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

PRESENT: HON. MANUEL J. MENDEZ PART 13
Justice

AAR-ZEE SERVICES, INC.,
Plaintiff(s),

- v -

QUANTUM ACQUISITION PARTNERS, L.L.C.,
Defendant(s).

INDEX NO. 115284/10

MOTION DATE 07-13-2011

MOTION SEQ. NO. 001

QUANTUM ACQUISITION PARTNERS, L.L.C.,
Third-Party Plaintiff(s),

- v -

OLYMPIC TOWER ASSOCIATES,
Third-Party Defendant(s).

The following papers, numbered 1 to 9 were read on this motion for summary judgment and cross-motion to/ for Dismiss:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 2, 6 - 7
Answering Affidavits — Exhibits ____ cross motion	3, 4, 8
Replying Affidavits	5, 9

Cross-Motion: X Yes No

Upon the foregoing papers, it is Ordered that plaintiff, AAR-ZEE SERVICES, INC.'s motion for summary judgment, is denied. Third-party defendant, OLYMPIC TOWER ASSOCIATES' cross-motion pursuant to CPLR 3211 [a][1], [4] and [7], to dismiss the third-party action, is granted.

Plaintiff brought this action to recover a total of $27,017.00, asserting causes of action in the complaint for work, labor, services and materials rendered that remain unpaid, account stated, unjust enrichment and for $10.00 in bank fees incurred based on a dishonored check issued by the defendant [Aff. in Opp. Exh. B]. Plaintiff's motion for summary judgment is based on the tender of a check by the defendant dated September 28, 2010, in the amount of $27,017.00 which was returned for insufficient funds [Mot. Exh. 1]. Plaintiff claims that the defendant's failure to disprove all or a portion of the May 26, 2010 invoice [Mot. Exh. 3] within twelve business days after tender as required pursuant to New York General Business Law (GBL) §756-a [2][i], along with the returned check was proof of concession to the amount owed.

Quantum Acquisition Partners, L.L.C. (Quantum), opposes the motion for summary judgment claiming that the parties had a written agreement that 90% percent of the amount owed to the plaintiff for work, labor, services and materials would be paid upon substantial completion, with the balance due on punch list sign off [Opp.Exh. A]. Defendant claims that the plaintiff was required to perform punch list work,

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

properly perform the work that was completed and provide all required Department of Buildings (DOB) documentation pursuant to the agreement, but failed to do so, therefore GBL §756-a [2] does not apply.

Third-party defendant, Olympic Tower Associates' (Olympic),cross-motion pursuant to CPLR 3211 [a][1], [4] and [7] seeks to dismiss the action. Olympic states that Quantum's claims asserted in the third party complaint were previously adjudicated in a holdover proceeding in the appropriate forum, Civil Court. Olympic claims in the third-party action has been rendered moot.

Quantum's opposition to the cross-motion only addresses the "Fourth Third-Party Claim" which seeks indemnification and/or contribution from Olympic in the event there is a finding of liability to AAR-ZEE SERVICES, INC.. Quantum claims that pursuant to CPLR 3211 [a][1], [4] and [7], Olympic's motion does not state a basis to dismiss the "Fourth Third-Party Claim."

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v. City of New York, 81 N.Y. 2d 833, 652 N.Y.S. 2d 723 [1996] and Ayotte v. Gervasio, 81 N.Y. 2d 1062, 601 N.Y.S. 2d 463 [1993]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (Kaufman v. Silver, 90 N.Y. 2d 204, 659 N.Y.S. 2d 250 [1997], Amatulli v. Delhi Constr. Corp., 77 N.Y. 2d 525, 569 N.Y.S. 2d 337 [1999]). In determining the motion the Court must construe the evidence in a light most favorable to the non-moving party (SSBS Realty Corp. v. Public Service Mut. Ins. Co., 253 A.D. 2d 583,677 N.Y.S. 2d 136 [N.Y.A.D. 1st Dept. 1998]).

Pursuant to GBL §756-a [2], A contractor is entitled to invoice the owner of property for interim payments at the end of a billing cycle and submit a final invoice, "upon full performance of all the contractor's obligation under the contract." After the contractor delivers the invoice and all documentation required under the contract, the owner has twelve business days to prepare and issue a written statement approving or disapproving all or a portion of an invoice or make a payment. GBL §756-a [2] does not provide a basis for summary judgment where there are issues of fact as to breach of contract (Metro Found. Contrs., Inc. v. Marco Martelli Assoc., Inc., 78 A.D. 3d 594, 912 N.Y.S. 2d 187 [N.Y.A.D. 1st Dept., 2010]).

Plaintiff provides the affidavit of Sergio Tomasi, its president, he states that an invoice for $27,017.00 was tendered to Quantum [Mot. Exh. 3] and that no objections were raised until this action was commenced. Quantum tendered a check to the plaintiff dated September 28, 2010, for the full amount indicated in the invoice. The check tendered by Quantum was returned for insufficient funds [Mot. Exh. 1]. Plaintiff claims that the invoice was tendered on or about May 26, 2010, and pursuant to GBL §756-a [2], the failure to issue a written statement objecting to the invoice within twelve business days of receipt combined with the bounced check is a basis to grant summary judgment.

In opposition Quantum produced a construction contract with a handwritten amendment which indicates the plaintiff is only entitled to "90 percent payment on Substantial Completion" with the balance due on the punch list sign off [Opp. Exh.. A].

Quantum claims that plaintiff is not entitled to payment because it did not "substantially complete" the work required pursuant to the parties construction contract. Quantum claims that the check for $27,017.00 was not funded when plaintiff failed to provide documentation from the Department of Buildings (DOB) or obtain a punch list sign off. Quantum states that because plaintiff did not comply with the terms of the construction agreement, GBL §756-a [2] does not apply.

An executed check is an instrument for the payment of money only and defenses in the form of impropriety of the underlying contract do not alter its character. An instrument for the payment of money creates a strong presumption of merit on the claims. After conceding to execution and default on the instrument, the defendant is required to come forward with strong evidentiary proof to raise an issue of fact as to the defenses (Seaman-Andwall Corp. v. Wright Maching Corp., B.S.F., 31 A.D. 2d 136, 295 N.Y.S. 2d 752 [N.Y.A.D. 1st Dept. 1968] and First Inter-County Bank of New York v. DeFilippis, 160 A.D. 2d 288, 553 N.Y.S. 2d 384 [N.Y.A.D. 1st Dept. 1990]).

Substantial performance of contractual obligation entitles the party that performed the services to payment under the contract, less the cost of corrections or defects in performance. If there is any doubt, the determination of substantial performance or breach of the agreement is to be made by the trier of fact (F. Garofalo Electric Co. v. New York University, 300 A.D .2d 186, 754 N.Y.S. 2d 227 [N.Y.A.D. 1st Dept. 2002] citing to Jacob & Youngs v. Kent, 230 N.Y. 239, 129 N.E. 889, N.Y.S [1921]).

Quantum provides the affidavit of Michael Kornblum, a member, he states the check for $27,017.00 was tendered contingent on plaintiff's performing all the punch-list work and providing DOB documentation. Michael Kornblum claims the amended terms of the construction contract were agreed to in a meeting with Serge Tomasi. Quantum claims the check was not funded because plaintiff did not complete the work as indicated in the construction agreement [Opp. Exh. A]. The punch list issued on April 13, 2010 [Opp. Exh. E] was not signed off and Quantum provides a field report from Daniel Pontecorvo, P.E., based on mechanical and sprinkler inspection of February 1, 2011, which indicates that there are defects in the work performed by the plaintiff [Opp. Exh. F]

In reply, plaintiff provides only the affirmation of its attorney, who has no personal knowledge of any meeting or modification of the agreement. Plaintiff's attorney claims that the agreement submitted by Quantum [Opp. Exh. A] may not have been signed by both parties and therefore does not constitute a valid construction contract. Plaintiff states that at the very least $5,815.30 was owed on the balance of completion of 90% of the work and that the last check that bounced was made to cover the full remaining amount owed including the final 10% .

The plaintiff met its burden of proof that an instrument for the payment of money, a check, was provided by Quantum and returned for insufficient funds. In opposition, Quantum sufficiently raised an issue of fact concerning potential lack of "substantial performance" of the construction agreement as a basis to not fund the check. Plaintiff provided no proof concerning when the invoice was delivered to Quantum and there remains an issue of fact as to when the invoice was tendered for purposes of establishing an account stated. There is an issue of fact as to the terms of the construction contract and whether GBL. §756-a [2] applies. There remain issues of fact concerning the defense to the defendant's check and the failure to have sufficient funds.

A motion to dismiss pursuant to CPLR §3211[a][1], on the ground that the action is barred by documentary evidence, requires the Court to construe every fact plaintiff has alleged as true. The party making the motion to dismiss must produce documentary evidence that, "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." (Leon v. Martinez, 84 N.Y. 2d 83, 638 N.E. 511, 614 N.Y.S. 2d 972 [1994] and AG Capital Funding Partners, L.P. v. State Street Bank and Trust Co., 5 N.Y. 3d 582, 842 N.E. 2d 471, 808 N.Y.S. 2d 573 [2005]).

Pursuant to CPLR §3211[a][4], an action may be dismissed on the ground that the action is barred because there is another action pending between the same parties seeking the same relief for the same causes of action in any court of the state. A motion pursuant to CPLR §3211[a][4] requires the relief in both actions be the same or substantially the same (White Light Productions, Inc. v. On the Scene Productions, Inc., 231 A.D. 2d 90, 660 N.Y.S. 2d 568 [N.Y.A.D. 1st Dept.,1997]). The characterization of damages in a different manner does not "in and of itself" create a substantial difference between actions (Stanley Electrical Services, Inc. v. City of New York, 26 A.D. 2d 951, 275 N.Y.S. 2d 222 [N.Y.A.D. 2nd Dept., 1966]).

Quantum commenced this third-party action on May 20, 2011, the complaint states four claims, and there were no prior stays or injunctions on the pending Civil Court holdover proceeding [Cross- Mot. Exh. J]. The first claim seeks a judicial determination that Quantum is not in default for failure to cure as indicated in the Notice to Cure and a finding that the Notice to Cure and Notice of Termination are null and void. The second claim seeks an injunction permanently restraining and enjoining Olympic from taking any further actions to cancel or terminate the lease and prosecuting the holdover proceeding. The third claim seeks judicial determination and an Order compelling Olympic to complete the tenants work and obtain certificates of approval within fifteen days or permit Quantum to utilize its own contractor to complete the same. The fourth claim seeks an Order for common law indemnification and/or contribution from Olympic on any judgment obtained by the plaintiff against Quantum.

Olympic seeks dismissal of the first, second and third claims in the third-party complaint because the same relief was sought and resolved in a related Civil Court holdover proceeding. On May 23, 2011, there was a Decision/Order in the holdover proceeding which awarded a judgment of possession and a monetary judgment, based on Quantum's failure to pay Court Ordered use and occupancy [Cross-Mot. Exh. A]. Olympic claims that as a result of the May 23, 2011 Decision/Order, Quantum is no longer entitled to possession of the premises and the claim concerning the Notice to Cure and Notice of Termination is moot. The failure of Quantum to obtain a Yellowstone injunction prior to termination of the tenancy according to Olympic renders the second claim moot and there is no showing of the requirements for any other injunctive relief. Olympic states that the third claim was resolved pursuant to a Court Ordered Stipulation in the Civil Court dated May 3, 2011, which provides that the work would be completed by Olympic [Cross-Mot. Exh. H]. The Decision/Order of Hon. Arlene Bluth dated June 21, 2011, denied Quantum's motion in the Civil Court for an order vacating the judgment and granting leave to amend its answer [Reply Exh. A].

Quantum did not provide opposition to dismissal of the first, second and third claims in the third-party complaint.

The Civil Court has jurisdiction over landlord and tenant disputes and should decide them when it can do so [Post v. 120 East End Ave. Corp., 62 N.Y. 2d 19, 464 N.E. 2d 125, 475 N.Y.S. 2d 821 [1984]). "Strong policy considerations favor finality in the resolution of disputes to assure that parties are not vexed by repetitious litigation." (Walentas v. Johnes, 126 A.D. 2d 417, 510 N.Y.S. 2d 121 [N.Y.A.D. 1st Dept. 1987]). The same policy considerations are implemented through the doctrine of res judicata to bar not only future litigation on the same matters but also matters that might have been litigated but were not (Walentas v. Johnes, 126 A.D. 2d 417, supra).

After receipt of a notice to cure and before the termination period has expired a tenant may seek a Yellowstone injunction. The purpose of the injunction is to allow the tenant a stay of the cure period during the pending proceeding to avoid a forfeiture of the premises (Empire State Building Associates v. Trump Empire State Partners, 245 A.D. 2d 225, 667 N.Y.S. 2d 31 [N.Y.A.D. 1st Dept. 1997]). A preliminary injunction requires a showing of, a probability of success, danger of irreparable injury in the absence of the relief sought, and a balance of the equities in the applicants favor (Aetna Ins. Co. v. Capasso, 75 N.Y. 2d 860, 552 N.E. 2d 166, 552 N.Y.S. 2d 919 [1990]).

Quantum has failed to provide a basis to proceed on the first, and third claims, which were resolved based on previous Decision/Orders rendered in the Civil Court. Quantum failed to timely seek a Yellowstone injunction and the opposition papers provide no arguments as to the basis for further injunctive relief. The first, second and third claims in the third-party complaint are dismissed.

A motion to dismiss pursuant to CPLR §3211[a][7], requires a reading of the pleadings to determine whether a legally recognizable cause of action can be identified and it is properly pled (Guggenheimer v. Ginzberg, 43 N.Y. 2d 268, 401 N.Y.S. 2d 182, 372 N.E. 2d 17, [1977]). Documentary evidence that contradicts the allegations, or pleadings that consist of bare legal conclusions will not be presumed to be true and are a basis for dismissal (Morgenthow & Latham v. Bank of New York Company, Inc., 305 A.D. 2d 74, 760 N.Y.S. 2d 438 [N.Y.A.D. 1st Dept.,2003]).

The fourth third-party claim seeks common law indemnification and/or contribution from Olympic for any judgment obtained by the plaintiff against Quantum. Olympic states that there is no basis for common law indemnity because it requires no actual fault on the part of the proposed indemnitee. Olympic claims that Quantum actually participated and to some degree is liable to plaintiff for wrong-doing by writing a check to the plaintiff that bounced for insufficient funds. Pursuant to CPLR §1401, common law contribution only applies to personal injury, injury to property and wrongful death, not breach of contract or actions for economic damages. Olympic refers to § 7.04 of the lease and states that Quantum has misinterpreted its terms and therefore would not be entitled to either indemnity or contribution.

Common law indemnification is "vicarious liability without the actual fault of the proposed indemnitee." (Trustees of Columbia University v. Mitchell/Giurgola Associates, 109 A.D. 2d 449, 492 N.Y.S. 2d 371 [N.Y.A.D. 1st Dept. 1985]). A party that has participated to some degree in the wrong-doing is not eligible to receive the benefit of the doctrine (Chunn v. New York City Housing Authority 83 A.D. 3d 416, 922 N.Y.S. 2d 3 [N.Y.A.D. 1st Dept. 2011]).

A claim for common-law contribution is not available where the only relief sought is economic damages. Pursuant to CPLR §1401 which codified common-law contribution, relief is only available for damages in personal injury, injury to property and wrongful death (Children's Corner Learning Center v. A. Miranda Contracting Corp., 64 A.D. 3d 318, 879 N.Y.S. 2d 418 [N.Y.A.D. 1st Dept., 2009]).

The lease between the parties in section 7.04 (a) requires documentation including certificates of approval by any authorized governmental and quasi-governmental body. Section 7.04 (a) of the lease also requires that the landlord disburse funds from time to time, after receipt of Tenant's request, for that portion of contribution equal to the amount set forth in tenant's requisition; "provided however, that no advance shall be made if, and for so long as there exists an Event of Default beyond any applicable notice and cure period."

Olympic has sufficiently established that common law indemnification and contribution would not apply to Quantum. Quantum's poorly stated claims cannot be maintained pursuant to the documentary evidence in the form of the lease. Quantum did not obtain documentation from the DOB and an "Event of Default" beyond the applicable notice and cure period has occurred. Quantum has not provided a sufficient basis to maintain or sever the "Fourth Third-Party Claim" and it is dismissed.

Accordingly, it is ORDERED that plaintiff, AAR-ZEE SERVICES, INC.'s motion for summary judgment, is denied, and it is further,

ORDERED that third-party defendant, OLYMPIC TOWER ASSOCIATES' cross-motion pursuant to CPLR 3211 [a][1], [4] and [7], to dismiss the third-party action, is granted, and QUANTUM ACQUISTION PARTNERS L.L.C.'S, third-party action is severed and dismissed.

ORDERED that the action shall continue to trial with the remaining to the parties.

This constitutes the decision and order of this court.

Dated: August 3, 2011

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE