

**McCready & Rice Plumbing Inc. v Hart Future Co.**

2025 NY Slip Op 33482(U)

September 12, 2025

Supreme Court, New York County

Docket Number: Index No. 153444/2023

Judge: Francis A. Kahn III

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

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*

-----X

MCCREADY & RICE PLUMBING INC.,

Plaintiff,

- v -

HART FUTURE CO., TOLE HART, HOPE HART,

Defendant.

INDEX NO. 153444/2023

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 51, 52, 53, 54, 55, 56

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, the motion is determined as follows:

Plaintiff, McCready & Rice Plumbing, Inc. (“Triumph”), alleges it was retained by Defendant Hart Future Co. (“Future”), to perform certain construction activities at a project located at 47 West 69th Street, New York, New York. The premises was, and remains, owned by Defendant Hart J. Tole (“Tole”). Defendant Hope Hart (“Hope”) was apparently Plaintiff’s contact person at Future. Plaintiff claims that it was not paid for its service and, as a result, it filed a mechanic’s liens against the property totaling, \$12,857.21. Plaintiff commenced the within action and pled four causes of action as follows (1) foreclosure of the subject lien; (2) breach of contract against; (3) an account stated against; and (4) unjust enrichment. Defendants Tole and Hope answered separately and pled answered and pled seven affirmative defenses, as well as a counterclaim. Plaintiff certain affirmative defenses and counterclaims. Now, Plaintiff moves for summary judgment on all its causes of action and to dismiss Defendants’ affirmative defenses and counterclaim. Defendants Tole and Hope attempted to oppose the motion.

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]). “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 contractor is not required to be in contractual privity with the property owner to file and enforce its mechanic’s lien (*see Ferrara v Peaches Café LLC*, 32 NY3d 348, 353 [2018]; *Matell Contr. Co., Inc. v Fleetwood Park Dev., LLC*, 111 AD3d 681, 684 [2d Dept 2013]).

As the proponent of a motion for summary judgment on a cause of action based upon a mechanic's lien, Plaintiff had the burden of presenting evidentiary facts showing the existence of a valid lien (*see Bryan's Quality Plus, LLC v Dorime*, 112 AD3d 870 [2d Dept 2013], *citing L & W Supply Corp. v A.D.F. Drywall, Inc.*, 55 AD3d 1026, 1027 [2d Dept 2008]; *Strober Bros. v Kitano Arms Corp.*, 224 AD2d 351, 353 [1<sup>st</sup> Dept 1996]). Plaintiff demonstrated with the affidavit of Leonard Williams ("Williams"), the Vice President of Plaintiff, as well as with corroborating documentation, the validity of its lien and its entitlement to enforce same against the property owned by Tole.

In addition to foreclosure, a lienor, like Plaintiff, may recover on a breach of contract cause of action (Lien Law §54). In support of its motion Plaintiff was required to show, *prima facie*, the existence of a valid contract, performance by Plaintiff, breach of the contract by Defendants and resulting damages (*see Flomenbaum v New York Univ.*, 71 AD3d 80 [1st Dept 2009]; *Clearmont Prop., LLC v Eisner*, 58 AD3d 1052 [3d Dept 2009]). Here, Plaintiff proffered no written contract executed by any of the Defendants nor any other proof to support the existence of a verbal contract between any of the parties.

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 575 [1st 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]). Here, Plaintiff proved its *prima facie* case against Future with copies of its invoices and Williams' affirmation. However, there was no proof tying the invoices to either Tole or Hope. At best, the invoices note that they were billed to Future "C/O Hope Ann Hart".

The basis of an unjust enrichment cause of action "is that the defendant has obtained a benefit which in 'equity and good conscience' should be paid to the plaintiff (*see eg Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]). "In a broad sense, this may be true in many cases, but unjust enrichment is not a catchall cause of action to be used when others fail" (*Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790 [2012]). The justification for resort to the court's equitable jurisdiction on this type of claim, is to impose a legal obligation, in the absence of an enforceable contract, in order to prevent a party's unjust enrichment (*see eg Heller v Kurz*, 228 AD2d 263 [1st Dept 1996]). In this case, the unjust enrichment claim is supported by proof that Future and Tole consented to Plaintiff's work, received a benefit thereby and that, absent a written or verbal contract, it would be unjust to permit Tole to retain such beneficial services.

In opposition, no Defendant filed an affirmation or affidavit in opposition. Rather, Defendant Hope, acting *pro se*, e-filed three "affidavits" (NYSCEF Doc Nos 48, 49 and 50), from purported non-party witnesses. However, these documents are insufficient as they fail to substantially comply with the requisites of CPLR §2106. Plaintiff sought and obtained an adjournment of its motion to reply to these documents. After the motion was submitted on May 30, 2025, Defendant Hope filed, three subsequent affidavits which are rejected as untimely.

Accordingly, it is

ORDERED that Plaintiff's motion is granted to the extent that the branches for foreclosure of its lien against the property owned by Tole and for entry of a money judgment against Future and Tole are granted, otherwise the motion is denied, and it is

ORDERED that the Clerk of the Court for New York County is directed to enter judgment in favor of Plaintiff and against Defendants Hart Future Co. and Hart J. Tole in the amount of \$12,857.21, together with statutory interest from June 27, 2022, until the entry of judgment. Plaintiff is also granted costs to be award upon submission to the Clerk of an appropriate bill of costs, and it is

ORDERED that **Jeffrey R. Miller, Esq, 32 Broadway, 13th Floor, New York, New York 10004, 212-227-4200** is hereby appointed Referee in accordance with RPAPL § 1321 to compute the amount due to Plaintiff and examine whether the tax parcel can be sold in parcels; and it is further

ORDERED that if a Defendant appears and contests the amount due, in the discretion of the Referee, a hearing may be held, and testimony taken, otherwise the Referee shall hold no hearing and take no testimony or evidence other than by written submission; and it is further

ORDERED that by accepting this appointment the Referee certifies that he is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to §36.2 (c) (“Disqualifications from appointment”), and §36.2 (d) (“Limitations on appointments based upon compensation”), and, if the Referee is disqualified from receiving an appointment pursuant to the provisions of that Rule, the Referee shall immediately notify the Appointing Judge; and it is further

ORDERED that, pursuant to CPLR 8003(a), and in the discretion of the court, a fee of \$350 shall be paid to the Referee for the computation of the amount due and upon the filing of his report and the Referee shall not request or accept additional compensation for the computation unless it has been fixed by the court in accordance with CPLR 8003(b); and it is further

ORDERED that the Referee is prohibited from accepting or retaining any funds for himself or paying funds to himself without compliance with Part 36 of the Rules of the Chief Administrative Judge; and it is further

ORDERED that if the Referee holds a hearing or is required to perform other significant services in issuing the report, the Referee may seek additional compensation at the Referee’s usual and customary hourly rate; and it is further

ORDERED that plaintiff shall forward all necessary documents to the Referee and to defendants who have appeared in this case within 30 days of the date of this order and shall *promptly* respond to every inquiry made by the referee (promptly means within two business days); and it is further

ORDERED that if defendant(s) have objections, they must submit them to the referee within 14 days of the mailing of plaintiff’s submissions; and include these objections to the Court if opposing the motion for a judgment of foreclosure and sale; and it is further

ORDERED the failure by defendants to submit objections to the referee shall be deemed a waiver of objections before the Court on an application for a judgment of foreclosure and sale; and it is further

ORDERED that plaintiff must bring a motion for a judgment of foreclosure and sale within 30 days of receipt of the referee’s report; and it is further

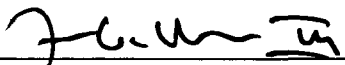
ORDERED that if plaintiff fails to meet these deadlines, then the Court may *sua sponte* vacate this order and direct plaintiff to move again for an order of reference and the Court may *sua sponte* toll interest depending on whether the delays are due to plaintiff's failure to move this litigation forward; and it further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the parties being removed pursuant hereto; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address ([www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh))); and it is further

ORDERED that Plaintiff shall serve a copy of this Order with notice of entry on all parties and persons entitled to notice, including the Referee appointed herein.

All parties are to appear for a virtual conference via Microsoft Teams on **January 21, 2026, at 10:00 a.m.** If a motion for judgment of foreclosure and sale has been filed Plaintiff may contact the Part Clerk ([SFC-Part32-Clerk@nycourts.gov](mailto:SFC-Part32-Clerk@nycourts.gov)) in writing to request that the conference be cancelled. If a motion has not been made, then a conference is required to explore the reasons for the delay.

<u>9/12/2025</u>					
DATE			FRANCIS KAHN, III, A.J.S.C.		
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input checked="" type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE