SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

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NEW AGE GENERAL CONTRACTING,

Plaintiff,

-against-

THESCO, CORP., MANHATTAN RESTORATION LLC, and RLI INSURANCE COMPANY,

Defendants.

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Index No. 150204/2016

**DECISION AND ORDER**

Motion Sequence 001

**CAROL R. EDMEAD, J.:**

**MEMORANDUM DECISION**

*Background Facts*

This is an action to confirm a lien and to recover monies owed for construction work performed at 300 East 71st Street, Unit 10RP, New York, New York (the "Unit"; the "Building"). Defendant Theso, Corp. ("Theso", incorrectly captioned as "Thesco") owns the subject building located at 300 East 71st Street, New York, New York (the "Building"). The owner of the Unit entered into a contract with Defendant Manhattan Restoration LLC ("Manhattan Restoration") for alterations and improvements to the Unit. In turn, Manhattan Restoration engaged various other contractors, including Plaintiff New Age General Contracting ("Plaintiff"), to complete the work.

In its Complaint, Plaintiff alleges that Manhattan Restoration failed to pay for labor and materials. Pursuant to that alleged failure, Plaintiff filed a mechanic's lien against the Building for $31,537.00 (the "Lien"). Shortly thereafter, Manhattan Restoration obtained a lien discharge bond from Defendant RLI Insurance Company ("RLI"; the "Bond" [*Exh C*]).

Plaintiff's Complaint asserts four causes of action against all Defendants: (1) an

adjudication that the Lien is valid, and a money judgement thereon; (2) breach of contract; (3) unjust enrichment; and (4) account stated.

In support of dismissal of the Complaint pursuant to CPLR 3211(a)(1) and (7), Theso attaches the affidavit of Theso's secretary Jan Sigmon, the Complaint, the Lien, and the Bond discharging the Lien. Theso argues that its posting of the Bond renders it an unnecessary and improper party pursuant to CPLR 1001, and a party against whom a lien claim cannot survive.[1]

In opposition, Plaintiff argues: first, that the Complaint cannot be dismissed in its entirety because it states three other causes of action independent of the lien (breach of contract, unjust enrichment, and account stated); and second, that a filing of a bond does not necessarily excuse the owner, Theso, as a necessary party.

Plaintiff also cross-moves to amend its Complaint to correct Theso's misidentification as Thesco, Plaintiff also argues that CPLR 2001 allows for the correction of non-prejudicial defects.

In reply, Theso argues for the first time that dismissal of the second, third, and fourth causes of action is justified because the Complaint and documentation (the Contract, attached for the first time in reply, and the Lien) identify only Manhattan Restoration as a party that contracted or otherwise engaged with Plaintiff.

*Discussion*

In determining a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the Court's role is deciding "whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*African Diaspora Maritime Corp. v Golden Gate Yacht Club*,

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[1] Theso does not specify which cause of action it seeks to be dismissed. However, Theso's focus on the Lien (and non-discussion of the other causes of action) in its initial moving papers point only to the first cause of action, the only one relating to the Lien.

109 AD3d 204, 968 NYS2d 459 [1st Dept 2013]; *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, 960 NYS2d 404 [1st Dept 2013]). On a motion to dismiss made pursuant to CPLR 3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs "the benefit of every possible favorable inference," and "determine only whether the facts as alleged fit into any cognizable legal theory" (*Siegmund Strauss,* 104 AD3d at 401, *Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972, 638 NE2d 511 [1994]).

However, "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not" presumed to be true or accorded every favorable inference (*David v Hack,* 97 AD3d 437, 948 NYS2d 583 [1st Dept 2012]; *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861, 731 NE2d 577 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279, 675 NE2d 1232 [1996]), and the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17 [1977]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150, 730 NYS2d 48 [1st Dept 2001]; *WFB Telecom., Inc. v NYNEX Corp.*, 188 AD2d 257, 259, 590 NYS2d 460 [1st Dept], *lv denied* 81 NY2d 709, 599 NYS2d 804, 616 NE2d 159 [1993] [CPLR 3211 motion granted where defendant submitted letter from plaintiff's counsel which flatly contradicted plaintiff's current allegations of prima facie tort]). "In deciding such a preanswer motion, the court is not authorized to assess the relative merits of the complaint's allegations against the defendant's contrary assertions or to determine whether or not plaintiff has produced evidence to support his

claims" (*Salles v Chase Manhattan Bank*, 300 AD2d 226, 228 [1st Dept 2002]).

Pursuant to CPLR 3211(a)(1), a party may move for judgment dismissing one or more causes of action asserted against him on the ground that "a defense is founded upon documentary evidence." A motion to dismiss on the basis of a defense founded upon documentary evidence may be granted "only where the documentary evidence *utterly refutes* [the complaint's] factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326, 746 NYS2d 858 [2002] (emphasis added); *Mill Financial, LLC v Gillett*, 122 AD3d 98, 992 NYS2d 20 [1st Dept 2014]). "Dismissal pursuant to CPLR 3211(a)(1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Mill Financial,* 122 AD3d 98, *citing Art and Fashion Group Corp. v Cyclops Production, Inc.*, 120 AD3d 436, 992 NYS2d 7 [1st Dept 2014]).

Generally speaking, Lien Law § 44 provides that owners of real property are necessary defendants in an action to enforce a lien against said property. However, pursuant to Lien Law § 44-b,

> . . . *any private owner* or the state or a public corporation with which a notice of lien is filed shall not be a necessary party defendant in an action to enforce the lien if, either before or after the commencement of the action, a contractor or subcontractor, . . . (b) *in the case of a private improvement*, executes a bond or undertaking in accordance with [Lien Law § 19[4] ] to the county clerk with which the notice of lien is filed conditioned for the payment of any judgment that may be recovered in an action to enforce the lien (emphasis added).

Importantly, the italicized language in Lien Law § 44-b above was added in 2006, shortly after *Romar Sheet Metal, Inc. v F.W. Sims, Inc.*, (8 Misc 3d 1021(A) [Sup Ct, NY County 2005]), upon which Plaintiff relies, was decided. The 2006 amendment was titled "an act to amend the

lien law, in relation to exempting a private entity as a necessary party to a private improvement lien foreclosure action," and its legislative history is explicit: a statement to then-Governor Pataki indicated that "the purpose of the legislation is to amend the Lien law to remove a private entity as a necessary party to a private improvement lien foreclosure action where a bond or undertaking is substituted for the real property which was subject to the lien" (New York Bill Jacket, 2006 S.B. 6884, Ch. 490). Accordingly, Plaintiff's reliance upon *Romar* and similar cases is misplaced, and the Bond (*Exh C*) renders Theso an unnecessary party. Inasmuch as the lien pertains only to Theso as owner of the Building, the first cause of action is dismissed in its entirety.

Conversely, Theso's arguments regarding dismissal of the remaining causes of action and attachment of the contract between Plaintiff and Manhattan Restoration were introduced for the first time in reply, and are therefore improper (*Caribbean Direct, Inc. v Dubset, LLC*, 100 AD3d 510, 511 [1st Dept 2012]). Moreover, accepting the Complaint's facts as true, the production of one written contract excluding Theso does not provide a complete defense— for example, it does not foreclose the possibility that *any* agreement existed, as alleged in the Complaint. Therefore, Theso's submissions do not "utterly refute" the Complaint's allegations (*Goshen*, 98 NY2d at 326). To the extent that the Complaint's second, third, and fourth causes of action ambiguously conclude that "defendants" are collectively responsible for Plaintiff's damages based on several theories (Complaint ¶¶ 24, 33, 38), the proper remedy is not dismissal, but a bill of particulars and disclosure proceedings to clarify liability (*Daukas v Shearson, Hammill & Co.*, 26 AD2d 526, 526 [1st Dept 1966]).

Finally, because CPLR 2001 allows the Court to correct non-prejudicial errors, and to the

extent that Theso does not substantively oppose Plaintiff's cross-motion, the cross-motion is granted (*Greenwich Ins. Co. v New Amsterdam Assoc.*, 111 AD3d 543, 544 [1st Dept 2013]).

*Conclusion*

Based on the foregoing, it is hereby

ORDERED that the motion of Defendant Theso, Corp, incorrectly identified as Thesco, Corp, to dismiss the Complaint pursuant to CPLR 3211(a)(1) and (7) is granted solely to the extent that the Complaint's first cause of action is dismissed in its entirety; and it is further

ORDERED that the Complaint's remaining causes of action shall be severed, and shall proceed to discovery; and it is further

ORDERED that the cross-motion of Plaintiff New Age General Contracting to amend the caption is hereby granted, and the new caption shall read as follows:

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Defendants.

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; and it is further

ORDERED that the parties shall appear for a preliminary conference on September 27, 2016, 2:15 p.m., at 60 Centre St., Room 438, New York, NY; and it is further

ORDERED that Defendant Theso shall serve a copy of this order upon all parties with notice of entry within 20 days.

This constitutes the decision and order of the Court.

Dated: August 23, 2016

Hon. Carol R. Edmead, J.S.C

HON. CAROL R. EDMEAD
J.S.C.