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SHORT FORM ORDER

NEW YORK SUPREME COURT-QUEENS COUNTY

P R E S E N T : Hon. Timothy J. Dufficy **Part 35**
Justice

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JD ALLIANCE CONSTRUCTION, INC.,

Plaintiffs,

- against -

DSA SERVICES, INC., ANTHONY FRASSETTI, SELFHELP (KI-KII) ASSOCIATES, LLC, FIDELITY AND DEPOSIT COMPANY OF MARYLAND, NEW YORK STATE HOUSING FINANCE AGENCY and STATE OF NEW YORK MORTGAGE AGENCY,

Defendants.

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Index No.: 787/12
Motion Date: 7/26/12
Calendar No.: 19
Motion Seq. : 1

The following papers numbered 1 to 4 read on this motion by defendant **DSA SERVICES, INC.**, defendant **ANTHONY FRASSETTI**, and defendant **FIDELITY AND DEPOSIT COMPANY OF MARYLAND** for, *inter alia*, an order pursuant to CPLR 3211(a)(1) dismissing the complaint against them

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1
Answering Affidavits - Exhibits.....	2
Memorandum of Law	3
Memorandum of Law	4

Upon the foregoing papers it is ordered that those branches of the motion which are brought pursuant to CPLR 3211(a)(1) and (7) are granted to the extent that the part of the complaint which concerns the KI facility is dismissed. That branch of the motion which is brought pursuant to CPLR 3211(a)(8) is granted to the extent that a hearing shall be held concerning whether in personam jurisdiction was properly acquired over defendant Anthony Frassetti. The hearing shall be conducted on Tuesday, January 15, 2013, at 9:30 a.m., in the Trial Scheduling Part (TSP), in Courtroom 25, at the Courthouse, located at 88-11 Sutphin Boulevard, Jamaica, NY 11435. The motion is otherwise denied.

I. The Allegations of the Parties

On or about September 30, 2009, defendant DSA Services, Inc. entered into a prime contract with Selfhelp Fellowship Fund for the Aged Housing Company and 45th Avenue Housing Company whereby DSA agreed to perform general construction work at two facilities operated by Selfhelp located at 45-25 Kissena Boulevard, Flushing, New York (K-I) and 137-47 45th Avenue, Flushing, New York (K- II). On August 3, 2010, DSA subcontracted roofing work to plaintiff JD Alliance Construction, Inc. to be performed at K-I and K-II at a price of $527,000. JD alleges that it performed extra roofing work having a value of $123,958.54 at the K-I facility that was not required by the original plans. According to JD, the extra work resulted from a discrepancy between the roof dimensions shown in the architectural plans and the actual dimensions of the roof. JD allegedly informed DSA of the discrepancy on November 11, 2010 and submitted a change order request for $123,958 on February 10, 2011. DSA denied the change order request on February 22, 2011. In regard to KII, on October 7, 2011, DSA threatened to withhold $44,000 because of defective work on a "Green Roof" area of the contract, but the defects were allegedly caused by DSA itself. On or about August 11, 2011, the plaintiff completed the work required by the contract, but the plaintiff had only received $474,300 of the sum due. On November 29, 2011, JD filed mechanic's liens on the premises for the extra work done on KI and for the sum allegedly improperly withheld on KII.

II. The Complaint

The plaintiff began this action on or about January 13, 2012 by the filing of a summons and a complaint which seeks damages in the sum of $176,658.(The causes of action are not properly numbered.) The first cause of action is for breach of contract in that DSA allegedly failed to pay sums owed to JD. The second cause of action is for unjust enrichment in that JD allegedly provided additional work and materials on KI. The third cause of action purports to be for "loss of use of funds and property." The fourth cause of action is brought pursuant to Article 3-A of the Lien Law for diversion and misappropriation of trust funds.

III. The Legal Standards

In order to prevail on a CPLR 3211(a)(1) motion, the documentary evidence submitted " must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim***." (*Fernandez v. Cigna Property and Casualty Insurance Company*, 188 AD2d 700,702; *see*, *Galvan v. 9519 Third Avenue Restaurant Corp,* 74 AD3d 743; *Vanderminden v.Vanderminden*, 226 AD2d 1037; *Bronxville Knolls, Inc. v.Webster Town Center Partnership*, 221 AD2d 248.)

In determining a motion brought pursuant to CPLR 3211(a)(7), the court " must afford the complaint a liberal construction, accept as true the allegations contained therein, accord the plaintiff the benefit of every favorable inference and determine only whether the facts alleged fit within any cognizable legal theory ***." (*1455 Washington Ave. Assocs. v. Rose & Kiernan*, 260 AD2d 770, 770-771; *Esposito-Hilder v. SFX Broadcasting Inc*, 236 AD2d 186.)

III. The Notice of Claim

Section 26.5 of the subcontract provides in relevant part: "*Notice of Claim*. Subcontractor shall file with the Contractor a written notice of each claim or possible claim within seven (7) days after occurrence of the event giving rise to such claim or within seven (7) days after the claimant first recognizes the condition giving rise to the claim, whichever is later. *** Strict compliance with the terms of this subparagraph shall be a condition precedent to the commencement of any action by the Subcontractor against the Contractor under this Subcontract."

Section 26.1 of the subcontract provides in relevant part: "*Notices*. All notices required under this Subcontract shall be in writing and shall be personally delivered or sent by registered or certified mail, return receipt requested ***."

On November 11, 2010, over three months after JD had begun its work on the project, George Digenis, an employee of JD, sent an e-mail to Tony Salame, DSA's project manager, informing the latter that "[a] discrepancy exists in the measurements of the roof areas stated in the drawings versus what the measurements actually are. The extra square footage and labor and materials has cost us a large amount. We would like to put in a change order for this discrepancy. Please instruct us how to resolve this matter."

The e-mail sent to Tony Salame did not meet the requirements of sections 26.1 and 26.5 of the contract, and the law demands strict compliance with the notice of claim provision found in the parties' contract . (*See*, *Promo-Pro Ltd. v. Lehrer McGovern Bovis, Inc*., 306 AD2d 221 *Morelli Masons, Inc. v. Peter Scalamandre & Sons*, 294 AD2d 113.) That part of the complaint which concerns the KI facility is dismissable pursuant to CPLR 3211(a)(1) and (7).

IV. The Release

"It is well established that a valid release constitutes a complete bar to an action on a claim which is the subject of the release ***." (*Global Minerals and Metals Corp. v. Holme* 35 A.D.3d 93, 98, 2006 N.Y. Slip Op. 07131, 3 (2006) DSA denied the change order request

for KI on February 22, 2011. The plaintiff executed a partial release on April 14, 2011 almost two months later. The release read in relevant part: JD "does hereby waive, release, discharge, and relinquish any and all rights, claims, demands, liens, causes of action and the like which [JD] has or may have had ***, if any, arising out of the furnishing of materials, equipment, services, and labor for the Project through April 14, 2011." The release signed by the plaintiff covered the KI facility, and DSA established pursuant to CPLR 3211(a)(1) that the documentary evidence in this case is dispositive of that part of the complaint which concerns the KI facility. The dispute over KII arose in October, 2011, and the release is not a defense to that part of the complaint which concerns the KII facility.

V. The Contractual Provisions Requiring the Plaintiff to Inspect the Premises

The plaintiff did comply with the provisions of the subcontract requiring inspection, which merely required the plaintiff to inspect the premises before beginning work, not prior to entering into the contract.

VI. The Mechanic's Liens

While the misidentification of the true owner of property is fatal to a mechanic's lien (*see*, *Tri–State Sol–Aire Corp. v. Lakeville Pace Mechanical, Inc*., 221 AD2d 519), the plaintiff has shown that there are numerous documents that represent Selfhelp as the owner of KI and KII, and, under the circumstances, the cases relied upon by the defendant are distinguishable.

VII. Jurisdiction over Defendant Anthony Frassetti

The conflicting affidavits of the parties have raised an issue of fact requiring a hearing on the issue of whether defendant Frassetti was properly served with process. (*See*, *Poree v. Bynum*, 56 AD3d 261.) The parties are directed to contact the clerk of IAS Part 35 and a hearing date will be arranged.

Dated: November 29, 2012

TIMOTHY J. DUFFICY, J.S.C.