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

PRESENT: HON. PAUL WOOTEN PART 7
Justice

MG MASTER GLAZER INC.,
Plaintiff,

-against-

INDEX NO. 154516/14

MOTION SEQ. NO. 001

UPACA SITE 7 ASSOCIATES, L.P., MARPAT CONSTRUCTION CORP., and MANHATTAN NORTH BUILDING CORP.,
Defendants.

The following papers were read on this motion by the defendant UPACA Site 7 Associates to discharge the lien and dismiss the complaint as against it.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Replying Affidavits (Reply Memo)	

Cross-Motion: ☐ Yes ☒ No

This is an action commenced by MG Master Glazer, Inc. (plaintiff) against the defendants for, *inter alia*, the alleged nonpayment for construction services at a property located at 1900 Lexington Avenue, New York, New York 10035 (the premises). UPACA Site 7 Associates, L.P. (UPACA) is the owner of the premises. On behalf of UPACA, Manhattan North Building Corp and Manhattan North Management Co., Inc. entered into an agreement with defendant Marpat Construction Corp., Inc. (Marpat), as the general contractor to perform construction work at the premises. Marpat subcontracted various construction services to the plaintiff. On or about December 17, 2013, plaintiff filed a Mechanic's Lien against the premises in the amount of $36,656.25. Now before the Court is a motion by UPACA, for an Order pursuant to CPLR 3211(a)(1) and Lien Law § 19, discharging of record the Notice of Mechanic's Lien, and for an order pursuant to CPLR 3211(a) and (7) to dismiss the complaint in its entirety as against UPACA. Moreover, UPACA seeks costs and fees in making this motion pursuant to 22 NYCRR § 130-1.1. Plaintiff is in opposition to the herein motion.

STANDARD

CPLR 3211(a), provides that:

> "a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> [1] A defense is founded upon documentary evidence;
>
> [7] The pleading fails to state a cause of action"

When determining a CPLR 3211(a) motion, "we liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]; *see Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409 [2001]; *Wieder v Skala*, 80 NY2d 628 [1992]). To defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory (*see Bonnie & Co. Fashions v Bankers Trust Co.*, 262 AD2d 188 [1st Dept 1999]). Further, the movant has the burden of demonstrating that, based upon the four corners of the complaint liberally construed in favor of the plaintiff, the pleading states no legally cognizable cause of action (*see Guggenheimer v Ginzburg,* 43 NY2d 268 [1997]; *Salles v Chase Manhattan Bank,* 300 AD2d 226 [1st Dept 2002]).

Pursuant to CPLR 3211(a)(1), in order to prevail on a motion to dismiss based on documentary evidence, "the documents relied upon must definitively dispose of plaintiff's claim" (*Bronxville Knolls v Webster Town Ctr. Partnership.*, 221 AD2d 248, 248 [1st Dept 1995]; *Demas v 325 W. End Ave. Corp.*, 127 AD2d 476 [1st Dept 1986]). A CPLR 3211(a)(1) motion "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326 [2002]; *see also Sempra Energy Trading Co. v BP Prods. N. Am., Inc.*, 52 AD3d 350, 350 [1st Dept 2008]).

Upon a CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action, the "question for us is whether the requisite allegations of any valid cause of action cognizable by the state courts 'can be fairly gathered from all the averments'" (*Foley v D'Agostino*, 21 AD2d 60, 65 [1st Dept 1964], quoting *Condon v Associated Hosp. Serv.*, 287 NY 411, 414 [1942]). A court must ensure that the plaintiff's statements can *sustain* a cause of action, not whether the plaintiff has "artfully drafted the complaint" (*Ambassador Factors v Kandel & Co.*, 215 AD2d 305, 306 [1st Dept 1995]; *see Guggenheimer*, 43 NY2d at 275 ["the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one"]).

DISCUSSION

"The subcontractor's right to recover is derivative or subrogated to the right of the general contractor to recover" (*Peri Formwork Sys., Inc. v Lumbermens Mut. Cas. Co.*, 112 AD3d 171, 176 [2d Dept 2013]). "[A] subcontractor's lien must be satisfied out of funds 'due and owing from the owner to the general contractor' at the time the lien is filed" (*Timothy Coffey Nursery/Landscape v Gatz*, 304 AD2d 652, 653-654 [2d Dept 2003], quoting *Electric City Concrete Co. v Phillips,* 100 AD2d 1, 4 [3d Dept 1984]). "Thus, if the general contractor is not owed any amount under its contract with the owner, then the subcontractor may not recover" (*Peri Formwork Sys., Inc.*, 112 AD3d at 176).

In support of its motion, UPACA attaches the Final and Release Upon Payment (Final Release) executed on October 24, 2013 by co-defendant and general contractor at the premises, Marpat which shows that Marpat was paid in full (*see* Notice of Motion, exhibit 2). As the subcontractor for Marpat, plaintiff's rights are derivative of Marpat's rights. Furthermore, as Marpat executed a release that all payments due to it have been satisfied, plaintiff has no right to proceed or maintain a lien against UPACA. As the Final Release "definitively disposes of plaintiff's claim" (*Bronxville Knolls,* 221 AD2d at 248), plaintiff's fourth and fifth causes of action, which asserted claims for a Mechanic's Lien and Violation of Construction Trust Funds,

respectively, are dismissed as against UPACA and the Lien is discharged.

Moreover, plaintiff is precluded from recovering against UPACA for unjust enrichment because of the presence of an express contract, which covers the subject matter in dispute (*see EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 23 [2005] ["the existence of a valid contract governing the subject matter generally precludes recovery in quasi contract for events arising out of the same subject matter"]; *Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572 [2005]; *Dabrowski v Abax Inc.*, 64 AD3d 426, 427 [1st Dept 2009] ["The quantum meruit and unjust enrichment causes of action also should have been dismissed because they arise out of subject matter covered by express contracts and the validity of the contracts are not in dispute"]). While the contract for the work plaintiff performed was executed between plaintiff and Marpat, and not UPACA (*see* Complaint ¶ 9), the existence of a written contract governing the subject matter in dispute, precludes quasi-contractual claims, even against noncontracting parties (*see Vitale v Steinberg*, 307 AD2d 107 [1st Dept 2003]; *Bellino Schwartz Padob Advertising, Inc. v Solaris Marketing Group*, 222 AD2d 313 [1st Dept 1995]; *Feigen v Advance Capital Mgt. Corp.*, 150 AD2d 281, 283 [1st Dept 1989]). Accordingly, plaintiff's third cause of action for unjust enrichment must be dismissed.

The Court now turns to UPACA's request for fees and costs in making the herein motion. Part 130 of the Rules of the Chief Administrator permits courts to sanction an attorney and/or a party for engaging in frivolous conduct, and such conduct is frivolous if it is: (1) "completely without merit in law"; (2) "undertaken primarily to... harass or maliciously injure another"; or (3) "assert[ing] material factual statements that are false" (*see* 22 NYCRR § 130-1.1; *Tavella v Tavella*, 25 AD3d 523, 524 [1st Dept 2006]). Even though UPACA's motion to dismiss the complaint and discharge the Notice of Mechanic's Lien is granted, the Court does not find that plaintiff's conduct was frivolous within the meaning of 22 NYCRR § 130-1.1. As such, this portion of UPACA's motion for sanctions in the form of costs and fees incurred in

bringing the motion, pursuant to 22 NYCRR 130-1.1, is denied.

CONCLUSION

Based upon the foregoing, it is hereby,

ORDERED that the portion of UPACA's motion, pursuant to CPLR 3211(a)(1) and Lien Law § 19, to discharge the Notice of Mechanic's Lien filed by plaintiff on or about December 17, 2013 is granted and the Mechanic's Lien is hereby discharged; and it is further,

ORDERED the portion of UPACA's motion, pursuant to CPLR 3211(a)(1) and (7) dismissing the complaint as against UPACA is granted, and the complaint is hereby dismissed as against UPACA in its entirety; and it is further,

ORDERED that the portion of UPACA's motion which seeks costs and fees in making this motion pursuant to 22 NYCRR § 130-1.1 is denied; and it is further,

ORDERED that UPACA is to serve a copy of this order with notice of entry upon all parties and on the Clerk of the Clerk who is directed to discharge the Notice of Mechanic's Lien, filed on or about December 17, 2013; and it is further,

ORDERED that all remaining parties are directed to appear for a Preliminary Conference on February 18, 2015 at 11:00 a.m. at Part 7, 60 Centre Street, Room 341.

This constitutes the Decision and Order of the Court.

Dated: 1/7/15

PAUL WOOTEN J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**