SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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J.T. MAGEN & COMPANY INC. (COUNTERCLAIM-DEFENDANT),

Plaintiff,

- v -

NISSAN NORTH AMERICA, INC.,GEORGETOWN ELEVENTH AVENUE OWNERS, LLC (COUNTERCLAIM PLAINTIFF) (CROSSCLAIM-PLAINTIFF), PHILADELPHIA INDEMNITY INSURANCE COMPANY, GARY FLOM, VEN NILVA,

Defendants.

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INDEX NO. 160497/2017

MOTION DATE 05/25/2022, 05/25/2022

MOTION SEQ. NO. 011 012

DECISION + ORDER ON MOTION

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 011) 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 911, 1012, 1013, 1028, 1029, 1031, 1032, 1035, 1036

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 012) 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 910, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1014, 1015, 1016, 1017, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1030, 1033, 1034, 1037, 1038

were read on this motion tofor SUMMARY JUDGMENT.

Defendants Nissan North America, Inc. ("Nissan") and Philadelphia Indemnity Insurance Company ("PIIC") move, pursuant to CPLR 3212, for summary judgment: (i) dismissing Plaintiff J.T. Magen & Company Inc.'s ("JTM") First Cause of Action for foreclosure of a mechanic's lien ("Lien" [NYSCEF 783]); (ii) granting their Tenth Affirmative Defense and

Nissan's First Counterclaim against JTM for willful exaggeration of the Lien; and (iii) granting their Fourth Affirmative Defense of unclean hands and Eleventh Affirmative Defense of equitable estoppel. Nissan and PIIC also seek a declaration that the Lien is null and void, and a hearing on damages.

Defendant Georgetown Eleventh Avenue Owners, LLC ("Georgetown" and with Nissan and PIIC "Defendants") moves, pursuant to CPLR 3212, for summary judgment: (i) dismissing JTM's First Cause of Action to foreclose the Lien, Second Cause of Action for *quantum meruit*, and Third Cause of Action for account stated; and (ii) granting its First Counterclaim for fraud against JTM, with damages asserted in the amount of $6,590,121.47, plus interest. Georgetown also seeks a declaration on its Fourth Counterclaim that the Lien is void because it was willfully exaggerated and seeks a hearing on damages.

For the reasons that follow, Defendants' motions for summary judgment are GRANTED IN PART. JTM's Complaint is dismissed in its entirety as against Defendants with prejudice and the Lien is declared void pursuant to Section 39 of the Lien Law because it was willfully exaggerated. Georgetown has also established JTM's liability for fraud. Defendants' claims for damages pursuant to Section 39-a of the Lien Law for willful exaggeration and on Georgetown's fraud counterclaim are reserved for trial.

In short, the summary judgment record presents as clear a case for application of the unclean hands, equitable estoppel, and willful exaggeration defenses as can be imagined. JTM is a plaintiff seeking equitable relief in foreclosure of the Lien. Yet the record shows that JTM intentionally falsified records and executed unconditional lien waivers falsely certifying that Defendants' tenant (non-party BICOM) had paid all outstanding JTM invoices. The purpose of the ruse was to persuade Georgetown to release millions of dollars of Tenant Improvement

Allowance ("TIA") funds to BICOM, in return for which JTM was to receive from BICOM not only payment for its invoices but also *double* the ten percent (10%) interest for late payment that previously had been agreed. In reliance on JTM's representations Georgetown paid millions in TIA, but then BICOM failed to pay JTM and its subcontractors as promised. With BICOM now in bankruptcy, and with the project left incomplete, JTM now seeks through Lien foreclosure to have Defendants pay *again* the invoices that JTM verified under oath had *already been paid*. JTM's contention that submitting false lien waivers is accepted "industry practice" is unavailing. Even assuming such waivers may be disregarded when a fully informed property owner seeks to stiff a knowingly unpaid contractor, under Lien Law § 34 or otherwise,[1] the equities are reversed when the contractor attempts to deploy such a false instrument against an *uninformed* property owner as a sword rather than a shield. In that case, it's fraud.

BACKGROUND

The following facts are drawn from the parties' Rule 19-A Statements (NYSCEF 851, 896, 1011, 1012, 1031, 1034) and related submissions.

The Premises, Leases, Sublease and Tenant Improvement Allowances (TIA)

This case involves a construction project ("Project") at 787 Eleventh Avenue ("Premises"). Georgetown owns the Premises (NYSCEF 915 [Deed]). By Retail Lease Agreement dated November 18, 2015 between Georgetown and non-party BICOM NY, LLC ("BICOM"), a portion of the Premises was to include a Jaguar/Land Rover dealership ("BICOM Lease" [NYSCEF 916]). By a second Retail Lease Agreement also dated November 18, 2015 between Georgetown and Nissan, a portion of the Premises was to include a Nissan/Infiniti

[1] See *W. End Interiors, Ltd. v Aim Const. & Contr. Corp.*, 286 AD2d 250, 252 [1st Dept 2001]

dealership ("Nissan Lease" [NYSCEF 917], together with the BICOM Lease, the "Leases"). Also on November 18, 2015, Nissan entered into a sublease ("Sublease" [NYSCEF 918]) with entities controlled by principals of BICOM, including Defendant Gary Flom ("Flom"), for its portion of the Premises.

The Leases include "Adjoining Lease" provisions (Leases Art. 27) that provide for common use of certain areas of the Premises. The Leases require BICOM and Nissan to "use all commercially reasonable efforts not to permit mechanic's or other liens to be placed on the Property" (NYSCEF 916 at 45; NYSCEF 917 at 38).

Section 3.03 of the BICOM Lease concerns reimbursements known as Tenant Improvement Allowances ("TIA") that Georgetown would provide for certain work completed at the Premises and reads, in relevant part,

> Landlord shall pay to Tenant an allowance in the amount of Nine Million Six Hundred Thousand and 00/100 Dollars ($9,600,000.00) (herein called the "Allowance"), which amount shall be paid to Tenant for the cost and expense incurred by Tenant (or the Nissan Tenant) in connection with Tenant's initial Alterations in the Premises. . .
> In the event that the costs and expenses of Tenant's Initial Work shall exceed the amount of the Allowance, Tenant shall be entirely responsible for such excess. Landlord shall pay to the order of Tenant . . .installments of the Allowance within 30 days after Landlord's receipt of a written request for disbursement together with the required accompanying documentation set forth below in Section 3.03(a) . . . Tenant, at Tenant's sole cost and expense (except for the Allowance) shall perform and complete Tenant's Initial Work in accordance with final detailed architectural plans and specifications approved by Landlord, which shall be completed without the same being subject to any liens or encumbrances or third party financing related to the construction of Tenant's Initial Work. Guarantor shall personally guaranty to Landlord such lien free completion of the Retail Improvements pursuant to the Guaranty.
>
> Section 3.03(a) of the BICOM Lease provides, in relevant part:
>
> Prior to the payment of any such installment, Tenant shall deliver to Landlord a written request for disbursement which shall be accompanied by (1) paid invoices for the portion of Tenant's Initial Work referenced in the immediately prior requisition for which a portion of the Allowance was disbursed . . ., (2) a certificate signed by Tenant's architect and an officer or authorized signatory of Tenant certifying that the portion of Tenant's

> Initial Work referenced in such requisition and represented by the aforesaid invoices has been substantially completed in accordance with Tenant's final plan approved by Landlord . . ., (3) partial lien waivers (in AIA form) from contractors, subcontractors and all materialmen who shall have performed any such work referenced in the immediately prior requisition for which a portion of the Allowance was disbursed, other than lien waivers with respect to costs of Tenant's Initial Work in an aggregate amount not exceeding $25,000 for all current and prior requisitions.

The Leases were amended to, among other things, increase the TIA amounts in October 2016 after the Project began (NYSCEF 921-922). As the Court has previously explained, "[t]o receive this [TIA] from Georgetown, BICOM needed to meet certain conditions, including the submission of an unconditional lien waiver purportedly verifying that J.T. Magen was fully paid the amount reflected in the lien waiver" (*J.T. Magen & Co. Inc. v Nissan N. Am., Inc.*, 2020 N.Y. Slip Op. 31374[U], 4 [Sup Ct, New York County 2020]).[2]

The April 18, 2016 BICOM/JTM Contract, Conditional and Unconditional Lien Waivers

BICOM, as "owner," and JTM, as contractor, entered into an AIA A101-2007 Standard Form of Agreement ("Contract" [NYSCEF 784]) for $21,347,349.00 pursuant to which JTM was to renovate the Jaguar/Land Rover automobile showroom (Phase I) and Nissan/Infinity automobile showroom (Phase II) at the Premises. Michael Coughlan ("Coughlan") of the Coughlan Group was designated to serve as BICOM's owner's representative on the Project (Contract § 8.3).

The Contract incorporates various provisions of the Leases and provides for a process whereby which BICOM would make progress payments on the Contract to JTM. The Alteration

[2] The parties appear to disagree as to whether TIA funds were to be *reimbursements* to BICOM for payments it had already made to contractors (Defendants' position) or instead *advancements* for payment obligations it was about to incur (JTM's position) (May 25, 2022 Tr. 7:5-18, 37:7-23, 39:19-40:21, 47:20-48:13 [NYSCEF 1039]). Either way, however, it is undisputed that the agreement required a representation to Georgetown that the relevant contractor invoices *had been paid* and that the Project was lien-free before new TIA funds were released.

Rules and Regulations appended to the Contract provides, in relevant part, that JTM "must submit invoices on an AIA G702 and must be authorized and signed by the Architect on that project. The completed Lien Waiver form must be attached to the AIA G702 identifying the legal ownership entity of the property" (Contract at 38).

JTM commenced work on the Project and periodically submitted to BICOM Applications and Certifications for Payment and Contractor Conditional Partial Waivers of Lien, stating, in part, that they were enforceable "to the extent payment is made" (NYSCEF 935). BICOM, in turn, submitted requests for TIA payments to Georgetown. In August 2016, Georgetown responded to Requisition Number 3 stating that a "partial unconditional lien waiver" must be provided as a pre-condition to the release of TIA funds (NYSCEF 862).

The Side-Deal Between JTM and BICOM

Following Requisition 3, BICOM stopped paying JTM, which resulted in JTM not paying its subcontractors. JTM's CEO Maurice Regan ("Regan") and BICOM's principal, Defendant Flom, met in person at the NoMad Hotel in Manhattan on November 28, 2016, during which JTM agreed to continue to work on the Project without being paid in exchange for a twenty percent (20%) interest fee on outstanding invoices as opposed to the ten percent (10%) they would otherwise be entitled to (NYSCEF 793 [Regan Tr. 59-63]; May 25, 2022 Tr. 55:1-8 [NYSCEF 1039]). Defendants submit a series of email exchanges among representatives from J.T. Magen and BICOM (NYSCEF 797, 798, 800, 805-807, 813, 815-818, 828-829, 840-841, 849, 862, 868-873) and transcripts from the examination before trial of the parties' representative (NYSCEF Doc. Nos. 788-796, 960, 961, 982, 983, 989, 990) to establish the November 28, 2016 side-deal. Among other things, Steven Mount, JTM's CFO and treasurer, confirmed the twenty percent (20%) side-agreement (NYSCEF 794 [Mount Tr. 107-110, 119-120]). Coughlan,

BICOM's representative, also confirmed the side-deal (NYSCEF 933 [Coughlan Tr. 126-145). Regan and Mount confirmed that JTM never disclosed the side-agreement to Georgetown (Regan Tr. 68:14-68:19; Mount Tr. 297:9-297:24).

Shortly after the side-agreement was reached, on December 2, 2016, Coughlan informed Flom that "[y]ou need to pay re4 and now re5 before I can get lien releases and include in the nest [sic] TI reimbursement invoice" and Flom responded "Maurice is financing those, You will get the lien releases and we need to include them so that I can get the money from [Georgetown] and pay back Maurice" (NYSCEF 869). December 21, 2016 emails from Flom to Coughlan confirm that the discussion with Regan concerning "the 20% interest for financing payments" took place on "November 28th" (NYSCEF 813, 873).

The Partial Release and Waiver of Lien

On December 2, 2016, BICOM's representative, Coughlan, emailed JTM's account receivables manager, Josephine Crespo, the following:

> I will need a JTM waiver for 4&5 so I can submit to the [Landlord] for reimbursement and then Gary will pay you. Touch base with Maurice and make sure he is ok with this.

Crespo forwarded the message to Regan with the following message:

> Maurice, are you ok with giving them a waiver for req's 4 & 5? Not paid yet.

Regan replied:

> Yes

(NYSCEF 849).

On December 2, 2016, JTM's CFO and treasurer, Steven Mount, executed a Partial Release and Waiver of Lien ("Partial Release" [NYSCEF 938]). The Partial Release provides, in relevant part:

> IN CONSIDERATION OF PAYMENT made by [*Bicom NY LLC*] (hereinafter "Tenant") to the UNDERSIGNED totaling $ 11,435,146.14 for work, labor, materials, and equipment furnished through the period ending November 28th, 2016 in connection with the general construction work performed pursuant to that certain contract by and between the UNDERSIGNED and the Tenant, dated 4/18/2016. . .
>
> 1.) THE UNDERSIGNED hereby unconditionally releases Tenant and Landlord, and Landlord's lender and/or surety (if any) through the date of this Partial Release and Waiver of Lien from any and all claims and demands of every kind and character. . .
>
> 2.) THE UNDERSIGNED hereby further warrants to Tenant and Landlord, and Landlord's lender and/or surety (if any) that (i) all workmen employed by it or its subcontractors at the Project have been fully paid to the date hereof, inclusive of all statutory withholding taxes, unemployment insurance, other mandatory deductions, and where applicable union dues, check-offs, and any such other compensation properly due. . .

The sworn Partial Release was notarized by Crespo, who as noted above was aware that the invoices had not in fact been paid (Crespo Tr. 113:10-15). Tellingly, the waiver references payments through November 28, 2016 – the date on which the side-deal was agreed.

JTM Submits Falsely Amended Requisition No. 4 Indicating Payment Was Made

Coughlan understood that Georgetown required submission of its own unconditional lien waiver form as a condition of releasing TIA funds to JTM (Coughlan Tr. 97:5-97:19, 124:15-125:12). Regan also understood that Georgetown required unconditional lien waivers as a condition to releasing TIA funds (Regan Tr. 90:24-91:7).

On December 8, 2016, Coughlan submitted Requisition Number 5 for repayment and Georgetown replied, among other things that Requisition Number 4 "has not been paid" and requested "cancelled checks to verify payment has been made for both requisitions, as the lease only provides for reimbursement" (NYSCEF 870). The next day, December 9, 2016, Coughlan emailed JTM's Crespo stating, "I need you to revise the Nov. invoice to show the Oct amount paid. . .I need for a LL reimbursement that is due this morning" (NYSCEF 872).

Moments after receiving Coughlan's email, Crespo replied, copying Regan, and attaching Requisition Number 5 "with revised coversheet showing no open balance" owed to BICOM and increasing the total payments made from $6,801,898,19 to $7,885,776,74 to falsely indicate that Requisition 4 had been paid by JTM (NYSCEF 797; Regan Tr 106:25-107:9). Crespo testified that she would not have sent the modified Requisition No. 5 eliminating the amounts due to BICOM and claiming payment by JTM without the direction of a JTM officer, such as Regan (Crespo Tr. 216:2-8, 220:19-221:24). Within minutes of Crespo's email, Coughlan submitted it to Georgetown stating "JTM revised Req #5 attached showing payment of October. Lien releases show payment as per lease" (NYSCEF 871). Georgetown released $6,590,121.47 in TIA to BICOM on January 3, 2017 (NYSCEF 868).

The Personal Guarantees

BICOM continued to fail to pay JTM and, in March 2017, Defendants Gary Flom and Ven Nilva ("Nilva"), principals of BICOM, executed guarantees in favor of JTM (the "Guarantees" [NYSCEF 3-4]). The Guarantees state that because BICOM "has failed to pay J.T. certain outstanding invoices" on the Project and because "J.T. is not willing to continue incurring costs and expenses" on the Projects that Messrs. Flom and Nilva would personally guarantee payment on the Project to JTM. Neither Georgetown nor Nissan is referenced in the Guarantees.

BICOM's July 2017 Bankruptcy

On July 10, 2017, BICOM filed a voluntary petition for bankruptcy (NYSCEF 242). JTM, Georgetown and Nissan have all appeared in the BICOM's bankruptcy case (NYSCEF 243). The BICOM bankruptcy continues to spawn litigation, including claims against Flom (*In re BICOM NY, LLC*, 633 BR 25, 30 [Bankr SDNY 2021]).

The August 25, 2017 Lien, Discharge Bond and Itemized Statement of Lien

On August 25, 2017, JTM docketed a Notice Under Mechanic's Lien Law (NYSCEF 783). The Lien states that JTM "was employed [by] **BICOM NY, LLC**. . .with the knowledge and consent of **Georgetown Eleventh Avenue Owners, LLC**. . .and **Nissan North America, Inc.** . . ." (Lien ¶4). The Lien provides that work was commenced on the Project on March 10, 2016 and ceased on April 13, 2017 (Lien ¶7). On September 8, 2017, PIIC issued a Bond to Discharge Mechanics Lien ("Bond" [NYSCEF 2]). On May 8, 2019, Steven Mount executed an Itemized Statement of Lien Pursuant to Lien Law 38 (NYSCEF 969) making clear that JTM's Lien was based on the Contract and invoiced issued pursuant to the Contract.

PROCEDURAL HISTORY

On November 28, 2017, JTM commenced this action to foreclose on the Lien; for *quantum meruit* against Georgetown and Nissan; for account stated against Georgetown and Nissan; for trust fund diversion against Flom and Nilva; and for breaches of the Guarantees against Flom and Nilva (NYSCEF 1). On October 2, 2018, the Court (Bransten, J.) dismissed the causes of action for account stated and trust fund conversion against Nissan (NYSCEF Doc. No. 147). The Appellate Division, First Department affirmed the dismissal of those claims and also dismissed the claim for *quantum meruit* because "the presence of a written contract between [JTM] and BICOM governing all aspects of the work to be done at the property bars any quantum meruit claim by plaintiff against Nissan" (*J.T. Magen & Co., Inc. v Nissan N. Am., Inc.*, 178 AD3d 466, 467 [1st Dept 2019]).

Nissan subsequently answered and asserted a counterclaim for willful exaggeration of the Lien against JTM (NYSCEF 780). Georgetown asserted several counterclaims in its answer including, as relevant here, willful exaggeration and fraud (NYSCEF 156). On January 30,

2019, counsel for Flom and Nilva was granted leave to withdraw as counsel and no attorney has filed an appearance on behalf of Flom or Nilva (*J.T. Magen & Co. Inc. v Nissan N. Am., Inc.*, 2019 N.Y. Slip Op. 30225[U], 3 [Sup Ct, New York County 2019]).

On December 11, 2019, the Court denied JTM's motion for summary judgment – made before discovery was completed – identifying numerous fact issues surrounding JTM's claims and Defendants' affirmative defenses and counterclaims (NYSCEF 464 [Tr. 64-78]). After the close of discovery, Defendants moved for summary judgment (NYSCEF 777, 852).

DISCUSSION

Legal Standard

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial (*Zuckerman v City of New York*, *supra*). Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient to defeat summary judgment (*Id.*).

A. Unclean Hands and Equitable Estoppel Preclude Foreclosure of the Mechanics Lien

An action to enforce a lien is equitable in nature and is subject to equitable defenses (*Salerno Painting & Coating Corp. v Natl. Neurolabs, Inc.*, 43 AD3d 1140, 1141 [2d Dept 2007] *citing Brescia Const. Co. v Walart Const. Co.*, 264 NY 260, 265 [1934]). In particular, "[w]here a litigant has himself been guilty of inequitable conduct with reference to the subject matter of

the transaction in suit, a court of equity will refuse him affirmative aid" (*Levy v Braverman,* 24 AD2d 430, 430 [1st Dept 1965]). "To charge a party with unclean hands, it must be shown that said party was 'guilty of immoral or unconscionable conduct directly related to the subject matter'" (*Citibank, N.A. v American Banana Co., Inc.*, 50 AD3d 593, 601 [1st Dept 2008] [internal citations omitted]). Contrary to JTM's contentions, the First Department's decision in this case did not reject any of Defendants' equitable defenses, including unclean hands.

Defendants argue that JTM acted with unclean hands by (i) entering the side-agreement with BICOM without Georgetown's knowledge; (ii) submitting falsified invoices that removed open balances to wrongly obtain TIA funds; and (iii) submitting the falsified unconditional Partial Waiver indicating that all contractors and material men had been paid on the Project when they had not.

JTM argues that the First Department's decision in this case found that the December 2 lien waiver is "void and unenforceable" (NYSCEF 1027 at 38). This is incorrect. The First Department found only that the "lien waiver did not 'conclusively establish' [Nissan's] defense that the lien was willfully exaggerated" and that the issue could be revisited after discovery (*J.T. Magen & Co., Inc. v Nissan N. Am., Inc.,* 178 AD3d 466, 467 [1st Dept 2019] [citations omitted]).

In denying JTM's motion for summary judgment, this Court found that Defendants were entitled to discovery about "an undisclosed financing arrangement and whatever other deal might have existed between J.T. Magen and BITCOM. . ." (Dec. 11, 2019 Tr. 67:11-17). The Court made clear that, with respect to the "affirmative defense of unclean hands," that "[t]here is certainly enough there to indicate to me that there is a possible case to be made" (Dec. 11, 2019 Tr. 69-70 [NYSCEF 464]).

The record now shows – unequivocally – that JTM's conduct precludes it from recovering on a claim in equity under the Lien. JTM knowingly made false, sworn statements to induce Georgetown to release TIA funds. JTM edited invoices and engaged in other inequitable conduct, including entering the side-agreement, that went straight to the heart of the Project and prejudiced Defendants by depriving them of their contractually bargained for protections. The end result of the scheme, if JTM were to succeed on its claim, would be that Georgetown would pay twice (once to BICOM and once to JTM) for the same work. In light of that conduct, as to which there are no disputed material issues of fact, the Court finds that JTM cannot recover on its claims seeking equitable relief.

The cases cited by JTM for the proposition that, in the context of a bilateral contracting situation, a lien waiver not accompanied by payment is ineffective as against an owner who knows payment was not actually made do not warrant a different result (Memorandum in Opp. At 15 [NYSCEF 1010]). For instance, in *W. End Interiors, Ltd. v Aim Const. & Contr. Corp.*, 286 AD2d 250, 252 [1st Dept 2001] the First Department held that "[w]here a waiver form purports to acknowledge that no further payments are owed, but the parties' conduct indicates otherwise, the instrument will not be construed as a release." Here, however, Georgetown was not a party to the Contract between BICOM and JTM. Instead, Georgetown reviewed Requisition Numbers 4 and 5 and determined that balances appeared to remain open. In response, JTM simply modified the records to show a zero balance and submitted the unconditional lien waiver falsely swearing that all payments due to contractors and materialmen were paid. As a result, Georgetown released millions in TIA funds to BICOM. Accordingly, the "circumstances surrounding the execution" of the December 2 Partial Release do not suggest that Georgetown was aware that JTM's lien waivers were false or conditioned upon expected future

payment (*Spectrum Painting Contractors, Inc. v Kreisler Borg Florman Gen. Const. Co., Inc.*, 64 AD3d 565, 578 [2d Dept 2009]).

Nor does New York Lien Law § 34 support JTM's position. That provision prohibits any contract purporting to waive "the right to file or enforce any lien" but permits waivers executed "simultaneously with or after payment" is made. Section 34 does not, however, allow JTM to falsely *represent* that it has been paid – thus making the waiver appear to Georgetown to be enforceable under the statute – and then rely on the same statute to escape the consequences of its own misrepresentation. Such a reading would turn Section 34 on its head and be an invitation to fraud and abuse.

Unlike the cases cited by JTM, this is not a case where payment was made to the contractor contingent on the receipt of a lien waiver (*Penava Mech. Corp. v Afgo Mech. Services, Inc.*, 71 AD3d 493, 495 [1st Dept 2010]) or where the Partial Waiver was treated "as a mere receipt of the amounts stated. . ." *Peter Scalamandre & Sons, Inc. v FC 80 Dekalb Assoc., LLC*, 129 AD3d 807, 810 [2d Dept 2015]). The unconditional Partial Waiver was instead relied on by Georgetown as a precondition to release TIA funds for payments that were sworn to have been made to JTM. JTM's contention that the Court should simply ignore the plain language of the lien waiver and JTM's blatantly misleading conduct, upon which Georgetown relied to its detriment, is illogical and unavailing. JTM's claim is barred by its unclean hands.

Separately, JTM's claim is barred by equitable estoppel. To establish estoppel defense, movants "must demonstrate a lack of knowledge of the true facts; reliance upon the conduct of the party estopped; and a prejudicial change in position" (*Riv. Seafoods, Inc. v JPMorgan Chase Bank*, 19 AD3d 120, 122 [1st Dept 2005] [collecting cases]). "The purpose of equitable estoppel is to preclude a person from asserting a right after having led another to

form the reasonable belief that the right would not be asserted, and loss or prejudice to the other would result if the right were asserted" (*Matter of Shondel J. v Mark D.*, 7 NY3d 320, 326 [2006]). JTM's submission of false invoices and false lien waivers is a paradigmatic example of conduct giving rise to equitable estoppel. JTM's opposition (NYSCEF 1010) is, tellingly, silent on this point.

Neither the case law nor the evidence in this record support JTM's suggestion that submission of false certifications of payment to Georgetown was consistent with accepted industry practice. The bottom line is that JTM cut a side deal with what turned out to be an unreliable entity (BICOM) and its principals, with the goal of extracting TIA funds from Georgetown for their mutual benefit. JTM cannot now come to this Court seeking equitable relief to shift the risk of that failed illicit bargain from itself to Defendants, who were the targets of the scheme. JTM's claim is barred by equitable estoppel.

B. Defendants Did Not Consent to JTM's Uncompensated Work Under Section 3 of the Lien Law

Separately, Defendants argue that they did not consent to the work for which JTM now seeks payment based on the doctrine of substantial completion (*Joson Iron Works, Inc. v Staten Is. Majors Realty Corp.*, 164 F3d 618 [2d Cir 1998] [collecting cases and applying New York law]).[3] JTM argues that the BICOM Lease constitutes indisputable proof that Defendants consented to JTM's uncompensated work, based on *Ferrara v Peaches Café LLC*, 32 NY3d 348,

[3] "An owner cannot be charged for improvements which are incomplete or fail to comply with the terms and specifications under which the consent was granted, *see, e.g., New York Elevator Supply Co. v. Bremer,* 74 A.D. 400, 77 N.Y.S. 509, 510-11 (App.Div.1902), *aff'd,* 175 N.Y. 520, 67 N.E. 1086 (1903), unless the failure to substantially comply with the terms of the consent is caused by the owner" (*Joson Iron Works, Inc. v Staten Is. Majors Realty Corp.*, 164 F3d 618 [2d Cir 1998]).

351 [2018] ["we hold that consent, for purposes of Lien Law § 3, was properly inferred from the terms of the lease agreement between COR and Peaches, and that the Appellate Division appropriately declined to impose a requirement that COR either expressly or directly consent to the improvements"]).

The Court holds, in addition to its determination on the equitable defenses *supra*, that Defendants did not consent to JTM's work that is the subject of the Lien based on the language of the Leases and the attendant facts. The Leases set forth a process by which Georgetown would provide TIA funds to BICOM upon receipt of confirmation that contractor invoices had been paid and there was no risk of a lien on the project. Neither Georgetown nor Nissan consented to the side-transaction in which JTM knowingly continued to work without compensation based upon promises from BICOM's principals. Instead, Georgetown required compliance with the Leases, including submission of unconditional lien waivers. The side-transaction deprived Defendants of their contractually bargained-for protections. Moreover, the facts show that this was no innocent mistake as Requisitions 4 and 5 were intentionally and inaccurately edited, after Georgetown's review, to induce Georgetown to make TIA Payments.

The Court of Appeals decision in *Ferrrara* has been cited to deny attempts to foreclose mechanics liens on similar facts. In *Baring Indus., Inc. v 3 BP Prop. Owner LLC*, 580 F Supp 3d 41, 56 [SDNY 2022], *appeal withdrawn*, 22-306, 2022 WL 1575801 [2d Cir Mar. 4, 2022] [*citing Ferrrara*], for example, the court held:

> In the MTD Order, the Court explained that Baring alleged adequately that 3 BP had consented to Baring's work on the Leased Property, but only to the extent that Baring's work resulted in permanent improvements to the Leased Property and fell under the ambit of the Allowance provisions of Section 3.03 of the Lease. . .Now that discovery has closed and the fully developed record is before the Court, it is clear that none of Baring's work resulted in permanent improvements and that DaDong was never reimbursed for Baring's work under Section 3.03 of the Lease. . . Accordingly, 3 BP did not consent to

> Baring's work on the Leased Property and Baring's claims arising out of the Lien against 3 BP and its surety, Westchester, fail.

A similar result was reached in *New York Green Mech. Services Inc. v MACC Corp.* [Sup Ct, New York County 2021] [*citing Ferrara*] ["The record before the Court is devoid of any affirmative act by HDFC implying consent to the underlying contract"]).

Ferrara does not, as argued by JTM, stand for the proposition that an owner's entry into a contract authorizing improvements consents to breaches of that same contract for purposes of the Lien Law. While Defendants may have consented to the completion of work generally, their consent must be read through the prism of the Leases, as required by *Ferrara.* The cases upon which JTM relies do not warrant a different result. On these facts, Defendants have established their entitlement to judgment as a matter of law that they did not consent to the unpaid work that is the subject of the Lien (*GCDM Ironworks, Inc. v GJF Const. Corp.*, 292 AD2d 495, 497 [2d Dept 2002] [granting summary judgment]; *Natixis, New York Branch v 20 TSQ Lessee LLC*, 71 Misc 3d 1201(A) [Sup Ct, New York County 2021]). Thus, in addition to the equitable grounds stated above, the Court determines that Defendants did not consent to JTM's allegedly unpaid work that is the subject of the Lien.

C. Plaintiff's *Quantum* Meruit and Account Stated Claims Against Georgetown are Dismissed

To be entitled to recover damages under a theory of *quantum meruit*, a plaintiff must establish (1) the performance of services in good faith, (2) the acceptance of services by the person or persons to whom the services are rendered, (3) the expectation of compensation therefor, and (4) the reasonable value of the services rendered (*Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 410 [1st Dept 2011], *affd* 19 NY3d 511 [2012]).

The existence of a written contract between J.T. Magen and BICOM governing all aspects of the work to be done at the Premises bars any *quantum meruit* claim by J.T. Magen against Georgetown, just as it barred a similar claim made against Nissan (*J.T. Magen*, 178 AD3d at 467; *Randall's Is. Aquatic Leisure, LLC v City of New York*, 92 AD3d 463, 464 [1st Dept 2012]).

The cause of action against Georgetown for an account stated is also dismissed. An account stated exists where a party to a contract receives bills or invoices and does not protest within a reasonable time (*Bartning v Bartning*, 16 AD3d 249, 250 [1st Dept 2005]). While Georgetown may have received the benefit of some services on the construction agreement, it is undisputed that the construction agreement is between J.T. Magen and *BICOM* – not Georgetown.

D. Summary Judgment on Defendants' Willful Exaggeration Defenses and Counterclaims Is Warranted and the Lien is Void

Lien Law § 39 provides, in relevant part, that "if the court shall find that a lienor has wilfully exaggerated the amount for which he claims a lien as stated in his notice of lien, his lien shall be declared to be void and no recovery shall be had thereon." A lien that seeks to recover amounts that were waived is wilfully exaggerated (*Westbury S & S Concrete, Inc. v Manshul Const. Corp.*, 212 AD2d 596, 597 [2d Dept 1995]). In light of the Court's determinations above, the Lien is declared void pursuant to Lien Law § 39, because the Lien seeks amounts that were specifically waived and are otherwise unrecoverable (*Strongback Corp. v N.E.D. Cambridge Ave. Dev. Corp.*, 25 AD3d 392, 394 [1st Dept 2006]).

E. Damages For Willful Exaggeration Pursuant to Lien Law Section 39-a Shall Be Determined at Trial

Lien Law § 39-a provides, in relevant part, that where "the court shall have declared said lien to be void on account of wilful exaggeration the person filing such notice of lien shall be liable in damages to the owner or contractor. . ." Section 39-a is penal in nature and must be construed narrowly and in favor of the party against whom the penalty is sought (*Guzman v Estate of Fluker*, 226 AD2d 676, 678 [2d Dept 1996] *citing Goodman v Del-Sa-Co Foods, Inc.*, 15 NY2d 191, 194 [1965]).

The remedies provide by Section 39-a of the Lien Law may include, among other things, "the premium for the bond given to discharge the lien and reasonable attorney's fees for securing the discharge" (*E-J Elec. Installation Co. v Miller & Raved, Inc.*, 51 AD2d 264, 266 [1st Dept 1976]). It is unclear on this record what, if any, damages for willful exaggeration may be due (*Saratoga Assoc. Landscape Architects, Architects, Engineers and Planners, P.C. v Lauter Dev. Group*, 77 AD3d 1219, 1223 [3d Dept 2010]; *J.T. Magen & Co., Inc. v Nissan N. Am., Inc.*, 178 AD3d at 467, *supra*). Accordingly, the issue of damages is reserved for trial.

F. Summary Judgment as to Liability on Georgetown's Fraud Counterclaim is Warranted

"The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009] [collecting cases]). Georgetown has established each required element. The Partial Waiver and the edited requisition 5 contained materially false representations of fact; the falsity of those representations was known to JTM; JTM submitted the documents to induce Georgetown to pay

TIA; and Georgetown justifiably relied on JTM's false representations when it released millions of dollars in TIA to BICOM.

However, questions of fact preclude summary judgment on damages with respect to Georgetown's fraud counterclaim. Here, JTM did complete significant work on the Project. While JTM may not recover in equity on its lien, it is equally true that Defendants should not realize a windfall and the Court cannot determine conclusively, on this record, whether and to what extent Georgetown suffered compensable damages, including some or all of the $6,590,121.47 in TIA funds it released to BICOM (*Matter of De Kovessey v Coronet Properties Co.*, 69 NY2d 448, 458 [1987]).

* * * *

Accordingly, it is

ORDERED that Defendants' motions for summary judgment are **GRANTED IN PART** and Plaintiff's Complaint is dismissed with prejudice as against Defendants Georgetown Eleventh Avenue Owners, LLC, Nissan North America, Inc., and Philadelphia Indemnity Insurance Company; it is further

ORDERED that summary judgment is **GRANTED** on Nissan and PIIC's Tenth Affirmative Defense, Nissan's First Counterclaim, and Georgetown's Fourth Counterclaim for willful exaggeration (other than with respect to damages); it is further

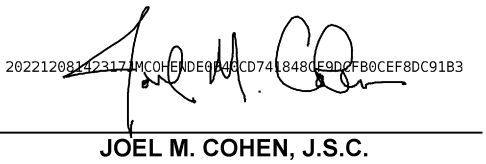
ORDERED, DECLARED AND ADJUDGED that JTM's Lien is void pursuant to Lien Law § 39; it is further

ORDERED that summary judgment is **GRANTED** (as to liability) on Georgetown's First Counterclaim for fraud; it is further

ORDERED that the issue of damages, if any, on Defendants' counterclaims for willful exaggeration pursuant to Lien Law § 39-a and Georgetown's counterclaim for fraud is reserved for trial; and it is further

ORDERED that the parties appear for an initial pretrial conference on **December 21, 2022 at 10:30 am**, or as soon thereafter as counsel are available, to determine scheduling and logistics for trial.

This constitutes the decision and order of the Court.



12/8/2022
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE