

**Senator Constr. Group Inc. v T.G. Nickel & Assoc.,  
LLC**

2021 NY Slip Op 30552(U)

February 16, 2021

Supreme Court, Kings County

Docket Number: 510716/2019

Judge: Lara J. Genovesi

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At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 16<sup>th</sup> day of February 2021.

PRESENT:

HON. LARA J. GENOVESI,  
J.S.C.

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SENATOR CONSTRUCTION GROUP INC.,

Index No.: 510716/2019

Plaintiff,

DECISION & ORDER

-against-

T.G. NICKEL & ASSOCIATES, LLC and  
MP OWNER LLC,

Defendants.

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Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	<u>NYSCEF Doc. No.:</u>
Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed _____	_____ 4, 5, 8 _____
Opposing Affidavits (Affirmations) _____	_____ 11, 12, 14 _____
Reply Affidavits (Affirmations) _____	_____ 15 _____

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### ***Introduction***

Defendant, T.G. Nickel & Associates, LLC, moves by notice of motion, sequence number one,<sup>1</sup> pursuant to CPLR § 3211, to dismiss plaintiff's Third Cause of Action on the grounds that the claim is not a legally cognizable claim and is barred by the documentary evidence of the controlling contract, and for such other relief as the court deems proper. Plaintiff opposes this motion.

### ***Background***

This is an action for foreclosure of a mechanics lien and breach of contract between plaintiff, Senator Construction Group, Inc., and defendants, T.G. Nickel & Associates, LLC ("T.G. Nickel") and MP Owner, LLC. Plaintiff is a contractor specializing in masonry, concrete, scaffolding and hoisting. Plaintiff was hired by general contractor T.G. Nickel & Associates, LLC to carry out masonry and brick work at 189 Montague Street, Brooklyn, New York 11201 (*see* NYSCEF Doc. # 7, Subcontract). The contract price was \$2,844,349.00 (*see id.*). In addition to the contract, there were four contract change orders adding \$224,300.22 to the total contract price, making the contract price \$3,095,605.22 (*see* NYSCEF Doc. # 13, Change Orders). The contract schedule required that the project be fully completed by February 28, 2019 (*see* NYSCEF Doc. # 7, Subcontract).

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<sup>1</sup> On October 2, 2019, oral arguments were held on this motion before the Honorable Paul Wooten (*see* NYSCEF Doc. # 17, Transcript of Proceedings). Although Judge Wooten denied this motion, no order was written.

Plaintiff alleges that the change orders were requested and approved by T.G. Nickel, and that, because of the change orders plaintiff's work was delayed (*see* NYSCEF Doc. # 1, Summons and Complaint). Plaintiff alleges that T.D. Nickel refused to pay Senator for the change orders and requisitions, causing plaintiff to file a mechanic's lien in the amount of \$754,091.29 to recover amounts owed to it by T.G. Nickel (*see id.*). In its summons and complaint, plaintiff alleges three causes of action: lien foreclosure, breach of contract, and unjust enrichment (*see id.*). Plaintiff's third cause of action for unjust enrichment seeks "millions of dollars worth of masonry and brick work to T.G. Nickel and Owner, representing labor and materials that was accepted by both, and which substantially and materially improved the Project" (*see id.*).

Defendant T.G. Nickel argues that dismissal of plaintiff's third cause of action is warranted under CPLR § 3211 (a)(7) and (a)(1). First, T.G. Nickel contends that because plaintiff relies on the subcontract for its first two causes of action, and has not argued that T.G. Nickel has any separate legal duty giving rise to an independent cause of action in tort, plaintiff cannot recover through its third cause of action under a theory of unjust enrichment (*see* NYSCEF Doc. # 8, T.D. Nickel Memorandum of Law; *see also* NYSCEF Doc. # 15, T.G. Nickel Reply). Second, T.G. Nickel contends that because the subcontract is valid and enforceable, the existence of a written agreement precludes recovery under the quasi-contract theory of unjust enrichment where there is no dispute as to the enforceability of the subcontract (*see id.*)

In opposition, plaintiff contends that its third cause of action for unjust enrichment is cognizable because CPLR § 3014 allows for causes of actions to be asserted

alternatively or hypothetically, and that plaintiff should be entitled to assert a cause of action for unjust enrichment “should the contract sued upon be held void” (*see* NYSCEF Doc. # 14, Plaintiff Opposition).

This action was commenced by the filing of the summons and complaint on May 14, 2019 (*see* NYSCEF Doc. # 1).<sup>2</sup> On June 20, 2019, this pre-answer motion was filed by defendant T.G. Nickel (*see* NYSCEF Doc. # 4, Notice of Motion).

### *Discussion*

#### *Motion to Dismiss*

Under CPLR § 3211, “a party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. a defense is founded upon documentary evidence; or . . . 7. the pleading fails to state a cause of action[.]” (CPLR § 3211(a)(1), (a)(7)). To succeed on a motion to dismiss pursuant to CPLR § 3211 (a)(1), “the documentary evidence must conclusively establish a defense as a matter of law” (*Snyder v. Voris, Martini & Moore, LLC*, 52 A.D.3d 811, 860 N.Y.S.2d 622 [2d Dept., 2008] (citing *Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 774 N.E.2d 1190 [2002])). “If documentary proof submitted in support of the motion disproves a material allegation of the complaint, a determination in the defendant’s favor is warranted” (*see id.* (citing *Weiss v. TD Waterhouse*, 45 A.D.3d 763, 847 N.Y.S.2d 94 [2d Dept., 2007]; *McGuire v. Sterliubleday Enters., LP*, 19 A.D.3d 660, 799 N.Y.S.2d 65 [2d Dept., 2005])). “On a motion to dismiss for failure to state a cause of action pursuant to CPLR

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<sup>2</sup> Although defendant MP Owner, LLC was served with the summons and complaint, defendant did not answer (*see* NYSCEF Doc. # 18, Preliminary Conference Order).


§ 3211 (a)(7), the allegations of the complaint should be accepted as true” and “the court must determine whether the alleged facts fit any cognizable legal theory” (*Morales v. Copy Right, Inc.*, 28 A.D.3d 440, 813 N.Y.S.2d 731 [2d Dept., 2006] (citing *Leon v. Martinez*, 84 N.Y.2d 83, 638 N.E.2d 511 [1994])). The standard is not whether the complaint states a cause of action, but whether the plaintiff has a cause of action (*see Morales v. City Right, Inc.*, 28 A.D.3d 440, *supra*).

Here, T.G. Nickel demonstrated that documentary evidence and a lack of a cognizable claim warrants a dismissal of plaintiff’s third cause of action for unjust enrichment. The validity of the contract is not at issue here, and at oral argument plaintiff and defendant conceded to this point. “The existence of a valid and enforceable written contract governing a particular subject matter precludes recovery in quasi contract for events arising out of the same subject matter” (*Gargano v. Morey*, 165 A.D.3d 889, 86 N.Y.S.3d 595 [2d Dept., 2018]; *see also EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 832 N.E.3d 26 [2005]; *Hamlet at Willow Cr. Dev. Co., LLC v. Northeast Land Dev. Corp.*, 64 A.D.3d 85, 878 N.Y.S.2d 97 [2d Dept., 2009]).

**Conclusion**

Accordingly, defendant’s motion to dismiss plaintiff’s third cause of action for unjust enrichment is granted. This constitutes the decision and order of this case.

ENTER:

  
Hon. Lara J. Genovesi  
J.S.C.

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