD3d at 673).

By contrast here, defendants, who are moving for summary judgment, must establish that there is no fund to which the lien could attach. Summary judgment on the first cause of action is denied as to Capital and Catherine.

B. The Second Cause of Action (Breach of Contract)

The second cause of action alleges that Capital breached a June 17, 2008 contract with plaintiff by failing to pay plaintiff $90,000 for the plumbing work (NYSCEF Doc No. 1, ¶¶ 36-37). A breach of contract claim requires a valid contract, the plaintiff's performance, the defendant's breach, and damages (*Noto v Planck, LLC*, 228 AD3d 516, 516 [1st Dept 2024]). "To establish the existence of an enforceable agreement, a plaintiff must establish an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound" (*Ostojic v Life Med. Tech., Inc.*, 201 AD3d 522, 523 [1st Dept 2022]). As is relevant here, "[a]n oral agreement is enforceable so long as its terms are in line with the parties' reasonable expectations, and the parties' conduct evinces mutual assent, even where the terms of the contract are not 'fixed with absolute certainty'" (*Cullity v Posner*, 212 AD3d 519, 519 [1st Dept 2023], quoting *Kramer v Greene*, 142 AD3d 438, 439 [1st Dept 2016]).

Here, Capital has demonstrated that it did not enter into a June 17, 2008 contract with plaintiff for $90,000, as alleged in the complaint. At his deposition, Murdocca admitted that plaintiff had no contract with Capital for that specific amount (NYSCEF Doc No. 103 at 11, 14 and 97). Nevertheless, triable issues of fact preclude granting Capital summary judgment.

Capital admits that it retained plaintiff to complete water and sewer and sprinkler work pursuant to two oral agreements totaling $150,000, that plaintiff completed some of the contracted-for work, and that Capital paid plaintiff $109,400 for that work. However, Yin's affidavit fails to furnish any details describing the circumstances surrounding the formation of the two oral

agreements, including whether Capital ever communicated the total contract price of $150,000 to plaintiff and whether plaintiff ever agreed to that amount (*see Jopal Bronx, LLC v Sayers*, 217 AD3d 627, 628 [1st Dept 2023]; *SageGroupAssoc., Inc. v Dominion Textile (USA)*, 244 AD2d 281, 282 [1st Dept 1997] [issues of fact concerning the terms of the parties' oral agreement]). In his affidavit, Yin avers only that Capital hired plaintiff in June to perform water and sewer work for $70,000, without explaining whether this encompassed the detector check valve and meter work as described in plaintiff's June 17, 2008 proposal (NYSCEF Doc No. 85, ¶¶ 4-5). Capital then engaged plaintiff to perform sprinkler work for $80,000 (*id.*, ¶ 6). Yin avers that plaintiff's first invoice dated August 16, 2011 reflected a payment credit of $75,000 for the water and sewer work (*id.*, ¶ 8; NYSCEF Doc No. 91), but Yin also avers that the contract price for this work was $70,000, and that plaintiff had yet to begin the sprinkler work at that time[2] (NYSCEF Doc No. 85, ¶¶ 8-9). Thus, it is unclear why Capital overpaid plaintiff by $5,000 when the parties' oral agreement set a contract price of $70,000 for the water and sewer work.

A triable issue of fact exists as to what plaintiff was actually paid. Capital has tendered copies of cancelled checks and receipts purporting to show the amounts it paid to plaintiff on the Project. The documents show that the total amount paid to plaintiff between December 11, 2010 and December 20, 2011 equals $145,000[3] (NYSCEF Doc No. 90 at 3-9, 12-15), but Yin avers that Capital paid plaintiff $109,400 through December 2011 (NYSCEF Doc No. 85, ¶ 10). In addition, two cashed checks and two receipts indicate that partial payments may have been directed to other

[2] Defendants' counsel argued that plaintiff was paid a $40,000 advance for the sprinkler work (oral argument tr at 13 and 16), but it is unclear how this amount factors into the $109,400 Capital paid plaintiff if the water and sewer work, alone, cost $80,000.

[3] The receipt dated November 18, 2010 describes a $20,000 payment via check no. 3112 and a separate $10,000 cash payment.

projects (*id.* at 12-15), and Murdocca testified that "[w]e allocated to the jobs that they told us to allocate it to" (NYSCEF Doc No. 103 at 49).

A triable issue of fact also exists as to whether plaintiff and Capital entered into written or oral agreements for the work (*see Sabre Intl. Sec., Ltd. v Vulcan Capital Mgt., Inc.*, 95 AD3d 434, 436 [1st Dept 2012] ["[q]uestions of fact and credibility exist with respect to the existence of a binding oral agreement between plaintiff and defendants, and the terms thereof, rendering summary judgment in favor of either side on the first cause of action, for breach of an oral contract, inappropriate"]). Plaintiff submits three proposals dated June 17, 2008, July 29, 2009 and July 26, 2012, the original August 16, 2011 invoice, and the corrected August 16, 2011. Murdocca avers these documents establish that "the plumbing work was provided pursuant to written agreements" (NYSCEF Doc No. 113, ¶ 19). However, Murdocca does not aver nor did he testify that Capital ever agreed to the price listed on those documents (*see Garcete v Lazar*, 294 AD2d 118, 119 [1st Dept 2002] [no contract formed where "there was never any meeting of the minds as to the price, an essential term of any contract of sale"]).

Yin's testimony fails to add any clarity because when asked whether there was an agreed-upon price for plaintiff's work, Yin gave no verbal response (NYSCEF Doc No. 122, Catanzaro affirmation, exhibit I, Yin tr at 76). Yin also testified that plaintiff had initially charged $95,000 for its work (*id.*), and that Capital made certain payments towards the initial $95,000 proposal from June 2008 (*id.* at 30). Yin, though, never testified whether Capital had accepted that initial proposal. Moreover, as discussed *supra*, Capital agreed to pay plaintiff $80,000 for the water and sewer work, not the $85,000 listed in the proposal. The $80,000 oral contract price also appears to include "change order work on the sewer connection" (*id.* at 41-42), but it is unclear on this record whether the change order work was even contemplated at the time Capital first hired

plaintiff in June 2008. Accordingly, the motion insofar as it seeks summary judgment on the breach of contract cause of action is denied.

D. Third Cause of Action (Unjust Enrichment and Quantum Meruit)

Both unjust enrichment and quantum meruit are quasi-contract claims (*Columbia Mem. Hosp. v Hinds*, 38 NY3d 253, 275 [2022]; *Graciano Corp. v Lanmark Group, Inc.*, 221 AD3d 473, 474 [1st Dept 2023]). To maintain a cause of action for unjust enrichment, the plaintiff must plead "that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered" (*Metropolitan Bank & Trust Co. v Lopez*, 189 AD3d 443, 444-445 [1st Dept 2020] [internal quotation marks and citations omitted]). A cause of action for quantum meruit requires "(1) the performance of the services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services" (*Farina v Bastianich*, 116 AD3d 546, 548 [1st Dept 2014] [internal quotation marks and citation omitted]). Ordinarily, "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]).

As discussed above, triable issues of fact exist as to whether plaintiff and Capital entered into a binding written or oral agreement governing the dispute at issue and the terms of their agreement. As such, plaintiff may pursue quasi-contract theories in the alternative (*see Parizat v Meron*, — AD3d —, 2024 NY Slip Op 04776, *3 [2d Dept 2024]; *Sabre Intl. Sec., Ltd.*, 95 AD3d at 438-439). Summary judgment dismissing the third cause of action is denied.

D. The Fourth Cause of Action (Account Stated)

An account stated "is an agreement, independent of the underlying agreement, regarding the amount due on past transactions" (*Aronson Mayefsky & Sloan, LLP v Praeger*, 228 AD3d 182, 185 [1st Dept 2024] [internal quotation marks and citation omitted]). "The very meaning of an account stated is that the parties have come together and agreed upon the balance of indebtedness … so that an action to recover the balance as upon an implied promise of payment may thenceforth be maintained" (*Herrick, Feinstein v Stamm*, 297 AD2d 477, 478 [1st Dept 2002] [internal quotation marks and citation omitted]). "[A] defendant's receipt and retention of invoices seeking payment for goods or services rendered, without objection within a reasonable time, gives rise to an actionable claim for account stated" (*TH Fashion Ltd. v Vince Holding Corp.*, — AD3d —, 2024 NY Slip Op 04630, *1 [1st Dept 2024] [citation omitted]).

Defendants have demonstrated their entitlement to summary judgment dismissing this cause of action. The record demonstrates that plaintiff sent Capital two invoices, both identified as invoice no. 1368 and dated August 16, 2011, more than one year apart, purporting to bill for the same water and sewer work (NYSCEF Doc Nos. 91 and 96). Each invoice billed different amounts for that work, with the revised invoice charging Capital $75,000, a $10,000 decrease from the previous invoice (*id.*). Murdocca testified that the second invoice, which plaintiff sent to Capital on August 1, 2012, was the correct invoice (NYSCEF Doc No. 103 at 81-82). Murdocca also testified that the "corrected" invoice must have been the result of "a discussion [with Capital] over the phone" (*id.* at 83). The corrected invoice omits the $14,500 for the detector check and meter work that plaintiff had previously billed and includes a new $80,000 charge for "Plumbing" (NYSCEF Doc Nos. 91 and 96). Then, just one week later, plaintiff demanded $120,000 to complete its work, excluding an additional $18,000 to perform the detector check and meter work (NYSCEF Doc No. 97 at 1). Capital challenged this amount, with Yin writing Murdocca that

Capital had already paid plaintiff $109,000 (*id.*). Accordingly, not only did plaintiff appear to amend the amount it had previously billed in the corrected invoice, but it appears that Capital promptly disputed those amounts (*see Hoffinger Stern & Ross, LLP v Neuman*, 110 AD3d 563, 563-564 [1st Dept 2013]). Given the foregoing, plaintiff's billing practices lack the regularity necessary to establish an account stated (*see Roth Law Firm, PLLC v Sands*, 82 AD3d 675, 676 [1st Dept 2011]). Plaintiff has failed to address this cause of action in its opposition, and therefore, it is deemed abandoned (*see Disla v Biggs*, 191 AD3d 501, 503 [1st Dept 2021]). The fourth cause of action for an account stated is dismissed.

E. Attorneys' Fees

The fifth cause of action pleads a claim for attorneys' fees (NYSCEF Doc No. 1, ¶¶ 48-51), but plaintiff cannot maintain a claim for attorneys' fees as a separate cause of action (*see Pier 59 Studios L.P. v Chelsea Piers L.P.*, 27 AD3d 217, 217 [1st Dept 2006], citing *Burke v Crosson*, 85 NY2d 10, 17-18 [1995]). In any event, "attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]). Plaintiff concedes that it has no contract with Capital that permits the recovery of its attorneys' fees (oral argument tr at 8-9). The fifth cause of action is dismissed.

Accordingly, it is

ORDERED that the motion brought by defendants 8 Catherine Street LLC, Twin City Enterprise, Inc., The Board of Managers of the Chatham Square Tower Condominium, Pang-Kuen Realty Company, Inc., Henry M. Fong and Capital One Construction Group Corp. for summary judgment is granted to the extent of:

(1) dismissing the fourth and fifth causes of action, and the fourth and fifth causes are dismissed; and

(2) dismissing the complaint against defendants Twin City Enterprise, Inc., The Board of Managers of the Chatham Square Tower Condominium, Pang-Kuen Realty Company, Inc., and Henry M. Fong, and the complaint is dismissed against them; and

(3) the balance of the motion is otherwise denied; and it is further

ORDERED that the claims against defendants Twin City Enterprise, Inc., The Board of Managers of the Chatham Square Tower Condominium, Pang-Kuen Realty Company, Inc., and Henry M. Fong are severed and the balance of the action shall continue against the remaining defendants; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendants Twin City Enterprise, Inc., The Board of Managers of the Chatham Square Tower Condominium, Pang-Kuen Realty Company, Inc., and Henry M. Fong dismissing the claims made against them in this action, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

11/20/2024
DATE

JAMES D'AUGUSTE, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE