

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS IA Part 4
Justice

<p>_____ x</p> <p>A.M. MARCA, INC.,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">-against-</p> <p>ST. JOHN'S UNIVERSITY, GMP CONSTRUCTION CORP., HIGH-RISE ELECTRIC, INC., SUFFOLK MATERIALS CORP., JACK K. ELROD CO., WEST COAST NETTING, INC., MASS ELECTRIC CONSTRUCTION CO., HALLMARK ELECTRICAL SUPPLIES CORP., THERMAL AIR SYSTEMS, INC. and SUFFOLK PAVING CORP.,</p> <p style="text-align: center;">Defendants.</p> <p>_____ x</p>	<p>Index Number <u>29928</u> 2003</p> <p>Motion Date <u>October 5,</u> 2004</p> <p>Motion Cal. Number <u>1</u></p>
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The following papers numbered 1 to 9 read on this motion by the plaintiff for an award of summary judgment in its favor and to amend the caption of this action so as to delete High-Rise Electric, Inc., Suffolk Materials Corp., Jack K. Elrod Co., West Coast Netting, Inc., Mass Electric Construction Co., and Thermal Air Systems, Inc. as party defendants and cross motion by defendant St. John's University for summary judgment dismissing the plaintiff's first cause of action against it.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1-4
Notice of Cross Motion - Affidavits - Exhibits ...	5-7
Reply Affidavits	8-9

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

The plaintiff, A.M. Marca, Inc. (Marca), commenced this action, inter alia, seeking to foreclose a subcontractor's mechanic's lien it filed against property owned by defendant St. John's University (SJU) in connection with work it performed during a construction project at SJU's Queens campus. The plaintiff also asserts three causes of action against defendant GMP Construction Corp. (GMP) for breach of contract, quantum meruit recovery and an account stated.

Pursuant to a contract dated October 1, 2002, SJU retained GMP to serve as the general contractor on the project at issue. The plaintiff was a subcontractor of GMP and had performed cement work required under the general contract. On August 11, 2003, SJU notified GMP that it was terminating the prime contract as a result of GMP's and its subcontractors' lack of performance. By letter dated August 13, 2003, GMP indicated that it received the termination letter and acknowledged that the construction project had suffered from mistakes on its part.

In its papers submitted in support of summary judgment, Marca submits that it contracted with GMP to perform some of the work required under GMP's contract with SJU for the sum of \$490,000. Marca also claims that it performed extra work totaling \$110,759.19 as reflected in certain change orders and invoices. Marca claims that it last furnished labor and material to the project in May 2003, that all of the extra work performed by it was approved and accepted by both GMP and SJU and that it never received any complaint about the quality of any of the work it performed. Marca contends that it received payments totaling \$407,500 and that it is owed a balance of \$193,259.19.

In opposition to Marca's motion and in support of its cross motion for summary judgment, SJU contends that there were several problems with Marca's work. According to SJU, several elements of Marca's work remain incomplete, the concrete supplied and put in place by Marca is cracking in several places, and much of the site work performed by it had to be re-done due to significant water drainage problems experienced at the site. As a result, SJU claims that it incurred further expenses to repair and/or replace defective work and materials. SJU also contends that no monies are due GMP as the costs of completion of the project exceed any amounts that GMP could claim against SJU as well as any amounts that Marca claims it is owed. Thus, SJU asserts that there is no lien fund and that, as a result, the plaintiff's cause of action for foreclosure of a mechanic's lien should be dismissed.

The rights of a subcontractor to enforce a mechanic's lien are derivative of the general contractor's rights (104 Contractors v RT Golf Associates, 270 AD2d 817 [2004]). "If labor is performed for, or materials furnished to, a contractor or subcontractor for an improvement, the lien shall not be for a sum greater than the sum earned and unpaid on the contract at the time of filing the notice of lien, and any sum subsequently owed thereon. In no case shall the owner be liable to pay by reason of all liens created pursuant to this article a sum greater than the value or agreed price of the labor and materials remaining unpaid, at the time of filing notices of such liens. . . ." (Lien Law § 4[1]). Thus, a subcontractor's lien must be satisfied out of funds due and owing from the owner to the general contractor at the time the lien is filed (Falco Construction Corp. v P&F Trucking, Inc., 158 AD2d 510 [1990]).

In light of the parties' sharply conflicting contentions, together with the absence of sufficient documentary proof to resolve the dispute, the court finds that a triable issue of fact exists as to the existence of a fund due and owing from SJU to GMP, the general contractor, at the time of Marca's filing of its mechanic's lien to which such lien could attach. Accordingly, the motion and cross motion for summary judgment with respect to Marca's first cause of action are denied (In re Guttitto Family Trust, 10 AD3d 656 [2004]).

That branch of Marca's motion which seeks summary judgment in its favor on the second through fourth causes of action against GMP for breach of contract, quantum meruit recovery and an account stated is also denied.

Notwithstanding GMP's failure to submit opposition to Marca's motion for summary judgment, in light of SJU's contentions regarding the poor quality and incomplete nature of Marca's work, a triable issue of fact exists as to whether Marca is owed an outstanding balance by defendant GMP for the work it performed on the project (Winegrad v New York University Medical Center, 64 NY2d 851 [1985]).

That branch of Marca's motion which seeks to discontinue the action as against defendants High-Rise Electric, Inc., Suffolk Materials Corp., Jack K. Elrod Co., West Coast Netting, Inc., Mass Electric Construction Co. and Thermal Air Systems, Inc. is granted. Accordingly, the caption shall be amended to read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

-----x
A.M. MARCA, INC.,

Plaintiff,

Index No. 29928/03

-against-

ST. JOHN'S UNIVERSITY, GMP
CONSTRUCTION CORP., HALLMARK
ELECTRICAL SUPPLIES CORP. and
SUFFOLK PAVING CORP.,

Defendants.

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Dated:

J.S.C.