

<b>Cogen Elec. Servs., Inc. v RGN-N.Y. IV, LLC</b>
2014 NY Slip Op 32476(U)
September 24, 2014
Supreme Court, New York County
Docket Number: 152266/14
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

-----X  
COGEN ELECTRICAL SERVICES, INC.,

Plaintiff,

Index No. 152266/14

**DECISION/ORDER**

-against-

RGN - NEW YORK IV, LLC, CORPORATE  
INTERIORS CONTRACTING, INC. and JOHN  
JOSEPH O'BRIEN, JR.,

Defendants.

-----X  
**HON. CYNTHIA S. KERN, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion  
for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff Cogen Electrical Services, Inc. commenced the instant action against defendants RGN - New York IV, LLC ("RGN"), Corporate Interiors Contracting, Inc. ("CIC") and John Joseph O'Brien to collect certain sums it is allegedly owed for certain work it performed. RGN now moves for an Order dismissing plaintiff's complaint. For the reasons set forth below, RGN's motion is granted.

The relevant facts are as follows. RGN is a commercial tenant in the building located at 136 Madison Avenue, New York, New York (the "Property"). On or about March 28, 2013, RGN contracted with CIC, as the general contractor, to perform certain work involved in the

renovation of RGN's corporate offices on the fifth floor of the Property, also known as the Regus Business Center (the "Project"). CIC then contracted with plaintiff to perform certain electrical work on the Project. It is undisputed that plaintiff did not maintain a contract with RGN for any of the work it performed. When CIC allegedly failed to pay plaintiff pursuant to their contract, on January 9, 2014, plaintiff filed a mechanic's lien against "136 Madison Avenue, 5<sup>th</sup> Floor, Regus Business Center, New York, New York 10016" in the amount of \$69,513.00 (the "Lien"). On or about February 26, 2014, RGN posted a cash undertaking pursuant to Lien Law § 20 to discharge the Lien against the Property. Plaintiff then commenced the instant action seeking, *inter alia*, to foreclose the Lien. RGN now moves for an Order dismissing plaintiff's complaint.

On a motion addressed to the sufficiency of the pleadings pursuant to CPLR § 3211(a)(7), the facts pleaded are assumed to be true and accorded every favorable inference. *See Morone v. Morone*, 50 N.Y.2d 481 (1980). Moreover, "a complaint should not be dismissed on a pleading motion so long as, when the plaintiff's allegations are given the benefit of every possible inference, a cause of action exists." *Rosen v. Raum*, 164 A.D.2d 809 (1<sup>st</sup> Dept 1990). "Where a pleading is attacked for alleged inadequacy in its statements, [the] inquiry should be limited to 'whether it states in some recognizable form any cause of action known to our law.'" *Foley v. D'Agostino*, 21 A.D.2d 60, 64-65 (1<sup>st</sup> Dept 1977), citing *Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956). Further, in order to prevail on a defense founded on documentary evidence pursuant to CPLR § 3211 (a)(1), the documents relied upon must definitively dispose of plaintiff's claim. *See Bronxville Knolls, Inc. v. Webster Town Partnership*, 221 A.D.2d 248 (1<sup>st</sup> Dept 1995). Additionally, the documentary evidence must be such that it resolves all factual issues as a matter of law. *Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314 (2002).

Pursuant to the Lien Law, “a mechanic’s lien is valid to the extent of ‘the sum earned and unpaid on the contract at the time of filing the notice of lien, and any sum subsequently earned thereon.’” *Albert J. Bunce, Ltd. v. Fahey*, 73 A.D.2d 632 (2d Dept 1979)(citing New York Lien Law (“Lien Law”) § 4(1)). Absent a direct contractual relationship between an owner and a subcontractor, “the rights of a subcontractor are derivative of the rights of the general contractor and a subcontractor’s lien must be satisfied out of funds ‘due and owing from the owner to the general contractor’ at the time the lien is filed.” *Timothy Coffey Nursery/Landscape v. Gatz*, 304 A.D.2d 652, 653-54 (2d Dept 2003)(citing *Electric City Concrete Co. v. Phillips*, 100 A.D.2d 1, 4 (3d Dept 1984); *see also Penava Mech. Corp. v. Afgo Mech. Servs., Inc.*, 71 A.D.3d 493, 495 (1<sup>st</sup> Dept 2010). Further, “in the absence of any balance due to [the general contractor] from the owners, [a subcontractor] is required to look to the contractor that engaged its services for payment.” *Blake Elec. Contracting Co., Inc. v. Paschall*, 222 A.D.2d 264, 266 (1<sup>st</sup> Dept 1995).

In the instant action, RGN’s motion for an Order pursuant to CPLR § 3211(a)(1) dismissing the complaint based on documentary evidence is granted. As an initial matter, RGN has provided the affidavit of Tom McLean, the Director of Construction of the Regus Management Group, LLC (“Regus”), who has affirmed that Regus is an affiliate of RGN and was responsible for making, and did make, all required payments to CIC for the work performed. Additionally, RGN has provided records which demonstrate that there was no amount due and owing from RGN to CIC at the time the Lien was filed. Specifically, RGN has provided CIC’s invoices for the work completed, receipts demonstrating wire transfers from RGN’s bank, Bank of America, to CIC in payment for that work, proof that CIC received and acknowledged full payment from RGN no later than October 16, 2013, including waivers and releases of any claims

based on the amounts set forth in the invoices and proof that the work performed by CIC was completed by September 26, 2013. Thus, as RGN has produced documentary evidence demonstrating that no money was due to CIC pursuant to their contract when the Lien was filed, the complaint must be dismissed as against RGN.

In response, plaintiff has failed to produce evidence or an affidavit by an individual with knowledge of the facts contradicting the evidence provided by RGN which establishes that there was no amount due and owing from RGN to CIC at the time the Lien was filed. Indeed, plaintiff merely asserts that CIC and Mr. O'Brien, who have allegedly defaulted in the action, may possess "missing information as to whether they have been fully paid by RGN." However, such assertion is merely speculative and is insufficient to defeat RGN's motion to dismiss the complaint based on documentary evidence. *See Trofien Steel & Construction Inc. v. Rybak*, 26 Misc.3d 1223 (Sup. Ct. Kings County 2010)(dismissing subcontractor's complaint against the owner based on documentary evidence which established that no money was due to the general contractor at the time the lien was filed and because the subcontractor failed to provide any evidence contradicting such assertion).

Finally, to the extent plaintiff seeks a default judgment in its opposition papers against CIC and Mr. O'Brien, such request is denied as plaintiff must make a formal motion and provide the basis for such relief pursuant to CPLR § 3215.

Accordingly, RGN's motion for an Order dismissing the complaint is granted. The complaint is hereby dismissed as against RGN only. This constitutes the decision and order of the court.

Dated: 9/24/14

Enter: \_\_\_\_\_

CK

J.S.C.

CYNTHIA S. KERN  
J.S.C.