

<b>JL Constr. of New Milford, LLC v Stewart Purchaser, LLC</b>
2020 NY Slip Op 31646(U)
May 26, 2020
Supreme Court, Kings County
Docket Number: 521805/2018
Judge: Wavny Toussaint
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At an IAS Term, Part 70 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 26th day of May, 2020.

P R E S E N T:

HON. WAVNY TOUSSAINT,  
Justice.

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JL CONSTRUCTION OF NEW MILFORD, LLC

INDEX NO: 521805/2018

Plaintiffs,

-against-

DECISION AND ORDER

STEWART PURCHASER, LLC,  
SHAMROCK CREEK LLC,  
REYNARD PRODUCTIONS, LLC d/b/a  
THE BROOKLYN MIRAGE,  
DELPHI CRE FUNDING, LLC  
and G.C. ENVIRONMENTAL, INC.,

Defendants

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The following e-filed papers read herein:

NYSEF Nos.:

Notice of Motion/Affirmation/Affidavit in Support: \_\_\_\_\_

16-18

Opposing Affirmation/Affidavit: \_\_\_\_\_

32-33

Reply Affirmation/Affidavit \_\_\_\_\_

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Upon the foregoing papers, defendants Stewart Purchaser, LLC (Stewart) and Delphi CRE Funding, LLC (Delphi) move for an order (Mot. Seq. 1), pursuant to CPLR 3212, granting summary judgment dismissing the complaint of plaintiff JL Construction of New Milford, LLC. Defendant Reynard Productions, LLC d/b/a The Brooklyn Mirage (Reynard), moves for an order (Mot. Seq. 2), pursuant to CPLR 3012 (d) and CPLR

2004, granting Reynard leave to extend its time to appear or answer in this action or otherwise compel plaintiff to accept the answer served by Reynard. Pursuant to a stipulation dated October 4, 2019 and filed October 7, 2019, plaintiff agreed to accept Reynard's answer and Reynard's motion to extend/compel was withdrawn without prejudice.

### ***Background***

Plaintiff commenced this action to foreclose a mechanic's lien filed against the premises known as 140 Stewart Avenue in Brooklyn and for other relief stemming from its performance of work on a construction project. Defendant Stewart is the owner of the premises. Plaintiff alleges that, in or about June 2017, it was retained by defendant Shamrock Creek, LLC (Shamrock) as a subcontractor to perform certain carpentry work at a nightclub located at the subject property. Plaintiff claims that it constructed five bars and a stage at the space over an approximate five-month period before Shamrock ceased making payments in or around October 2017. Plaintiff thereafter abandoned the project and, on or about December 15, 2017, filed a Notice of Mechanic's Lien with the Kings County Clerk in the amount of \$125,500.00. On or about October 30, 2018, plaintiff commenced the instant action setting forth causes of action to foreclose the mechanic's lien, fraudulent inducement, promissory fraud, unjust enrichment, breach of contract, account stated, quantum meruit and diversion of Lien Law Article 3-A trust funds. Delphi was made a party to this action as it holds a first mortgage encumbering the subject property.

On January 3, 2019, defendant Stewart procured a bond discharging the

mechanic's lien from International Fidelity Insurance Company. On March 22, 2019, defendants Stewart and Delphi brought the instant motion for summary judgment dismissing the complaint on the ground that, as owner and encumbrancer of the subject property, they are no longer necessary parties to this action, as the lien on the property was discharged by the bond.

In opposition, plaintiff alleges that all of the work done by plaintiff was done with the knowledge and consent of the moving defendants. Further, plaintiff argues that the improvement of the premises increased the value of same, thus benefitting the moving defendants.

### ***Discussion***

Under Lien Law § 44 (3), necessary parties to an action to foreclose a mechanic's lien on real property include “[a]ll persons appearing by the records in the office of the county clerk or register to be owners of such real property or any part thereof.” However, where, as here, a bond has been filed discharging the lien, the bond “has replaced the real property as the security to be attached and attacked” and thus Lien Law § 44 relating to an action “to enforce a lien against real property” is no longer applicable (*Bryant Equip. Corp. v A-1 Moore Contr. Corp.*, 51 AD2d 792, 793 [2d Dept 1976]; see *Norden Elec. v Ideal Elec. Supply Corp.*, 154 AD2d 580, 581 [2d Dept 1984]; *Melniker v Grae*, 82 AD2d 798, 799 [2d Dept 1981]).

In an action brought to enforce the bond, Lien Law § 37 (7) specifies the parties to be joined as “the principal and surety on the bond, the contractor, and all claimants who have filed notices of claim” (Lien Law § 37 [7]). The owner of the property is not a

necessary party where the lien has been discharged.

Accordingly, the cause of action to foreclose the mechanic's lien must be dismissed as against defendants Stewart and Delphi, (*see Melniker*, 82 AD2d at 799; *Bryant Equip. Corp.*, 51 AD2d at 793).

With respect to the remaining causes of action asserted against Stewart sounding in unjust enrichment and quantum meruit, plaintiff argues that the filing of the bond does not preclude these quasi-contractual claims as they are separate and distinct from any foreclosure claim on the mechanic's lien. However, a property owner has no liability to a subcontractor on a quasi-contract theory unless it expressly consents to pay for the subcontractor's performance (*see Sears Ready Mix LTD v Lighthouse Marina*, 127 AD3d 845, 846 [2d Dept 2015]; citing *Perma Pave Contr. Corp. v Paerdegat Boat & Racquet Club*, 156 AD2d 550, 551 [2d Dept 1989]; *Metropolitan Elec. Mfg. Co. v Herbert Constr. Co.*, 183 AD2d 758, 759 [2d Dept 1992]. "The owner's mere consent to and acceptance of improvements placed on [its] property by the subcontractor, without more, does not render it liable to the subcontractor" (*Perma Pave Contr. Corp.*, 156 AD2d at 551; *see Contelmo's Sand & Gravel v J & J Milano*, 96 AD2d 1090 [2d Dept 1983])).

In its complaint, plaintiff alleges that defendant Stewart received the benefit of plaintiff's work by "having its space improved" and has "benefited and continue[s] to benefit from [plaintiff's] work, labor and/or materials." However, there is no allegation that Stewart promised to pay plaintiff for any work it performed at the property.

Accordingly, it is hereby

**ORDERED** that defendants Stewart Purchaser, LLC and Delphi CRE Funding LLC's motion for summary judgment is granted in its entirety; and it is further

**ORDERED** that the action is hereby severed and shall continue as against the remaining defendants.

The foregoing constitutes the decision and order of the court.

ENTER,



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J. S. C.