SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER Justice

PART 45

SNM CONSTRUCTION LLC

-v-

LINDSAY TAYLOR and NICOLE TAYLOR

INDEX NO. 650801/13

MOTION DATE

MOTION SEQ. NO. 001

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). ____

Answering Affidavits — Exhibits ____ | No(s). ____

Replying Affidavits ____ | No(s). ____

Upon the foregoing papers, it is ordered that this motion by defendants to dismiss all causes of action except for breach of contract is DENIED in part (first cause of action for foreclosure of mechanics lien, and leave granted to plaintiff to amend the complaint to add necessary parties), and GRANTED in part (dismissal of second, fourth, fifth, sixth and seventh causes of action) all as per the attached Decision and Order.

Status Conference scheduled for 12-18-13 at 2:30 PM at 26 Broadway 10th Floor

Dated: October 9, 2013

MELVIN L. SCHWEITZER J.S.C.

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

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☑ DENIED ☑ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

SNM CONSTRUCTION LLC,	:	
	:	
Plaintiff,	:	Index No. 650801/13
-against-	:	
	:	ORDER AND DECISION
LINDSAY TAYLOR and NICOLE TAYLOR,	:	
	:	Motion Sequence No. 001
Defendants.	:	

MELVIN L. SCHWEITZER, J.:

This is an action to foreclose upon a mechanic's lien filed by plaintiff SNM Construction LLC (SNM), a home improvement construction company operated by Steven Moy, against certain residential property owned by defendants Lindsay Taylor and Nicole Taylor, husband and wife. The complaint alleges seven causes of action: foreclosure of mechanic's lien; work, labor, services and materials provided; breach of contract; unjust enrichment and quantum meruit; account stated; fraud and conversion; and attorney's fees. Defendants move, pursuant to CPLR 3211 (a) (1), (7) and (10), to dismiss all causes of action, except for breach of contract. For the reasons stated herein, the motion is granted except to the extent set forth below with regard to foreclosure of the mechanic's lien.

Background

On or about December 9, 2011, plaintiff and defendants entered into a contract for the renovation of a condominium apartment owned by defendants located at 230 West 78th Street, New York City. Plaintiff provided labor and materials for about nine months, from December 12, 2011 to September 14, 2012, at which point defendants terminated plaintiff from the renovation project allegedly without notice. In addition to hiring plaintiff, defendants

employed Hudson Home, an interior design firm that served as the architect and supervisor for the project.

The contract, which is in an abbreviated industry standard form of agreement, stated that the project would be substantially completed within four months from the commencement date, and that the contract price would be $182,396. The contract provided that the down payment for the project would be 15% of the contract price, subsequent payments would be based upon the completion of each phase or trade as certified by the architect, and final payment constituting the unpaid balance of the contract sum would be paid upon the completion of the work enumerated in a "punch list," which described the "to-do" items that must be finished by the contractor to complete the project. Attached to the contract was the "supplementary contract" that set forth the scope of the various work and the corresponding pricing for such work.

It is undisputed that defendants requested plaintiff to perform additional work beyond the original scope of work under by the contract, as reflected by the six "change orders" or "requisitions" that were annexed, in part, as exhibits to the parties' papers. Due to the additional requisitions, the project was not completed within four months of the commencement date. While the parties dispute who caused the delay in completing the project, they placed the blame on the other party. For instance, defendants allege that "what work SNM did do in June through August [2012] related to changes we asked for ... and [we] were not pleased by the quality or quantity of the work performed ... and it became apparent that the Project would never be completed by SNM." Nicole Taylor affidavit, ¶ 7. In opposition, plaintiff contends that "defendants delayed the job by their own conduct in improperly restricting the times when plaintiff was permitted to work ... issues with their child ... smell of paint ... going on vacation,

entertaining relatives, etc." Steven Moy affidavit, ¶ 12. Plaintiff further contends that "SNM was willing to fix/adjust/repair anything that the defendants had a problem with, but the defendants refused to give the plaintiff both notice and the opportunity to do so." *Id.*, ¶ 14.

Plaintiff was terminated by defendants on September 14, 2012. On November 16, 2012, it filed a notice of mechanic's lien against defendants' premises in the county property record. The notice of lien stated, among other things, that "the agreed price and value of the labor performed" was $244,591, and that "the amount unpaid to the lienor for said labor performed" was $36,236. On March 4, 2013, plaintiff filed a notice of pendency and a complaint commencing the instant action. No discovery was conducted by either party when defendants filed this motion.

Discussion

With respect to the first cause of action (foreclosure of mechanic's lien), defendants argue that the documentary evidence shows that the lien amount is willfully overstated, and thus is void as a matter of law. Defendants rely on these documents to support their argument: (1) the lien notice which stated that the agreed price and the labor performed was $244,591, and the unpaid amount owed was $36,236; (2) a chart showing that the aggregate payments made by defendants to plaintiff totaled $208,355; and (3) the sixth requisition/invoice for the period up to September 2012 which stated, inter alia, that the "current payment due" was $21,236 and the "balance to finish plus retainage" was $15,000. Based on the foregoing, defendants assert: (a) the difference between $244,591 and $36,236 is $208,355, which is the amount paid to plaintiff; (b) the sum of $21,236 and $15,000 is $36,236, which is the alleged unpaid amount stated in the lien notice; and (c) the $15,000 "balance to finish" is plaintiff's "admission" that it did not complete the

project when it left the premises, which is a "willful overstatement" of its lien because the lien notice stated that the unpaid amount - particularly the $15,000 portion – was for labor performed and completed, while in fact it was not performed or completed. Defendants' moving brief at 3.

In support of the argument that a willful overstatement of the lien results in a forfeiture of the lien, defendants rely on Lien Law § 39, which provides, in relevant part, that in an action to enforce a mechanic's lien, "if the court shall find that a lienor has willfully 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." Notably, "willful exaggeration" is not defined in the statute. However, it is well established that mere inaccuracy or honest mistake in setting the lien amount is not a willful exaggeration that will result in discharging or voiding the lien. *Goodman v Del-Sa-Co Foods*, 15 NY2d 191, 194 (1965)("Inaccuracy in amount of lien, if no exaggeration is intended, does not void a mechanic's lien; willfulness also must be shown [citations omitted]"). The case of *Strongback Corp. v N.E.D. Cambridge Ave. Dev. Corp.* (25 AD3d 392 [1st Dept 2006]), which is the principal case relied on by defendants, illustrates an example of willful exaggeration. In that case, the undisputed record showed that the plaintiff lienor was already paid $238,000 by the defendant property owner, who argued that plaintiff only provided $85,081 in labor and materials for the project, and that plaintiff's own invoice reflected a value of only $122,395 in completed work. Based on these facts, the Court observed that, when the mechanic's lien was filed, plaintiff was already overpaid in the amount of at least $115,605 ($238,000 minus $122,395) and the filing was without justification. Thus, the court opined that "[t]hese facts conclusively establish that the lien was willfully exaggerated, leaving only the issue of damages to be determined [in favor of defendants]." *Id.* at 394.

Defendants' reliance on *Strongback* is misplaced. In that case, the undisputed evidence showed that the lien was grossly and willfully exaggerated because the plaintiff had been overpaid $115,605, an amount that was about 50% of the total payments made by the defendant. In this case, defendants allege that the lien is over exaggerated by $15,000. This amount, when compared with the $208,355 that defendants have admittedly paid plaintiff, is only 7% of the total payments made. Thus, the relevant facts between the two cases are distinguishable. More importantly, plaintiff disputes defendants' characterization of the sixth requisition/invoice as an "admission" that it did not do the work. Steven Moy affidavit, ¶ 19. It also disputes defendants' interpretation of the subject document, and argues that the issue of whether the "punch list" items were substantially completed is to be determined at trial. *Id.*, ¶ 20. As noted earlier, the subject document described the $15,000 as "balance to finish plus retainage." Defendants have not addressed the meaning of "retainage" or its computation, and instead focus solely on "balance to finish" to argue that the work was not done or completed. Moreover, there is a dispute as to how this document should be interpreted. The foregoing issue, when coupled with plaintiff's assertion that it was willing to fix/adjust/repair anything that defendants had a problem with, but they refused to give it a chance to do so before terminating its employment without notice, militates against granting relief to defendants based on the defense of documentary evidence. Under CPLR 3211 (a) (1), a party may move to dismiss a cause of action based on documentary evidence, but the documentary evidence submitted must "conclusively establish" a defense to the asserted claim as a matter of law. *Goldman v Metro. Life Ins. Co.*, 5 NY3d 561, 571 (2005). Here, defendants failed to meet their burden of proof, as a matter of law, that the documents conclusively establish that plaintiff has willfully exaggerated the lien amount.

Further, defendants' reliance on the case of *Minelli Constr. Co. v Arben Corp.* (1 AD3d 580 [2d Dept 2003]) is also misplaced. In that case, besides ruling that the defendant failed to show that the plaintiff had willfully exaggerated the lien, the court also noted that "a lien may contain improper charges does not, in and of itself, establish that a plaintiff willfully exaggerated a lien." *Id.* at 581 (citations omitted). Indeed, the court stated that Lien Law § 39 "must be strictly construed in favor of the party against whom the penalty is sought to be imposed." *Id.* (citations omitted). Here, as discussed above, defendants have not sustained their burden of proof that plaintiff has violated Lien Law § 39, particularly in light of the rule of law that this statutory provision must be strictly construed. Accordingly, that branch of defendants' motion seeking to dismiss the first cause of action (foreclosure of mechanic's lien) is denied.

Additionally, defendants argue that plaintiff's notice of lien failed to name other necessary parties, which is legally defective and must be dismissed pursuant to CPLR 3211 (a) (10). Lien Law § 44 sets forth the necessary parties in an action to enforce a lien against real property. In relevant part, the statute states the following, among others, are the necessary parties: all lienors having liens of notices of which have been filed against the same real property, as well as all persons appearing by the records in the county clerk's register to be the owners of such real property. In this case, plaintiff's lien notice only named defendants, the owners of the premises, as parties. Defendants assert that, at a minimum, their mortgagee (the existing lender) has a mortgage lien on the premises and must be named as a necessary party. Yet, despite the statutory provision, plaintiff contends that in the case of *W.J. Plander Block, Inc. v Mussler* (27 Misc 2d 591, 592 [Sup Ct, Nassau County 1961]), it was ruled that "prior mortgagees are not necessary parties." Plaintiff's opposition, ¶ 56. Plaintiff's argument is unavailing. The "prior

mortgagees" noted in the foregoing case were former mortgagees that no longer had an interest in the real property, and thus were not necessary parties. Alternatively, plaintiff requests that it be "given the opportunity to amend its complaint in the unlikely event the court requires same." *Id.*, ¶ 63. Under CPLR 3025 (b), leave to amend shall be "freely given," if there is no prejudice to the parties. Here, defendants do not argue that they will be prejudiced if plaintiff is permitted to amend its complaint to name additional parties that are necessary to the lien foreclosure action. Thus, plaintiff is granted leave to amend its complaint to name the additional necessary parties, in accordance with CPLR 3025.

As noted above, other than the third cause of action (breach of contract), defendants seek to dismiss all other causes of action in the complaint, pursuant to CPLR 3211 (a) (7), namely: second cause of action (work, labor, services and materials provided); fourth cause of action (unjust enrichment and quantum meruit); fifth cause of action (account stated); sixth cause of action (fraud, conversion and punitive damages); and seventh cause of action (attorney's fees). In its opposition papers, plaintiff failed to address, and may be deemed to have conceded, the issues regarding the dismissal of these causes of action.

In any event, the second and fourth causes of action should be dismissed because they are duplicative or redundant of the third cause of action. *See Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 (1997)(existence of a valid contract governing a subject matter precludes recovery in quasi contract or tort); *TAG 380, LLC v ComMet 380, Inc.*, 40 AD3d 1, 8 (1st Dept 2007) (misrepresentation and other tort claims are duplicative of breach of contract claim because they seek identical recovery and such claims are intrinsically related to the contract claim), *affd as modified* 10 NY3d 507 (2008). The fifth cause of action for account stated is

devoid of any allegation that the subject account statement (the sixth requisition/invoice) was reviewed and agreed to by the defendants, but that they failed to pay same. *Parker Chapin Flattau & Klimpl v Daelen Corp.*, 59 AD2d 375, 377 (1st Dept 1997)(setting forth the requisite elements for account stated claim). In fact, it is undisputed that defendants in this case never agreed to pay such requisition/invoice. Thus, the fifth cause of action should be dismissed.

The sixth cause of action alleges that defendants committed fraud and conversion to induce plaintiff to provide labor, services and materials with the sole malicious intent of not paying for same. Complaint, ¶ 45. The fraud and conversion claim does not set forth sufficient particularity as required by CPLR 3013, and is duplicative of the second (labor and materials provided) and third (breach of contract) claims. *Financial Structures Ltd. v UBS AG*, 77 AD3d 417, 419 (1st Dept 2010)(fraud claim dismissed because it is based on the same facts that underlie the breach of contract claim and is not collateral to the contract). The seventh cause of action for attorney's fees is without merit because the complaint does not allege that the contract awards attorney's fees to the prevailing party. *Tag 380*, 10 NY3d at 515 (in a breach of contract case, prevailing party may not collect attorney's fees unless it is authorized in the contract).

Conclusion

Based on all of the foregoing, it is hereby

ORDERED that defendants' motion seeking dismissal of the first cause of action (foreclosure of mechanic's lien) of the complaint is denied, and that plaintiff is granted leave to amend the complaint, pursuant to CPLR 3025, to add the necessary parties as to the foreclosure of mechanic's lien cause of action; and it is further

ORDERED that defendants' motion seeking dismissal of the second (work, labor, services and materials provided), fourth (unjust enrichment and quantum meruit), fifth (account stated), sixth (conversion and conversion) and seventh (attorney's fees) causes of actions is granted; and it is further

ORDERED that the remainder of this action shall continue, and counsel for the parties are directed to appear for a status conference before this court on December 18, 2013, at 2:30 p.m. At 26 Broadway 10th Floor

Dated: October 9, 2013

ENTER:

J.S.C.

MELVIN L. SCHWEITZER