

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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ENKO CONSTRUCTION CORP.,

Plaintiff,

-against-

EVA SCRIVO, INC., EVA SCRIVO SALON, INC.,
EVA SCRIVO, ARIK EFROS, 13TH STREET
ENTERTAINMENT, LLC, BAGATELLE
HOLDINGS LLC, RDV HOLDINGS LLC,
JARMCO HOLDING CORP., STEWART & SONS,
LLC, NEW YORK CITY ENVIRONMENTAL
CONTROL BOARD, BLACK ELECTRIC
CONTRACTING CO., ISRAEL DISCOUNT BANK
OF NEW YORK, BOARD OF MANAGERS OF THE
50 BOND STREET CONDOMINIUM, and the
following persons or parties being either tenants or
occupants of the liened premises or persons or parties
having or claiming to have a right title or interest in
the liened premises herein being sued fictitiously
because their representative names are presently
unknown to the Plaintiff, i.e. John Doe "1" through
John Doe "5,"

Defendants.

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KORNREICH, SHIRLEY WERNER, J.:

In this action for breach of contract, quasi-contract, unjust enrichment and foreclosure on mechanic's liens, plaintiff Enko Construction Corp. seeks payment for work it completed.

Defendant Eva Scrivo is the President of the defendant corporations that own two salons -- Eva Scrivo, Inc. (Scrivo Inc.), located at 50 Bond Street, and Eva Scrivo Salon, Inc. (Salon Inc.), located at 407 West 13th Street, both in Manhattan, in which work was done. Defendant Arik Efros is Scrivo's husband, and he was manager of the salons during the period alleged in the complaint, October 22, 2007 through on or about July 25, 2009. Defendant Jarmco Holding

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DECISION and ORDER

Corp. (Jarmco) owns the building located at 407 West 13th Street. Defendant Board of Managers of the 50 Bond Street Condominium (Bond Street Board) is the governing body of the 50 Bond Street Condominium Association. Defendant Stewart & Sons, LLC (Stewart & Sons) owns Condominium Unit C-1 at 50 Bond Street, the condo occupied by Scrivo, Inc. The other named defendants are either holders of separate liens against the properties or are other entities in the properties for which plaintiff claims to have done work.

Efros, Scrivo and the salons (collectively the Scrivo Defendants) move to discharge the mechanic's liens (third and eighth causes of action) and to dismiss the claims against them. Those claims are: breach of contract as to work done at 50 Bond Street (first cause of action); quantum meruit and unjust enrichment as to the Bond Street work (second cause of action); breach of contract as to the 13th Street work (fourth cause of action); and quantum meruit and unjust enrichment as to the 13th Street work (fifth causes of action).

Jarmco moves¹ to discharge and dismiss the eighth and ninth causes of action, two mechanic's liens on the 13th Street property housing Salon Inc. Stewart & Sons and the 50 Bond Street Board cross-move to discharge and dismiss the third cause of action, a mechanic's lien on the Bond Street condominium housing Scrivo, Inc.²

I. Background

A. The Complaint

¹ Although this motion should have been brought pursuant to a different sequence number, the motion was assigned the same sequence number as that of the Scrivo motion.

² 13th Street Entertainment, LLC, Bagatelle Holdings LLC and RDV Holdings LLC have filed answers to the complaint and have not moved to dismiss. Defendants New York City Environmental Control Board and Blake Electric Contracting Co. were named as necessary parties under Lien Law § 44, and in its answer, Blake asserted cross-claims.

Enko alleges, *inter alia*, that: "Pursuant to written and oral agreements, invoices and change orders, from on or about October 22, 2007 through on or about July 25, 2009, at the specific instance and request of [the Scrivo defendants], plaintiff provided labor and materials to the Scrivo Defendants" for their salons located at 50 Bond Street and at 407 West 13th Street. Compl., ¶ 17. It further alleges that it fully performed under its "agreement(s)" with the Scrivo Defendants. *Ibid.* at 18. The complaint alleges that: the agreed price for labor and materials was \$932,000 on the 50 Bond Street project and \$374,000 on the 13th Street project; the Scrivo Defendants breached the contracts by failing to pay a balance of \$276,000 due pursuant to "agreement(s), invoices and approved and accepted change orders" for the 50 Bond Street project, and the entire amount of \$374,000 due under the "agreement(s), invoices and approved and accepted change orders" for the 13th Street project; Enko made numerous demands for payment; and it has been damaged in the amounts due, plus interest and attorney's fees. *Ibid.* at 19-22, 45-51.

Alternatively, Enko alleges that: it performed work on the two projects with the "good faith" belief that it would be paid; the Scrivo Defendants knew Enko was performing the work based on the terms of the written agreements, invoices and change orders; the Scrivo Defendants unjustly benefitted; and Enko is entitled to the reasonable value of its work. *Ibid.* at 23-30, 52-59. Enko claims damages in an amount not less than \$276,000 for the Bond Street project and \$374,000 on the 13th Street project, plus interest and attorney's fees. *Ibid.*

Enko does not attach copies of any written agreements, invoices or change orders, but it does attach copies of the mechanic's liens on the Bond Street and the 13th Street properties. Enko also alleges service by certified mail, the non-existence of any other action or proceeding to

recover its claims, proper notice and compliance with the requirements of the New York Lien Law. *Ibid.* at 31-44, 74-103. Enko attaches descriptions of the properties included as Schedule A to the New York County Tax Assessment Map. Exs. A, C, E.

B. The Liens and Schedules

The September 4, 2009 Notice of Lien describes the property subject to the lien as “50 Bond Street, 1st Floor and Basement” in New York County. The owner is identified as Stewart & Sons, LLC. The parties employing Enko and to whom it provided materials and services are identified as “Eva Scrivo and Arick Afros.” The lien amount is \$276,000. Complaint, Ex. B.

The September 3, 2009 Notice of Lien describes the property subject to the lien as “407 West 13th Street, 2nd Floor” in New York County. The owner is identified as Jarmco Holding Corp. The parties employing Enko and to whom it provided materials and services are identified as “Eva Scrivo and Arick Afros.” The lien amount is \$374,000. Ex. D.

The November 5, 2009 Notice of Lien describes the property subject to the lien as “407 West 13th Street, 2nd Floor, Ground and Basement” in New York County. The owner is identified as Jarmco Holding Corp. The party employing Enko and to whom it provided materials and services is identified as “13 St. Entertainment LLC.” The lien amount is \$267,000. Ex. F.

The first Schedule A (Ex. A), describes “Unit No. C-1 in the building designated as the 50 Bond Street.” Enko, however, does not identify Stewart & Sons as the owner of Unit C-1, but rather as the owner of “50 Bond Street, 1st Floor and Basement,” and it refers only to the further description in Schedule A as “Block 30, Lot 1301.” Compl., ¶ 32. Exhibits C and E are identical, and they describe the 13th Street property. The descriptions in these two schedules do not include the Block and Lot numbers. Instead, Enko includes the Block and Lot numbers in the

complaint, identifying the second floor of 407 West 13th Street (9/3/09 Lien), as well as the “basement, ground and second floors” (11/5/09 Lien), as “Block 646, Lot 49.” *Ibid.* at 75, 90.

II. The Motions

A. Scrivo Defendants’ Motion

The Scrivo Defendants argue: (1) Enko contracted with the corporate defendants, not Scrivo or Efros; (2) Enko lacks standing to assert claims for unjust enrichment or quantum meruit against Scrivo or Efros because Enko did not confer any benefit on them; (3) Enko did not have a contract with or confer a benefit on Scrivo, Inc. for the 13th Street project or Salon, Inc. for the Bond Street project; (4) Enko’s claim for unjust enrichment is barred by the parties’ contracts; (5) Enko’s mechanic’s liens for the 13th Street and the Bond Street properties fail to identify the party with which Enko contracted and to which it furnished materials as required by Lien law 9(3), and the description of the property in the Notice of Lien is defective; and (6) the complaint fails to state a cause of action [CPLR 3211(a)(7)] and the documentary evidence is conclusory.

1. Evidence in Support

Efros and Scrivo Affidavits

Although this motion is one for dismissal, Efros submits an affidavit in which he attests that he “never had any direct, personal dealing, agreement, or relationship” with Enko and that Enko dealt and contracted with the corporate entities. He further avers that: Scrivo is his wife and the president of the corporations, which operate the salons; Stewart & Sons owns 50 Bond Street, Unit C-1, a condominium comprised of first floor retail space and part of the basement; Jarmco owns 407 West 13th Street; the labor and materials provided by Enko on both projects

were “unworkmanlike, poor, negligent, and failed to adhere to multiple building codes or regulations [and Enko] failed to provide [the corporations] with some of the services set forth in the parties’ contract”; Efros futilely requested that Enko return to correct and complete its work after Enko finished; and the corporations incurred additional charges in securing other contractors and workers; and there is no money due Enko. Efros also describes the Notices of Lien, which are attached.

Scrivo attests that her husband’s affidavit is accurate, and she adopts it in its entirety. She further attests that she “never had any personal agreements, dealings, or relationships” with Enko.

2. *Opposing Evidence*

In opposition to the Scrivo Defendants’ motion, Enko submits: Affidavits of its president Hernan Vinicio Mora (with exhibits), of Mora’s wife Urzula Brzozowska, and of past employees of the Scrivo salons. Enko also submits an affirmation of attorney Vincent T. Pallaci.

Mora’s Affidavit and Exhibits

Mora avers that Enko’s only agreements relating to its construction of the salons were with Efros and Scrivo, whom he had met through a mutual friend. Mora knew Scrivo as the owner and Efros as the manager/co-owner of the salon at 50 Bond Street. After Mora met with them, he discussed specifics with Scrivo, who was very “particular” about what she wanted. Mora refers to a standard “form” agreement that he uses for “most projects,” but attests that because he felt “comfortable” with Scrivo and Efros, he did not think a “formal” agreement was necessary for the Bond Street project. The “terms” of their agreement was that Enko would perform work and Efros would pay for it.

Mora additionally avers that later, however, he decided to reduce the scope of the work and the price to a written document, to which Scrivo and Efros agreed. Mora then prepared an invoice listing the work to be performed at a total price of \$272,400. He believes that it was Efros who asked him to forward all documents to the attention of Scrivo, Inc. at 50 Bond Street, but he was not told who the company was or its role, if any, in the project. Regardless, he hand-delivered the invoice to Scrivo and Efros and “we both signed off on the scope and cost.” The signature line on the invoice where Efros signed does not indicate that he is signing in a representative capacity, unlike the Enko signature line. Ex. C, 10/22/07 Invoice. Mora had no reason to include a corporate signature line for Scrivo on the invoice. The “customer” is identified on the top of the invoice as “Eva Scrivo, Inc.” Ex. C. The original invoice was supplemented with three additional invoices, attached as exhibits, that Mora refers to as “upcharges,” and a separate “price breakdown” and “cash agreement.” Exs. C - E. These documents are dated October 23, 2007, and they are signed by Efros. Eva Scrivo, Inc. is identified on the “upcharges” as the customer. *Ibid.* None of the documents includes a date by which the project would be completed or any reference to how long the project would take. After construction began, Mora recalls that due to unforeseen conditions, Scrivo requested “significant changes” to the original scope of the work

Mora further attests that when the project was completed, Scrivo was overwhelmingly satisfied, Efros was extremely happy, and they bragged about “Eva’s” or “his” new salon. At the “grand” opening party, Efros and Scrivo introduced Mora as the designer and builder of “their” salon and people Mora met raved about the space. Mora also was interviewed for a documentary arranged by Scrivo and narrated by her client Martha Stewart, regarding the renovation and

opening of the salon. During the interview Efros is referred to as the “co-owner” of the salon. Mora photographed the outside of the salon, and the name on the front door is “Eva Scrivo.” Ex. F, Photographs. Additionally, the plans prepared for the project have only the name Eva Scrivo on the title page. Ex. K, Plans. Mora also conducted a Google search of Eva Scrivo’s salon and did not find any reference to the corporation. Mora asserts that he has repeatedly asked Scrivo and Efros for payment of the remaining amount due, that they admitted Enko was owed money, and they promised to pay it as soon as possible.

As for the salon on 13th Street, Mora attests that “shortly after” Enko started the Bond Street project, it was asked to build another salon at 407 West 13th Street. Mora visited the location and agreed on the scope of work and the price with Scrivo and Efros. For this project, Mora decided to use Enko’s standard form contract because “at this point I knew that I would be investing more than half a million dollars of work into the two combined Eva Scrivo projects so I wanted to make sure that Enko was protected in the event that something went wrong (such as non-payment).”

Mora further attests that: after negotiation with Scrivo and Efros, Efros again signed; the contract did not include any reference to indicate that his signature was on behalf of Salon, Inc; the contract states that the agreement is between the “Owner,” identified as Eva Scrivo Salon (no “Inc.”), and the Contractor, Enko³; Mora understood that Efros and Scrivo were co-owners; Mora did not hear the name Eva Scrivo Salon, Inc. until Efros sent him a document on June 4, 2009 that lists Eva Scrivo Salon, Inc. below Efros’ name; at the request of Efros and Scrivo,

³The contract is included as Exhibit 5 to the Scrivo motion. The line on which Mora signed is directly over the words “Contractor’s Signature.” The line on which Efros signed is directly over the words “Owner’s Signature.”

Enko built them a bedroom and bathroom in the 13th Street salon space for their personal use; neither Efros nor Scrivo ever said there was a problem with Enko's work; Mora contacted past salon employees who said that Scrivo was "very happy" with the work; and Enko was not paid anything for its completed work, even though Efros and Scrivo repeatedly assured Mora that Enko would be paid in full.

Past-Employee Affidavits

Shelly Berube attests that she is a former employee of Scrivo and was involved in the day-to-day financial accounting of the salon. She avers that Scrivo and Efros hired Enko, that she heard Scrivo and Efros promise to pay Mora, and that Enko is owed money. She attests that she never heard Scrivo or Efros say there was a problem with Enko's work and that "Eva always gushed about how beautiful the salon was."

Kerry Quintanilha, also a former employee, attests that Scrivo and Efros hired Enko and never said there was a problem with Enko's work. Quintanilha states that Scrivo was "very excited" about the new locations.

Brzowska Affidavit

Mora's wife Urzula Brzowska attests that she and Scrivo were friends who attended social events together and the two couples would go out to dinner. She avers that: she visited Scrivo's salon for treatments; she and Scrivo talked about Enko's work; Scrivo admitted she owed Enko money; she personally promised to pay; Scrivo never said there were problems with Enko's work or that she believed Enko was not due money; Mora gave Scrivo more time to pay because they were friends; and Scrivo and Efros said they owned salons and never said that a corporation had hired Enko.

3. *The Scrivo Defendants' Reply*

Efros attaches to a reply affidavit an unsigned "invoice" (Ex. 1) for plans and permits for a "total price" of \$10,500, on which he attests Mora hand-printed the name "Eva Scrivo Inc." as the customer at 50 Bond Street. Efros describes the period in which this invoice was generated as "initial drafting stages"; Efros also attaches a statement "To whom it may concern" apparently signed "Vinny Mora" that states, in part, "I, Vinny Mora, am the General Contractor hired by Eva Scrivo Inc. to do the build out for their new salon at the retail space on 50 Bond Street." Lastly, Efros attaches a June 4, 2009 document signed by Mora and Efros. Efros' signature appears above the words "Eva Scrivo Salon, Inc." The document states, in part, that, "Upon general completion of construction on 407 West 13th Street, Suite 2A, it is agreed by Enko Construction and Eva Scrivo Salon, Inc. (Owner) that the total cost for job ... remains at \$353,000."

B. *Jarmco Motion*

Jarmco joins in the arguments raised by the Scrivo defendants and also bases its motion on the following grounds: (1) Jarmco requested, but Enko failed to provide an itemized statement of the underlying goods and services, as required by Lien Law 38; and (2) Jarmco did not consent to the work performed, as required by Lien Law 3.

1. *Evidence in Support*

Jarmco submits an affirmation of attorney James C. Mantia with attached exhibits. The exhibits include: Jarmco's verified answer to the complaint with counterclaims and cross-claims (Ex. B); a demand for an itemized statement signed by Mantia on April 28, 2010 (Ex. C); a six-year lease (dated in November 2007, with no specified day) between Jarmco and Deva West Realty Inc. for Loft #2A at 407 West 13th Street, describing the loft's use to be for a beauty salon

and spa, and signed by Richard Copell for Jarmco and Eva Scrivo for Deva West Realty (Ex. D). The lease contains a clause (§ 3) requiring the landlord's written consent before making alterations.

2. *Evidence in Opposition*

In his affidavit, Mora incorporates by reference his affidavit opposing the Scrivo motion. He further attests that: shortly after Enko was hired for the 13th Street salon project, Mora met the owners of RDV Lounge, Bagatelle Restaurant and Kiss & Fly nightclub (other 13th Street tenants), including Ryan Tarantino, who requested that Enko perform a number of upgrades, renovations, repairs and remodels to "various aspects" of the 13th Street building. Mora avers that he also met the "owners" of the building, Richard Copell and his father Martin Copell.⁴ Mora explains that: Martin had an office on the second floor of the building; Martin "frequently interacted and directed Enko during construction"; Enko was hired by Jarmco to work on the roof; Enko worked in the basement and on the first and second floors for the other tenant defendants, mostly at the direction and request of Tarantino; Enko worked on the second floor for the Scrivo Defendants; Enko worked on the third floor for a tenant that paid for the work; Enko also performed a "tremendous amount of work" in the common areas, mostly at the direction of Martin Copell, who indicated that either Efros or Tarantino would pay for it; Martin further directed Enko to perform work in his personal office and to bill it to Tarantino, who "rarely" objected to the work; Tarantino approved all the work in Bagatelle Restaurant on the first floor; the Copells were aware of the work, checked to see how it was going, and commented

⁴In his affidavit supporting Jarmco's motion, Richard attests that he is the "managing agent" for Jarmco, the landlord and owner of the building.

on how the work should be done; in Mora's presence, Richard Copell asked Efros to install water meters, which Enko completed; and Enko helped Jarmco clear up approximately 81 building violations at Tarantino's request.

C. Stewart & Sons and 50 Bond Street Board Motion

These defendants seek to discharge the mechanic's lien, and to dismiss the third cause of action under CPLR 3211(a)(1) (documentary evidence) and CPLR 3211(a)(7) (failure to state a claim), citing the following grounds: (1) the lien fails to identify the party with whom Enko had a contractual relationship for the Bond Street project [Lien Law 9(3)]; and (2) the lien fails to sufficiently identify the property subject to the lien [Lien Law 9(7)].

1. Evidence in Support

Defendants submit: affidavits of Stewart Richter, the Manager of Stewart & Sons, and Ira Meister, the Assistant Secretary of the owners association and managing agent of the 50 Bond Street condominium; and an affirmation of attorney Gary Wachtel with exhibits, including the deed to Unit C-1, the September 4, 2009 lien, a demand for an itemized statement under Lien Law 38, and a response by Enko.

Richter and Meister attest that: Stewart & Sons owns condominium Unit C-1 in the 50 Bond Street building; the Board is the governing body of the owners' association of the building; Scrivo occupies Unit C-1; Unit C-1 does not encompass the entire basement, a part of which is used as a common area for storage, etc.; Enko did not receive consent from the condominium owners to encumber the entire basement; and the Notice of Lien does not specify Unit C-1, instead identifying the encumbered property as "1st Floor and Basement" (Ex. B, Lien).

2. *Evidence in Opposition*

In his affidavit, Mora attests that “to the extent that Enko’s lien encompasses more than Unit C-1, Enko makes no claim to that portion of the property and does not object to limiting the extent of its lien to the areas encompassed by Unit C-1.” Mora further incorporates his affidavit submitted in opposition to the Scrivo defendants’ motion.

II. Discussion

On a motion to dismiss pursuant to CPLR 3211, the court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory. *Morone v Morone*, 50 NY2d 481, 484 (1980); *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 (1976); *Skillgames, L.L.C. v Brody*, 1 AD3d 247, 250 (1st Dept 2003). “[T]he criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.” *Rovello* at 636. The pleadings should give adequate notice to the court and the adverse party of the transactions or occurrences intended to be proved. *Two Clinton Sq. Corp. v Friedler*, 91 AD2d 1193, 1194 (4th Dept 1983); see *Ackerman v 305 E. 40th Owners Corp.*, 189 AD2d 665, 666 (1st Dept 1993).

Moreover, CPLR 3026 mandates that “[p]leadings shall be liberally construed. Defects shall be ignored if a substantial right of a party is not prejudiced.” “However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration.” *Skillgames*, 1 AD3d 250. Dismissal under CPLR 3211(a)(1) (documentary evidence) is warranted only if the documentary evidence conclusively establishes a defense to the

asserted claims as a matter of law. *Leon v Martinez*, 84 NY2d 83, 88 (1994); see *Bishop v Maurer*, 33 AD3d 497, 498 (1st Dept 2006) (“The court, however, is not required to accept factual allegations, or accord favorable inferences, where the factual assertions are plainly contradicted by documentary evidence”); see *Sokol v Leader*, 74 AD3d 1180, 1182 (2d Dept 2010) (when court considers evidentiary material on 3211 motion, criteria is whether plaintiff has cause of action, not whether he has stated one).

In assessing a motion under CPLR 3211(a)(7) (failure to state a claim), a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint. *Rovello* at 635-636. However, “Affidavits submitted by a respondent will almost never warrant dismissal under CPLR 3211[(a)(7)] unless they ‘establish conclusively that [petitioner] has no [claim or] cause of action.’” *Lawrence v Miller*, 11 NY3d 588, 595 (2008), quoting *Rovello*, 40 NY2d at 635-636.

A. *Breach of Contract (Scrivo Defendants)*

The Scrivo Defendants move to dismiss the first and fourth causes of action for breach of contract as against all of them for failure to state a cause of action and as against Scrivo and Efros, arguing that they were never parties to the contracts. Additionally, they argue that the first cause of action relates to the 50 Bond Street property, which housed Scrivo, Inc. and, thus, states no claim against Salon Inc. Similarly, they argue that the fourth cause of action relates to the 13th Street property, which housed Salon Inc. and, therefore, states no claim against Scrivo, Inc.

The elements of a cause of action for breach of contract are: (1) formation of a contract between plaintiff and defendant; (2) performance by plaintiff; (3) defendant's failure to perform;

and (4) resulting damage. *Noise in Attic Producers, Inc. v London Records*, 10 AD3d 303 (1st Dept 2004); *see also Kraft v Sheridan*, 134 AD2d 217 (1st Dept 1987); *Pernet v Peabody Engineering Corp.*, 20 AD2d 781, 781-782 (1st Dept.1964). The complaint, together with plaintiff's affidavits submitted on this motion, allege the elements of a breach of contract action. However, as the Scrivo Defendants argue, the first cause of action does not state a claim for formation of a contract with Salon Inc. and the fourth cause of action does not state a claim against Scrivo Inc. The remaining arguments for dismissal are denied.

Through its complaint, affidavits and submitted writings, Enko alleges that it entered into an agreement with Scrivo and Efros to perform construction services on the first floor and basement of the Bond Street property and on the second floor of the 13th Street property, that they agreed on the price, that Enko fully performed, that defendants breached, and that the breach caused damage to Enko. The price and damage amounts are specifically stated and the period of the contract alleged. Although "Eva Scrivo, Inc." appears on invoices, Mora, in his affidavit, claims that this name was used for address purposes only. Further, Efros, Scrivo's husband, signed construction documents on the signature page above the words "Customer signature" and without indicating that he was signing for a corporate entity. Enko's allegations, such as Mora's assertion that he negotiated with Scrivo and that Efros was her husband and co-owner of the salons, are sufficient for the court to reasonably infer that Efros was signing on behalf of himself and his wife. *See Hallock v State of New York*, 64 NY2d 224, 231 (1984) ("Essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction"). Additionally, the lease for Loft #2A at 407 West 13th Street, which Jarmco

submitted in support of its motion, is executed by Jarmco as the landlord and by Scrivo on behalf of a tenant identified as *Deva West Realty Inc.*, not *Eva Scrivo, Inc.* Further, evidence submitted by the Scrivo Defendants refuting Mora's denial of knowledge about the Scrivo corporations is not so conclusive as to require dismissal. Whether Enko will ultimately prevail is not at issue on this motion. At this stage, the court is constrained to find only whether Enko has a cause of action. *Rovello*, 40 NY2d 636. Based on the complaint, the affidavits submitted by Enko and the writings before the court, Enko has sufficiently alleged causes of action for breach of contract against Scrivo and Efros (first and fourth causes of action), but not the corporations.

B. Quasi-Contract (Scrivo Defendants)

The Scrivo Defendants argue that the quasi-contract claims (second and fifth causes of action) should be dismissed in their entirety because the claims are barred by the existence of valid and enforceable contracts. Although the court has found that the breach of contract claims are sufficient as against the individuals, where, as here, there is a bona fide dispute as to the existence of a contract, a plaintiff may proceed upon a theory of quasi contract as an alternative theory and will not be required to elect his remedies. *Plumitallo v Hudson Atlantic Land Company, LLC*, 74 AD3d 1038 (2d Dept. 2010). Consequently, the quasi-contract causes of action are not dismissed as duplicative.

Moreover, Enko has sufficiently alleged the requisite elements of a quantum meruit claim and unjust enrichment claim in the second and fifth causes of action. To state a cause of action to recover in quantum meruit, a plaintiff must allege (1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services allegedly

rendered. *See AHA Sales, Inc. v Creative Bath Prods., Inc.*, 58 AD3d 6 (2d Dept 2008). Enko has alleged that it performed the services in good faith and that it had a reasonable expectation that it would be compensated by the individual Scrivo Defendants for its performance. *See Fulbright & Jaworski, LLP v Carucci*, 63 AD3d 487, 489 (1st Dept 2009). It also has alleged that the services were performed for the individual Scrivo Defendants, who accepted them. *See General Sec. Prop. & Cas. Co. v American Fleet Mgt., Inc.*, 37 AD3d 345, 346 (1st Dept 2007).

As for the corporate Scrivo Defendants, Enko unequivocally denies contracting with or working for either entity.⁵ The quantum meruit claims, therefore, are dismissed as to them. However, the quasi-contract claim of unjust enrichment, as alleged in the second cause of action, is not dismissed as against the corporate defendants.

The theory of an action in quasi contract "rests upon the equitable principle that a person shall not be *allowed to enrich himself unjustly at the expense of another*. It is an obligation which the law creates, in the absence of any agreement, when and because the acts of the parties or others have placed in the possession of one person money, or its equivalent, under such circumstances that in equity and good conscience he ought not to retain it"... The general rule is that "the plaintiff *must have suffered a loss* and an action not based upon loss is not restitutionary." [citations omitted]

State v Barclays Bk. of New York, 76 NY2d 533, 540 (1990). Enko in its complaint and submitted affidavits alleges that it provided services and materials to the Scrivo Defendants, that the Scrivo Defendants did not pay for these services and materials and that they unjustly benefitted from them. These allegations sufficiently make out a claim for unjust enrichment. Nonetheless, Scrivo Inc. should not have been included in the fifth cause of action, which

⁵In support of their motion, the Scrivo Defendants have taken the position that the contracts were with the corporations and not the individuals. This does not impact the court's decision that the pleading is sufficient as to breach of contract with the individuals. However, the assertion is relevant to the quasi-contract causes of action.

concerns the 13th Street salon project, and Salon Inc. should not have been included in the second cause of action, which concerns the 50 Bond Street salon project.

C. *Mechanic's Liens*

The interest of the owner of real property may only be subjected to a mechanic's lien for improvements if the work was done "with the consent or at the request of the owner thereof." Lien Law § 3. To come within the intendment of the statute, "the owner must either be an affirmative factor in procuring the improvement to be made, or having possession and control of the premises assent to the improvement in the expectation that he will reap the benefit of it." *Paul Mock, Inc. v 118 East 25th Street Realty Co.*, 87 AD2d 756 (1st Dept 1982), quoting *Rice v Culver*, 172 NY 60, 65-66 (1902). "The consent contemplated by the statute is not a consent given to the tenant, but a consent given to the materialman; it is a holding out of the owner as acquiescing in the giving of credit which is at the foundation of the right to a lien against the owner of the fee." *Id.* quoting *Sager v Renwick Park & Traffic Assn.*, 172 App Div 359, 367, 368 (3d Dept 1916) (grant of foreclosure reversed without affirmative consent given by owner to materialman for tenant's improvements). Mere acquiescence by the owner is not sufficient. *Bedford Lake Park Corp. v Twelve Linden Corp.*, 8 AD2d 818, 819 (2d Dept 1959).

As for the 50 Bond Street property, Enko has pled consent by Stewart & Sons, the owner of Condominium Unit C-1, but the documents submitted by defendants show only negotiation and communication between Enko, Scrivo and Efros. The lease between Stewart & Sons and Scrivo has not been submitted. Mora does not allege that any principals from Stewart & Sons consented to the work done by Enko for the Scrivo Defendants. Without contradictory evidence

from defendants though, the court would be inclined to sustain the pleading, but this lien, as well as the other two, also fail because the contents of the notices of lien are deficient.

Under Lien Law 9(7), the notice of lien must state: "The property subject to the lien, with a description thereof sufficient for identification." A mechanic's lien placed on a condominium unit must limit the lien to the particular units in the condominium, if any, which were claimed to be subject to the lien, and shall not impose a "blanket lien" on the entire property. Lien Law §9 (7); Real Property Law § 339-1; *see also City of Albany Indus. Development Agency v. Degraff-Moffly/General*, 164 AD2d 20, 22 (3d Dept 1990) (the description of the property subject to the lien was inadequate because it failed to limit the lien to the particular condominium units owned); *Advanced Alarm Technology, Inc. v Pavilion Associates*, 145 AD2d 582, 584 (2d Dept 1988) (the description of the property subject to the lien was inadequate since it failed to limit the lien to the particular units in the condominium but rather imposed a "blanket lien" on the entire property). The September 4, 2009 mechanic's lien identifies the property subject to the lien as: 50 Bond Street, 1st Floor and Basement. The parties agree that Unit C-1 does not include the entire basement of the building, a part of which is a common area, and that the owners of the other condominium units did not consent. This deficiency renders the lien invalid. *See In re Atlas Tile & Marble Works*, 191 AD2d 247 (1st Dept 1993) (affirming invalidation of blanket lien where condominium unit not specified). Enko asks the court to amend the lien *nunc pro tunc*, but the court's authority to do so under Lien Law 12(a) "presupposes the existence of a valid lien and may not be construed to revive an invalid notice of lien." *Id.*

The mechanic's liens encumbering the West 13th Street property are not discharged. Enko has sufficiently pled the consent of Jarmco. The documents submitted by Jarmco in

support of its motion do not conclusively show otherwise. Further, Mora attests that: Martin Copell of Jarmco monitored the work and made suggestions; Jarmco hired Enko to perform work in the common areas of the West 13th Street building; Martin Copell had Enko do work in his office at the other defendants' expense; and Enko cleared violations in the 13th Street building at Martin's request. The lease between Jarmco and the Scrivo Defendants includes a clause requiring written consent by the landlord for the kind of work Enko performed for the tenants, but this is not conclusive as to the contractor.

However, Enko failed to respond to Jarmco's demand for an itemized statement under Lien Law 38, which provides in pertinent part:

A lienor who has filed a notice of lien shall, on demand in writing, deliver to the owner or contractor making such demand a statement in writing which shall set forth the items of labor and/or material and the value thereof which make up the amount for which he claims a lien, and which shall also set forth the terms of the contract under which such items were furnished....

Jarmco has shown conclusively that it served Enko with an April 28, 2010 demand for an itemized statement (Ex. C) and that Enko did not respond. In his affidavit, Enko's president Mora does not even respond to Jarmco's argument based on the failure to provide an itemized statement in response to the demand. The statement would be particularly important where, as here, there are two separate liens that concern work by Enko for different employers in separate areas of the building. The court is constrained by Lien Law 38 to ordering Enko's compliance and finding Jarmco's motion for discharge premature. *See e.g.* 8-92 Warren's Weed Real Property § 92-12 (2010).

Defendants' remaining argument based on misidentification of the parties that employed Enko is rejected. At this stage, the allegations support the claim that the contracts were with the individual Scrivo Defendants, who are the named employers in the liens. Accordingly, it is

ORDERED that the motion of defendants Eva Scrivo, Inc., Eva Scrivo Salon, Inc., Eva Scrivo and Arik Efros (Scrivo Defendants) to dismiss the First and Fourth Causes of Action for Breach of Contract against the individual defendants Eva Scrivo and Arik Efros is denied; and it is further

ORDERED that the Scrivo Defendants' motion to dismiss the First Cause of Action for Breach of Contract against Eva Scrivo Salon, Inc., and the Fourth Cause of Action for Breach of Contract against Eva Scrivo, Inc., is granted; and it is further

ORDERED that the Scrivo Defendants' motion to dismiss the Second Cause of Action for Quantum Meruit and Unjust Enrichment against Eva Scrivo Salon, Inc., and the Fifth Cause of Action for Quantum Meruit and Unjust Enrichment against Eva Scrivo, Inc., is granted; and it is further

ORDERED that the motions of the Scrivo Defendants and of defendant Jarmco Holding Corp. to dismiss the Eighth and Ninth Causes of Action to foreclose on mechanic's liens is denied without prejudice to re-filing if plaintiff fails to provide Jarmco with an itemized statement pursuant to Lien Law 38 within 14 days of this decision, and plaintiff is so ordered; and it is further

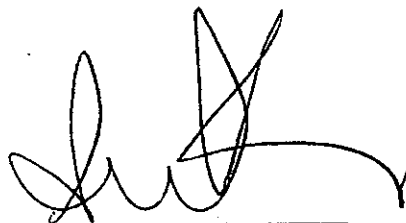
ORDERED that the motions of the Scrivo Defendants and of defendants Stewart & Sons, LLC and Board of Managers of The 50 Bond Street Condominium to dismiss the Third Cause of

Action to foreclose on a mechanic's lien is granted, the claim is dismissed, and the mechanic's lien dated September 4, 2009 is discharged; and it is further

ORDERED that the remaining causes of action are severed and continued; and it is further

ORDERED that the Scrivo Defendants shall serve and file an Answer to the Complaint within 30 days of this decision.

ENTER,

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right. The signature is positioned above a horizontal line.

J.S.C.

Date: January 13, 2011
New York, N. Y.