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SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. IRA B. WARSHAWSKY,
Justice.**

TRIAL/IAS PART 7.

MARJAM SUPPLY CO., INC., on behalf of
themselves and all others similarly situated,

Plaintiff,

INDEX NO.: 008163/2009
MOTION DATE: 02/09/2011
MOTION SEQUENCE: 005

-against-

JOHN J. GRIFFIN ROOFING, INC., JOHN J.
GRIFFIN, INC., JOHN J. GRIFFIN a/k/a JOHN
JAMES GRIFFIN a/k/a JOHN GRIFFIN and
MARY GRIFFIN,

Defendants.

The following papers read on this motion:

Notice of Motion, Affirmation, Affidavit & Exhibits Annexed	1
Affidavit in Opposition of John J. Griffin & Exhibits Annexed	2
Reply Affirmation of Elizabeth P. Weiland & Exhibits Annexed	3

PRELIMINARY STATEMENT

This is an action to recover for building materials supplied to a home improvement contractor. Plaintiff Marjam Supply Co. is engaged in the business of selling building materials to contractors. Defendant John J. Griffin Roofing, Inc. is a roofing contractor. Defendant John J. Griffin is the owner of the company. Defendant Mary Griffin is the estranged wife of John J. Griffin.

On March 21, 2000, Griffin, on behalf of the corporation, submitted an application to plaintiff for a \$25,000 line of credit. In the application, Griffin personally guaranteed the

indebtedness of the company. Griffin also agreed to pay finance charges of 2% per month and attorney's fees in the event that litigation was commenced to collect payment. On March 1, 2006, Griffin signed a similar credit application and guarantee, but the new application did not contain a maximum credit line. On December 19, 2007, plaintiff and Griffin Roofing entered into an agreement reducing the late charges to 1% per month on invoices which had been due over 60 days. This agreement was also personally guaranteed by Griffin.

Although the parties appear to have done business since the time of the first credit application, the present action is to collect payment for building materials which Griffin Roofing purchased between June 4 and November 4, 2008. Griffin used these materials in connection with home improvement projects for 103 different customers. Plaintiff alleges that although Griffin was paid for the work which it performed, it has not remitted payment for the materials to plaintiff. Between November 19 and December 18, 2008, plaintiff filed notices of mechanic's liens against the properties benefitted by the home improvement projects.

This action was commenced on April 28, 2009. The first 103 causes of action are based on 103 individual construction projects for which plaintiff provided materials to defendant. The 104th cause of action is based upon the total amount of materials which plaintiff supplied to defendant and is thus cumulative of the first 103 causes of action. Plaintiff alleges that the total value of the materials is \$497,557.44. The 105th cause of action is for \$27,812.29 in finance charges which accrued at the rate of 1% per month. The 106th cause of action is for attorney fees. The 107th cause of action is against defendant John Griffin on his guarantee. The 108th cause of action is against defendant Mary Griffin, alleging that, as part of a divorce settlement, she received \$500,000 of the proceeds of the construction projects in violation of § 77 of the Lien Law.

As required by § 77, the action is brought in the form of a class action to enforce a trust, on behalf of all persons who have supplied goods or services to Griffin's construction projects (*See Aspro Contracting, Inc. v Fleet Bank*, 1 NY3d 324 [2004]). Nevertheless, plaintiff released the majority of its mechanic's liens on June 2, 2009, after the action was commenced.

DISCUSSION

Plaintiff moves for partial summary judgment against defendants John Griffin and the corporation on the 104th through 107th causes of action pursuant to CPLR § 3212. Plaintiff moves for a severance of the 108th cause of action against Mary Griffin. Summary judgment terminates a case before a trial, and it is therefore a drastic remedy that will not be granted if there is any doubt with regard to a genuine issue of material fact, since it is normally the jury's function to determine the facts. (*Sillman v. Twentieth Century-Fox Film Cor.*, 3 NY2d 395 [1957]). When summary judgment is determined on the proof, it is equivalent to a directed verdict: if contrary inferences can reasonably be drawn from the evidence, then genuine issues of material fact preclude summary judgment. (*Gerard v. Inglese*, 11 AD2d 381 [2d Dep't 1960]).

If a party has presented a prima facie case of entitlement to summary judgment, because no triable issues of material fact exist, the opposing party is obligated to come forward and bare his proof by affidavit of an individual with personal knowledge, or with an attorney's affirmation to which appended material in admissible form, and the failure to do so may lead the court to believe that there is no triable issue of fact. (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]).

Plaintiffs' proof consists essentially of the same documents that have been previously submitted on other motions and which this court has decided do not preclude defendants' colorable defense of having paid the amount sued. Thus, plaintiff submits a letter signed by John Griffin, dated November 11, 2008, agreeing to pay "the existing balance of \$522,778.36 or any balance *that may be outstanding in full* at the time my pending lawsuit is settled with Allied Building Supply" (emphasis added). (*Id.* Ex. O). Plaintiff also submits an incomplete statement of account, dated 12/04/08, which purports to add all prior invoiced amounts for deliveries as well as amounts not yet due but that are expected to be payable in the "future." (*Id.* Ex. K). The plaintiff has also attached a massive number of invoices, presumably representing all charged amounts. (*Id.* Ex. L). Finally, the plaintiff has provided copies of some checks paying various sums due, with dates ranging from 7/11/08 to 10/25/08. (Weiland Reply Aff. Ex. A). Plaintiffs' affidavits and affirmations do not establish, by personal knowledge, that the checks provided to this court represent the *entirety* of payments made to Marjam. Furthermore, the invoices and

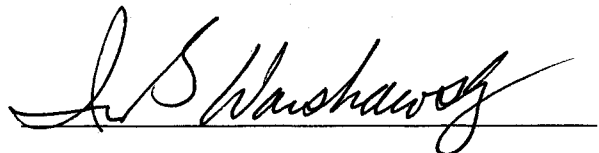
statements of account provided to this court are incomplete inasmuch as they omit any payments received, and the statement of account, with an old balance as of 12/04/08, includes some amounts which were purportedly not due at the time of that statement. The plaintiff's proof is incomplete to permit this court to award it judgment.

The defendants contend that issues of fact exist regarding the actual "dates" of deliveries for any amounts due and owing, (Cox. Aff. ¶¶ 12-13) as well as with regard to the "possibility" that the November 2008 Griffin letter suggests that "Plaintiff's claim was settled prior to the commencement of the action, or in the alternative, whether Plaintiff's claim was ripe at the time of the commencement of this action," (*id.* ¶ 17). Had the plaintiff established the amounts paid and the amounts still due and owing, the defendants' contentions would not create any issue of fact. The fact that plaintiff identified in its complaint particular dates for the deliveries which have not been paid, does not necessarily make this fact material for judgment, even though it could become material if other issues of fact exist, such as regarding the application of payments for particular deliveries. Moreover, no issue of fact exists regarding settlement of plaintiff's claims, since the defendants have not averred anything to suggest such a settlement, and defense counsel's suggestion appears to be wild speculation even though it should be something within his personal knowledge.

Even though the defendants have not presented any triable issues of fact, they had no burden to do so since the plaintiffs had not met their burden of proof on summary judgment. Plaintiff's motion for summary judgment is denied on the 104th Cause of Action. As plaintiff did not submit any proof on the other causes of action, including accrued interest and attorneys fees, summary judgment is also denied as to those causes of action. Severance of the 108th cause of action is also denied.

This shall constitute the decision and order of the court.

Dated: April 26, 2011



J.S.C.

ENTERED

MAY 02 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**