SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN - Justice **PART** 58

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CORE DEVELOPMENT GROUP, LLC, ROYAL RENOVATION CORP.

Plaintiff,

- v -

ALEXANDRA JACKSON,

Defendant.

INDEX NO. 650577/2016

MOTION DATE 6/10/2016

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60

were read on this application to/for Dismiss

Upon the foregoing documents, it is

Decided that the defendant's motion seeking dismissal based upon documentary evidence and failure to state a cause of action is granted. In the Amended Complaint, plaintiff alleges that Alexandra Jackson ("Defendant") requested that Core Development Group, LLC ("Core") provide a quote for the estimated price of a gut demolition and full renovation of defendant's property at 14 West 17th Street, Unit 6, New York, New York, 10011 (the "Property"). Core provided the estimate, which included a base amount and that additional amounts would be paid in the event of change orders or extra work. Additionally, Core alleged that it proposed that the requested work at the Property would be performed by Royal Renovation Corp. ("Royal" and combined with Core, "Plaintiffs") and overseen by Zbiginew Wojtowicz ("Wojtowicz"), Royal's president and Core's construction manager. The Amended Complaint further alleges that the parties agreed that Core and Royal would proceed with the gut demolition, full renovation and associated construction work based on and in accordance with the terms of the provided quote and proposal. The total

agreed upon price for the work, which was set forth in several invoices transmitted to defendant and her architect, Donato Maselli ("Maselli"), was $1,344,221.00. Following the renovation, Core claims that it was not paid the full amount that it contracted for. The Amended Complaint alleges four causes of action; (1) account stated, (2) breach of contract, (3) *quantum meruit*, and (4) unjust enrichment.

Defendant moved to dismiss based upon CPLR 3211(a)(1) and (7). In support of the motion, defendant submitted the emails leading to the agreement for the renovation, the mechanics lien filed by Core in this action, along with the testimony of Fation Spaho, the Director of Operations of Core and testimony and affidavit of Zbiginew Wojtowicz, the project Manager for Core submitted by Core in connection with the mechanic's lien and the invoices (plus checks for the invoices) for the renovation.

Following the Initial Complaint brought by Core only, it was revealed that Core is not and was not licensed as a home improvement contractor by the New York City Department of Consumer Affairs. Consequently, Core did not plead that it was licensed, contrary to the requirements of CPLR § 3015(e). Plaintiffs then filed the Amended Complaint naming both Core and Royal as plaintiffs. Royal is licensed as a contractor by the New York City Department of Consumer Affairs. In opposition of this motion, Core has acknowledged this deficiency in its cause of action, and all claims brought by Core are dismissed. Thus, only the claims by Royal remain.

When deciding a motion to dismiss pursuant to CPLR § 3211, the court should give the pleading a "liberal construction, accept the facts alleged in the complaint to be true and afford the plaintiff the benefit of every possible favorable inference" (*Landon v Kroll Laboratory Specialists, Inc.*, 22 NY3d 1, 5-6 [2013]; *see Faison v Lewis*, 25 NY3d 220 [2015]). Defendant moves to

dismiss based upon documentary evidence and failure to state a claim upon which relief can be granted.

A motion to dismiss pursuant to CPLR § 3211(a)(1), should not be granted unless the documentary evidence submitted is such that it resolves all factual issues as a matter of law and conclusively disposes of the claims set forth in the pleading (*Art & Fashion Grp. Corp. v Cyclops Prod., Inc.*, 120 A.D.3d 436, 438 [1st Dept. 2014]).

Under CPLR § 3211(a)(7), the court "accepts as true the facts as alleged in the complaint and affidavits in opposition to the motion, accords the plaintiff the benefit of every possible favorable inference, and determines only whether the facts as alleged manifest any cognizable legal theory" (*Elmaliach v Bank of China Ltd.*, 110 A.D.3d 192, 199 (1st Dept 2013) (quoting *Sokoloff v Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 414 [2001])).

The documentary evidence overwhelmingly demonstrates that defendant entered into a contract only with Core as a general contractor and had no direct dealings with Royal. There is no formal written contract. The series of emails that negotiated the deal, setting forth the terms and the ultimate agreement to the final terms, were between Maselli, defendant's architect, and Josh Guberman, Core's president and CEO. Nowhere in any of these emails is Royal mentioned. Josh Guberman's signature block contains Core's information and makes no mention of Royal. In fact, the signature block contains a section that states "visit our websites!" and lists several websites but again makes no reference to Royal. All correspondence to defendant came from people working for Core. Royal's claim that it was a party to the contract rests on its claim that it was copied on the emails during the negotiations. This claim fails to make out a contractual relationship. These emails were copied to Wojtowicz, who worked for both Core and Royal. The emails contain negotiations conducted between Josh Guberman, Core's principal, and Maselli. Only Mr.

Guberman copied Wojtowicz on the emails. Wojtowicz did not author any emails, respond to the emails, or participate in the chain, now was he the addressee of any emails from Maselli. Additionally, the email address used to copy Wojtowicz had a generic "aol" domain name and a user name that did not contain either his full first or last name. Additionally, Royal admitted that "[a] formal contract was not entered into" for the performance of the renovation project in question.

Royal's reliance on the mechanic's lien as evidence to back up their claims also lacks merit. Core was the only party to file a Notice of Mechanic's Lien against defendant seeking missing payments. Furthermore, during a 2014 hearing regarding the lien proceeding, Fation Spaho, Director of Operations for Core, made no mention of Royal while testifying about Core's contract with defendant. Said lien was discharged on default because the liens had expired as a matter of law as Core had not extended or foreclosed within one year.

The motion to dismiss for breach of contract is granted. In order for someone to be liable for a breach of contract, that person must be a party to the contract (*Perma Pave Contracting Corp. v Paerdegat Boat & Racquet Club, Inc.*, 156 AD2d 550 [2nd Dept 1989]). Here, as discussed above, there is no contract between Royal and defendant. Royal claims that a construction protocol signed by defendant and Royal shows they had a direct contractual relationship. This construction protocol was also signed by Core. It is not disputed that Royal performed work at the Property. The construction protocol was entered into only after Royal's work had been stopped by the building, and set forth a list of specific procedures that "must be complied with once work resumes." A plain reading of the construction protocol shows that it is not a contract between Royal and defendant, but merely a commitment by all parties concerned, including the worker's onsite, to abide by procedures for the conduct of operations in coordination with the wishes and directives of building management.

Generally, a "subcontractor may not assert a cause of action to recover damages for breach of contract against a party with whom it is not in privity with" (*Id.*). Although it is not clear that Core and Royal had a contractor/subcontractor relationship, Royal did not have a direct relationship with defendant and was not a party to the contract between Core and defendant. Thus, vis-a-vis defendant, Royal was not a contractor and therefore, must be a subcontractor. The "rights of [the] subcontractor [must be] derivative of the rights of the general contractor and 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" (*Kamco Supply Corp. v JMT Bros. Realty, LLC*, 98 AD3d 891 [1st Dept 2012]). Here, Royal has not proven that it was in a contractual relationship with defendant and the breach of contract claim is dismissed.

The motion to dismiss for account stated is granted. An account stated, "assumes the existence of some indebtedness between the parties, or an express agreement to treat the statement as an account stated" (*M. Paladino, Inc. v J. Lucchese & Son Contr. Corp.*, 247 AD2d 515, 516 [2nd Dept 1998]). Here, the existence of an underlying contract between the parties has not been established. The account stated claim by Royal must also fail as Royal did not submit any invoices to the defendant. In fact, all of the invoices were only from Core, as were any emails accompanying the invoices and emails discussing payments. Similarly, all payments made were to Core. As such, there is no grounds for an account stated claim on behalf of Royal. Additionally, a claim for an account stated may not be utilized simply as another means to attempt to collect under a disputed contract (*Martin H. Bauman Assoc., Inc. v H & M Int'l Transp., Inc.*, 171 AD2d 479 [1st Dept 1991]).

The third and fourth causes of action seeking quasi-contractual remedies against defendant are dismissed. The third cause of action seeks to recover in *quantum meruit*, while the fourth cause

of action seeks to recover for defendant's unjust enrichment. A cause of action under a quasi-contract theory "only applies in the absence of an express agreement, and is not really a contract at all, but rather a legal obligation imposed in order to prevent a party's unjust enrichment" (*Martin H. Bauman Assoc., Inc.*, 171 AD2d at 484). To prevail on a claim for *quantum meruit* the "plaintiff must allege (1) the performance of services in good, faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services" (*Fulbright & Jaworski, LLP v Carucci*, 63 AD3d 487 [1st Dept 2009]). Similarly, to adequately plead a claim for unjust enrichment, the "plaintiff must allege that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered" (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511 [2012]).

In order to "recover under a theory of quasi contract, a plaintiff must demonstrate that services were performed for *the defendant* resulting in its unjust enrichment" (*Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 108 [1st Dept 2002]; *see also Kagan v K-Tel Entm't*, 172 AD2d 375, 376 [1st Dept 1991]). Additionally, a subcontractor "cannot sustain a cause of action for unjust enrichment against a property owner with whom it has not contracted, absent an agreement to pay the general contractor's debt or circumstances giving rise to such an obligation" (*See IMS Engineers-Architects, P.C., v State of N.Y.*, 51 AD3d 1355, [3d Dept 2008]; *Mariacher Contracting Co. v Kirst Constr., Inc.*, 187 AD2d 986 [4th Dept 1992]; *Metropolitan Elec. Mfg. Co. v Herbert Constr. Co.*, 183 AD2d 758 [2d Dept 1992]). Here, Royal alleges that defendant knowingly received and accepted the benefits of the work performed by plaintiff upon its premises as grounds for the quasi contract claims. However, the owner's mere consent to and acceptance of improvements placed on his property by the subcontractor, without

more, does not render it liable to the subcontractor (*Sybelle Carpet & Linoleum, Inc. v E. End Collaborative, Inc.*, 167 AD2d 535 [2nd Dept 1990]; *see also Contelmo's Sand & Gravel, Inc. v J & J Milano, Inc.*, 96 AD2d 1090 [2nd Dept 1983]).

The rationale behind this rule lies in that any services performed by the subcontractor pursuant to its contract with the general contractor were done "for the benefit of the general contractor, [the person responsible for the completion of the improvement],...,not for the benefit of the owner" (*Sybelle Carpet & Linoleum*, 167 AD2d at 536, *quoting Schuler-Haas Elec. Corp. v Wager Constr. Corp.*, 57 AD2d 707 [4th Dept 1977]). "[T]he subcontractor should not be allowed to perform an end-run around the bargained-for contractual structure by seeking relief directly from the landowner, with whom he has not bargained" (*Scientific Elec. Co., Inc. v ADG Park Constr. Group, LLC*, 2013 NY Slip Op 31251[U], *13-14 [Sup Ct, NY County 2013], *quoting US E. Telecom., Inc. v U.S. W. Communications Serv., Inc.*, 38 F3d 1289, 1297 [2d Cir 1994]). Here, the services Royal performed were at the behest of someone other than defendant (Core), therefore, Royal must look to Core for recovery. Moreover, defendant's enrichment was not unjust because Royal expected payment from Core, not defendant. Plaintiff has failed to properly allege its unjust enrichment and *quantum meruit* claims. Because there is nothing pleaded or presented in the record to suggest that defendant was in privity of contract with Royal, or that defendant assumed an obligation, by her actions, the third and fourth causes of action against defendant are dismissed. Defendants motion for sanctions is denied. Accordingly, it is therefore

ORDERED, that defendant's motion to dismiss is granted and this action is dismissed.

This constitutes the decision and order of the Court.

6/29/2017
DATE

DAVID BENJAMIN COHEN, J.S.C.

CHECK ONE: [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION
[X] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER

APPLICATION:
CHECK IF APPROPRIATE:

☐ SETTLE ORDER
☐ DO NOT POST

☐ SUBMIT ORDER
☐ FIDUCIARY APPOINTMENT

☐ REFERENCE