

**H&L Ironworks Corp. v McGovern & Co., LLC**

2016 NY Slip Op 32300(U)

November 17, 2016

Supreme Court, New York County

Docket Number: 153853/2016

Judge: Carol R. Edmead

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This opinion is uncorrected and not selected for official publication.

# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

**PRESENT:** HON. CAROL R. EDMOND  
J.S.C.  
*Justice*

**PART** 35

Index Number : 153853/2016  
H&L IRONWORKS CORP.  
vs  
MCGOVERN & COMPANY, LLC  
Sequence Number : 002  
DISMISS

INDEX NO. \_\_\_\_\_  
MOTION DATE 9/1/16  
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 _____	<input type="checkbox"/> No(s). _____
Answering Affidavits — Exhibits _____	<input type="checkbox"/> No(s). _____
Replying Affidavits _____	<input type="checkbox"/> No(s). _____

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

In this lien foreclosure action, defendant 10E53 Owner LLC (the "Owner") moves pursuant to CPLR 3211(a)(1) to dismiss the complaint based on documentary evidence. In response, plaintiff H&L Ironworks Corp. ("plaintiff") cross moves pursuant to CPLR § 3025 for leave to file and serve its proposed amended complaint.

*Factual Background*

Plaintiff alleges that between February, 2014 and January, 2015, it entered into a series of purchase order agreements with defendant McGovern & Co. LLC ("McGovern"), which was the general contractor and/or construction manager at the Owner's construction project located in New York, New York (the "Project"). Plaintiff provided labor and materials for the Project pursuant to the purchase orders, and during this period, submitted invoices and requisitions for payment to McGovern. However, McGovern failed to make payment, and plaintiff filed a mechanic's lien (the "Lien") on April 21, 2016 claiming the sum of \$371,012.50 as the amount owed by McGovern and the Owner for the improvements to the subject property.

In support of dismissal, the Owner argues that it fully paid McGovern pursuant to all of the valid applications for payments made by McGovern for all of the work performed on the Project during the period at issue under the Lien, and plaintiff does not have any privity of contract with the Owner. Thus, plaintiff may only seek redress from McGovern for any amounts

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

Dated: \_\_\_\_\_, 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
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due and owing.<sup>1</sup>

In opposition, McGovern argues that the none of the documents constitutes documentary evidence. Further, the payment application documents demonstrate that “retainage” was withheld from the previous payments due to McGovern in connection with three of the agreements submitted. Thus, the amounts being withheld by the Owner totals at least \$463,386.57, nearly \$100,000 more than plaintiff’s claim under the Lien. Further, leave to amend the complaint should be granted to reflect that the Owner discharged the Lien by filing a mechanic’s lien discharge bond on June 1, 2016. The Owner has not yet served an answer, and the nature of the claims against it will not change

In reply, the Owner argues that the undisputed deposited checks are documentary evidence, and courts have relied upon affidavits and lien waivers to grant dismissal. And, the cross-motion should be denied because if the Lien is not valid, the surety plaintiff seeks to add should not be a party to this lawsuit.

#### *Discussion*

Pursuant to CPLR 3211 (a)(1), a party may move for judgment dismissing one or more causes of action asserted against him on the ground that “a defense is founded upon documentary evidence.” A motion to dismiss on the basis of a defense founded upon documentary evidence may be granted “only where the documentary evidence utterly refutes [the complaint’s] factual allegations, conclusively establishing a defense as a matter of law” (*DKR Soundshore Oasis Holding Fund Ltd. v. Merrill Lynch Intern.*, 80 AD3d 448, 914 NYS2d 145 [1<sup>st</sup> Dept 2011] *citing Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]).

To be considered “documentary,” evidence must be unambiguous and of undisputed authenticity (*Fontanetta v Doe*, 73 AD3d 78, 898 NYS2d 569 [2d Dept 2010] *citing* Siegel, Practice Commentaries, McKinney’s Cons. Laws of N.Y., Book 7B, CPLR C3211:10, at 21–22; *Raske v Next Management, LLC*, 40 Misc 3d 1240(A), Slip Copy, 2013 WL 5033149 (Table) [Supreme Court, New York 2013]; *Philips South Beach, LLC v ZC Specialty Ins. Co.*, 55 AD3d 493, 867 NYS2d 386 [1<sup>st</sup> Dept 2008] (documentary evidence “apparently aims at paper whose content is essentially undeniable and which assuming the verity of its contents and the validity of its execution will itself support the ground on which the motion is based”)). To constitute documentary evidence, the papers must be “essentially undeniable” and support the motion on its own (*Amsterdam Hospitality Group, LLC v. Marshall-Alan Associates, Inc.*, 120 A.D.3d 431, 992 N.Y.S.2d 2 [1<sup>st</sup> Dept 2014] *citing* Siegel, Practice Commentaries, *supra*, at 2)).

Where a written agreement unambiguously contradicts the allegations of a breach of contract cause of action, the contract itself constitutes documentary evidence warranting dismissal of the complaint, pursuant to CPLR 3211(a)(1), regardless of any extrinsic evidence or self-serving allegations offered by the plaintiff (*Prichard v 164 Ludlow Corp.*, 14 Misc 3d 1202, 831 NYS2d 362 [Supreme Court, New York County 2006] *citing* *150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1 [1st Dept 2004]).

It is undisputed that plaintiff, as subcontractor, cannot enforce a lien where there is no

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<sup>1</sup> See original submissions and Affidavit of Robert DeWitt dated September 30, 2016, correcting and clarifying his initial affidavit dated June 16, 2016.

balance due and owing from the owner to the general contractor (*Ebert v Van-Mar Developers*, 111 AD2d 495,496 [3d Dept 1985] *citing* Lien Law §4 and *Electric City Concrete Co. v. Phillips*, 100 AD2d 1,4; 37 NY Jur, Mechanics' Liens, §§ 17-18, at 134-137).

Here, the Owner submits four separate agreements between it and McGovern, dated April 2, 2014 (the "April Agreement"), July 7, 2014 (the "July Agreement"), September 10, 2014 (the "September Agreement"), and November 7, 2014 (the "November Agreement"), lien waivers, and copies of deposited checks. The executed contracts, lien waivers and releases, and copies of checks with correlating bank statements, the authenticity of which is not disputed, appear to establish that the Owner paid McGovern, as general contractor, for the work performed pursuant to the four contracts at issue (*cf. Perma Pave Contr. Corp. v Paerdegat Boat & Racquet Club*, 156 AD2d 550, 552 [1989] (pointing out that "no checks or similar financial documents demonstrating the date of full payment were submitted"); *Ebert v Van-Mar Developers, supra* (criticizing plaintiff for failing "to support its motion with any checks or similar financial documents indicating payment to" the general contractor)). However, as plaintiff points out, such documents do not conclusively establish that the Owner paid McGovern in full prior to the filing of the Lien. As plaintiff states, the application and certificate of payment submitted by the Owner indicate "retainage" amounts of \$383,719.11, \$37,499.36, and 42,168.10 in connection with the April, July and November Agreements, respectively. The remaining documentary evidence is silent as to whether these amounts were paid. And, affidavits do not qualify as "documentary evidence" for purposes of this rule (*see Regini v Board of Managers of Loft Space Condominium*, 107 AD3d 496, 968 NYS2d 18 [1st Dept 2013]; *Correa v Orient-Express Hotels, Inc.*, 84 AD3d 651, 924 NYS2d 336 [1st Dept 2011]; *Marin v AI Holdings (USA) Corp.*, 35 Misc 3d 1227(A), 953 NYS2d 550 (Table) [Supreme Court, New York County 2012]; *Kearins v Gruberg, McKay & Stone*, 2 Misc 3d 1001, 2004 WL 316521 [Supreme Court, Bronx County 2004] (affidavits and depositions cannot be the basis for this motion); *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 780 NYS2d 593 [1st Dept 2004] (deposition and trial testimony and a three-page e-mail narrative "are of a type that 'do not meet the CPLR 3211(a)(1) requirement of conclusively establishing [the] defense as a matter of law'"); *Williamson, Picket, Gross v Hirschfeld*, 92 AD2d 289, 290 [1st Dept 1983] [stating that affidavits do not qualify as "documentary evidence" for purposes of this rule]). While the Owner attempts to explain, in reply, that if McGovern was owed additional funds for the time period at issue, McGovern would have submitted payment requisitions for such funds, and that McGovern did not submit any such payment requisitions, such explanation buttresses the fact that an affidavit is required and that the documentary evidence, in and of itself, does not conclusively dispose of the claims.

Therefore, having failed to conclusively establish that the Owner fully paid McGovern at the time the Lien was filed, dismissal of the complaint pursuant to CPLR 3211(a)(1) is denied.

As to plaintiffs request to amend the complaint, such request is granted. It "is fundamental that leave to amend a pleading should be freely granted, so long as there is no surprise or prejudice to the opposing party" (*Kocourek v Booz Allen Hamilton Inc.*, 925 NYS2d 51 [1st Dept 2011] *citing* CPLR 3025[b] and *Solomon Holding Corp. v Golia*, 55 A.D.3d 507, 868 N.Y.S.2d 612 [2008]). There is no showing of prejudice resulting from such amendment,

and it cannot be said that the amendment is palpably lacking in merit. It is uncontested that the Lien, if established, will be enforceable against the Bond. Therefore, leave to amend is warranted.

It is noted that the motion is does not adequately address plaintiffs remaining causes of action to merit dismissal of the complaint.

*Conclusion*

Based on the foregoing, it is hereby

ORDERED that the motion by defendant 10E53 Owner LLC pursuant to CPLR 3211(a)(1) to dismiss the complaint based on documentary evidence is denied; and it is further

ORDERED that the cross-motion by plaintiff H&L Ironworks Corp. pursuant to CPLR § 3025 for leave to file and serve its proposed amended complaint is granted; and it is further

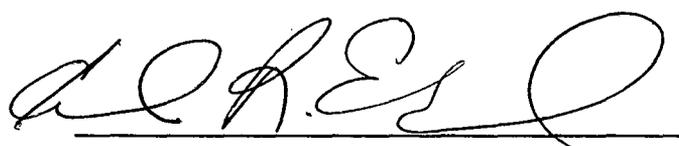
ORDERED taht plaintiff shall file and serve its amended complaint within 20 days of entry of this order; and it is further

ORDERED that the parties shall appear for a preliminary conference on February 7, 2017,2:15 p.m.

ORDERED that defendant 10E53 Owner LLC shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

DATED: 11/17/16



**HON. CAROL R. EDMEAD** J.S.C.  
J.S.C.

- 1. CHECK ONE :  CASE DISPOSED  NON-FINAL DISPOSITION
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