SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 15

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GENETECH BUILDING SYSTEMS, INC., DECISION AND ORDER

Plaintiff, Index No. 656410/2016

- against -

APG INTERNATIONAL, INC. and TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK,

Defendants.

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MELISSA A. CRANE, J.:

Defendant Trustees of Columbia University in the City of New York (Columbia) moves, pursuant to CPLR 3212, for summary judgment dismissing the fourth cause of action seeking to foreclose on a mechanic's lien.

BACKGROUND

This dispute arises out of the construction of the Columbia University School of Nursing building (the Project) at 1150 St. Nicholas Avenue, New York, New York (NY St Cts Elec Filing [NYSCEF] Doc No. 56, Anthony Donatich [Donatich] aff, exhibit C [complaint], ¶ 5; NYSCEF Doc No. 53, Donatich aff, ¶ 2). On or about August 21, 2015, nonparty construction manager TDX Construction Corp. (TDX), acting for Columbia, the Project's owner, retained defendant APG International, Inc. (APG) to install the exterior curtain wall system for the new building for $6,340,000 (the Contract) (NYSCEF Doc No. 54, Donatich aff, exhibit A at 1). AGP subsequently subcontracted a portion of its work to plaintiff, Genetech Building Systems, Inc. (the Subcontract) (NYSCEF Doc No. 56, ¶ 5). Plaintiff alleges that it performed under the Subcontract until APG delivered a notice of termination dated September 7, 2016 (NYSCEF Doc No. 56, ¶ 7; NYSCEF Doc No. 66, Michael Tedesco [Tedesco] aff, exhibit 1 at 2).

On October 4, 2016, plaintiff filed a notice of mechanic's lien in the amount of $367,629.32 (NYSCEF Doc No. 55, Donatich aff, exhibit B at 1). It then commenced this action against APG and Columbia on December 8, 2016, asserting causes of action for breach of contract, quantum meruit, account stated, and foreclosure of the mechanic's lien. In a decision and order dated April 19, 2018, this court struck APG's answer (NYSCEF Doc No. 41 at 1). A judgment of $519,394.15 against AGP was subsequently entered after an inquest (NYSCEF Doc No. 49 at 1).

THE PARTIES' CONTENTIONS

Columbia now moves for summary judgment dismissing the sole cause of action against it on the ground that plaintiff cannot demonstrate the existence of a lien fund to which a mechanic's lien may attach. Columbia submits an affidavit from Donatich, Columbia's Director of Capital Project Management, who avers that APG terminated plaintiff's services in September 2016 and retained nonparty Jackson Installation, LLC (Jackson) as plaintiff's replacement (NYSCEF Doc No. 53, ¶ 13). By September 20, 2016, Columbia had paid APG $4,783,763.25 for its work, as APG's waiver of liens and release form of the same date demonstrates (NYSCEF Doc No. 59, Donatich aff, exhibit F at 1). APG's payment requisition no. 18, dated October 15, 2016, also reflects that Columbia had paid APG $4,783,763.25 (NYSCEF Doc No. 58, Donatich aff, exhibit E at 1). This left $1,556,236.75 of the $6,340,000 Contract price unpaid (NYSCEF Doc No. 53, ¶ 7).

In November 2016, APG informed TDX that it lacked the financial resources to complete the Contract and that it was abandoning the Project (NYSCEF Doc No. 53, ¶ 13). Donatich states that, after APG abandoned the Project, TDX and Columbia jointly directed Jackson to complete APG's work (*id.*, ¶ 16). Donatich further states that Columbia paid more than $2.9

million to complete APG's work on the Contract (NYSCEF Doc No. 53, ¶ 8; NYSCEF Doc No. 61, Donatich, exhibit H at 1). Therefore, there were no funds to which plaintiff's lien could attach.

Plaintiff, in opposition, argues that the fraud and bad faith exceptions to the lien fund rule preclude granting Columbia summary judgment. Plaintiff relies on the affidavit of its president, Tedesco, who avers that "APG owed plaintiff substantial sums under the Subcontract" when it was terminated (NYSCEF Doc No. 65, Tedesco aff, ¶ 10). Tedesco complains that it was illogical for Columbia to hire Jackson to fulfill the remainder of APG's Contract when plaintiff was already at the site (*id.*, ¶ 15). Moreover, plaintiff argues that Columbia's payments to Jackson by way of several two-party checks did not diminish the lien fund because that fund existed when plaintiff filed its lien in October 2016 (*id.*, ¶ 24).

DISCUSSION

It is well settled that the movant on 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 issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and by the pleadings and other proof such as affidavits, depositions and written admissions (*see* CPLR 3212). The "facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*id.*, citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The "[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the

motion, *regardless of the sufficiency of the opposing papers*" (*Vega*, 18 NY3d at 503 [internal quotation marks and citation omitted, emphasis in original]).

Lien Law § 3 permits a subcontractor who performs labor or furnishes material to file a mechanic's lien for the "value, or the agreed price, of such labor … or materials upon the real property improved or to be improved." Pursuant to Lien Law § 4 (1), a mechanic's lien "shall extend to the owner's right, title or interest in the real property and improvements, existing at the time of filing the notice of lien, or thereafter acquired." Further, "the lien shall not be for a sum greater than the sum earned and unpaid on the contract at the time of filing the notice of lien, and any sum subsequently earned thereon" (Lien Law § 4 [1]).

A subcontractor's right to recover is generally derivative of the general contractor's right to recover from an owner (*see Kamco Supply Corp. v. JMT Bros. Realty, LLC*, 98 AD3d 891, 891 [1st Dept 2012]). Therefore, "[i]n the case of a subcontractor, the lien will only attach to those funds due and owing to the general contractor at the time of its filing, or which may thereafter become due and owing" (*Albert J. Bunce, Ltd. v Fahey*, 73 AD2d 632, 632 [2d Dept 1979] [citations omitted]; *see also West-Fair Elec. Contrs. v Aetna Cas. & Sur. Co.*, 87 NY2d 148, 157 [1995] [concluding that a property owner's liability to a subcontractor filing the mechanic's lien "is limited to the unpaid portion of the value or agreed to price of the improvements at the time the lien is filed"]). A lien fund is defined as the "monies earned at the time of the filing of the lien, plus 'any sums earned subsequently thereon'" (8 Warren's Weed New York Real Property § 92.11 [4] [b] [2019]). As such, the party seeking to foreclose on a mechanic's lien bears "the burden of proving the existence of a lien fund and entitlement to recovery of a lien" (*Strober Bros. v Kitano Arms Corp.*, 224 AD2d 351, 353 [1st Dept 1996]; *Falco Constr. Corp. v P & F Trucking*, 158 AD2d 510, 510 [2d Dept 1990] [dismissing a

subcontractor's action to foreclose on a mechanic's lien where the subcontractor failed to establish the existence of a lien fund]). Thus, where there are no funds due from the owner to the general contractor at the time the mechanic's lien was filed, a subcontractor must look to the general contractor for payment for its services (*see Blake Elec. Contr. Co. v Paschall*, 222 AD2d 264, 267 [1st Dept 1995]).

Additionally, where a general contractor abandons a construction contract, the general contractor's abandonment affects a subcontractor's mechanic's lien as follows:

> "If nothing is due to the contractor pursuant to the contract, when the lien is filed and he abandons the undertaking without just cause, but the owner completes the building according to the contract and under a provision thereof permitting it, the lien attaches to the extent of the difference between the cost of completion and the amount unpaid when the lien was filed"

(*Van Clief v Van Vechten*, 130 NY 571, 577 [1892]; *Abe Schild Stone Corp. v Apostle*, 41 Misc 2d 732, 733 [Sup Ct, NY County 1964] [stating that where a general contractor breaches its contract by abandoning the job, and the owner completes the general contractor's work under the contract, then the fund against which the mechanic's lien attaches "consists of the contract price plus agreed extras, if any, less what the owner has already paid for the improvement, against which is credited the actual cost of completion by the owner, provided same is fair and reasonable"]). However, where the owner's costs to complete the general contractor's work exceeds the balance due under the contract, then there is no surplus upon which a mechanic's lien may attach (*see Philan Dept. of Borden Co. v Foster-Lipkins Corp.*, 39 AD2d 633, 634 [4th Dept 1972], *affd* 33 NY2d 709 [1973]; *Reilly & Co., Inc. v Scheer*, 125 Misc 832, 832 [App Term, 2d Dept 1925] [finding that the plaintiff was not entitled to recovery because the defendant owner spent more than the contract price to complete the work]; *Maycumber v Wolfe*, 10 Misc 2d 464, 469 [Sup Ct, Onondaga County 1958] [stating that where a general contractor

abandons its contract, and "the cost of completing the building equals or excess the amount unpaid on the [general contractor's] contract, there is nothing on which the lien of a subcontractor may attach"]).

Here, APG acknowledged that it had been paid all sums due under the Contract as of September 20, 2016, as evidenced in its waiver of liens and release form. Therefore, at the time plaintiff filed its lien, there were no funds due to APG. Nevertheless, APG's payment requisition no. 18 dated October 15, 2016 shows that APG sought $110,535 for work performed after September 20, 2016. While Donatich avers that no payment was made on this requisition (NYSCEF Doc No. 53, ¶ 7), plaintiff's mechanic's lien presumably attaches to that amount. However, Columbia has established that APG abandoned the Project in November 2016. Columbia then undertook to perform APG's work, and in accordance with articles 6.2.1 and 6.2.3 of the Contract, Columbia charged APG for that work (NYSCEF Doc No. 54 at 8). Columbia has also shown that the amount paid to complete APG's work exceeded the unpaid balance on the Contract, and that the lien fund was depleted as a result. Consequently, Columbia has met its burden on summary judgment (*see 3-G Servs. Ltd. v SAP V/Atlas 845 WEA Assoc. NF L.L.C.*, 162 AD3d 487, 488 [1st Dept 2018]).

Plaintiff's reliance on the fraud exception to an owner's obligation on a mechanic's lien is unavailing. Generally, in the absence of fraud, an owner may not be compelled to pay more than it has agreed to pay to complete a construction contract (*see Crane v Genin*, 60 NY 127, 131 [1875]; *Larry Alvaro, Inc. v Chow*, 221 AD2d 752, 753 [3d Dept 1995]; *Abe Schild Stone Corp.*, 41 Misc 2d at 733 [stating that "an owner's liability for mechanics' liens is that, except in cases of fraud or collusion or evasion of the provisions of the Lien Law, an owner cannot be compelled to pay any greater sum for the completion of a building than by his contract he has agreed to

pay"]). Plaintiff argues that the amount expended to complete APG's work was unreasonable and constitutes fraud. But, "[i]t is well settled that affidavits devoid of evidentiary facts and consisting of mere conclusions, speculation and unsupported allegations are insufficient to defeat a motion for summary relief" (*Castro v New York Univ.*, 5 AD3d 135, 136 [1st Dept 2004]; *accord Handlin v Burkhart*, 101 AD2d 850, 852 [2d Dept 1984], *affd* 66 NY2d 678 [1985]). Plaintiff's generalized allegations of fraud are wholly conclusory and unsupported by anything other than speculation (*see Kalt Lbr. Co. v Sterner*, 121 Misc 505, 506 [Sup Ct, NY County 1923] [concluding that there was no fraud proven]).

Plaintiff's argument that Columbia failed to mitigate its damages is equally unpersuasive. First, Columbia was under no obligation to hire plaintiff to complete APG's work, especially in view of Donatich's averment that APG terminated plaintiff because of its substandard performance (*id.*). Second, as Donatich's reply affidavit notes, plaintiff was no longer on the job because APG had terminated plaintiff's services two months before APG left the Project (NYSCEF Doc No. 72, Donatich reply aff, ¶ 7). Hence, even if Columbia had retained plaintiff to complete the remaining Contract work, plaintiff would have likely incurred extra costs to mobilize its staff, whereas Jackson was already working at the Project site. Further, plaintiff fails to support its contention that the completion costs were excessive and unreasonable with specific, probative evidence. Notably, plaintiff has not described what work was left to complete under the Contract when APG abandoned the Project.

Plaintiff's conclusory allegations of bad faith are also insufficient (*see Falco Constr. Corp.*, 158 AD2d at 510-511). While bad faith may be found where an owner pays a general contractor in advance in an effort to circumvent the Lien Law, plaintiff has produced no such evidence here (*see 3-G Servs. Ltd.*, 162 AD3d at 488; *Reilly & Co., Inc.*, 125 Misc at 833 [stating

that bad faith requires a showing that the payment was made "for the purpose of defrauding the subcontractor"]). In any event, Columbia has established that the payments made after plaintiff filed its lien were made to those subcontractors completing APG's Contract work (NYSCEF Doc No. 72, ¶ 13).

Lastly, plaintiff's argument that the documents upon which Columbia relies are inadmissible lacks merit. APG's waiver of liens and release form constitutes a sworn, admissible statement, and the payment requisition was submitted to TDX as Columbia's agent. Donatich also avers that he directed the preparation of the spreadsheet detailing Columbia's completion costs (*id.*, ¶ 12).

Accordingly, it is

ORDERED that the motion of defendant Trustees of Columbia University in the City of New York for summary judgment dismissing the complaint against it is granted; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 10-29-2019

ENTER:

J.S.C.

HON. MELISSA A. CRANE
J.S.C.