SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER Justice

PART 15

Index Number : 158345/2012
A. & L. CONSTRUCTION CORP.
vs.
EAST HARLEM DEVELOPERS, LLC
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to ____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1, 2, 3

Answering Affidavits — Exhibits _____ | No(s). 4, 5, 6

Replying Affidavits _____ | No(s). 7

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 1/2/14

HON. EILEEN A. RAKOWER, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

----------X

A. & L. CONSTRUCTION CORP.,

Plaintiff,

- against -

EAST HARLEM DEVELOPERS, LLC,

Defendant.

----------X

Index No.
158345/2012

DECISION and ORDER

Mot. Seq. 2

HON. EILEEN A. RAKOWER

This is an action for foreclosure of a mechanic's lien and judgment in the amount of $150,229.79 with respect to property located at 178 East 117th Street, New York, New York. The Complaint pleads four causes of action: (1) Foreclosure on a mechanic's lien; (2) breach of contract; (3) account stated; and (4) quantum meruit.

On or about January 20, 2013, defendant East Harlem Developers, LLC ("Defendant"), interposed its answer and moved for partial summary judgment dismissing the first and second causes of action of Plaintiff's Complaint, discharging the mechanic's lien, and cancelling the notice of pendency. The Court granted Defendant's motion and severed the remaining account stated and quantum meruit claims.

Plaintiff now moves for summary judgment pursuant to CPLR §3212 on its account stated and quantum meruit claim. In support, Plaintiff submits the affidavit of Segundo Maldonado, Chairman and Chief Executive of Plaintiff.

Maldonado avers that pursuant to a contract entered on December 11, 2007 between Plaintiff and Dynatec Contracting Inc. ("Dynatec"), as agent and general

contractor for Defendant, the owner of the subject property, Plaintiff was requested to furnish, *inter alia*, the interior framing, insulation, sheetrock and taping, and installation of interior door, moldings, closets, kitchens and associated hardware. The first item of work was performed and the first item of material was furnished by Plaintiff on February 1, 2008 and completed on April 5, 2010.

Maldonado avers that Plaintiff submitted to Defendant written invoices for payment as the work progressed, that Defendant received those invoices, that Defendant made payments to Plaintiff through Dynatec or directly in the amount of $210,750.27 that Defendant has never disputed them nor has claimed any deficiencies in the work for which the invoices reflected, and that Defendant has failed to pay the remaining outstanding balance due in the amount of $150,299.79.

As further averred by Maldonado, the final invoice submitted to Plaintiff was dated September 24, 2010 and in the amount of $150,229.79. Plaintiff had received checks from Dynatec on behalf of East Harlem until August 26, 2009 and three checks from East Harlem thereafter until May 31, 2010, the date of the last check. On November 22, 2010, within eight months after the completion of the contract, Plaintiff filed a notice of lien in writing in the amount of $150,229.79.

Defendant opposes Plaintiff's motion for summary judgment and cross moves for an Order for leave to serve a First Amended Answer and Counterclaim to add counterclaims for alleged defective work done by Plaintiff.

In opposition to Plaintiff's motion and in support of Defendant's cross motion to amend, Defendant submits the affidavits of Mosche Gold, principal of Defendant, dated August 28, 2013. Gold avers that the work that Plaintiff performed on the subject premises was inferior and defective and that Defendant withheld payment from Plaintiff as a result. Annexed to Gold's affidavit is another affidavit from Moshe Gold, dated December 15, 2011, averring to the alleged inferior work, and the proposed First Amended Answer. Gold's prior affidavit dated December 15, 2011 was submitted in the previous case between the parties (*A&L Construction Corp. v. East Harlem Developers, LLC and TD Bank, N.A.*, Index No. 108255/2011) commenced by A&L for payment on May 27, 2011. That action was dismissed for lack of standing and Plaintiff thereafter commenced this action.

CLR §3025 provides,

> (b) Amendments and supplemental pleadings by leave. A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of the court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleadings clearly showing the changes or additions to be made to the pleading.

Here, Defendant is entitled to amend its Answer to add a counterclaim based on alleged defective work. There is nothing in the record indicating that any prejudice will result from amendment nor is the proposed amendment plainly lacking in merit.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]).

"An account stated is an agreement between the parties to an account based upon prior transactions between them with respect to the correctness of the separate items composing the account and the balance due, if any, in favor of one party or the other . . . In this regard, receipt and retention of plaintiff's accounts, without objection within a reasonable time, and agreement to pay a portion of the indebtedness, [gives] rise to an actionable account stated, thereby entitling plaintiff to summary judgment in its favor." (*Shea & Gould v. Burr*, 194 AD2d 369, 370[1st Dept. 1993]). "The existence of a counterclaim of uncertain amount does not preclude the grant of summary judgment in favor of plaintiff on its account-stated cause of action; however, execution and costs should abide the resolution of the remaining claims." *RPI Professional Alternatives, Inc. v.*

Citigroup Global Markets, Inc., 61 A.D. 3d 618, 619 [1st Dept 2009](citations omitted).

Here, Plaintiff has made a prima facie showing of entitlement to judgment as a matter of law on its account stated claim by submitting evidence of Defendant's receipt and retention of Plaintiff's invoices without objection within a reasonable time. Defendant, in opposition, has failed to raise a triable issue of fact. While Defendant now contends that it withheld payment because of the inferior nature of Plaintiff's work and asserts a counterclaim for the same, Defendant does not submit sufficient evidence in admissible form that Defendant made any objection on that basis or any other basis upon receipt of the Plaintiff's invoices or within a reasonable time thereafter.

Wherefore, it is hereby,

ORDERED that Plaintiff's motion for partial summary judgment on its account stated claim is granted; and it is further

ORDERED that the Clerk enter judgment in favor of Plaintiff and against defendant East Harlem Developers, LLC in the amount of $150,299.79, together with interest as prayed for allowable by law (at the rate of 9% per annum) until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that defendant East Harlem Developers, LLC's cross motion to amend the Answer is granted, and the First Amended Answer in the proposed form annexed to the moving papers shall be deemed served on plaintiff upon service of a copy of this Order with a notice of entry thereof.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: JANUARY 2, 2014

EILEEN A. RAKOWER, J.S.C.