SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

LONG ISLAND TINSMITH SUPPLY CORP.,

Plaintiff,

INDEX No. 20945/06

MOTION DATE: Feb. 19, 2009
Motion Sequence # 003, 004, 005 & 006

-against-

WESTBURY HEBREW CONGREGATION NOW KNOWN AS OLD WESTBURY HEBREW CONGREGATION, TURNER CONSTRUCTION COMPANY, HRC CONSTRUCTION CORP., STEVEMAR STONE & MARBLE, INC., B. GELLER RESTORATION, INC., BRIAN GELLER, PANZNER DEMOLITION AND CONTRACTING CORP., NORTH FORK BANK, "JOHN DOE" and "JANE DOE" TENANTS IN POSSESSION WHO'S TRUE NAMES ARE UNKNOWN,

Defendants.

The following papers read on this motion:

Amended Notice of Motion..... X
Notice of Motion..... X
Cross-Motion..... XX
Affirmation in Opposition..... X
Reply Affirmation X
Memorandum of Law..... X

Defendants B. Geller Restoration Inc. and Brian Geller [hereinafter the Geller defendants] move pursuant to CPLR §3212 for an order granting summary judgment dismissing the plaintiff's complaint as being in violation of the Statute of Frauds as embodied in General Obligations Law §5-701(a)(2). (Sequence #003); Defendant Westbury Hebrew Congregation, now known as, Old Westbury Hebrew Congregation [hereinafter OWHC], moves pursuant to CPLR §3012 for an order dismissing the cross-claim asserted against it by co-defendant Panzer Demolition and Contracting Corporation. (Sequence #004); Plaintiff Long Island Tinsmith Supply Corp. moves pursuant to CPLR §3212 for an order granting summary judgment of the complaint against defendants B. Geller Restoration Inc. and Brian Geller in the sum of $57, 161.19. (Sequence #005); Defendant Panzer Demolition and Contracting Corporation move pursuant to CPLR §3212 for an order granting summary judgment on it's cross-claims assert against co-defendants HRC Consolidation Corp. and Old Westbury Hebrew Congregation. (Sequence #006).

Factual Background

In May of 2004, defendant, OWHC, entered into a construction contract in connection with a renovation project it elected to undertake with respect to it's building located at 21 Old Westbury Road, Old Westbury, New York. Defendant Turner Construction Company acted in the capacity of construction manager and defendant HRC Construction Corporation [hereinafter HRC] functioned in the capacity of general contractor. HRC subcontracted the demolition work to defendant Panzer Demolition and Contracting Corp. [hereinafter Panzer]. As to the roofing portion of the renovation project, HRC subcontracted same to defendant Stevemar Stone & Marble, Inc. [hereinafter Stevemar], the principal of which is an individual by the name of Steven Puco, who also serves as an Officer for B. Geller Restoration, Inc.. Mr. Puco contracted with the plaintiff, Long Island Tinsmith Supply Co. [hereinafter LITSC] to obtain the requisite materials to complete the roofing portion of the renovation project.

Thereafter, a dispute arose in which the plaintiff alleges that there remains an outstanding balance due and owing with respect to the roofing materials provided. As a consequence, the within action was commenced in or about December 2006. As to corporate defendant, B. Geller Restoration, Inc., the plaintiff alleges an account stated was created and demands judgment thereon for the unpaid balance of $57,161.19 together with interest and reasonable counsel fees attendant to the prosecution of the within action. As to the individually named defendant, Brian Geller, the plaintiff alleges that he is

personally liable for any debts incurred by the corporate defendant and demands judgment thereon in the sum of $57,161.19 with interest, together with reasonable counsel fees.

Motion for Summary Judgment by the Geller Defendants

In support of the application, the central contention posited by the Geller defendants is that there is no writing whereby they agreed to assume the debts incurred on behalf of Stevemar and thus the within complaint must be dismissed as against them pursuant to the Statute of Frauds as contained General Obligations Law §5-701[a][2]. Additionally, as a general overarching assertion, the Geller defendants posit that they were not in any respect involved in the renovation project, were not a party to any contracts executed relative thereto and received no consideration in connection therewith.

The Geller defendants, while conceding that Mr. Steven Puco was an Officer of B. Geller Restoration, Inc., contend that he was not acting on behalf thereof, but rather contracted with the plaintiff for the exclusive purpose of procuring the roofing material necessary for Stevemar to satisfy its obligations as the roofing subcontractor. The defendants assert that, notwithstanding that Puco was acting on behalf of Stevemar, he nonetheless improperly advised the plaintiff that the Geller defendants would be financially responsible for the material ordered and that said assurance was extended without a writing as required by the Statute of Frauds.

As documentary support for said contentions, the moving defendants provide a copy of a facsimile sent to the plaintiff, the contents of which bear Stevemar's letterhead and contain a request, specifically from Steven Puco, that the roofing materials should be shipped as expeditiously as possible. The Geller defendants also make particular reference to the annexed deposition transcript of Kevin Clarke, an account manager for the plaintiff, who testified that Mr. Puco informed him that he was "partners with B. Geller, and that it was going to be billed through B. Geller's account". The Geller defendants further rely upon that portion of Mr. Clarke's testimony where he testified that he was never provided with any writing stating that the Geller defendants were obligated to satisfy the debts incurred on behalf of Stevemar.

The plaintiff opposes the within application and cross-moves for summary judgment against the Geller defendants. In opposing the motion interposed by the Geller defendants, the plaintiff argues that the Statute of Frauds is inapplicable to the matters herein raised inasmuch as the Geller defendants were not answering for the debt of

another, but rather are primarily liable for a debt which was directly incurred on behalf of B. Geller Restoration Inc. Specifically, the plaintiff contends that the evidence adduced herein demonstrates that B. Geller Restoration Inc., through the actions of its officer Steven Puco, ordered the subject materials, yet has failed to tender payment therefor.

In support of its opposing arguments, the plaintiff relies upon the Shareholders Agreements wherein Steven Puco is named as an Officer of B. Geller Restoration, Inc. The plaintiff additionally, relies upon the portions of the deposition transcript of Steven Puco, wherein he states that it was in his capacity as an officer of B. Geller Restorations, Inc. and on its behalf, that he ordered the roofing materials necessary for the renovation project underway at OWHC and that they were received by the Geller defendants.

In seeking to recover damages, the plaintiff further contends that individual defendant, Brian Geller, is personally liable for any debts incurred by the corporate defendant, including the outstanding balance which is the subject of the within action. The plaintiff contends that, in accordance with the application for a line of credit submitted by the B. Geller Restoration, Inc., Brian Geller is listed as a personal guarantor thereon, and as a consequence bears personally liability for the debt due and owing to the plaintiff.

Finally, the plaintiff argues that, contrary to the defendants contentions and pursuant to the heretofore referenced Shareholders Agreement, B. Geller Restoration Inc., received a benefit in the form of a share in those profits earned upon completion of the renovation project.

It is well settled that a motion for summary judgment is a drastic remedy that should not be granted where there is any doubt as the existence of a triable issue of fact (***Sillman v Twentieth Century Fox***, 3 NY2d 395 [1957]; ***Bhatti v Roche***, 140 AD2d 660, 2d Dept., 1998). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof in admissible form sufficient to warrant the Court, as a matter of law, to direct judgment in the movant's favor. Such evidence may include deposition transcripts as well as other proof annexed to an attorney's affirmation (CPLR §3212 [b]; ***Olan v Farrell Lines***, 64 NY2d 1092, 1985).

If a sufficient ***prima facie*** showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of

summary judgment and necessitates a trial. It is incumbent upon the non-moving party to lay bare all of the facts which bear on the issues raised in the motion (***Mgrditchian v Donato***, 141 AD2d 513, 2d Dept., 1998). Conclusory allegations are insufficient to defeat the application and the opposing party must provide more than a mere reiteration of those facts contained in the pleadings (***Toth v Carver Street Associates***, 191 AD2d 631, 2d Dept., 1993). When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist (***Barr v County of Albany***, 50 NY2d 247, 1980; ***Daliendo v Johnson***, 147 AD2d 312, 2d Dept., 1989).

As a general proposition, enforcement of an oral promise to guarantee the debt of another is barred by the statute of frauds (General Obligations Law §5-701[a][2]). An exception to this general principle exists where the plaintiff can prove that the oral promise to answer for the debt incurred by another is "supported by a new consideration moving to the promisor and beneficial to the [promisor] and that the promisor has become in the intention of the parties a principal debtor primarily liable" (***Perini v Sabatelli***, 52 AD3d 588, 2d Dept., 2002 quoting ***Martin Roofing v Goldstein***, 60 NY2d 262, 1983). "Courts have generally required that the new consideration be both tangible and directly beneficial to the promisor to satisfy this exception" (***Carey Associates v Ernst***, 27 AD3d 261, 1st Dept., 2006).

The Court, having reviewed the record as developed herein, finds that the statute of frauds in applicable to the matter *sub judice* and that the Geller defendants have demonstrated their ***prima facie*** case entitling them to judgment as a matter of law (***Sillman v Twentieth Century Fox***, 3 NY2d 395,1957, ***supra***). Initially, the Court finds that the evidence demonstrates that Mr. Puco was acting on behalf of Stevemar, yet directed the plaintiff to bill the Geller defendants for the materials provided. In the instant matter, it is undisputed that Stevemar was the roofing subcontractor hired by HRC in connection to the renovation work being done at OWHC. Additionally, the copy of the facsimile dated August 18, 2005, and annexed to the defendants' moving papers, establishes that Mr. Steven Puco was indeed acting on behalf of Stevemar, and not the Geller defendants, when ordering the subject roofing material from the plaintiff. Further, as adduced from the deposition testimony of Mr. Puco and Mr. Kevin Clarke, it was Mr. Puco who assured the plaintiff that the Geller defendants would be responsible for bearing the costs incurred and that said assurance was extended without any proffered writing.

In opposition to the defendants' ***prima facie*** showing, the plaintiff has failed to

raise a triable issue of fact (***Zuckerman v City of New York***, 49 NY2d 557, 1980). Other than setting forth in a conclusory manner that the defendants shared in the profits from the project for OWHC, the plaintiff has failed to provide any proof that the Geller defendants in fact received any consideration therefrom. Additionally, the very shareholders agreement upon which the plaintiff relies to demonstrate that Mr. Puco was acting on behalf of B. Geller Restoration, Inc. clearly provides that "no single Shareholder, whether acting as an officer, director or employee, is authorized to unilaterally bind the company to any agreement or obligation . . ." and that any such action may only be undertaken "if and only if one of the Gellers (Brian or Marshall) and one of the Pucos (Steve, Ralph or Joseph) have agreed to do so in writing ." Thus, inasmuch as Mr. Puco's dealings with the plaintiff were admittedly undertaken without any attendant writing, he therefore was not acting on behalf of B. Geller Restoration Inc. in ordering the merchandise.

Based upon the foregoing, the motion interposed by B. Geller Restoration Inc. and Brian Geller pursuant to CPLR §3212 and which seeks an order granting summary judgment dismissing the plaintiff's complaint as being in violation of the Statute of Frauds is hereby **granted**. (Sequence #003). In accordance with the foregoing, the motion interposed by the plaintiff, Long Island Tinsmith Supply Corp., made pursuant to CPLR §3212 and which seeks an order granting summary judgment on the complaint against defendants B. Geller Restoration Inc. and Brian Geller in the sum of $57, 161.19 is hereby **denied**.

Motion by Old Westbury Hebrew Congregation

OWHC moves for an order pursuant to CPLR §3012 dismissing the cross-claim asserted against it by co-defendant Panzer, the substance of which seeks to foreclose upon a mechanics lien filed against the property owned by OWHC.

In support of the within application, OWHC argues that the Answer in which Panzer's cross-claims is asserted was never served upon OWHC and therefore must be dismissed. OWHC contends that, notwithstanding that Panzer's Answer is dated January 16, 2007, it was not even made aware as to the existence thereof until March 18, 2008, when OWHC received a copy from counsel for the plaintiff. OWHC additionally contends that, if Panzer were permitted to go forth with the prosecution of it's cross-claim, OWHC would be severely prejudiced.

Panzer opposes that application and contends that OWHC was served with Panzer's

Answer in January of 2007. Panzer asserts that at such time OWHC was not yet represented by counsel and therefore its Answer was directly served upon OWHC by mail. Panzer further contends that OWHC was fully cognizant of the cross-claims asserted by Panzer and, in fact, had served discovery demands within regard to both the mechanic's lien Panzer served upon it and the work that Panzer had done in connection to the renovation project.

As stated above, OWHC seeks dismissal of Panzer's cross-claim predicated upon CPLR §3012 which provides that "Service of an answer or reply shall be made within twenty days after service of the pleading to which it responds." However, the statutory section which particularly governs cross-claims is that which is entitled "Counterclaims and cross-claims" and is embodied in CPLR §3019. As noted in the practice commentaries attendant thereto, while the statute is silent as to the time in which cross-claims are to be served, they are "as a rule served within whatever time the defendant has to answer the main complaint under CPLR 3012" (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3019:12). Professor Siegel goes on to state, however, that "courts are not strict about time limits governing the service of cross-claims if no prejudice is shown" (*id.*; *see also* ***Manganaro v Estwing Manufacturing Co. Inc.***, 27 AD2d 711, 1st Dept., 1967).

In the instant matter and guided by the foregoing, the Court finds that, under the extant circumstance, no prejudice has been borne by OWHC sufficient to grant its application to dismiss the cross-claim by Panzer. The record herein demonstrates that, at the Preliminary Conference conducted on May 22, 2007, OWHC was made fully aware that Panzer had filed a mechanic's lien seeking payment for work done on the premises owned by OWHC and therefore had ample opportunity to defendant against said claim. Further, counsel for OWHC does not deny being served with the notice of lien upon which Panzer now seeks to foreclose, and therefore clearly was aware of Panzer's claims.

Therefore, based upon the foregoing, the motion interposed by OWHC pursuant to CPLR §3012 and which seeks an order dismissing the cross-claim asserted against it by co-defendant Panzer Demolition and Contracting Corporation is hereby **denied**. (Sequence #004).

With respect to Panzer's motion for an order granting Summary Judgment against OWHC and HRC Construction, the Court initially addresses the foreclosure upon a mechanic's lien Panzer filed against the premises owed by OWHC. In support of this

branch of the application, Panzer contends that in its capacity as the demolition sub-contractor, it performed work for HRC (the general contractor), in connection with the renovation project undertaken at the property owned by OWHC. Panzer asserts that the labor provided continued through July 20, 2006, after which time payment therefor was not received precipitating the timely filing of a Notice of Lien on September 22, 2006. Panzer argues that it is therefore entitled to judgment thereon against OWHC in the amount of $73,870. OWHC opposes the instant application.

Lien Law §10 and the provisions therein contained provide the following, in pertinent part:

> 1. "Notice of lien may be filed at any time during the progress of the work and the furnishing of the materials, or, within eight months after the completion of the contract, or the final performance of the work, or the final furnishing of the material, dating from the last item of work performed or materials furnished"

In the instant matter, a review of the subject lien upon which Panzer seeks to foreclose reveals that same was filed on September 22, 2006 and makes particular reference to work done in accordance with Panzer's alleged contract with HRC. By its own admission, and as is clearly evidenced by the several invoices annexed to the moving papers, the work Panzer presumably conducted for HRC was completed by December 22, 2004. Further, Panzer concedes that, during the course of its work on the renovation project, HRC was removed as general contractor and Panzer was thereafter directly engaged by OWHC to continue the demolition work and was remunerated for same by OWHC.

Thus, inasmuch as the evidence adduced herein clearly demonstrates that the work Panzer completed with respect to its purported agreement with HRC was last performed on December 22, 2004, the Notice of Lien filed on September 22, 2006 was untimely and, accordingly, that branch of Panzer's application which seeks an order granting summary judgment to foreclose upon its mechanic's lien filed against the property owned by OWHC is hereby **denied**. Further, pursuant to CPLR §3212[b], the Court has searched the record and as a result hereby **grants** summary judgment in favor of OWHC dismissing the cross-claim asserted against it by Panzer.

The Court now turns to that remaining branch of Panzer's motion which seeks summary judgment on its cross-claim asserted against HRC sounding in breach of contract. In support of the application, Panzer relies, ***inter alia***, upon the annexed affidavit of Todd Panzer, President of Panzer Demolition and Contracting Corp. He states that, in September of 2004, the company and HRC entered into a subcontract whereby Panzer would provide demolition services with regard to the renovation project at OWHC . He avers that the initial agreement was revised as to the contract price and that the amount ultimately agreed upon was $126,720. He states that, notwithstanding Panzer having fully performed its services under the contract and duly submitted the relevant invoices to HRC, there remained an outstanding balance for services rendered. As a result, and in an attempt to settle the fee dispute, HRC and Panzer entered into a letter agreement which was drafted by a representative of HRC. Mr. Panzer further avers that HRC breached the terms of this agreement and contends that there exists an outstanding balance of $73,870 and that Panzer is entitled to an order granting summary judgment thereon.

In order to establish a cause of action sounding in breach of contract, the party so asserting must demonstrate the following: the existence of a contract between the parties; performance by the party asserting the claim; breach of the agreement by the other party; and damages resulting from said breach (***Clearmont Property, LLC v Eisner***, 58 AD3d 1052, 3d Dept., 2009).

In the instant matter, the Court finds that Panzer has failed to demonstrate the absence of a material issue of fact as to the existence of a contract between HRC and Panzer (***Zuckerman v City of New York***, 49 NY2d 557, 1980, ***supra***). Initially, no dispositive documentary evidence has been submitted. The document to which Panzer refers as evidence thereof is a proposal of the costs which would be incurred by Panzer for providing the required demolition work. While Panzer contends that this proposal is in fact a revised agreement, the original contract which is alleged to have been modified has not been provided herein. Further, the letter agreement authored by HRC and sent to Panzer, clearly states in the first paragraph that "As you are aware, your contract was with Triple M Construction." This letter agreement further states that "no contract exists between HRC and Panzer Bros Demolition Inc." Neither counsel for Panzer nor Mr. Panzer addresses these statements contained in the letter agreement.

Accordingly, the Court finds that Panzer has failed to demonstrate it ***prima facie*** case entitling it to judgment as a matter of law and, accordingly, the within application which seeks an order granting summary judgment on its cross-claim asserted against HRC

sounding in breach of contract is hereby **denied**.

This constitutes the Decision and Order of the Court.

A Certification Conference is scheduled for April 21, 2009 at 9:30 a.m. in Chambers of the undersigned.

Dated MAR 2 6 2009

Stephen A Bucaria
J.S.C.