| **3-G Servs. Ltd. v SAP V/Atlas 845 WEA Assoc. NF L.L.C.** |
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| 2017 NY Slip Op 31593(U) |
| July 28, 2017 |
| Supreme Court, New York County |
| Docket Number: 650583/13 |
| Judge: Joan A. Madden |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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3-G SERVICES LIMITED,

Plaintiff,

INDEX NO. 650583/13

-against-

SAP V/ATLAS 845 WEA ASSOCIATES NF L.L.C., B & B CONSTRUCTIONS, INC., VANQUISH CONTRACTING CORP., DISTINCT DRYWALL INC., A.D.E. SYSTEMS INC., STERLING AMERICAN PROPERTY V, L.P., and JOHN and JANE DOE NOS. 1-10, said names being fictitious and representing persons and entities unknown to plaintiff and having or claiming any interest in or lien upon the Premises,

Defendants.

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JOAN A. MADDEN, J.:

In this action to foreclose on a subcontractor's mechanic's lien and for other relief, defendant SAP V/Atlas 845 WEA Associates NF L.L.C. ("SAP") moves for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint in its entirety as against it. Plaintiff 3-G Services Limited ("3-G") opposes the motion in part to the extent it seeks summary judgment dismissing the first cause of action to foreclose on 3G's mechanic's lien against SAP's property. Plaintiff does not oppose summary judgment dismissing the 4th cause of action as against SAP for quantum meruit nor the 6th cause of action as against SAP for breach of contract. None of the co-defendants has responded to the motion.

The following facts are not disputed unless otherwise noted. This action arises out of a construction project at a building located at 845 West Avenue, New York, New York, owned by defendant SAP, which involved the rehabilitation and combination of certain apartment units for

conversion to condominium ownership. On December 30, 2010, SAP entered into a contract with defendant B & B Construction, Inc ("B&B") for B&B to provide work, labor and materials as the general contractor on the project. B&B hired plaintiff 3-G as a subcontractor to perform drywall, framing and carpentry work on the project; 3G was one of eleven subcontractors on the project.[1]

On July 20, 2012, SAP and B&B executed a letter agreement ("Termination Agreement"), in which they mutually agreed to terminate their December 2010 contract "in connection with the work to be performed" at 845 West End Avenue. The Termination Agreement states that "[t]his letter will serve to acknowledge that the Contract has been terminated effective July 20, 2012, and that Contractor [B&B] has been paid in full for all work, labor, services, equipment and materials furnished on the Project by Contractor [B&B] and its subcontractors, laborers and materialmen, and that no further monies are due or shall become due from Owner [SAP] to Contractor [B&B] in connection with the Work."

Annexed to the letter is the following list itemizing the amounts owed to B&B and paid by SAP on July 20, 2012:

$229,969.00 June
$243,456.00 Retainage
$114,847.00 July to Date
$588,272.00 Subtotal before deducts
$163,131.10 Deposit Deduct
$425.140.90 Total

-62810.61 Fine Finish
-62801.61 Total Escrow Paid Today
$362,330.29 B&B Paid today

[1]Plaintiff originally asserted a claim for fraud against B&B's sole officer and director, Richard Jacobsen, but filed a stipulation of discontinuance as against him on August 23, 2016.

SAP's affidavit from its project manager, Louis Blum, addressed the items identified as "$243,456.00 Retainage" and "$163,131.10 Deposit Deduct." Blum explains that in accordance with Article 5.1.6.1 of the Contract, SAP withheld 10% retainage from each progress payment to B&B, and that as of July 2012, the cumulative amount of such retainage was $243,456, which was paid to B&B as part of the final payment. Blum further explains that during the project, SAP provided B&B with advance payments to cover the costs of certain materials that B&B needed to purchase for the project, and as of July 20, 2012, B&B had not used $163,131.10 of those funds, so SAP received a credit for that amount in calculating the final amount due and owing to B&B.

On July 20, 2012, SAP and B&B also executed an Escrow Agreement, with respect to a mechanic's lien in the amount of $62,810.61 previously filed on May 20, 2012 by non-party subcontractor Fine Finish. The Escrow Agreement provided that the sum of $61,810.61 would be held in escrow "to secure the payment of the lien" filed by Fine Finish and "shall be released to the lienor set forth on Schedule A [Fine Finish] upon the delivery to Escrow Agent of a Satisfaction of Lien . . . together with a Waiver and Release."

It is undisputed that on July 20, 2012, SAP gave B&B two checks, one payable to B&B in the amount of $362,330.29 and the other payable to B&B's attorney, as escrow agent, in the amount of $62,810.61. At the same time, B&B executed a Contractor's Acknowledgment, Final Lien Waiver and Release of Claims ("Final Lien Wavier/Release"), in which B&B acknowledged receipt of SAP's "Final Payment . . . in full for all work, labor, services, equipment and materials furnished on the Project by Contractor [B&B] and its subcontractors." The Final Lien Waiver/Release provided in its entirety as follows:

> Contractor [B&B] hereby acknowledges that (i) the contract for the Project (the "Contract") has been terminated; (ii) Final Payment has been received and represents payment in full for all work, labor, services, equipment and materials furnished on the Project by Contractor [B&B] and its subcontractors, laborers and materialmen (the "Work"); and (iii) no further monies are due or shall become due from Owner [SAP] to Contractor in connection with the Work.
>
> In consideration of the sums previously received, and the Final Payment, Contractor [B&B] hereby waives and releases Owner [SAP] from any and all claims for payment for the Work and liens and rights of liens in connection with the Project as well as any other claims, rights or causes of action in equity or law whatsoever arising out of, through or under the Contract for the Work on the Project or otherwise in connection with the Project.

On September 5, 2012, plaintiff filed a Notice of Mechanic's Lien in the amount of $74,468.03 against SAP's property, 845 West End Avenue. On April 13, 2013, plaintiff commenced the instant action to foreclose on its lien and for other relief. Defendant SAP is now moving for summary judgment.

As noted above, plaintiff does not oppose dismissal of the quantum meruit and breach of contract claims as asserted aainst SAP. Thus, in the absence of opposition, defendant SAP is entitled to summary judgment dismissing the 4th cause of action for quantum meruit as against SAP and the 6th cause of action for breach of contract as against SAP. The sole remaining issue is whether SAP is entitled to judgment as a matter of law dismissing the 1st cause of action to foreclose on 3-G's mechanics lien against SAP's property.

As the proponent of a motion for summary judgment, defendant SAP must make a prima facie showing of entitlement to judgment and dismissal as a matter of law, by submitting evidentiary proof in admissible form sufficient to establish the absence of any material issues of fact. See CPLR 3212(b); Winegrad v. New York University Medical Center, 64 NY2d 851, 853

(1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Once that showing is satisfied, the burden of proof shifts to plaintiff to produce evidentiary proof in admissible form sufficient to demonstrate material issues of fact requiring a trial. See Winegrad v. New York University Medical Center, supra.

Pursuant to statute, a mechanic's lien is valid to the extent of "the sum earned and unpaid on the contract at the time of filing the notice of lien, and any sum subsequently earned thereon." Lien Law §4; see Matros Automated Electrical Constrution Corp v. Libman, 37 AD3d 313 (1st Dept 2007); Hartman v. Travis, 81 AD2d 692 (3rd Dept 1981); Albert J. Bunce, Ltd v. Fahey, 73 AD2d 632 (2nd Dept 1979). "In the case of a subcontractor, the lien will only attach to those funds due and owing to the general contractor at the time of its filing, or which may thereafter become due and owing." Id at 633. As a subcontractor on the project, plaintiff has the burden "of establishing the existence of a fund due and owing from the owner [SAP] to the general contractor [B&B] at the time of the filing of its mechanic's lien to which such lien could attach." Falco Construction Corp v. P&F Trucking, Inc, 158 AD2d 510 (2nd Dept 1990)

Defendant SAP has made a prima facie showing that no funds were due and owing from SAP to B&B at the time plaintiff filed its lien. The undisputed documentary evidence, as quoted above, establishes that SAP paid B&B, in full, nearly two months before plaintiff's lien was filed. Specifically, the notice of lien shows that plaintiff did not file its lien until September 5, 2012. Pursuant to the clear and express terms of the Termination Agreement between SAP and B&B, and B&B' Lien Wavier/Release both of which were executed on July 20, 2012, and SAP's payment in "in full" on July 20, 2012, no amount was due from SAP to B&B when the lien was filed on September 5, 2012. Thus, since SAP has established that it did not owe any amount to

B&B when plaintiff filed its lien, no fund existed to which plaintiff's lien could attach, and plaintiff cannot maintain a claim to enforce its mechanic's lien against SAP's property. See Matros Automated Electrical Constrution Corp v. Libman supra; Falco Construction Corp v. P&F Trucking, Inc, supra; Hartman v. Travis, supra; Albert J. Bunce, Ltd v. Fahey, supra.

In opposition, plaintiff asserts that it has a valid lien against SAP's property based on section 7 of the Lien Law. Lien Law §7 provides in pertinent part that "[a]ny payment by the owner, contractor or subcontractor upon a contract for the improvement of real property, made prior to the time when, by the terms of the contract, such payment becomes due, for the purpose of avoiding the provisions of this article, shall be of no effect as against the lien of a subcontractor, laborer, or materialman under such contract, created before such payment actually becomes due." Pursuant to section 7, when an owner's payment to the general contractor is an "advance payment" made before it is due and "for the purpose of avoiding" the provisions of the Lien Law, the payment has no effect on a mechanic's lien filed subsequent to the payment. See Hartman v. Travis, supra at 693; Drane Lumber Co v. T.G.K. Construction Co, Inc, 39 AD2d 567 (2nd Dept 1972).

Courts have held that a claim under Lien Law §7 requires a showing of bad faith, and that good faith is a defense when the advance payment is made before the filing of the mechanic's lien. See Falco Construction Corp v. P&F Trucking, Inc, supra; Certified Industries, Inc v. International Business Machines Corp, 69 AD2d 806 (2nd Dept 1979); Drane Lumber Co v. T.G.K. Construction Co, supra; Albert J. Bunce, Ltd v. Fahey, supra. It is well settled, however, that Lien Law §7 is "not intended to disable the owner from modifying or terminating his contract or facilitating his work by payment earlier than the contract stipulated." Wagner v.

Butler, 155 AD 425, 427 (2nd Dept 1913). Although plaintiff must prove that the owner's payments were accelerated for the purpose of avoiding the provisions of the Lien Law, it is not enough to show that the owner had knowledge of the subcontractor's unpaid claim, as that "disregards the purpose or intention with which the payments are made." Id at 426; see e.g., Abe Schild Stone Corp v. Apostle, 41 Misc2d 732 (Sup Ct, NY Co 1964) (Lien Law §7 is not applicable where the owner's advance payment is "made in good faith to expedite the work or because the contractor is in financial difficulties or for other legitimate reasons."); Maycumber v. Wolfe, 10 Misc2d 464 (Sup Ct, Onondaga Co 1958) (The "mere fact" that the owner has knowledge of the contractor's indebtedness to the lienors, "is not of itself sufficient to charge the owner with liability on account of such payments."); New York Plumbers' Specialties Co v. W&C Feldman, Inc, 125 NYS2d 377 (Sup Ct, NY Co 1953) (City's knowledge of contractors' indebtedness to subcontractor or the contractor's insolvency was not sufficient to charge the City with liability under Lien Law §7.).

Here, plaintiff asserts that notwithstanding the termination of SAP's contract with B&B and SAP's payment to B&B, SAP remains liable under Lien Law §7, as SAP's payment was an "advance payment" made before it was due under the contract and "for the purpose of avoiding" the Lien Law. To support such assertion, plaintiff submits an affidavit from its owner and president, Thomas J. Carchietta; a statement as to the amounts owed for the work plaintiff performed on the project; a purchase order dated August 20, 2012 from SAP to 3-G for work in apartment 11C; 3-G's Notice of Mechanic's Lien filed on September 5, 2012; correspondence including emails; and portions of the deposition testimony of Louis Blum on behalf of SAP and Richard Jacobsen on behalf of B&B.

In his affidavit, Carchietta explains that 3-G's purchase orders with B&B were on a "per apartment basis," so 3-G "invoiced B&B for each apartment separately." He explains that payments were "based on percentage completion," and that a 10% retainage was withheld on each invoice which was released when the apartment unit was 100% complete and after B&B received final payment for the unit from SAP. Carchietta states that at the end of April 2012, B&B owed 3-G approximately $45,000 on "January through March invoices," and he was "aware at the time that other subcontractors were also experiencing late or partial payments from B&B." He states that "on or about May 29," 3-G received a check from B&B for $15,000, and on June 7, 2012, he "sent an email to Blum that SAP issue two-party checks to B&B and 3-G." Carcheitta states that on June 22, 2012, 3-G received a check from B&B for $14,129.01 "for payment on our March invoices," and on June 25, 2012, he received a email from Blum "to confirm receipt of the check from B&B the previous month." He states that he confirmed receipt of the check and "asked that SAP not issue checks to B&B until 3-G was brought current out of funds already paid to B&B." He states that on "July 20, 3-G and ten other subcontractors received an email from B&B giving notice that B&B was no longer holding the contract for the Project." Carchietta states that as of that date "3-G was owed a total of $74,468.03 for work performed through July 2012."

Carchietta explains that 3-G did not file a mechanic's lien prior to July 20, 2012 since he "believed that B&B would get caught up on 3-G's outstanding invoices and back on track with making regular payments." He states that 3-G signed a purchase order for Units 7EF on April 20, 2012 and "kept its work force working at the Project despite overdue invoices." Carchietta states that the checks 3-G received from B&B in May and June, "gave me the belief that SAP was

staying on B&B to make sure subcontractors were paid" and he was "not aware that any other subcontractor had filed a lien." He states he expected a check from B&B at the end of July "after SAP's payment to B&B on its June requisitions," and that B&B's termination was a complete surprise." Carchietta states he "believes" SAP was concerned that B&B would not be able to make its July payments to subcontractors and "wanted to cut off subcontractors' liens by terminating and paying B&B in full before SAP's payment on B&B's July acquisitions came due." Carchietta states that on July 23, 2012, he was contacted by Blum and Smolarz [both from SAP] by phone, and that they "discussed the amount B&B owed 3-G, the status of 3-G's work on units 7EF and 11C, and SAP's plans to complete the apartment units." He states the "reason for B&B's termination was not discussed," but he "presumed that B&B was terminated for cause for failure to pay subcontractors and that 3-G's purchase orders were assigned to SAP." Carchietta states that on or about August 20, 2012, 3-G received a "SAP purchase order for Unit 11C," and "until then I thought that 3-G's purchase orders with B&B in connection with Unit 7EF and Unit 11C were assigned to SAP and that the purchase order's scope of work for each unit was being modified." He states he "signed the SAP purchase order on or about August 27 and retained the service of mechanic's lien service to prepare a mechanic's lien."

Plaintiff also submits portions of deposition testimony of Louis Blum on behalf of SAP and Richard Jacobsen on behalf of B&B. Blum testitifed that the "payment process" for the project was for SAP to "pay B&B and then within two weeks B&B would pay the subs and obtain partial waivers or final waivers and releases of liens, and that SAP withheld retainage from the subcontractors until B&B completed the unit." He testified that in April 2012, he had requested from B&B, a balance due to subcontractors, since a "few of the subs complained that

they had not gotten paid." Blum testified that B&B was terminated due to "financial matters," explaining that B&B could not complete the project since "they had underbid the work" and "went off of a price per square foot on the initial contract." Blum testified that after B&B was terminated on July 20, 2012, SAP "self-performed" the remaining work on the project. Blum also testified that SAP was expecting more contractors to file liens since SAP "knew moneys were owed to subcontractors" at that time.

Jacobsen testified that B&B's contract with SAP was terminated "[b]ecause we didn't have enough money to finish the project" and SAP "didn't want to pay us any more money to complete the work." He explained that B&B's original bid price on the project was short $10 a square foot "to pay for everything that had to be done," the "overall project was too cheap" and B&B "didn't have enough money to finish the whole thing." Jacobsen also testiified that when B&B was terminated on July 20, 2012, there was "a list of subs that were owed money."

Plaintiff asserts that the foregoing documents, affidavit and deposition testimony "strongly support the inference that SAP made the full payment to B&B with the retainage" that was not due under the terms of the Contract, "for the purpose of avoiding the provisions of the Lien Law." Specifically, plaintiff argues that following facts and circumstances have been shown: subcontractors complained to SAP directly regarding B&B'S overdue payments; B&B underbid the project and had financial difficulty in completing the project; SAP terminated the contract on July 20, 2012, before the July invoices became due; SAP knew of the amounts owed to the subcontractors and that the subcontractors would file liens; SAP terminated the contract "without cause" which required SAP to pay B&B in full, and if the contract had been terminated "for cause," B&B would not have been paid until the project was completed; SAP's payment

included the retainage, so as to "set up a complete defense" to subcontractors' liens; and after SAP paid the retainage to B&B, "nothing was left in SAP's hands to which subcontractors' liens could attach."

Contrary to plaintiff's assertion, the facts as detailed above are insufficient to raise an issue of material fact as to SAP's liability under Lien Law §7. At best, the undisputed record shows that SAP had knowledge that B&B underbid the project, was having financial difficulty completing the project, and owed money to its subcontractors, including 3-G. As noted above, an owner's knowledge that a subcontractor owes money, by itself, is insufficient to show that payments were accelerated for the purpose of evading the Lien Law. See Wagner v. Butler, supra; Maycumber v. Wolfe, supra; New York Plumbers' Specialties Co v. W&C Feldman, Inc, supra.

The record neither shows nor suggests that SAP and B&B terminated their contract and that SAP made the final payment to B&B in bad faith. To the contrary, the undisputed record demonstrates that B&B could not continue the project to completion without additional funds which SAP was unwilling pay, and as a result SAP exercised its right to terminate the contract pursuant to Article 14.4 of the General Conditions to the Contract, which provides that "[t]he Owner may, at any time, terminate the Contract for the Owner's convenience and without cause." Moreover, under Article 14.4.3, "[i]n case of such termination for the Owner's convenience, the Contractor [B&B] shall be entitled to receive payment of that portion of its Fee for Work actually completed and for sums due the Contractor and its Subcontractors for Work actually completed." Even though Article 14.2.1 gave SAP the right to terminate the contract "for cause" if the "Contractor . . . fails to make payments to Subcontractors," the record neither shows nor suggests

that SAP was required to do so, or that the failure to do so constitutes bad faith.

Rather, the record conclusively shows that B&B was in financial trouble for underbidding the project, and to resolve that issue, B&B and SAP reached a mutual agreement, in good faith, to terminate their relationship, and for SAP to pay B&B the final amount due and owing for the work and materials furnished through the date of termination. See e.g., Abe Schild Stone Corp v. Apostle, supra (Where the contract was "unprofitable," the court held that the "questioned payments were made prior to the filing of any notice of mechanics' liens and were given in good faith under the exigencies of the situation in payment of actual work done and materials furnished."); Walsh v. Boulder Apartments, Inc, 191 NYS2d 503 (Sup Ct, West Co 1959) (The payments were made in good faith in advance of time when due to help out the contractor in its financial difficulties and to insure continuance of the work rather than to evade the provisions of the Lien Law.).

The July 20, 2012 Escrow Agreement between SAP and B&B provides further evidence that SAP's payment was not made in bad faith to avoid the provisions of the Lien Law. By executing the Escrow Agreement, SAP and B&B expressly acknowledged and accounted for the one and only mechanic's lien filed prior to the termination of the contract. Pursuant to the Escrow Agreement, B&B and SAP agreed to hold the sum of $62, 810.61 in escrow to secure payment of the mechanic's lien filed by non-party Fine Finish. Based on that agreement, SAP issued a separate check in the amount of $62,810.61 payable to B&B's attorney, as escrow agent, and that amount was deducted from the total amount paid to B&B.

The affidavit of plaintiff's owner and president, Thomas Carchietta, provides no evidence of bad faith. Carchietta admits that although B&B owed substantial amounts since January 2012,

3-G continued to work on the project and did not file a mechanic's lien until September 2012, two months after the termination of B&B's contract. He also admits he knew that other subcontractors were receiving late or partial payments from B&B. He testified that as of April 2012, B&B had outstanding invoices totaling $45,000 for January through March 2012. B&B paid plaintiff $15,000 at the end of May and almost another $15,000 at the beginning of June, but much more was owed, and by the time the contract was terminated on July 20, 2012, the outstanding amount had grown to nearly $75,000. Carchietta admits that B&B's partial payments in May and June led him to "believe" that B&B would eventually get "caught up" and he expected a check at the end of July. Thus, despite the amount owed and B&B's history of late and partial payments, plaintiff voluntarily chose not to file a mechanic's lien and instead took the risk that it would eventually be paid, but unfortunately that did not happen.

In calculating the final amount due and owing to B&B as of the date the contract was terminated, SAP included the 10% retainage in the amount of $243,456, that it had been withholding from its progress payments to B&B under Article 5.1.6.1 of the contract. Plaintiff's assertion that SAP's payment of the retainage to B&B was an advance payment before it was due within the meaning Article 7 of the Lien Law, is not persuasive, given the fact that the July 20, 2012 payment was intended as the "final payment" to B&B for all prior work and materials supplied through that date, which was due on July 20, 2012, the date the contract was terminated for the owner's convenience pursuant to Article 14.4. See New York Plumbers' Specialties Co v. W&C Feldman, Inc, supra (Neither the City's knowledge of the contractor's insolvency nor the City's payment of moneys which it had the right to retain under the contract, was sufficient to show that the payments were made for the purpose of avoiding the Lien Law as required by

section 7.).

Finally, the cases plaintiff cites are distinguishable on the facts. In Glens Falls Portland Cement Co v. Schenectady County Coal Co, 163 App Div 757 (3rd Dept 1914) and Lawrence v. Dawson, 34 App Div 211 (2nd Dept 1898), the plaintiffs produced sufficient evidence establishing both an advance payment and bad faith. In Glens Falls Portland Cement Co v. Schenectady County Coal Co, supra, the owner had notified one but not all of the subcontractors of its intent to make a final payment in advance to the contractor. The Third Department found bad faith in connection with the subcontractors who were not notified. Here, no issue of notice is presented.

In Lawrence v. Dawson, supra, the plaintiff refrained from filing his lien for more than six weeks, in reliance on the contractors' explicit assurances that 15% would be retained until the work was complete. In the meanwhile, the 15% retainage was paid to another subcontractor and nothing was left to which plaintiff's lien could attach. The Second Department found bad faith, holding that "[i]t is impossible to perceive what was the purpose of assuring plaintiff's agent that the fifteen percent would be retained, unless it was to prevent the plaintiff from then filing a lien." Here, plaintiff does not allege that it refrained from filing a lien based on any affirmative representations by B&B or SAP that it would ultimately be paid in full from the 10% retainage or any other funds held by SAP.

In view of the foregoing, plaintiff has failed to raise an issue of material fact as to whether SAP's final payment to B&B was an advance payment for the purpose of avoiding the Lien Law, and as such, no basis exists to impose liability on SAP under section 7 of the Lien Law. SAP, therefore, is entitled to judgment as a matter of law dismissing the complaint in its entirety as

against it.

Accordingly, it is

ORDERED that the motion by defendant SAP V/Atlas 845 WEA Associates NF L.L.C. for summary judgment is granted, and the complaint in its entirety is severed and dismissed as against defendant SAP V/Atlas 845 WEA Associates NF L.L.C. and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that since this action has been transferred to the Hon. Margaret A. Chan, the remaining parties shall contact Part 33 to schedule a status conference. .

DATED: July 28, 2017

ENTER:

J.S.C.

HON. JOAN A. MADDEN
J.S.C.