

CAUSE NO. 2018-42734

ABG General Construction, Plaintiff,	§	IN THE DISTRICT COURT
	§	
	§	
v.	§	OF HARRIS COUNTY, TEXAS
	§	
3S Real Estate Investments, LLC – Series 3 Defendant.	§	269th JUDICIAL DISTRICT

DEFENDANT’S TRADITIONAL MOTION FOR SUMMARY JUDGMENT

Defendant, 3S Real Estate Investments, LLC – Series 3, asks the Court to sign a summary judgment under Texas Rule of Civil Procedure 166a on Plaintiff ABG General Construction’s causes of action against Defendant for: (1) liability under Section 53.083 of the Texas Property Code; (2) *quantum meruit*; and (3) violations of the Texas Prompt Pay Act.

INTRODUCTION

1. Plaintiff, ABG General Construction (“ABG”), sued Defendant, 3S Real Estate Investments, LLC – Series 3 (“3S” or “Movant”), to foreclose on a lien and for the causes of action listed above.

2. Plaintiff’s causes of action all suffer from a similar deficiency – a subcontractor such as Plaintiff has no right to bring these claims against 3S, the owner of the property at which subcontractor performed services under the direction of a general contractor.

BACKGROUND

3. Defendant contracted with United Plus Construction to build an outdoor bbq grill at a residential property owned by Defendant at a total project price of \$2,500. *See* Exhibit 1.

4. Plaintiff was engaged as a subcontractor to United Plus Construction to complete stucco work at a residential property owned by Defendant and Plaintiff claims United Plus Construction promised \$4,000 to Plaintiff upon completion of the project. *See* Exhibit 2.

5. Defendant remitted payment of \$2,500 to general contractor upon notice that the project was complete, prior to receiving Plaintiff’s fund-trapping notice. *See* Exhibits 3 and 4.

6. Plaintiff then improperly filed a lien in excess of the 10% statutory retainage. *See* Exhibit 2.

7. Defendant now files this traditional motion for summary judgment seeking dismissal of Plaintiff’s non-lien related causes of action listed above.

SUMMARY-JUDGMENT EVIDENCE

8. To support the facts in this motion, Defendant offers the following summary-judgment evidence attached to this motion and incorporates the evidence into this motion by reference.

Exhibit 1: Correspondence between Defendant and general contractor United Plus Construction.

Exhibit 2: Affidavit Claiming Mechanic's and Materialman's Lien.

Exhibit 3: Proof of Payment to United Plus Construction.

Exhibit 4: Plaintiff's Fund-Trapping Notice.

TRADITIONAL SUMMARY JUDGMENT PLAINTIFF'S CAUSE OF ACTION FOR LIABILITY UNDER SECTION 53.083 OF THE TEXAS PROPERTY CODE

A. Defendant can disprove Plaintiff's cause of action as a matter of law.

9. Defendant is entitled to summary judgment on Plaintiff's cause of action for liability under Section 53.083 of the Texas Property Code because Defendant can disprove as a matter of law at least one element of the cause of action. To prevail on a cause of action for liability under Section 53.083 of the Texas Property Code¹, Plaintiff must prove the following: that the owner remitted funds to the general contractor subsequent to receiving Plaintiff's Section 53.083 notice. *See* Texas Prop. Code Section 53.084.

- a. Plaintiff paid the general contractor in full *prior to* receiving Plaintiff's Section 53.083 notice. *Cf.* Exhibit 3 and 4.

B. Plaintiff's cause of action is not viable.

10. Defendant is entitled to summary judgment on Plaintiff's cause of action for liability under Section 53.083 of the Texas Property Code because Plaintiff's pleading affirmatively demonstrates that it is not a viable claim. Section 53.083 of the Texas Property Code does not create liability for the owner, it only dictates the requirements by which a subcontractor is to provide notice to the owner of a property.

C. Plaintiff's pleadings do not support its cause of action.

11. Defendant is entitled to summary judgment on Plaintiff's cause of action for liability under Section 53.083 of the Texas Property Code because the claim fails to sufficiently state

¹ Plaintiff most likely intended to establish Defendant's liability pursuant to Section 53.084 of the Texas Property Code (not 53.083), so this motion will attempt to address any potential liability under either section of the Code.

a cause of action. Plaintiff has failed to allege that Defendant released funds to the general contractor following receipt of Plaintiff's Section 53.083 notice.

**TRADITIONAL SUMMARY JUDGMENT
PLAINTIFF'S CAUSE OF ACTION FOR *QUANTUM MERUIT***

A. Defendant can disprove Plaintiff's cause of action as a matter of law.

12. Defendant is entitled to summary judgment on Plaintiff's cause of action for *quantum meruit* because Defendant can disprove as a matter of law at least one element of the cause of action. To prevail on a cause of action for *quantum meruit*, Plaintiff must prove the following: that an express contract does not cover the subject matter for which recovery is sought under *quantum meruit*. See *Truly v. Austin*, 744 S.W.2d 934,936 (Tex. 1988); *Woodard v. Southwest States, Inc.*, 384 S.W.2d 674, 675 (Tex. 1964); *Economy Forms Corp. v. Williams Bros. Constr. Co.*, 754 S.W.2d 451, 458 (Tex.App. — Houston [14th Dist.] 1988, no writ).

- a. In this instance, Plaintiff claims to have had an express contract with United Plus Construction, the general contractor, for the services upon which it now seeks to recover under *quantum meruit*. See Plaintiff's Second Amended Petition, paragraph 7; see also Exhibit 2.

B. Plaintiff pleaded facts that negate {his/her/its} own cause of action.

13. Defendant is entitled to summary judgment on Plaintiff's cause of action for *quantum meruit* because Plaintiff affirmatively pleaded the following facts that negated its claim: Plaintiff pleaded to the existence of an express contract covering the subject matter for which recovery is sought under *quantum meruit*. *Id.*

**TRADITIONAL SUMMARY JUDGMENT
PLAINTIFF'S CAUSE OF ACTION FOR VIOLATIONS OF THE TEXAS PROMPT PAY ACT**

A. Defendant can disprove Plaintiff's cause of action as a matter of law.

14. Defendant is entitled to summary judgment on Plaintiff's cause of action for violations of the Texas Prompt Pay Act because Defendant can disprove as a matter of law at least one element of the cause of action. To prevail on a cause of action for violations of the Texas Prompt Pay Act, Plaintiff must prove the following: that Plaintiff is a contractor in privity with the owner. See Tex. Prop Code §28.002(a).

- a. In this instance, Plaintiff is a subcontractor and not a contractor under the statute, as Plaintiff claims to have had an express contract with United Plus Construction, the general contractor, for the services upon which it now seeks to recover under the Texas Prompt Pay Act. See Tex. Prop Code §28.001; see also Plaintiff's Second Amended Petition, paragraph 7; see also Exhibit 2.

B. Plaintiff pleaded facts that negate its own cause of action.

15. Defendant is entitled to summary judgment on Plaintiff's cause of action for violations of the Texas Prompt Pay Act because Plaintiff affirmatively pleaded the following facts that negated its claim: that it is a subcontractor and not a contractor under the statute. *Id.*

ALTERNATIVE RELIEF

16. In the alternative, if the Court denies any part of Defendant's motion for summary judgment, Defendant asks the Court to sign an order specifying the facts that are established as a matter of law and directing any further proceedings as are just. *See* Tex. R. Civ. P. 166a(e).


CONCLUSION

17. Plaintiff's status as a subcontractor bars his attempt at recovery pursuant to the above stated causes of action and Plaintiff's prompt payment to the general contractor releases Plaintiff from liability under Tex. Prop. Code §53.083/.084.

PRAYER

For these reasons, Defendant asks the Court to grant this motion and sign an order for partial summary judgment. In the alternative, Defendant asks for an order specifying the facts that are established as a matter of law.

Respectfully submitted,

By: 
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**ATTORNEY FOR DEFENDANT 3S
REAL ESTATE INVESTMENTS,
LLC**

CERTIFICATE OF CONFERENCE

On September 14, 2018, counsel conferenced in person regarding Defendant's intent to file a motion for summary judgment on Plaintiff's claims. Subsequent to that conference, Plaintiff amended its petition but failed to nonsuit the causes of action to which Defendant now files this motion. Defendant files this motion having attempted to comply with TEX. R. CIV. P. 191.2 and Rule 3.3.6 of the LOCAL RULES OF THE CIVIL TRIAL DIVISION OF THE HARRIS COUNTY DISTRICT COURTS.




Barry M. Hammond, Jr.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document has been served upon the following as outlined below on this 23rd day of September 2018.

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Barry M. Hammond, Jr.