SHORT FORM ORDER

SCAN

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

Present: HON. ZELDA JONAS
Justice

H. VERBY COMPANY,

Plaintiff,

- against -

PLAINVIEW ASSOCIATES t/a HOLIDAY INN MOTEL, CONSTRUCTURE CORP., DASGOWD INC., DAYA BANGALORE, R & G EQUITIES LTD., PLAINVIEW ENTERPRISES INC., t/a HOLIDAY INN MOTEL, TULNOW LUMBER INC. and KAMCO SUPPLY COMPANY, INC. and UTICA MUTUAL INSURANCE COMPANY,

Defendants.

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Index # 18070/00

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Motion by defendants, Plainview Associates t/a Holiday Inn Motel, R&G Equities Ltd., Plainview Enterprises Inc., t/a Holiday Inn Motel, and Utica Mutual Insurance Company, for summary judgment pursuant to CPLR 3212 on the first, second, fifth, and sixth causes of action is granted only with respect to the first cause of action and denied with respect to the remaining causes of action, the second, fifth, and sixth.

Cross-motion by plaintiff, H. Verby Company, for summary judgment is denied. Cross-motion by plaintiff, H. Verby Company, for certain disclosure is denied based upon plaintiff's failure to make and document a good faith effort to resolve the disclosure dispute.

Pursuant to a contract with defendant, Dasgowd, plaintiff, H. Verby Company; provided building and roofing supplies to defendant, Constructure, a corporation affiliated with Dasgowd and performing on behalf of Dasgowd as subcontractor on a project on certain lands located at 215 Sunnyside Boulevard, Plainview, New York. The premises are owned by defendants, Plainview (referring to the Plainview defendants collectively), and operated as a Holiday Inn. Defendant, R&G Equities, acted as general contractor for the remodeling project on behalf of owner, Plainview.

Defendants, Plainview, R&G Equities, and Utica Mutual, allege that Constructure failed to complete its obligations under the subcontract and was overpaid approximately $258,000. Constructure, on the other hand, avers that it was not paid in full, was prevented from completing the work, and is owed $583,044. Constructure also contests the amount claimed due by plaintiff materialman, averring that plaintiff engaged in double billing, failed to give credit for returned items, and failed to show that certain items billed were actually ordered or delivered. None of these issues are the focus of defendants' summary judgment motion, and the moving defendants do not attempt to resolve the payment obligations among the parties, including owner Plainview. However, the fact that amounts due among the parties, from owner to

contractor, from contractor to subcontractor, and from subcontractor to materialman, are not established or resolved is material and relevant to so much of the application as seeks to dismiss the causes of action founded upon the trust provisions of the Lien Law.

Turning to the complaint, plaintiff brings this action to recover approximately $100,000 for materials supplied to subcontractor Constructure. The First cause of action is contractual in nature and seeks to recover a judgment for goods sold and delivered. The Second seeks to foreclose upon a mechanic's lien and the lien bond provided by Utica Mutual. The Fifth is based upon Lien Law Article 3-A for a breach of trust, and the Sixth seeks an accounting by the trustee.

With respect to defendant, Utica Mutual, the moving defendants aver that bonds issued by Utica Mutual, which provide that Utica Mutual is obligated to pay any judgment which is rendered against the property for the enforcement of a mechanic's lien, have been duly filed and approved by this Court. They contend that any claim against Utica Mutual before plaintiff's lien is judicially approved is premature, and thus the entire complaint should be dismissed as against it. Such claim is without merit.

After a lien is discharged by the substitution of a bond, an action "continues in form as a foreclosure proceeding" to establish the validity of the lien, and the lien shifts from the real property to the bond (**U.S. v. Certified Indus.**, 361 F2d 857, 860 [2nd Cir. NY]; *see also*, **Martirano Constr. Corp. v. Briar Contracting Corp.**, 104 AD2d 1028, 1031). Thus an action which continues in order to enforce a discharged lien is in the form of an equitable foreclosure, but in substance, it is an action to test the validity

of the lien and to hold the surety liable to the extent the lien is valid. In any such continuing action, "the surety may be joined as a defendant for convenience sake" and the judgment will be "conclusive" as against it (**U.S. v. Certified Indus, supra**, at p. 861). While a separate proceeding on the bond is not precluded, determination of all issues in one proceeding is favored. "It is the policy of the court to avoid multiplicity of actions and in the foreclosure of mechanics' liens the courts have always favored and often compelled, by the bringing in of additional parties, a settlement of the whole controversy in the one suit" (**Martirano Const. Corp. v. Briar Contracting Corp.**, 104 AD2d 1028, 1031, **supra**, quoting **Maltby & Sons Co. v. Boland Co.**, 152 App. Div 596, 600). A surety is "free to litigate the validity of the lien whenever the lienor seeks to enforce it" (**J. Castronovo, Inc. v. Hillside Devel. Corp.**, 160 AD2d 763, 765). Accordingly, the application to dismiss the complaint against Utica is denied, and it shall remain a party of convenience, with a right but no obligation to contest a finding of validity of the mechanic's liens.

With respect to the cause of action for goods sold and delivered, such claim is contractual in nature (**Wm. H. Clark Mun. Equipment, Inc. v. Town of La Grange**, 170 AD2d 831, 832), and it is well settled that in the absence of privity, an owner or contractor has no liability in contract to a subcontractor's materialman. Unless an owner and contractor have "undertaken liability" toward a subcontractor's materialman under the terms of the general contract or the subcontract, the materialman, "because it is not in privity" with the owner and contractor "may not assert a cause of action that is

contractual in nature" against them. (*See,* **Mariacher Contracting Co. v. Kirst Constr.**, 187 AD2d 986, 987; **Martirano Constr. Corp. v. Briar Contracting Corp.**, 104 AD2d 1028, 1030, **supra.**) Accordingly, the First cause of action for goods sold and delivered is dismissed as against the moving defendants.

With regard to the Second cause of action, which in form is a mechanic's lien foreclosure, the moving defendants aver that the proceeding must be dismissed for failure to join other lienors as necessary parties. While the Lien Law provides for the adjustment of equities among lienors by requiring the joinder of all lienors in an action to foreclose a mechanic's lien and the moving defendants aver that plaintiff has failed to join all lienors, they offer no proof to support their contention. Notices of lien are not attached to the motion papers and aside from "naked allegations" of several names on an otherwise blank sheet of paper, there is *no* proof that there are other lienors who ought to be joined as parties defendant. The moving defendants have failed to sustain their burden of proving the sufficiency of their defense on this application. (*See*, **Admiral Transit Mix Corp. v. Sagg-Bridgehampton Corp.**, 56 Misc.2d 47, 49 [Supreme Court, Suffolk County].) The submission is particularly lacking as movant, R&G Equities, has bonded open liens with movant, Utica Mutual, and therefore, both would be in possession of the necessary evidence. Accordingly, the motion to dismiss the Second cause of action in foreclosure for failure to join necessary parties is denied.

With regard to so much of the motion as seeks to dismiss the Fifth and Sixth causes of action under the trust provisions of the lien law, the moving defendants make the following argument:

> As to its claims against the owner of the property and the General Contractor, the Plaintiff apparently relies on Section 70 of the lien law, believing that a trust has been established by the Defendant, Plainview Associates, the owner of the land, and/or R&G Equities Ltd., as the General Contractor for the payment to sub-contractors materialmen. A careful reading of Section 70 of the lien law reveals this not to be the case. If a trust is established at all on behalf of the Plaintiff herein, it is by Constructure to whom it sold material. It is Constructure who must account to its materialmen and laborers for the funds it received from R&G Equities, and not R&G Equities Ltd.

Defendants' argument runs counter to the very purposes of the trust provisions. "The purpose of the enactment of ... article 3-A was to make more certain that laborers and materialmen on an improvement are paid from the project funds. 'The trust concept was intended precisely to forbid that an owner, contractor or subcontractor act merely as entrepreneur and was intended to require that he act, instead, as fiduciary manager of the fixed amounts provided for the operation' " (**Frontier Excavating v. Sovereign Constr. Co.,** 30 AD2d 487, 489, app. dsmd 24 NY2d 991). In addition, it has been held that " 'the owner or the contractor is a trustee ... for the benefit of subcontractors, laborers and materialmen ... who necessarily, therefore, become ... beneficiaries of such trusts'" (**Frontier Excavating v. Sovereign Constr. Co., supra**; *see also*, **Martirano Constr. Corp. v. Briar Contracting Corp.**, 104 AD2d 1028, 1031, **supra**).

The moving defendants rely upon **Quantum Corp. Funding Ltd. v. L.P.G. Assocs.**, which states that "merely supplying material which is used in the project cannot

suffice to impose obligations on the owner under the statute"(**Quantum Corp. Funding Ltd. v. L.P.G. Assocs.**, 246 AD2d 320, 322). However, **Quantum** also states that "[p]ursuant to Lien Law §71(3)(a), the claims for which an owner is responsible as a statutory trustee are 'claims of contractors, subcontractors, architects, engineers, surveyors, laborers and materialmen arising out of the improvement, for which the owner is obligated'. The basis of such liability is an existing obligation, such as one imposed by contract *or as the result of a mechanic's lien*" (**Quantum Corp. Funding Ltd. v. L.P.G. Assocs.**, 246 AD2d 320, 322, **supra**, emphasis supplied). Thus, by virtue of its mechanic's lien, plaintiff is not only a trust beneficiary with respect to its subcontractor with whom it is in contractual privity but also with the owner. (*See*, **Abjen Properties, L.P. v. Crystal Run Sand & Gravel** 168 AD2d 783, 784.) Nevertheless, the lien of a materialman is derivative and limited "in the sense that it is derived from what is owed" to the subcontractor with whom it is in privity (**Regal Lumber Co. v. Buck**, 157 Misc2d 376, 379 [County Court, Chautauqua County]). It is also restricted to the amount owed to the general contractor by the owner at the time the lien was filed (**Central Valley Concrete Corp. v. Montgomery Ward & Co.**, 34 AD2d 860; **Regal Lumber Co. v. Buck, supra**). Thus, payment in full by the owner or the contractor constitutes a complete defense in a lien foreclosure action, and the lien will not be validated (**Central Valley Concrete Corp. v. Montgomery Ward & Co., supra**; **Kinematics, Ltd. v. Sprayview Const. Corp.**, 27 Misc.2d 332, 333 [Supreme Court, Suffolk County]). Accordingly, complete payment would constitute a defense in

a breach of trust claim, as it eliminates the predicate for liability, the lien. *(See,* **Innovative Drywall v. Crown Plastering Corp.**, 224 AD2d 664, lv app dsmd 88 NY2d 1016.)

With regard to the trust liability of a contractor, the moving defendants contend that the court in **Quantum Corp. Funding Ltd., supra**, held that a subcontractor's materialman could not reach trust funds in the hands of contractor. To the contrary, the court explicitly stated that it was not clear whether the contractor's statutory trust obligation "extends to a subcontractor's creditors" and for purposes of the matter before it, it was "not necessary to decide the issue" (**Quantum Corp. Funding Ltd. v. LP.G. Assocs.**, 246 AD2d 320, 323, **supra**).

As noted above, the amounts owed among the parties are not established, and thus, any limitation on plaintiff's lien, and therefore its trust claim, cannot be established as a matter of law. Although plaintiff's lien has not been judicially validated, neither has it been dismissed based upon the defenses raised against it. Accordingly, there are no grounds to dismiss the trust causes of action at this time. *(See,* **Innovative Drywall v. Crown Plastering Corp.**, 224 AD2d 664, lv app dsmd 88 NY2d 1016, **supra.**)

Turning to plaintiff's cross-motion for summary judgment, plaintiff, it appears, has offered nothing in support of its burden of proof except a conclusory affidavit by the president of plaintiff averring that unspecified materials were delivered to the project on behalf of the owner and contractor, that no payment was received, and that the balance due is $101,107.07. "The proponent of a summary judgment motion must make a *prima*

facie showing of entitlement to judgment as a matter of law, *tendering sufficient evidence to eliminate any material issues of fact from the case* * * * Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (**Winegrad v. New York Univ. Med. Cent.**, 64 NY2d 851, 853, emphasis supplied). Plaintiff has not submitted so much as a single invoice. Accordingly, the purported motion for summary judgment is denied.

Plaintiff also cross-moves for disclosure. Section 202.7 of the Uniform Rules for Trial Courts (22 NYCRR) requires that a good-faith effort to resolve discovery disputes be made between counsel before a filing a motion seeking relief with regard to discovery, and the Notice of Motion must indicate that an affirmation of such good-faith effort is included in the papers. A perfunctory telephone call or computer-generated form letters to opposing counsel's office do not constitute a good faith effort to resolve disclosure differences. (*See*, **Eaton v. Chahal**, 146 Misc2d 977, 983 [Supreme Court, Rensselaer County].) Section 202.7(c) of the Uniform Rules for Trial Courts (22 NYCRR) requires that an affirmation of good faith effort to resolve the issues must "indicate the time, place and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held" (22 NYCRR 202.7[c]). Plaintiff has failed to comply, and the motion is denied. It is noted, however, for assistance to the parties in resolving their differences, without addressing the burdensome document demands and interrogatories served by plaintiff, that plaintiff is entitled as a trust beneficiary to the

examination of books and records or a verified statement as provided for in Lien Law §76 (**Radory Const. Corp. v. Arronbee Const. Corp.**, 24 AD2d 573).

Dated: 8/1/01

J.S.C.