

NO. 2018-42734

ABG GENERAL CONSTRUCTION (VICTORI -- 2105) Plaintiff,	§	IN THE DISTRICT COURT
	§	
V.	§	269TH JUDICIAL DISTRICT
	§	
3S REAL ESTATE INVESTMENTS, LLC- SERIES 3 Defendant.	§	OF HARRIS COUNTY, TEXAS

**PLAINTIFFS RESPONSE TO
DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT**

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Plaintiff, ABG General Construction, Non-Movant herein, and requests this Honorable Court to DENY Defendant's Motion.

**I.
INTRODUCTION**

A. When a movant files a motion for summary judgment based on summary judgment evidence, the court can grant the motion only when the movant's evidence proves, as a matter of law, all the elements of the movant's cause of action or defense or disproves the facts of at least one element in the non-movant's cause or defense.

B. When evaluating a motion for summary judgment, the court must:

1. Assume all the non-movant's proof is true;
2. Indulge every reasonable inference in favor of the non-movant; and
3. Resolve all doubts about the existence of a genuine issue of material fact against the movant.

C. The burden is on the Non-Movant to produce summary judgment evidence raising a genuine issue of material fact as to the challenged element.

D. The Court must view the evidence so produced in a light most favorable to the Non-Movant, indulging every reasonable inference and resolving any doubts in Non-Movant's favor.

II. DEFENSE / ARGUMENT

A. Movant is attempting to confuse the Court. Movant's sole argument argues:

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 series under the direction of a general contractor.

See Movant's motion. If this was true, then the entire Texas Property Code Chapter 53 would be bad law. Non-Movants complied with the statute and sent the proper notices. See:

- Exhibit A Request Information to Property Owner
- Exhibit B Request Information to Contractor
- Exhibit C Notice of Claim to Owner, Contractor, and Property
- Exhibit D Letter sending copy of Lien to Owner, Contractor, and Property
- *Exhibit E Lien Affidavit*

Non-Movants even request information to both contractor and property owner to determine if any information was lacking or incorrect per Texas Property Code sections 53.106, 53.107, and 53.159. It is undisputed that the notices were received. Movant simply failed to retain in their entirety and therefore are personally responsible for the entire claim. According to Movant they "remitted full payment for invoice on January 9, 2017" after "receiving an invoice on December 29, 2016". Movant is supposed to retain for a full 30 days after receipt of an all bills paid affidavit, of which, Movant did not. Movant did not even attain an all bills paid affidavit, they simply paid an invoice. If Movant would have waited the statutory period, then the full amount would have been retained.

B. Movant is further misguiding the Court by inaccurately stating that the general contractor is "United Plus Construction" and that the total agreed price for project was "\$2,500". First, the property owner, Movant (3S Real estate Investments, LLC), is the general contractor.

Movant has hired many trades, one of which, happens to be “United Plus Construction”. The barbeque work performed by Non-Movant was one of many projects performed on this real property during that time period. In fact, this barbeque project was second project Non-Movant performed on the property. The first project performed by Non-Movant on the property was stucco work to the side of the home. Movant’s is still responsible for a 10% retainage of the entire project which would be well more than \$4,000. Irrelevant if Movant was or was not “a general contractor”, Movant is still required to maintain 10% of the entire project. Not even an all bills affidavit has been presented by the Movant. There was absolutely no retainage practices on the entire project.

C. A statutory lien may be based on the promise implied by law to pay for beneficial services rendered and knowingly accepted. A recovery in quantum meruit may support a lien. Sixty-Seven Prop. V. Cutsinger Elec. Contr., 536 S.W.2d 268, 271 (Civ.App.—Corpus Christi 1976, no writ. The lien is perfected when a lien affidavit is properly filed and served; if the claim is unpaid, the original contractor may expect the lien to attach to the property. Contractor statutory lien when there was showing that contract was substantially performed was based on quantum meruit. Davidson v. Clearman, 391 SW2nd 48, 50-52 (Tex. 1965), Taylor v. Rigby, 574 S.W.2d 833, 837-839 (civ. App.—Tyler 1978, nre).

D. Funds must be retained for 30 days after last date of actual work. An owner who prematurely pays funds to a contractor before that should be done, and is then personally liable to derivative claimant. Prop. C. § 53.084, TDIndustries v. NCNB Texas Nat. Bank, 837 S.W.2d 270, 272 (Tex.App—Eastland 1992, no writ). Also see Texas Property Code 53.056(d) and 53.057 the owner is personally liable and the owner's property can be subjected to a lien unless: (1) the owner withholds payments from the contractor for payment of the claim; or (2) the

claim is otherwise paid or settled. Even further see, Texas Property Code Sec. 53.101.

REQUIRED RETAINAGE. (a) During the progress of work under an original contract for which a mechanic's lien may be claimed and for 30 days after the work is completed, the owner shall retain:

- (1) 10 percent of the contract price of the work to the owner; or
- (2) 10 percent of the value of the work, measured by the proportion that the work done bears to the work to be done, using the contract price or, if there is no contract price, using the reasonable value of the completed work.

(b) In this section, "owner" includes the owner's agent, trustee, or receiver.

By Movant's own admission they did not retain at all.

E. Movant, 3S Real Estate Investments, LLC – Series 3 is one in the same in the eyes of the law (Sham Contract). Tex. Prop. Code §53.026. *First Nat'l Bank in Dallas v. Whirlpool Corp.*, 517 S.W.2d 262 (Tex. 1974) and *Da-Col Paint Mfg. Co. v. American Indem. Co.*, 517 S.W.2d 270 (Tex.1974). The question is the appearance of control. Movant can and did effectively control the entire project. Tex. Prop. Code §53.026. *First Nat'l Bank in Dallas v. Whirlpool Corp.*, 517 S.W.2d 262 (Tex. 1974) and *Da-Col Paint Mfg. Co. v. American Indem. Co.*, 517 S.W.2d 270 (Tex.1974).

III.

A. Non-Movant filed a claim against Movant seeking affirmative relief seeking to foreclose under Chapter 53 Texas Property Code.

B. Movant alleges Movant is entitled to a summary judgment as a matter of law and alleges that Movant can disprove at least one element of Non-Movant's claim of to foreclose under Chapter 53 Texas Property Code.

1. Non-Movant claims a genuine issue of material fact exists as to Non-Movant's claim to foreclose under Chapter 53 Texas Property Code and submits an

affidavit, as summary judgment evidence, referenced in an appendix attached hereto, filed with this response and incorporated by such reference for all purposes as if recited verbatim herein.

IV.

A. Non-Movant filed a claim against Movant seeking affirmative relief for quantum meruit.

B. Movant alleges Movant is entitled to a summary judgment as a matter of law and alleges that Movant can disprove at least one element of Non-Movant's claim of quantum meruit.

1. Non-Movant claims a genuine issue of material fact exists as to Non-Movant's claim of quantum meruit and submits an affidavit, as summary judgment evidence, referenced in an appendix attached hereto, filed with this response and incorporated by such reference for all purposes as if recited verbatim herein.

V.

A. Non-Movant filed a claim against Movant seeking affirmative relief for Texas Prompt Pay Act.

B. Movant alleges Movant is entitled to a summary judgment as a matter of law and alleges that Movant can disprove at least one element of Non-Movant's claim of Texas Prompt Pay Act.

1. Non-Movant claims a genuine issue of material fact exists as to Non-Movant's claim of Texas Prompt Pay Act and submits an affidavit, as summary judgment evidence, referenced in an appendix attached hereto, filed with this response and incorporated by such reference for all purposes as if recited verbatim herein.

VI.

Oral Hearing AND Continuance Requested

Movant's motion is premature and has not allowed for the discovery period to complete. Non-Movant respectfully requests oral hearing and a continuance if the Honorable Judge of this Court does not deny Movant's motion.

VII.

OBJECTION TO MOVANT EXHIBIT 1

Non-Movant objects to Movant's Exhibit 1 in that: is hearsay, is not sworn, is not the best evidence, is not reliable, and is not a business record.

VIII.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Non-Movant prays that this Court will deny Defendant's Motion for Final Summary Judgment or order such other relief as may be appropriate.

Respectfully submitted,

Law Offices of Marcos & Associates, P.C.

By: _____

Javier Marcos, Jr.
Texas Bar No. 24028925
228 Westheimer Road
Houston, TX 77006
Tel. (713) 528-7711
Fax. (713) 528-7710
Email: jmarcos@marcoslaw.com
Attorney for Plaintiff ABG General Construction

CERTIFICATE OF SERVICE

I certify that on October 15, 2018 a true and correct copy of Plaintiffs' Response to Defendant's Motion for Final Summary Judgment and Defendant's Motion for No Evidence Summary Judgment was served via efile to all attorneys of record.



Javier Marcos, Jr.