To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.

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NICHOLSON & GALLOWAY, INC.,

Plaintiff,

-against-

Index No. 50539/2017
DECISION & ORDER
Motion Sequence 1

PAUL RYAN ASSOCIATES DBA RYAN ASSOCIATES, PAUL RYAN, BLUE RIVER VALLEY, LLC, JANE DOES 1-10, being entities unknown to Plaintiff and who may have a claim upon the property being foreclosed upon herein,

Defendants.

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The following papers were received and considered in connection with a motion pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7) to dismiss the complaint and pursuant to CPLR 7503 for a stay of the action and direct arbitration:

Notice of Moton/Affirmation/Exhibits A-E	1-7
Memorandum of Law in Support	8
Affidavit in Opposition/Exhibit 1	9-10
Memorandum of Law in Opposition	11
Reply Affirmation/Exhibits A-C	12-15

Factual and Procedural Background

On or about March 24, 2016, the defendant, Paul Ryan Associates, d/b/a Ryan Associates ("RA") entered into a subcontract with the plaintiff, Nicholson & Galloway, Inc. ("N&G"), to perform roofing and other construction work on a residence located at 663-655 North Broadway, Hastings-On Hudson, New York. On January 13, 2017, N&G commenced this action against the defendants seeking damages of $40,725.10 for work

performed and materials supplied. The complaint alleged five causes of action: (1) to foreclose a mechanic's lien; (2) breach of contract; (3) unjust enrichment; (4) account stated; (5) violation of the Prompt Payment Act.

RA and Paul Ryan ("Ryan") now file the instant motion pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7) seeking to dismiss the complaint as against the defendant Ryan on the grounds that Ryan has no liability to N&G and pursuant to CPLR 7503, seeking a stay of the action and to compel arbitration.

In support of the motion, the defendants rely upon, *inter alia*, a statement of information, NYS Department of State Corporation document, certificate of assumed name, a copy of the subcontract, an attorney's affirmation and a memorandum of law. The defendants argue that Ryan is not a proper party under the New York Lien Law, that RA is a corporate entity, and that Ryan is not personally liable under any agreement between N&G and RA and that there is no privity of contract between N&G and Ryan. The defendants argue in defense of the motion to compel arbitration, that N&G and RA have a valid agreement to arbitrate the disputes raised in the complaint.

N&G opposes the motion and in support of its opposition, submits the subcontract between N&G and RA, an attorney's affirmation and a memorandum of law. N&G asserts that arbitration is not necessary, since there is no dispute between the parties. N&G also asserts that the arbitration clause should be construed in accordance with the parties' intent, which is that RA's failure to pay the agreed amount due, is not subject to arbitration. With regard to Ryan's individual liability, N&G argues that he is personally liable because his company failed to use or maintain the proper corporate designations.

Discussion

Rule 3211 of the Civil Practice Law and Rules provides, in relevant part that,

"[a] party may move for judgment dismissing one or more causes of action asserted against [it] on the ground that:
(1) A defense is founded upon documentary evidence; or
(7) the pleading fails to state a cause of action..."
(N.Y. Civ. Prac. L. & R. 3211[a] [7]).

In such motions, the facts alleged in the complaint are accepted as true, and the only determination is whether the facts alleged fit within any recognizable legal theory of recovery. However, this rule does not apply to legal conclusions lacking factual support, or to factual claims that are contradicted by documentary evidence (*see Doria v Masucci*, 230 AD2d 764 [2d Dept 1996]).

"A motion to dismiss pursuant to CPLR 3211(a)(1) may be appropriately granted only where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*see 730 J & J LLC v Fillmore Agency, Inc.*, 303 AD2d 486 [2d Dept 2003]).

Under CPLR 3211(a)(7), initially "[t]he sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law...." (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). On a motion to dismiss for failure to state a cause of action, the court must view the challenged pleading in the light most favorable to the non-moving party, and determine whether the facts as alleged fit within any cognizable legal theory (*see Brevtman v Olinville Realty, LLC*, 54 AD3d 703 [2d Dept 2008]; *see also EBC 1, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, [2005]; *Leon v Martinez*, 84 NY2d 83 [1994]).

Upon review, the Court finds that the causes of action against Ryan must be dismissed. With regard to the first cause of action to foreclose on the mechanic's lien, Ryan does not have a lien or claim on the property, nor is he an owner of record. Neither is he personally liable for the debt upon which the mechanic's lien is based. With regard to the other causes of action, Ryan was not a party to the subcontract, as principal of RA. Paul Ryan Associates is a foreign corporation organized in California and authorized to do business in New York State under the assumed name of Ryan Associates. The Court finds no merit in N&G's contention that because Paul Ryan Associates or the assumed name of Ryan Associates does not use a corporate designation to give an indication that it is a corporation, Paul Ryan individually should not gain protection of the corporate shield.

RA is allowed to use an assumed name and is not required to use a corporate designation in its name. The plaintiff did not provide the Court with any statute or case which makes such a requirement and RA has properly filed all necessary documents to be properly authorized as a corporation in New York and operated under an assumed name. Therefore, Ryan is entitled to the corporate shield protection.

RA also seeks to stay the action and compel arbitration. CPLR 7503 states in relevant part that:

A party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration. Where there is no substantial question whether a valid agreement was made or complied with, and the claim sought to be arbitrated is not barred by limitation..., the court shall direct the parties to arbitrate. CPLR 7503(a). 'In deciding an application to compel arbitration pursuant to CPLR 7503(a), the court is required to "first make a determination whether the parties have entered into a valid arbitration agreement

(citation omitted) and, if so, whether the issue sought to be submitted to arbitration falls within the scope of that agreement"' (*Koob v IDS Financial Services, Inc.* 213 AD2d 26 [1st Dept 1995]). "The agreement [to arbitrate] must be clear, explicit and unequivocal...and must not depend upon implication or subtlety" *(Sutphin Retail One, LLC v Sutphin Airtrain Realty, LLC*, 143 AD3d 972, 973 [2d Dept 2016]).

"A broad arbitration clause should be given the full effect of its wording in order to implement the intention of the parties" (*Weinrott v Carp*, 32 NY2d 190, 199 [1973]). A court's job is to perform the initial screening process designed to determine in general terms whether the parties have agreed that the subject matter under dispute should be submitted to arbitration. The burden is on the party seeking arbitration, to demonstrate a "clear and unequivocal" agreement to arbitrate, (*Matter of Siegel v 141 Bowery Corp.*, 51 AD2d 209, 212). Here, the defendants have demonstrated a clear and unequivocal agreement to arbitrate and the Court finds a relationship between the subject matter of the dispute and the general subject matter of the underlying subcontract.

It is clear to the Court that the parties entered into a valid arbitration agreement and that the issues stated in the summons and complaint are encompassed within the subcontract's broad arbitration clause which states that:

> Subject to this Subcontract and the General Contract, if any questions or claims arise regarding Subcontractors Operations, or Subcontractors performance on the Project, under the General Contract and contract documents and/or under this Subcontract, or regarding the rights and obligations of Contractor and Subcontractor, Subcontractor and Contractor will resolve any dispute through arbitration, whether or not the General Contractor or any other contract documents require arbitration.

The Court finds no merit in N&G's assertion that there is no dispute between the

parties. The plaintiff asserts disputes in its complaint, which RA has not addressed because it has not yet filed an answer. As per the arbitration clause, any questions or claims regarding the rights and obligations of the contractor or subcontractor, are subject to arbitration. Here, N&G commenced this action by filing a complaint and is asserting a right of payment for work and materials from the defendants. Therefore, there is a dispute, which is subject to arbitration. Further, RA was not required to include N&G in its arbitration with the owner of the property, Blue River Valley, LLC., and its failure to include N&G is not an admission that there is no dispute between the parties.

N&G asserts that Section 26 of the subcontract is much broader than the arbitration clause and makes clear that there are other areas, involving any act, omission or requirement of the Contractor, which are to be resolved by the court and not by arbitration N&G argues that the clear intent of the parties was that RA's failure to pay is not subject to arbitration. Section 26 states in pertinent part that:

> No claim, suit, action, arbitration or proceeding shall lie or be maintained by Subcontractor that arises out of or is in any way connected with or incidental to this Subcontract or the performance of Work or which concerns any act, omission or requirement of Contractor unless such action shall be commenced within one(1) year after substantial completion of the Work performed pursuant to the Subcontract.

However, the Court understands Section 26 to simply states that any claim, suit, action or arbitration must be commenced within one year after substantial completion of the work performed. It does not prevent arbitration, nor does it negate the arbitration clause. Further, there is nothing in the provisions of the subcontract that would establish to this Court that the intent of the parties was not to arbitrate RA's failure to pay.

Therefore, the defendants' motion is granted in all respects and it is

ORDERED that all causes of action are dismissed as against Paul Ryan; and it is further

ORDERED that the parties shall submit to arbitration pursuant to the subcontract; and it is further

ORDERED that the action is stayed pending such arbitration.

The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York
September 25 2017

Sam D. Walker
HON. SAM D. WALKER, J.S.C.