

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D19499
X/kmg

_____AD3d_____

Argued - May 13, 2008

STEVEN W. FISHER, J.P.
FRED T. SANTUCCI
DANIEL D. ANGIOLILLO
WILLIAM E. McCARTHY, JJ.

2007-05630

DECISION & ORDER

Modern Era Construction, Inc., appellant,
v Shore Plaza, LLC, et al., respondents.

(Index No. 102120/05)

Yuen Roccanova Seltzer & Sverd LLP, New York, N.Y. (Peter E. Sverd of counsel),
for appellant.

Calabro & Associates, P.C., New York, N.Y. (Ricardo M. Vera of counsel), for
respondent Shore Plaza, LLC.

In an action, inter alia, to foreclose a mechanic's lien, the plaintiff appeals, as limited by its brief, from so much of an order of the Supreme Court, Richmond County (McMahon, J.), dated May 15, 2007, as denied its motion for summary judgment.

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

The Supreme Court properly denied the plaintiff's motion for summary judgment on the ground that there were triable issues of fact as to whether the defendant Shore Plaza, LLC (hereinafter Shore Plaza), consented to the services and materials allegedly provided by the plaintiff. In order to maintain and enforce a mechanic's lien, a plaintiff is required to demonstrate that the defendant consented to the work performed on its property (*see* Lien Law § 3; *Zimmerman v Carlson*, 293 AD2d 744, 745). The consent required by the Lien Law is not mere acquiescence and benefit, but some affirmative act or course of conduct establishing confirmation (*see Zimmerman v Carlson*, 293 AD2d at 745; *Valsen Constr. Corp. v Long Is. Racquet & Health Club*, 228 AD2d 668; *Harner v Schechter*, 105 AD2d 932). Here, although the lease between Shore Plaza and its tenant

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suggested that Shore Plaza had knowledge of, and acquiesced in, the overall improvement of the leased premises, a question remains as to whether Shore Plaza gave affirmative consent for the improvements for which the plaintiff now seeks payment (*cf. Vardon, Inc. v Suga Dev., LLC*, 36 AD3d 897, 898-899).

FISHER, J.P., SANTUCCI, ANGIOLILLO and McCARTHY, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style with a large initial "J".

James Edward Pelzer
Clerk of the Court