West Flooring & Design, Inc. v K. Romeo, Inc.
2016 NY Slip Op 31967(U)
July 1, 2016
Supreme Court, Suffolk County
Docket Number: 10412-2015
Judge: William G. Ford
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[* 1]

SHORT FORM ORDER

INDEX NO.: 10412-2015 & 611626-2015

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:
HON. WILLIAM G. FORD
JUSTICE SUPREME COURT

ACTION 1

WEST FLOORING & DESIGN, INC.,
Plaintiff,

-against-

K. ROMEO, INC., and HARSH PADIA
Defendants.

INDEX NO.: 10412-2015

Motion Date: 9/14/15
Adjourn Date: 5/9/16
Motion Seq #:001 MG

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ACTION 2

WEST FLOORING & DESIGN, INC.,
Plaintiff,

-against-

K. ROMEO, INC., HARSH PADIA and PAUL CONSIGLIO CONTRACTING, INC.,
Defendants.

INDEX NO.: 611626-2015

Motion Date Seq 01: 1/14/16
Motion Date Seq 02: 2/11/16
Adjourn Date: 5/9/16
Motion Seq #: 001 MG
002 MD

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Upon consideration of the following papers on the motions pending in this matter:

1. Defendant Harsh Padia's Notice of Motion to Dismiss the Complaint pursuant to CPLR 3211 and supporting papers under Index No. 10412/2015;
2. Defendant Harsh Padia's Reply papers in further support of dismissal of the Complaint under Index No. 10412/2015
3. Defendants K. Romeo, Inc. & Harsh Padia's Notice of Motion to Dismiss the Complaint pursuant to CPLR 3211 and supporting papers under Index No. 611626/2015;
4. Plaintiff West Flooring & Design, Inc.'s Notice of Cross-Motion and supporting papers pursuant to CPLR 602(a) for consolidation for joint trial under Index No. 611626/2015
5. Defendants K. Romeo, Inc. & Harsh Padia's Reply papers in further support of dismissal of the Complaint under Index No. 611626/2015; it is

ORDERED that plaintiff West Flooring's cross-motion seeking an order consolidation Action No. 1, 101412/2015 and Action No. 2, 611626/2015 is **GRANTED** and that defendant, Padia's motion to dismiss the complaint against him is **GRANTED**; defendant K. Romeo and Padia's motion to dismiss is **DENIED** as thoroughly examined below.

The relevant procedural history and the parties' respective positions are summarized thusly:

Factual & Procedural Background

Pending before the Court are a series of motions made by both parties involved in two separate actions arising from the same set of circumstances, transactions and occurrences. Succinctly summarized, in Action No. 1 under Index No. 10412/2015, plaintiff West Flooring & Design, Inc. (hereinafter "West Flooring") sued defendants K. Romeo, Inc. and Harsh Padia asserting claims for breach of contract, unjust enrichment and quantum meruit.

These claims arose from a home construction project for a residence located in Bridgehampton, New York, for which on or about July 14, 2014, plaintiff had been retained by K. Romeo, general contractor, to supply certain materials and provide labor for the installation of treads and wood on a set of stairs in the home. Padia is the owner of that residence. It is alleged that plaintiff sent the first shipment of material for the project on February 13, 2014. On K. Romeo's inspection it was determined that those materials were defective and non-conforming. West Flooring began installation of hardwood floor and stair treads and/or risers on the work site on or around February 16, 2015. Thereafter West Flooring's portion or participation in the home construction project ceased. The parties dispute when this occurred with plaintiff claiming that it last performed work on site on or about September 9, 2015. Defendants dispute this and argue that West Flooring walked off the job on March 4, 2015. Defendants further claim that West Flooring indicated in writing via email received on April 11, 2015 its inability to continue to supply conforming supplies. At that point, West Flooring had received approximately $174,565.10 in payment on its agreement with K. Romeo.

West Flooring alleges that it performed under the subcontractor agreement and that defendants breached that agreement by failing to pay it for services rendered and thus seeks damages in the amount of $73,334. In opposition, K. Romeo responds that West Flooring indicated in writing via email that it would no longer be able to perform under the contract and supply conforming goods. K. Romeo has filed a counterclaim for breach of warranty and unjust enrichment for $100,000.00, having sought additional and outside help as substitute performance.

Padia has moved to dismiss West Flooring's Complaint pursuant to CPLR 3211(a)(1),(3) & (7) arguing that as the homeowner who retained K. Romeo's services as the general contractor for the construction at his home, he lacked direct privity of contract with West Flooring, subcontractor retained under separate agreement with K. Romeo. Padia further contends that his agreement with K. Romeo required indemnification of any and all claims arising from the project, and that the subcontractor agreement between K. Romeo and West Flooring further required the same or similar indemnification. That motion was submitted unopposed.

Motions are also pending before the Court, in Action No. 2 under Index No. 611626/2015. West Flooring commenced a second, separate action against K. Romeo, Padia and alleged necessary and indispensable party Paul Consiglio Contracting, Inc.[1] This action is premised on the same transaction and occurrences between and among West Flooring, Padia and K. Romeo, with the exception being that now plaintiff additionally seeks to foreclosure on a mechanic's lien filed on Padia's property on or about September 9, 2015 for the uncompensated work performed.

Defendants Padia and K. Romeo have also moved to dismiss this Complaint pursuant to CPLR 3211(a)(1),(4) & (7) arguing that since the action involves nearly identical parties, arises from the same set of facts, circumstances, transactions and occurrences as a prior action pending with this Court, it should be dismissed as a matter of law. Further, defendants argue that West Flooring's mechanic's lien is untimely having been filed after the four month statute of limitations provided by the New York Lien Law.

Standard of Review

A motion to dismiss pursuant to CPLR 3211(a)(1) will be granted only if the "documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (***Fortis Fin. Servs. v. Fimat Futures USA***, 290 AD2d 383, 383, 737 NYS2d 40; *see* ***Leon v. Martinez***, 84 NY2d 83, 88, 614 NYS2d 972; ***Martin v. New York Hosp. Med. Ctr. of Queens***, 34 AD3d 650, 826 NYS2d 85; ***Berger v. Temple Beth-El of Great Neck***, 303 AD2d 346, 347, 756 NYS2d 94). "[I]f the court does not find [their] submissions 'documentary', it will have to deny the motion" (Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3211:10 at 22); ***Fontanetta v. Doe***, 73 A.D.3d 78, 83-84, 898 N.Y.S.2d 569, 573 [2d Dept. 2010)]. If documentary proof submitted in support of the motion disproves a material allegation of the complaint, a determination in the defendant's favor is warranted (*see* ***Weiss v. TD Waterhouse***, 45 AD3d 763, 847 NYS2d 94; ***McGuire v. Sterling*** *Doubleday Enters., LP,* 19 AD3d 660, 661–662, 799 NYS2d 65); ***Snyder v. Voris, Martini & Moore, LLC***, 52 AD3d 811, 812, 860 NYS2d 622, 623-24 [2d Dept. 2008)].

In order for evidence submitted in support of a CPLR 3211(a)(1) motion to qualify as "documentary evidence," it must be "unambiguous, authentic, and undeniable" (***Granada Condominium III Assn. v. Palomino***, 78 AD3d 996, 996–997, 913 NYS2d 668 [internal quotation marks omitted]. "[J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case." At the same time, "[n]either affidavits, deposition testimony, nor letters are considered documentary evidence within the intendment of CPLR 3211 (a)(1)"(***Attias v. Costiera***, 120 AD3d 1281, 1282-83, 993 NYS2d 59, 61-62 [2d Dept. 2014]).

[1] The parties' papers reference that plaintiff may have discontinued litigation against this entity, however the Court's file does not reflect receipt of any such stipulation.

In determining whether a complaint is sufficient to withstand a motion to dismiss pursuant to CPLR 3211(a)(7), "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 a motion for dismissal will fail" (***Guggenheimer v. Ginzburg***, 43 NY2d 268, 275, 401 NYS2d 182; *see* ***1414 Realty Corp. v. G & G Realty Co.***, 272 AD2d 309, 707 NYS2d 885). "The complaint must be construed liberally, the factual allegations deemed to be true, and the nonmoving party granted the benefit of every possible favorable inference" (***Hense v. Baxter***, 79 AD3d 814, 815, 914 NYS2d 200; *see* ***Leon v. Martinez***, 84 NY2d 83, 87, 614 NYS2d 972; ***Kopelowitz & Co., Inc. v. Mann***, 83 AD3d 793, 796–797, 921 NYS2d 108). In addition, a court may consider any factual submissions made in opposition to a motion to dismiss in order to remedy pleading defects (*see* CPLR 3211[c]; ***Ryan v. Cover***, 75 AD3d 502, 503, 904 NYS2d 750; ***Tarzia v. Brookhaven Natl. Lab.***, 247 AD2d 605, 669 NYS2d 230); ***Quinones v. Schaap***, 91 AD3d 739, 740, 937 NYS2d 262, 264 [2d Dept. 2012]).

However, it has also been held that the rule that the facts alleged are presumed to be true and are to be accorded every favorable inference which can be drawn therefrom on a motion addressed to the sufficiency of the pleadings (*see,* ***Morone v. Morone***, 50 NY2d 481, 429 NYS2d 592;) does not apply to allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence (*see,* ***Roberts v. Pollack***, 92 AD2d 440, 444, 461 NYS2d 272; ***Matter of City of Albany v. McMorran***, 16 AD2d 1021, 1022, 230 NYS2d 438); ***SRW Associates v. Bellport Beach Prop. Owners***, 129 AD2d 328, 331, 517 NYS2d 741, 743 [2d Dept. 1987]).

Pursuant to CPLR 3211(a)(4), a court has broad discretion in determining whether an action should be dismissed on the ground that there is another action pending between the same parties for the same cause of action (*see* ***Whitney v. Whitney***, 57 NY2d 731, 732, 454 NYS2d 977; ***Cherico, Cherico & Assoc. v. Midollo***, 67 AD3d 622, 886 NYS2d 914). A court may dismiss an action pursuant to CPLR 3211(a)(4) where there is a substantial identity of the parties, the two actions are sufficiently similar, and the relief sought is substantially the same (*see* ***Scottsdale Ins. Co. v. Indemnity Ins. Corp. RRG***, 110 AD3d 783, 784, 974 NYS2d 476; ***Matter of Willnus***, 101 AD3d 1036, 1037, 957 NYS2d 229). It is not necessary that "the precise legal theories presented in the first action also be presented in the second action" (***Matter of Willnus***, 101 AD3d at 1037, 957 NYS2d 229; *see* ***Syncora Guar. Inc. v. J.P. Morgan Sec. LLC***, 110 AD3d 87, 96, 970 NYS2d 526; ***Simonetti v. Larson***, 44 AD3d 1028, 1029, 845 NYS2d 369). The critical element is whether both suits arise out of the same subject matter or series of alleged wrongs (*see* ***Scottsdale Ins. Co. v. Indemnity Ins. Corp. RRG***, 110 AD3d at 784, 974 NYS2d 476; ***DAIJ, Inc. v. Roth***, 85 AD3d 959, 960, 925 NYS2d 867; ***Cherico, Cherico & Assoc. v. Midollo***, 67 AD3d at 622, 886 NYS2d 914); ***Jadron v. 10 Leonard St., LLC***, 124 AD3d 842, 843, 2 NYS3d 563, 565 [2d Dept. 2015]).

Thus, a court may dismiss an action pursuant to CPLR 3211(a)(4) where there is a substantial identity of the parties for the same cause of action (*see* ***Lopez v. Shaughnessy***, 260 AD2d 551, 688 NYS.2d 614). Further, to warrant dismissal, the two actions must be "sufficiently similar" and the relief sought must be "the same or substantially the same" (***White Light Prods. v. On The Scene Prods.***, 231 AD2d 90, 660 N.Y.S.2d 568, *quoting* ***Kent Dev. Co. v. Liccione***, 37 NY2d 899, 378 NYS.2d 377; ***Montalvo v. Air Dock Sys.***, 37 AD3d 567, 567, 830 NYS2d 255, 256 (2d Dept. 2007]).

Discussion

I. Consolidation

[* 5]

As an initial matter, the Court pauses to note that two related actions which pend on its docket, comprise cases or controversies involving the same subject matter, nearly identical parties, and claims arising from interpretation of the same contractual agreements. Given this, defendants urge dismiss Action No. 2 as unduly repetitive and an unwarranted waste of judicial resources, on the theory that the second action was a naked attempt at a second bite at the apple, or worse, vexatious and frivolous litigation commenced by the plaintiff. Defendant additionally argue that the inclusion of the additional defendant Consiglio is a sham. Lastly, defendant argues that since the previous action exists, between identical parties, with the same or similar causes of action on the same subject matter, that under CPLR 3211(a)(4), dismissal is warranted and appropriate.

Plaintiff on the other hand counters that its claim seeking foreclosure on its mechanic's lien is substantively different from the breach of contract and quasi-contractual theories of recovery advanced in the previous action, and thus consolidation instead of dismissal would promote judicial economy. On this point, the Court is in agreement with West Flooring's position. This Court is not of the view that the two actions are mutually exclusive or that the claims asserted in both are diametrically opposed. Therefore West Flooring's cross-motion is **GRANTED** to the extent that its two actions will be consolidated to serve the interests of judicial economy and the expedite resolution of the claims asserted in its complaints.

Accordingly, it is

ORDERED that the cross-motion by plaintiff West Flooring defendant in Action No. 2, order of consolidation and directing a joint trial of Action No. 1 and Action No. 2 is considered under CPLR 602(a) and is granted to the extent that the two actions shall be tried jointly on the issue of liability only (*see* ***Import Alley of Mid-Island, Inc. v Mid-Island Shopping Plaza, Inc.,*** 103 AD2d 797, 477 NYS2d 675 [2d Dept. 1984]); and it is further

ORDERED that the movants shall promptly serve a copy of this Order via first class mail upon all appearing parties in both actions, and upon the Suffolk County Clerk; and it is further

ORDERED that the Clerk of the County of Suffolk is directed to consolidate both files as one under Index No. 10412-2015; and it is further

ORDERED that the new caption of these consolidated actions shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK
--X
WEST FLOORING & DESIGN, INC.

PLAINTIFF,

-against-

K. ROMEO, INC., HARSH PADIA, and PAUL CONSIGLIO CONTRACTING, INC.,

DEFENDANTS.
--X

and it is further

ORDERED that all counsel shall appear for the previously scheduled compliance conference at 9:30 a.m., in the courtroom of the undersigned, so as to establish one timetable for completion of discovery in this matter; it is further

ORDERED that all counsel shall appear on that date ready to enter into and bind their parties to a discovery Order, except as to those items that have already been agreed upon and exchanged by and between the parties.

New York CPLR § 602(a) provides that "[w]hen actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all of the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

Since the actions arise from the same incident and involve common questions of fact, consolidation is appropriate to avoid inconsistent verdicts (*see* ***Fransen v Maniscalco,*** 256 AD2d 305, 681 NYS2d 310 [2d Dept. 1998]); *see also* ***Okin v White Plains Hospital,*** 97 AD2d 399, 467 NYS2d 225 [2d Dept. 1983]). Moreover, it would be a waste of judicial resources and duplicitous to require two separate trials with the concomitant costs and expenses (*see* ***Wieder v Skala,*** 218 AD2d 507, 630 NYS2d 308 [1st Dept. 1995]).

Where the pleadings in both actions show that both are based on the same contractual agreements and arise out of the same actionable wrongs and there is a substantial identity of the parties, and the nature of the relief sought is substantially the same, courts have held that there is no good reason for two actions rather than one (*see,* ***Kent Dev. Co. v. Liccione,*** 37 NY2d 899, 378 NYS2d 377; ***Barringer v. Zgoda,*** 91 AD2d 811, 458 NYS2d 42; Siegel, Practice Commentaries, McKinney's Cons.Laws of N.Y., Book 7B, CPLR C3211:15, at 26); ***JC Mfg., Inc. v. NPI Elec., Inc.***, 178 AD2d 505, 506, 577 NYS2d 145, 146 [2d Dept. 1991]). The appellate courts have made clear that the trial court should consolidate actions involving common questions of law and fact, where consolidation will avoid unnecessary duplication of trials, save unnecessary costs and expense, and prevent an injustice which would result from divergent decisions based on the same facts (***Gutman v. Klein***, 26 AD3d 464, 465, 811 NYS2d 413, 414 [2d Dept. 2006]).

It has been previously determined that where both actions arise out of the same subject matter; the same issue of determining completion of a project under contract, the same witnesses will testify at both trials, and all the parties presumably reside [in the same county] or are readily available to all parties at that location, and lastly and both actions were commenced within a reasonable amount of time, it is an improvident exercise of discretion to deny the motion, *inter alia,* to consolidate the actions (***Preiss v. Brannigan,*** 6 AD2d 1046, 179 NYS2d 91); ***Cafil Homes, Inc. v. Ihasz***, 104 AD2d 961, 962, 480 NYS2d 754, 755-56 [2d Dept. 1984]). Thus the parties shall proceed expeditiously to complete discovery proceedings and all parties shall exchange any materials previously received through pretrial disclosure with any party so demanding. Thus both actions shall proceed as one and the parties are hereby directed to proceed expeditiously with discovery.

II. Privity

Padia seeks dismissal of the claims sounding in breach of contract or quasi-contractual relief (unjust enrichment and quantum meruit) against him brought by West Flooring on the grounds that he lacks any direct privity of contract with them. He asserts that as the homeowner of the residence under construction from 2014 to 2015, those claims of both its contract with co-defendant K. Romeo

and K. Romeo's contract with plaintiff bar assertion of these claims against it, as K. Romeo and West Flooring both are contractually required to indemnify Padia. The Court finds that case law supports this reasoning and therefore Padia's motion to dismiss the Complaint against him is **GRANTED.**

At the threshold, West Flooring's quasi-contractual claims should not lie to the extent that its relationship with defendants on the property and project at issue was governed by written agreement. The existence of a valid and enforceable written contract covering a particular subject matter ordinarily precludes recovery in quasi-contract for events arising out of the same subject matter (*see* ***Goldman v. Metropolitan Life Ins. Co.***, 5 NY3d 561, 572, 807 NYS2d 583; ***Clark–Fitzpatrick, Inc. v. Long Is. R.R. Co.***, 70 NY2d 382, 388–389, 521 NYS2d 653; ***R.I. Is. House, LLC v. North Town Phase II Houses, Inc.***, 51 AD3d 890, 896, 858 NYS2d 372); ***Hamlet at Willow Creek Dev. Co., LLC v. Ne. Land Dev. Corp.***, 64 A.D.3d 85, 102, 878 N.Y.S.2d 97, 109 [2d Dept. 2009]).

Liability for breach of contract does not lie absent proof of a contractual relationship or privity between the parties (*see* ***Simplex Grinnell v. Ultimate Realty, LLC***, 38 AD3d 600, 832 NYS.2d 244; ***M. Paladino, Inc. v. Lucchese & Son Contr. Corp.***, 247 AD2d 515, 669 NYS2d 318). Generally, a subcontractor is in privity with the general contractor on a construction project and is not in privity with the owner, even if the owner benefitted from the subcontractor's work (*see* ***Sybelle Carpet & Linoleum of Southampton v. East End Collaborative***, 167 AD2d 535, 536, 562 NYS2d 205; *see also* ***Sky–Lift Corp. v. Flour City Architectural Metals***, 298 AD2d 214, 748 NYS2d 725); *Id.*

Since Padia did not enter into contractual relationship with subcontractor-plaintiff West Flooring, and West Floorings dealings on the project were pursuant to a contractual relationship with general contractor-defendant K. Romeo, plaintiff cannot recover as against Padia, the homeowner pursuant to this well settled general principle. More importantly, plaintiff did not oppose Padia's motion, the Court is not in the position to determine whether any exceptions to the general rule apply here. *See e.g.* ***Metro. Elec. Mfg. Co. v. Herbert Const. Co.***, 183 AD2d 758, 759, 583 NYS2d 497, 498 [2d Dept. 1992][where court determined that even though owners consented to the improvements provided by the plaintiff and accepted the benefits, that did not make them liable to the plaintiff, particularly where pleadings failed to allege owners were in privity of contract]; *see also* ***Sybelle Carpet & Linoleum of Southampton v. East End Collaborative***, 167 AD2d 535, 536, 562 NYS2d 205; ***Contelmo's Sand & Gravel v. J & J Milano***, 96 AD2d 1090, 1091, 467 NYS.2d 55). Therefore West Flooring's breach of contract claims against Padia are dismissed as a matter of law. Similarly, West Flooring's claims for quasi-contractual relief are barred to the extent that its relationship to the parties on the subject project were governed and the respective rights, responsibilities and obligations of each are dictated in a written contract. Therefore West Floorings quasi-contractual claims are also dismissed.

III. Statute of Limitations & Documentary Evidence

Both Padia and K. Romeo insist that West Floorings mechanic's lien must be vacated and the related Complaint filed in Action No. 2 dismissed for failure to comply with the four-month statute of limitations supplied by the Lien Law § 10.

The resolution of this point of contention involves close inspection of the sequence of events concerning West Flooring's filing of the lien. West Flooring's mechanic's lien was filed with the Suffolk County Clerk on September 9, 2015, alleging that the date of last work performed under itsagreement with K. Romeo was May 9, 2015. In response, defendants counter arguing that since West Flooring walked off the job and ceased work at the project site in March 2015, the mechanic's

lien is untimely, being outside the four month limitations period. Defendants accordingly seek dismissal pursuant to CPLR 3211(a)(4).

Lien Law § 10 provides:

> 1. Notice of lien may be filed at any time 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; provided, **however, that where the improvement is related to real property improved or to be improved with a single family dwelling, the notice of lien may be filed at any time during the progress of the work and the furnishing of the materials, or, within four 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**; ...

N.Y. Lien Law § 10 (McKinney's 2015) [emphasis added]

Here since the dispute concerns plaintiff's last date of work performed under its agreement, there is no dispute that the statute of limitation is four (4) months. The Courts have also consistently held that where a Notice of Lien is sufficient, according to its face and any recording data, the Court may not pass on disputed issues of fact in order to summarily discharge that lien (***Matter of Jory Construction Corp.***, 6 Misc2d 701, 702, 158 NYS2d 632). Where it appears that the specific requirements of the statute have been observed, and that there exists no defect upon the face of the notice of lien, then any dispute regarding the validity of the lien must await trial in an action to foreclose that lien (***Dember Construction Corp. v. P & R Electric Corp.***, 76 AD2d 540, 546, 431 NYS.2d 586; ***Metivier v. Sarandrea***, 154 Misc2d 355, 357, 585 NYS2d 291, 292 [Sup. Ct.; Oneida Co. 1992], *aff'd* 187 AD2d 963, 592 NYS2d 938 [3d Dept. 1992]).

Here defendants' seek an order dismissing plaintiff's action on the grounds that evidence exists casting doubt on plaintiff's asserted sequence of the last date of work performed vis-à-vis the filing of the lien. More specifically, defendants assert that West Flooring indicated to K. Romeo by email dated April 1, 2015 that it would no longer perform on the contract and was unable to supply conforming goods. Further defendants state that plaintiff abandoned the project. Naturally plaintiff denies this. West Flooring argues that rather than abandoning the project, as was required by its contract with K. Romeo, it returned to the job site to clean it, retrieve shop tools and remove non-conforming goods and supplies. Thus plaintiff argues that its work was not only contemplated, but rather required by the contract, and therefore by its nature has "worked performed" within the ambit of the Lien Law.

In reply defendants claim that plaintiff's new theory supporting its mechanic's lien concerning the date and time sequence on cessation of work is internally inconsistent and conflicts with prior representations made in verified pleadings filed in Action No. 1. To that end, defendants argue that plaintiff has conceded this point by judicial admission.

A motion to dismiss pursuant to CPLR 3211(a)(7) in which the movant relies upon evidence beyond the four corners of the complaint must be denied "unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it" (***Guggenheimer v. Ginzburg***, 43 NY2d at 275, 401 N.Y.S.2d 182; ***J.A. Lee Elec., Inc. v. City of New York***, 119 AD3d 652, 654, 990 NYS2d 223, 226 [2d Dept. 2014]).

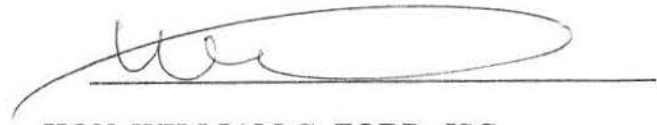
To the extent that resolution of defendant's motion requires credibility assessments and careful analysis of evidence beyond the four corners of the pleadings, defendant's motions are **DENIED**. The parties' arguments center on the timing of the last day of work performed and whether plaintiff abandoned the project. Resolution of the pending motion thus seeks credibility assessments concerning documentary evidence (emails sent and received by principals for the parties and affidavits supplied by other certain representatives) not appropriate for a motion to dismiss. Moreover the presented arguments require more than a facial review of the filed lien which invite substantive determinations not akin for summary dismissal on a CPLR 3211 motion. Since these constitute evidence raising questions invoking significant and disputed triable issues of fact ripe for exhaustion through the discovery process, judgment as a matter of law is wholly premature at this juncture and dismissal is inappropriate under this posture. Thus this motion is **DENIED**.

Conclusion

Accordingly, the Court holds that plaintiff West Flooring's cross-motion for consolidation pursuant CPLR 602(a) is **GRANTED** and defendant K. Romeo's motion to dismiss pursuant to CPLR 3211(a)(4) is **DENIED** and that Actions No. 1, Index No. 101412/2015 and Action No. 2, Index No. 611626/2015 shall be consolidated and joined for trial purposes; defendant Padia's motion dismiss pursuant to CPLR 3211(a)(7) seeking dismissal of plaintiff West Flooring's Complaint in Action No. 1and its causes of action for breach of contract, unjust enrichment and quantum meruit is **GRANTED** as unopposed and those claims as against Padia are dismissed with prejudice; and lastly that defendants Padia and K. Romeo's motions to dismiss pursuant to CPLR 3211(a)(1) & (7) on statute of limitations grounds is **DENIED.**

The foregoing constitutes the Decision and Order of this Court.

Dated: July 1, 2016



HON. WILLIAM G. FORD, JSC

___**Final Disposition** ___X___ **Non-Final Disposition**