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SIGNATURE SERIES:
Mechanic's Liens: An Overview of a Mechanic's Lien from the Perspective of Both Lienor and the Lienee

FACULTY:

Beth Gazes, Esq.
Taylor Eldridge & Endres, PC

September 13, 2022
Suffolk County Bar Association, New York

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Beth M. Gazes, Esq. – Associate Attorney at Taylor Eldridge & Endres, P.C.

Beth concentrates in real estate law, particularly in the areas of community association governance, litigation. real estate transactions, and landlord tenant matters,

Ms. Gazes is a graduate of Touro Law Center. While in law school, she served as a Board Member of the Moot Court Honors Board, as well as a member of the Touro Law Center Honors Program, Trial Advocacy and Practice Society, and Journal of Gender, Race, and Ethnicity. She was her class representative of the Student Bar Association and was the Founder of the Public Speaking Club at Touro Law Center. She also served as research assistant in areas of both land use and environmental crimes. Off campus, Ms. Gazes served on the NYSBA Commercial and Federal Litigation Section's Publication Committee and coached a Brentwood High School Student Mock Trial Team. She also served as intern to the Honorable C. Randall Hinrichs.

While studying at Touro, Ms. Gazes received CALI Awards for Academic Excellence in Land Use and Zoning, Legal Research, NY Civil Procedure, and her pro bono work at the college's Small Business and Not-for-Profit Clinic. She received the ABA State & Local Government Section Recognition for Academic Performance in Land Use and was honored at graduation with the Touro Law Pro Bono Service Award: Special Service to the Public & Community.

Ms. Gazes is a member of the Suffolk County Bar Association, New York Bar Association, and Suffolk County Women's Bar Association. She currently sits as a member of the Advisory Board of Touro's Institute for Land Use and Sustainable Development Law and was appointed to that position by Touro's Dean Elena Langan in February 2020. Ms. Gazes is also a member of the Ambassadors Counsel of Pride for Youth/Long Island Crisis Center and is a volunteer attorney with the Transgender Legal Defense & Education Fund assisting transgender individuals effectuate name changes on a pro bono basis.

Suffolk Academy Of Law
Signature Series
September 13, 2022

MECHANIC'S LIENS

Mechanic's Liens on Private Existing One-Family Homes in Suffolk County: What to Know When Representing Either a Lienor or a Lienee

Taylor, Eldridge & Endres, P.C.
Attorneys and Counselors at Law

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Attorneys and Counselors at Law

ABOUT

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- **Practice Areas:**
  - **Community Association Board Representation**
  - **Litigation**
  - **Real Estate Transactions**
  - **Landlord/Tenant Matters**
- **Touro University Jacob D. Fuchsberg Law Center, '20**

AGENDA

- What is a Mechanic's Lien?
- Definitions
- Who can file a Mechanic's Lien?
- How is a Mechanic's Lien filed?
- How does a Lienor enforce or collect amounts claimed under a Mechanic's Lien?
- How does a Lienee defend or discharge a Mechanic's Lien?

What is a Mechanic's Lien?

- Non-mortgage lien against real property
- Notice of Lien
- Filed by a "contractor" that performed "home improvement" services on the property against which the Notice of Lien is filed
- Covers labor and materials
- Must be filed within 4 months the latest of last time work performed
- Expires after one year

TODAY'S DEFINITIONS

- **MECHANIC'S LIEN or LIEN** : Notice of Mechanic's Lien
- **CONTRACTOR**: Includes downstream vendors (i.e., subs*)
- **OWNER**: Property Owner, lessee
- **HOME IMPROVEMENT**: Improvement to real property
- **CONTRACT**: Signed writing
- **LICENSE**: Home improvement contractor's license (County/Town)

**C.C.C. Renovations, Inc. v. VictoriaTowers Dev. Corp.*, 168 A.D.3d 664 (2nd Dept. 2019)

BIG PICTURE– Who has to litigate?

CONTRACTOR

- **FILES NOTICE OF LIEN**
  - PREPARED TO COMMENCE A FORECLOSURE ACTION TO COLLECT ON LIEN?
    - LIEN VALID?
    - EXAGGERATED?

PROPERTY OWNER

- **DISCOVERS LIEN**
  - SELLING (or refinancing)?

WHO IS ELIGIBLE TO FILE A MECHANIC'S LIEN?

TWO ELEMENTS:

- **Contractors, subcontractors, laborers, materialpersons, landscape gardeners, engineers, and preconstruction design professionals (among others) that made improvements to real property.**
  - Lien Law § § 2 and 3; see also *Matter of Old Post Rd. Assocs., LLC v. LRC Constr., LLC*, 177 A.D.3d 658 (2nd Dept., 2019)
- **Performed work with consent of property owner.**
  - Lien Law § 3; *see also Gcdm Ironworks v. Gjf Constr. Corp.*, 292 A.D.2d 495 (2nd Dept. 2002); *Ferrara v. Peaches Café LLC*, 32 N.Y.3d 348 (2018)

NOTICE OF LIEN – Filing and Facial Sufficiency

- **Filed in County Clerk's Office** (Lien Law §10)
- **Must be facially sufficient** (Lien Law § § 9, 10, and 19)
  - Timely (Four months since work completed) *Melniker v. Grae*, 82 A.D.2d 798 (2nd Dept. 1981); *Ren. Reh. Sys. Co., Inc. v. Faulkner*, 85 A.D.3d 752 (2nd Dept. 2011)
  - Must include, inter alia:
    - Accurate property description *Santucci Constr. Corp. v. Errico*, 242 A.D.2d 696 (2nd Dept. 1997)
    - Proper names:
      - Owner
      - Contractor(s)
      - First and last dates work performed
      - Amount unpaid to lienor
    - Section/Block/Lot of property
  - Verification

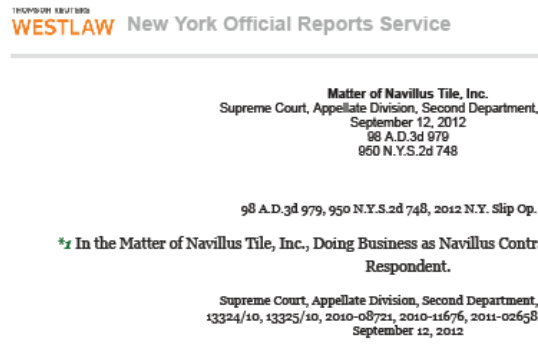
NOTICE OF LIEN – Filing and Facial Sufficiency *(continued)*

- **File Affidavit of Service (within 5 days of service)** *Outrigger Constr. Co. v. Nostrand Ave. Dev. Corp.*, 217 A.D.2d 689 (2nd Dept. 1995)
- Mechanic's Lien may be summarily discharged for facial deficiency (Special Proceeding Seeking Discharge) *Matter of Matrix Staten Island Dev., LLC v. BKS-NY, LLC*, 204 A.D.3d 1004 (2nd Dept. 2022)

ENFORCING A MECHANIC'S LIEN

- **Enforcing Mechanic's Lien:**
  - ***Foreclosure***
    - *J&M Indus., Inc. v. Red Apple 180 Myrtle Ave. Dev., LLC*, 197 A.D.3d 1154 (2nd Dept. 2021); *Martirano Constr. Corp. v. Briar Contracting Corp.*, 104 A.D.2d 1028 (2nd Dept. 1984)

- **Extending a lien**
  - ***Ex Parte Application, one year extension***
    - *Matter of Navillus Tile, Inc.*, 98 A.D.3d 979 (2nd Dept. 2021)
  - ***Motion, additional year extension***


WESTLAW New York Official Reports Service

Matter of Navillus Tile, Inc.
Supreme Court, Appellate Division, Second Department,
September 12, 2012
98 A.D.3d 979
950 N.Y.S.2d 748

98 A.D.3d 979, 950 N.Y.S.2d 748, 2012 N.Y. Slip Op.

*1 In the Matter of Navillus Tile, Inc., Doing Business as Navillus Contr
Respondent.

Supreme Court, Appellate Division, Second Department,
13324/10, 13325/10, 2010-08721, 2010-11676, 2011-02658
September 12, 2012

DISCHARGING A MECHANIC'S LIEN

- **DEPOSIT MONEY WITH CLERK**
  - *Peri Formwork Sys., Inc. v. Lumbermens Mut. Cas. Co.*, 112 A.D.3d 171,(App. Div. 2nd Dept. 2013)
    - *Lien shifts from one against real property to one against the bond/funds*
- **DEMAND ITEMIZED STATEMENT (Lien Law § 38)**
  - *In re Burdick Assocs. Owners Corp.*, 131 A.D.2d 672 (2nd Dept. 1987); *Matter of Plain Ave. Storage, LLC v. BRT Mgmt., LL*C, 165 A.D.3d 1264 (2nd Dept. 2018); *De Palo v. McNamara*, 139 A.D.2d 646 (2nd Dept. 1988)
  - Contents of Statement:
    - statement in writing
    - setting forth the items of labor and/or material and the value thereof which make up the amount for which a lien is claimed; *and*
    - setting forth the terms of the contract under which such items were furnished.
    - verified by the lienor or his agent

DISCHARGING A MECHANIC'S LIEN *(continued)*

BRING ACTION TO DISCHARGE

- ***Failure to maintain license***
  - Suffolk County Code §563-16, and General Business Law § 770; *see also Haldmi v. Cantwell Landscaping & Design, Inc.*, 50 A.D.3d 848,(2nd Dept., 2008); *Bujas v. Katz*, 133 AD2d 730 (2nd Dept., 1987); *Enka Constr. Corp. v. Aronshtein*, 89 AD3d 676 (2nd Dept. 2011); *Forman Constr., Inc. v. P.D.F. Constr.*, 175 A.D.3d 1491 (2nd Dept., 2019)
- ***Failure to enter into a signed, written contract***
  - NY. General Business Law §§771 and 775; Suffolk County Code §§563-17 and 563-21(c); see also *F & M Gen. Contr. v. Oneel*, 132 A.D.3d 946 (2nd Dept., 2015)
- ***No amounts due for work claimed/General Contractor paid for work claimed***
  - *Peri Formwork Sys., Inc. v. Lumbermens Mut. Cas. Co.*, 112 A.D.3d 171 (2nd Dept. 2013); *NGU, Inc. v. City of N.Y.*, 189 A.D.3d 850 (2nd Dept. 2020); *Pizzarotti, LLC v. X-treme Concrete Inc.*, 2021 NY Slip Op 30396(U) (Sup. Ct. New York Cty); *Trs. of Hanover Square Realty Inv'rs v. Weintraub*, 52 A.D.2d 600 (2nd Dept. 1976); *SR City Entertainment, LLC v. Yoon & Guy Elec.*, 2011 NY Slip Op 32131(U), 3 (Sup. Ct., New York Cty., 2009); *Matter of Blue Diamond Group Corp. v. KlinConstr. Group*, 23 Misc. 3d 1120(A) (Sup. Ct., Kings Cty., 2009)

AFFIRMATIVE DEFENSES IN ACTION TO FORECLOSE

- **Failure to maintain license** (*supra*, Slide 11)
- **Failure to enter into a signed, written contract** (*supra*, Slide 11)
- **No amounts due for work claimed/General Contractor paid for work claimed** (*supra*, Slide 11)
- **Claims willfully exaggerated** (Lien Law § 39)
  - *Guzman v. Estate of Fluker*, 226 A.D.2d 676 (2nd Dept. 1996); *Degraw Constr. Grp., Inc. v. McGowan Builders, Inc.*, 178 A.D.3d 770 (2nd Dept. 2019)
  - **Damages and attorney's fees** (Lien Law § 39-a)
    - Difference between amount claimed/bonded and actual amount owed to lienor.

Beth M. Gazes, Esq.
(beth@taylor-eldridge.com)

Thank you!

C.C.C. Renovations, Inc. v Victoria Towers Dev. Corp.
Supreme Court, Appellate Division, Second Department, New York
January 9, 2019
168 A.D.3d 664
91 N.Y.S.3d 506

168 A.D.3d 664, 91 N.Y.S.3d 506, 2019 N.Y. Slip Op. 00089

***1** C.C.C. Renovations, Inc., Respondent,

v

Victoria Towers Development Corp. et al., Appellants, et al., Defendants.

Supreme Court, Appellate Division, Second Department, New York
2016-04718, 700169/13
January 9, 2019

CITE TITLE AS: C.C.C. Renovations, Inc. v Victoria Towers Dev. Corp.

Michael T. Lamberti, New York, NY, for appellants.
John J. Janiec, New York, NY, for respondent.

In an action to foreclose mechanic's liens, the defendants Victoria Towers Development Corp. and Westchester Fire Insurance Company appeal from an order and judgment (one paper) of the Supreme Court, Queens County (Marguerite A. Grays, J.), entered April 1, 2016. The order and judgment, insofar as appealed from, granted that branch of the plaintiff's motion which was for summary judgment on the fifth, sixth, and seventh causes of action in the amended supplemental complaint and directed the defendant Westchester Fire Insurance Company to pay the plaintiff the full amount due under Bonds Discharging Mechanic's Liens numbers K0864570A and K08645711, as amended.

Ordered that the order and judgment is affirmed insofar as appealed from, with costs.

The defendant Victoria Towers Development Corp. (hereinafter ***665** Victoria Towers) is the owner, along with the defendant Wu Towers, LLC (hereinafter Wu Towers), of a building located in Queens (hereinafter the property). Victoria Towers contracted with the defendant Blue Diamond Group, LLC (hereinafter Blue Diamond), to act as general contractor to make repairs to the property necessitated by damage sustained in September 2010. The plaintiff entered into four separate subcontract agreements with Blue Diamond to perform roofing, pipe scaffolding, electrical scaffolding, and sidewalk scaffolding work at the property. After the work was performed, some or all of the amounts owed under the four subcontracts went unpaid. On or about November 7, 2011, the plaintiff filed two mechanic's liens against the property, naming Victoria Towers as the owner, and seeking $59,500 for unpaid roofing work and $698,185 for unpaid sidewalk bridging, pipe, and electric scaffolding work. On or about January 18, 2012, Blue Diamond also filed a mechanic's lien against the property, naming both Victoria Towers and Wu Towers as owners, and seeking $5,325,557 for unpaid services, labor, and materials provided at the property. The plaintiff then filed a third mechanic's lien, on or about January 23, 2012, naming both Victoria Towers and Wu Towers as owners. In August 2012, Victoria Towers secured bonds from the defendant Westchester Fire Insurance Company (hereinafter Westchester Fire), as surety, to discharge the plaintiff's roofing mechanic's lien and the plaintiff's piping, electrical, and sidewalk scaffolding mechanic's liens.

Following the commencement of this action, the plaintiff moved, inter alia, for summary judgment on the fifth, sixth, and seventh causes of action in the amended supplemental complaint, which sought foreclosure of the mechanic's liens filed against the property, and a directive that Westchester Fire pay the full amount due under the bonds to the plaintiff. The Supreme Court granted those branches of the motion, determined that the plaintiff had met its prima facie burden of proving its entitlement to recover on the filed discharge bonds, and found that the defendants' submissions in opposition to the motion failed to raise a triable issue of fact as to whether, inter alia, an adequate lien fund existed at the time the plaintiff's liens were filed. An order and judgment was subsequently issued, which foreclosed the mechanic's liens and directed Westchester Fire to pay the plaintiff the full amount due under the bonds. Victoria Towers and Westchester Fire appeal. We affirm the order and judgment insofar as appealed from.

Lien Law § 3 provides that a contractor who performs labor ***666** or furnishes materials for the improvement of real property with the consent, or at the request of, the owner "shall have a lien for the principal and interest, of the value, or the agreed price, of such labor . . . or materials upon the real property improved or to be improved and upon such improvement, from the time of filing a notice of such lien." "The lienor must establish the amount of the outstanding debt by submitting proof of either the price of its contract or the value of the labor and materials supplied" (*DHE Homes, Ltd. v Jamnik*, 121 AD3d 744, 745 [2014]; *see Peri Formwork Sys., Inc. v Lumbermens Mut. Cas. Co.*, 112 AD3d 171, 175 [2013]). The amount of the lien is limited by the contract under which it is claimed, and ordinarily a lienor is bound by the price term contained in the contract to which it is a party (*see Peri Formwork Sys., Inc. v Lumbermens Mut. Cas. Co.*, 112 AD3d at 175).

The lienor's right to recover is further limited by principles of subrogation (*see id.* at 176; 8-92 Warren's Weed, New York Real Property § 92.11 [1], [4]). Thus, no individual mechanic's lien can exceed the total amount owed by the owner to the general contractor at the time of the filing of the notice of lien (*see* Lien Law § 4 [1]; *Peri Formwork Sys., Inc. v Lumbermens Mut. Cas. Co.*, 112 AD3d at 176). The subcontractor's right to recover is derivative of the right of the general contractor to recover, and if the general contractor is not owed any amount under its contract with the owner at the time the subcontractor's notice of lien is filed, then the subcontractor may not recover (*see Timothy Coffey Nursery/Landscape v Gatz*, 304 AD2d 652, 653-654 [2003]).

Here, the plaintiff established its prima facie entitlement to judgment as a matter of law on its causes of action to foreclose the mechanic's liens it filed through evidence establishing, inter alia, the amounts owed for the services it provided at the property under the relevant subcontracts, and that those amounts did not exceed the amount owed by the owners to the general contractor, Blue Diamond. In opposition, Victoria Towers and Westchester Fire failed to raise a triable issue of fact.

The remaining contention of Victoria Towers and Westchester Fire is without merit (*see Matter of Union Indem. Ins. Co. of N.Y.*, 89 NY2d 94, 103-104 [1996]). Mastro, J.P., Rivera, Duffy and Brathwaite Nelson, JJ., concur.

END OF DOCUMENT

Matter of Old Post Rd. Assoc., LLC v LRC Constr., LLC Supreme Court, Appellate Division, Second Department, New York November 6, 2019
177 A.D.3d 658
112 N.Y.S.3d 254

177 A.D.3d 658, 112 N.Y.S.3d 254, 2019 N.Y. Slip Op. 07930

***1** In the Matter of Old Post Road Associates, LLC, Appellant,

v

LRC Construction, LLC, Respondent.

Supreme Court, Appellate Division, Second Department, New York
2018-06454, 52057/18
November 6, 2019

CITE TITLE AS: Matter of Old Post Rd. Assoc., LLC v LRC Constr., LLC

Tarter Krinsky & Drogin LLP, New York, NY (David J. Pfeffer, Charles R. Pierce, Jr., and Sean T. Scuderi of counsel), for appellant.
Paul H. Slaney, White Plains, NY, for respondent.

In a proceeding pursuant to Lien Law § 19 (6) to summarily discharge a mechanic's lien, the petitioner appeals from an order of the Supreme Court, Westchester County (Terry Jane Ruderman, J.), dated May 9, 2018. The order denied the petition.

Ordered that the order is affirmed, with costs.

In April 2016, the petitioner, Old Post Road Associates, LLC (hereinafter Old Post Road), considered developing real property it owned in Rye (hereinafter the property). At that time, Old Post Road engaged the respondent, LRC Construction, LLC (hereinafter LRC), to perform preconstruction management services in connection with the project. Old Post Road terminated LRC's services in March 2017, and LRC was not retained to provide construction management services for the project.

On August 14, 2017, LRC filed a notice of mechanic's lien against the property, alleging that it was owed the sum of $250,000 for preconstruction management services. In February 2018, Old Post Road, by the filing of an order to show cause and petition, commenced this proceeding pursuant to Lien Law § 19 (6) to summarily discharge the mechanic's lien. In the petition, ***659** Old Post Road alleged, inter alia, that LRC's mechanic's lien was invalid on its face, since the preconstruction management services provided by LRC could not form the basis of a mechanic's lien. LRC opposed the petition. The Supreme Court denied Old Post Road's petition to summarily discharge the mechanic's lien, reasoning that in the absence of clear case law precluding mechanic's liens for all the types of work described by LRC in its opposition, the mechanic's lien was "not entirely invalid on its face." Old Post Road appeals.

Lien Law § 19 (6) provides, in pertinent part, that a lien may be discharged as follows: "Where it appears from the face of the notice of lien that the claimant has no valid lien by reason of the character of the labor or materials furnished and for which a lien is claimed, . . . the owner or any other party in interest, may apply . . . for an order summarily discharging of record the alleged lien." Thus, to be summarily discharged, the notice of lien must be invalid on its face (*see Rivera v Department of Hous. Preserv. & Dev. of the City of N.Y.*, 29 NY3d 45, 51 [2017]; *Matter of Gold Dev. & Mgt., LLC v P.J. Contr. Corp.*, 74 AD3d 1340, 1341 [2010]; *Matter of Northside Tower Realty, LLC v Klin Constr. Group, Inc.*, 73 AD3d 1072, 1072 [2010]). When there is no defect on the face of the notice of lien, any dispute regarding the validity of the lien must await the lien foreclosure trial (*see Rivera v Department of Hous. Preserv. & Dev. of the City of N.Y.*, 29 NY3d at 51; *Matter of Luckyland [N.Y.], LLC v Core Cont. Constr., LLC*, 83 AD3d 1073, 1074 [2011]).

Lien Law § 3 provides, in pertinent part, that a contractor "who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof . . . shall have a lien for the principal and interest, of the value, or the agreed price, of such labor . . . or materials upon the real property improved or to be improved." The term "improvement," as defined in Lien Law § 2 (4), "includes the demolition, erection, alteration or repair of any structure upon, connected with, or beneath the surface of, any real property and any work done upon such property or materials furnished for its permanent improvement, . . . and shall also include the drawing by any architect or engineer or surveyor, of any plans or specifications or survey, which are prepared for or used in connection with such improvement."

In support of the petition, Old Post Road showed that certain services performed by LRC, including consulting with agents of Old Post Road regarding, inter alia, construction phasing and the preparation of construction budgets, were services which ***660** could not form the basis of a mechanic's lien (*see Goldberger-Raabin, Inc. v 74 Second Ave. Corp.*, 252 NY 336, 341-342 [1929]; *Chas. H. Sells, Inc. v Chance Hills Joint Venture*, 163 Misc 2d 814, 815 [Sup Ct, Westchester County 1995]; *Carl A. Morse, Inc. v Rentar Indus. Dev. Corp.*, 85 Misc 2d 304,

309 [Sup Ct, Queens County 1976], *affd* 56 AD2d 30 [1977], *affd* 43 NY2d 952 [1978]). In opposition to the petition, however, LRC submitted the affidavit of its president, who averred that LRC was a construction management firm which employed construction professionals, architects, and engineers, and that, in addition to the consulting services it rendered, LRC also prepared "site logistics and access plans" for the property, and performed "a constructability review for the project" at the property. Affording the Lien Law its liberal construction to protect the beneficial interests of lienors (*see* Lien Law § 23), those services could qualify as an "improvement" if the site logistics, access plans, or constructability review included drawings by an architect or engineer, even if such were prepared preconstruction (*see* Lien Law § 2 [4]; *Chas. H. Sells, Inc. v Chance Hills Joint Venture*, 163 Misc 2d at 815).

Since LRC would be entitled to file a mechanic's lien if its architects and/or engineers prepared the site logistics, access plans, or constructability review, the mechanic's lien is not invalid on its face (*see Lane Constr. Co., Inc. v Chayat*, 117 AD3d 992, 993 [2014]). Accordingly, the dispute regarding the validity of the mechanic's lien must be resolved at the lien foreclosure trial (*see Rivera v Department of Hous. Preserv. & Dev. of the City of N.Y.*, 29 NY3d at 51; *Matter of Luckyland [N.Y.], LLC v Core Cont. Constr., LLC*, 83 AD3d at 1074). Thus, we agree with the Supreme Court's determination denying Old Post Road's petition to summarily discharge the mechanic's lien filed by LRC. Dillon, J.P., Cohen, Duffy and Christopher, JJ., concur. **[Prior Case History: 60 Misc 3d 391.]**

GCDM Ironworks v GJF Constr. Corp.
Supreme Court, Appellate Division, Second Department, New York
March 18, 2002
292 A.D.2d 495
739 N.Y.S.2d 193

292 A.D.2d 495, 739 N.Y.S.2d 193, 2002 N.Y. Slip Op. 02354

GCDM Ironworks, Inc., Respondent,

v.

GJF Construction Corp., Defendant, and Astoria Pines Holding Co., LLC, Appellant.

Supreme Court, Appellate Division, Second Department, New York
2001-04575
(March 18, 2002)

CITE TITLE AS: GCDM Ironworks v GJF Constr. Corp.

In an action, inter alia, to foreclose a mechanic's lien, the defendant Astoria Pines Holding Co., LLC, appeals, as limited by its brief, from so much of an order of the Supreme Court, Queens County (Taylor, J.), dated February 23, 2001, as denied its motion for summary judgment dismissing the complaint insofar as asserted against it. ***496**

Ordered that the order is reversed insofar as appealed from, on the law, with costs, the motion is granted, the complaint is dismissed insofar as asserted against the appellant, and the action against the remaining defendant is severed.

The plaintiff GCDM Ironworks, Inc., doing business as GC Ironworks (hereinafter GCI), commenced this action, inter alia, to foreclose a mechanic's lien filed against property owned by the appellant, Astoria Pines Holding Co., LLC. The appellant moved, inter alia, for summary judgment dismissing the complaint insofar as asserted against it on the ground that it did not consent to the work allegedly performed by GCI. The Supreme Court denied the motion, finding the existence of a triable issue of fact as to whether the appellant consented to the work. This was error.

The relevant portion of Lien Law § 3 provides that a contractor "who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof, or of his agent, contractor or subcontractor ... shall have a lien for the principal and interest, of the value, or the agreed price, of such labor ... or materials upon the real property improved." Consent of the owner is the sine qua non, and if no consent is shown, there is no right to a lien (*see, Delany & Co. v Duvoli,* 278 NY 328, 331; 76 NY Jur 2d, Mechanics' Liens § 38; 16 Carmody-Wait 2d, Mechanics' Liens § 97:49, at 99). The consent required by this section is not mere acquiescence and benefit, but some affirmative act or course of conduct establishing confirmation (*see, Valsen Constr. Corp. v Long Is. Racquet & Health Club,* 228 AD2d 668, 669; *Tri-North Bldrs. v Di Donna,* 217 AD2d 886; *see also, Delany & Co. v Duvoli, supra; Brigham v Duany,* 241 NY 435, 440; *Beaudet v Saleh,* 149 AD2d 772, 773; *Mock, Inc. v 118 E. 25th St. Realty Co.,* 87 AD2d 756; *Harner v Schecter,* 105 AD2d 932; *M & B Plumbing & Heating Co. v Cammarota,* 103 AD2d 879).

"Where the circumstances are such that an owner may be said to have consented so far as the contractor is concerned, the owner is deemed also to have consented to the furnishing of labor and materials to the contractor with the latter's consent" (*Rure Assoc. v DiNardi Constr. Corp.,* 917 F2d 1332, 1336; *see, Wheeler v Scofield,* 67 NY 311, 314; 16 Carmody-Wait 2d, Mechanics' Liens § 97:49, at 99; 76 NY Jur 2d, Mechanics' Liens § 38). The subcontractor has the burden of establishing that there was money due and owing to the general contractor from the owner based on a primary contract (*see, Falco Constr. Corp. v P & F Trucking,* 158 AD2d 510; *Brainard v County of Kings,* 155 NY 538, 543-544; *see also, Rure Assoc. v DiNardi Constr. Corp., supra* at 1335). ***497**

The appellant established its entitlement to judgment as a matter of law through the submission of credible evidence that the work allegedly performed by GCI, at the request of Builders Group, was not performed with the appellant's consent or at its request (*see, Zuckerman v City of New York,* 49 NY2d 557, 562). In fact, the appellant had never heard of GCI and first learned of the work allegedly performed for it upon GCI's filing of the mechanic's lien (*see, Valsen Constr. Corp. v Long Is. Racquet & Health Club, supra*). In opposition to the appellant's prima facie showing that it was not liable to GCI under Lien Law § 3, GCI submitted an affidavit from its vice president containing only conclusory, vague, and speculative statements which failed to raise a triable issue of fact as to whether the appellant affirmatively or impliedly consented to its work (*see, Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851, 853; *Falco Constr. Corp. v P & F Trucking, supra*).

In view of this determination, we need not reach the appellant's remaining contentions.

Goldstein, J.P., McGinity, Luciano and Crane, JJ., concur.

END OF DOCUMENT

Ferrara v Peaches Café LLC
Court of Appeals of New York
November 20, 2018
32 N.Y.3d 348
115 N.E.3d 621

32 N.Y.3d 348, 115 N.E.3d 621, 91 N.Y.S.3d 349, 2018 N.Y. Slip Op. 07925

*1 Angelo A. Ferrara, Respondent,

v

Peaches Café LLC et al., Defendants, and COR Ridge Road Company, LLC, Also Known as COR Holt Road Company, LLC, Appellant.

Court of Appeals of New York
124
Argued October 17, 2018
Decided November 20, 2018

CITE TITLE AS: Ferrara v Peaches Café LLC

RESEARCH REFERENCES

Am Jur 2d Mechanics' Liens §§ 145, 146, 317, 338, 350.

Carmody-Wait 2d Establishment, Discharge, and Enforcement of Mechanics' Liens §§ 97:50, 97:56, 97:57, 97:290, 97:291.

McKinney's, Lien Law § 3.

Mechanics' Liens in New York (2017 ed) §§ 2:13, 2:14, 13:3.

NY Jur 2d Mechanics' Liens §§ 50, 52, 253.

ANNOTATION REFERENCE

Landlord's liability to third party for repairs authorized by tenant. 46 ALR5th 1.

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*350 Query: mechanic /2 lien /p foreclose & consent /s lease & relation!

APPEARANCES OF COUNSEL

Mannion & Copani, Syracuse (*Gabrielle Mardany Hope* of counsel), for appellant.
Davidson Fink LLP, Rochester (*Thomas A. Fink* and *Mallory K. Smith* of counsel), for respondent.

OPINION OF THE COURT

Wilson, J.

Defendant COR Ridge Road Company, LLC (COR) [1] appeals from a Supreme Court judgment to bring up for review an Appellate Division order that, among other things, granted partial summary judgment against it, in favor of plaintiff Angelo Ferrara, [2] upholding the validity of a lien placed by Ferrara on COR's real property.

Adhering to our long-standing precedent, we hold that consent, for purposes of Lien Law § 3, was properly inferred from the terms of the lease agreement between COR and Peaches, and that the Appellate Division appropriately declined to impose a requirement that COR either expressly or directly consent to the improvements. We therefore affirm the judgment and order brought up for review.

COR leased space in a retail shopping plaza to Peaches Café, LLC, in which Peaches would build and operate a full-service restaurant. The 10-year lease agreement and attached Retail Construction Exhibit imposed several requirements on Peaches regarding the electrical work involved in the construction of the restaurant site, stating that: ***2*** Peaches "*shall* retain competent and skilled contractors for the completion of" the electrical work; Peaches "*shall* use only contractors approved by [COR]"; Peaches "*shall* not make . . . any . . . improvements . . . without first obtaining the consent of [COR]"; Peaches "*shall* retain the services of a competent experienced architect(s) and engineer(s)"; Peaches "*shall* provide [COR] with detailed plans and specifications for the build-out of improvements to be constructed in the [p]remises"; the design drawings that Peaches was to submit "*shall* include" electrical plans; the design drawings "*shall* be revised" according to any proposed changes by COR, which it retained the right to do; and Peaches cannot open for business unless it completes the ***352*** improvements according to the lease terms and submits to COR a certificate of completion certifying that the premises were "constructed and completed in accordance with [the] final Design Drawings as approved by [COR]" (emphasis added). The lease anticipated that Peaches would substantially complete the required work within 90 days, and provided that Peaches' obligation to pay rent would commence at the end of the 90-day period, even were the work unfinished. The lease also provided that any improvements made to the "vanilla box" space would become part of the realty at the end of the lease. The lease obligated Peaches to keep its restaurant "open for business on all days and at a minimum during the following hours: Monday through Saturday 7:00 am until 6:00 pm and Sunday 7:00 am until 3:00 pm (except for holidays); (ii) adequately staff its store with sufficient employees; and (iii) utilize only those minor portions of the Premises as are reasonably required therefor for office purposes," and further provided that Peaches' failure to do so would constitute a default, entitling COR to terminate the lease, retain the improvements and recover the balance of the rent due through the end of the lease term.

The agreement also outlined detailed requirements for the electrical work that is the subject of the challenged lien: it specified the type of service, the type of panel board and type of electrical system to be installed. The agreement required that, as a condition of Peaches performing the work, it must propose a schedule to COR for COR's approval, and that if Peaches did not complete the work timely, it would be responsible for any additional costs that COR incurred as a result of the delay in completing the work.

Peaches contracted with Ferrara to perform its portion of the electrical build-out work at the premises, which Ferrara satisfactorily completed. Peaches opened for business but subsequently closed, still owing Ferrara more than $50,000. Ferrara filed a mechanic's lien against the property, noticing both Peaches and COR. Two years later, upon failure to discharge the lien, Ferrara initiated this action seeking, among other things, to foreclose on the lien.

Ferrara moved for partial summary judgment on that cause of action; COR moved for summary judgment dismissing the complaint. Supreme Court, as relevant here, denied Ferrara's ***353*** motion, granted COR's motion, and dismissed the complaint with prejudice insofar as asserted against COR. The Appellate Division unanimously reversed the order insofar as appealed from and granted Ferrara's motion, concluding that "consent for purposes of Lien Law § 3 may be inferred from the terms of the lease" (138 AD3d at 1393-1394 [internal quotation marks and brackets omitted]). We now affirm.

COR urges that the Appellate Division erred because, as a matter of law, a contractor working for a tenant may not place a lien on a landlord's property unless the landlord has "expressly" or "directly" consented to the performance of the work, which COR says it did not do. We reject that argument; our precedents establish that the Lien Law does not require any direct relationship between the property owner and the contractor for the contractor to be able to enforce a lien against the property owner. Lien Law § 3 (as added by L 1885, ch 342, as amended) provides:

> "A contractor, subcontractor, laborer, [or] materialman, . . . who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof, or of [the owner's] agent . . . shall have a lien for the principal and interest, of the value, or the agreed price, of such labor . . . from the time of filing a notice of such lien."

The "impetus" behind the law is to provide "protection to those who furnish work, labor and services or provide materials for the improvement of real property" (*West-Fair Elec. Contrs. v Aetna Cas. & Sur. Co.*, 87 NY2d 148, 156 [1995] [quoting floor speech by Sen. James Donovan]). Accordingly, the law "is to be construed liberally to secure the beneficial interests and purposes thereof" (*West-Fair*, 87 NY2d at 156 [quoting Lien Law § 23]).

To enforce a lien under Lien Law § 3, a contractor performing work for a tenant need not have any direct relationship with the property owner. Instead, "[t]o fall within that provision 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" (*Rice v Culver*, 172 NY 60, 65-66 [1902]). We ***3*** further explained that the ***354*** owner's consent or requirement that the improvement be made, rather than mere passive acquiescence in or knowledge of improvements being made, is contemplated by the statute (*see id.* at 65). In *Rice*, we concluded that the landowner could not be held liable for the work contracted for by the tenant who had leased the land to build and maintain an athletic field. Although the landowner consented "in a certain sense of the word" because he "must have known" at the time the lease was executed that the tenant planned to make improvements in order to use the property for the purpose covenanted for in the lease, that knowledge alone was "insufficient to show that the appellant consented to the performance by the plaintiff of the work for which her lien was filed" (*id.* at 65, 66).

However, we distinguished *Rice* from our prior cases "in which the tenant covenanted by the lease to erect buildings or make improvements. . . . In those cases the . . . landlord was properly held liable because not only did [the landlord] require the improvement to be made, but the improvement inured to [the landlord's] benefit, either because it reverted to [the landlord] at the expiration of the demised term or because . . . rent proceeded from its use" (*Rice*, 172 NY at 66-67) (distinguishing *Burkitt v Harper*, 79 NY 273 [1879]; *Otis v Dodd*, 90 NY 336 [1882]; *Jones v Menke*, 168 NY 61 [1901]).

Jones, decided the year before *Rice*, reaffirmed the rule of that line of prior cases that certain lease provisions can establish consent for purposes of Lien Law § 3:

> "[A] requirement in a contract between . . . landlord and tenant, that the . . . tenant shall make certain improvements on the premises is a sufficient consent of the owner to charge [the owner's] property with claims which accrue in making those improvements, though it would

not render [the] property liable for improvements or alterations beyond those specified in the contract" (168 NY at 64 [citations omitted]; *see De Klyn v Gould*, 165 NY 282 [1901]).

In *Jones*, we based the landlord's consent on contractual provisions supporting the proposition that the landlord had consented to the improvements for purposes of Lien Law § 3. In particular, we noted the contractual requirement that the tenant convert the space to a "first-class saloon," that the conversion be accomplished in a few months, and that failure ***355** to timely complete the conversion would terminate the lease and vest title to the improvements in the landlord. In that way, the owner sufficiently "consented to [the repairs] and . . . his property was chargeable with their value" (*id.* at 65). A similar result obtained in *McNulty Bros.v Offerman* (221 NY 98, 106 [1917] [holding that as long as "the liens have been confined to work called for by the lease . . . the landlords' estate may be charged to the same extent as if the owners of that estate had ordered the work themselves"]).

(1) No material facts are in dispute here. The language of the lease agreement not only expressly authorized Peaches to undertake the electrical work, but also required it to do so to effectuate the purpose of the lease—that is, for Peaches to open the restaurant for business and operate it continuously, seven days a week, during hours specified by COR. Furthermore, the detailed language makes clear that COR was to retain close supervision over the work and authorized it to exercise at least some direction over the work by reviewing, commenting on, revising, and granting ultimate approval for the design drawings related to the electrical work. We therefore conclude that, under our prior precedents, the terms of the lease agreement between COR and Peaches, taken together, are sufficient to establish COR's consent under Lien Law § 3.

COR relies on our decision in *Delany & Co. v Duvoli* (278 NY 328 [1938]) to argue that we should adopt the position taken by certain of the Appellate Division departments in several cases it interprets as rejecting a finding of consent under Lien Law § 3 when no direct relationship between a tenant's contractor and the property owner is present. [3] In *Delany*, the defendant property owner entered into an agreement to convey the property with an option ***4** for the purchaser to take title within ***356** one year. The agreement provided that the purchaser would pay rent in the meantime, and that the agreement would be voided if the purchaser did not take title within the year. Although the agreement did not contemplate any construction work, the purchaser undertook new construction on the property.

We examined whether the owner had consented to the improvements within the meaning of Lien Law § 3, reaffirming the rule from our prior decisions that "[t]he consent required by [Lien Law § 3] is not a mere acquiescence by the owner to improvements by a lessee in possession at [the lessee's] own expense. There must be some affirmative act by the owner" (*id.* at 331). We determined that the owner had not consented to the improvements:

> "Here there has been no compliance with the statutory requirements. The most that can be said . . . is that the owner did not object to improvements by the tenants at their own expense. *That the lienors never dealt with the record owner or her agent in respect to those improvements cannot be doubted*. The evidence demonstrates that *the credit accorded by the lienors was to the tenants and not to the owner*, that *all the transactions relating to the improvements occurred between the lienors and . . . the tenants in possession*, and that the tenants assured the owner that the improvements were to be effected at their own expense" (*id.* [emphasis added]).

The italicized portions, stripped from the balance of the decision, have been emphasized in some Appellate Division decisions to impose a requirement of a direct relationship between owner and contractor. Read properly, however, *Delany* simply noted that the lease did not contain any provisions requiring the tenant to undertake the improvement work made by the lienors. Absent such a provision, we looked to whether the property owner had taken any other "affirmative act" sufficient to establish consent for the purposes of Lien Law § 3. Finding none, we concluded that the owner had not consented and, therefore, that the lienors could not proceed against the landlord.

(2) Contrary to COR's argument, *Delany* does not stand for the proposition that consent under Lien Law § 3 requires a direct relationship between the property owner and the lienor. ***357** Instead, Delany stands for the proposition that some "affirmative act" by the landowner is required to find consent for the purposes of Lien Law § 3. Our decisions make clear that that "affirmative act" can include lease terms requiring specific improvements to the property (*see Burkitt*, 79 NY 273; *Otis*, 90 NY 336; *Jones*, 168 NY 61). When a lease does not require improvements, the owner's overall course of conduct and the nature of the relationship between the owner and the lienor may demonstrate consent for purposes of Lien Law § 3 (*see National Wall Paper Co. v Sire*, 163 NY 122 [1900]). The decision in *Paul Mock*, when read properly, is consistent with our precedents, as are most of the Appellate Division cases relied on by COR. To the extent that certain Appellate Division decisions relying on *Paul Mock* suggest that Lien Law § 3 requires a direct relationship between the landlord and the contractor to establish consent, they are contrary to our precedents and should not be followed.

For the above reasons, the judgment appealed from and the Appellate Division order brought up for review should be affirmed, with costs.

Chief Judge DiFiore and Judges Rivera, Stein, Fahey, Garcia and Feinman concur.

Judgment appealed from, and Appellate Division order brought up for review, affirmed, with costs.

Footnotes

1 Defendants were sued as COR Ridge Road Company, LLC a/k/a COR Holt Road Company, LLC.

2 Quinlan Ferrara Electric, Inc., contracted to perform the work in question; it assigned its rights to Angelo Ferrara, the plaintiff in this case. We refer to both as "Ferrara" herein.

3 The cases on which COR relies begin with *Paul Mock, Inc. v 118 E. 25th St. Realty Co.* (87 AD2d 756 [1st Dept 1982]), and include *Interior Bldg. Servs., Inc. v Broadway 1384 LLC* (73 AD3d 529 [1st Dept 2010]); *Matell Contr. Co., Inc. v Fleetwood Park Dev., LLC* (111 AD3d 681 [2d Dept 2013]); *Drapaniotis v 36-08 33rd St. Corp.* (48 AD3d 736, 737 [2d Dept 2008]); *Vardon, Inc. v Suga Dev., LLC* (36 AD3d 897, 898-899 [2d Dept 2007]); *Elliott-Williams Co., Inc. v Impromptu Gourmet, Inc.* (28 AD3d 706, 707 [2d Dept 2006]); *GCDM Ironworks v GJF Constr. Corp.* (292 AD2d 495 [2d Dept 2002]); *Tri-North Bldrs. v Di Donna* (217 AD2d

886, 887 [3d Dept 1995]); *Beaudet v Saleh* (149 AD2d 772, 773 [3d Dept 1989]); and *Sager v Renwick Park & Traffic Assn.* (172 App Div 359, 367-368 [3d Dept 1916]).

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Melniker v Grae
Supreme Court, Appellate Division, Second Department, New York
June 1, 1981
82 A.D.2d 798
439 N.Y.S.2d 409

82 A.D.2d 798, 439 N.Y.S.2d 409

Albert Melniker, Respondent,

v.

Barbara Grae et al., Appellants, and Milton Leibman, Intervenor-Appellant, et al., Defendants

Supreme Court, Appellate Division, Second Department, New York
1328 E, 1329 E, 1330 E
June 1, 1981

CITE TITLE AS: Melniker v Grae

In an action to foreclose a mechanic's lien, the appeals are from (1) so much of a decision of the Supreme Court, Richmond County (Rubin, J.), dated May 14, 1980, as denied the appellant-intervenor's motion insofar as it was to dismiss the complaint, without prejudice to renew after an exchange of pleadings, (2) a decision of the same court dated September 23, 1980, which denied the appellants' motion to dismiss the complaint, and (3) stated portions of an order of the same court dated October 31, 1980, which, *inter alia*, denied the said motions to dismiss.

Appeals from decisions dated May 14, 1980 and September 23, 1980, respectively, dismissed. No appeal lies from a decision. Order dated October 31, 1980 modified, on the law, by adding provisions thereto (1) directing defendant Barbara Grae to execute an undertaking in the amount of $4,250, and (2) directing that, upon such execution, the order (if still in effect) enjoining the Chicago Title Insurance Company from paying out an escrow deposit of $5,000 is vacated and the complaint against defendant Joel Grae is dismissed. As so modified, order affirmed insofar as appealed from. Plaintiff is awarded one bill of $50 costs and disbursements.

Appellants and intervenor-appellant contend that the mechanic's lien is void since it was untimely filed. The notice of lien is valid on its face since the notice indicates that it was filed within four months after the completion of the contract (see Lien Law, § 10). Where there exists “no defect upon the face of a notice of lien, any dispute regarding the validity of the lien must await trial thereof by foreclosure” and the court cannot summarily discharge the lien (see *Dember Constr. Corp. v P & R Elec. Corp.*, 76 AD2d 540, 546; Lien Law, § 19, subd [6]). There is a triable issue of fact as to whether plaintiff's latest services, which were rendered within four months of the filingof ***799** the notice of lien, were part of the original contract or performed in continuance of work done under the contract (see *Watts-Campbell Co. v Yuengling*, 125 NY 1; *Nelson v Schrank*, 273 App Div 72). An additional issue to be determined at a trial is whether the work was performed “with the consent or at the request of the owner ... or of [the owner's] agent” (see Lien Law, § 3). Although the lienor was employed by a contract vendee, the lien is still valid if the owner consented to the lienor's performance, or if the vendee was acting as the owner's agent (see *Craig v Swinerton*, 8 Hun 144, affd 76 NY 608; *Schmalz v Mead*, 125 NY 188; 37 NY Jur, Mechanic's Liens, § 46). Allegations concerning the owner's consent, or the vendee's agency, should appear in the complaint, and need not be mentioned in the notice of lien (Lien Law, § 9; *Burkitt v Harper*, 79 NY 273). Furthermore, the failure of the notice of lien to name the tenants in common of the property other than appellant Barbara Grae does not invalidate the lien as against her, to the extent of her interest in the property (see Lien Law, § 2, subds 3, 4, 9; *Strauchen v Pace*, 195 NY 167; *Matter of Refrod Realty Corp.*, 216 NYS2d 564). Moreover, the misdescription in the notice of lien of Barbara Grae's interest as fee owner also does not invalidate the lien (Lien Law, § 9, subds 2, 7). Although Barbara Grae obtained an order discharging the lien upon the execution of an undertaking (see Lien Law, § 19, subd [4]), she never executed such an undertaking apparently, because the title insurance company required all the tenants in common to deposit a total of $5,000 in escrow upon the sale of the property. However, it was improper for Barbara Grae to use the escrow as a substitute for execution of the undertaking, since the lien only affected her interest in the property but the moneys held in escrow belonged to all of the tenants in common. We also note that although section 44 of the Lien Law requires all the record owners to be joined as party defendants the statute refers to persons having an interest in the property at the time of the commencement of the foreclosure action (see *Harlem Plumbing Supply Co. v Handelsman*, 40 AD2d 768; *Admiral Tr. Mix Corp. v Sagg-Bridgehampton Corp.*, 56 Misc 2d 47). Thus, the lienor need not join those persons who are not named in the notice of lien and have no interest in the property at the time of suit. As to appellant Joel Grae, although, as a mortgagee, he would be a necessary party to an action to enforce a lien against real property (Lien Law, § 44), once Barbara Grae executes an undertaking, there is no longer in existence such an action against real property. “The bond [would replace] the real property as the security to be attached and attacked” *(Bryant Equip. Corp. v A-1 Moore Contr. Corp.*, 51 AD2d 792, 793). Thus, the mortgagee's interest in the real property would no longer require his joinder as a necessary party in the lien foreclosure action.

Hopkins, J. P., Mangano, Gulotta and Margett, JJ., concur.

END OF DOCUMENT

Ren. Reh. Sys. Co., Inc. v Faulkner
Supreme Court, Appellate Division, Second Department, New York
June 7, 2011
85 A.D.3d 752
924 N.Y.S.2d 813924 N.Y.S.2d 813 (Mem)

85 A.D.3d 752, 924 N.Y.S.2d 813 (Mem), 2011 N.Y. Slip Op. 05040

***1** Ren. Reh. Systems Co., Inc., Respondent

v

James B. Faulkner et al., Defendants, and Albert Salamone et al., Appellants.

Supreme Court, Appellate Division, Second Department, New York
2010-05071, 22720/08
June 7, 2011

CITE TITLE AS: Ren. Reh. Sys. Co., Inc. v Faulkner

***753**

D'Agostino, Levine, Landesman & Lederman, LLP, New York, N.Y. (Bruce H. Lederman of counsel), for appellants.
Kressel, Rothlein, Walsh & Roth, LLC, Massapequa, N.Y. (Stephen Kressel of counsel), for respondent.
In an action, inter alia, to foreclose a mechanic's lien, the defendants Albert Salamone, Jennifer Salamone, and Wells Fargo Bank, N.A., appeal from an order of the Supreme Court, Nassau County (Parga, J.), entered April 19, 2010, which denied their motion for summary judgment dismissing the complaint insofar as asserted against them, to discharge the mechanic's lien filed December 28, 2007, and to vacate the notice of mechanic's lien and notice of pendency dated December 23, 2008, and granted the plaintiff's cross motion for leave to serve and file an amended notice of mechanic's lien.

Ordered that the order is reversed, on the law, with costs, the motion of the defendants Albert Salamone, Jennifer Salamone, and Wells Fargo Bank, N.A., for summary judgment dismissing the complaint insofar as asserted against them, to discharge the mechanic's lien filed December 28, 2007, and to vacate the notice of mechanic's lien and notice of pendency dated December 23, 2008, is granted, the plaintiff's cross motion for leave to serve and file an amended notice of mechanic's lien is denied, and the action against the remaining defendants is severed.

The defendants Albert Salamone, Jennifer Salamone, and Wells Fargo Bank, N.A. (hereinafter collectively the appellants), established, prima facie, that the notice of mechanic's lien was not timely filed (*see* Lien Law § 10; *Aztec Window & Door Mfg., Inc. v 71 Vil. Rd., LLC*, 60 AD3d 795 [2009]; *Ward-Carpenter Engrs. v Sassower*, 163 AD2d 304 [1990]; *see generally 72 Pyrgi v Gkam Corp.*, 293 AD2d 387 [2002]; *Melniker v Grae*, 82 AD2d 798, 798-799 [1981]; *cf. Nelson v Schrank*, 273 App Div 72 [1947]). In opposition, the plaintiff failed to raise a triable issue of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Accordingly, the Supreme Court should have granted the appellants' motion for summary judgment dismissing the complaint insofar as asserted against them, to discharge the mechanic's lien filed December 28, 2007, and to vacate the notice of mechanic's lien and notice of pendency dated December 23, 2008, and denied the plaintiff's cross motion for leave to serve and file an amended notice of mechanic's lien. ***2**

The parties' remaining contentions are without merit, or need not be reached in light of our determination. Mastro, J.P., Leventhal, Austin and Cohen, JJ., concur.

Santucci Constr. Corp. v Errico
Supreme Court, Appellate Division, Second Department, New York
September 29, 1997
242 A.D.2d 696
664 N.Y.S.2d 953664 N.Y.S.2d 953 (Mem)

242 A.D.2d 696, 664 N.Y.S.2d 953 (Mem), 1997 N.Y. Slip Op. 08248

Santucci Construction Corp., Respondent,

v.

Jerry Errico, Appellant.

Supreme Court, Appellate Division, Second Department, New York
(September 29, 1997)

CITE TITLE AS: Santucci Constr. Corp. v Errico

SUMMARY

In an action, *inter alia,* to foreclose a mechanic's lien, the defendant appeals from (1) an order of the Supreme Court, Westchester County (Donovan, J.), entered July 17, 1996, which, *inter alia,* denied his motion for summary judgment vacating the mechanic's lien, and (2) an order of the same court, entered January 6, 1997, which denied his motion to summarily discharge the lien pursuant to Lien Law § 19 (6) for failure to comply with the requirements of Lien Law § 9 (7).

Ordered that the appeal from the order entered July 17, 1996, is dismissed as academic; and it is further, ***697**

Ordered that the order entered January 6, 1997, is reversed, on the law, and the motion to summarily discharge the lien is granted; and it is further,

Ordered that the appellant is awarded one bill of costs.

The notice of lien did not adequately describe the property subject to the lien. Thus, it failed to comply with the requirements of Lien Law § 9 (7) and the mechanic's lien was invalid. Therefore, the motion to summarily discharge the lien should have been granted (*see, Contelmo's Sand & Gravel v J & J Milano,* 96 AD2d 1090; *Hudson Demolition Co. v Ismor Realty Corp.,* 62 AD2d 980). In addition, the lien is not subject to amendment pursuant to Lien Law § 12-a (*see, Matter of Atlas Tile & Marble Works,* 191 AD2d 247; *Avon Elec. Supplies v Goldsmith,* 54 AD2d 552).

The parties' remaining contentions are either without merit or academic in light of this determination (*see, Guzman v Estate of Fluker,* 226 AD2d 676).

Miller, J. P., Ritter, Santucci and Florio, JJ., concur.

Matter of HMB Acquisition Corp. v F&K Supply
Supreme Court, Appellate Division, Second Department, New York
November 7, 1994
209 A.D.2d 412
618 N.Y.S.2d 422

209 A.D.2d 412, 618 N.Y.S.2d 422

***412** In the Matter of HMB Acquisition Corp., Inc., Respondent,

v.

F&K Supply Inc., Appellant.

Supreme Court, Appellate Division, Second Department, New York
93-05372
(November 7, 1994)

CITE TITLE AS: Matter of HMB Acquisition Corp. v F&K Supply

In a proceeding to discharge a mechanic's lien, the appeal is from an order of the Supreme Court, Westchester County (Fredman, J.), entered April 13, 1993, which granted the petition.
Ordered that the order is affirmed, with costs.

Pursuant to Lien Law § 11, a party is required to serve a notice of lien on a corporation by one of three specified methods. Strict compliance with the statutory requirements is mandated and the court does not have discretion to excuse noncompliance *(see, Matter of PKS Dev. Co. v Kahn Lbr. & Millwork Co.,* 187 AD2d 656; *Matter of Hui's Realty v Transcontinental Constr. Servs.,* 168 AD2d 302; *Murphy Constr. Corp. v Morrissey,* 168 AD2d 877). The appellant served the notice of lien on the petitioner by service on the Secretary of State, a method of service which is not authorized by Lien Law § 11. Since the appellant failed to comply with the requirements of the statute, the Supreme Court properly granted the petitioner's application to discharge the lien. There is no merit to the appellant's contention that the petitioner should be estopped from challenging the validity of the lien *(see, Matter of Northport Marina Assocs. v Cashman, Inc.,* 146 Bankr 60).

Lawrence, J. P., O'Brien, Joy and Altman, JJ., concur.

Capital Concrete NY Inc. v Happy Living Dev. LLC
2021 NY Slip Op 30872(U)
March 17, 2021
Supreme Court, Kings County
Docket Number: 511280/20
Judge: Leon Ruchelsman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

----------X

CAPITAL CONCRETE NY INC.,

Plaintiffs Decision and order

- against - Index No. 511280/20

HAPPY LIVING DEVELOPMENT LLC, 9TH ST DEV LLC, BESPOKE HARLEM WEST LLC, WEST 37TH ST LLC, D SOLNICK DESIGN AND DEVELOPMENT LLC, GALIL PS 488 LLC, PS 48 GROUP LLC, 834 PACIFIC HOLDINGS LLC, W133 OWNER LLC, LEVI BALKANY, WESTCHESTER FIRE INSURANCE COMPANY, March 17, 2021

Respondent,

----------X

PRESENT: HON. LEON RUCHELSMAN

The defendants have moved pursuant to CPLR §3211 on the grounds the plaintiff failed to properly serve a mechanic's lien. The plaintiff opposes the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

Property located at 441 West 37th Street is owned by D Solnick Design and Development LLC and West 37th Street LLC. On November 27, 2019 the plaintiff filed a mechanic's lien and pursuant to Lien Law §11 served 441 West 37th Street within the requisite time. However, the plaintiff never served D Solnick Design. The defendants now seek to dismiss the action on the grounds the defendant D Solnick Design was never served with notice of the lien, a necessary element of Lien Law §11. The plaintiff does not dispute that owner was not served, however,

plaintiff argues service upon one owner is sufficient and consequently, the motion seeking dismissal must be denied.

Conclusions of Law

A mechanic's lien is a legislative creation, remedial in nature, to protect those who improved and enhanced the value of real property by using labor and materials (Niagra Venture v. Sicoli & Massaro, Inc., 77 NY2d 175, 565 NYS2d 449 [1990]). Thus, "a mechanic's lien is an encumbrance on realty" (Perrin v. Stempinski Realty Corp., 15 AD2d 48, 222 NYS2d 148 [1st Dept., 1961]). There is another purpose of a mechanic's lien, namely to provide notice to subsequent purchasers (Niagra Venture, supra). In any event, Lien Law §23 states that the lien laws are "to be construed liberally to secure the beneficial interests and purposes thereof" (id). Notwithstanding that broad and liberal approach, the notice requirement contained in Lien Law §11 requires strict compliance with all its provisions (146 West 45th Street Corp., v. McNally, 188 AD2d 410, 591 NYS2d 402 [1st Dept., 1992]). The question squarely presented is whether service of the mechanic's lien upon one owner and not another owner satisfies the strict requirements of Lien Law §11 which requires service upon "the owner" (id). The statute does not provide any guidance in situations where the property has more than one owner and if service may be effectuated upon only one owner.

There are no cases in New York that discuss this issue although it is addressed in other jurisdictions. Thus, in Maryland the mechanic's lien statute provides that "if there is more than one owner, the subcontractor may comply with this section by giving the notice to any of the owners" (Maryland Real Property Law §9-104(d)). That statutory directive cannot guide this case where the ambiguity is not resolved. Likewise, in Towner v. Remick, 19 Mo.App. 205 [Kansas City Court of Appeals, Missouri, 1885] the court interpreted the Missouri statute which stated that notice must be given "to the owner, owners or agent, or either of them" (Rev.St.Mo. 1879, §3190) to require service of a mechanic's lien upon all owners where there are multiple owners. The state of Arkansas similarly requires notice upon all owners pursuant to a similarly worded statute (see, Doke v. Benton County Lumber Co., 114 Ark 1, 169 SW 327 [Supreme Court of Arkansas 1914]). In Owen Lumber Company v. Chartrand, 270 Kan 215, 14 P3d 395 [Supreme Court of Kansas 2000] the court held that notice upon one owner was sufficient where the language in the statute required notice upon "any one owner of the property" (id).

Where no such statutory clarity exists the consensus among the various jurisdictions that have addressed the issue requires service upon every owner, especially in the context of two spouses jointly owning the property. Thus, in Webber Lumber &

Supply Company v. Erickson, 216 Mass 81, 102 NE 940 [Supreme Judicial Court of Massachusetts, Worcester 1913] the court held that service upon one owner spouse did not thereby constitute service upon the other owner spouse as well and the mechanic's lien was not effective upon the spouse that did not receive notice. Again, in Liese v. Hentze, 326 Ill 633, 158 NE 428 [Supreme Court of Illinois, 1927] the court held that service of the mechanic's lien upon one owner spouse did not confer sufficient notice of the lien upon the other spouse. Further, in Nurmi v. Beardsley, 275 Mich 328, 266 NW 368 [Supreme Court of Michigan 1936] the court held that service of a mechanic's lien upon one owner spouse did not constitute service on the other owner spouse. Again, in Bayes v. Isenberg, 429 NE2d 654 [Court of Appeals of Indiana, First District 1981] the court concluded that notice of the mechanic's lien had to be served upon all owners of the property even thought the owners were two spouses married to each other. There is no legal distinction between two spouses that share ownership or any two individuals or entities that share ownership. Thus, "where the requirement is only that notice be given to "the owner," notice must be given to all owners of co-ownership property in order to bind the interest of all cotenants. Notice to one owner is not necessarily notice to the other owner, even though the other owner is the spouse of the owner receiving the notice and a joint tenant or tenant by the

entireties" (see, 76 ALR3d 605: Who is the Owner Within Mechanic's Lien Statute Requiring Notice of Claim, 1977).

Notwithstanding, the plaintiff asserts by way of comparison that CPLR §6512 when seeking to file a notice of pendency only one owner of a multi-owner property need be served. The plaintiff argues that "the parallels between §11 and CPLR §6512 are clear. Each statute requires that after the filing of a notice affecting title to a property, an owner must be promptly served. Like §11's requirement of service upon 'the owner' in the singular, CPLR §6512 refers to service upon "the defendant" in the singular" (Affirmation in Opposition, page 4). Therefore, since a notice of pendency may be filed against one owner, similarly a notice of the filing of a mechanic's lien may be filed only as to one owner.

CPLR §6512 provides that "a notice of pendency filed before an action is commenced is effective only if, within thirty days after filing, a summons is served upon the defendant" (id). In Washington Heights Federal Savings & Loan Association v. 685A Hancock Street Corp., 41 Misc2d 911, 246 NYS2d 681 [Supreme Court Kings County 1964] the court explained the reference to "the defendant" was a change from the earlier statute which required service upon "a defendant" and that the change was made to conform with other provisions of the CPLR. The court concluded there was no substantive service requirement change effected by

the language change and any ambiguity that arose was "the product of transposing language" among various statutes. Thus, the intent of the legislature was not altered by the change from "a defendant" to "the defendant" and consequently service of the notice of pendency upon one defendant remains sufficient (see, Micheli Contracting Corporation v. Fairwood Associates, 73 AD2d 774, 423 NYS2d 533 [3rd Dept., 1979]). No such statutory changes exist regarding a mechanic's lien and thus service is required upon each owner.

This is not merely a technical distinction based upon prepositional changes and drafting oversights but reflects a fundamental difference between notices of pendency and mechanic's liens.

"Permission to file a notice of pendency of action in specified cases is an added privilege granted to a litigant by statute which does not affect his cause of action. The purpose of the grant of the privilege was to prevent 'the acquisition pendente lite of an interest in the subject-matter of the suit, to the prejudice of the plaintiff..." (see, Israelson v. Bradley, 308 NY 511, 127 NE2d 313 [1955]). Thus, the notice of pendency represents a policy whereby "a suitor's action shall not be impeded or defeated by an alienation of the subject property during the course of the lawsuit" (Cayuga Indian Nation of New York v. Fox, 544 F.Supp 542 [N.D.N.Y. 1982]). By contrast a

mechanic's lien is a mechanism whereby a laborer may file a lien for the value of an agreed upon price of labor and materials. "Subcontractors may enforce their mechanics' liens against the property specified in the notice of lien and any person liable for the debt upon which the lien is founded" (West-Fair Electric Contractors v. Aetna Casualty & Surety Company, 87 NY2d 148, 638 NYS2d 394 [1995]). Thus a laborer may "file and enforce a mechanics' lien against a person liable for the debt upon which the lien is founded, such as the owner, and the real estate being improved" (id). Necessarily, the owner must have consented to such performance of work and the consent is braod and does not necessarily require actual and affirmative consent (see, Ferrara v. Peaches Café LLC, 32 NY3d 348, 91 NYS3d 349 [2018]). Therefore, the connection between the lien and the owners of the property is more direct and consequently requires a greater degree of knowledge and awareness than a mere notice of pendency that only notifies the public of a claim of undefined nature. Thus, requiring service of a notice of pendency upon any defendant suffices for that generalized goal. However, service of a mechanic's lien which is far more personalized in the sense of the relief it ultimately seeks requires service upon each owner.

In this case there is no dispute the mechanic's lien was not served upon D Solinick Design. Thus, the mechanic's lien is not

effective as to that party. Thus, the motion of that party seeking dismissal of the lawsuit is therefore granted.

So ordered.

ENTER:

DATED: March 17, 2021
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC

Outrigger Constr. Co. v Nostrand Ave. Dev. Corp.
Supreme Court, Appellate Division, Second Department, New York
July 31, 1995
217 A.D.2d 689
630 N.Y.S.2d 332

217 A.D.2d 689, 630 N.Y.S.2d 332

Outrigger Construction Company, Inc., Appellant,

v.

Nostrand Avenue Development Corporation et al., Defendants, and Bank Leumi Trust Company of New York, Respondent. (And a Third-Party Action.)

Supreme Court, Appellate Division, Second Department, New York
94-02807
(July 31, 1995)

CITE TITLE AS: Outrigger Constr. Co. v Nostrand Ave. Dev. Corp.

Ordered that the order is affirmed, with costs.

The plaintiff, Outrigger Construction Company, Inc., commenced this action to foreclose a mechanic's lien on real property owned by Nostrand Avenue Development Corporation (hereinafter Nostrand) and on which the defendant Bank Leumi Trust Company of New York (hereinafter Bank Leumi) held a mortgage. The plaintiff had performed construction work on the property for Nostrand. However, Nostrand failed to fully pay the plaintiff for its labor and materials.

On October 26, 1990, the plaintiff filed a notice of a mechanic's lien in the amount of $68,480.46 on the real property in question. On November 21, 1990, the plaintiff served a notice of the lien on Nostrand in compliance with Lien Law § 11. On November 26, 1990, the plaintiff and Nostrand entered into a stipulation in which they agreed that the mechanic's lien would be discharged by the filing of a bond in the amount of $68,480.46. The plaintiff, however, did not file proof of service of the notice of the lien with the Kings County Clerk within 35 days after the filing of the notice of the lien as required by Lien Law § 11. The plaintiff contends that the stipulation between ***690*** it and Nostrand, which was made within the 35-day period, obviates the need for filing proof of service of the notice of the mechanic's lien pursuant to Lien Law § 11.

The Supreme Court properly declared the mechanic's lien null and void and properly dismissed the complaint insofar as it is asserted against Bank Leumi. The plaintiff failed to file proof of service of the notice of the lien as required by the clear and unambiguous language of Lien Law § 11 *(see, Matter of Podolsky v Narnoc Corp.,* 196 AD2d 593, 594-595). The "invalidation of the lien where proof of service is not filed is mandatory leaving no discretion in the court" *(Matter of Northport Marina,* 146 Bankr 60, 62 [ED NY]; *Matter of Connecticut St. Dev. Corp. v Garber Bldg. Supplies,* 216 AD2d 561).

Further, the plaintiff cannot avoid the requirement of filing proof of service of the notice of the lien merely because the lien was discharged by the filing of a surety bond. The posting of a surety bond merely shifts the lien from its original adherence and attaches it to the substituted bond *(see, Tri-City Elec. Co. v People,* 96 AD2d 146, 150, *affd* 63 NY2d 969). To justify payment of the lien out of the bond, a valid lien must first be perfected. The filing of the bond, by itself, does not establish the validity or timely filing of the lien *(see, Tri-City Elec. Co. v People, supra,* at 150).

We find the plaintiff's remaining contentions to be without merit.

Rosenblatt, J. P., Copertino, Hart and Friedmann, JJ., concur.

Matter of Matrix Staten Is. Dev., LLC v BKS-NY, LLC
Supreme Court, Appellate Division, Second Department, New York
April 27, 2022
204 A.D.3d 1004
167 N.Y.S.3d 530

204 A.D.3d 1004, 167 N.Y.S.3d 530, 2022 N.Y. Slip Op. 02795

***1** In the Matter of Matrix Staten Island Development, LLC, et al., Respondents,

v

BKS-NY, LLC, Appellant, et al., Respondent.

Supreme Court, Appellate Division, Second Department, New York
2018-04840, 85029/18
April 27, 2022

CITE TITLE AS: Matter of Matrix Staten Is. Dev., LLC v BKS-NY, LLC

Trenk, DiPasquale, Della Fera & Sodono, P.C., New York, NY (Margreta M. Morgulas and Paul Hollander of counsel), for appellant.
Faegre Drinker Biddle & Reath LLP, New York, NY (Marsha J. Indych and Kenneth J. Wilbur, pro hac vice, of counsel), for petitioners-respondents.

In a proceeding, inter alia, pursuant to Lien Law § 19 (6) to summarily discharge certain mechanic's liens, BKS-NY, LLC, appeals from an order of the Supreme Court, Richmond County (Orlando Marrazzo, Jr., J.), dated March 15, 2018. The order, insofar as appealed from, granted those branches of the petition which were, in effect, (1) to summarily discharge a mechanic's lien dated January 2, 2018, and filed by BKS-NY, LLC, insofar as asserted against the petitioners, (2) to direct the Richmond County Clerk's Office to vacate and discharge the subject lien insofar as asserted against the petitioners, and (3) for a determination that the amount claimed in the subject mechanic's lien was willfully exaggerated, and thereupon, for a hearing to determine the amount of damages sustained by the petitioners, inter alia, pursuant to Lien Law § 39-a.

Ordered that the order is reversed insofar as appealed from, on the law, with costs, and those branches of the petition which were, in effect, (1) to summarily discharge the subject mechanic's lien insofar as asserted against the petitioners, (2) to direct the Richmond County Clerk's Office to vacate and discharge the subject lien insofar as asserted against the petitioners, and (3) for a determination that the amount claimed in the subject mechanic's lien was willfully exaggerated, and thereupon, for a hearing to determine the amount of damages sustained by the petitioners, inter alia, pursuant to Lien Law § 39-a, are denied.

BKS-NY, LLC (hereinafter BKS), filed a mechanic's lien dated January 2, 2018 (hereinafter the composite mechanic's lien). The composite mechanic's lien identified the real property subject to the lien, the alleged owners of the real property subject to the lien, and the amounts allegedly due for certain unreimbursed material and labor.

The petitioners, Matrix Staten Island Development, LLC, ***1005** and Matrix Construction Services, LLC, commenced this special proceeding against BKS and another respondent. The petition sought, inter alia, in effect, to summarily discharge the composite mechanic's lien insofar as asserted against the petitioners, (2) to direct the Richmond County Clerk's Office to vacate and discharge the subject lien insofar as asserted against the petitioners, and (3) for a determination that the amount claimed in the composite mechanic's lien was willfully exaggerated, and, thereupon, for ***2** a hearing to determine the amount of damages sustained by the petitioners, inter alia, pursuant to Lien Law § 39-a. In the order appealed from, dated March 15, 2018, the Supreme Court, among other things, granted those branches of the petition. We reverse the order insofar as appealed from.

“Lien Law § 19 (6) provides, with respect to a mechanic's lien for a private improvement, that a court may summarily discharge of record the alleged lien when ‘the notice of lien is invalid by reason of failure to comply with the provisions of’ Lien Law § 9' ” (*Matter of Malbro Constr. Servs., Inc. v Straightedge Bldrs., Inc.*, 188 AD3d 1068, 1068 [2020], quoting Lien Law § 19 [6]; *see Rivera v Department of Hous. Preserv. & Dev. of the City of N.Y.*, 29 NY3d 45, 51 [2017]). “Thus, to be summarily discharged, the notice of lien must be invalid on its face” (*Matter of Old Post Rd. Assoc., LLC v LRC Constr., LLC*, 177 AD3d 658, 659 [2019]). “When there is no defect on the face of the notice of lien, any dispute regarding the validity of the lien must await the lien foreclosure trial” (*id.* at 659). “In determining the validity of a notice of lien, the requirements of the Lien Law are ‘to be construed liberally to secure the beneficial interests and purposes thereof’ ” (*Matter of Malbro Constr. Servs., Inc. v Straightedge Bldrs., Inc.*, 188 AD3d at 1068, quoting Lien Law § 23). “ ‘A substantial compliance with its several provisions shall be sufficient for the validity of a lien and to give jurisdiction to the courts to enforce the same’ ” (*Matter of Malbro Constr. Servs., Inc. v Straightedge Bldrs., Inc.*, 188 AD3d at 1068, quoting Lien Law § 23).

Here, the composite mechanic's lien was facially valid and the Supreme Court should not have summarily discharged it. Contrary to the petitioners' contention, the composite mechanic's lien was not invalid because of a failure to apportion the work and material furnished between the four parcels of real property that were identified in the composite mechanic's lien. The requirement to do so "applies where several transactions, involving the improvement of distinct parcels of property, have been effected at the request of independent owners" (*Matter of Niagara Venture v Sicoli & Massaro*, 77 NY2d 175, 181-182 [1990]). Here, the petitioners failed to establish that the individual and independent lot owners identified in the composite mechanic's lien hired BKS in separate and distinct transactions. Furthermore, the composite mechanic's lien was not invalid on its face merely because it identified multiple lots by their respective tax block and lot designations (*see East Coast Mines & Materials Corp. v Golf Course Props. Co.*, 228 AD2d 545, 546 [1996]). Unlike the lien at issue in *Hudson Demolition Co. v Ismor Realty Corp.* (62 AD2d 980 [1978]), the composite mechanic's lien in this case identified the proper block and lot designations for each of the four lots (*see Fremar Bldg. Corp. v Sand*, 104 AD2d 1025, 1026 [1984]; *cf. Hudson Demolition Co. v Ismor Realty Corp.*, 62 AD2d at 980). Under the circumstances, the court erred in granting those branches of the petition which were, in effect, (1) to summarily discharge the composite mechanic's lien insofar as asserted against the petitioners, and (2) to direct the Richmond County Clerk's Office to vacate and discharge the composite mechanic's lien insofar as asserted against the petitioners (*see generally Matter of Malbro Constr. Servs., Inc. v Straightedge Bldrs., Inc.*, 188 AD3d at 1068-1069; *Matter of Old Post Rd. Assoc., LLC v LRC Constr., LLC*, 177 AD3d at 660).

The Supreme Court also should not have summarily determined that branch of the petition which alleged that the amount claimed in the composite mechanic's lien was willfully exaggerated. "Pursuant to Lien Law § 39, the court may declare a lien void and deny recovery if the lienor has willfully exaggerated the amount claimed" (*Guzman v Estate of Fluker*, 226 AD2d 676, 678 [1996]). This Court has held that the remedy in Lien Law § 39-a is "available only where the lien was valid in all other respects and was declared void by reason of willful exaggeration after a trial of the foreclosure action" (*Guzman v Estate of Fluker*, 226 AD2d at 678). Accordingly, "damages under section 39-a [of the Lien Law] may not be awarded unless the lien has been declared void for wilful exaggeration after a trial in an action to foreclose the lien" (*Wellbilt Equip. Corp. v Fireman*, 275 AD2d 162, 166 [2000]; *see Guzman v Estate of Fluker*, 226 AD2d at 678; *Joe Smith, Inc. v Otis-Charles Corp.*, 279 App Div 1, 5 [1951], *affd* 304 NY 684 [1952]). Under the circumstances, the Supreme Court erred in granting that branch of the petition which was, in effect, for a determination that the amount claimed in the composite mechanic's lien was willfully exaggerated, and thereupon, for a hearing to determine the amount of damages sustained by the petitioners, inter alia, pursuant to Lien Law § 39-a (*see generally W & W Glass, LLC v 1113 York Ave. Realty Co. LLC*, 113 AD3d 563, 564 [2014]; *Wellbilt Equip. Corp. v Fireman*, 275 AD2d at 166-168). Barros, J.P., Brathwaite Nelson, Miller and Wooten, JJ., concur. ***3**

Motion by the appellant, inter alia, to strike stated portions of the petitioners-respondents' brief, on an appeal from an order of the Supreme Court, Richmond County, dated March 15, 2018, on the ground that they contain matter dehors the record or improperly raise issues for the first time on appeal. By decision and order on motion of this Court dated December 18, 2018, that branch of the motion which is to strike stated portions of the petitioners-respondents' brief was held in abeyance and referred to the panel of Justices hearing the appeal for determination upon the argument or submission thereof.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, and upon the argument of the appeal, it is

Ordered that the branch of the motion which is to strike stated portions of the petitioners-respondents' brief is denied as academic.

J&M Indus., Inc. v Red Apple 180 Myrtle Ave. Dev., LLC Supreme Court, Appellate Division, Second Department, New York September 15, 2021
197 A.D.3d 1154
153 N.Y.S.3d 515

197 A.D.3d 1154, 153 N.Y.S.3d 515, 2021 N.Y. Slip Op. 04966

***1** J&M Industries, Inc., Respondent,

v

Red Apple 180 Myrtle Avenue Development, LLC, et al., Appellants, et al., Defendants.

Supreme Court, Appellate Division, Second Department, New York
2018-10472, 508488/16
September 15, 2021

CITE TITLE AS: J&M Indus., Inc. v Red Apple 180 Myrtle Ave. Dev., LLC

Westermann Sheehy Keenan Samaan & Aydelott, LLP, East Meadow, NY (Michael J. Rosenthal of counsel), for appellants.
Kilhenny & Felix, Scarsdale, NY (James M. Felix of counsel), for respondent.

In an action, inter alia, to recover damages for breach of contract and to foreclose a mechanic's lien, the defendants Red Apple 180 Myrtle Avenue Development, LLC, and Hartford Fire Insurance appeal from an order of the Supreme Court, Kings County (Lawrence Knipel, J.), dated May 17, 2018. The order, insofar as appealed from, denied those branches of those defendants' motion which were for summary judgment dismissing the first and fourth causes of action insofar as asserted against them and discharging the mechanic's lien, and for summary judgment on their first counterclaim, to recover an overpayment.

Ordered that the order is affirmed insofar as appealed from, with costs.

The plaintiff commenced this action, among other things, to recover damages for breach of contract (first cause of action) and to foreclose a mechanic's lien (fourth cause of action). The defendants Red Apple 180 Myrtle Avenue Development, LLC, and Hartford Fire Insurance (hereinafter together the defendants) appeared in the action and in their answer, inter alia, interposed a counterclaim to recover an alleged overpayment (first counterclaim).

***1155** The defendants moved for summary judgment dismissing the complaint insofar as asserted against them and discharging the mechanic's lien, and for summary judgment on their first counterclaim. The defendants contended, among other things, that their evidentiary submissions demonstrated that the plaintiff had executed a series of releases in connection with payments it had received, totaling an amount that exceeded the total amount the plaintiff sought in its itemized lien statement.

The plaintiff opposed the defendants' motion. The plaintiff contended that the defendants' submissions failed to establish as a matter of law that all of the amounts due under the subject contract were paid in full. The plaintiff further contended that the releases did not bar this action.

In an order dated May 17, 2018, the Supreme Court denied the defendants' motion. The court determined, inter alia, that the defendants failed to demonstrate that all of the amounts ***2** allegedly due under the subject contract had been paid in full. The defendants appeal. On appeal, the defendants contend that the Supreme Court should have granted those branches of their motion which were for summary judgment dismissing the first and fourth causes of action and discharging the mechanic's lien, and for summary judgment on their first counterclaim to recover an alleged overpayment.

A mechanic's lien (*see* Lien Law art 2), may be enforced in accordance with the provisions of article 3 of the Lien Law (*see* Lien Law § 24). "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 [the lienor] claims a lien, and which shall also set forth the terms of the contract under which such items were furnished" (Lien Law § 38).

"Notwithstanding the provisions of any other law, any contract, agreement or understanding whereby the right to file or enforce any lien created under article two [of the Lien Law] is waived, shall be void as against public policy and wholly unenforceable" (Lien Law § 34). However "[t]his section shall not preclude a requirement for a written waiver of the right to file a mechanic's lien executed and delivered by a contractor, subcontractor, material supplier or laborer simultaneously with or after payment for the labor performed or the materials furnished" (*id*.).

A defendant moving for summary judgment on a counterclaim generally has the burden of establishing, prima facie, "all of ***1156*** the essential elements of the [counterclaim]" (*Nunez v Chase Manhattan Bank*, 155 AD3d 641, 643 [2017]; *see Shah v Mitra*, 171 AD3d 971, 979 [2019]; *see generally Stukas v Streiter*, 83 AD3d 18, 23 [2011]). "By contrast, a defendant moving for summary judgment dismissing one of the plaintiff's causes of action may generally sustain his or her prima facie burden 'by negating a single essential element' of that cause of action" (*Sterling Park Devs., LLC v China Perfect Constr. Corp.*, 185 AD3d 1082, 1084 [2020], quoting *Nunez v Chase Manhattan Bank*, 155 AD3d at 643; *see Poon v Nisanov*, 162 AD3d 804, 806 [2018]).

"It is a defendant's burden, when it is the party moving for summary judgment, to demonstrate affirmatively the merits of a defense [or counterclaim], which cannot be sustained by pointing out gaps in the plaintiff's proof" (*Quantum Corporate Funding, Ltd. v Ellis*, 126 AD3d 866, 871 [2015]; *see Nill v Schneider*, 173 AD3d 753, 755 [2019]). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Here, as the Supreme Court correctly concluded, the defendants' evidentiary submissions failed to account for, or otherwise address, numerous items listed in the plaintiff's itemized lien statement (*see* Lien Law § 38), and the defendants otherwise failed to demonstrate that all of the amounts allegedly due under the subject contract had been paid in full. Furthermore, the defendants failed to demonstrate that the releases executed by the plaintiff barred the relief sought in this action (*see generally* Lien Law § 34). Since the defendants failed to establish their prima facie entitlement to judgment as a matter of law dismissing the first and fourth causes of action and discharging the mechanic's lien, and for summary judgment on their first counterclaim, the court properly denied those branches of their motion without regard to the sufficiency of the plaintiff's opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853). Chambers, J.P., Miller, Barros and Iannacci, JJ., concur. **[Prior Case History: 2018 NY Slip Op 31000(U).]**

Martirano Constr. Corp. v Briar Contr. Corp.
Supreme Court, Appellate Division, Second Department, New York
October 29, 1984
104 A.D.2d 1028
481 N.Y.S.2d 105

104 A.D.2d 1028, 481 N.Y.S.2d 105

Martirano Construction Corp., Respondent,

v.

Briar Contracting Corporation et al., Defendant; Tishman Construction Corporation of New York et al., Appellants, and Montfort Brothers, Inc., Respondent.

Supreme Court, Appellate Division, Second Department, New York
382 E
October 29, 1984

CITE TITLE AS: Martirano Constr. Corp. v Briar Contr. Corp.

OPINION OF THE COURT

TMollen, P. J., Titone, Weinstein and Rubin, JJ., concur.
In an action, *inter alia*, to recover damages for breach of contract and misappropriation of trust funds, defendants Tishman Construction Corporation of New York and the New York Girl Scouts, Inc. appeal from an order of the Supreme Court, Westchester County (Delaney, J.), entered August 16, 1983, which denied their motion to dismiss the amended verified complaint of plaintiff Martirano Construction Corp. and the cross claims of defendant Montfort Brothers, Inc. against them pursuant to CPLR 3211 (subd [a], par 7).

Order modified, on the law, by deleting the provision thereof which denied that branch of the motion which sought dismissal of the amended verified complaint as against appellants, and substituting therefor a provision granting that branch of the motion only to the extent of dismissing, as against appellants, the first cause of action and so much of the fourth cause of action of the amended verified complaint as was predicated upon willful breach of contract, severing those portions of the amended verified complaint as are dismissed and otherwise denying that branch of the motion. As so modified, order affirmed, without costs or disbursements.

This action involves a project undertaken by defendant Briar Contracting Corporation (Briar) to perform all the work and to furnish all the material and equipment necessary for the construction of the Edith Macy Conference Center in Mount Pleasant. The New York Girl Scouts, Inc. (Girl Scouts) owned the real property upon which the conference center was being built. In return for Briar's service, Tishman Construction Company of New York (Tishman), as agent for Girl Scouts, contracted to pay Briar in accordance with the terms of their agreement. Thereafter, on or about March 17, 1981, Briar entered into a subcontract agreement with plaintiff Martirano Construction Corp. in which Martirano agreed to perform all work as outlined in the “Division 4-Masonry” section of the contract between Tishman and Briar. The subcontract, by its terms, expressly made the contract between Briar and Tishman a part thereof. Moreover, the subcontractor was required to submit a list of suppliers and samples to the general contractor for approval by Girl Scouts. ***1029**

Defendant Reliance Insurance Company executed and delivered to Tishman a written surety bond. By the terms of the surety bond, Reliance was obligated to incur liability in the event that Briar failed to promptly pay all those furnishing labor or materials in connection with the construction project.

During the course of the project, numerous disputes arose between Martirano and Briar concerning the progress and quality of the former's work as required by the subcontract as well as the propriety of various items of extra work and materials furnished by Martirano. As a consequence of these disputes, both Martirano and Briar claim that the other party has breached their subcontract agreement.

On or about November 20, 1981, Martirano filed a mechanic's lien against the premises owned by Girl Scouts based on what it claimed are unpaid sums due under its subcontract with Briar. Additionally, defendant Montfort Brothers, Inc. (Montfort), a subcontractor hired by plaintiff to supply masonry and building blocks for the project, filed a mechanic's lien against the premises for the balance owed to it for its delivery of materials. Pursuant to section 19 of the Lien Law, Briar caused both of said liens to be discharged by the filing of surety bonds in the office of the Westchester County Clerk.

Plaintiff Martirano thereafter commenced the instant action against Briar, Tishman, Girl Scouts, Reliance and Montfort. The amended verified complaint alleges a cause of action sounding exclusively in breach of contract, a cause of action to foreclose Martirano's mechanic's lien, a

cause of action predicated on Briar's misapplication of trust funds in violation of sections 72 and 79-a of the Lien Law and a cause of action sounding in both breach of contract and misappropriation of trust funds. Defendant Montfort asserted cross claims against Briar, Tishman, Girl Scouts and Reliance based upon its assertion of a lien against the subject premises.

Tishman and Girl Scouts subsequently moved for an order pursuant to CPLR 3211 (subd [a], par 7) dismissing the amended verified complaint and cross claims in their entirety as against them. Tishman and Girl Scouts now appeal from the denial of that motion. Neither Briar nor Reliance is a party to the instant appeal.

It is well settled that a motion to dismiss for failure to state a cause of action will be denied in its entirety where the complaint asserts several causes of action, at least one of which is legally sufficient and where the motion is aimed at the pleading as a whole without particularizing the specific causes of action sought to be dismissed (*Brush v. Olivo*, 81 AD2d 852; *Griefer v.* ****1030*** *Newman*, 22 AD2d 696; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:26; Siegel, NY Prac, § 265, p 325; 4 Weinstein-Korn-Miller, NY Civ Prac, par 3211.38). In the instant case, however, Tishman and Girl Scouts specifically particularized the reasons why the respective causes of action should be dismissed against them. Accordingly, although dismissal of each and every cause of action is sought, it is our view that the moving papers sufficiently particularized each individual claim and the reasons for seeking dismissal of each (see *Brush v. Olivo*, supra., p 853). We therefore address the motion to dismiss as applying to each cause of action separately.

The first cause of action of Martirano's amended verified complaint alleges a breach of the agreement between Martirano and Briar emanating from Briar's failure to pay for services performed thereunder. It has been held that a subcontractor may not assert a cause of action which is contractual in nature against parties with whom it is not in privity. Moreover, there exists no tort liability to incidental beneficiaries not in privity with the subcontractor plaintiff (see *Alvord & Swift v. Muller Constr. Co.*, 46 NY2d 276, 282). Absent any indication that Tishman or Girl Scouts were privy to the contract sued upon, the first cause of action of Martirano's amended verified complaint fails to state a cause of action against them. Moreover, the fourth cause of action of Martirano's amended verified complaint seeks additional damages for, *inter alia*, willful breach of contract. Inasmuch as the pleadings fail to indicate that Tishman and Girl Scouts were in privity of contract with Martirano, that portion of the fourth cause of action which sounds in breach of contract must also be dismissed as to them.

The second cause of action of Martirano's amended verified complaint and Montfort's first cross claim seek to foreclose upon mechanics' liens. Section 24 of the Lien Law provides that mechanics' liens "may be enforced against the property specified in the notice of lien and which is subject thereto and against any person liable for the debt upon which the lien is founded". Pursuant to subdivision 3 of section 44 of the Lien Law, "[a]ll persons appearing by the records in the office of the county clerk or register to be owners of such real property or any part thereof" are necessary parties in an action to enforce a lien against real property. Thus, Girl Scouts was properly made a party defendant.

Dismissal of these claims as against Tishman would likewise have been improper. There exists authority to the effect that a general contractor is also a proper party defendant in an action to enforce a mechanic's lien (*Hilton Bridge Constr. Co. v. New* ****1031*** *York Cent. & Hudson Riv. R. R. Co.*, 145 NY 390; *Maltby & Sons Co. v. Boland Co.*, 152 app. div 596). Inasmuch as the parties have raised an issue of fact as to whether or not Tishman was a general contractor, summary judgment dismissing this claim against it would not be an appropriate remedy. "It is the policy of the court to avoid multiplicity of actions and in the foreclosure of mechanics' liens the courts have always favored and often compelled, by the bringing in of additional parties, a settlement of the whole controversy in the one suit" (*Maltby & Sons Co. v. Boland Co.*, supra., p 600).

This situation is not altered by Briar's filing of surety bonds to discharge the mechanics' liens. Such surety bonds are conditioned for the payment of any judgment which may be rendered against the subject property for the enforcement of the liens (see Lien Law, §19, subd [4]). It therefore follows that although the property itself was released from the lien, for plaintiff to be entitled to recover, it must commence a formal action for the enforcement of the lien and obtain a judgment as if the lien still existed. Such judgment should then contain a provision directing the surety to pay the amount found due upon the lien (*Kelly v. Highland Constr. Co.*, 133 app. div 579, 581; see, also, *Kinematics, Ltd. v. Sprayview Constr. Corp.*, 27 Misc 2d 332, 333). Accordingly, the motion, insofar as it sought the dismissal of the cause of action and cross claim to foreclose upon the two mechanics' liens, was properly denied.

Both the third cause of action of Martirano's amended verified complaint and Montfort's second cross claim allege violations of sections 72 and 79-a of the Lien Law emanating from Tishman's and Girl Scouts' alleged diversion and misappropriation of trust funds. Additionally, the fourth cause of action is phrased in part in terms of "willful diversion and misappropriation of trust funds". It has been held that "the owner or the contractor is a trustee (Lien Law, §§70, 72) for the benefit of subcontractors, laborers and materialmen (Lien Law, §71), who necessarily, therefore, become *cestuis que trustent* or beneficiaries of such trusts" (*Frontier Excavating v. Sovereign Constr. Co.*, 30 AD2d 487, 489, app dsmd 24 NY2d 991). Martirano and Montfort allege that defendants Girl Scouts and Tishman, as trustees of the funds intended for distribution among the subcontractors, violated sections 72 and 79-a of the Lien Law. As such, a legally sufficient cause of action and cross claim have been asserted and the motion to dismiss was properly denied as to these claims. As indicated above, a factual issue exists with regard to the status of Tishman.

In conclusion, the order appealed from should be modified to the extent that the entire first cause of action of Martirano's ****1032*** amended complaint as well as that portion of the fourth cause of action which sounds in breach of contract, should be dismissed. Inasmuch as the remaining causes of action of that pleading as well as Montfort's cross claims are legally sufficient, the motion insofar as it was to dismiss them was properly denied.

END OF DOCUMENT

Matter of Navillus Tile, Inc.
Supreme Court, Appellate Division, Second Department, New York
September 12, 2012
98 A.D.3d 979
950 N.Y.S.2d 748

98 A.D.3d 979, 950 N.Y.S.2d 748, 2012 N.Y. Slip Op. 06143

*1 In the Matter of Navillus Tile, Inc., Doing Business as Navillus Contracting, Appellant; LC Main, LLC, Respondent.

Supreme Court, Appellate Division, Second Department, New York
13324/10, 13325/10, 2010-08721, 2010-11676, 2011-02658, 2011-02661
September 12, 2012

CITE TITLE AS: Matter of Navillus Tile, Inc.

Rabinowitz & Galina, Mineola, N.Y. (Michael M. Rabinowitz and Gail A. Rosen of counsel), for appellant. DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, White Plains, N.Y. (Brian T. Belowich of counsel), for respondent.

In two related proceedings pursuant to Lien Law § 17 to extend the term of mechanic's liens, the petitioner appeals (1) from an order of the Supreme Court, Westchester County (Colabella, J.), dated August 9, 2010, which denied its petition *980 to extend, for a period of one year, the term of a mechanic's lien filed in connection with certain real property, (2) from an order of the same court, also dated August 9, 2010, which denied its petition to extend, for a period of one year, the term of a second mechanic's lien filed in connection with the real property, (3), as limited by its brief, from so much an order of the same court dated February 14, 2011, as, upon renewal and reargument, adhered to the determination in the first order dated August 9, 2010, and (4), as limited by its brief, from so much of an order of the same court, also dated February 14, 2011, as, upon renewal and reargument, adhered to the determination in the second order dated August 9, 2010.

Ordered that the appeals from the orders dated August 9, 2010, are dismissed, as those orders were superseded by the orders dated February 14, 2011, made upon renewal and reargument; and it is further,

Ordered that the orders dated February 14, 2011, are reversed insofar as appealed from, on the law and in the exercise of discretion, upon renewal and reargument, the determinations in the orders dated August 9, 2010, denying the petitions are vacated, and the petitions are thereupon granted nunc pro tunc to May 19, 2010; and it is further,

Ordered that one bill of costs is awarded to the appellant.

Navillus Tile, Inc., doing business as Navillus Contracting (hereinafter Navillus), filed two mechanic's liens in connection with the subject real property in White Plains, which is owned by LC Main, LLC (hereinafter LC Main). The liens were dated May 29, 2008. Navillus filed two one-year extensions of the liens, which are date-stamped as received by the Westchester County *2 Clerk on May 22, 2009.

On May 19, 2010, a Wednesday, Navillus, proceeding ex parte, filed with the Chief Clerk of the Supreme Court, Westchester County, and the County Court, Westchester County, two petitions (one as to each lien), seeking to extend the terms of each of the two liens for an additional year. Navillus's counsel handed the petitions to that clerk since, in Westchester County, such ex parte applications for relief are no longer permitted to be hand-delivered to a judge or justice. Navillus's counsel informed that clerk that the liens were to expire on the upcoming Saturday. The petitions, however, were not received by a justice of the Supreme Court until Tuesday, May 25, 2010, which was after the liens had expired.

Observing that the liens had expired, the Supreme Court asked Navillus to brief the issue of whether the court still had the power to grant the extensions. Thereafter, the Supreme *981 Court denied the petitions in separate orders, one for each lien, concluding that once the liens had expired, it lacked the power to extend the liens nunc pro tunc.

Navillus moved for leave to renew and reargue, and LC Main opposed the motion. The Supreme Court, upon renewal and reargument, adhered to its prior determinations.

Contrary to the Supreme Court's conclusion, it did possess the power to grant the petitions extending the term of the liens nunc pro tunc. Nothing in the text of Lien Law § 17 prohibits the granting of an application for an extension of the term of a lien where the application is timely filed but not presented to a judge or justice until after the expiration date (*see Makovic v Aigbogun*, 41 AD3d 342 [2007]). Although, in denying the petitions and adhering to its prior determinations, the Supreme Court relied on *Matter of Binghamton Masonic Temple v Armor El. Co.* (186 AD2d 338 [1992]) and *Contelmo's Sand & Gravel v J & J Milano* (96 AD2d 1090 [1983]), those cases are distinguishable, as

they did not squarely address the issue presented in this case. Since the granting of the petitions nunc pro tunc is not “otherwise expressly prescribed by law, the court may extend the time fixed by [Lien Law § 17] upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed” (CPLR 2004).

In the exercise of our discretion, we grant the petitions nunc pro tunc to May 19, 2010, the date the petitions were filed. Since the requests for relief set forth in the petitions may be made ex parte, and there may be a gap between the signing of the extension order and its filing, during which the one-year term of the lien may expire without affecting the validity of the lien, LC Main would not be prejudiced by the granting of the extensions nunc pro tunc (*see H.M. Hughes Co. v Carmania Corp.*, 187 AD2d 287 [1992]; *Matter of Binghamton Masonic Temple v Armor El. Co.*, 186 AD2d at 338; *Madison Lexington Venture v Crimmins Contr. Co.*, 159 AD2d 256, 258 [1990]; *Bianchi Constr. Corp. v D'Egidio*, 165 Misc 2d 973, 975 [1995]). Florio, J.P., Balkin, Belen and Chambers, JJ., concur.

Peri Formwork Sys., Inc. v Lumbermens Mut. Cas. Co.
Supreme Court, Appellate Division, Second Department, New York
November 13, 2013
112 A.D.3d 171
975 N.Y.S.2d 422

112 A.D.3d 171, 975 N.Y.S.2d 422, 2013 N.Y. Slip Op. 07461

***1** Peri Formwork Systems, Inc., Appellant-Respondent

v

Lumbermens Mutual Casualty Company et al., Defendants, and Arch Insurance Company et al., Respondent-Appellants.

Supreme Court, Appellate Division, Second Department, New York
November 13, 2013

CITE TITLE AS: Peri Formwork Sys., Inc. v Lumbermens Mut. Cas. Co.

RESEARCH REFERENCES

Am Jur 2d, Appellate Review §§ 566–569; Am Jur 2d, Mechanics' Liens §§ 432, 440.

Carmody-Wait 2d, Courts and Their Jurisdiction §§ 2:237–2:243; Carmody-Wait 2d, Appeals in General §§ 70:474–70:479; Carmody-Wait 2d, Establishment, Discharge, and Enforcement of Mechanics' Liens §§ 97:161, 97:188, 97:258, 97:381.

NY Jur 2d, Appellate Review §§ 586, 588, 589, 593; NY Jur 2d, Mechanics' Liens §§ 339, 340.

ANNOTATION REFERENCE

See ALR Index under Bonds and Undertakings; Law of the Case; Mechanics' Liens.

FIND SIMILAR CASES ON WESTLAW

Query: bond /s lien & “law of the case” & prior /2 appeal

APPEARANCES OF COUNSEL

Neal Brickman, P.C., New York City (*Aaron A. Mitchell* of counsel), for appellant-respondent.
DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, White Plains (*Patrick M. Reilly* of counsel), for respondents-appellants.

OPINION OF THE COURT

Chambers, J.

(1) During a nonjury trial in this action, the plaintiff argued ****173*** that, under the doctrine of law of the case, it was not required to prove the amount it was owed on its mechanic's liens because this Court had previously determined that issue on a prior appeal (*see Peri Formwork Sys., Inc. v Lumbermens Mut. Cas. Co.*, 65 AD3d 533 [2009]). After the trial, the Supreme Court adopted the plaintiff's argument. This was error because this Court did not resolve that issue on the prior appeal. Since the plaintiff failed to carry its burden of proving the amount it was owed on its mechanic's liens, it was not entitled to recover on the subject bonds filed to discharge the liens. In addressing the issues raised on this appeal, we take the opportunity to review the statutory requirements for recovery under the Lien Law, and the limits on recovery imposed by the principle of subrogation. ****2***

The defendants LC White Plains, LLC (hereinafter LC White Plains) and Cappelli Enterprises, Inc. (hereinafter Cappelli, and hereinafter together the owners) owned the White Plains City Center (hereinafter the property). The owners contracted with the defendant George A. Fuller Company (hereinafter the general contractor) to construct several buildings in multiple phases at the property. The general contractor hired Rogers & Sons Concrete, Inc., as a concrete subcontractor (hereinafter the concrete subcontractor), who, in turn, hired the plaintiff, a sub-subcontractor, to provide formwork and related supplies and services. The concrete subcontractor and the plaintiff entered into a rental agreement pursuant to which the plaintiff agreed to supply certain materials at a rental rate of 5% of list value per 28-day period.

On March 19, 2004, the plaintiff filed a mechanic's lien in the sum of $423,055.97. On March 31, 2004, the defendant Arch Insurance Company (hereinafter Arch) posted a surety bond in the sum of $466,296.57, discharging the lien. A second lien was filed on November 4, 2004, in the sum of $57,966.89. On September 26, 2005, Cappelli and Arch posted a lien discharge bond in the sum of $63,763.58.

The plaintiff then commenced this consolidated action against, among others, the owners, the general contractor, and Arch, inter alia, to recover on the bonds. At the completion of discovery, the plaintiff moved for summary judgment on the claims to recover on the bonds. In an order entered March 26, 2008, the Supreme Court, inter alia, granted that branch of the plaintiff's motion, stating:

> "The Court finds that [the plaintiff] has established its entitlement to summary judgment as to the Arch ***174** surety lien bonds filed with respect to the amounts alleged to be due under the [concrete subcontractor's] contracts; defendants have raised no genuine issues of fact with respect thereto. Accordingly, [the plaintiff] is granted summary judgment with respect to [the] Arch surety bonds."

The plaintiff appealed from that order, and the owners, the general contractor, and Arch cross-appealed from the order. This Court modified the order by denying that branch of the plaintiff's motion which was for summary judgment on its claims to recover on the two bonds filed to discharge its mechanic's liens (*see id.* at 534). In the body of the decision and order, this Court explained that the plaintiff's

> "liens were valid only as to any amount still due and unpaid to the [concrete] subcontractor. Since a triable issue of fact exists as to whether the [concrete] subcontractor was owed any money and, if so, the amount, at the time the plaintiff's liens were filed, the plaintiff was not entitled to summary judgment" (*id.* at 535 [citations omitted]).

The action proceeded to a nonjury trial, where counsel for the plaintiff continually asserted that he did not need to prove the amount the plaintiff was owed on its mechanic's liens. At the outset of trial, counsel for the plaintiff maintained that this Court's prior decision and order limited the issue presented to determining "the amount of money that was due and owing from [the owners and the general contractor] to [the concrete] subcontractor . . . at the time of the filing of the mechanic's lien or thereafter." Later, during cross-examination of the president of the concrete subcontractor, counsel for the plaintiff objected to a line of inquiry regarding the amount of the liens, asserting that the liens had already been found valid by this Court, and reiterating his position that the issue at trial was limited to "the amounts still due to the [concrete] subcontractor." Counsel's objection was overruled. During the trial, evidence was produced showing that the general contractor owed money to the concrete subcontractor as of March 19, 2004, when the first lien was filed, and that the general contractor paid the concrete subcontractor approximately $2.7 million after the liens were filed.

On June 4, 2010, the plaintiff moved pursuant to Lien Law § 19 (4) (d) and CPLR 2508 to require the owners to post an additional undertaking in the sum of $308,465.43 to bond the ***175** mechanic's liens, claiming that the interest on the liens exceeded the amount of the bonds by that amount. In an order entered October 19, 2010, the Supreme Court denied the motion.

In a decision entered December 14, 2010, the Supreme Court directed dismissal of the complaint insofar as asserted against LC White Plains and the general contractor, and found that the plaintiff was entitled to judgment against Arch and Cappelli in the principal sum of $530,060.15, the total sum of the bonds. The court noted that, since there was no privity between the owners and the plaintiff, the measure of the plaintiff's liens was the value of the labor and material added to the property, rather than the contract price. The court further stated:

> "Be that as it may, as indicated above, Defendants challenged the validity of the liens when they moved for summary judgment before Justice Rudolph. Whether they challenged them as exceeding the reasonable value of the materials furnished does not appear. In any event, Justice Rudolph held them valid as to the amounts ***3** claimed therein and that holding was affirmed on appeal. It is therefore law of the case."

On May 31, 2011, the Supreme Court entered judgment in favor of the plaintiff and against Arch and Cappelli in the principal sum of $530,060.15.

(2) Lien Law § 3 provides, inter alia, that a "subcontractor [or] materialman . . . who performs labor or furnishes materials for the improvement of real property . . . shall have a lien for the principal and interest, of the value, or the agreed price, of such labor . . . or materials upon the real property improved or to be improved." In other words, a lienor is required to prove the debt it is owed, which requires proof of either the price of its contract or the value of the materials supplied to the project (*see* 76A NY Jur 2d, Mechanics' Liens § 24 ["A subcontractor is allowed to claim to the extent of (his or her) debt"]). As explained in two leading New York treatises on mechanic's liens,

> "[t]he amount of a mechanic's lien is limited by the contract under which it is claimed; the lienor should ordinarily be bound by the price term contained in the contract to which lienor is a party . . . Typically, the 'value' measure would be resorted to if there were no 'agreed price.' In an appropriate case, ***176** however, the 'value' measure might be substituted for the 'price' measure" (Jenean Taranto, Mechanics' Liens in New York § 2:3 [34 West's NY Prac Series 2013]; *see* 8-92 Warren's Weed, New York Real Property § 92.11 [2]).

In addition to a lienor's right to recover being limited by the contract price or reasonable value of the materials provided, it is further limited by the principle of subrogation (*see* 8-92 Warren's Weed, New York Real Property § 92.11 [1], [4]; Jenean Taranto, Mechanics' Liens in New York § 2:3 [34 West's NY Prac Series 2013]). Lien Law § 4 (1) provides,

> "If labor is performed for, or materials furnished to, a contractor or subcontractor for an improvement, the lien shall not be for a sum greater than the sum earned and unpaid on the contract at the time of filing the notice of lien, and any sum subsequently earned thereon. In no case shall the owner be liable to pay by reason of all liens created pursuant to this article a sum greater than the value or agreed price of the labor and materials remaining unpaid, at the time of filing notices of such liens, except as hereinafter provided."

In other words, no individual mechanic's lien can exceed the amount owed by the owner to the general contractor at the time of filing the lien (*see Kaback Enters., Inc. v Oxford Constr. Dev., Inc.*, 2010 NY Slip Op 33722[U] [Sup Ct, NY County 2010]). Money still due and owing from the owner to the contractor at the time of the filing of the lien, plus any sums subsequently earned thereon, is known as the "lien fund" (*see* 8-92 Warren's Weed, New York Real Property § 92.11 [4]). The subcontractor's right to recover is derivative or subrogated to the right of the

general contractor to recover. Thus, if the general contractor is not owed any amount under its contract with the owner, then the subcontractor may not recover (*see Timothy Coffey Nursery/Landscape v Gatz*, 304 AD2d 652, 653-654 [2003] ["the rights of a subcontractor are derivative of the rights of the general contractor and a subcontractor's lien must be satisfied out of funds due and owing from the owner to the general contractor at the time the lien is filed" (internal quotation marks omitted)]). The purpose of this provision is "to limit the liability of the owner in the aggregate to the amount which he had contracted to pay" (*Heckmann v Pinkney*, 81 NY 211, 217 [1880]). Where sub-subcontractors are involved, this rule becomes more complex, because the principle of subrogation applies ***177** to all tiers of subcontractor liens. "Each party is subrogated to the rights of the contractor or subcontractor on the contracting tier above him" (8-92 Warren's Weed, New York Real Property § 92.11 [4] [a]). Therefore, in the case of a sub-subcontractor or a materialman to a subcontractor, it

> "may not enforce its lien for an amount in excess of either (1) the amount of money owed to him by the subcontractor; (2) the amount of money owed by the general contractor to the subcontractor; or (3) the amount of money owed by the owner to the general contractor" (*id*. § 92.11 [4] [c] [i]).

Here, the plaintiff, a sub-subcontractor, failed to prove at trial the amount it was owed on its liens through evidence of either the agreed price or the value of the materials it supplied to the project. Although there was a contract between the plaintiff and the concrete subcontractor, it did not call for an agreed price. The contract had only a "general pricing guideline," calling for a rental rate of 5% of list value, which was not proven. In addition, the plaintiff did not prove the reasonable value of the materials it supplied to the project. In fact, the plaintiff does not argue that it proved either that there was an agreed price or the reasonable value of the materials it supplied to the project. Instead, consistent with its argument at trial, it relies on the doctrine of the law of the case, ***4** asserting that this Court upheld the Supreme Court's award of summary judgment to it on this issue when this Court stated that "[t]he plaintiff's liens were valid only as to any amount still due and unpaid to the [concrete] subcontractor" (65 AD3d at 535).

(1)As a general rule, the doctrine of law of the case precludes this Court from re-examining an issue which has been raised and decided against a party on a prior appeal where that party had a full and fair opportunity to address the issue (*see People v Evans*, 94 NY2d 499, 502 [2000]; *Frankson v Brown & Williamson Tobacco Corp.*, 67 AD3d 213, 217 [2009]; *Allison v Allison*, 60 AD3d 711 [2009]). The doctrine of law of the case is a judicially crafted policy that expresses the practice of courts generally to refuse to reopen what has been decided, and is not a limit to their power (*see People v Evans*, 94 NY2d at 503; *Frankson v Brown & Williamson Tobacco Corp.*, 67 AD3d at 217-218). However, contrary to the plaintiff's contention, as well as the conclusion of the Supreme Court, the doctrine of law of the case has no applicability here, because the issue of the amount owed to the plaintiff on its liens was not resolved on ***178** the prior appeal (*see Erickson v Cross Ready Mix, Inc.*, 98 AD3d 717 [2012]). To the contrary, as evidenced by the decretal paragraph in the Court's prior decision and order, the plaintiff's motion for summary judgment on its claims to recover on the bonds was denied in its entirety. Nothing on the issue of the extent of the lien, as decided by the Supreme Court, was left intact by that decision and order. The plaintiff's reliance on language in the body of this Court's decision and order, stating that the plaintiff's "liens were valid only as to any amount still due and unpaid to the [concrete] subcontractor," is misplaced. That statement was made in the context of evaluating the issue of the existence of a lien fund, not the issue of the amount owed to the plaintiff on its liens. In other words, the plaintiff misconstrues a statement relating to the existence of a lien fund as a statement about the extent of the debt owned to the plaintiff on its liens. This Court's singular use of the word "valid" was not an award of partial summary judgment on the extent of the debt owed on the liens. Therefore, once the plaintiff's motion for summary judgment on the claims to recover on the bonds was denied in its entirety, it had the obligation of proving each and every element of its claims. Since it failed to do so, it was not entitled to recover on the bonds filed to discharge its liens (*see Metropolitan Steel Indus., Inc. v Perini Corp.*, 36 AD3d 568, 570 [2007]).

In light of our determination, the parties' remaining contentions, including those raised by the plaintiff on its appeal from the order denying its motion for an additional undertaking, have been rendered academic.

The appeal from the order entered October 19, 2010, must be dismissed because the right of direct appeal therefrom terminated with the entry of judgment in the action (*see Matter of Aho*, 39 NY2d 241, 248 [1976]). The issues raised on the appeal from the order are brought up for review and have been considered on the appeal from the judgment (*see* CPLR 5501 [a] [1]). In addition, we dismiss the appeal from that order as academic in light of our determination on the appeal from the judgment.

Accordingly, the appeal from the order is dismissed, the judgment is reversed, on the law, the complaint is dismissed insofar as asserted against Arch and Cappelli, and the action is severed against the remaining defendants.

Rivera, J.P., Angiolillo and Roman, JJ., concur.

Ordered that the appeal from the order is dismissed; and it is further,

***179** Ordered that the judgment is reversed, on the law, the complaint is dismissed insofar as asserted against the defendants Arch Insurance Company and Cappelli Enterprises, Inc., and the action is severed against the remaining defendants; and it is further,

Ordered that one bill of costs is awarded to the defendants Arch Insurance Company and Cappelli Enterprises, Inc.

Matter of Burdick Assoc. Owners Corp. (Karlan Constr. Corp.)
Supreme Court, Appellate Division, Second Department, New York
June 15, 1987
131 A.D.2d 672
516 N.Y.S.2d 750

131 A.D.2d 672, 516 N.Y.S.2d 750

In the Matter of Burdick Associates Owners Corp., Respondent; Karlan Construction Corp., Appellant.

Supreme Court, Appellate Division, Second Department, New York
1116E
June 15, 1987

CITE TITLE AS: Matter of Burdick Assoc. Owners Corp. (Karlan Constr. Corp.)

OPINION OF THE COURT

Lawrence, J. P., Weinstein, Rubin and Kooper, JJ., concur.
In a proceeding pursuant to Lien Law § 38 to cancel four notices of mechanic's liens, Karlan Construction Corp. (hereinafter Karlan) appeals from a judgment of the Supreme Court, Kings County (Lodato, J.), dated December 11, 1986, which canceled the notice of mechanic's lien dated October 8, 1985, in the amount of $420,000. The appeal brings up for review so much of an order of the same court, dated August 29, 1986, as granted the petitioner's application to cancel the notice of mechanic's lien dated October 8, 1985, pursuant to Lien Law § 38 unless Karlan provided, within 60 days, a verified, itemized statement of labor and material upon which the notices were based.

Ordered that the judgment is affirmed, with costs.

Karlan (the lienor) contracted with the petitioner Burdick Associates Owners Corporation (the owner) to renovate a building on Pierrepont Street in Brooklyn for a price of $485,000. For reasons which are not fully set forth in this record, the lienor stopped work on the project before the renovation was completed. The lienor filed four notices of mechanic's liens for payments allegedly due under the contract. The fourth lien, dated October 8, 1985, in the amount of $420,000 is the only one at issue on this appeal.

We conclude that the court did not err when, by order dated August 29, 1986, pursuant to Lien Law § 38, it conditionally granted the owner's application to cancel the notice of lien dated October 8, 1985, in the amount of $420,000, unless the lienor provided an itemized statement of the labor and material costs underlying the notice of lien. Since the work on the project was not completed when this notice of lien was filed, and the nature and cost of the work performed under the contract were in dispute, the itemized statement was necessary to enable the owner to check the lienor's claim *(cf., Matter of Solow v. Bethlehem Steel Corp.*, 60 AD2d 826, *appeal dismissed* 46 NY2d 836; *Matter of 819 Sixth Ave. Corp. v. T. & A. Assocs.*, 24 AD2d 446). ***673**

In response to the court's conditional order, the lienor submitted only those documents previously found to be inadequate, together with a breakdown of costs that related to only part of the amount of the lien. Under these circumstances, the court properly canceled the notice of lien dated October 8, 1985.

Matter of Plain Ave. Stor., LLC v BRT Mgt., LLC
Supreme Court, Appellate Division, Second Department, New York
October 31, 2018
165 A.D.3d 1264
84 N.Y.S.3d 89484 N.Y.S.3d 894 (Mem)

165 A.D.3d 1264, 84 N.Y.S.3d 894 (Mem), 2018 N.Y. Slip Op. 07312

***1** In the Matter of Plain Avenue Storage, LLC, Respondent,

v

BRT Management, LLC, Appellant.

Supreme Court, Appellate Division, Second Department, New York
2017-09324, 2017-09325, 68412/16
October 31, 2018

CITE TITLE AS: Matter of Plain Ave. Stor., LLC v BRT Mgt., LLC

Bleakley Platt & Schmidt, LLP, White Plains, NY (William H. Mulligan, Jr., of counsel), for appellant.
Zetlin & De Chiara LLP, New York, NY (Carol J. Patterson and Elissa Rossi of counsel), for respondent.
In a proceeding pursuant to Lien Law § 38 to compel BRT Management, LLC, to provide a revised itemized statement relating to a mechanic's lien, BRT Management, LLC, appeals ***1265** from (1) a decision of the Supreme Court, Westchester County (Lewis J. Lubell, J.), dated July 26, 2017, and (2) an order of the same court also dated July 26, 2017. The order, upon the decision, in effect, granted the motion of Plain Avenue Storage, LLC, to cancel the mechanic's lien upon the failure of BRT Management, LLC, to provide a sufficient revised itemized statement.

Ordered that the appeal from the decision is dismissed, as no appeal lies from a decision (*see Schicchi v J.A. Green Constr. Corp.*, 100 AD2d 509, 509-510 [1984]); and it is further,

Ordered that the order is affirmed; and it is further,

Ordered that one bill of costs is awarded to the petitioner.

In January 2016, the petitioner, Plain Avenue Storage, LLC (hereinafter Plain Avenue), as owner, and the appellant, BRT Management, LLC (hereinafter BRT), as the Design-Builder, entered into a written contract for the design and construction of a storage facility located in New Rochelle. On or about September 23, 2016, BRT filed a notice of mechanic's lien against the subject property. Plain Avenue served a demand for an itemized statement setting forth the items of labor and/or material and the value thereof which make up the amount for which BRT claimed the mechanic's lien. In response, BRT served an itemized statement. Thereafter, Plain Avenue commenced this proceeding pursuant to Lien Law § 38 to compel BRT to provide a revised itemized statement on the ground that the itemized statement previously served failed to comply with the requirements of the Lien Law.

In March 2017, BRT filed a revised itemized statement. Plain Avenue then moved to cancel the mechanic's lien on the ground that the revised itemized statement failed to provide the information required by Lien Law § 38. In an order dated July 26, 2017, upon a decision, the Supreme Court, in effect, granted Plain Avenue's motion to cancel the mechanic's lien. BRT ***2** appeals.

Lien Law § 38 provides, in relevant part, that "[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."

Inasmuch as the work on the project was not completed when the notice of lien was filed and the nature and cost of the work performed under the contract were in dispute, an itemized ***1266** statement was necessary to enable Plain Avenue to check BRT's claim (*see Matter of Burdick Assoc. Owners Corp. [Karlan Constr. Corp.]*, 131 AD2d 672 [1987]; *cf. Associated Bldg. Servs., Inc. v Pentecostal Faith Church*, 112 AD3d 1130, 1131 [2013]). The revised itemized statement provided by BRT failed to comply with the requirements of Lien Law § 38. The revised itemized statement, among other things, failed to sufficiently set forth "the items and cost of labor, or the items and cost of materials" (*Matter of DePalo v McNamara*, 139 AD2d 646, 647 [1988]; *see Matter of 819 Sixth Ave. Corp. v T. & A. Assoc.*, 24 AD2d 446 [1965]). Accordingly, we agree with the Supreme Court's determination to, in effect, grant Plain Avenue's motion to cancel the mechanic's lien (*see Matter of DePalo v McNamara*, 139 AD2d at 647; *Matter of Burdick Assoc. Owners Corp. [Karlan Constr. Corp.]*, 131 AD2d at 672). Austin, J.P., Roman, Duffy and Christopher, JJ., concur.

END OF DOCUMENT

Matter of DePalo v McNamara
Supreme Court, Appellate Division, Second Department, New York
April 18, 1988
139 A.D.2d 646
527 N.Y.S.2d 283

139 A.D.2d 646, 527 N.Y.S.2d 283

In the Matter of John DePalo et al., Respondents,

v.

John McNamara, Appellant.

Supreme Court, Appellate Division, Second Department, New York
12NE
April 18, 1988

CITE TITLE AS: Matter of DePalo v McNamara

OPINION OF THE COURT

Bracken, J. P., Lawrence, Rubin and Kooper, JJ., concur.
In a proceeding pursuant to Lien Law § 38, *inter alia*, to cancel a mechanic's lien, the respondent appeals from an order of the Supreme Court, Westchester County (Dachenhausen, J.), entered January 6, 1987, which granted the application and canceled the lien.

Ordered that the order is affirmed, with costs.

On June 13, 1986, the appellant filed a mechanic's lien in the Westchester County Clerk's office in the sum of $141,095. The petitioners thereafter requested the appellant to furnish an itemized statement, pursuant to Lien Law § 38. On or about August 28, 1986, the appellant served a statement in response to the petitioners' demand.

Thereafter, the petitioners, by petition dated September 23, 1986, commenced this proceeding pursuant to Lien Law § 38, seeking, initially, to compel the appellant to submit a further itemized statement on the ground that the statement of August 28, 1986 was insufficient.

By order dated November 12, 1986, the Supreme Court, Westchester County (Dachenhausen, J.), directed the appellant to deliver to the petitioners' attorney “a proper and complete itemized statement of the items of labor and/or material, and values thereof, making up the stated lien and terms of the contract as required by Section 38 of the Lien Law of the State of New York”.

The appellant thereafter submitted to the petitioners unsigned and unverified handwritten notes which indicated the square footage of each room in the petitioners' house and listed the various tasks to be done in each room without any indication whether the work had been completed. In addition, the appellant resubmitted his statement of August 28, 1986, which had indicated, *inter alia*, that the appellant alleged that he was to be paid $80 per square foot for the work; and that the amount due him included $13,035 for “extras”.

Consequently, upon the petitioners' further motion, the court, by order dated January 6, 1987, canceled the lien, as provided for in Lien Law § 38.

We find no merit to the appellant's claim that his resubmission of his statement of August 28, 1986, and his handwritten notes, constituted compliance with the order of November 12, 1986. Since the work on the project was incomplete at the time the notice of lien was filed and both the nature and the cost of the work performed under the contract were in dispute, the petitioners were entitled, upon their demand, to an ***647** appropriate itemized statement to enable them to check the appellant's claim *(see, Matter of Burdick Assocs. Owners Corp. [Karlan Constr. Corp.]*, 131 AD2d 672; *Matter of Sperry [Millar]*, 254 App Div 819). In addition, the appellant was required to furnish a detailed itemized statement as to the disputed claim for extra work *(see, Matter of Solow v. Bethlehem Steel Corp.*, 60 AD2d 826, 827, *mot to dismiss appeal granted* 46 NY2d 836; *Matter of 819 Sixth Ave. Corp. v. T. & A. Assocs.*, 24 AD2d 446). The documents submitted by the appellant herein contained no details as to the terms of the parties' purported oral contract, the items and cost of labor, or the items and cost of materials. Accordingly, the court properly canceled the appellant's lien pursuant to Lien Law § 38.

Hakimi v Cantwell Landscaping & Design, Inc.
Supreme Court, Appellate Division, Second Department, New York
April 15, 2008
50 A.D.3d 848
855 N.Y.S.2d 273

50 A.D.3d 848, 855 N.Y.S.2d 273, 2008 N.Y. Slip Op. 03419

*1 Farhad Hakimi, Appellant

v

Cantwell Landscaping & Design, Inc., et al., Respondents. (Action No. 1.)

v

Cantwell Landscaping & Design, Inc., et al., Respondents, v Farhad Hakimi, Appellant. (Action No. 2.)

Supreme Court, Appellate Division, Second Department, New York
April 15, 2008

CITE TITLE AS: Hakimi v Cantwell Landscaping & Design, Inc.

Caputi, Weintraub & Neary, Huntington, N.Y. (Gary N. Weintraub of counsel), for appellant.
Lefkowitz, Hogan & Cassell, LLP, Jericho, N.Y. (Shaun K. Hogan and Michael D. Cassell of counsel), for respondents.

In two related actions which were joined for trial, inter alia, to recover damages for breach of contract, Farhad Hakimi, the plaintiff in action No. 1 and the defendant in action No. 2, appeals from so much of an order of the Supreme Court, Suffolk County (Whelan, J.), dated July 11, 2007, as denied those branches of his motion which were for summary judgment dismissing the complaint in action No. 2 and to vacate a mechanic's lien and cancel a notice of pendency filed against his property.

Ordered that the order is reversed insofar as appealed from, on the law, with costs, those branches of the appellant's motion which were for summary judgment dismissing the complaint in action No. 2 and to vacate the mechanic's lien and cancel the notice of pendency filed against his property are granted, so much of the order as denied that branch of the appellant's motion which was for summary judgment dismissing the first counterclaim in action No. 1 is vacated, and that branch of the motion is granted; and it is further, *2

Ordered that the Suffolk County Clerk is directed to cancel the notice of pendency dated August 11, 2006 and to vacate the mechanic's lien filed on August 25, 2005 against the subject property.

Farhad Hakimi hired Cantwell Landscaping & Design, Inc., and L. Lincoln Cantwell (hereinafter collectively Cantwell) to perform landscaping work at his property where he was having a new home constructed. It is undisputed that, at the time, Cantwell was not licensed as a home improvement contractor pursuant to Suffolk County Administrative Code § 345-17(A) and Southampton Town Code § 143-2.

Hakimi commenced an action against Cantwell seeking dam *849 ages, inter alia, for breach of contract (hereinafter action No. 1). Cantwell counterclaimed to recover damages for breach of contract and to foreclose on a mechanic's lien filed against Hakimi's property. Cantwell also commenced its own action against Hakimi to foreclose on the same mechanic's lien and, in conjunction therewith, filed a notice of pendency against the property (hereinafter action No. 2).

Hakimi moved, inter alia, to consolidate the two actions, for summary judgment dismissing the counterclaims asserted by Cantwell in action No. 1 and the complaint in action No. 2, and to vacate the mechanic's lien and cancel the notice of pendency. Hakimi contended that Cantwell forfeited its right to sue for breach of contract and to foreclose on the mechanic's lien since at the time it performed the work at his property it did not possess a home improvement contractor's license as required by Suffolk County Administrative Code § 345-17 and Southampton Town Code § 143-2. Cantwell contended that the licensing exemptions in the Suffolk County Administrative Code and the Southampton Town Code for those engaged in the construction of a new home were applicable and, consequently, it was not required to be licensed while performing landscaping work at Hakimi's property.

The Supreme Court, inter alia, denied those branches of the motion which were for summary judgment dismissing the complaint in action No. 2 and to vacate the mechanic's lien and cancel the notice of pendency. The Supreme Court concluded that the licensing exemptions for new home construction were applicable to Cantwell's landscaping work and therefore a home improvement contractor's license was not required.

Pursuant to Suffolk County Administrative Code § 345-17, “[i]t is unlawful for any person to engage in any business as a home improvement contractor without obtaining a license therefor.” Suffolk County Administrative Code § 345-16 defines a “home improvement contractor” as “[a] person who engages in home improvement contracting upon residential property” and further defines “home improvement contracting” as “any repair, remodeling, alteration, conversion, modernization, improvement or addition to residential property, and includes but is not limited to . . .waterproofing, *as well as other improvements to structures or upon land which are part of residential property, including landscaping* and arboriculture . . . but shall not include the construction of a new home” (emphasis added).

Similarly, pursuant to Southampton Town Code § 143-2, “[n]o person shall conduct or engage in any home improvement business without first obtaining and maintaining in effect at all ***850** times a license therefor.” Southampton Town Code § 143-1 (A) defines “home improvement” as [t]he repairing, remodeling, altering, converting or modernizing of, or adding to, residential property and shall include, but not be limited to . . . *landscaping* . . . and other improvements of residential ***3** property and all structures or land adjacent to it” (emphasis added). It expressly excludes from the definition of home improvement “[t]he construction of a new home” (Southampton Town Code § 143-1 [B] [1]).

The issue on this appeal is whether Cantwell was engaged in “the construction of a new home” by performing landscaping work on Hakimi's property, thus exempting it from the licensing requirements of the Suffolk County Administrative Code and Southampton Town Code. The words “construction” and “home” are not defined in the codes.

When interpreting language in a statute or code, a court “should attempt to effectuate the intent of the [legislative body]” and “[b]ecause the statutory text is the clearest indicator of legislative intent, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof” (*Matter of Jansen Ct. Homeowners Assn. v City of New York,* 17 AD3d 588, 589 [2005] [internal quotation marks omitted]; *see Stinton v Robin's Wood, Inc.,* 45 AD3d 203 [2007]; *Matter of Elgut v County of Suffolk,* 1 AD3d 512 [2003]).

Here, giving effect to the plain and common meaning of the words “construction” and “home” in Suffolk County Administrative Code § 345-16 and Southampton Town Code § 143-1 (*see Matter of Elgut v County of Suffolk,* 1 AD3d 512 [2003]; *Matter of Vernon Woods Dev. Corp. v Pucillo,* 134 AD2d 597 [1987]), the phrase “the construction of a new home” applies only to the building of a new residential structure (*see Blake Elec. Contr. Co. v Paschall,* 222 AD2d 264, 266 [1995]). Interpreting the phrase to include landscaping work performed at the property where a new home is being constructed would require this Court to “impermissibly rewrite a clearly worded statute to obtain a desired result” (*Matter of Briffel v County of Nassau,* 31 AD3d 79, 85 [2006], *affd sub nom. O'Shea v Board of Assessors of Nassau County*, 8 NY3d 249 [2007]).

Cantwell did not build a new structure on Hakimi's property. Its involvement with the property was limited to the installation of landscape materials and performance of landscaping services. Under such circumstances, Cantwell was not engaged in “the construction of a new home.” Rather, it was engaged in “home improvement contracting” and “home improvement” as those terms are defined in the Suffolk County Administrative ***851** Code and the Southampton Town Code, respectively (*see Blake Elec. Contr. Co. v Paschall,* 222 AD2d at 266; *cf. Marciano Constr. Corp. v Stout,* 12 Misc 3d 1152[A], 2006 NY Slip Op 50874 [U] [2006]). Thus, it was required to possess a home improvement contractor's license. Since it did not possess such a license, it cannot recover damages for breach of contract or foreclose on its mechanic's lien (*see Ben Krupinski Bldr. & Assoc., Inc. v Baum,* 36 AD3d 843 [2007]; *Callos, Inc. v Julianelli,* 300 AD2d 612 [2002]; *Ellis v Gold,* 204 AD2d 261 [1994]).

Consequently, the Supreme Court should have granted those branches of Hakimi's motion which were for summary judgment dismissing the complaint in action No. 2 and to vacate the mechanic's lien and cancel the notice of pendency. Additionally, so much of the order as denied that branch of Hakimi's motion which was for summary judgment dismissing Cantwell's first counterclaim in action No. 1 must be vacated and that branch of the motion must be granted since that relief is inextricably intertwined with the portion of the order reversed on appeal (*see City of Mount Vernon v Mount Vernon Hous. Auth.,* 235 AD2d 516, 517 [1997]). Prudenti, P.J., Miller, Dillon and McCarthy, JJ., concur. [*See* 2007 NY Slip Op 32483(U).]

Bujas v Katz
Supreme Court, Appellate Division, Second Department, New York
October 19, 1987
133 A.D.2d 730
520 N.Y.S.2d 18

133 A.D.2d 730, 520 N.Y.S.2d 18

Anthony Bujas, Respondent,

v.

Michelle Katz, Appellant, et al., Defendant.

Supreme Court, Appellate Division, Second Department, New York
2224E
October 19, 1987

CITE TITLE AS: Bujas v Katz

OPINION OF THE COURT

Niehoff, J. P., Mangano, Eiber and Harwood, JJ., concur.
In an action to foreclose a mechanic's lien, the defendant Katz appeals from an order of the Supreme Court, Nassau County (Roberto, J.), dated January 12, 1987, which denied her motion for summary judgment.

Ordered that the order is reversed, on the law, with costs, the motion is granted and the complaint is dismissed as against the defendant Katz.

The plaintiff, an unlicensed home improvement contractor, entered into an agreement to perform demolition, carpentry, masonry, heating, plumbing and electrical work on the appellant's premises. The plaintiff completed the work, but claimed a portion of the contract price was still due. After due demand, ***731** he filed a notice of mechanic's lien and then commenced this action to foreclose the lien. The appellant's answer included the defense that the plaintiff was unlicensed, in violation of section 21-11.2 of the Nassau County Administrative Code. The appellant subsequently moved for summary judgment dismissing the complaint on this ground.

The authorities are clear that an unlicensed home improvement contractor cannot recover for services rendered either on the contract or in quantum meruit *(Richards Conditioning Corp. v. Oleet*, 21 NY2d 895; *Millington v. Rapoport*, 98 AD2d 765; *George Piersa, Inc. v. Rosenthal*, 72 AD2d 593; *Segrete v. Zimmerman*, 67 AD2d 999). In opposition to the motion for summary judgment, the plaintiff contends that since the ordinance prohibiting home improvement contractors from operating without a license is aimed at prohibiting abusive practices of contractors, it does not bar recovery on the contract or in quantum meruit where there is no evidence that any abusive practices occurred. However, this court has barred recovery regardless of "whether the work was performed satisfactorily or whether the failure to obtain a license was willful" *(Millington v. Rapoport*, supra., at 766).

The plaintiff's other contentions have been considered and have been found to be without merit.

ENKO Constr. Corp. v Aronshtein
Supreme Court, Appellate Division, Second Department, New York
November 1, 2011
89 A.D.3d 676
932 N.Y.S.2d 501

89 A.D.3d 676, 932 N.Y.S.2d 501, 2011 N.Y. Slip Op. 07805

***1** ENKO Construction Corp., Appellant

v

Dimitry Aronshtein, Respondent.

Supreme Court, Appellate Division, Second Department, New York
18956/09, 2010-08679
November 1, 2011

CITE TITLE AS: ENKO Constr. Corp. v Aronshtein

Kushnick & Associates, P.C., Melville, N.Y. (Vincent T. Pallaci of counsel), for appellant.
Siler & Ingber, LLP, Mineola, N.Y. (Isaac J. Burker of counsel), for respondent.

In an action, inter alia, to recover damages for breach of contract, the plaintiff appeals, as limited by its brief, from so ***677** much of an order of the Supreme Court, Nassau County (Marber, J.), entered August 20, 2010, as granted that branch of the defendant's motion which was pursuant to CPLR 3211 (a) (7) and 3015 (e) to dismiss the complaint.

Ordered that the order is affirmed insofar as appealed from, with costs.

The parties entered into a written contract, the terms of which required the plaintiff "to renovate" the defendant's residence located in Oceanside, so as to, among other things, construct a second-story addition to the master bedroom. After performing extensive services, but prior to completing the project, the defendant terminated the plaintiff's services. The plaintiff thereafter commenced this action to recover damages for breach of contract and in quantum meruit for services performed. The defendant moved, inter alia, pursuant to CPLR 3211 (a) (7) and 3015 (e) to dismiss the complaint on the ground that the plaintiff was not a licensed home improvement contractor. The Supreme Court, among other things, granted that branch of the defendant's motion.

The Nassau County Administrative Code (hereinafter the Code), the local law applicable here, provides that "[n]o person shall own, maintain, conduct, operate, engage in or transact a home improvement business . . . unless he [or she] is licensed therefore" (Nassau County Administrative Code § 21-11.2). "An unlicensed contractor may neither enforce a home improvement contract against an owner nor seek recovery in quantum meruit" (*J.M. Bldrs. & Assoc., Inc. v Lindner*, 67 AD3d 738, 741 [2009] [internal quotation marks omitted]; *B & F Bldg. Corp. v Liebig*, 76 NY2d 689 [1990]; *Hakimi v Cantwell Landscaping & Design, Inc*., 50 AD3d 848, 851 [2008]; *Al-Sullami v Broskie*, 40 AD3d 1021, 1022 [2007]). Pursuant to CPLR 3015 (e), a complaint that seeks to recover damages for breach of a home improvement contract or to recover in quantum meruit for home improvement services is subject to dismissal under CPLR 3211 (a) (7) if it does not allege compliance with the licensing requirement (*see* CPLR 3015 [e]; *Epic Pool Corp. v Fontecchio*, 67 AD3d 858 [2009]; *Flax v Hommel*, 40 AD3d 809, 810 [2007]; *Westchester Stone, Sand & Gravel v Marcella*, 262 AD2d 403, 404 [1999]). ***2**

Here, the plaintiff did not allege that it was duly licensed, and conceded, in opposition to the defendant's motion, that it did not possess the requisite license. Accordingly, the plaintiff was not entitled to enforce its contract against the defendant or to recover in quantum meruit (*see Flax v Hommel*, 40 AD3d at 810; *Brite-N-Up, Inc. v Reno*, 7 AD3d 656 [2004]; *Hakimi v Cantwell Landscaping & Design, Inc.*, 50 AD3d at 851). Contrary to the plaintiff's contention, the fact that the project ultimately became more extensive than originally contemplated, resulting in the demolition of most of the original structure, did not render the licensing requirement inapplicable to the subject project. Although the licensing requirement does not apply to the construction of a new home, interpreting a functionally equivalent local law, this Court concluded that "[t]he statutory exemption for construction of a new home is limited to the creation of a structure, where none previously existed . . . Even if a dwelling is stripped to the frame and rebuilt, the work constitutes the renovation of an existing home, not the erection of a new one" (*J.M. Bldrs. & Assoc., Inc. v Lindner*, 67 AD3d at 740 [internal quotation marks omitted]). It is undisputed that, when the plaintiff began its work, there was an existing home on the property, which was not completely demolished (*id.*). Accordingly, the plaintiff was not engaged in the construction of a new home, but, rather, in "[h]ome improvement," as that term is defined by the Code (Nassau County Administrative Code§ 21-11.1 [3]) and, thus, the plaintiff was required to obtain a home improvement contractor license (*id*.; *see Durao Concrete v Jonas*, 287 AD2d 481 [2001]; *cf. Cinelli Bldrs., Inc. v Ferris*, 78 AD3d 881, 882 [2010] [home improvement contractor's license was not required where the "contract 'called for the construction of a new home' " and "the existing structures were entirely removed from the property," such that "not even the existing foundation was used in constructing the new home"]).

Contrary to the plaintiff's further contention, although the licensing requirement only applies where improvements are made to buildings "used as a private residence or dwelling place" (Nassau County Administrative Code § 21-11.1 [3]), the defendant's home fell within that category notwithstanding the fact that the defendant homeowner moved out of the house temporarily while the renovations were being performed (*see Racwell Constr., LLC v Manfredi*, 61 AD3d 731, 733 [2009]).

The plaintiff's remaining contentions are without merit.

Accordingly, the Supreme Court properly granted that branch of the defendant's motion which was pursuant to CPLR 3211 (a) (7) and 3015 (e) to dismiss the complaint. Prudenti, P.J., Skelos, Balkin and Sgroi, JJ., concur. **[Prior Case History: 28 Misc 3d 1228(A), 2010 NY Slip Op 51528(U).]**

Forman Constr., Inc. v P.D.F. Constr.
Supreme Court, Appellate Division, Second Department, New York
September 25, 2019
175 A.D.3d 1491
109 N.Y.S.3d 453

175 A.D.3d 1491, 109 N.Y.S.3d 453, 2019 N.Y. Slip Op. 06748

***1** Forman Construction, Inc., Appellant,

v

P.D.F. Construction et al., Respondents.

Supreme Court, Appellate Division, Second Department, New York
2016-11592, 8122/08
September 25, 2019

CITE TITLE AS: Forman Constr., Inc. v P.D.F. Constr.

Scott A. Rosenberg, P.C., Garden City Park, NY (Kenneth J. Pagliughi of counsel), for appellant.
Tsunis Gasparis LLP, Islandia, NY (Maria Gasparis of counsel), for respondents.

In an action, inter alia, to recover damages for breach of contract, the plaintiff appeals from an order of the Supreme Court, Nassau County (Julianne T. Capetola, J.), entered July 5, 2016. The order granted the defendants' motion for summary judgment dismissing the complaint.

***1492** Ordered that the order is affirmed, with costs.

The plaintiff contractor performed certain construction work on property owned by the defendants Pier D'Alessandro and Debra D'Alessandro. Pier D'Alessandro does business as P.F.D. Construction, incorrectly sued herein as P.D.F. Construction, which hired the plaintiff. After a dispute arose, the plaintiff commenced this action to recover damages for breach of contract and in quantum meruit. The defendants moved for summary judgment dismissing the complaint on the ground that the plaintiff was unlicensed at the time it performed the work and, accordingly, it forfeited its right to recover under any legal theory. The Supreme Court granted the defendants' motion, and the plaintiff appeals.

Where a home improvement contractor is not properly licensed in the municipality where the work is performed at the time the work is performed, the contractor forfeits the right to recover for the work performed, both under the contract and on a quantum meruit basis (*see B & F Bldg. Corp. v Liebig*, 76 NY2d 689, 693 [1990]; *Graciano Corp. v Baronoff*, 106 AD3d 778, 779 [2013]; *CMC Quality Concrete III, LLC v Indriolo*, 95 AD3d 924, 925 [2012]; *Orchid Constr. Corp. v Gottbetter*, 89 AD3d 708, 709 [2011]; *Vatco Contr., Ltd. v Kirschenbaum*, 73 AD3d 1163, 1164 [2010]; *see also* CPLR 3015 [e]). Administrative Code of Suffolk County § 563-17 (a) provides, in pertinent part, that "[i]t is unlawful for any person to engage in any business as a home improvement contractor without obtaining a license therefor."

Here, it is undisputed that, at all relevant times, the plaintiff did not have a home improvement license as required by Administrative Code of Suffolk County § 563-17 (a). The plaintiff contends that the licensing provision does not apply because it contracted with P.F.D. Construction, which acted as the general contractor. We disagree with the plaintiff's contention that the licensing provision does not apply to entities that enter into contracts with general contractors, as opposed to entities that enter into contracts with owners or residents of the premises where the construction work is to be performed (*see CMC Quality Concrete III, LLC v Indriolo*, 95 AD3d at 925). In any event, in support of their motion, the defendants established, prima facie, that the plaintiff contracted with a party who actually resided in the premises where the construction work was performed (*see Matter of Kuchar v Baker*, 261 AD2d 402, 403 [1999]; *cf. Matter of Migdal Plumbing & Heating Corp. [Dakar Devs.]*, 232 AD2d 62, 66 [1997]). In opposition, the plaintiff failed to raise a triable issue of fact. Since ***1493** the plaintiff lacked the required license when it performed the work, it is precluded from recovery, either under the contract or on a quantum meruit basis (*see B & F Bldg. Corp. v Liebig*, 76 NY2d at 693; *Graciano Corp. v Baronoff*, 106 AD3d at 779; *CMC Quality Concrete III, LLC v Indriolo*, 95 AD3d at 925; *Orchid Constr. Corp. v Gottbetter*, 89 AD3d at 709; *Vatco Contr., Ltd. v Kirschenbaum*, 73 AD3d at 1164).

The plaintiff's remaining contentions are without merit.

Accordingly, we agree with the Supreme Court's determination to grant the defendants' motion for summary judgment dismissing the complaint. Austin, J.P., Leventhal, Roman and Miller, JJ., concur.

F & M Gen. Contr. v Oncel
Supreme Court, Appellate Division, Second Department, New York
October 28, 2015
132 A.D.3d 946
18 N.Y.S.3d 678

132 A.D.3d 946, 18 N.Y.S.3d 678, 2015 N.Y. Slip Op. 07815

***1** F & M General Contracting, Respondent

v

Koray Oncel et al., Appellants.

Supreme Court, Appellate Division, Second Department, New York
2015-02984, 604332/14
October 28, 2015

CITE TITLE AS: F & M Gen. Contr. v Oncel

***947**
Klose & Associates, P.C., Nyack, N.Y. (Peter Klose of counsel), for appellants.
Darren Jay Epstein, Esq., P.C., New City, N.Y., for respondent.

In an action to recover damages for breach of contract, unjust enrichment, in quantum meruit, and on an account stated, the defendants appeal, as limited by their brief, from so much of an order of the Supreme Court, Nassau County (Feinman, J.), entered March 19, 2015, as denied those branches of their motion which were pursuant to CPLR 3211 (a) (7) to dismiss so much of the complaint as sought to recover damages for breach of contract and in quantum meruit.

Ordered that the order is modified, on the law, by deleting the provision thereof denying that branch of the defendants' motion which was pursuant to CPLR 3211 (a) (7) to dismiss so much of the complaint as sought to recover damages for breach of contract, and substituting therefor a provision granting that branch of the motion; as so modified, the order is affirmed insofar as appealed from, without costs or disbursements.

In 2008, the defendants hired the plaintiff to renovate their home located in Manhasset. The plaintiff provided them with a detailed written estimate setting forth a project cost of $526,443.13. After agreeing to complete the project for $475,000, the plaintiff commenced its work. According to the plaintiff, during the course of the project, the defendants requested that the plaintiff perform additional work that was not covered by the original estimate. Although the plaintiff maintains that it completed the project in June 2010, including the additional work, the defendants contend that the plaintiff abandoned the project in December 2009 without completing it. In August 2014, the plaintiff commenced this action against the defendants seeking to recover payment for the additional work. Thereafter, the defendants moved, inter alia, pursuant to CPLR 3211 (a) (7) to dismiss the complaint. The Supreme Court, among other things, denied those branches of the defendants' motion which were pursuant to CPLR 3211 (a) (7) to dismiss so much of the complaint as sought to recover damages for breach of contract and in quantum meruit. The defendants appeal from that portion of the order.

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (*see*, CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). “However, when evidentiary material is adduced in support of a motion to dismiss a complaint ***2** pursuant to CPLR 3211 (a) (7), and the motion has not been converted to one for summary judgment, the court must determine whether the ***948** proponent of the pleading has a cause of action, not whether he or she has stated one and, ‘unless it has been shown that a material fact as claimed by the [plaintiff] to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, . . . dismissal should not eventuate’ ” (*Vertical Progression, Inc. v Canyon Johnson Urban Funds*, 126 AD3d 784, 786 [2015], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

General Business Law article 36-a is entitled “Home Improvement Contracts” (*see* General Business Law § 770 *et seq*.). General Business Law § 771 provides that all home improvement contracts must be in writing and signed by the parties thereto. Similarly, the Regulations promulgated by the Nassau County Commissioner of Consumer Affairs require that every home improvement agreement, as well as any addenda thereto, be evidenced by a writing signed by all parties (*see* Nassau County Administrative Code §§ 21-11.2, 21-11.7 [4]).

Here, although the plaintiff contends that there was an enforceable contract between the parties, it is undisputed that the parties' agreement was not evidenced by a signed writing. As such, the absence of an enforceable written agreement necessarily precludes recovery based on a breach of contract cause of action (*see* General Business Law § 771; *Johnson v Robertson*, 131 AD3d 670 [2015]). Accordingly, the

Supreme Court should have granted that branch of the defendants' motion which was pursuant to CPLR 3211 (a) (7) to dismiss so much of the complaint as sought to recover damages for breach of contract.

The Supreme Court properly denied that branch of the defendants' motion which was to dismiss so much of the complaint as sought to recover damages in quantum meruit. The elements of a cause of action sounding in quantum meruit are (1) the performance of services in good faith, (2) the acceptance of services by the person or persons to whom they are rendered, (3) the expectation of compensation therefor, and (4) the reasonable value of the services rendered (*see Johnson v Robertson*, 131 AD3d 670 [2015]; *Stephan B. Gleich & Assoc. v Gritsipis*, 87 AD3d 216, 222 [2011]; *Evans-Freke v Showcase Contr. Corp*., 85 AD3d 961, 962 [2011]). Here, the documentary evidence submitted by the defendants in support of this branch of their motion did not establish that a fact alleged by the plaintiff was not a fact at all or that there was no significant dispute regarding it (*cf. Vertical Progression, Inc. v Canyon Johnson Urban Funds*, 126 AD3d at 786-787).

The parties' remaining contentions either are without merit ***949** or have been rendered academic by our determination. Dillon, J.P., Miller, Duffy and LaSalle, JJ., concur.

END OF DOCUMENT

NGU, Inc. v City of New York
Supreme Court, Appellate Division, Second Department, New York
December 2, 2020
189 A.D.3d 850
138 N.Y.S.3d 170

189 A.D.3d 850, 138 N.Y.S.3d 170, 2020 N.Y. Slip Op. 07204

***1** NGU, Inc., et al., Respondents,

v

City of New York et al., Defendants, and Masterpiece U.S., Inc., et al., Appellants.

Supreme Court, Appellate Division, Second Department, New York
150891/13, 2019-00057
December 2, 2020

CITE TITLE AS: NGU, Inc. v City of New York

Meltzer, Lippe, Goldstein & Breitstone, LLP, Mineola, NY (Manny A. Frade and Adam P. Wald of counsel), for appellants.
Zetlin & De Chiara, LLP, New York, NY (James H. Rowland of counsel), for respondents.

In an action, inter alia, to foreclose mechanic's liens, the defendants Masterpiece U.S., Inc., and Hudson Insurance Company appeal from an order of the Supreme Court, Richmond County (Kim Dollard, J.), dated September 6, 2018. The order, insofar as appealed from, denied those branches of the motion of the defendants Masterpiece U.S., Inc., and Hudson Insurance Company which were for summary judgment dismissing the first, seventh, eighth, and fourteenth causes of action insofar as asserted against them.

Ordered that the order is affirmed insofar as appealed from, with costs.

The defendant New York City Housing Authority (hereinafter NYCHA), as owner, entered into a written agreement (hereinafter the agreement) with the defendant Masterpiece U.S., ***851** Inc. (hereinafter Masterpiece), as general contractor, for a window replacement project for a building located at 70 New Lane, Staten Island. Masterpiece entered into a subcontract with the plaintiff Citiquiet (hereinafter Citi), as subcontractor, to remove the existing windows and install the new windows, and a subcontract with Industrial Window Corp. (hereinafter Industrial), as subcontractor, to supply the new windows for the project. On or about March 14, 2012, Industrial sub-subcontracted with the plaintiff NGU, Inc. (hereinafter NGU), as sub-subcontractor or materialman, to manufacture the new windows for the project.

On or about March 29, 2013, after certain production and work issues arose among the parties, Masterpiece entered into an agreement (hereinafter the cure agreement) with Citi and NGU, among others, in an attempt to resolve those issues. On or about May 23, 2013, NGU filed two mechanic's liens against Industrial and Masterpiece in the amounts of $55,000 and $96,448.30, respectively, for its manufacture of new windows and associated labor costs. On the same date, Citi filed a mechanic's lien against Masterpiece in the amount of $80,100 for its work on the project. On or about May 29, 2013, the defendant Hudson Insurance Company (hereinafter Hudson), as surety for Masterpiece, issued bonds discharging NGU's $55,000 mechanic's lien, NGU's $96,448.30 mechanic's lien, and Citi's $80,100 mechanic's lien. Subsequently, on or about June 4, 2013, Masterpiece terminated Industrial and Citi from the project.

***2** Thereafter, on December 6, 2013, the plaintiffs commenced this action, inter alia, to foreclose on the mechanic's liens against Masterpiece and Hudson, among others. Masterpiece and Hudson moved, inter alia, for summary judgment dismissing the first, seventh, eighth, and fourteenth causes of action, to foreclose on the plaintiffs' mechanic's liens, insofar as asserted against them.

In an order dated September 6, 2018, the Supreme Court, inter alia, denied those branches of the motion which were for summary judgment dismissing the first, seventh, eighth, and fourteenth causes of action insofar as asserted against Masterpiece and Hudson. Masterpiece and Hudson appeal.

We agree with the Supreme Court's determination denying those branches of Masterpiece and Hudson's motion which were for summary judgment dismissing the first, seventh, eighth, and fourteenth causes of action insofar as asserted against them, as Masterpiece and Hudson failed to establish their prima facie entitlement to judgment as a matter of law.

***852** Lien Law § 3 provides that a contractor who performs labor or furnishes materials for the improvement of real property with the consent, or at the request of, the owner "shall have a lien for the principal and interest, of the value, or the agreed price, of such labor . . . or materials upon the real property improved or to be improved and upon such improvement, from the time of filing a notice of such lien." "The lienor must

establish the amount of the outstanding debt by submitting proof of either the price of its contract or the value of the labor and materials supplied" (*DHE Homes, Ltd. v Jamnik*, 121 AD3d 744, 745 [2014]; *see Peri Formwork Sys., Inc. v Lumbermens Mut. Cas. Co.*, 112 AD3d 171, 175 [2013]). The amount of the lien is limited by the contract under which it is claimed, and ordinarily a lienor is bound by the price term contained in the contract to which it is a party (*see Peri Formwork Sys., Inc. v Lumbermens Mut. Cas. Co.*, 112 AD3d at 175).

The lienor's right to recover is further limited by principles of subrogation (*see id.* at 176; 8 Warren's Weed New York Real Property § 92.11 [1], [4]). Thus, no individual mechanic's lien can exceed the total amount owed by the owner to the general contractor at the time of the filing of the notice of lien (*see* Lien Law § 4 [1]; *Peri Formwork Sys., Inc. v Lumbermens Mut. Cas. Co.*, 112 AD3d at 176). The subcontractor's right to recover is derivative of the right of the general contractor to recover, and if the general contractor is not owed any amount under its contract with the owner at the time the subcontractor's notice of lien is filed, then the subcontractor may not recover (*see Timothy Coffey Nursery/Landscape v Gatz*, 304 AD2d 652, 653-654 [2003]). "[T]he principle of subrogation applies to all tiers of subcontractor liens" (*Peri Formwork Sys., Inc. v Lumbermens Mut. Cas. Co.*, 112 AD3d at 176-177). "Each party is subrogated to the rights of the contractor or subcontractor on the contracting tier above him" (*id.* at 177 [internal quotation marks omitted]).

Despite their contentions to the contrary, Masterpiece and Hudson failed to establish that there were no funds due and owing to Industrial, the subcontractor, to which the liens of NGU, the sub-subcontractor, could attach (*see C.C.C. Renovations, Inc. v Victoria Towers Dev. Corp.*, 168 AD3d 664, 666 [2019]; *Bryan's Quality Plus, LLC v Dorime*, 112 AD3d 870, 870 [2013]; *L & W Supply Corp. v A.D.F. Drywall, Inc.*, 55 AD3d 1026, 1027 [2008]).

In addition, Masterpiece and Hudson failed to establish that NGU and Citi's liens were invalid, as they failed to demonstrate that the costs of completing the work for which NGU ***853** and Citi were retained exceeded the outstanding sum otherwise due to the plaintiffs (*see L & W Supply Corp. v A.D.F. Drywall, Inc.*, 55 AD3d at 1027; *Westbury S & S Concrete v Manshul Constr. Corp*., 212 AD2d 596 [1995]).

Since Masterpiece and Hudson failed to satisfy their prima facie burden, we need not address the sufficiency of NGU's and Citi's opposition papers (*see Winegrad v New York Univ. Med. Ctr*., 64 NY2d 851 [1985]). Scheinkman, P.J., Maltese, LaSalle and Christopher, JJ., concur.

Pizzarotti, LLC v X-treme Concrete Inc.
2021 NY Slip Op 30396(U)
February 9, 2021
Supreme Court, New York County
Docket Number: 655471/2017
Judge: Frank P. Nervo

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART IV

----------x

PIZZAROTTI, LLC,

Plaintiff,

-against-

X-TREME CONCRETE INC., a/k/a XTREME CONCRETE INC., and MICHAEL FALCO,

Defendants

----------x

ENGINEERED DEVICES CORP.,

Plaintiff

-against-

XTREME CONCRETE INC., MICHAEL FALCO, ZURICH AMERICAN INSURANCE COMPANY, COLONIAL AMERICAN CASUALTY AND SURETY COMPANY, and FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

Defendants

----------x

DECISION AND ORDER

Index. No.
655471/2017
Mot. Seq. 005

Index. No.

451148/2018
Mot. Seq. 001

NERVO, J.:

In these related matters, Pizzarotti seeks partial summary judgment dismissing X-treme Concrete's (hereinafter "Xtreme") counterclaims against it. Fidelity and Deposit Company of Maryland, Zurich American Insurance Company, and Colonial American Casualty and Surety Company (hereinafter "Fidelity," "Zurich," and "Colonial," respectively) seek summary judgment dismissing Engineered Devices claims as against them.

As an initial matter, movants incorrectly contend that this matter, bearing index number 451145/2018, was consolidated with *IMT Steel v. X-treme Concrete, Inc.* (451314/2018) by a January 14, 2019 decision and order (*see* notice of motion, NYSCEF Doc. No. 38).[1] The IMT Steel matter (451314/2018) was not consolidated and remained before a different Justice of this Court.[2] On October 3, 2019, Justice Billings, the Justice to which the IMT Steel matter was assigned, dismissed the matter for the parties' repeated failures to appear at preliminary conferences.[3] Consequently, to the extent the instant motion purports to seek relief in the IMT Steel matter, such relief is inappropriate (*see* notice of motion, NYSCEF Doc. 38 at (ii), "granting F&D and Zurich summary judgment dismissing all claims asserted by IMT in the action entitled IMT Steel, LLC v. X-treme Concrete, Inc., et al [NY Co. Sup. Ct., Index No, 451314/2018]"). Accordingly, the relief before the Court is: (1) Pizzarotti's summary judgment motion against Xtreme and (2) Fidelity, Zurich, and Colonial's summary judgment motion against Engineered Devices.

These related disputes arise out of a construction project. WC 28 Realty hired Pizzarotti to perform construction management services for its project, a residential building on 28th Street called the Jardim, and the agreement was reduced to a written contract. Thereafter, Pizzaarotti subcontracted the building's concrete superstructure

[1] Consolidation was found to be inappropriate. The Court ordered the matters under index numbers 451148/2018, 451314/2018, and 154342/2018 be jointly tried (Index No. 655471/2017 NYSCEF Doc. No. 87).

[2] The three related matters were ordered to be jointly tried (NYSCEF Doc. No. 38 & 60). However, full consolidation was not granted as it would inappropriately result in a party being both a plaintiff and defendant in the proposed consolidated action.

[3] The Court notes that Justice Billings decision was uploaded to NYSCEF on December 21, 2020, after the filing of the instant motion.

work to Xtreme. Engineered Devices and IMT Streel acted as suppliers to Xtreme. Engineered Devices and IMT steel allege they were not paid by Xtreme for their supplies, and filed mechanics liens on the project. Pizzarotti subsequently dismissed Xtreme and entered into another subcontract with MDB Development to complete the work originally performed by Xtreme. Following Xtreme's termination, it filed a mechanics lien against the project.

SUMMARY JUDGEMENT STANDARD

On a motion for summary judgment, the burden rests with the moving party to make a prima facie showing they are entitled to judgment as a matter of law and demonstrate the absence of any material issues of fact (*Friends of Thayer lake, LLC v. Brown*, 27 NY3d 1039 [2016]). Once met, the burden shifts to the opposing party to submit admissible evidence to create a question of fact requiring trial (*Kershaw v. Hospital for Special Surgery*, 114 AD3d 75 [1st Dept 2013]). "Where a defendant moves for summary judgment and establishes a prima facie entitlement to such relief as a matter of law, the burden shifts to the plaintiff to raise a triable issue of fact" (*Kesselman v. Lever House Rest.*, 29 AD3d 302 [1st Dept 2006]). However, a "feigned issue of fact" will not defeat summary judgment (*Red Zone LLC v. Cadwalader, Wickersham & Taft LLP*, 27 NY3d 1048 [2016]). A failure to make a prima facie showing requires the Court to deny the motion, regardless of the sufficiency of opposing papers (*Alverez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373 [2005]).

PIZZAROTTI - SUMMARY JUDGMENT MOTION (655471/2017)

Pizzarotti alleges Xtreme was paid in excess of the work it actually performed, and that Pizzarotti was required to pay MDB an amount that exceeded the balance remaining on the Xtreme contract, in order to complete the work. Xtreme alleges, inter alia, it suffered damages as a result of delay, Pizzarotti was unjustly enriched, and Xtreme was not fully paid for its services. Pizzarotti moves to dismiss Xtreme's counterclaims.

The subcontract between Pizzarotti and Xtreme unambiguously waives claims for delay under the "No Damage for Delay Clause"

> The Subcontractor [Xtreme] expressly agrees for itself, its sub-subcontractors and suppliers not to make, and hereby waives, any claim for damages on account of any delay, obstruction or hindrance. The Subcontractor's sole remedy for any delay, obstruction, or hindrance shall be an extension of the time in which to complete the Work

(*see* subcontract, NSYCEF Doc. No. 130 at section 3.3). Consequently, Xtreme may not recover for those causes of action that it has waived, absent a showing that enforcement of the waiver is unequitable (*see generally*, *Hack v. United Capital Corp*, 247 AD2d 300 [1st Dept 1998]). Xtreme has not demonstrated enforcing the waiver would be unequitable under these circumstances. Thus, the waiver bars Xtreme's causes of action for delay.

Xtreme also alleges it was not fully paid for the work performed in January, August, and December of 2016. Section 4.2 of the subcontract required Xtreme to waive and release payment for work done to date at the time it received payment (NYSCEF

Doc. No. 130 at section 4.2; *id*. at Exhibit I "Subcontractor's Partial Waiver and Release"). Xtreme waived its claims to any unpaid "work, labor, services, materials, supplies and/or equipment", in accordance with the subcontract agreement, for the periods it alleges in its counterclaim (*see* NYSCEF Doc. No. 132). "[a] general release bars an action on any cause of action arising prior to its execution" (*Hack v. United Capital Corp*, 247 AD2d at 301). A party seeking to set aside a release bears the burden of "demonstrate[ing] that it does not apply to their claim or to establish [an] equitable basis to vitiate its effect" (*id*.). Xtreme has failed to so demonstrate.

To the extent that Xtreme has asserted actions for *quantum meruit* and unjust enrichment, those claims must fail as a matter of law. A quasi-contract claim may be maintained only "in the absence of an express agreement," as it is a legal obligation to prevent unjust enrichment (*Clark-Fitzpatrick, Inc. v. Long Is. R.R.*, 70 NY2d 382 [1987]). The "contract" in an unjust enrichment or *quantum meruit* claim is a legal fiction, imposed where, '"there has been no agreement or expression of assent, by word or act, on the part of either party involved' in order to assure a just and equitable result" (*id*. quoting *Bradkin v. Leverton*, 26 NY2d 192, 196 [1970]). Here, the parties entered into a written contract, and thus no action in quasi-contract can be maintained.

Finally, Xtreme's claims under Article 3A and Section 77 of the Lien Law must fail, as they have not been properly brought as a class-action and fail to set forth evidentiary facts to support the claim *(see e.g. Callender v. Shirell Air, Inc.*, 282 AD2d 564 [2d Dept 2001]; *Matros Automated Elec. Const. Copr. v. Libman*, 37 AD3d 313 [1st Dept 2007]).

Accordingly, Pizzarotti has demonstrated its defense, as a matter of law, to Xtreme's counterclaims. Xtreme has not raised a triable issue of fact related to the contract that precludes summary judgment in Pizzarotti's favor on Xtreme's delay-based counterclaims or claims predating February 14, 2017.

FIDELITY, ZURICH, AND COLONIAL - SUMMARY JUDGMENT MOTION (451148/2018)

Fidelity, Zurich, and Colonial, (together the "Insurers") move for summary judgment dismissing Engineered Devices fourth cause of action seeking foreclosure of its mechanic's lien. The Insurers contend that the liens must be dismissed as there is no money due Xtreme from Pizzarotti, and thus no fund to which Xtreme's suppliers could attach a valid lien.

The fund to which a subcontractor may attach a lien is the money still due from the contractor/construction manager to the subcontractor at the time the lien is filed, and any sums subsequently earned (New York Lien Law § 4; *Van Clief v. Van Vechten*, 130 NY 571, 574 [1892]). Thus, where a contractor, or surety, seeks summary judgment dismissing a sub-contractor's lien, they must establish that no funds were due the subcontractor (*NGU, Inc., v. City of New York*, 189 AD3d 850 [2d Dept 2020]).

The contract between Xtreme, as subcontractor, and Pizzarotti, as construction manager, was terminated on April 1, 2017. At that time, no money was due Xtreme from Pizzarotti (*see* application and certificate for payment, NYSCEF Doc. No. 131; see also NSYCEF Doc. No. 135). Consequently, there is no fund to which Engineered Devices

may attach a lien, and therefore summary judgment dismissing the lien of Engineered Devices is proper.[4]

Accordingly, it is

ORDERED that to the extent movants seek relief in IMT Steel v. X-treme Concrete, Inc. (451314/2018) the motion is denied, as that matter has been dismissed; and it is further

ORDERED that Pizzarotti's summary judgment motion is granted and Xtreme's counterclaims against Pizzarotti are dismissed; and it is further

ORDERED that the motion of Fidelity and Deposit Company of Maryland, Zurich American Insurance Company, and Colonial American Casualty and Surety Company is granted to the extent of dismissing Engineered Devices claims, and cancelling and vacating the lien, as against Fidelity and Deposit Company of Maryland, Zurich American Insurance Company, and Colonial American Casualty and Surety Company of Engineered Devices and otherwise denied.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: February 9, 2021

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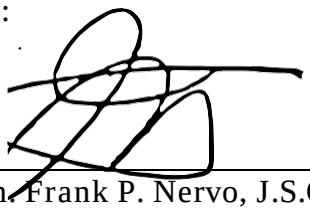

Hon. Frank P. Nervo, J.S.C.

[4] To the extent the Insurers seek relief as to the lien filed by IMT steel, such relief cannot be considered in these actions (*see supra* at p. 2).

Trustees of Hanover Sq. Realty Invs. v Weintraub
Supreme Court, Appellate Division, Second Department, New York
April 12, 1976
52 A.D.2d 600
382 N.Y.S.2d 110

52 A.D.2d 600, 382 N.Y.S.2d 110

Trustees of Hanover Square Realty Investors, Respondent,

v.

Victor H. Weintraub et al., Respondents, et al., Defendants, and Nigro Bros., Inc., Appellant

Supreme Court, Appellate Division, Second Department, New York
April 12, 1976

CITE TITLE AS: Trustees of Hanover Sq. Realty Invs. v Weintraub

In an action *inter alia* to foreclose a mortgage on real property, defendant Nigro Bros., Inc., appeals from an order of the Supreme Court, Westchester County, entered September 22, 1975, which granted the motion of defendants Weintraub to fix the amount of the bond to be posted to discharge the mechanic's liens on the premises on the basis of the amount of the lien asserted by the general contractor.

Order affirmed, with one bill of $50 costs and disbursements jointly to respondents appearing separately and filing separate briefs.

The owner of premises is liable to subcontractors only to the extent of the debt he owes to the general contractor. The bond given to discharge the mechanics' liens herein was properly fixed on the basis of the amount in which the owner was indebted to the general contractor at the time of the assertion of the liens (see Lien Law, §§ 4, 19; *Custer Bldrs. v Quaker Heritage*, 41 AD2d 448, 451; *Lorber v Eskof Real Estate*, 21 Misc 2d 308; *Randolph v Garvey*, 10 Abb Prac 179, 183). Insofar as the First Department case of *Matter of Rockefeller Center (Jackson)* (238 App Div 736) holds to the contrary, we do not agree.

Hopkins, Acting P. J., Martuscello, Latham, Shapiro and Hawkins, JJ., concur.

SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: LUCY BILLINGS PART 0

Justice

SR City Entertainment

- v -

Yoon + Guy

INDEX NO. 10 11>/;1

MOTION DATE

MOTION SEQ. NO. ??}/

MOTION CAL. NO.

The following papers, numbered 1 to .3 were read on this motion to/for Vacate ML

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...	PAPERS NUMBERED I i.
Answering Affidavits - Exhibits	3
Replying Affidavits	

Cross-Motion: Yes D No

Upon the foregoing papers, it is ordered ~~that this motion~~ and adjudged that:

Petitioner withdraws its original petition, having supplanted it with a supplemental petition, rendering the original petition moot. Since the accompanying 7/21/11 decision grants the supplemental petition and vacates respondent's lien on grounds other than any error or defect in its notice of the lien, its motion to amend the notice is also moot.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk To and notice of entry cannot be issued based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1416).

Dated: 1/31/11

LUCY BILLINGS J.S.C.

Check one: G2(FINAL DISPOSITION O NON-FINAL DISPOSITION

Check if appropriate: [] DO NOT POST Ll REFERENCE

[J SUBMIT ORDER/ JUDG. [J SETTLE ORDER/ JUDG.

[2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

----------x

SR CITY ENTERTAINMENT, LLC,

Petitioner Index No. 101132/2011

- against - DECISION AND ORDER

YOON & GUY ELECTRIC,

Respondent

LUCY BILLINGS, J. S. C.:

Respondent claims it performed electrical work on a construction project for which it has not been fully paid, pursuant to a contract with the general contractor, GwangGaeTou Development Corp. (GGT), and claims entitlement to a mechanic's lien against the premises where the construction was performed because GGT has not been fully paid by the premises' owner or tenant. Respondent relies on emails from Steven Yi, a former employee of the general contractor, to respondent's proprietor, Jun Ha Yoon, and to its attorney, Euisun Pyun, that petitioner tenant did not pay GGT for additional work orders beyond the original contracted work. While respondent cites to instances where email communications may constitute admissible evidence of a signed contract, Al-Bawaba.com, Inc. v. Nstein Tech. Corp., 19 Misc. 3d 1125, 2008 WL 1869751, at *4 (Sup. Ct. Kings Co. 2008); N.Y. Gen. Obligs. Law§ 5-701(b); N.Y. U.C.C. § 2-201(2); Newmark & Co. Real Estate Inc. v. 2615 E. 17 St. Realty LLC, 80 A.D.3d 476, 477 (1st Dep't 2011); Naldi v. Grunberg, 80 A.D.3d 1,

5-6 (1st Dep't 2010); Williamson v. Desenter, 59 A.D.3d 291 (1st Dep't 2009), or of notice, Kaywein Realty Co., LLC v. City of New York Envtl. Control Bd., 29 Misc. 3d 1213, 2010 WL 4137618, at *2 (Sup. Ct. N.Y. Co. 2010); Harpercollins Publ., L.L.C. v. Arnello, 23 Misc. 3d 1117, 2009 WL 1119517, at *5 (Sup. Ct. N.Y. Co. 2009), the emails are not a sworn attestation of facts equivalent to testimony or an affidavit. Banco Popular N. Am. v. Victory Taxi Mgt., 1 N.Y.3d 381, 384 (2004); Henkin v. Fast Times Taxi, 307 A.D.2d 814, 815 (1st Dep't 2003); Merrill/New York Co. v. Celerity Sys., 300 A.D.2d 206, 207 (1st Dep't 2002).

Moreover, even were the court to consider these emails authenticated and admissible, Yi further communicated that, once he discussed the question of payment with Dong Ouk Kim, GGT's principal under whom Yi formerly worked, Yi did not adhere to his prior claim of nonpayment and referred respondent to Kim. Kim, whose superior position would govern in any event, acknowledges in a sworn affidavit that his corporation has been fully paid by petitioner. At the hearing granted to respondent on the supplemental petition, petitioner further proved that its payments to GGT preceded respondent's filing of its lien January 11, 2011. N.Y. Lien Law§ 4(1); Matros Automated Elec. Const. Corp. v. Libman, 37 A.D.3d 313 (1st Dep't 2007); Timothy Coffey Nursery/Landscape v. Gatz, 304 A.D.2d 652, 653-54 (2d Dep't 2003); DiVeronica Bros. v. Basset, 213 A.D.2d 936, 937 (3d Dep't 1995). See Davidson Pipe Supply Co. v. Wyoming County Indus. Dev. Agency, 85 N.Y.2d 281; 285 (1995); 104 Contrs. v. R.T. Golf

Assocs., 270 A.D.2d 817, 818 (4th Dep't 2000); Town & Country Linoleum & Carpet Co. v. Tropea, 262 A.D.2d 1045, 1046 (4th Dep't 1999). Although already provided repeated opportunity to call or subpoena Yoon, Yi, and Kim to be examined at the hearing, respondent has not proffered any testimony that might contradict or undermine Kim's affidavit that his corporation makes no claim against petitioner or the owner of the premises where GGT and respondent worked. Timothy Coffey Nursery/Landscape v. Gatz, 304 A.D.2d at 654. See DiVeronica Bros. v. Basset, 213 A.D.2d at 938-39.

Consequently, the court denies respondent's motion to dismiss the supplemental petition to vacate the mechanic's lien of $25,000 filed by respondent January 11, 2011, and grants the supplemental petition. N.Y. Lien Law§ 4(1); Matros Automated Elec. Const. Corp. v. Libman, 37 A.D.3d 313; Timothy Coffey Nursery/Landscape v. Gatz, 304 A.D.2d at 653-54; DiVeronica Bros. v. Basset, 213 A.D.2d at 937-38. The Clerk shall vacate and discharge the lien forthwith.

Petitioner withdraws its original petition, having supplanted it with the supplemental petition and thus rendered the original petition moot. Since this decision grants the supplemental petition and vacates respondent's lien on grounds other than any error or defect in its notice of the lien, its motion to amend the notice is also moot. This decision

constitutes the court's order and judgment on the supplemental petition. C.P.L.R. § 411.

DATED: July 21, 2011

LUCY BILLINGS, J.S.C.

LUCY BiL l i;.y -;'-
J.S.C.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's **Desk (Room 1416).**

Matter of Blue Diamond Group Corp. v Klin Constr. Group Inc.
Supreme Court, Kings County
May 6, 2009
23 Misc.3d 1120(A)
886 N.Y.S.2d 70886 N.Y.S.2d 70 (Table)

Unreported Disposition
23 Misc.3d 1120(A), 886 N.Y.S.2d 70 (Table), 2009 WL 1233825 (N.Y.Sup.), 2009 N.Y. Slip Op. 50871(U)

This opinion is uncorrected and will not be published in the printed Official Reports.

*1 In the Matter of the Application of Blue Diamond Group Corp., Petitioner-General Contractor,

v.

Klin Construction Group, Inc., Respondent-Lienor,

32979/08
Supreme Court, Kings County
Decided on May 6, 2009

CITE TITLE AS: Matter of Blue Diamond Group Corp. v Klin Constr. Group Inc.

APPEARANCES OF COUNSEL

Appearances:
Petitioner
The Scher Law Firm LLP
Carle Place NY
Respondent
Wang Law Office
Flushing NY

OPINION OF THE COURT

Arthur M. Schack, J.

Petitioner-general contractor BLUE DIAMOND GROUP CORP. (BLUE DIAMOND) seeks discharge and cancellation of a $109,762.98 mechanic's lien [exhibit D of petition], docketed in the Office of the Kings County Clerk on November 21, 2008, by respondent-lienor KLIN CONSTRUCTION GROUP, INC. (KLIN), for labor performed for the improvement of property at 142 North 6th Street, Brooklyn, New York, owned by NORTHSIDE TOWER REALTY, LLC (NORTHSIDE). KLIN was a subcontractor for excavation and foundation work at the subject premises. NORTHSIDE *2 made final payment on October 7, 2008 of the $1,900,000.00 contract amount owed to its general contractor, BLUE DIAMOND, for the excavation and foundation work at 142 North 6th Street. This exhausted and satisfied the NORTHSIDE to BLUE DIAMOND contractual obligation 45 days prior to the filing of KLIN's mechanic's lien. Thus, the KLIN mechanics's lien must be discharged and cancelled because the lien attached to nothing, with the contract sum for excavation and foundation fully paid before the filing of the KLIN mechanic's lien.

Further, subsequent to the commencement of the instant action, BLUE DIAMOND, on December 17, 2008, posted a bond discharging KLIN's November 21, 2008-mechanic's lien, for $120,739.28. KLIN, on December 18, 2008, filed a claim with the Kings County Clerk against the bond for the lien amount of $109,762.98. However, the discharge of KLIN's mechanic's lien renders KLIN's claim to the bond a nullity.

BACKGROUND

Petitioner BLUE DIAMOND, a domestic corporation, on or about November 1, 2007, entered into a general contractor's agreement (THE AGREEMENT) [exhibit A of petition], with NORTHSIDE, to improve NORTHSIDE's real property at 142 North 6th Street, Brooklyn, New York. THE AGREEMENT was retroactive to and effective from April 18, 2007. Pursuant to the terms of THE AGREEMENT, NORTHSIDE was obligated to pay BLUE DIAMOND $1,900,000.00 for the “Excavation and Foundation” (E & F) portion of the construction project. The “Schedule of Values” (SOV) [exhibit I of THE AGREEMENT] describes this in detail. The SOV established the maximum lienable value for the E & F work, for BLUE DIAMOND, as the general contractor, and for any subcontractors that might make claims through the general contractor for payment of outstanding amounts for E & F work performed at the subject property.

KLIN, ON OR ABOUT NOVEMBER 27, 2007, ENTERED INTO A SUBCONTRACT (THE SUBCONTRACT) WITH BLUE DIAMOND TO PERFORM A SUBSTANTIAL PORTION OF THE E & F WORK, FOR $1,850,000.00 [EXHIBIT B OF PETITION]. THE AGREEMENT WAS

INCORPORATED BY REFERENCE INTO THE SUBCONTRACT [§ 1.1]. THUS, KLIN WAS ON NOTICE THAT THE MAXIMUM LIENABLE VALUE WAS $1,900,000.00 FOR E & F WORK AT THE SUBJECT PREMISES.PETITIONER BLUE DIAMOND CLAIMS THAT IT RECEIVED FULL PAYMENT OF THE $1,900,000.00 CONTRACTUAL OBLIGATION FROM NORTHSIDE FOR THE PERFORMANCE OF THE E & F WORK AT THE SUBJECT PROPERTY AND THERE WEREN'T ANY CHANGE ORDERS BETWEEN NORTHSIDE AND BLUE DIAMOND FOR THE E & F WORK. RESPONDENT KLIN ATTEMPTS TO REFUTE THIS SOLELY BY AN ATTORNEY'S AFFIRMATION, WHICH LACKS EVIDENTIARY VALUE. KLIN FAILS TO TENDER EVIDENTIARY PROOF IN ADMISSIBLE FORM THAT THERE WERE CHANGE ORDERS. BLUE DIAMOND, IN CONTRAST, SUBMITTED DETAILED DOCUMENTARY PROOF, IN ADMISSIBLE FORM, DETAILING NORTHSIDE'S PAYMENT OF THE CONTRACTUAL $1,900,000.00 FOR E & F WORK TO BLUE DIAMOND, INCLUDING PAYMENTS THAT BLUE DIAMOND DIRECTED TO BE PAID DIRECTLY TO KLIN [EXHIBIT E OF PETITION].

THE E & F WORK WAS COMPLETED ON OR ABOUT JULY 31, 2008.

Subsequent to July 1, 2008, a dispute arose between NORTHBROOK and BLUE ***3*** Diamond as to whether the entire $1,900,000.00 for E & F work had been paid. NORTHSIDE, to resolve the dispute, retained a forensic accountant [exhibit E of petition] to verify if the full $1,900,000.00 had been paid to BLUE DIAMOND for the E & F work. On or about October 7, 2008, the forensic accountant determined that NORTHSIDE owed a final payment of $77,105.00 to BLUE DIAMOND to exhaust and completely satisfy its contractual obligations. NORTHSIDE made the final payment of $77,105.00 on October 7, 2008, and the payment was acknowledged by BLUE DIAMOND [exhibit E of petition].

On November 21, 2008, 45 days subsequent to NORTHSIDE's final payment to

petitioner BLUE DIAMOND for E & F work, KLIN filed and docketed the subject mechanic's lien, for $109,762.98, with the Office of the Kings County Clerk, claiming that this sum was due from NORTHSIDE and BLUE DIAMOND, in that the “labor performed was excavation and foundation.”

Petitioner contends that the KLIN November 21, 2008-lien must be discharged and cancelled because, pursuant to THE AGREEMENT, the $1,900,000.00 for E & F work was fully paid on October 7, 2008, prior to the filing of the mechanics's lien. Thus, pursuant to Lien Law § 4 (1), the mechanic's lien was untimely filed and does not attach to any monies unpaid by NORTHSIDE to BLUE DIAMOND for “excavation and foundation” work at the subject property.

KLIN opposes the petition on both procedural and substantive grounds. KLIN's attorney alleges that BLUE DIAMOND appointed its attorney as its agent for service, and thus personal service by BLUE DIAMOND's attorney, as a party to the action who delivered the notice of petition upon respondent and respondent's attorney, is barred by CPLR Rule 318. Substantively, relying on Lien Law § 19 (6), respondent contends that any dispute regarding the validity of its mechanic's lien must await a foreclosure trial.

After the commencement of the instant action, BLUE DIAMOND, on December 17, 2008, posted a bond for 110% of KLIN's mechanic's lien. BLUE DIAMOND never admitted the validity of KLIN's mechanic's lien. KLIN filed on the next day, December 18, 2008, with the Office of the Kings County Clerk a notice of claim for the lien amount against the bond.

Discussion

KLIN's challenge to jurisdiction, based upon alleged improper service, is baseless

and devoid of merit. KLIN's counsel, in ¶ 3 of his affirmation in opposition to the petition, alleges “ . . . papers may be served by any person not a party of the age of eighteen years or over.' CPLR 2103 (a). Petitioner is a corporation whose agent designated for service is Mr. Scher [petitioner's counsel] and thus the party to the action. CPLR 318. Service of process by the party itself is a jurisdictional defect, which renders the action subject to dismissal.” Petitioner presents a New York State Department of State website search revealing that petitioner's authorized agent for service of process is ***4*** Richard Holowchak, and not Jonathan L. Scher, Esq. [exhibit 1 of reply affirmation]. Respondent's counsel cites CPLR Rule 318 to support his argument of improper service, but presents no proof that petitioner appointed its law firm “in a writing, executed and acknowledged in the same manner as a deed, with the consent of the agent endorsed thereon,” or that “the writing . . . [is] filed in the office of the clerk of the county in which the principal to be served resides or has its principal office.”

Respondent's counsel admitted receipt of personal service of the notice of petition on December 9, 2008, in ¶ 4 of his affirmation in opposition to petition, and in a December 18, 2008-letter to Mr. Scher [exhibit 2 of reply affirmation].

A mechanic's lien by a subcontractor is a statutory creation, operating much like attachment and garnishment, to make sure that a subcontractor who supplies labor or materials for a construction project and does not have a contractual relationship with the owner of the property will receive the amount due to himself or herself. The mechanic's lien secures the amount due to the subcontractor by a lien on the real property improved. (Lien Law § 3; *Modern Era Const., Inc. v Shore Plaza, LLC*, 51 AD3d 990 [2d Dept 2008]; *Zimmerman v Carlson*, 293 AD2d 744 [2d Dept 2002]; *Martens v O'Neill*, 121 AD 123 [2d Dept1909]).

PETITIONER BLUE DIAMOND CORRECTLY ARGUES IN ITS MOVING PAPERS THAT, PURSUANT TO LIEN LAW § 4 (1), THE RIGHTS OF A SUBCONTRACTOR ARE DERIVATIVE OF THE RIGHTS OF THE GENERAL CONTRACTOR, AND A SUBCONTRACTOR'S LIEN MUST BE SATISFIED OUT OF ANY FUNDS DUE AND OWING FROM THE OWNER TO THE GENERAL CONTRACTOR AT THE TIME THE LIEN IS FILED. LIEN LAW § 4 (1) STATES:

If labor is performed for, or materials furnished to a contractor or

subcontractor for an improvement, *the lien shall not be for a sum*

greater than the sum earned and unpaid on the contract at the time of filing of the notice of lien, and any sum subsequently earned thereon. *In no case shall the owner be liable to pay* by any rea son of all liens created pursuant to this article *a sum greater than the value or agreed price of the labor and materials remaining unpaid*, at the

time of filing notices of such liens. [*Emphasis added*]

The Appellate Division, Third Department, discussed the derivative rights of a lienor in *Electric City Concrete Co. Inc. v Phillips* (100 AD2d 1, 4 [3d Dept 1984], holding:

Pursuant to the Lien Law, a mechanic's lien is valid to the extent of "the sum earned and unpaid on the contract at the time of filing the notice of lien, and any sum subsequently earned thereon" (Lien Law § 4; see, als o, *Albert J. Bunce, Ltd, v Fahey*, 73 AD2d 623 [2d Dept 1979]). *In the case of a subcontractor, a mechanic's lien will attach only to those funds due and owing to the general contractor at the time of its filing, or which may thereafter become* ****5*** *due and owing (*Hartman v Travis*, 81 AD2d 692, 993 [3d Dept 1981];* Albert J. Bunce, Ltd, v Fahey, supra*). Indeed, it is well established that the* rights of lienors are "derivative of those of the general contractor and are restricted to satisfaction out of the amount established to be due and owing from the owner to the general contractor" *(*Strain & Son v Baranello & Sons*, 90 AD2d 924, 925 [3d Dept 1982]; see, also,* Central Val. Concrete Corp. v Montgomery *Ward & Co.*, 34 AD2d 860, 861 [3d Dept 1970]; 37 NY Jur., Mechanic's Liens, §§ 17, 18, pp 134-137). [*Emphasis added*] (*See Timothy Coffey Nursery/Landscape, Inc. v Gatz*, 304 AD2d 652, 653-654 [2d Dept 2003]; *104 Contractors, Inc. v R.T. Golf Associates, L.P.*, 270 AD2d 817, 818 [4th Dept 2000]; *Di Veronica Bros. v Basset*, 213 AD2d 936, 937 [3d Dept 1995])

"Moreover a subcontractor bears the burden of demonstrating that there is money due and owing to the general contractor from the owner based on the primary contract (*See GCDM Ironworks v GCH Constr. Corp*., 292 AD2d 495 [2d Dept 2002]; *Falco Constr. Corp. v P & F Trucking*, 158 AD2d 510 [2d Dept 1990])." (*Timothy Coffey Nursery/Landscape, Inc. v Gatz,* at 654). (*See Franco Belli Plumbing and Heating and Sons, Inc. v Imperial Development & Const. Corp*., 45 AD3d 634, 637 [2d Dept 2007]).

Respondent-lienor KLIN failed to present any facts that preclude judgment, including documentary evidence, demonstrating that there was any money due and owing to petitioner-general contractor BLUE DIAMOND from owner NORTHSIDE on the day that it filed the instant mechanic's lien. Petitioner, on the other hand, provided extensive documentary evidence demonstrating that no money was due and owing to the general contractor for E & F work prior to the filing of the instant mechanic's lien. "No lien may attach if the owner has discharged his obligation to the contractor, and it appears that has been done." (*W.E. Blume Inc. v Postal Tel. Cable Co.*, 265 AD 1062 [2d Dept 1943]). The Court, in *Perma Pave Contracting Corp. v Paerdegat Boat and Racquet Club, Inc.* (156 AD2d 550, 552 [2d Dept 1989]), held that to establish, as a matter of law, that full payment had been made by the owner to the general contractor, the owner must provide the court with checks and/or any other financial documents demonstrating the date of full payment. BLUE DIAMOND, in the instant case, submitted proof to the Court in the form of "copies of checks or similar financial documents which demonstrated the date of full payment [*Perma Pave* at 552]," that BLUE DIAMOND is entitled to the full payment defense.

Respondent KLIN, in opposition to BLUE DIAMOND's petition, quotes from *Retek v City of New York* (14 AD3d 708, 709 [2d Dept 2005]), claiming that the Court "has no inherent power to vacate or discharge a notice of lien except as authorized by ****6***

LIEN LAW § 19 (6) (SEE MATTER OF LOWE, 4 AD3D 476 [2004]; DEMBER CONST. CORP. V P & R ELEC. CORP., 76 AD2D 540 [1980])." FURTHER, CITING RETEK AT 709, RESPONDENT ALLEGES THAT "[W]HERE THERE [IS] NO DEFECT UPON THE FACE OF THE NOTICE OF LIEN, ANY DISPUTE REGARDING THE VALIDITY OF THE LIEN MUST AWAIT TRIAL THEREOF BY FORECLOSURE' DEMBER CONSTR. CORP. V P & R ELEC. CORP., SUPRA)."

Respondent's reliance on Lien Law § 19 (6) to defeat the instant petition is correct when unpaid money owed to a subcontractor exists. However, in the instant action, the full payment for E & F work by NORTHSIDE was made to BLUE DIAMOND on October 7, 2008. When KLIN filed its mechanic's lien on November 21, 2008, 45 days later, no money was owed by NORTHSIDE to BLUE DIAMOND for E & F work. In the absence of any unpaid money for E & F work owed by the owner to the general contractor, KILN's lien attached to nothing but thin air. The Appellate Division, Second Department, in *Timothy Coffey Nursery/Landscape, Inc. v Gatz*, *supra* at 304 AD2d 652, 653-654, instructed that:

the rights of a subcontractor are derivative of the rights of thegeneral

contractor and a subcontractor's lien must be satisfied out of funds

"due and owing from the owner to the general contractor" at the time

the lien is filed (*Electric City Concrete Co. Inc. v Phillips* (100AD2d 1,

4 [1984], quoting *Strain & Son v Baranello & Sons*, 90 AD2d 924,

925 [1982]; *see also Di Veronica Bros. v Basset*, 213 AD2d 936,

937 [1995]; *Tibbetts Contr. Corp. v O & E Constr. Co.*, 15 NY2d

324 [1965]; *104 Contractors, Inc. v R.T. Golf Associates, L.P.*, 270

AD2d 817, 818 [2000]; *Falco Constr. Corp. v P & F Trucking*, 158

AD2d 510 [1990]).

Petitioner-general contractor BLUE DIAMOND has clearly established the

absence of any funds "due and owing from the owner to the general contractor [*Strain & Son v Baranello & Sons*, supra at 925]" for E & F work on November 21, 2008. Respondent-lienor KLIN failed to demonstrate that "there is money due and owing to the general contractor from the owner based on the primary contract [*GCDM Ironworks v GCH Constr. Corp., supra* at 496]." Therefore, the Court must grant BLUE

DIAMOND's petition to discharge and cancel KILN's instant mechanic's lien for $109,762.98 for labor performed for E & F work at 142 North 6th Street, Brooklyn, New York.

Further, KLIN's opposition papers are nothing more than a three-page affirmation by its counsel, with attached exhibits. While respondent's counsel states, in ¶ 1 of her affirmation in opposition, that "I am fully familiar with the facts and circumstances ***7** herein," it does not state that KLIN's counsel had personal knowledge of the facts. An affirmation by an attorney who lacks personal knowledge of the facts "is without evidentiary value and thus unavailing." (*Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]).

The Court's analysis of BLUE DIAMOND's petition is similar to an analysis of a summary judgment motion. BLUE DIAMOND has met its burden of coming forward with admissible evidence to prove that KLIN's mechanic's lien must be

discharged and cancelled. With the burden shifting to KLIN, "the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring the trial of the action or tender an acceptable excuse for his failure to do so, and the submission of a hearsay affirmation by counsel alone does not satisfy this requirement." (*Zuckerman* at 560). (*See Ferluckaj v Goldman Sachs &* Co., _____ NY2d____, 2009 NY Slip Op 02483 [April 2, 2009]; *Gonzalez ex rel. Gonzalez v 98 Mag Leasing Corp.*, 95 NY2d 124, 129 [2000]; *Alvarez v Prospect Hospital*, 68 NY2d 320, 325-327 [1986]; *GTF Marketing, Inc. v Colonial Aluminum Sales, Inc*., 66 NY2d 965, 967-968 [1985]; *Lancer Ins. Co. v Whitfield*,_____AD3d____, 2009 NY Slip Op 02975 [2d Dept April 14, 2009]; *Shickler v Cary*, 59 Ad3d 700 [2d Dept 2009]; *Hirsch v Morgan Stanley & Co.*, 239 AD2d 466, 467 [2d Dept 1997]; *Pierson v Good Samaritan Hospital*, 208 AD2d 513, 513-514 [2d Dept 1994]; *Murphy v Stein*, 156 AD2d 546 [2d Dept 1989]).

With respect to respondent KILN's December 18, 2008 claim to the lien amount in the December 17, 2008-bond posted by petitioner BLUE DIAMOND, Lien Law § 19 (4) allows a lienee to substitute one security for another. The Court, in *Harley v Plant* (149 AD 719, 725 [2d Dept 1912]), observed:

Subdivision 4 of section 19 of the Lien Law (Consol. Laws, chap. 33;

Laws of 1909, chap. 38), in providing for bonds for the discharge of

liens, says that such bonds shall be "conditioned for the payment of

any judgment which may be rendered against the property for the

enforcement of the lien." Such a bond takes the place of the property

and becomes the subject of the lien, the same as moneys paid into

court, or securities deposited after suit brought to foreclose the lien.

(*Morton v Tucker*, 145 NY 244 [1895]).

"The issuance of the lien bond . . . does not constitute an admission of its validity." (*Spring Sheet Metal & Roofing Co., Inc. v County of Monroe Indus. Development Agency*, 226 AD2d 1064, 1065 [4th Dept 1996]." Further, a "valid lien must be judicially established before a surety may be made to pay pursuant to its bond." *(J. Castronovo, Inc. v Hillside Development Corp*., 160 AD2d, 763, 765 [2d Dept 1990]). "The filing of the bond, by itself, does not establish the validity or timely filing of the lien." (*Outrigger Const. Co., Inc. v Nostrand Ave. Development Corp.*, 217 AD2d 589, 690 [2d Dept ***8** 1995]). The purpose of posting a bond for a mechanic's lien "is to relieve the contractor

. . . from the embarrassment of the lien without waiting for the result of an action to enforce the lien." (*Berger Mfg. Co. v City of New York*, 206 NY 24, 30 [1912]). In the instant action, the December 17, 2008-bond discharging the mechanic's lien is rendered moot by the cancellation of KLIN's November 21, 2008-mechanic's lien. Thus, KLIN's claim to the bond is a nullity. (*See Sexauer & Lemke v Luke A. Burke & Sons Co.*, 228 NY 341, 345 [1920]; *Milliken Bros. v City of New York*, 201 NY 65, 74 [1911]; *G. Rama Const. Enters., Inc. v 80-82 Guernsey St. Assoc., LLC*, 43 AD3d 863, 865 [2d Dept 2007]; *Royal Ins. Co. of America v Citizen Developers of Oneonta*, 200 AD3d 804, 806 [3d Dept 1994]; *J. Castronovo, Inc.* at 765).

Conclusion

Accordingly, it is

ORDERED, that petitioner-general contractor BLUE DIAMOND GROUP CORP.'s petition for the discharge and cancellation of the $109,762.98 mechanic's lien, docketed in the Office of the Kings County Clerk on November 21, 2008, by respondent-lienor KLIN CONSTRUCTION GROUP, INC., for labor performed for the improvement of the property at 142 North 6th Street, Brooklyn, New York, owned by NORTHSIDE TOWER REALTY, LLC, is granted; and it is further

ORDERED, that the Kings County Clerk is directed to mark the Lien Docket to reflect that the above-referenced November 21, 2008 mechanic's lien for $109,762.98, docketed by respondent-lienor KLIN CONSTRUCTION GROUP, INC., for labor performed for the improvement of the property at 142 North 6th Street, Brooklyn, New York, owned by NORTHSIDE TOWER REALTY, LLC, is discharged and cancelled; and it is further

ORDERED, that the December 17, 2008 "Bond Discharging Mechanic's Lien" for $120,739.28, filed on behalf of BLUE DIAMOND GROUP CORP., "conditioned for the payment of any all judgments which may be rendered . . . in favor of KLIN Construction Group, Inc., . . . to enforce their alleged lien" of November 21, 2008 is moot, and the

December 18, 2008 claim filed by respondent KLIN CONSTRUCTION GROUP, INC. for $109,762.98 against said ”Bond Discharging Mechanic's Lien,“ is discharged; and, it is further

ORDERED, that the Kings County Clerk is directed to mark the Lien Bond Docket to reflect that the above-referenced December 17, 2008 ”Bond Discharging Mechanic's Lien“ for $120,739.28, filed on behalf of BLUE DIAMOND GROUP CORP., is discharged and cancelled.

This constitutes the decision and order of the Court.

ENTER

_____

HON. ARTHUR M. SCHACK

J. S. C.

END OF DOCUMENT

Guzman v Estate of Fluker
Supreme Court, Appellate Division, Second Department, New York
April 29, 1996
226 A.D.2d 676
641 N.Y.S.2d 721

226 A.D.2d 676, 641 N.Y.S.2d 721

Antonio Guzman, Appellant,

v.

Estate of Edsel B. Fluker et al., Respondents.

Supreme Court, Appellate Division, Second Department, New York
95-00737
(April 29, 1996)

CITE TITLE AS: Guzman v Estate of Fluker

Ordered that the order is reversed, on the law, with costs, and the plaintiff's motion to dismiss the counterclaim of the defendants Estate of Edsel B. Fluker and Faustina Nischk for damages pursuant to Lien Law § 39-a for willful exaggeration of the mechanic's lien is granted.

The plaintiff commenced this action to foreclose a mechanic's lien filed on properties owned by the decedent Edsel B. Fluker for an amount allegedly owed on a renovation contract. In their answer, the defendants Estate of Edsel B. Fluker and Faustina Nischk, the executor of the estate, alleged, *inter alia,* as an affirmative defense that the plaintiff willfully exaggerated the amount of the lien, and they sought damages in the amount of the lien. The defendants subsequently moved to ***677** cancel the lien based on the plaintiff's failure to furnish a verified, itemized statement of the labor and materials involved. The motion was granted in September 1993 upon the plaintiff's default, and the lien was cancelled.

In November 1993, the plaintiff sought reinstatement of the lien contending that his default on the prior motion was excusable and that the defendants failed to comply with Lien Law § 38 in their demand for an itemized statement. The defendants cross-moved to amend their answer to include a counterclaim pursuant to Lien Law § 39-a for damages for willful exaggeration of the lien. The court, in an order dated March 2, 1994, denied the plaintiff's motion to reinstate the lien on the ground that he failed to allege in his complaint that he was licensed as a home improvement contractor (*see,* CPLR 3015 [e]). The defendants' motion to amend their answer was granted without any opposition by the plaintiff.

The defendants' claim for damages for willful exaggeration of the lien was referred to a Judicial Hearing Officer upon the consent of the parties. The hearing commenced on August 2, 1994, and was adjourned to November 17, 1994. In September 1994, the plaintiff moved pursuant to CPLR 3212 for summary judgment dismissing the counterclaim on the ground that damages may only be awarded under Lien Law § 39-a if the lien was declared void on account of willful exaggeration. The motion was referred by the Judicial Hearing Officer to the Supreme Court for determination. In the order appealed from, the court denied the plaintiff's motion as untimely because he failed to oppose the defendants' motion to amend their answer and because he stipulated to submit the claim to a Judicial Hearing Officer. We now reverse.

Contrary to the Supreme Court's determination, the plaintiff's motion for summary judgment dismissing the counterclaim cannot be considered untimely based on his failure to oppose the defendants' motion to amend their answer. Once the amended answer was served, the plaintiff was entitled to move for summary judgment dismissing the counterclaim on the merits. A motion for summary judgment should not be denied solely on the ground that it is made on the eve of trial, particularly where the motion is meritorious (*see, e.g., Kule Resources v Reliance Group,* 49 NY2d 587; *676 R.S.D. v Scandia Realty,* 195 AD2d 387; *Carvel Corp. v Burstein,* 99 AD2d 935, *affd* 62 NY2d 638). Moreover, the plaintiff's consent pursuant to CPLR 4317 (a) to refer the counterclaim to a Judicial Hearing Officer for determination did not constitute a stipulation as to the validity of the claim. ***678**

We conclude that the Supreme Court should have granted the plaintiff's motion for summary judgment dismissing the counterclaim as a matter of law. Pursuant to Lien Law § 39, the court may declare a lien void and deny recovery if the lienor has willfully exaggerated the amount claimed. Lien Law § 39-a provides that where the court has declared a lien void "on account of wilful exaggeration the person filing such notice of lien shall be liable in damages to the owner or contractor". Lien Law § 39-a is penal in nature, and therefore it must be strictly construed in favor of the person upon whom the penalty is sought to be imposed (*see, Goodman v Del-Sa-Co Foods,* 15 NY2d 191, 195). Lien Law §§ 39 and 39-a must be read in tandem, and damages may not be awarded under section 39-a unless the lien has been discharged for willful exaggeration (*see, Joe Smith, Inc. v OtisCharles Corp.,* 279 App Div 1, *affd* 304 NY 684; *Matter of Mohawk Frozen Foods v Nole & Sons,* 780 F2d 7; *cf., Goodman v Del-Sa-Co Foods, supra; Westbury S & S Concrete v Manshul Constr. Corp.,* 212 AD2d 596).

Here, the lien was discharged for failure to comply with a demand for an itemized statement. Although the claim of willful exaggeration was raised as an affirmative defense in the defendants' original answer, they did not seek an adjudication of that issue prior to discharge of the lien (*see, e.g., Durand Realty Co. v Stolman,* 197 Misc 208, *affd* 280 App Div 758 [it is well settled that the fact of willful exaggeration must be established in the trial of the foreclosure action]). The court's subsequent denial of the plaintiff's request to reinstate the lien was based on a defect on the face of the complaint--i.e., the failure to allege that the plaintiff was licensed--and no finding was made that the lien was void due to willful exaggeration. The Legislature intended the remedy in Lien Law § 39-a to be available only where the lien was valid in all other respects and was declared void by reason of willful exaggeration after a trial of the foreclosure action *(see, Joe Smith, Inc. v OtisCharles Corp., supra).* Since the defendants succeeded in obtaining a discharge of the lien prior to trial, the foreclosure action was terminated and "thereafter the court was without authority to declare the lien void on account of willful exaggeration" *(Joe Smith, Inc. v OtisCharles Corp., supra,* at 5).

O'Brien, J. P., Ritter, Hart and Goldstein, JJ., concur.

Degraw Constr. Group, Inc. v McGowan Bldrs., Inc.
Supreme Court, Appellate Division, Second Department, New York
December 11, 2019
178 A.D.3d 770
114 N.Y.S.3d 395

178 A.D.3d 770, 114 N.Y.S.3d 395, 2019 N.Y. Slip Op. 08820

*1 Degraw Construction Group, Inc., Respondent,

v

McGowan Builders, Inc., et al., Appellants, et al., Defendants.

Supreme Court, Appellate Division, Second Department, New York
2018-00940, 2018-05951, 8072/14
December 11, 2019

CITE TITLE AS: Degraw Constr. Group, Inc. v McGowan Bldrs., Inc.

Law Firm of Joseph J. Hocking LLC, New York, NY, for appellants.
Zisholtz & Zisholtz, LLP, Garden City, NY (Joseph McMahon of counsel), for respondent.

In a consolidated action, inter alia, to foreclose mechanic's liens, the defendants McGowan Builders, Inc., and Liberty Mutual Insurance Company appeal from (1) an order of the Supreme Court, Kings County (Mark I. Partnow, J.), dated September 5, 2017, and (2) a judgment of the same court dated March 23, 2018. The order, insofar as appealed from, granted that branch of the motion of the defendants McGowan Builders, Inc., and Liberty Mutual Insurance Company which was for summary judgment on their counterclaims for damages pursuant to Lien Law § 39-a only to the extent of awarding them the sum of $25,645. The judgment, insofar as appealed from, upon the order, awarded the defendant McGowan Builders, Inc., the principal sum of only $25,645.

Ordered that the appeal from the order is dismissed; and it is further,

Ordered that the judgment is affirmed insofar as appealed from, with costs.

The appeal from the order must be dismissed because the right of direct appeal therefrom terminated with the entry of the judgment in the action (*see Matter of Aho*, 39 NY2d 241, 248 [1976]). The issues raised on the appeal from the order are brought up for review and have been considered on the appeal from the judgment (*see* CPLR 5501 [a][1]).

The defendant McGowan Builders, Inc. (hereinafter McGowan), was a general contractor on construction projects for the defendants YMCA of Greater New York and Nan Shan Local Development Corp. The plaintiff subcontracted with McGowan to perform certain work on each project. In April 2013, the plaintiff and McGowan entered into a settlement agreement to terminate the subcontracts. Pursuant thereto, the parties agreed, inter alia, that McGowan would pay the plaintiff $150,000 in installments, and the parties would release each other from all potential claims arising from the projects except, inter alia, for claims arising from latent defects in workmanship. The agreement further provided that if either party breached the agreement, the other party's sole remedy would be to seek enforcement of the terms of the agreement. Subsequently, after paying $100,000 pursuant to the agreement, McGowan *771 informed the plaintiff that it would make no further payments because latent defects had been discovered in the plaintiff's work. Rather than seeking to enforce the agreement, the plaintiff filed mechanic's liens against the properties associated with the projects, and commenced two actions, inter alia, to foreclose on the liens, which were consolidated in the Supreme Court, Kings County. McGowan and the defendant Liberty Mutual Insurance Company (hereinafter Liberty), which posted surety bonds to discharge the liens, served answers interposing counterclaims alleging, inter alia, that the mechanic's liens were barred by the settlement agreement and therefore were willfully exaggerated.

McGowan and Liberty moved, inter alia, for summary judgment on their counterclaims. The Supreme Court granted the motion, finding, inter alia, that the mechanic's liens were invalid because they were precluded by the terms of the settlement agreement. The court awarded McGowan damages in the sum of $25,645, representing the sum McGowan paid Liberty in premiums for the bonds given to obtain discharge of the liens. McGowan and Liberty appeal, contending that they were entitled to additional damages and attorneys' fees under Lien Law § 39-a based on the plaintiff's alleged willful exaggeration of the mechanic's liens.

When a court determines that a mechanic's lien is void due to willful exaggeration, the person filing such notice of lien is liable in damages to the owner or contractor (*see* Lien Law § 39-a). “The damages which said owner or contractor shall be entitled to recover, shall include the amount of any premium for a bond given to obtain the discharge of the lien . . . , reasonable attorney's fees for services in securing the discharge of the lien, and an amount equal to the difference by which the amount claimed to be due or to become due as stated in the notice

of lien exceeded the amount actually due or to become due thereon" (Lien Law § 39-a). However, "[t]he Legislature intended the remedy in Lien Law § 39-a to be available only where the lien was valid in all other respects and was declared void by reason of willful exaggeration after a trial of the foreclosure action" (*Guzman v Estate of Fluker*, 226 AD2d 676, 678 [1996]; *see Atlas Refrigeration-Air Conditioning, Inc. v Lo Pinto*, 33 AD3d 639, 640 [2006]). Moreover, "[t]he remedy in Lien Law § 39-a requires a finding that the lienor deliberately and intentionally exaggerated the *lien amount*, and is available only where the lien is otherwise valid" (*Saratoga Assoc. Landscape Architects, Architects, Engrs. & Planners, P.C. v Lauter Dev. Group*, 77 AD3d 1219, 1223 [2010] [citation and internal quotation marks omitted]).

***772** Here, McGowan and Liberty contended in their motion for summary judgment, and the Supreme Court determined, that both of the plaintiff's mechanic's liens were invalid in their entirety because the plaintiff was precluded by the settlement agreement from asserting them, and was instead relegated to seeking enforcement of the agreement as its sole remedy for McGowan's alleged breach of the agreement's terms. Therefore, under these circumstances, damages under Lien Law § 39-a for willful exaggeration of the liens were unavailable, as the liens were not otherwise valid (*see Saratoga Assoc. Landscape Architects, Architects, Engrs. & Planners, P.C. v Lauter Dev. Group*, 77 AD3d at 1223; *Atlas Refrigeration-Air Conditioning, Inc. v Lo Pinto*, 33 AD3d at 640; *Wellbilt Equip. Corp. v Fireman*, 275 AD2d 162, 165-167 [2000]; *Guzman v Estate of Fluker*, 226 AD2d at 678; *cf. Westbury S & S Concrete v Manshul Constr. Corp.*, 212 AD2d 596 [1995]). Accordingly, we affirm the judgment insofar as appealed from. Mastro, J.P., Leventhal, Duffy and Brathwaite Nelson, JJ., concur.

Motion by the respondent, on appeals from an order of the Supreme Court, Kings County, dated September 5, 2017, and a judgment of the same court dated March 23, 2018, inter alia, in effect, to dismiss the appeals on the ground that they have been rendered academic. By decision and order on motion of this Court dated March 15, 2019, the branch of the motion which is, in effect, to dismiss the appeals as academic was held in abeyance and referred to the Justices hearing the appeals for determination upon the argument or submission thereof.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, and upon the argument of the appeals, it is

Ordered that the branch of the motion which is, in effect, to dismiss the appeals is denied.

Lien

§ 2. Definitions. 1. Lienor. The term "lienor," when used in this chapter, means any person having a lien upon property by virtue of its provisions, and includes his successor in interest.

2. Real property. The term "real property," when used in this chapter, includes real estate, lands, tenements and hereditaments, corporeal and incorporeal, fixtures, and all bridges and trestle work, and structures connected therewith, erected for the use of railroads, and all oil or gas wells and structures and fixtures connected therewith, and any lease of oil lands or other right to operate for the production of oil or gas upon such lands, and the right of franchise granted by a public corporation for the use of the streets or public places thereof, and all structures placed thereon for the use of such right or franchise.

3. Owner. The term "owner," when used in this chapter, includes the owner in fee of real property, or of a less estate therein, a lessee for a term of years, a vendee in possession under a contract for the purchase of such real property, and all persons having any right, title or interest in such real property, which may be sold under an execution in pursuance of the provisions of statutes relating to the enforcement of liens of judgment, and all persons having any right or franchise granted by a public corporation to use the streets and public places thereof, and any right, title or interest in and to such franchise. The purchaser of real property at a statutory or judicial sale shall be deemed the owner thereof from the time of such sale. If the purchaser at such sale fails to complete the purchase, pursuant to the terms of the sale, all liens created by his consent after such sale shall be a lien on any deposit made by him and not on the real property sold.

4. Improvement. The term "improvement," when used in this chapter, includes the demolition, erection, alteration or repair of any structure upon, connected with, or beneath the surface of, any real property and any work done upon such property or materials furnished for its permanent improvement, and shall also include any work done or materials furnished in equipping any such structure with any chandeliers, brackets or other fixtures or apparatus for supplying gas or electric light and shall also include the drawing by any architect or engineer or surveyor, of any plans or specifications or survey, which are prepared for or used in connection with such improvement and shall also include the value of materials actually manufactured for but not delivered to the real property, and shall also include the reasonable rental value for the period of actual use of machinery, tools and equipment and the value of compressed gases furnished for welding or cutting in connection with the demolition, erection, alteration or repair of any real property, and the value of fuel and lubricants consumed by machinery operating on the improvement, or by motor vehicles owned, operated or controlled by the owner, or a contractor or subcontractor while engaged exclusively in the transportation of materials to or from the improvement for the purposes thereof and shall also include the performance of real estate brokerage services in obtaining a lessee for a term of more than three years of all or any part of real property to be used for other than residential purposes pursuant to a written contract of brokerage employment or compensation.

5. Cost of improvement. The term "cost of improvement," when used in this chapter, means expenditures incurred by the owner in paying the claims of a contractor, an architect, engineer or surveyor, a subcontractor, laborer and materialman, arising out of the improvement, and in paying the amount of taxes based on payrolls including such persons and withheld or required to be withheld and taxes based on the purchase price or value of materials or equipment required to be installed or furnished in connection with the performance of the

improvement, payment of taxes and unemployment insurance and other contributions due by reason of the employment out of which any such claim arose, and payment of any benefits or wage supplements or the amounts necessary to provide such benefits or furnish such supplements, to the extent that the owner, as employer, is obligated to pay or provide such benefits or furnish such supplements by any agreement to which he is a party, and shall also include fair and reasonable sums paid for obtaining building loan and subsequent financing, premiums on bond or bonds filed pursuant to section thirty-seven of this chapter or required by any such building loan contract or by any lease to be mortgaged pursuant thereto, or required by any mortgage to be subordinated to the building loan mortgage, premiums on bond or bonds filed to discharge liens, sums paid to take by assignment prior existing mortgages, which are consolidated with building loan mortgages and also the interest charges on such mortgages, sums paid to discharge or reduce the indebtedness under mortgages and accrued interest thereon and other encumbrances upon real estate existing prior to the time when the lien provided for in this chapter may attach, sums paid to discharge building loan mortgages whenever recorded, taxes, assessments and water rents existing prior to the commencement of the improvement, and also those accruing during the making of the improvement, and interest on building loan mortgages, ground rent and premiums on insurance likewise accruing during the making of the improvement. The application of the proceeds of any building loan mortgage or other mortgage to reimburse the owner for any payments made for any of the above mentioned items for said improvement prior to the date of the initial advance received under the building loan mortgage or other mortgage shall be deemed to be an expenditure within the "cost of improvement" as above defined; provided, however, such payments are itemized in the building loan contract and/or other mortgage other than a building loan mortgage, and provided further, that the payments have been made subsequent to the commencement of the improvement.

5-a. Benefits and wage supplements. The term "benefits and wage supplements" as used in this chapter means all remuneration for employment paid in any medium other than cash, or reimbursement for expenses, or any payments which are not "wages" within the meaning of the law, including, but not limited to, health, welfare, non-occupational disability, retirement, vacation benefits, holiday pay and life insurance.

6. Public corporation. The term "public corporation," when used in this chapter, means a municipal corporation or a district corporation or a public benefit corporation as such corporations are defined in section three of the general corporation law.

7. Public improvement. The term "public improvement," when used in this chapter, means an improvement of any real property belonging to the state or a public corporation; however, if the beneficial interest of an improvement is in an entity other than the state or a public corporation notwithstanding legal title being vested in an industrial development agency created under article eighteen-A of the general municipal law, then such improvement shall be considered an improvement of real property subject to mechanics' liens on real property as provided in section three of this chapter. Nothing contained in this section shall create or be deemed to create any liability upon any industrial development agency for the payment of the cost of any improvement, or otherwise. For the purposes of this subdivision the term "beneficial interest" shall mean the beneficial incidents of ownership of the improvement to include, but not be limited to, the right to possession, the right to claim tax benefits, if any, and the right to purchase or

secure title to the improvement pursuant to an executory contract of sale, option agreement or lease.

8. Improvement of real property. The term "improvement of real property," when used in this chapter, means any improvement of real property not belonging to the state or a public corporation.

9. Contractor. The term "contractor," when used in this chapter, means a person who enters into a contract with the owner of real property for the improvement thereof, or with the state or a public corporation for a public improvement.

10. Subcontractor. The term "subcontractor" when used in this chapter, means a person who enters into a contract with a contractor and/or with a subcontractor for the improvement of such real property or such public improvement or with a person who has contracted with or through such contractor for the performance of his contract or any part thereof.

11. Laborer. The term "laborer," when used in this chapter, means any person who performs labor or services upon such improvement.

12. Materialman. The term "materialman" when used in this chapter, means any person who furnishes material or the use of machinery, tools, or equipment, or compressed gases for welding or cutting, or fuel or lubricants for the operation of machinery or motor vehicles, either to an owner, contractor or subcontractor, for, or in the prosecution of such improvement.

The expression "furnishes material" or other similar expression wherever used in this chapter, shall be deemed to mean and include the reasonable rental value for the period of actual use of machinery, tools or equipment, and the value of compressed gases furnished for welding or cutting, and the value of fuel and lubricants consumed by machinery operating on, or by motor vehicles owned, operated or controlled by the owner, or a contractor or subcontractor while engaged exclusively in the transportation of materials to or from the improvement for the purposes thereof.

13. Building loan contract. The term "building loan contract," when used in this chapter, means a contract whereby a party thereto, in this chapter termed "lender," in consideration of the express promise of an owner to make an improvement upon real property, agrees to make advances to or for the account of such owner to be secured by a mortgage on such real property, whether such advances represent moneys to be loaned or represent moneys to be paid in purchasing from or in selling for such owner bonds or certificates secured by such mortgage upon such real property, providing, however, nothing herein contained shall be deemed to construe as a building loan contract a preliminary application for a building loan made by such owner and accepted by such lender if, pursuant to such application and acceptance, a building loan contract is thereafter entered into between the owner and the lender and filed as provided in section twenty-two of this chapter.

14. Building loan mortgage. The term "building loan mortgage," when used in this chapter, means a mortgage made pursuant to a building loan contract and includes an agreement wherein and whereby a building loan mortgage is consolidated with existing mortgages so as to constitute one lien upon the mortgaged property.

15. Subsequent financing. By the term "subsequent financing" is meant moneys borrowed upon the security of the improvement after the recording of a building loan contract and/or mortgage other than a building loan mortgage upon the premises to be improved and within four months after the completion thereof.

16. Prior mortgage. By the term "prior mortgage" is meant a mortgage on real property and/or leasehold recorded prior to the commencement of an improvement thereon.

17. Consideration. The term "consideration" when used in this chapter, includes real property as defined in section two hereof, and personal property as defined in section thirty-nine of the general construction law.

18. Advances. The term "advances" when used in this chapter, includes money, real property as defined in section two hereof and/or personal property as defined in section thirty-nine of the general construction law.

19. Funds. The term "funds" when used in this chapter, includes money, real property as defined in section two hereof and/or personal property as defined in section thirty-nine of the general construction law.

20. Persons. The term "persons" when used in this chapter, includes an individual, partnership, association, trust or corporation.

Lien

§ 3. Mechanic's lien on real property. A contractor, subcontractor, laborer, materialman, landscape gardener, nurseryman or person or corporation selling fruit or ornamental trees, roses, shrubbery, vines and small fruits, who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof, or of his agent, contractor or subcontractor, and any trust fund to which benefits and wage supplements are due or payable for the benefit of such laborers, shall have a lien for the principal and interest, of the value, or the agreed price, of such labor, including benefits and wage supplements due or payable for the benefit of any laborer, or materials upon the real property improved or to be improved and upon such improvement, from the time of filing a notice of such lien as prescribed in this chapter. Where the contract for an improvement is made with a husband or wife and the property belongs to the other or both, the husband or wife contracting shall also be presumed to be the agent of the other, unless such other having knowledge of the improvement shall, within ten days after learning of the contract give the contractor written notice of his or her refusal to consent to the improvement. Within the meaning of the provisions of this chapter, materials actually manufactured for but not delivered to the real property, shall also be deemed to be materials furnished.

Lien

§ 9. Contents of notice of lien. The notice of lien shall state:

1. The name and residence of the lienor; and if the lienor is a partnership or a corporation, the business address of such firm, or corporation, the names of partners and principal place of business, and if a foreign corporation, its principal place of business within the state.

1-a. The name and address of the lienor's attorney, if any.

2. The name of the owner of the real property against whose interest therein a lien is claimed, and the interest of the owner as far as known to the lienor.

3. The name of the person by whom the lienor was employed, or to whom he furnished or is to furnish materials; or, if the lienor is a contractor or subcontractor, the person with whom the contract was made.

4. The labor performed or materials furnished and the agreed price or value thereof, or materials actually manufactured for but not delivered to the real property and the agreed price or value thereof.

5. The amount unpaid to the lienor for such labor or materials.

6. The time when the first and last items of work were performed and materials were furnished.

7. The property subject to the lien, with a description thereof sufficient for identification; and if in a city or village, its location by street and number, if known; whether the property subject to the lien is real property improved or to be improved with a single family dwelling or not. A failure to state the name of the true owner or contractor, or a misdescription of the true owner, shall not affect the validity of the lien. The notice must be verified by the lienor or his agent, to the effect that the statements therein contained are true to his knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Lien

§ 10. Filing of notice of lien. 1. Notice of lien may be filed at any time during the progress of the work and the furnishing of the materials, or, within eight months after the completion of the contract, or the final performance of the work, or the final furnishing of the materials, dating from the last item of work performed or materials furnished; provided, however, that where the improvement is related to real property improved or to be improved with a single family dwelling, the notice of lien may be filed at any time during the progress of the work and the furnishing of the materials, or, within four months after the completion of the contract, or the final performance of the work, or the final furnishing of the materials, dating from the last item of work performed or materials furnished; and provided further where the notice of lien is for retainage, the notice of lien may be filed within ninety days after the date the retainage was due to be released; except that in the case of a lien by a real estate broker, the notice of lien may be filed only after the performance of the brokerage services and execution of lease by both lessor and lessee and only if a copy of the alleged written agreement of employment or compensation is annexed to the notice of lien, provided that where the payment pursuant to the written agreement of employment or compensation is to be made in installments, then a notice of lien may be filed within eight months after the final payment is due, but in no event later than a date five years after the first payment was made. For purposes of this section, the term "single family dwelling" shall not include a dwelling unit which is a part of a subdivision that has been filed with a municipality in which the subdivision is located when at the time the lien is filed, such property in the subdivision is owned by the developer for purposes other than his personal residence. For purposes of this section, "developer" shall mean and include any private individual, partnership, trust or corporation which improves two or more parcels of real property with single family dwellings pursuant to a common scheme or plan. The notice of lien must be filed in the clerk's office of the county where the property is situated. If such property is situated in two or more counties, the notice of lien shall be filed in the office of the clerk of each of such counties. The county clerk of each county shall provide and keep a book to be called the "lien docket," which shall be suitably ruled in columns headed "owners," "lienors," "lienor's attorney," "property," "amount," "time of filing," "proceedings had," in each of which he shall enter the particulars of the notice, properly belonging therein. The date, hour and minute of the filing of each notice of lien shall be entered in the proper column. Except where the county clerk maintains a block index, the names of the owners shall be arranged in such book in alphabetical order. The validity of the lien and the right to file a notice thereof shall not be affected by the death of the owner before notice of the lien is filed.

2. Where the county clerk indexes liens in a block index, every notice of lien presented to the clerk of a county of filing, in order to entitle the same to be filed, shall contain in the body thereof, or shall have endorsed thereon, a designation of the number of every block, on the land map of the county, which is affected by the notice of lien. The county clerk shall cause such notice of lien to be entered in the block index suitably ruled to contain the columns listed in the preceding paragraph, under the block number of every block so designated. In cases where a notice of lien shall have been filed without such designation or with an erroneous designation, the county clerk, on presentation of proper proof thereof, shall enter such instrument in the proper index, under the proper block number of every block in which the land affected is situated, and shall, at the same

time, make a note of such entry and of the date thereof in every place in which such instrument may have been erroneously indexed, opposite the entry thereof, and also upon the instrument itself, if the same be in his possession or produced to him for the purpose, and the filing of such instrument shall be constructive notice as to property in the block not duly designated at the time of such filing only from the time when the same shall be properly indexed.

A county clerk may adopt a new indexing system utilizing electro-mechanical, electronic or any other method he deems suitable for maintaining the indexes.

§ 19. Discharge of lien for private improvement. A lien other than a lien for labor performed or materials furnished for a public improvement specified in this article, may be discharged as follows:

(1) By the certificate of the lienor, duly acknowledged or proved and filed in the office where the notice of lien is filed, stating that the lien is satisfied or released as to the whole or a portion of the real property affected thereby and may be discharged in whole or in part, specifying the part. Upon filing such certificate, the county clerk in the office where the same is filed, shall note the fact of such filing in the "lien docket" in the column headed "Proceedings had" opposite the docket of such lien.

(2) By failure to begin an action to foreclose such lien or to secure an order continuing it, within one year from the time of filing the notice of lien, unless an action be begun within the same period to foreclose a mortgage or another mechanic's lien upon the same property or any part thereof and a notice of pendency of such action is filed according to law, but a lien, the duration of which has been extended by the filing of a notice of the pendency of an action as herein provided, shall nevertheless terminate as a lien after such notice has been cancelled or has ceased to be effective as constructive notice.

(3) By order of the court vacating or cancelling such lien of record, for neglect of the lienor to prosecute the same, granted pursuant to section fifty-nine of this chapter.

(4) Either before or after the beginning of an action by the owner or contractor executing a bond or undertaking in an amount equal to one hundred ten percent of such lien conditioned for the payment of any judgment which may be rendered against the property for the enforcement of the lien:

a. The execution of any such bond or undertaking by any fidelity or surety company authorized by the laws of this state to transact business, shall be sufficient; and where a certificate of qualification has been issued by the superintendent of financial services under the provisions of section one thousand one hundred eleven of the insurance law, and has not been revoked, no justification or notice thereof shall be necessary. Any such company may execute any such bond or undertaking as surety by the hand of its officers, or attorney, duly authorized thereto by resolution of its board of directors, a certified copy of which resolution, under the seal of said company, shall be filed with each bond or undertaking. Any such bond or undertaking shall be filed with the clerk of the county in which the notice of lien is filed, and a copy shall be served upon the adverse party. The undertaking is effective when so served and filed. If a certificate of qualification issued pursuant to subsections (b), (c) and (d) of section one thousand one hundred eleven of the insurance law is not filed with the undertaking, a party may except, to the sufficiency of a surety and by a written notice of exception served upon the adverse party within ten days after receipt, a copy of the undertaking. Exceptions deemed by the court to have been taken unnecessarily, or for vexation or delay, may, upon notice, be set aside, with costs. Where no exception to sureties is taken within ten days or where exceptions taken are set aside, the undertaking shall be allowed.

b. In the case of bonds or undertakings not executed pursuant to paragraph a of this subdivision, the owner or contractor shall execute an undertaking with two or more sufficient sureties, who shall be free holders, to the clerk of the county where the premises are situated. The sureties must together justify in at least double the sum named in the undertaking. A copy of the undertaking, with notice that the sureties will justify before the court, or a judge or justice thereof, at the

time and place therein mentioned, must be served upon the lienor or his attorney, not less than five days before such time. Upon the approval of the undertaking by the court, judge or justice an order shall be made by such court, judge or justice discharging such lien.

c. If the lienor cannot be found, or does not appear by attorney, service under this subsection may be made by leaving a copy of such undertaking and notice at the lienor's place of residence, or if a corporation at its principal place of business within the state as stated in the notice of lien, with a person of suitable age and discretion therein, or if the house of his abode or its place of business is not stated in said notice of lien and is not known, then in such manner as the court may direct. The premises, if any, described in the notice of lien as the lienor's residence or place of business shall be deemed to be his said residence or its place of business for the purposes of said service at the time thereof, unless it is shown affirmatively that the person servicing the papers or directing the service had knowledge to the contrary. Notwithstanding the other provisions of this subdivision relating to service of notice, in any case where the mailing address of the lienor is outside the state such service may be made by registered or certified mail, return receipt requested, to such lienor at the mailing address contained in the notice of lien.

d. Except as otherwise provided in this subdivision, the provisions of article twenty-five of the civil practice law and rules regulating undertakings is applicable to a bond or undertaking given for the discharge of a lien on account of private improvements.

(5) Upon filing in the office of the clerk of the county where the property is situated, a transcript of a judgment of a court of competent jurisdiction, together with due proof of service of due notice of entry thereof, showing a final determination of the action in favor of the owner of the property against which the lien was claimed.

(6) Where it appears from the face of the notice of lien that the claimant has no valid lien by reason of the character of the labor or materials furnished and for which a lien is claimed, or where for any other reason the notice of lien is invalid by reason of failure to comply with the provisions of section nine of this article, or where it appears from the public records that such notice has not been filed in accordance with the provisions of section ten of this article, the owner or any other party in interest, may apply to the supreme court of this state, or to any justice thereof, or to the county judge of the county in which the notice of lien is filed, for an order summarily discharging of record the alleged lien. A copy of the papers upon which application will be made together with a notice setting forth the court or the justice thereof or the judge to whom the application will be made at a time and place therein mentioned must be served upon the lienor not less than five days before such time. If the lienor can not be found, such service may be made as the court, justice or judge may direct. The application must be made upon a verified petition accompanied by other written proof showing a proper case therefor, and upon the approval of the application by the court, justice or judge, an order shall be made discharging the alleged lien of record.

Lien

§ 38. Itemized statement may be required of lienor. 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. The statement shall be verified by the lienor or his agent in the form required for the verification of notices in section nine of this chapter. If the lienor shall fail to comply with such a demand within five days after the same shall have been made by the owner or contractor, or if the lienor delivers an insufficient statement, the person aggrieved may petition the supreme court of this state or any justice thereof, or the county court of the county where the premises are situated, or the county judge of such county for an order directing the lienor within a time specified in the order to deliver to the petitioner the statement required by this section. Two days' notice in writing of such application shall be served upon the lienor. Such service shall be made in the manner provided by law for the personal service of a summons. The court or a justice or judge thereof shall hear the parties and upon being satisfied that the lienor has failed, neglected or refused to comply with the requirements of this section shall have an appropriate order directing such compliance. In case the lienor fails to comply with the order so made within the time specified, then upon five days' notice to the lienor, served in the manner provided by law for the personal service of a summons, the court or a justice or judge thereof may make an order cancelling the lien.

Lien

§ 39. Lien wilfully exaggerated is void. In any action or proceeding to enforce a mechanic's lien upon a private or public improvement or in which the validity of the lien is an issue, if the court shall find that a lienor has wilfully exaggerated the amount for which he claims a lien as stated in his notice of lien, his lien shall be declared to be void and no recovery shall be had thereon. No such lienor shall have a right to file any other or further lien for the same claim. A second or subsequent lien filed in contravention of this section may be vacated upon application to the court on two days' notice.

Lien

§ 39-a. Liability of lienor where lien has been declared void on account of wilful exaggeration. Where in any action or proceeding to enforce a mechanic's lien upon a private or public improvement the court shall have declared said lien to be void on account of wilful exaggeration the person filing such notice of lien shall be liable in damages to the owner or contractor. The damages which said owner or contractor shall be entitled to recover, shall include the amount of any premium for a bond given to obtain the discharge of the lien or the interest on any money deposited for the purpose of discharging the lien, reasonable attorney's fees for services in securing the discharge of the lien, and an amount equal to the difference by which the amount claimed to be due or to become due as stated in the notice of lien exceeded the amount actually due or to become due thereon.

§ 563-16. Definitions.

As used in this article, the following terms shall have the meanings indicated:

ESTABLISHMENT — Any shop, residence, place or premises from which a home improvement contracting business is transacted.

FINANCIAL RESPONSIBILITY — Knowledge of the extent of liability and risks to which home improvement contractors expose themselves when accepting a home improvement license in Suffolk County, including knowledge as to the need to furnish certificates of public liability and property damage, insurance, as well as proof of workers' compensation, if required by law, and fees for the license.**[Added 7-8-1986 by L.L. No. 19-1986]**

HOME IMPROVEMENT CONTRACTING — Excluding work in the electrical and plumbing fields as defined by § 563-126 of this chapter, any repair, remodeling, alteration, conversion, modernization, home raising or home elevating services, improvement or addition to residential property, and includes but is not limited to painting of residential structures; carpentry; fencing; driveways; exterminating; flooring; ductwork for heating, ventilation and air-conditioning systems; masonry; roofing; siding; the construction, installation and/or servicing of swimming pools and portable and permanent spas; and waterproofing; as well as other improvements to structures or upon land which are part of residential property, including landscaping and arboriculture, which as used herein shall mean tree sprayers, tree pruners, tree stump removers and all other tree services; but shall not include the construction of a new home or work done by a contractor in compliance with a guaranty of completion on new residential property or the sale of goods by a seller who neither arranges to perform nor performs, directly or indirectly, any work or labor in connection with the installation of or application of the goods or improvements to residences owned by or controlled by any government subdivision.**[Amended 5-10-1983 by L.L. No. 10-1983; 9-22-1987 by L.L. No. 38-1987; 10-23-1990 by L.L. No. 37-1990; 12-15-1998 by L.L. No. 2-1999; 3-6-2007 by L.L. No. 6-2007; 6-4-2013 by L.L. No. 27-2013; 7-30-2013 by L.L. No. 36-2013]**

HOME IMPROVEMENT CONTRACTOR — A person who engages in home improvement contracting upon residential property.

HOME RAISING OR HOME ELEVATING SERVICES — Any services involving the separation of a house, or part of a house, from its foundation. Home raising or home elevating services shall include, but not necessarily be limited to, the temporary raising of a house or part of a house off of its foundation with hydraulic jacks and the shoring and leveling of a house.**[Added 7-30-2013 by L.L. No. 36-2013]**

HOME MAINTENANCE — The keeping in a state of repair or efficiency residential property, as defined herein. Such work shall not include alteration of or additions to the original design or function of the residence and shall be limited to the simple repair of existing facilities and systems. For the purpose of this article, "home maintenance" work shall be considered minor, casual and inconsequential in nature when performed in connection with the seasonal opening and closing of residences.**[Added 6-27-1975 by L.L. No. 12-1975]**

OWNER — Any owner of residential property, tenant or any other person who contracts for the services of a home improvement contractor or the person entitled to performance of the work of a home improvement contractor pursuant to a contract.

RESIDENTIAL PROPERTY — One- or two-family houses and property associated therewith.

SALESMAN — Any individual who negotiates or offers to negotiate a contract for a home improvement contractor with an owner or solicits or otherwise endeavors to procure a contract from an owner on behalf of a home improvement contractor, whether or not such individual is an employee of the home improvement contractor.

§ 563-17. License required. [Amended 7-8-1986 by L.L. No. 19-1986]

A. It is unlawful for any person to engage in any business as a home improvement contractor without obtaining a license therefor from the office in accordance with and subject to the provisions of this article and Article I. Every licensee shall maintain an establishment within the State of New York. **[Amended 6-21-1994 by L.L. No. 13-1994]**

B. An individual applicant shall demonstrate to the satisfaction of the Director or his designee a basic understanding of the financial responsibility incurred by such licensing as evidenced by a written test administered by the Office to verify the applicant's knowledge of the requirements, terms and conditions of this chapter. **[Amended 12-17-2002 by L.L. No. 4-2003]**

C. All certificates of public liability and property damage insurance and workers' compensation shall be furnished to the Office by the applicant prior to the initial issuance of the license or at any time there is a change in insurance carrier. At the time of license renewal, a sworn affidavit shall be required stating that all insurance is in effect or a certificate of insurance filed. **[Amended 12-17-2002 by L.L. No. 4-2003; 9-15-2011 by L.L. No. 49-2011]**

D. All advertising for home improvement contracting shall contain the number of the home improvement license issued pursuant to this chapter.

E. The Suffolk County Department of Health Services, in conjunction with the County Division of Vector Control, shall develop a three-hour course, certified by the Suffolk County Office of Consumer Affairs after approval by the Community Advisory Committee established pursuant to § 647-7 of the Suffolk County Code, to provide training in the use of nonpesticide procedures and the least toxic pesticide use under the Federal Insecticide Fungicide and Rodenticide Act (FIFRA). The course shall be available to pesticide applicators certified by the NYSDEC to use or supervise the use of pesticides in the State of New York, people who are working under the supervision of certified applicator, or those who do not use pesticides as defined by FIFRA, but are licensed through the Home Improvement Division of the Suffolk County Office of Consumer Affairs. Any landscaper successfully completing this course shall be issued a certificate by the County Office of Consumer Affairs stating "I'm Organically Trained." **[Added 9-12-2000 by L.L. No. 25-2000]**

F. Every person applying under this chapter for a license to engage in, or applying for the renewal of a license to engage in, home improvement contracting, as that term is used in this chapter, and who applies any fertilizer in the operation of such home contracting business shall take a turf management course approved by the Commissioner of the Department of Environment and Energy, pursuant to rules, regulations and standards to be promulgated by the Department of Environment and Energy. **[Added 12-18-2007 by L.L. No. 41-2007[1]]**

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1. Editor's Note: This local law provided an effective date of 1-1-2009. For additional provisions found in this local law, see Ch. 459, Fertilizer, Art. II, Sales and Use.

G. Any applicant seeking a license to engage in, or applying for the renewal of a license to engage in, home improvement contracting, and who builds and installs swimming pools and permanent spas over 24 inches in depth, must provide proof that he or she has obtained the Association of Pool and Spa Professionals' Certified Building Professionals certification or other pool building certification approved by the Commissioner and demonstrate a minimum of two years of experience in the building and installation of pools. These requirements shall not apply to individuals licensed as electricians or plumbers pursuant to Article XI of this chapter. **[Added 6-4-2013 by L.L. No. 27-2013]**

H. Any applicant seeking a license to engage in, or applying for the renewal of a license to engage in, home improvement contracting, and who services the plumbing, heating and/or the electrical elements of swimming pools, permanent spas and/or portable spas, must provide proof that he or she has obtained the Association of Pool and Spa Professionals' Certified Service Technician, Certified Service Professional or Certified Builder Professional certification, or other equivalent certification program approved by the Commissioner, and demonstrate a minimum of two years of experience and training in such servicing. These requirements shall not apply to individuals licensed as electricians or plumbers pursuant to Article XI of this chapter. **[Added 6-4-2013 by L.L. No. 27-2013]**

I. Applicants seeking to renew a license to engage in home improvement contracting and who engage in the building, installation or servicing of swimming pools, permanent spas and/or portable spas must provide documentation that the applicant has obtained a minimum of six hours of continuing education in their industry since their last license application or renewal. **[Added 6-4-2013 by L.L. No. 27-2013[2]]**

J. No applicant for a license renewal shall have any outstanding judgment for child support against him or her, or be in arrears in child-support payments as determined by official court records or official government records, at the time an application is filed for such license renewal. If an applicant has such a judgment against him or her, or is in such arrears, but is current in payments on a judicially approved payment schedule to pay off or reduce such judgment or arrears, then such individual shall not be deemed ineligible for a license renewal on the grounds of such judgment or arrears. At least 30 days prior to the expiration of a license, the Office shall send a written notice to a licensee informing said licensee of his or her obligation to comply with the provisions of this article pertaining to compliance with child-support obligations. If necessary, a second written notice shall be sent by the Office to a licensee 60 days after the license has lapsed informing said licensee of his or her obligation to comply with the provisions of this section pertaining to compliance with the child-support obligations. In addition, the County Department of Social Services, through its Child Support Enforcement Bureau, shall notify all current noncustodial parents of the obligations contained herein. **[Added 6-21-1994 by L.L. No. 13-1994; amended 6-6-2000 by L.L. No. 11-2000; 9-12-2000 by L.L. No. 25-2000]**

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2. Editor's Note: This local law also redesignated former Subsection G as Subsection J.

§ 563-21. Prohibited acts.

The following acts are prohibited:

A. Any fraud in the execution of or in the material alteration of any contract, mortgage, promissory note or any document incident to a transaction.

B. Preparing or executing any mortgage, promissory note or other evidence of indebtedness upon the obligation of the transaction with knowledge that it represents a greater monetary obligation than the agreed consideration for work performed.

C. Failure to enter into a written contract for work to be performed which specifies starting and completion dates, description of costs of labor and materials.

D. (Reserved)[1]

E. A failure to abide by any provision of § 771 of the New York State General Business Law. **[Added 3-23-2010 by L.L. No. 7-2010]**

1. Editor's Note: Former Subsection D, which prohibited the willful or deliberate disregard in the violation of government building, sanitary, fire and health laws of the state or any political subdivision thereof in which work is performed, was repealed 5-11-2021 by L.L. No. 15-2021.

§ 770. Definitions. As used in this article, the following terms, unless the context requires otherwise, shall have the following meanings:

1. "Person" means a natural person.

2. "Owner" means any homeowner, co-operative shareholder owner, or residential tenant, or any person who purchases a custom home as defined in this section.

3. "Home improvement" means the repairing, remodeling, altering, converting, or modernizing of, or adding to, residential property and shall include, but not be limited to, the construction, erection, replacement, or improvement of driveways, swimming pools, siding, insulation, roofing, windows, terraces, patios, landscaping, fences, porches, garages, solar energy systems, flooring, basements, and other improvements of the residential property and all structures or land adjacent to it. "Home improvement" shall also mean the construction of a custom home, the installation of home improvement goods or the furnishing of home improvement services. "Home improvement" shall not include:

(a) the sale or construction of a new home, other than a custom home as defined in this section;

(b) the sale of goods by a seller who neither arranges to perform nor performs, directly or indirectly, any work or labor in connection with the installation or application of the goods;

(c) the sale or installation of appliances, such as stoves, refrigerators, freezers, room air conditioners, dishwashers, clothes washers or dryers, which are designed to be removable from the premises without material alteration thereof;

(d) the sale or installation of decorative goods or services, such as draperies and carpets; or

(e) the performance of repairs, replacements, or other services pursuant to an express or implied warranty, or a maintenance agreement as defined in section three hundred ninety-five-a of this chapter.

4. "Home improvement goods or services" means goods and services which are bought in connection with home improvement. Such home improvement goods and services include burglar alarms, texture coating, fencing, air conditioning, heating equipment, and any other goods which, at the time of sale or subsequently, are to be so affixed to real property by the home improvement contractor as to become a part of real property whether or not severable therefrom.

5. "Home improvement contractor" means a person, firm or corporation which owns or operates a home improvement business or who undertakes, offers to undertake or agrees to perform any home improvement for a fee and for whom the total cash price of all of his home improvement contracts with all his customers exceeds one thousand five hundred dollars during any period of twelve consecutive months. Home improvement contractor does not include a person, firm, corporation, landlord, cooperative corporation, condominium board of managers, joint tenant or co-tenant that owns, in whole or in part, the property to be improved.

6. "Home improvement contract" means an agreement for the performance of home improvement, between a home improvement contractor and an owner, and where the aggregate contract price specified in one or more home improvement contracts, including all labor, services and materials to be furnished by the home improvement contractor, exceeds five hundred dollars.

7. "Custom home" means a new single family residence to be constructed on premises owned of record by the purchaser at the time of contract, provided that such residence is intended for residential occupancy by

such purchaser and the contract of sale is entered into on or after the first day of March, nineteen hundred ninety.

8. "Roofing contractor" means a person, firm or corporation, including but not limited to, a person that is a nonresident roofing contractor, independent contractor, day laborer or subcontractor engaged in the business of roofing, gutter, downspout or siding services for a fee or who offers to engage in or solicits roofing-related services, including construction, installation, renovation, repair, maintenance, alteration or waterproofing. This definition shall not include a person engaged in the demolition of a structure or the cleanup of construction waste and debris that contains roofing material, nor a person engaged in building a new home or housing development. "Roofing contractor" shall not include:

(a) an owner or farm property owner who physically performs, or has employees who perform repairing, remodeling, altering, converting, or modernizing of, or adding to, their own dwelling or another structure located on the property owned by the person without the assistance of a roofing contractor.

(b) any authorized employee or representative of the United States government, the state of New York, or any political subdivision performing the repairing, remodeling, altering, converting, or modernizing of, or adding to, government property.

§ 771. Contract provisions. 1. Every home improvement contract subject to the provisions of this article, and all amendments thereto, shall be evidenced by a writing and shall be signed by all the parties to the contract. The writing shall contain the following:

(a) The name, address, telephone number and license number, if applicable, of the contractor.

(b) The approximate dates, or estimated dates, when the work will begin and be substantially completed, including a statement of any contingencies that would materially change the approximate or estimated completion date. In addition to the estimated or approximate dates, the contract shall also specify whether or not the contractor and the owner have determined a definite completion date to be of the essence.

(c) A description of the work to be performed, the materials to be provided to the owner, including make, model number or any other identifying information, and the agreed upon consideration for the work and materials.

(d) A notice to the owner purchasing the home improvement that the contractor or subcontractor who performs on the contract or the materialman who provides home improvement goods or services and is not paid may have a claim against the owner which may be enforced against the property in accordance with the applicable lien laws. Such home improvement contract shall also contain the following notice to the owner in clear and conspicuous bold face type:

"Any contractor, subcontractor, or materialman who provides home improvement goods or services pursuant to your home improvement contract and who is not paid may have a valid legal claim against your property known as a mechanic's lien. Any mechanic's lien filed against your property may be discharged. Payment of the agreed-upon price under the home improvement contract prior to filing of a mechanic's lien may invalidate such lien. The owner may contact an attorney to determine his rights to discharge a mechanic's lien".

(e) A notice to the owner purchasing the home improvement that, except as otherwise provided in paragraph (g) of this subdivision, the home improvement contractor is legally required to deposit all payments received prior to completion in accordance with subdivision four of section seventy-one-a of the lien law and that, in lieu of such deposit, the home improvement contractor may post a bond, contract of indemnity or irrevocable letter of credit with the owner guaranteeing the return or proper application of such payments to the purposes of the contract.

(f) If the contract provides for one or more progress payments to be paid to the home improvement contractor by the owner before substantial completion of the work, a schedule of such progress payments showing the amount of each payment, as a sum in dollars and cents, and specifically identifying the state of completion of the work or services to be performed, including any materials to be supplied before each such progress payment is due. The amount of any such progress payments shall bear a reasonable relationship to the amount of work to be performed, materials to be purchased, or expenses for which the contractor would be obligated at the time of payment.

(g) If the contract provides that the home improvement contractor will be paid on a specified hourly or time basis for work that has been performed or charges for materials that have been supplied prior to the time that payment is due, such payments for such work or materials shall not be deemed to be progress payments for the purposes of paragraph (f) of this subdivision, and shall not be required to be deposited in accordance with the provisions of paragraph (e) of this subdivision.

(h) A notice to the owner that, in addition to any right otherwise to revoke an offer, the owner may cancel the home improvement contract

until midnight of the third business day after the day on which the owner has signed an agreement or offer to purchase relating to such contract. Cancellation occurs when written notice of cancellation is given to the home improvement contractor. Notice of cancellation, if given by mail, shall be deemed given when deposited in a mailbox properly addressed and postage prepaid. Notice of cancellation shall be sufficient if it indicates the intention of the owner not to be bound. Notwithstanding the foregoing, this paragraph shall not apply to a transaction in which the owner has initiated the contact and the home improvement is needed to meet a bona fide emergency of the owner, and the owner furnishes the home improvement contractor with a separate dated and signed personal statement in the owner's handwriting describing the situation requiring immediate remedy and expressly acknowledging and waiving the right to cancel the home improvement contract within three business days. For the purposes of this paragraph the term "owner" shall mean an owner or any representative of an owner.

* (i) Before a contractor or subcontractor begins work on a home, such writing shall disclose to the homeowner the existence of a property and/or casualty insurance policy that covers the scope of such contractor or subcontractor's employment should an insurance claim be filed resulting from losses arising from the work at such property. Such disclosure shall also include the contact information of the insurance company providing such property and/or casualty insurance, including a phone number and address.

* NB Effective April 23, 2022

2. The writing shall be legible, in plain English, and shall be in such form to describe clearly any other document which is to be incorporated into the contract. Before any work is done, the owner shall be furnished a copy of the written agreement, signed by the contractor. The writing may also contain other matters agreed to by the parties to the contract.

General Business

§ 775. Applicability. This article shall not exempt any contractor subject to its provisions from complying with any local law with respect to the regulation of home improvement contractors, provided, however, that after the effective date of this article, no political subdivision may enact a local law inconsistent with the provisions of section seven hundred seventy-one of this article.

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