

**DFNY Drywall & Acoustics, Inc. v Artisan Constr.
Partners, LLC.**

2019 NY Slip Op 30471(U)

February 22, 2019

Supreme Court, New York County

Docket Number: 650107/2017

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

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INDEX NO. 650107/2017

DFNY DRYWALL & ACOUSTICS, INC.,
Plaintiff,

MOTION SEQ. NO. 001

- v -

ARTISAN CONSTRUCTION PARTNERS, LLC., 1411 IC-SIC
PROPERTY LLC., AMERICO GROUP INC., and JAMES GALVIN,
Defendants.

**DECISION, ORDER AND
JUDGMENT**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20

were read on this motion to/for SUMMARY JUDGMENT AND DEFAULT

Upon the foregoing documents, it is ordered that the motion is granted as follows.

In this action by plaintiff DFNY Drywall & Acoustics, Inc. (“DFNY”) seeking, inter alia, equitable relief, defendant Americo Group Inc. (“Americo”) moves: 1) pursuant to CPLR 3212 for summary judgment dismissing the claims against it; 2) pursuant to Lien Law § 11, discharging plaintiff’s lien and canceling the bond securing the same; 3) pursuant to CPLR 3215, granting Americo a default judgment on its first counterclaim, which seeks a declaratory judgment against plaintiff; and 4) for such other relief as this Court deems just and proper. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motion, which is unopposed, is granted as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

In May of 2015, Basic Resources, Inc. (“Basic”) and USA Legwear LLC (“USA”) (collectively “owners”) entered into a commercial sublease pursuant to which they rented the entire

second floor and a portion of the third floor at 1411 Broadway, New York, New York, also known as Block 815, Lot 1 (“the premises”). Doc. 18. In October of 2016, USA entered into a contract (“the contract”) with Artisan Construction Partners, LLC (“ACP”), a general contractor, pursuant to which ACP was to perform certain construction at the premises. Ex. B to Doc. 18. The contract referred to the name of the project as “Americo Group.” Id. The contract price was \$9,988,845.00. Id. During the project, change orders totaling \$570,549.14 were approved, thereby increasing the contract price to \$10,559,334.14. Ex. C to Doc. 18.

Pursuant to the contract, all applications for payment had to be submitted by ACP to the project’s architect and the architect had to approve the payments. Ex. C to Doc. 18, at par. 5.1.3. From October 2015 until May 2016, the project’s architect received six applications for payment from ACP and approved all of the same. Doc. 18. By June 7, 2015, USA had paid ACP \$9,371,968.92, representing the amount of the approved payments submitted as of that time, plus a \$75,000 advance, for a total of \$9,446,968.92. Ex. E to Doc. 18.

Sometime in June 2016, when no amounts were due and owing under the contract, ACP abandoned the project and absconded with the money it had been paid by USA instead of paying its subcontractors, including DFNY, the money they were owed. Doc. 18. USA did not continue work on the project as an agent of ACP, but rather retained a new contractor and various subcontractors to complete the project. Doc. 18. ACP’s subcontractors, including DFNY, which were not paid as a result of ACP’s conduct, thereafter filed liens against the premises. Doc. 18.

On September 14, 2016, DFNY, which was hired by ACP to work on the project, filed a lien (“the DFNY lien”) in the amount of \$231,442.50 against the premises for amounts allegedly unpaid on its subcontract with ACP. Ex. A to Doc. 2; Doc. 15. The DFNY lien was not served on USA, Basic or Americo. Ex. A to Doc. 2. At the owners’ request, Westchester Fire Insurance

Company ("WFIC") issued bond number K0954513A, Index Number 101567/16, to bond and discharge the DFNY lien. Doc. 15. On September 23, 2016, owners filed the bond with the New York County Clerk under the foregoing Index Number and the property was marked discharged by bond.

On January 6, 2017, DFNY commenced the captioned action against ACP and its principal, James Galvin ("Galvin"), 1411 IC-SIC Property LLC ("1411"), which owned the premises, and Americo, seeking to foreclose on the DFNY lien. Doc. 1. Only the second and third causes of action, for quantum meruit and unjust enrichment, respectively, were alleged as against Americo. Doc. 1.

Americo joined issue by service of its verified answer filed March 17, 2017. Doc. 13. As a first counterclaim Americo alleged, inter alia, that it paid to ACP all money owed to it as of June, 2016, when the latter abandoned the project; that it was not in privity with ACP; and that it filed a bond in order to discharge the lien against the premises. Doc. 13. Thus, asserted Americo, it was entitled to a judgment on its first counterclaim declaring: 1) it is not responsible for any of the amounts sought to be recovered in DFNY's lien; 2) that the lien was a nullity and had to be discharged, and all claims against Americo dismissed; 3) that WFIC's bond securing the lien must be cancelled and WFIC as surety should be discharged; and 4) the complaint must be dismissed as against Americo. Doc. 13.

LEGAL CONCLUSIONS:

Americo has established its prima facie entitlement to summary judgment dismissing DFNY's claims against it (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), as well as to a default judgment on its

first counterclaim against DFNY, by submitting, inter alia, the affidavit of Aaron Harari, President of USA. Harari's affidavit and the exhibits annexed thereto establish that Americo did not enter into a contract with DFNY; that Americo was neither a lessee nor sublessee of the premises, and thus was not an "owner" within the meaning of the Lien Law; and that USA paid all amounts due under its contract with ACP as of the date DFNY's lien was filed.

Pursuant to Lien Law § 4(1), "a mechanic's lien is valid to the extent of 'the sum earned and unpaid on the contract at the time of filing the notice of lien, and any sum subsequently earned thereon.'" *Albert J. Bunce, Ltd. v. Fahey*, 73 A.D.2d 632 (2d Dept 1979). Where no direct relationship exists between an owner and a subcontractor, "the rights of a subcontractor [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) quoting *Penava Mech. Corp. v Afgo Mech. Servs., Inc.*, 71 AD3d 493, 495 (1st Dept 2010) (internal quotation marks omitted). "[I]n the absence of any balance due to [a general contractor] from the owners, [a subcontractor] is required to look to the contractor that engaged its services for payment." *Blake Elec. Contracting Co. v Paschall*, 222 AD2d 264, 267 (1st Dept 1995) (citations omitted).

Given that USA had paid all monies it owed to ACP as of June, 2016, when ACP left the job and absconded with the payments, DFNY could not look to USA for payment, much less to Americo, which was neither an owner pursuant to the Lien Law nor a signatory to the contract between USA and ACP. Thus, DFNY's claims for unjust enrichment and quantum meruit must be dismissed. Said claims, sounding in quasi contract, are precluded where, as here, a valid and enforceable written agreement exists which governs the dispute in question. *See MG W. 100 LLC*

v St. Michael's Prot. Episcopal Church, 127 AD3d 624 (1st Dept 2015) citing *Clark-Fitzpatrick, Inc. v Long Is. R.R.*, 70 NY2d 382, 388 (1987).

Further, Americo has established its entitlement to a default judgment on its first counterclaim seeking declaratory relief against DFNY. See CPLR 3215(a). Specifically, Americo provided proof of service of the counterclaim, the default, and the facts, as set forth above, constituting the claim. See *Gantt v North Shore-LIJ Health Sys.*, 140 AD3d 418 (1st Dept 2016). Since DFNY failed to respond to the counterclaim, it is therefore in default. See *Simons v Doyle*, 262 AD2d 236, 237 (1st Dept 1999) citing CPLR 3012(a).

Moreover, as can be seen from the affidavit of service of the notice of DFNY's lien (Ex. A to Doc. 2), DFNY "failed to properly serve the notice of lien on all of the appropriate interested entities, thus warranting vacatur of the lien" pursuant to Lien Law § 11. *LV Constr. Servs. LLC v Manhattan Professional Group, Inc.*, 149 AD3d 640, 641 (1st Dept 2015) (citations omitted).

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by defendant Americo Group, Inc. for summary judgment dismissing the second and third causes of action as against it pursuant to CPLR 3212 is granted, and the complaint against Americo Group, Inc. is dismissed in its entirety; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that the motion by defendant Americo Group, Inc. for a default judgment on its first counterclaim against plaintiff DFNY Drywall & Acoustics, Inc. pursuant to CPLR 3215 is granted; and it is further

ORDERED and ADJUDGED that Americo Group, Inc. is not liable to plaintiff or, by extension, to Westchester Fire Insurance Company on the bond, for all or any part of the amounts sought to be recovered by plaintiff's lien, and there is no lien fund upon which plaintiff's lien can attach; and it is further

ORDERED and ADJUDGED that plaintiff's lien is a nullity and is discharged, and all claims based on the lien against Americo Group, Inc. fail to state a claim upon which relief may be granted and are thus dismissed; and it is further

ORDERED and ADJUDGED that the bond filed by Westchester Fire Insurance Company securing plaintiff's lien is cancelled and Westchester Fire Insurance Company as surety is discharged accordingly; and it is further

ORDERED that the notice of mechanic's lien in the sum of \$231,442.50, filed by DFNY Drywall & Acoustics, Inc. on September 14, 2016 with the County Clerk of the County of New York against the real property located at 1411 Broadway, 2nd and 3rd Floors, in the County and State of New York, 10018, and designated on the tax map as Block 815, Lot 1, is hereby vacated and canceled, and the County Clerk shall amend its records accordingly; and it is further


ORDERED that the County Clerk shall release and discharge bond number K0954513A, in the sum of \$254,586.75, posted by nonparty Westchester Fire Insurance Company with the County Clerk on September 23, 2016, under Index Number 101567/2016; and it is further

ORDERED that counsel for the moving party shall serve a copy of this decision, order and judgment with notice of entry upon plaintiff's attorney as well as on the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that this constitutes the decision, order and judgment of the court.

2/22/2019
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
		<input type="checkbox"/>	FIDUCIARY APPOINTMENT
		<input type="checkbox"/>	OTHER
		<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: