

W24

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

-----X
XANDER ENVIRONMENTAL CORP.

Plaintiff,

-against-

**EXTREME CONSTRUCTION SERVICES, D/B/A
XTREME CONSTRUCTION SERVICES, INC.,
EMIL BRAUN, SPINNEY HILL HOMES I
HOUSING DEVELOPMENT FUND COMPANY,
AND SPINNEY HILL HOMES II HOUSING
DEVELOPMENT FUND COMPANY,**

Defendants.

TRIAL PART: 10

NASSAU COUNTY

INDEX NO:23113-10

MOTION SEQ NO.:4,5

SUBMIT DATE: 2/27/12

-----X
The following papers having been read on this motion:

Plaintiffs Notice of Motion.....	1
Opposition.....	2
Reply.....	3
Defendant Spinney Hill Notice of Motion.....	4
Opposition.....	5

Co-Defendant Spinney Hill moves for summary judgment pursuant to section CPLR §3212 dismissing the cross claim of defendant Extreme Construction against the Spinney Hill defendants.

Defendants Spinney Hill state that the underlying action herein was brought by plaintiff Xander Environmental Corp.(hereinafter referred to as Xander), and Espestos Removal subcontractor against Extreme Construction Services Inc.(hereinafter referred to as Extreme) and it's principal Emil Braun for money damages. Xander filed an amended summons and complaint adding a lien foreclosure action against Spinney Hill the project owners. Xander had previously filed a mechanics lien on or about December 30, 2010.

Extreme and Braun then answered and cross claimed but made no reference to Spinney Hill in there answer. Subsequently, Extreme and Braun served an amended verified answer with a cross claim brought against the Spinney Hill defendants. Upon completion of discovery Spinney Hill alleges that no documentary evidence was produced in support of the cross-claim against it and

moves for dismissal.

In opposition, the Extreme defendant claims that the Spinney Hill defendants are relying upon discovery defendant Extreme provided in response to plaintiff's demands. There was no discovery requested by Spinney Hill from defendant Extreme. Furthermore, defendant Extreme claims that the Spinney Hill motion papers are deficient because the defendants Spinney Hill have not provided affidavits from a person with knowledge and the defendants' answer was never verified and cannot be a substitute for the absence of affidavits. There are no reply papers submitted to the court by Spinney Hill defendants.

"On a motion for summary judgment pursuant to CPLR §3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." (*Sheppard-Mobley v King*, 10 AD3d 70, 74 (2d Dept. 2004), aff'd. as mod., 4 NY3d 627 (2005), citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985)). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." (*Sheppard-Mobley v King*, supra, at p. 74; *Alvarez v Prospect Hosp.*, supra; *Winegrad v New York Univ. Med. Ctr.*, supra). Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. *Alvarez v Prospect Hosp.*, supra, at p. 324. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. (See, *Demishick v Community Housing Management Corp.*, 34 AD3d 518, 521 (2d Dept. 2006), citing *Secof v Greens Condominium*, 158 AD2d 591 (2d Dept. 1990)).

Defendants Spinney Hill have not made a prima facie case of entitlement to summary judgment based upon sufficient evidence. There is no affidavit from a person with knowledge and the attorney's affirmation is hearsay which is an insufficient basis for summary judgment. (*Morissant v. Raemer Corp.*, 271 AD2d 586). Furthermore, it appears that counsel is trying to have the cross-claims dismissed based upon documentary evidence, namely discovery provided by defendant Extreme to plaintiff. A motion to dismiss based upon documentary evidence pursuant to CPLR §3211 (a) (1) requires a showing of documentary evidence that resolves all factual issues as a matter of law and definitively disposes of the alleged claim. [*Unadilla Silo Company, Inc. V. Ernst*

& Young et. al., 234 AD2d 754; *Ozdemin v. Caithness Corp.*, 285 AD2d 961; *Roth v. Goldman*, 254 AD2d 405]. In assessing a motion to dismiss made pursuant to CPLR §3211 (a)(1) on documentary evidence, the facts plead by defendant Extreme in the cross-claim against the defendants Spinney Hill as stated in the verified answer are presumed to be true and are accorded every favorable inference. Here, the pleadings state that the co-defendants Spinney Hills obtained a benefit from Extreme's services who has not been paid for the work performed. (Opposition, Exhibit D). Thus seeking a claim for unjust enrichment. The reliance by the Spinney Hill defendants on discovery provided by defendant Extreme To Plaintiff which demands by plaintiff did not request information about Extreme's relationship to the Spinney Hill defendants is not documentary evidence that is definitive and resolves all issues of factual issues as a matter of law. A subcontractor may recover against a landowner under the theory of quasi contract and unjust enrichment where there is evidence that the owner expressly consented to or otherwise assumed an obligation to pay the subcontractor. (See, *Paladino, Inc. V. J.Lucchese & Son Contracting Corp.*, 247 AD2d 515 [2nd Dept. 1998]). Defendants have not proffered any admissible evidence to the contrary.

Accordingly, the motion for summary judgment by defendants Spinney Hill are denied in their entirety.

Plaintiff Xander moves for summary judgment against Extreme and Emil Braun likewise alleging that there are no triable issues of fact raised by Extreme and Braun. Plaintiff brought this breach of contract action against Extreme for work performed with regards to asbestos removal. The plaintiff served an invoice upon defendants in the amount of \$408,000. Xander states that Extreme has paid a total amount of \$267,600 leaving a balance of \$178,400.00. Defendant has failed to produce any documentation to show that the balance was paid, such as cancelled checks. Instead, defendants oppose the motion and in their moving papers raise two defenses. The first is that the plaintiff's motion is procedurally defective because a complete set of the papers were not attached to the motion. The court finds that argument unpersuasive. The defendant next alleges that issues of fact exist as to the defendant Braun's liability, specifically that the motion fails to allege that Braun is personally liable for the damages. However, Exhibit K of the defendant's moving papers indicates otherwise (Affirmation in opposition, Exhibit K). The contract clearly states that the signer of the agreement 'personally guarantees' payment as denoted above. This guarantee is clear and

unequivocal and is a valid basis for summary judgment.

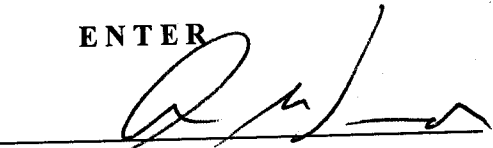
Accordingly, plaintiff is granted summary judgment in the amount of \$178,400.00 against Extreme and Emil Braun. Submit judgement on notice. The motion to preclude is rendered moot by the above ruling.

The cross-claim by Extreme against the Spinney co-defendants is hereby severed from the main action.

This constitutes the decision and order of this Court.

DATED: March 7, 2012

ENTER


HON. ARTHUR M. DIAMOND

J. S.C.

ENTERED

MAR 09 2012

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

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