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SHORT FORM ORDER

INDEX No. 4328-11

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 45 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 5/4/11
ADJ. DATES 12/9/11
Mot. Seq. # 001 - MD
PC Scheduled: 3/23/12
CDISP Y____ N X

SCHWING ELECTRICAL SUPPLY CORP., Plaintiff, -against- HUNTER ROBERTS CONSTRUCTION GROUP LLC, ROBIN HOOD FOUNDATION, RH ATLANTIC-PACIFIC LLC a/k/a ROBIN HOOD FOUNDATION, PAUL D. ANDERSON, TIMOTHY J. DILLON, KEVIN M. BARRETT, MICHAEL LESKO, MATTHEW RITTLER and MICHAEL PARK, Defendants.	ROBERT & ROBERT, PLLC Attys. For Plaintiff 150 Broadhollow Rd. Melville, NY 11747 HOLLAND & KNIGHT, LLP Attys. For Defendants 31 W. 52nd St. New York, NY 10019

Upon the following papers numbered 1 to 13 read on this motion to dismiss ; Notice of Motion/Order to Show Cause and supporting papers 1 - 4 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 5-7 ; Replying Affidavits and supporting papers ; Other 8-9 (memorandum); 10-11 (memorandum); 12-13 (memorandum) ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#001) by defendants for an order dismissing certain of the causes of action set forth in the plaintiff's complaint is considered under CPLR 3211(a)(7) and is denied; and it is further

ORDERED that a preliminary conference shall be held on **March 23. 2012** in Part 45, at 9:30 a.m. at the courthouse located at 1 Court Street - Annex, Riverhead, New York. Counsel are directed to appear thereat on March 23, 2012 ready for such conference.

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The plaintiff commenced this action to recover monies due from the defendants for electrical goods sold and delivered to a construction project in Brooklyn, New York from April of 2009 through August of 2010. The plaintiff also seeks recovery of damages from various defendants under tort law concepts. The project at issue involves the building of a charter school and was governed by an August 1, 2008 contract between defendant, RH Atlantic-Pacific, LLC, as Owner of the project and Hunter Roberts Construction Group, Inc. (s/h/a Hunter Roberts Construction Group, LLC), as Contractor. At the time of the execution of this prime contract, defendant, Robin Hood Foundation, was the sole member of RH Atlantic-Pacific, LLC, which was formed in 2006 for the purpose of owning real estate. On December 30, 2008, some five months after execution of the prime contract, defendant Robin Hood sold its membership to a non-party, not-for-profit, non-stock, Delaware corporation.

On January 29, 2009, defendant, Hunter Roberts Construction Group, LLC as Contractor under the General contract with RH Atlantic-Pacific, LLC, a/k/a Robin Hood Foundation (Owner), entered into a subcontract for electrical work with Coastal Electric Construction Corp. A sub-contract between Coastal and the plaintiff was thereafter executed, pursuant to which, the plaintiff supplied electrical goods and material to the jobsite in Brooklyn. In May of 2010, Coastal stopped paying the plaintiff due, allegedly, to Hunter Roberts' failure to pay Coastal. In an effort to keep the plaintiff engaged in supplying the jobsite with electrical goods and materials, Hunter Roberts, by its agent, defendant Michael Lesko, suggested that the plaintiff execute a joint checking agreement by which the monies owed to Coastal would be deposited therein for the benefit of the plaintiff. At the time of Hunter Roberts' execution of the Checking Account agreement (JCA) on June 3, 2010, the value of the goods delivered by the plaintiff to the project totaled some $367,905.30, out of which, the sum of $226,531.52 was past due.

Under the terms of the JCA, the plaintiff was to receive payments of $9,470.47 in May of 2010; $39,864.33 in June of 2010; and $164,791.24 in July of 2010. The incorporation of these payments into the terms of the JCA, coupled with the assurances of payment made by the individual defendants on behalf of Hunter Roberts and the other corporate defendants, allegedly induced the plaintiff into continuing to deliver goods and materials to the jobsite despite the prior defaults in payment by Coastal and/or Hunter Roberts. Notwithstanding such promises and assurances, Hunter Roberts failed to make the July payment set forth in the JCA and failed to make any further payments for the goods sold and delivered to the project at the behest of Hunter Roberts and/or its co-defendants.

By its complaint, the plaintiff claims, among other things, that the defendants failed to pay the plaintiff some $420,537.45 worth of electrical supplies delivered to the project and that Hunter Roberts, acting in concert with remaining defendants, breached the JCA entered into with the plaintiff and Coastal. The plaintiff seeks recovery of such amount and other damages sustained under theories of contract and tort law and under the Lien Law.

The defendants jointly move to dismiss all but the FIRST, NINTH and TENTH causes of action set forth in the plaintiff's complaint. The defendants claim that the targeted claims of the plaintiff are barred by the terms of the prime contract between RH Atlantic Pacific and Hunter Roberts; the subcontract between Hunter Roberts and Coastal; and by the terms of the LLC Agreement by which RH Atlantic operates. The defendants further contend that none of the plaintiff's claims are cognizable against Robin Hood due its

transfer of its entire membership in RH Atlantic on December 30, 2008. For the reasons stated, the motion is denied.

The legal standards to be applied in evaluating a motion to dismiss pursuant to CPLR 3211(a)(7) are well-settled. That standard is "whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action" (***Marist Coll. v Chazen Envtl. Serv.***, 84 AD3d 1181, 923 NYS2d 695 [2d Dept 2011], quoting ***Sokol v Leader***, 74 AD3d 1180, 1180–1181, 904 NYS2d 153 [2d Dept 2010]). In considering a motion to dismiss pursuant to CPLR 3211(a)(7), the court must afford the complaint a liberal construction and determine only whether the facts, as alleged, fit within any cognizable legal theory (*see* ***High Tides, LLC v DeMichele***, 88 AD3d 954, 931 NYS2d 377 [2d Dept 2011]; ***Reiver v Burkhardt, Wexler & Hirschberg, LLP***, 73 AD3d 1149, 901 NYS2d 690 [2d Dept 2010]). If the court can determine that the plaintiff is entitled to relief on any view of the facts alleged, its inquiry is complete and the complaint must be declared legally sufficient (*see* ***Symbol Tech. v Deloitte & Touche, LLP***, 69 AD3d 191, 888 NYS2d 538 [2d Dept 2009]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus" (***EBC I, Inc. v Goldman, Sachs & Co.***, 5 NY3d 11, 19, 799 NYS2d 170 [2005]). In making such determination, the court must consider whether the complaint contains factual allegations as to each of the material elements of any cognizable claim and whether such allegations satisfy any express, specificity requirements imposed upon the pleading of a that particular claim by applicable statutes or rules (*see* ***East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.***, 66 AD3d 122, 884 NYS2d 94 [2d Dept 2009]).

CPLR 3211 allows a plaintiff to submit affidavits but it does not oblige him or her to do so on penalty of dismissal (*see* ***Rovello v Orofino Realty, Co.***, 40 NY2d 633, 389 NYS2d 814 [1976]). Such affidavits may be received for the limited purpose of remedying defects in the complaint but may not serve for purposes of determining whether there is evidentiary support for the pleadings (*Id.*, at 40 NY2d 636). In this regard, the Second Department has recently noted that "affidavits are not to be examined for the purpose of determining whether there is evidentiary support for the pleading (*see* ***Kempf v Magida***, 37 AD3d 763, 832 NYS2d 47 [2d Dept 2007]), but 'a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint'" (***Berman v Christ Apostolic Church Intern. Miracle***, 87 AD3d 1094, 931 NYS2d 74 [2 Dept 2011]; quoting ***McGuire v Sterling Doubleday Enters., LP***, 19 AD3d 660, 661, 799 NYS2d 65 [2d Dept 2005]; quoting ***Leon v Martinez***, 84 NY2d 83, 88, 614 NYS2d 972 [1994]).

The court is permitted to consider evidentiary material submitted by a moving defendant and, where it does so, the criterion becomes whether the plaintiff has a cause of action, not whether he has stated one (*see* ***Guggenheimer v Ginzburg***, 43 NY2d 268, 401 NYS2d 182 [1977]). However, affidavits submitted by a defendant will almost never warrant dismissal under CPLR 3211 unless they establish conclusively that the plaintiff has no cause of action (*see* ***Sokol v Leader***, 74 AD3d 1180, 904 NYS2d 153 [2d Dept 2010], *quoting*, ***Lawrence v Graubard Miller***, 11 NY3d 588, 873 NYS2d 517 [2008]). Absent a showing that a material fact as claimed by the plaintiff is not a fact at all, a motion pursuant to CLR 3211(a)(7) to dismiss for legal insufficiency must be denied (*see* ***Sokol v Leader***, 74 AD3d 1180, *supra*).

A motion to dismiss on the basis of documentary evidence is governed by CPLR 3211(a)(1). It provides a basis for the dismissal of claims where documentary evidence submitted utterly refutes the

plaintiff's allegations, conclusively establishing a defense as a matter of law (*see* ***Bekas v Valiotis,*** ___ AD3d ___, 2011 WL 6225192 [2d Dept 2011]; ***Fontanetta v Doe***, 73 AD3d 78, 898 NYS2d 569 [2d Dept 2010]). The documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law and conclusively disposes of the plaintiff's claim (*see* ***AG Cap. Funding Partners, LP v State St. Bank and Trust Co.***, 5 NY3d 582, 590–591, 808 NYS2d 573 [2005]; ***Nisari v Ramjohn***, 85 AD3d 987, 927 NYS2d 358 [2d Dept 2011]; ***Fontanetta v Doe,*** 73 AD3d 78, *supra*). To qualify as "documentary," the evidence relied upon must be unambiguous and undeniable, such as judicial records and documents reflecting out-of-court transactions, such as mortgages, deeds, and contracts. Documents compiled by the parties, such as affidavits, notes, accounts, depositions, correspondence and the like, generally do not constitute documentary evidence of the type contemplated by CPLR 3211(a)(1) (*see* ***Granada Condominium III Assn. v Palomino***, 78 AD3d 996, 913 NYS2d 668 [2d Dept 2010]; ***Fontanetta v Doe,*** 73 AD3d 78, *supra*).

It is a well-settled general rule in the absence of privity between the project owner and a subcontractor, the latter cannot state a claim for breach of contract against the owner (*see* ***Freedman v Chemical Constr. Corp.***, 43 NY2d 260, 401 NYS2d 176 [1977]; ***Concordia Gen. Contr. v Peltz***, 11 AD3d 502, 782 NYS2d 848 [2d Dept 2004]). It also well-settled that where a general contract between the owner and general or other prime contractor includes an explicit negation of third party beneficiary obligations, the provision is generally controlling (*see* ***AHA Gen. Constr., Inc. v Edelman Partnership***, 291 AD2d 239, 737 NYS2d 85 [1st Dept 2002]). Subcontractors may thus be precluded from asserting claims for unjust enrichment against owners with whom they are not in privity (*see* ***Metropolitan Elec. Mfg. Co. v Herbert Constr. Co., Inc.***, 183 AD2d 758, 583 NYS2d 497 [2d Dept 1992]).

Nevertheless, a subcontractor may state a cause of action for breach of contract or unjust enrichment against the owner where direct dealings between the owner and the subcontractor justify imposing an obligation upon the owner, despite the initial lack of privity between them (*see* ***Concordia Gen. Contr. v Peltz***, 11 AD3d 502, *supra*). Here, the record reflects the absence of any dispute that the defendants engaged in "direct dealings" with the plaintiff in order to keep the plaintiff engaged in the delivery of electrical goods and materials to the job site, notwithstanding the non-payment for such goods and materials in whole or in part in a timely manner. A review of the factual allegations set forth in the plaintiff's complaint with respect to its demands for recovery of damages due breaches of the terms of the JCA or other promises, express or implied, by the defendants, individually and as agents for each other, reveals that the same state cognizable claims for recovery of such damages and that none of the documentation submitted by the defendants in support of this motion utterly refutes the plaintiff's allegations, conclusively establishing a defense as a matter of law. Consequently, the THIRD, FIFTH, SIXTH and TWELFTH causes of action set forth in the complaint are sustained as legally sufficient. Whether the plaintiff will succeed in establishing these claims against one or all of the defendants is an issue not considered in determining the viability of such claims on this pre-answer motion to dismiss.

The court further finds that the plaintiff's ELEVENTH cause of action, wherein it seeks to hold defendant Robin Hood liable as the alter ego of RH Atlantic for its torts and breaches of contract, is legally sufficient and that the documentation relied upon by the defendants does not utterly refute the plaintiff's

allegations thereby conclusively establishing a defense as a matter of law (*see* ***Peery v United Capital Corp.***, 84 AD3d 1201, 924 NYS2d 470 [2d Dept 2011]). Whether the plaintiff will succeed in establishing this claim against defendant Robin Hood is an issue not considered on this pre-answer motion to dismiss.

Also sustained is the plaintiff's SECOND cause of action against Hunter Roberts and individual defendants Anderson, Dillon, Barrett, Lesko and Rittler and the FOURTH cause action against RH Atlantic, Robin Hood and Park, both of which sound in fraud in the inducement. The factual allegations regarding the representations allegedly made by these defendants to induce the plaintiff into continuing to deliver goods to the jobsite, notwithstanding non-payment therefor, and to execute the JCA contain the requisite specificity required for such claims by the provisions of CPLR 3016(b). The elements of a cause of action sounding in fraud are a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages (*see* ***Introna v Huntington Learning Ctrs., Inc.***, 78 AD3d 896, 898, 911 NYS2d 442 [2d Dept 2010]; *see* ***Eurycleia Partners, LP v Seward & Kissel, LLP***, 12 NY3d 553, 559, 883 NYS2d 147 [2009]). In the context of corporate law, "corporate officers and directors may be held individually liable if they participated in or had knowledge of the fraud, even if they did not stand to gain personally" (***Polonetsky v Better Homes Depot***, 97 NY2d 46, 55, 735 NYS2d 479 [2001]; *see* ***Pludeman v. Northern Leasing Sys., Inc.***, 10 NY3d 486, 491, 860 NYS2d 422 [2009]). While no cause of action to recover damages for fraud will arise when the only fraud alleged relates to a breach of contract, a cause of action alleging fraud may be maintained where a party pleads a breach of duty separate from, or in addition to, a breach of the contract (*see* ***J&D Evans Constr. Corp. v Iannucci***, 84 AD3d 1171, 923 NYS2d 864 [2d Dept 2011]; ***First Bank of Am. v Motor Car Funding***, 257 AD2d 287, 291, 690 NYS2d 17 [1st Dept 1999]). A review of the factual assertions set forth in the complaint reveal that they sufficiently state a cause of action to recover damages for fraud in the inducement from the targeted defendants with the requisite particularity imposed by CPLR 3016(b) and that none of the documentation submitted by the defendants utterly refutes the plaintiff's allegations, conclusively establishing a defense as a matter of law. The plaintiff's SECOND and FOURTH causes of action are thus sustained as legally sufficient, with no consideration as to whether the plaintiff will succeed thereon.

The court also sustains the plaintiff's SEVENTH and EIGHTH causes of action for relief pursuant Article 3a of the Lien Law. While the defendants assert that this claim is not properly pled as a class action, as required by Lien Law § 77, case authorities have held that the failure to so plead is not fatal and may be cured (*see* ***ADCO Elec. Corp. v McMahon***, 38 AD3d 805, 835 NYS2d 588 [2d Dept 2007]). The defendants' claims that the claims brought pursuant to Article 3a of the Lien Law are subject to dismissal because they fail to properly plead class action status are thus rejected as unmeritorious.

In view of the foregoing, the instant motion (#001) to dismiss the complaint is denied. Counsel are directed to appear on March 23, 2012 for the preliminary conference set forth above , the scheduling of which, presumes that issue will have been joined well before that date.

DATED: 12/28/11

THOMAS F. WHELAN, J.S.C.