

**King Constr. & Design, Inc. v 210 Wycombe LLC**

2017 NY Slip Op 32531(U)

November 29, 2017

Supreme Court, New York County

Docket Number: 151558/2017

Judge: Kathryn E. Freed

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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. KATHRYN E. FREED**

**PART 2**

*Justice*

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KING CONSTRUCTION AND DESIGN, INC.,

INDEX NO. 151558/2017

Plaintiff,

MOTION DATE 05/02/17

- v -

210 WYCOMBE LLC, 210 NORTHFIELD LLC, EDWARD  
WASSERMAN, LTI CONSTRUCTION CORP., JLS COST  
MANAGEMENT SYSTEM INC., JENNIFER DIAMOND, ROBERT  
DIAMOND

MOTION SEQ. NO. 002

**DECISION AND ORDER**

Defendant.

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The following e-filed documents, listed by NYSCEF document number 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 66, 67, 68 (as well as document numbers 53-68 on a cross motion)

were read on this motion to/for DISMISSAL

In this action by plaintiff King Construction and Design, Inc. for, among other things, foreclosure on a mechanic's lien based on home improvement work on the building located at 210 West 11th Street, New York, NY, defendants 210 Wycombe LLC, 210 Northfield LLC, Edward Wasserman a/k/a Ted Wasserman, JLS Cost Management System, Inc. Jennifer Diamond and Robert Diamond (hereinafter collectively referred to as "defendants") move, pre-answer, to dismiss the amended complaint against them. Plaintiff cross-moves for leave to file and serve a second amended complaint, among other things, to include causes of action for quantum meruit and unjust enrichment. Each party opposes the other's requests for relief.

Initially, this Court notes that plaintiff's cross motion was erroneously filed in conjunction with motion sequence No. 003, which motion was previously permitted to be withdrawn, thereby making it appear in this Court's records as though the cross motion had also been resolved. The parties executed a stipulation dated June 1, 2017 deeming the cross motion

as having been timely filed in opposition to the instant motion under motion sequence No. 002.

In light of the stipulation, which will be so ordered herewith, and in the absence of any indication that any error has resulted in prejudice, this Court proceeds to the determination of the motion and cross motion on their merits. *See* CPLR 2001. This Court also notes that this action has been discontinued as to defendant LTA Construction Corp. by stipulation dated March 23, 2017 (Doc. No. 52), leaving only the moving defendants as the remaining defendants. The Clerk will be directed to amend the caption accordingly.

“[R]egardless of which subsection of CPLR 3211 (a) a motion to dismiss is brought under, the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” *Ray v Ray*, 108 AD3d 449, 451 (1st Dept 2013); *see Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 (2001); *Leon v Martinez*, 84 NY2d 83, 87-88 (1994). As for the first cause of action in the amended complaint, “[i]t is well established that only a stranger to a contract, such as a third party, can be liable for tortious interference with a contract.” *Ashby v ALM Media, LLC*, 110 AD3d 459, 459 (1st Dept 2013), *lv denied* 22 NY3d 860 (2014) (internal quotation marks and citations omitted); *see UBS Sec. LLC v Highland Capital Mgt., L.P.*, 86 AD3d 469, 476-477 (1st Dept 2011); *Kassover v Prism Venture Partners, LLC*, 53 AD3d 444, 449-450 (1st Dept 2008). Plaintiff, a general contractor, has alleged that defendants, collectively the individuals and entities for which it acted as a general contractor, have interfered with plaintiff’s relationship with its subcontractors. Specifically, plaintiff alleges that defendants have attempted to bypass plaintiff and negotiate directly with some of its subcontractors. Since defendants were the third-party beneficiaries of plaintiff’s contracts with its subcontractors, inasmuch as they were the entities for which the work was being performed,

defendants are not strangers to the contracts, and the first cause of action in the amended complaint must be dismissed.<sup>1</sup>

Turning to the second cause of action in the amended complaint, seeking to foreclose on a mechanics' lien, plaintiff, by cross-moving to amend the complaint to add Excellent Contracting LLC, John F. Graney Metal Design LLC and Royal HVAC Systems, Inc. as parties, impliedly concedes that the amended complaint is faulty in its current condition in light of their absence in the caption. *See* CPLR 1003; 3211 (a) (10); Lien Law § 44.

The third cause of action, for a permanent injunction to enjoin defendants from interfering with plaintiff's contractual relations with the subcontractors, fails for the same reasons that the first cause of action does. Both the first and third causes of action are predicated on the notion that it is unlawful for defendants to directly contact plaintiff's subcontractors. Since this Court has determined that said conduct is not actionable, the demand for equitable relief must be dismissed along with the substantive claim for tortious interference. *See Schindler v Rothfeld*, 153 AD3d 436, 437 (1st Dept 2017); *Weinreb v 37 Apts. Corp.*, 97 AD3d 54, 58-59 (1st Dept 2012).

The fourth cause of action in the amended complaint alleges that defendants Jennifer and Robert Diamond are personally liable to plaintiff as a result of assuming the debts of the other defendants. Plaintiff claims that the Diamonds paid plaintiff \$800,000 in October 2016 to satisfy

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<sup>1</sup> Plaintiff alleges that it contracted with some of its subcontractors such that they would pay plaintiff 25% of any payment that they received from parties other than plaintiff, and that defendants interfered with those agreements by negotiating directly with the subcontractors. This theory does not change the analysis. Assuming, for the sake of argument, that plaintiff separately negotiated with its subcontractors in anticipation of the possibility that defendants would attempt to pay them directly and bypass plaintiff, then defendants' conduct would not have caused a breach of plaintiff's contracts with its subcontractors. Rather, paying the subcontractors directly merely would have activated the 25% provision. *See generally RLR Realty Corp. v Duane Reade, Inc.*, 145 AD3d 444, 445 (1st Dept 2016).

the corporate defendants' obligations, and that this act constituted an assumption of the remainder of the debt. Since plaintiff has neither alleged nor shown that the Diamonds made a written promise (or, indeed, any promise at all), to assume the other defendants' debts, and in the absence of any alleged basis to pierce the corporate veil, it has failed to state a cause of action against the Diamonds. *See* General Obligations Law § 5-701 (a) (2); *Castellotti v Free*, 138 AD3d 198, 203 (1st Dept 2016); *Carey & Assoc. v Ernst*, 27 AD3d 261, 263 (1st Dept 2006).<sup>2</sup>

Turning to plaintiff's cross motion for leave to file and serve a second amended complaint, "leave to amend a pleading pursuant to CPLR 3025 (b) is freely given absent prejudice or surprise resulting directly from the delay." *O'Halloran v Metropolitan Transp. Auth.*, 154 AD3d 83, \_\_\_, 60 NYS3d 128, 130 (1st Dept 2017) (internal quotation marks, brackets, and citations omitted); *see Lindo v Brett*, 149 AD3d 459, 463 (1st Dept 2017). The second amended complaint seeks to add causes of action for quantum meruit and unjust enrichment. In the absence of a signed written contract, these are appropriate causes of action. Defendants' only arguments against adding the causes of action would require this Court to determine, as a matter of law, that the written contract that they submit governs this dispute, despite never being executed by the parties. This is impossible to determine given the current procedural posture and, as such, plaintiff must be permitted to amend its complaint.

The only issue is whether plaintiff has cured the deficiencies in the amended complaint with respect to the cause of action for foreclosure on a mechanics' lien. In defendants' moving papers, they noted that the property is subject to a mortgage in favor of First Republic Bank.

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<sup>2</sup> Plaintiff's citation to *Wallin v Burstein* (82 NYS2d 292 [Sup Ct, NY County 1948]) – a decision that appears never to have been cited by another court in a reported decision in the 69 years since it was issued – misses the mark. There is no allegation that the other defendants transferred property or rights to the Diamonds. The only allegation is that the Diamonds made a single payment on the other defendants' behalf.

(Doc. No. 34.) Since plaintiff failed to name First Republic Bank, and has offered no reason in its papers why the omission may be overlooked, this Court must therefore conclude that plaintiff has failed to cure the deficiencies in the amended complaint as to the cause of action to foreclose on a mechanics' lien. *See* Lien Law §§ 44; 44-a; *see also* 17 Carmody-Wait 2d § 97:295. Nevertheless, rather than dismiss the cause of action on this basis, this Court is empowered to add First Republic as a party and direct plaintiff to serve said party with its second amended summons and complaint. *See Henry Quentzel Plumbing Supply Co. v 60 Pineapple Residence Corp.*, 126 Misc 2d 751 (Sup Ct, Kings County 1984).

Accordingly, it is hereby:

ORDERED that the motion to dismiss the amended complaint is granted to the extent that the first, third, and fourth causes of action appearing therein are dismissed; and it is further

ORDERED that the cross motion to serve a second amended complaint (Doc. No. 63) is granted, in part, except that the first, third, and fourth causes of action appearing therein, being substantially identical to the dismissed causes of action in the amended complaint, are dismissed and stricken therefrom, and FIRST REPUBLIC BANK is added as a defendant; and it is further

ORDERED that counsel for plaintiff is directed to e-file a completed Notice to County Clerk (Form EF-22), with a copy of this order attached thereto, and the Clerk is directed to **remove** LTI CONSTRUCTION CORP., JENNIFER DIAMOND, and ROBERT DIAMOND from the caption as defendants, and to **add** EXCELLENT CONTRACTING LLC, JOHN F.

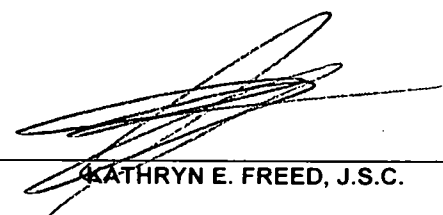
GRANEY METAL DESIGN LLC, ROYAL HVAC SYSTEMS, INC. and FIRST REPUBLIC BANK to the caption as defendants; and it is further

ORDERED that service of the second amended complaint is deemed completed upon those defendants that have already appeared in this action by filing via NYSCEF, and service upon those defendants being added to the caption shall be effectuated in accordance with article 3 of the CPLR; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on February 27, 2018 at 2:15 p.m.

11/29/2017

DATE

  
KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input checked="" type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	DO NOT POST	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	