

**American Bldrs. & Contrs. Supply Co., Inc. v US  
Allegro Inc.**

2017 NY Slip Op 30780(U)

March 17, 2017

Supreme Court, Queens County

Docket Number: 709189/2015

Judge: Frederick D.R. Sampson

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE FREDERICK D.R. SAMPSON IA Part 31  
Justice

**FILED**  
MAR 30 2017  
COUNTY CLERK  
QUEENS COUNTY

AMERICAN BUILDERS & CONTRACTORS x  
SUPPLY CO., INC., d/b/a ABC SUPPLY CO.,  
INC.,

Index  
Number 709189 / 2015

Plaintiff,

Motion  
Date November 2, 2016

-against-

Motion  
Cal. Number 6

US ALLEGRO INC., ET. AL.,

Motion Seq. No. 1

Defendants.

\_\_\_\_\_ x

The following papers numbered 1 to 5 read on this motion by defendant Five Star Contracting Companies, Inc for an order permitting it to serve an amended answer containing counterclaims and on this cross motion by plaintiff American Builders & Contractors Supply Co. Inc. for, inter alia, an order compelling defendant Five Star Contracting Companies, Inc. to sign a stipulation of discontinuance

	<u>Papers</u> <u>Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1
Notice of Cross Motion - Affidavits - Exhibits .....	2
Answering Affidavits - Exhibits.....	3-4
Reply Affidavits.....	5
Memoranda of Law .....	

Upon the foregoing papers it is ordered that the motion by defendant Five Star Contracting Companies, Inc, is denied. The branch of the cross motion by plaintiff

American Builders & Contractors Supply Co. Inc. which is for an order compelling defendant Five Star Contracting Companies, Inc. and defendant Mohammed Iqbal to sign a stipulation of discontinuance is granted to the extent that the court orders this action discontinued against them. The branch of the cross motion which is for costs and sanctions is denied.

Plaintiff American Builders & Contractors Supply Co. Inc. d/b/a ABC Supply Co, Inc. (ABC) sold materials to defendant US Allegro, Inc. for use at public works projects undertaken at Hollis Public Library and New Brighton Public Library. Defendant Five Star Contracting Companies, Inc. acted as the general contractor for the projects, and it subcontracted work to US Allegro. By May, 2015, US Allegro owed ABC about \$80,177 and \$13,935 for the Hollis and New Brighton projects respectively.

On or about June 1, 2015, plaintiff ABC filed mechanic's liens in the amounts of \$80,177 and \$13,935 for the Hollis and New Brighton projects respectively. The parties agreed that Five Star would pay the balance owed to US Allegro directly to ABC in satisfaction of the liens. However, after Five Star paid only a part of the sum owed on the Hollis project and little or no part of the sum owed on the New Brighton project, on or about August 21, 2015, ABC filed only a partial satisfaction of lien on the Hollis project in the amount of \$63,932.

On or about September 1, 2015, ABC began the instant action to foreclose on the liens. The first cause of action asserted the existence of a lien in the reduced amount of \$16,244 for the Hollis project and the existence of a lien for the sum of \$13,935 for the New Brighton project. Defendant Five Star served an answer dated October 2, 2015 which did not contain any counterclaims.

On November 13, 2015, Elie Brandon Gold, an attorney representing Five Star and its principal, Mohammed Iqbal, sent an email to Michelle Englander, an attorney representing plaintiff ABC, with attachments (lien waivers and affidavits) purporting to show that Five Star had paid the debts owed in full. The attorney for plaintiff ABC was not satisfied that all of the lien funds had been depleted, and she did not discontinue the action against Five Star and Iqbal as requested.

On December 22, 2015, US Allegro paid ABC in full for the \$29,391 dollar balance due for both projects., and the following day plaintiff ABC filed satisfactions of lien for the two projects. All of the parties to this action, except for defendant Five Star and defendant Iqbal, signed a stipulation discontinuing the instant action shortly thereafter. The attorney

for plaintiff ABC made repeated unsuccessful attempts to obtain Five Star's signature on the stipulation.

Defendant Five Star filed the instant motion on September 16, 2016. The proposed counterclaims seek (1) to recover damages for intentionally filing an exaggerated lien, (2) to invalidate the liens, and (3) to recover damages for abuse of process. Five Star alleges that the plaintiff brought this action against it "despite the actual knowledge that no money was owed by Five Star to Allegro and there was no lien fund available for any payment to ABC on its claim." Five Star further alleges that at the time that ABC filed the lien there was a lien fund in the amount of only \$58,800 and that on July 13, 2015 Five Star made payment to ABC of the entire \$58,800. Five Star asserts that when plaintiff ABC began the instant action September, 2015, knowing that the lien fund had been exhausted, it willfully exaggerated the amount subject to a lien, thereby rendering itself liable under Lien Law §39-a.

CPLR 3025(b) provides that leave to amend a pleading "shall be freely given upon such terms as may be just." (See, *Holchender v. We Transport, Inc.*, 292 AD2d 568; *St. Paul Fire & Marine Ins. Co. v. Town of Hempstead*, 291 AD2d 488; *Whitney-Carrington v. New York Methodist Hosp.*, 289 AD2d 326.) Lateness in making a motion to amend, coupled with the absence of a satisfactory excuse for the delay and prejudice to the opposing party, justifies denial of such a motion \*\*\*." (*Thibeault v. Palma*, 266 AD2d 616, 617; see, *Murray-Gardner Management Inc. v. Iroquois Gas Transmission System L.P.*, 251 AD2d 954.) Upon consideration of these factors, the court finds that permission to amend Five Star's answer should be denied. The instant motion by defendant Five Star seeking permission to assert counterclaims for the first time is certainly late since plaintiff ABC began this action in September, 2015 and Five Star knew about the transactions upon which the proposed counterclaims are based at that time. Defendant Five Star offered no excuse for not filing this motion until September 16, 2016, one year after the commencement of this litigation. All of the parties except for defendant Five Star and defendant Iqbal signed a stipulation discontinuing this action in or about December, 2015, and plaintiff ABC would be prejudiced by having to resume this litigation long after the case was effectively settled. Moreover, in determining whether to permit a party to amend a pleading to add a cause of action, the court must examine the merits of the proposed cause of action. (See, *Morgan v. Prospect Park Associates Holdings, LP*, 251 AD2d 306; *McKiernan v. McKiernan*, 207 AD2d 825.) In view of the affirmation submitted by attorney Englander regarding her uncertainty about the depletion of the lien fund, there was no willful exaggeration of a lien subjecting the plaintiff to liability under Lien Law §39-a. In addition, the lien was discharged without a finding of willful exaggeration. (See, *Harrington v. Smith*, 138 AD3d 548,548 ["Attorneys' fees were improperly granted pursuant to Lien Law §§ 39 and 39-a, since this

was not an action or proceeding to enforce the lien, and the lien had been discharged without a finding of willful exaggeration”].)

In regard to the cross motion, there is no need for an order compelling defendant Five Star and defendant Iqbal to sign a stipulation of discontinuance, since, pursuant to CPLR 3217(b), this court can issue an order permitting the plaintiff to discontinue the action against those defendants. (See, *Hurrell-Harring v. State*, 112 AD3d 1213,) “ While the decision to grant such an application is generally committed to the sound discretion of the trial court \*\*\*, a party cannot ordinarily be compelled to litigate and, absent special circumstances -- such as prejudice to a substantial right of the defendant or other improper consequences -- discontinuance should be granted \*\*\*,” ( *Hurrell-Harring v. State, supra*, 1215.) The discontinuance of this action will not prejudice defendant Five Star and defendant Iqbal, and the plaintiff’s motion will be granted to the extent that the court orders its discontinuance against them.

Dated: March 17, 2017

  
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J.S.C.

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