Solco Plumbing Supply Inc. v Paramount Plumbing Co. of N.Y. Inc.
2022 NY Slip Op 31766(U)
June 3, 2022
Supreme Court, New York County
Docket Number: Index No. 158038/2018
Judge: Sabrina Kraus
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SABRINA KRAUS** **PART** **57TR**

Justice

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SOLCO PLUMBING SUPPLY INC.,

Plaintiff,

- v -

PARAMOUNT PLUMBING CO. OF NEW YORK INC.,PLAZA CONSTRUCTION LLC,AMERICAN HOME ASSURANCE COMPANY, THE WITKOFF GROUP, LLC, THE WITKOFF ORGANIZATION, LLC, FISHER BROTHERS MANAGEMENT CO, LLC, HENRY V MURRAY SENIOR LLC, 111 MURRAY STREET CONDOMINIUM, BREDS III MORTGAGE CORP, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, HENRY QUENTZEL PLUMBING & HEATING CO., INC, TPE, INC D/B/A THE PLUMBING EXCHANGE, ROSENWACH TANK CO LLC

Defendants.

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INDEX NO. 158038/2018

MOTION DATE 02/14/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102

were read on this motion to/for SUMMARY JUDGMENT.

BACKGROUND

This action arises from a private construction project located at 111 Murray Street, New York, New York (the Project). The Project's owner Henry V. Murray Senior LLC c/o Fisher Brothers Management Co., LLC (Owner), retained Plaza Construction LLC (Plaza) to perform construction management services at the Project. Thereafter, in its capacity as construction manager, Plaza entered into a written subcontract agreement with Paramount Plumbing Co. (Paramount) to perform certain labor and to furnish certain equipment and material for all plumbing and site services work at the Project.

Pursuant to the terms of the Subcontract, Paramount was required, among other things, to: timely pay all of its lower-tier subcontractors and material suppliers; bond off or otherwise discharge any mechanic's liens filed by its subcontractors or material suppliers; provide lien waivers for its work, its sub-subcontractors work and material suppliers work; indemnify Plaza and Owner against all liability arising out of its failure to pay its lower-tier subcontractors and material suppliers; and pay all costs to Plaza and Owner as a result of its default on the Project.

Paramount sub-subcontracted with plaintiff, Solco Plumbing Supply Inc. (Solco), and with defendants, Mayer Malbin Co., Inc. (MMC) and TPE Inc. d/bf The Plumbing Exchange (TPE) to supply to Paramount plumbing supplies and fixtures for use and incorporation into the Project. Paramount entered into a series of sales contracts with sub-subcontractor defendant, Quentzel, for the purchase and delivery of plumbing supplies and materials for use and incorporation into the Project. Paramount sub-subcontracted with defendant, Rosenwach Tank Co LLC (Rosenwach), to furnish certain labor materials and/or perform certain construction work at the Project.

Plaza alleges that during the Project, Paramount defaulted on its contractual obligations by, *inter alia*, failing to pay certain of its material suppliers, resulting in mechanic's liens being filed by those material suppliers against the Project's premises.

On or about June 18, 2018, Rosenwach filed, twenty (20) notices under the Mechanic's Lien Law against the Project premises, the sum total of which filings amounted to $136,000.00 (Rosenwach Liens). On or about June 21, 2018, MMC filed a notice under the Mechanic's Lien Law against the Project premises in the amount of $114,154.76 (MMC Lien). On or about August 3, 2018, Solco filed, a notice under the Mechanic's Lien Law against the Project premises in the amount of $376,274.91 (Solco Lien). On or about September 12, 2018, Quentzel

filed, a notice under the Mechanic's Lien Law against the Project premises in the amount of $64,999.54 (Quentzel Lien). On or about November 2, 2018, TPE filed, a notice under the Mechanic's Lien against the Project premises in the amount of $126,844.97 (TPE Lien).

Notices were issued to Paramount on June 20, 2018, June 25, 2018, and August 27, 2018 by Plaza demanding that Paramount immediately remove or discharge the liens in accordance with Paramount's obligations under the Subcontract. Paramount failed to respond to Plaza's requests to remove or discharge the liens in accordance with its Subcontract obligations. After which, Plaza terminated the Subcontract for cause, by formal notice, issued to Paramount on August 28, 2018, which termination took effect three days later, on September 1, 2018.

American Home Assurance Company (AHAC) and National Union Fire Insurance Company Of Pittsburgh, PA (NUFIC), as sureties, issued lien discharge bonds to Plaza in response to the series of mechanic's liens that were filed against the Project premises by Paramount's allegedly unpaid material suppliers, Solco, Quentzel, MMC, TPE and Rosenwach, following Plaza's declaration of default and termination of Paramount's subcontract.

On or about August 27, 2018, Solco initiated a lawsuit against Paramount, Plaza and AHAC under Index No.: 158038/2018 seeking to foreclose on its mechanic's lien from Paramount, Plaza and AHAC.

On or about October 10, 2018, Quentzel initiated a lawsuit against Paramount and AHAC under Index No.: 655029/2018 seeking to foreclose on its mechanic's lien from AHAC. Paramount filed a Verified Answer by its attorney, dated November 29, 2018, in response to Quentzel's Verified Complaint.

On or about November 29, 2018, MMC initiated a lawsuit against Plaza, AHAC and NUFIC and others under Index No.: 150219/2019 seeking to recover damages from all

defendants arising from the contract it had with Paramount. MMC additionally sought diversion of Lien Law Article 3-A trust fund claims against Plaza, and foreclosure on its mechanic's lien from Plaza, AHAC and NUFIC.

On or about February 5, 2019, TPE initiated a lawsuit against Paramount, Plaza, AHAC and Owner under Index No.: 151394/2019 seeking to recover damages from Plaza, Paramount and Owner arising out of the contract it had with Paramount. TPE additionally sought to foreclose on its mechanic's lien from Plaza and AHAC.

On or about March 26, 2019, Rosenwach initiated a lawsuit against Paramount, Owner, AHAC and Plaza under Index No. 153225/2019 seeking to recover damages from Paramount, Owner and Plaza arising from the contract it had with Paramount. Rosenwach additionally sought diversion of Lien Law Article 3-A trust fund claims against Plaza, and foreclosure on multiple mechanic's liens from all defendants, which included Plaza and AHAC.

Although Paramount filed Verified Answers by its attorney, in response to the Verified Complaints in the Solco and Quentzel actions, counsel for Paramount, in each action, submitted an Affirmation in support of an Order to Show Cause, seeking to be relieved from representation of Paramount, on the grounds that Paramount was no longer in business. The court, in each instance, granted Paramount's counsel's Order to Show Cause, providing Paramount thirty days to obtain substitute counsel. Following the withdrawal of counsel requests in the Solco and Quentzel actions, Paramount failed to obtain substitute counsel to appear on its behalf in the related five lawsuits.

Rosenwach filed a Notice of Motion for Default Judgment against Paramount, dated October 21, 2019, seeking monetary judgment against Paramount in the amount of $136,000. On or about March 2, 2020, the court (D'Auguste, J) granted Rosenwach's Motion for Default

Judgment against Paramount for failure to appear and answer, and for attorney's fees, costs and disbursements. Rosenwach filed its Notice of Entry of Judgment against Paramount on March 3, 2020 in the total sum of $175,209.86.

Plaza requested this Court to consolidate the five abovementioned actions involving the foreclosure of mechanic's liens against the same property, dated October 2, 2019.

On October 8, 2019, the court (D'Auguste, J) granted the motion to consolidate the five actions on the grounds that each of the actions involved the foreclosure of mechanic's liens against the same property.

PENDING MOTION

On December 3, 2021, Plaza, AHAC and NUFIC moved for an Order, pursuant to CPLR § 3212, granting partial summary judgment: to AHAC dismissing all claims asserted by Quentzel in its October 2, 2018 Verified Complaint; to Plaza, AHAC and NUFIC dismissing the First through Fourth Causes of Action asserted by defendant MMC in its November 29, 2018 Verified Complaint; to Plaza and AHAC dismissing all claims asserted by defendant TPE, Inc. in its February 5, 2019 Verified Complaint; and to Plaza dismissing the Twenty-Fifth Cause of Action asserted by defendant Rosenwach in its July 11, 2019 First Amended Verified Complaint.

The motion was fully briefed and assigned to this court for disposition

DISCUSSION

In order to prevail on a motion for summary judgment, the moving party must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). Absent such a *prima facie* showing, the motion must

be denied, regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

However, "[o]nce the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Alvarez*, 68 NY2d at 324). "[A]ll of the evidence must be viewed in the light most favorable to the opponent of the motion" (*People v Grasso*, 50 AD3d 535,544 [1st Dept 2008]).

"On a motion for summary judgment, the court's function is issue finding, not issue determination, and any questions of credibility are best resolved by the trier of fact" (*Martin v Citibank, N.A.*, 64 AD3d 477,478 [1st Dept 2009]; *see also Sheehan v Gong*, 2 AD3d 166,168 [1st Dept 2003] ["The court's role, in passing on a motion for summary judgment, is solely to determine if any triable issues exist, not to determine the merits of any such issues"], *citing Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

AHAC and Plaza's motion to dismiss lien foreclosure claims asserted by Quentzel and TPE is denied

In October 2018, Quentzel commenced litigation as against Paramount and AHAC seeking lien foreclosure in the amount of $64,999.54 due on a mechanic's lien for materials provided and not paid for.

In February 2019, TPE commenced litigation as against Paramount, Plaza and AHAC for lien foreclosure and unjust enrichment in the amount of $126,844.97, as a balance due for labor and materials provided and not fully paid for.

New York Lien Law §4, provides, in pertinent part

> If labor is performed for, or materials furnished to, a contractor or subcontractor for an improvement, 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. In no case shall the owner be liable to pay by reason of all liens created pursuant to this article a sum greater than the value or agreed price of the labor and materials remaining unpaid, at the time of filing notices of such liens

Plaza and AHAC argue Quentzel and TPE's lien foreclosure claims must be dismissed, and the liens cancelled and vacated, as Plaza asserts it has paid all amounts due and owing to Paramount at the time the Liens were filed and, thus, there exists no lien fund to which the parties' liens may attach. Plaza asserts it was forced to engage other contractors to correct and complete Paramount's work and expend more than $1.4 million in excess of Paramount's contract sum to do so. Plaza alleges it paid a total of $4,654,746 to other contractors to complete the work, which amount exceeds the balance that remained on Paramount's subcontract by $1,431,408.70. As a result, Plaza asserts it has paid substantially over the Paramount Subcontract balance to complete Paramount's scope of work. Therefore, Plaza argues, neither Quentzel's, nor TPE's liens are viable since there was no lien fund available to which those liens could attach, rendering the liens void and unenforceable as a matter of law.

In support, plaintiffs submit the affidavit of Anthony Gervaise, the project manager employed by Plaza. Mr. Gervaise outlines the names and scope of work performed by the contractors hired to complete the work on the Project. Plaza does not, however, submit any invoices to support the amounts paid to the completion contractors, just rather a chart (Ex G) created by plaintiff listing the name of the contractor and the amount alleged paid to the same.

Plaza relies on a line of cases which hold that only if money is still due and owing from the construction manager to its direct subcontractor at the time a second-tier subcontractor files a lien, is there a "lien fund" to which the second-tier subcontractor's lien may attach. N.Y. Lien

Law § 4; *Van Clief v. Van Vechten*, 130 NY 571 (1892); *Trustees of Hanover Square Realty Investors v. Weintraub*, 52 AD2d 600 (2d Dep't 1976).

TPE and Quentzel both argue that whether there is money remaining in the lien fund is a factual issue and whether all the lien funds money was expended is also a factual issue. TPE asserts that Plaza has failed to establish that it had to pay a contractor to correct anything TPE supplied to the Project. TPE argues that a review of the claimed costs for replacement contractors shows that there was no replacement contractor needed in connection with the materials supplied by TPE which remain unpaid for. TPE supplied plumbing materials, such as pipes. The material was delivered. Plaza makes no indication, nor does Plaza claim, that any of TPE's material was defective or had to be replaced. Further TPR argues that Plaza received TPE's mechanics lien prior to paying the completion contractors and was therefore on notice that the material supplied by TPE were not paid for. TPE points out that the chart submitted by Plaza fails to include any of the dates for which the competition contractors were paid. Lastly, TPE argues that the motion is premature as discovery is not yet completed. TPE has not had the opportunity to depose Plaza or Paramount about these claimed expenditures and what was known at the time of making the expenditures, or review any supporting documentation related to the work performed by the completion contractors.

Quentzel asserts, as well, that pipes they provided were installed in the building in good order, are fully functioning and have become a part of the fixture of the building. As no discovery has taken place, Quentzel argues that Plaza has not sufficiently established that there are no funds left that would establish a lien fund.

The court agrees, Plaza has failed to establish with sufficient admissible evidence that there was no lien fund available to which the liens could attach. The only evidence Plaza submits

is a self-serving chart and the affidavit of a project manager. Questions of fact remain as to whether there are funds which would establish a lien fund, and whether the material supplied by Quentzel and TPE were used in the completion of the Project. Quentzel and TPE are entitled to an opportunity to conduct discovery on this issue.

Plaza, AHAC and NUFIC motion to dismiss unjust enrichment claims asserted by TPE and MMC is granted

Plaza, AHAC and NUFIC argue that as all parties agree a contract existed between Paramount and the subcontractors, specifically TPE and MMC, that any claim for unjust enrichment must be dismissed.

In opposition TPE argues that although a contract exists between Paramount, no such agreement exists between Plaza and TPE or AHAC and NUFIC, and as such, at this very early stage of litigation, before discovery has been completed, the claim for unjust enrichment should stand.

The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter (*Blanchard v. Blanchard,* 201 N.Y. 134, 138; *see also,* 66 Am.Jur.2d, Restitution and Implied Contracts, § 6, at 949). A "quasi contract" only applies in the absence of an express agreement, and is not really a contract at all, but rather a legal obligation imposed in order to prevent a party's unjust enrichment (*Parsa v. State of New York,* 64 N.Y.2d 143, 148).

Here it is undisputed that TPE and MMC had a valid and enforceable contract with Paramount for the goods and services provided. Although Plaza was not a party to the agreement between Paramount and TPE and MMC, the Appellate Division has held "a non-signatory to a contract cannot be held liable where there is an express contract covering the same subject matter (*Feigen v. Advance Capital Mgt. Corp.,* 150 A.D.2d 281, 283 [1st Dept. 1989]).

Plaza, AHAC and NUFIC's motion to dismiss MMC's claim for breach of contract is granted

In November 2018, MMC commenced litigation against Plaza, Paramount, AHAC and NUFI, among others, for breach of contract, account stated, unjust enrichment, breach of trust fund claim, and to foreclose on a mechanic's lien in the amount of $114,154.76.

Plaza, AHAC and NUFIC move to dismiss the cause of action for breach of contract, as no contract exists between MMC and Plaza, AHAC or NUFIC.

The elements for a breach of contract claim are the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages (*Harris v. Seward Park Housing Corp.,* 79 A.D.3d 425, 426 [1st Dep't 2010]). Here MMC does not dispute that there exists no contract between Plaza, AHAC, NUFIC and MMC. Therefore, breach of contract claims as against Plaza, AHAC, NUFIC may not be maintained.

Plaza's Motion to Dismiss MMC and Rosenwach's Claims under Lien Law Article 3-A is Denied

MMC's third (3) cause of action and Rosenwach's twenty-fifth (25) cause of action in their respective complaints against Plaza is for diversion of Lien Law Article 3-A Trust Funds.

> Article 3–A of the Lien Law creates 'trust funds out of certain construction payments or funds to assure payment of subcontractors, suppliers, architects, engineers, laborers, as well as specified taxes and expenses of construction' (*Aspro Mech. Contr. v. Fleet Bank,* 1 N.Y.3d 324, 328, 773 N.Y.S.2d 735, 805 N.E.2d 1037, quoting *Caristo Constr. Corp. v. Diners Fin. Corp.,* 21 N.Y.2d 507, 512, 289 N.Y.S.2d 175, 236 N.E.2d 461; *see* Lien Law §§ 70, 71). "[T]he primary purpose of article 3–A and its predecessors [is] to ensure that those who have directly expended labor and materials to improve real property [or a public improvement] at the direction of the owner or a general contractor receive payment for the work actually performed" (*Aspro Mech. Contr. v. Fleet Bank,* 1 N.Y.3d at 328, 773 N.Y.S.2d 735, 805 N.E.2d 1037 [internal quotation marks omitted]; *see Matter of RLI Ins. Co., Sur. Div. v. New York State Dept. of Labor,* 97 N.Y.2d 256, 264, 740 N.Y.S.2d 272, 766 N.E.2d 934).

Plaza argues that MMC and Rosenwach are only beneficiaries of Paramount's Article 3-A trust, and not beneficiaries of Plaza's trust. Plaza argues that a person or entity must be in privity with the trustee to be a beneficiary of the Trustee's trust, and that a sub-subcontractor would not be a beneficiary of a contractor's trust, *citing H. Verby Co., Inc. v. Plainview Associates*, 6 Misc3d 1011(A) (Nassau Sup. Ct. 2005).

However, Rosenwach argues in opposition, that an Article 3-A trust claim asserted by a subcontractor "depends upon a valid mechanic's lien or contractual privity", (*Quantum Corp. Funding Ltd. v. L.P.G. Assocs.,* 246 A.D.2d 320, 322 [1st Dept.] lv. app. den., 91 N.Y.2d 814 [1998]). Rosenwach argues that they have a valid lien and as their lien was filed on June 18, 2018, long before Plaza terminated Paramount's contract, Rosenwach should have been paid before making any payments to any of the completion contractors. In support, Rosenwach submits a copy of a purchase order, invoice, and the mechanics lien.

Further, the court in *H. Verby Co., Inc. supra,* stated, "if the amounts due the general contractor and subcontractor have been paid, there is no derivative claim in favor of a sub-subcontractor." Plaza argues that the amounts have been paid, however, Rosenwach and MMC successfully argue that Plaza has failed to sufficiently establish the same, offering only the affidavit of a project manager and a self-serving chart listing completion contractors and amounts alleged paid. Rosenwach and MMC should have the opportunity to conduct discovery on this issue.

CONCLUSION

WHEREFORE it is hereby:

ORDERED that motion for summary judgment is granted only to the extent that the claim for unjust enrichment asserted by TPE and MMC is dismissed and the claim for breach of contract asserted by MMC is dismissed, and the motion is otherwise denied; and it is further

ORDERED that, within 20 days from entry of this order, movant shall serve a copy of this order with notice of entry on all parties and on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk 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 any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that the parties shall appear for a virtual status conference on August 2, 2022 at 12 pm; and it is further

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

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6/3/2022
DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE