[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JOAN M. KENNEY J.S.C. PART 8

Justice

Index Number : 115242/2008
IMP PLUMBING AND HEATING
VS.
NYU HOSPITAL CENTER
SEQUENCE NUMBER : 003
MONEY JUDGMENT

INDEX NO. 115242/03

MOTION DATE

MOTION SEQ. NO. 003

MOTION CAL. NO. 5/21/10

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

Dated: August 19, 2010

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☒ DO NOT POST ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 8

----------X

IMP PLUMBING AND HEATING CORP.

Plaintiff,

- against -

317 EAST 34th STREET, LLC, NYU MEDICAL CENTER a/k/a NYU HOSPITAL CENTER, MICHAEL CONDE, individually, and d/b/a CONDE ASSOCIATES, C&A ENTERPRISES, INC., d/b/a under a fictitious name of ACCH ENTERPRISES and/or under an assumed name of CONDE ASSOCIATES,. and JOHN DOES,

Defendants.

DECISION AND ORDER
Index Number: 115242/08
Cal.: 5/21/2010
Motion Seq. No.: 003

KENNEY, JOAN M., J.

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion for summary judgment:

Papers	**Numbered**
Notice of Motion, Affirmation, Affidavit, & Exhibits	1-11
Affidavit in Opposition, Exhibits, & Memorandum in Opposition	12-24
Reply Affirmation & Affidavit	25-26

Appearances

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Plaintiff, IMP Plumbing and Heating Corp. (IMP) seeks an order, pursuant to CPLR 3212(a), for summary judgment in the amount of $77,529.54 against defendant NYU Medical Center a/k/a NYU Hospital Center (NYU) for an unpaid lien (plaintiff's first cause of action), and dismissing all cross-claims filed by NYU against defendants Michael Conde individually, and d/b/a Conde Associates, C & A Enterprises, Inc., d/b/a under a fictitious name of ACCH Enterprises and/or under an assumed name of Conde Associates (collectively, Conde).

FACTS AND PROCEDURAL BACKGROUND

IMP, a plumbing subcontractor, commenced the present action to enforce a mechanic's lien on or about January 23, 2009, against defendants NYU and the general contractor, Conde. On October 19, 2007, NYU entered into a written agreement (the agreement) with Conde for construction of an infusion / Apharesis Laboratory at 317 East 34th Street, New York, New York

(the project) (Affidavit of Paul Schwabacher, ¶ 5, Ex. "A" attached to opposition papers). NYU agreed to pay Conde $495,108.00 for the project (Schwabacher Aff. ¶ 14, Ex. "G").

Per the agreement between NYU and Conde, Conde was required to submit applications for payment. Conde submitted three applications for payment dated December 12, 2007, January 1, 2008, and February 27, 2008 (Ex. "B" attached to opposition papers). Each of these applications for payment were certified by NYU's project architect several days after submission. NYU made each payment (Schwabacher, ¶ 9-13, Ex. "B", "C", "D" attached to opposition papers).

By letter dated March 10, 2008, NYU terminated the agreement with Conde "for default based on the reduction of your labor force to a number insufficient in [NYU's] judgment to maintain the progress of the Work or complete the Work in accordance with the Progress Schedule . . " (default letters) (Ex. "H" attached to opp. papers). However, just nine and 10 days after NYU sent its termination notice, NYU approved two more payment applications submitted by Conde seven days earlier (Schwabacher Aff., ¶¶ 12-13, Ex. "E", "F" attached to opp. papers).

On January 25, 2008, IMP entered into a subcontract[1] with Conde to perform plumbing work for the project at the agreed upon price of $77,520.54. IMP was not paid for the work it performed on the project. On April 16, 2008, IMP filed its mechanic's lien in the amount of $77, 520.54 (the lien) (Ex. "A" attached to moving papers). On or about July 17, 2008, NYU discharged the lien by filing a bond in the amount of $85,272.60.

It is undisputed that, at the time NYU terminated the agreeement, NYU paid Conde only $358,110.00 of the $495,108.00 agreed upon, leaving an unpaid balance of $136,998.00. (Ex. "D3" attached to moving papers.) It is further undisputed that the remainder is sufficient to satisfy IMP's lien in the amount of $77, 520.54.

ARGUMENTS

IMP argues that summary judgment is warranted as triable issues do not exist regarding IMP's entitlement to foreclose on its lien against NYU because: (1) documentary evidence proves that NYU owes Conde $136,998.00 under its contract for the project; and (2) the unpaid balance of

[1] The alleged subcontract between IMP and Conde is not attached to the motion papers.

$136,998.00 satisfies the outstanding lien amount of $77,520.54 obtained by IMP. Additionally, plaintiff seeks dismissal of all of NYU's cross-claims because NYU has not moved for entry of a default judgment against Conde, within one year of the date of service of NYU's verified answer and cross-claims, against the non-appearing defendant, Conde.

NYU contends that IMP is not entitled to a money judgment because: (1) NYU doesn't owe any monies to Conde since IMP has not shown that Conde substantially performed under the agreement; and (2) NYU's cross-claims against Conde are not time-barred as a judgment has not been entered against Conde.

DISCUSSION

IMP's mechanic's lien

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to a judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the *prima facie* showing has been made, the burden of production shifts to the opponent who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In opposing the motion for summary judgment, the non-movant must assemble and lay bare its affirmative proof to demonstrate the existence of genuine, triable issues; reliance upon mere conclusions or unsubstantiated allegations are insufficient. [*Corcoran Group, Inc. v Morris*, 107 AD2d 622, 624 [1st Dept 1985], *aff'd*, 64 NY2d 1034, [1985])

To establish the right to enforce a mechanic's lien, the subcontractor must make a *prima facie* showing that: (1) the lien is valid; and (2) the subcontractor is entitled to the amount asserted in the lien (*Ruckle and Guarino, Inc. v Hangan*, 49 AD3d 267, 267-268 [1st Dept 2008]). Since the rights of a subcontractor are derived from the rights of the general contractor, the subcontractor has the burden of establishing that there was money due and owing to the general contractor (Lien Law § 4; *see Timothy Coffey Nursery/Landscape, Inc. v Gatz*, 304 AD2d 652, 653-654 [2d Dept 2003]; *see also GCDM Ironworks, Inc. v GJF Constr. Corp.*, 292 AD2d 495, 496 [2d Dept 2002]).

Here, it is undisputed that IMP sufficiently established the validity of the lien in the amount

of $77,520.54. Additionally, IMP has shown that an outstanding balance of $139,998.00 exists which is sufficient to satisfy the amount of the lien. Therefore, IMP has made its *prima facie* showing that there are funds due and owing to Conde under the agreement.

NYU has failed to rebut IMP's *prima facie* case (*see e.g. F. Garofalo Elec. Co., Inc. v New York University*, 300 AD2d 186 [1st Dept 2002]). In a similar case involving a contractor suing NYU for breach of contract, the First Department in *Garofalo* reversed the lower court's granting of summary judgment in favor of NYU for terminating its agreement with a contractor for "insufficiency of [the *Garofalo* plaintiff's] workforce" (*id.*, at 186-187). Despite NYU's submission of a letter allegedly memorializing agreed-upon milestones for completion of the work, the Appellate Division found that the *Garofalo* plaintiff sufficiently rebutted NYU's *prima facie* case by positing sufficient evidence raising a triable issue of fact as to whether the plaintiff substantially performed under the agreement. (*Id.*)

Although the manner by which NYU appears to conduct its business with contractors bears some similarity to this case, *Garofalo* is distinguishable. First, in his self-serving affidavit, NYU's Senior Vice President, Mr. Schwabacher, conclusorily asserts that Conde "failed to progress with the work" but fails to cite a single reason as to how Conde "failed" (Schwabacher Aff., ¶ 15). Morever, it is undisputed that none of Conde's payment applications indicate any problems with Conde's rate of progress up to the date of the default letters. In fact, NYU's architect approved two of Conde applications after NYU sent its March 10, 2008 letter alleging Conde's default under the agreement.

Whereas, in *Garofalo*, NYU submitted an alleged agreement between the *Garofalo* plaintiff and NYU memoralizing a schedule for certain work to be completed, NYU's default letters in the instant action simply state that NYU was terminating its contract with Conde "based on the reduction of [Conde's] labor force to a number insufficient in the Owner's judgment to maintain the progress of the Work." (Ex. "H" attached to opp. papers.) NYU's reliance on these default letters to raise an issue worthy of trial are wholly inadequate. The default letters are devoid of any factual basis upon which NYU invokes its authority to terminate the agreement (*see* Ex. "H", "I" attached to opposition papers). Since the default letters simply re-state the provisions of the agreement and no

facts have been posited to support NYU's unsubstantiated allegations of Conde's default, NYU's "mere conclusions" have not raised a genuine issue of fact which would preclude summary judgment in IMP's favor.

Dismissal of NYU's cross-claims

A cause of action by a party who fails to enter a default judgment against the defaulting party within one year after the default shall have his cause of action dismissed absent a showing of "sufficient cause" (*see* CPLR 3215[c]). This provision applies with equal force to counterclaims, cross-claims and third-party claims (*see Mint Factors v Goldman*, 74 AD2d 599, 599-600 [2d Dept 1980]).

Here, NYU does not dispute that more than one year has passed since it served its verified answer and cross-claims for breach of contract and indemnification against Conde. Since the commencement of this action, Conde has not appeared or otherwise moved in response to NYU's cross-claims. In the absence of any "sufficient cause" posited by NYU, its second and third cross-claim against Conde for breach of contract must be dismissed as they are time-barred pursuant to CPLR 3215[c].

Furthermore, while NYU's first cross-claim against Conde for indemnification is not time-barred (*see Multari v Glalin Arms Corp.*, 28 AD2d 122, 123 [2d Dept 1964]), said cross-claim is now rendered moot by the granting of summary judgment in the underlying action.

Accordingly, it is

ORDERED, that plaintiff IMP Plumbing and Heating Corp.'s motion for summary judgment is granted in its entirety; and it is further

ORDERED, that the Clerk of the Court shall enter judgment in favor of plaintiff IMP Plumbing and Heating Corp. and against defendant NYU Medical Center a/k/a NYU Hospital Center in the amount of $33,746.66 with interest from February 27, 2008, together with costs and disbursements.

ORDERED, that all of defendant NYU Medical Center a/k/a NYU Hospital Center cross-claims are dismissed.

Dated: August 19, 2010

E N T E R

Hon. Joan M. Kenney
J.S.C.