

**J&M Indus. Inc. v Red Apple 180 Myrtle Ave. Dev.
LLC**

2018 NY Slip Op 31000(U)

May 17, 2018

Supreme Court, Kings County

Docket Number: 508488/16

Judge: Lawrence S. Knipel

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At an IAS Term, Part Comm-4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 17th day of May, 2018.

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

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J&M INDUSTRIES INC. D/B/A
J&M CONSTRUCTION MANAGEMENT,

Plaintiff,

- against -

Index No. 508488/16

RED APPLE 180 MYRTLE AVENUE
DEVELOPMENT LLC, HARTFORD FIRE
INSURANCE AND JOHN AND JANE DOE
"1 THROUGH 10,"

Defendants.

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The following papers numbered 1 to 7 read herein:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1-4
Opposing Affidavits (Affirmations) _____	5, 6
Reply Affidavits (Affirmations) _____	7
_____ Affidavit (Affirmation) _____	_____
Other Papers _____	_____

Upon the foregoing papers, defendants Red Apple 180 Myrtle Avenue Development LLC (Red Apple) and Hartford Fire Insurance (Hartford) move for an order, pursuant to CPLR 3212, granting Red Apple and Hartford "partial summary judgment" dismissing the complaint of plaintiff J&M Industries Inc. d/b/a J&M Construction Management, discharging

the Notice of Mechanic's Lien filed by plaintiff and granting Red Apple summary judgment on its first counterclaim seeking \$70,108.59 in overpayments.

Plaintiff commenced this action for breach of contract and foreclosure of a mechanic's lien based upon amounts allegedly owed by Red Apple in connection with the construction of a building at 180 Myrtle Avenue in Brooklyn. On September 9, 2014, plaintiff entered into a contract with Red Apple to provide materials and equipment to complete the superstructure portion of the project for the sum of \$9,450,000.00. The contract contained a clause allowing Red Apple to terminate the contract at its convenience. Under section 14.4.3 of the contract, if Red Apple elected to terminate the contract at its convenience,

“[Plaintiff] shall be entitled to receive payment for Work properly executed, and reasonable and documented costs incurred by reason of such termination, provided that such expenses shall not include any early termination penalties (other than surrender of deposits for leased or rented equipment), charges for anticipated profits, lost opportunity costs, or other charges for work not performed assessed against [plaintiff] by its Subcontractors, suppliers or laborers. [Plaintiff] hereby waives and releases all other claims for payment and damages, including, without limitation, anticipated profits.”

On or about January 15, 2015, plaintiff commenced work on the project. On or about March 13, 2015, Red Apple terminated the contract at its convenience. In the interim, Red Apple made payments to plaintiff directly, or on its behalf, based upon requisitions for payment submitted by plaintiff. Following the termination of the contract, Red Apple made additional payments directly to plaintiff's subcontractors, suppliers and vendors and releases were executed by plaintiff in connection with these payments.

On November 13, 2015, plaintiff filed a Notice of Mechanic's Lien in the amount of \$275,639.54. On November 18, 2015, Red Apple procured a bond from Hartford discharging the mechanic's lien. On or about December 30, 2015, Red Apple served a demand upon plaintiff pursuant to Lien Law § 38 for an itemized statement of the mechanic's lien. An itemized statement of lien from plaintiff, dated April 8, 2016, stated that the total contract amount, as of the date of termination, was \$435,365.74, of which Red Apple paid \$159,726.20, leaving a balance due of \$275,639.54. The itemized statement included a spreadsheet identifying charges and payments to various subcontractors and/or suppliers of plaintiff.

In support of their motion, defendants submit the affidavits of Robert Zorn, Red Apple's Executive Vice President, and Emmet Friel, the Senior Project Manager for McGowan Builders, Inc. (Red Apple's construction manager for the project), copies of releases indicating payment to or on behalf of plaintiff and copies of cancelled checks. Among the documents submitted is a release dated March 13, 2015 stating that as of said date, plaintiff received a total of \$289,638.07 in payments. Also attached as exhibits are several post-termination lien waiver and indemnity agreements from May 4, 2015 through June 30, 2015, along with copies of checks, indicating that payments totaling \$215,311.26 were made to plaintiff's subcontractors and/or suppliers. The agreements, each signed by plaintiff's president, James Fauci, indicated that Red Apple was remitting the payment to the subcontractor at the direction of plaintiff and that such payment was to be credited against

any balance or claim on account of the contract sum due from Red Apple to plaintiff. The agreements further provided that plaintiff and the relevant subcontractor waive and release any payment-related claims and demands they may have against Red Apple for the work performed. The agreements, along with the copies of checks, demonstrate that payments were made by Red Apple to the following subcontractors and/or suppliers:

- Bay Crane Service of Long Island . . . \$1,600
- Bay Crane Services . . . \$9,472.13
- Connolly & Son Construction, Inc. . . . \$4,000.00
- Extech Building Materials . . . \$2,072.22
- Fallproof Systems, LLC . . . \$2,500.00
- Feldman Lumber . . . \$56,191.38
- ISG Risk Management, Inc. . . . \$2,550.00
- Men of Steel Rebar Fabricators, LLC . . . \$10,542.56
- Municipal Building Consultants, Inc. . . . \$3,225.00
- Peri Formwork Systems, Inc. . . . \$114,075.15
- Structure Tech NY . . . \$5,000

Defendants argue that the aforesaid payments, together with the \$289,638.07 payment evidenced by the March 13, 2015 release, demonstrate that Red Apple paid plaintiff and/or its subcontractors/suppliers a total of \$505,474.33,¹ which exceeds the \$435,365.74 contract

¹The actual amount established by the submissions included in defendants' motion is \$504,949.33.

amount stated in the itemized statement of lien. Red Apple seeks to recover this alleged overpayment by its counterclaim.

“[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence” to eliminate any material issue of fact from the case (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008] [internal quotation marks and citation omitted]). The “[f]ailure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

The spreadsheet attached as exhibit “C” to plaintiff’s itemized statement of lien includes many of the post-termination payments to plaintiff’s subcontractors/suppliers established by defendants in their motion.² However, while these payments are reflected in the spreadsheet, they do not appear to be included in the calculation of the “Total Contract Amount (as of Date of Termination),” which is based upon the total of all the other payments listed in the spreadsheet, plus unpaid charges totaling \$164,885.26 allegedly due to “Capital Premium Financing” and “Decon,” and a “Direct Payroll Cost - In House” charge of \$108,076.39. In their motion for summary judgment, defendants do not submit proof that these unpaid charges were in fact paid or address the legitimacy of the unpaid charges included in the spreadsheet. Defendants have simply demonstrated that other certain charges identified in the statement but not included in the calculation of the total contract amount “as

²The spreadsheet does not recite the \$2,072.22 payment to Extech Building Materials or the \$5,000.00 payment to Structure Tech NY.

of the date of termination” were duly paid (which is not disputed). Since it appears from the spreadsheet, however, that the “total contract amount” calculation did not include the subcontractor/supplier charges and payments demonstrated by defendants’ motion, defendants have not established as a matter of law that the “total contract amount” was completely satisfied by those payments. In sum, it remains unclear from the record what, if any, additional monies are owed to plaintiff or whether there was otherwise an overpayment.

Accordingly, defendants’ motion for summary judgment dismissing the complaint, for summary judgment on its counterclaim and for discharge of the Notice of Mechanic’s Lien and mechanic’s lien bond is denied.

The foregoing constitutes the decision and order of the court.

E N T E R,



J. S. C.

HON. LAWRENCE KNIPEL