

NO. 2018-42734

ABG GENERAL CONSTRUCTION	§	IN THE DISTRICT COURT
Plaintiff,	§	
	§	
V.	§	269TH JUDICIAL DISTRICT
	§	
3S REAL ESTATE INVESTMENTS,	§	
LLC- SERIES 3	§	
Defendant.	§	OF HARRIS COUNTY, TEXAS

PLAINTIFF'S AMENDED PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES ABG General Construction, hereinafter called Plaintiff, complaining of and about 3S Real Estate Investments, LLC- Series 3, hereinafter called Defendant, and for cause of action shows unto the Court the following: completely

DISCOVERY CONTROL PLAN LEVEL

1. Plaintiff intends that discovery be conducted under Discovery Level 2.

PARTIES AND SERVICE

2. Plaintiff, ABG General Construction, is an entity doing business in Texas.
3. Defendant, 3S Real Estate Investments LLC- Series 3, has already made an appearance.

CLAIM FOR RELIEF

4. Plaintiff seeks monetary relief of \$100,000 or less and non-monetary relief.

JURISDICTION AND VENUE

5. This Court has subject-matter jurisdiction over this lawsuit because the amount in controversy exceeds this Court's minimal jurisdictional requirements and because district courts have exclusive jurisdiction over foreclosure suits to enforce mechanic's liens. This Court has personal jurisdiction over Plaintiff because they are Texas residents and over

Defendant, because it purposefully availed itself of the privileges and benefits of conducting business in Texas by engaging in business in Texas in a continuous and systematic manner.

6. Venue is mandatory in Harris County, Texas, pursuant to Tex. Civ. Prac. & Rem. Code § 15.011 because lawsuits to foreclose mechanics' liens on real property are to be maintained in the county in which all or a part of the property is located, and this is the county in which all of the property at issue is located. Venue is also proper in Harris County, Texas, pursuant to Tex. Civ. Prac. & Rem. Code §§15.002(a)(1) and (3) since all or a substantial part of the events or omissions giving rise to Plaintiff's claims occurred in Harris, Texas.

FACTUAL ALLEGATIONS

7. ABG General Construction agreed with 3S Real Estate Investments, LLC- Series 3 that ABG General Construction would do demo, design, build a BBQ including stucco and related thereto and 3S Real Estate Investments, LLC- Series 3 would pay for services. After all, just offsets the amount owed is \$4,000.00.

1) OWNER: 3S Real Estate Investments, LLC- Series 3
LEGAL ADDRESS: LT 6 BLK 16 HYDE PARK MAIN of Harris County, Texas
COMMON ADDRESS: 2105 Morse St., Houston, Texas 77019
CLAIM AMOUNT: \$4,000.00

8. Plaintiff provided valuable goods or services to the Defendant, specifically construction and related work.

9. Defendant accepted the goods or services from Plaintiff, with knowledge that the Plaintiff expected payment for same.

10. In reliance on the promise of Defendant, that would pay monies, Plaintiff performed work.

11. The actions taken by the Plaintiff was reasonable and foreseeable in light of the

promise made by Defendant.

12. Plaintiff, through counsel, an affidavit with the Real Property Records of Harris County, claiming mechanic's and materialmen's liens against the Projects (the "Lien").

FORECLOSURE OF MECHANIC'S LIENS AGAINST THE PROJECT

13. Plaintiff has taken all steps necessary to perfect and create mechanic's liens against the Project pursuant to Chapter 53 of the Texas Property Code. Plaintiff gave timely notice to the real property owner, of all unpaid invoice amounts in its notice letter. Plaintiff duly and timely filed its Affidavits claiming Mechanic's and Materialman's Liens against the Project with the Real Property Records of Harris County, Texas ("Lien Affidavits"). The Lien Affidavits were indexed and recorded by the Harris Clerk. Plaintiff sent copies of the Lien Affidavits to Defendant. Plaintiff also made demand on Defendant for payment of the Lien Affidavits.

14. After all, just and lawful offsets, payments, and credits have been allowed, the balance due and unpaid to Plaintiff on the lien claims.

15. Plaintiff is entitled to and seek the establishment and foreclosure of its mechanic's liens on the property described above together with all improvements located thereon. Plaintiff is entitled to an Order of Sale and a Writ of Possession to be issued by a sheriff or constable with the State of Texas, directing him/her to seize and sell said property as under execution and satisfaction of Defendant obligations by reason of its failure to pay the sums due and owing as set forth above. If the proceeds of such sale are insufficient to satisfy Defendant Obligations, then Plaintiff request that the sheriff or constable take the money and any balance thereof remaining unpaid out of any other property of Defendant, as in the case of ordinary execution. Any excess amounts should be paid to Defendant.

16. All conditions precedent have been performed, have occurred, or have been waived in order for Plaintiff to possess its mechanic's liens on the real estate, improvements, and removables located on the property.

LIABILITY UNDER TEXAS PROPERTY CODE SECTION 53.083

17. Plaintiff gave notice to Defendant pursuant to Section 53.083 of the Texas Property Code. Plaintiff made demand for payment to Defendant pursuant to Section 53.083, neither contractor (at all levels) nor Owner of Property paid debt. Notices were given in writing and under the proper time table. Therefore, pursuant to Section 53.083 of the Texas Property Code, since Defendant assented to the demand, Defendant was required to pay Plaintiff's lien claims, which they failed to do. Section 53.083 of the Texas Property Code provides that under such conditions Plaintiff's lien claims should have been paid by Defendant. However, since Defendant failed to pay Plaintiff, despite its statutory obligations to do same, Defendant is personally indebted to Plaintiff for the amount of the subject materialman's liens. Plaintiff is further entitled to a personal judgment against Defendant and for prejudgment and post-judgment interest as may be allowed by the law, and costs.

BREACH OF CONTRACT

18. Plaintiff performed, or in the alternative substantially performed, all of its obligations under the Agreements with Defendant. Defendant breached its agreements by failing to pay their respective balances due under the Agreements for the labor, materials and/or equipment Plaintiff provided to Defendant and to the Project.

19. As a result of the breach of these Agreements, Plaintiff sustained damages within the jurisdictional limits of this Court. All conditions precedent have been performed, and have occurred to entitle Plaintiff to recover its damages under the Agreements.

SWORN ACCOUNT

20. Defendant has defaulted by failing to make payments on the account. The principal balance due to Plaintiff on the account after all just and lawful offsets, payments, and credits have been allowed. Plaintiff has demanded that Defendant pay this amount, but Defendant has not done so.

21. All conditions precedent have been performed or have occurred.

CONSTITUTIONAL LIEN

22. Pursuant to Texas Constitution, Article XVI Section 50, "Any mechanic, artisan, or material man" who provides improvement to real property, if Defendant refused to pay or is unable to pay for the improvement Plaintiff seeks to enforce a Constitutional Lien on the property.

23. *Damages.* Plaintiff seeks damages.

24. *Attorney's Fees.* As the result of Defendant's failure to satisfy Plaintiff's demand for payment, Plaintiff has found it necessary to employ the undersigned attorney to seek foreclosure of the lien. This claim was timely presented to Defendant and remains unpaid. Reasonable fees for the attorney's services rendered and are to be rendered.

QUANTUM MERUIT

25. In the alternative, Plaintiff provided labor, materials or equipment to Defendant under circumstances which Defendant knew, or should have known, that Plaintiff expected payment. Defendant is liable to Plaintiff respectively in the amounts owed, the reasonable value of the labor and materials furnished to Defendant under *quantum meruit* for which payment have not been made.

UNJUST ENRICHMENT

26. Pleading in the alternative, failure to allow Plaintiff to recover for the reasonable value of its materials it supplied to the project, the benefit of which Defendant has willingly accepted, but refused to pay for would result in unjust enrichment to Defendant. Defendant is liable to Plaintiff in the amounts owed, the reasonable value of the materials Plaintiff furnished to Defendant for which Plaintiff has not been paid.

PROMISSORY ESTOPPEL

27. Plaintiff incorporates by reference the factual allegations contained in the preceding paragraphs.

28. In the alternative, Plaintiff seeks to recover for the costs incurred by Plaintiff in detrimental reliance on the promise of the Defendant.

DAMAGES/FORCLOSURE

29. Plaintiff has sustained damages in excess of this Court's jurisdictional minimum, as a result of the actions and/or omissions of Defendant described hereinabove and seek a judicial foreclosure to satisfy the judgment.

PRE-JUDGEMENT AND POST-JUDGEMENT INTREST

30. Plaintiff seeks recovery of prejudgment interest at the maximum rate permitted by law, more specifically, 1.5% compounded monthly under Texas Property Code Chapter 28.

ALTERNATIVE ALLEGATIONS

31. Pursuant to Rules 47 and 48, Texas Rules of Civil Procedure and the rules of pleadings, allegations in this petition are made in the alternative.

VIOLATIONS OF TEXAS PROMPT PAY ACT AND CLAIM FOR INTEREST

32. By way of additional plea and/or in the alternative, Plaintiff seeks recovery of interest as outlined in this pleading pursuant to Tex. Prop. Code Ch. 28, et seq., known as the Texas Prompt Pay Act. Specifically, the Texas Prompt Pay Act requires prompt payment to subcontractors, such as Plaintiff, which Defendant has failed to do despite receipt of payment of all or part of the amount due for the work performed by Plaintiff on the Project. Therefore, Defendant has violated the Texas Prompt Pay Act. There is no dispute regarding the validity of Plaintiff's claim, Plaintiff is entitled to recover from Defendant statutory penalty interest at a rate of one and a half percent (1½%) per month beginning date of completion.

33. In the alternative, Plaintiff seeks to recover from Defendant interest on the respective principal sums owed by them at the highest rate allowed by law as provided and authorized by the Texas Finance Code.

ATTORNEYS' FEES AND INTEREST

34. Plaintiff is entitled to recover its attorneys' fees and costs from Defendant pursuant to Texas Civil Practice and Remedies Code § 38.001 et seq. Plaintiff is entitled to recover its attorneys' fees, interest and costs for bringing its lien foreclosure actions against Defendant pursuant to Tex. Prop. Code § 53.156.

35. All conditions precedent to Plaintiff's right to recover its attorneys' fees have been performed or have occurred.

36. Plaintiff is also entitled to recover pre-judgment and post-judgment interest at the highest legal rate from Defendant, pursuant to applicable Texas law.

CONDITIONS SATISFIED

37. Plaintiff has fully or substantially performed all acts necessary to perfect and

establish all claims and causes of action asserted in this lawsuit.

38. All conditions precedent to Plaintiff's right to recover on any of the claims and causes of action asserted in this lawsuit have been discharged, satisfied or fully performed.

REQUEST FOR DISCLOSURE

39. Pursuant to Texas Rule of Civil Procedure 194, Defendant 3S Real Estate Investments LLC Series 3 are hereby requested to disclose, within fifty (50) days of service of this request, the information and material described in R.190.2(b)(6) and Rule 194.2 (a) through (l).

NOTICE

40. Plaintiff incorporate by reference paragraphs 1 through 39 above.

41. This is an attempt to collect a debt. Any information obtained will be used for that purpose.

TEX. R. CIV. P. 193.7 NOTICE

42. This paragraph serves as notice, pursuant to Tex. R. Civ. P. 193.7, that documents produced in response to written discovery requests served by Plaintiff will be used against the producing party in any pretrial proceeding and/or trial.

PRAYER

43. For these reasons, Plaintiff asks that Defendant be cited to appear and answer, further, that the Court enter a Judgment that Defendant take nothing, dismiss Defendant's claims with prejudice and that Plaintiff has judgment against Defendant in their proportionate share, for:

- a) All Plaintiff's actual damages
- b) The foreclosure of Plaintiff's mechanic's liens against the Project to satisfy its claims;
- c) Order of sale of the Project with the proceeds of such sale being paid to Plaintiff in satisfaction of the debt owed to it plus interest, attorney's fees and costs of Court;
- d) Statutory penalty interest under the Prompt Payment Statute against Defendant;
- e) Costs per Section 53.156 of the Texas Property Code;
- f) Reasonable attorneys' fees in the trial court and all appellate courts;
- g) All costs of court in the trial court and all appellate courts; and
- h) All such other and further relief, both general and specific, at law and in equity, to which it may show itself to be justly entitled.

Respectfully submitted,

The Law Offices of Marcos & Associates, P.C.

By: _____

Javier Marcos, Jr.

Texas Bar No. 24028925

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228 Westheimer Road

Houston, TX 77006

Tel. (713) 528-7711

Fax. (713) 528-7710

Attorney for Plaintiff ABG General Construction

CERTIFICATE OF SERVICE

I certify that on September 10, 2018 a true and correct copy of Plaintiff's Amended Petition was served by e-file to all counsel of record.

Javier Marcos, Jr.

ABG GENERAL CONSTRUCTION
Plaintiff,

V.

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LLC- SERIES 3
Defendant.

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§ **269TH JUDICIAL DISTRICT**
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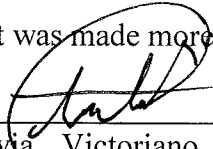
VERIFICATION FOR SUIT ON SWORN ACCOUNT

BEFORE ME, the undersigned authority, on this day personally appeared Silvia Victoriano, who swore on oath that the following facts are true:

- "1. My full name is Silvia Victoriano, President of ABG General Construction.
- "2. I am at least 18 years of age and am of a sound mind.
- "3. I have care, custody, and control of all records concerning the account of 3S Real Estate Investments, LLC- Series 3, Defendants.

"4. I hereby aver that the claim Plaintiff's Amended Petition is within the personal knowledge of the affiant, is just and true, and is due by Defendants to Plaintiff and that all just and lawful offsets, payments, and credits to this account have been allowed.

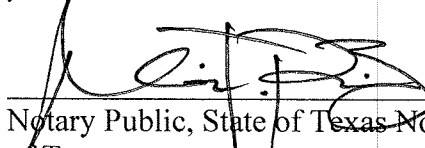
"5. These records show that a total principal balance of \$4,000.00, exclusive of interest, is due and payable by 3S Real Estate Investments, LLC- Series 3, Defendants, to ABG General Construction, Plaintiff, and demand for payment was made more than thirty days ago."



Silvia Victoriano, President of ABG General Construction, Affiant

SIGNED under oath before me on 9/10/18.





Notary Public, State of Texas Notary Public, State of Texas