

**Zivkovic Connolly Architects, P.C. v Serbian E.  
Orthodox Dioceses for the United States of Am. &  
Can.**

2025 NY Slip Op 31200(U)

April 3, 2025

Supreme Court, New York County

Docket Number: Index No. 160905/2023

Judge: Francis A. Kahn III

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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. FRANCIS A. KAHN, III PART 32**

*Justice*

INDEX NO. 160905/2023

MOTION DATE

MOTION SEQ. NO. 001

ZIVKOVIC CONNOLLY ARCHITECTS, P.C.,

Plaintiff,

- v -

THE SERBIAN EASTERN ORTHODOX DIOCESES FOR THE UNITED STATES OF AMERICA AND CANADA, THE SERBIAN ORTHODOX CHURCH IN NORTH, CENTRAL AND SOUTH AMERICA, THE SERBIAN ORTHODOX DIOCESE OF EASTERN AMERICA, SRPSKA ISTOCNO-PRAVOSLAVNA CRKVA SVETOGA SAVE, THE SERBIAN ORTHODOX CATHEDRAL OF ST. SAVA, THE BOARD OF TRUSTEES OF SAINT SAVA SERBIAN ORTHODOX CATHEDRAL, JOHN DOES, ABC CORPS

Defendant.

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 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

were read on this motion to/for

DISMISS

Upon the foregoing documents, the motion and cross-motion are determined as follows:

In the complaint, Plaintiff is alleged to be an architect retained by Defendant Serbian Orthodox Cathedral of St. Sava ("Cathedral"), the owner of a premises located at 15 West 25<sup>th</sup> Street, New York, New York, to provide architectural and project executive services in connection with the reconstruction of St. Sava Cathedral. Defendant Board of Trustees of Saint Sava Serbian Orthodox Cathedral ("Board") is apparently responsible for overseeing the routine operations associated with the real property at St. Sava Cathedral. The contract between these parties states it was made on August 23, 2017, but the execution dates contained on the signature page are October 25, 2017. In addition to Plaintiff's principal, the agreement is signed by Blagoje Mitch Micich as Chairman, St. Sava Building Committee ("Committee"). Plaintiff asserts the Committee was formed under the auspices of the Bishop of The Serbian Orthodox Dioceses of Eastern New York ("Dioceses") and that its chairman executed the contract on behalf of Cathedral. Subsequently, Board purportedly formed its own building committee which was chaired by Mark Cupkovie.

In April 2021, Plaintiff claims that it requested payment for additional services, pursuant to section 4.1 of the agreement purportedly totaling \$710,000.00, that were not part of its base contract. Plaintiff acknowledges it assented to accept a reduced fee of \$411,466.00 which would be subject to an additional \$60,000.00 reduction if paid within 30 days. These terms are alleged to have been accepted by the Dioceses and Board building committees. When payment was not made, Plaintiff claims it filed a mechanic's lien with the New York County Clerk's Office on September 15, 2022. An attempted extension of that lien was filed on September 5, 2023. Plaintiff commended the within action and pled causes of action to enforce the mechanic's lien through sale of the property as well as for breach of contract, an account stated and unjust enrichment

against Cathedral. As against Board, Plaintiff pled a cause of action for tortious interference with its contract Cathedral. An answer, later amended, was filed by Defendant Diocese. Now, Defendants Cathedral and Board move to dismiss Plaintiff's complaint as against them pursuant to CPLR §3211[a][7], [8] and [11]. Plaintiff opposes the motion and cross-moves for an extension of time to serve these defendants under CPLR §306-b. Defendants oppose the cross-motion.

Defendants posit that Plaintiff's cause of action to "foreclose" its lien should be dismissed for failure to state a claim since the lien was not timely filed. The Lien Law is intended to protect those who directly expend labor and services for the improvement of real property by permitting a contractor to file a "lien for the principal and interest, of the value, or the agreed price, of such labor . . . or materials upon the real property improved" (Lien Law §3; *West-Fair Elec. Contractors v Aetna Cas. & Sur. Co.*, 87 NY2d 148, 157 [1995]). As applicable here, a lien is timely when it is filed "during the progress of the work and the furnishing of the materials, or, within eight months after the completion of the contract, or the final performance of the work, or the final furnishing of the materials, dating from the last item of work performed or materials furnished" (Lien Law §10[1]). "Foreclosure" of a mechanic's lien is accomplished under Lien Law §24 which provides that a mechanic's lien may be "enforced against the property specified in the notice of lien and which is subject thereto and against any person liable for the debt upon which the lien is founded as prescribed in [article 3 of the Lien Law]". Further, an action in a court of record to enforce a mechanic's lien is governed by the "provisions of the real property actions and proceedings law relating to actions for the foreclosure of a mortgage upon real property" (Lien Law §43).

"A court has no inherent power to vacate or discharge a notice of lien except as authorized by Lien Law §19[6]" and that section permits vacatur of an untimely lien (*Matter of Lowe*, 4 AD3d 476, 476 [2d Dept 2004]). When evaluating the sufficiency of a complaint, "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). The allegations contained in the complaint must be presumed to be true, liberally construed and a plaintiff must be accorded every possible favorable inference (*see Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46 [2016]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506 [1979]; *Foley v D'Agostino*, 21 AD2d 60 [1st Dept 1964]). Further, "whatever may be implied from [the] statements [in the pleading] by reasonable intention" is required to be accepted (*Natixis Real Estate Capital Trust 2007-HE2 v Natixis Real Estate Holdings, LLC*, 149 AD3d 127 [1st Dept 2017]).

As such, a lien, and by extension, a cause of action to foreclose same, is facially valid if the lien sets forth dates indicating that the lien was filed within the applicable limitations period (*see Matter of Taocon, Inc. v Urban D.C. Inc.*, 110 AD3d 423 [2d Dept 1981]; *J. Fried Plumbing & Heating Corp. v 245 Glenmore Ave. Corp.*, 55 AD2d 945 [2d Dept 1977]; *see also Rivera v Department of Hous. Preserv. & Dev. of City of New York*, 130 AD3d 802 [2d Dept 2015]; *Matter of Taocon, Inc. v Urban D.C. Inc.*, 110 AD3d 423 [1st Dept 2013]). Plaintiff's notice of lien states on its face that the last item of work was performed on June 22, 2022, less than three months before it was filed. Contrary to any assertion by Defendants, the complaint, when read as required, does not fail to state a timely claim for foreclosure. "Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss" (*Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2d Dept 2006]).

Defendants seeks dismissal of the cause of action for breach of contract as against Cathedral on the basis that it was not a signatory thereto. "[T]he elements of a breach of contract claim are (1) the existence of a contract, (2) the plaintiff's performance, (3) the defendant's breach, and (4) resulting damages" (*Alloy Advisory*,

*LLC v 503 West 33rd Street Associates*, 195 AD3d 436, 436 [1<sup>st</sup> Dept 2021]). To be sure, it is well settled that one who is not a party to an agreement bears no liability thereunder (*see Balk v 125 W. 92nd St. Corp.*, 24 AD3d 193 [1<sup>st</sup> Dept 2005]). Nevertheless, a contract may be binding on a non-signatory when it is signed by an agent with actual or apparent authority (*see Hallock v State of New York*, 64 NY2d 224, 231 [1984]; *Greene v Hellman*, 51 NY2d 197, 204 [1980]). In this case, the complaint alleges, and the contract states on its first page, that an agreement was reached between Plaintiff and Cathedral. Plaintiff further pled that the contract was signed by the chair of Committee “on behalf of” Cathedral. In opposition, Plaintiff submitted a decree issued by the Diocese which states it creates Committee and designates Mark Cupkovie as a member. This sufficiently states a claim for breach of contract against Cathedral (*see Spectra Audio Research, Inc. v. 60-86 Madison Ave. Dist. Mgmt. Ass’n*, 267 AD2d 23 [1<sup>st</sup> Dept 1999]).

The branch of the motion to dismiss the unjust enrichment cause of action as duplicative of the breach of contract claim fails since Cathedral has taken the position it is not bound by same (*see eg Lembo v Rosania*, 187 AD3d 544 [1<sup>st</sup> Dept 2020]; *Elhanani v Kuzinez*, 172 AD3d 590 [1<sup>st</sup> Dept 2019]).

Generally, a claim for an account stated is pled by averring that a plaintiff prepared and sent invoices to a defendant in the ordinary course of business and that the defendant did not object to same in a timely fashion (*see EPF Intl. Ltd. v Lacey Fashions, Inc.*, 170 AD3d 515 [1<sup>st</sup> Dept 2019]). The Appellate Division, First Department recently explained that this type of claim is not duplicative of a breach of contract claim (*see Aronson Mayefsky & Sloan. LLP v Praeger*, 228 AD3d 182 [1<sup>st</sup> Dept 2024]). Contrary to Defendants’ assertion, the allegations in the complaint are sufficiently particular to state a claim in this regard (*see CPLR §§3013, 3014; Environmental Appraisers & Bldrs., LLC v Imhof*, 143 AD3d 756 [2d Dept 2016]). Indeed, given Cathedral’s denial of a relationship with Plaintiff, any insufficiency regarding dispute of invoices was inconsequential (*see Ryan Graphics, Inc. v. Bailin*, 39 AD3d 249 [1<sup>st</sup> Dept 2007]).

The branch of the motion to dismiss based upon CPLR §3211[a][11] is not established as Defendants failed to proffer any proof, by affidavit or otherwise, that the individual members of Board and/or Cathedral serve without compensation or that either Defendant qualifies as an entity under Internal Revenue Code §501[c][3] (*cf. Kamchi v Weissman*, 125 AD3d 142 [2d Dept 2014]; *Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 112 [1<sup>st</sup> Dept 2009]). Even assuming Defendants are entitled to qualified immunity provided by N-PCL §720-a, Plaintiff’s complaint, and the affidavit of S.D. Don Zivkovic submitted in opposition, sufficiently pleads to a “reasonable probability” that Board acting on behalf of Cathedral intentionally determined not to pay Plaintiff.

“The tort of inducement of breach of contract, now more broadly known as interference with contractual relations, consists of four elements: (1) the existence of a contract between plaintiff and a third party; (2) defendant’s knowledge of the contract; (3) defendant’s intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to plaintiff” *Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993]; *see also Burrowes v Combs*, 25 AD3d 370, 373 [1<sup>st</sup> Dept 2006]). This cause of action is fatally flawed as Plaintiff has pled that Board was acting on behalf of Cathedral throughout the transactions at issue. The very existence of the disputed contract, and the claim for breach thereof, is contingent on Board acting as Cathedral’s agent such that its actions were referable to the latter. “An agent cannot be held liable for inducing its principal to breach a contract where it is acting on behalf of its principal and within the scope of its authority” (*KSK Constr. Group, LLC v 26 E. 64th St., LLC*, 126 AD3d 568, 569 [1<sup>st</sup> Dept 2015]). Also, absent are any allegations that Board was not acting “in good faith and commit[ed] independent torts or predatory acts directed at another for personal pecuniary gain” (*Schmidt & Schmidt, Inc. v Town of Charlton*, 68 AD3d 1314, 1316 [3d Dept 2009]).

Turning to the cross-motion, CPLR §306-b requires service of the summons and complaint to be made within 120 days after filing said documents with the Court. If the service is not completed timely, a Plaintiff may move to extend time to serve upon showing good cause or in the interest of justice (CPLR §306-b; *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 104 [2001]). “Good cause” and the “interest of justice” are two different standards (see *Bumpus v New York City Transit Authority*, 66 AD3d 26, 32 [2d Dept 2009]).

To establish good cause, a plaintiff must demonstrate reasonable diligence in attempting service (see *Henneberry v Borstein*, 91 AD3d 493, 496 [1<sup>st</sup> Dept 2012]). Good cause may also be found when the Plaintiff’s failure to timely serve process is a result of circumstances beyond the Plaintiff’s control (see *Bumpus v New York City Transit Authority*, *supra*). The interest of justice standard requires review of the facts of the case and a balancing of the competing interests of the parties (see *Leader v Maroney*, *supra* at 105-106). “Indeed, the court may consider diligence or lack thereof, along with any other relevant factor, in making its determination, including expiration of the statute of limitations, the potentially meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff’s request for the extension of time, and prejudice to defendant” (*Estate of Fernandez v Wyckoff Hgts. Med. Ctr.*, 162 AD3d 742, 744 [2d Dept 2018]; see also *Nunz-Ariza v Nell*, 161 AD3d 614 [1<sup>st</sup> Dept 2018]; *McKenney v Beth Abraham Family of Health Services*, 99 AD3d 630 [1<sup>st</sup> Dept 2012]; *Hernandez v Abdul-Salaam*, 93 AD3d 522 [1<sup>st</sup> Dept 2012]).

Here, service was not made on Defendants, but they cannot credibly claim this litigation is a surprise. Indeed, it was Cathedral’s demand to foreclose under Lien Law §59 which precipitated this action. The within application was made some three months after the 120-day period expired, there is no demonstrable prejudice to Defendants shown, most of Plaintiff’s causes of action are presently viable, and it is likely the statute of limitations for the foreclosure cause of action has expired. Based on the foregoing, Plaintiff has demonstrated a basis for an extension of time to serve Defendants Board and Cathedral (see *Ardel Constr. & Design Group, Inc. v VBG 990 AOA, LLC*, 223 AD3d 451 [1<sup>st</sup> Dept 2024]). The branch of Defendants’ motion to dismiss pursuant to CPLR §3211[a][8] is consequently moot.

Accordingly, it is

ORDERED that Defendants’ motion is granted only to the extent that Plaintiff’s fifth cause of action pled against Defendant Board is dismissed, otherwise the motion is denied, and it is

ORDERED that Plaintiff is granted an additional 120 days from the date of e-filing of this decision to serve Defendants Board and Cathedral.

4/3/2025

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

*F. G. U. III*  
FRANCIS KAHN, III, A.J.S.C.  
**HON. FRANCIS A. KAHN III**  
J.S.C.