SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

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SUNSHINE QUALITY CONSTRUCTION, INC.,

Plaintiff,

-against-

GARY H. SILVER ARCHITECTS, P.C., et. al.

Defendants.

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DECISION AND ORDER

Index No. 151118/2015

HON. ANIL C. SINGH, J.:

Defendants Gary H. Silver Architects, P.C., and 2147 Second Avenue, LLC move by order to show cause for an order: 1) dismissing the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, and CPLR 3211(a)(1) because a complete defense exists based on documentary evidence; and 2) upon dismissal of the complaint, vacating, voiding and discharging a mechanic's lien filed by plaintiff against defendant 2147 Second Avenue LLC's building located at 1247 Second Avenue in Manhattan and a Notice of Pendency. Plaintiff Sunshine Quality Construction, Inc., opposes the motion.

This is an action to foreclose a mechanic's lien.

Plaintiff commenced the instant action by filing a summons and verified complaint on February 3, 2015. The complaint alleges that the lien against defendant's property was filed on June 6, 2014, within six (6) months of the date

when the work was last performed and/or materials and equipment were last furnished. The alleged amount of the mechanic's lien is sum of $364,941.

The complaint alleges that defendant 2147 Second Avenue, LLC, is the fee simple owner of the liened premises, and defendant Gary H. Silver Architects, P.C., was the general contractor on the project in question for the work performed at the liened premises. The complaint asserts four causes of action: 1) foreclosure on the mechanic's lien; 2) misappropriation of funds; 3) breach of contract; and 4) quantum meruit.

Plaintiff filed a Notice of Pendency on February 2, 2015.

Defendants' first contention is that the complaint contains no allegation that there is any sum of money due from the owner to the contractor, and plaintiff has failed, therefore, to allege an essential element of the cause of action for foreclosure on a mechanic's lien. Defendants contend that the work required under the construction contract was completed as of June 2011, and plaintiff acknowledged having been paid in full for its services, as evidenced by plaintiff's principal signing both a contractor's affidavit of payment of debts and claims, and a final waiver of lien, both notarized on June 27, 2011. Further, defendants assert that the representations contained in the mechanic's lien alleging ongoing work through December 2013 are untrue and were made up solely to as to comply with the

requirements under the Lien Law that a mechanic's lien must be filed within eight (8) months of the last date services or materials are provided to be timely. Accordingly, defendants contend that the mechanic's lien is a complete fabrication and should be discharged and voided, and the complaint seeking to foreclose on the mechanic's lien should be dismissed as it is entirely frivolous.

On a motion to dismiss pursuant to CPLR 3211, the court must afford the pleadings a liberal construction, accepting the allegations of the complaint as true and provide plaintiff the benefit of every possible favorable inference (AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co., 5 NY3d 582, 591 [2005]). The court's 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, a motion for dismissal will fail (Polonetsky v. Better Homes Depot, 97 NY2d 46, 54 [2001]). The facts pleaded are to be presumed to be true and are to be accorded every favorable inference, although bare legal conclusions, as well as factual claims, flatly contradicted by the record are not entitled to any such consideration (see Morone v. Morone, 50 NY2d 481 [1980]).

"Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (Almazan v. Gani Realty Corp., 60 A.D.3d 491, 492 [1st Dept., 2009]).

"In assessing a motion to dismiss under CPLR 3211(a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint, the criterion being not whether the proponent of the pleading has simply stated a cause of action, but whether he or she actually has one" (id.)

Plaintiff exhibits the sworn affidavit of Henry Borton, who states that he is the President of the corporate plaintiff. Mr. Borton asserts that the unpaid work, which is the subject of the mechanic's lien, was commenced after the exterior and structural work that is the subject of the final lien waiver. He states further that he was called back on several other occasions to do repair work on the exterior, which ended in December 2013, in a major cladding alteration and repair that was done at the insistence of the defendants. According to Mr. Borton, he demanded payment from the defendants on numerous occasions, and the defendants promised to pay him for the work. Further, he states that the defendants told him to be patient; that he has borrowed money from a line of credit to finance the improvements he made to the property; and that payment remains due and owing from the defendants.

Viewing the allegations in the verified complaint and the affidavit in the light most favorable to plaintiff, the Court finds that plaintiff has stated a valid cause of action to foreclose on a mechanic's lien. The Court finds further that the documentary evidence submitted by the defendants does not establish a conclusive

defense to plaintiff's mechanic's lien claim.

In their reply papers, the defendants assert that this Court has the discretion to deem the figures set forth in the mechanic's lien to have been "willfully exaggerated."

"The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion" (Dannasch v. Bifulco, 184 A.D.2d 415, 417 [1st Dept., 1992]). As the "willful exaggeration" issue is being raised by defendants for the first time in the reply papers, we will not consider it.

Finally, we turn to defendants' contention that the complaint fails to state a cause of action for quantum meruit against all defendants.

"Where there is an express contract, as here, between the general contractor and the subcontractor, the owner of the subject premises may not be held directly liable to the subcontractor on a theory of implied or quasi-contract, unless he has in fact assented to such an obligation; the mere fact that he has consented to the improvements provided by the subcontractor and accepted their benefit does not render him liable to the subcontractor, whose sole remedy lies against the general contractor" (Contelmo's Sand & Gravel v. J&J Milano, 96 A.D.2d 1090, 1090 [2nd Dept., 1983]).

Here, complaint the complaint does not allege a contractual obligation between plaintiff and defendant 2147 Second Avenue, LLC, the owner of the property in issue. Nor does the complaint allege that the defendant assented to such an obligation. The third cause of action alleges that plaintiff entered into an agreement with only one of the defendants – namely, Gary H. Silver Architects, P.C.

Accordingly, it is

ORDERED that the motion is granted only to the extent that fourth cause of action of the complaint (quantum meruit) is dismissed as against defendant 2147 Second Avenue, LLC; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 320, 80 Centre Street, on April 8, 2015, at 9:30 AM.

The foregoing constitutes the decision and order of the court.

Date: 3/3/15
New York, New York

Anil C. Singh