

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

D22675
Y/prt

_____AD3d_____

Argued - February 13, 2009

ROBERT A. SPOLZINO, J.P.
MARK C. DILLON
ANITA R. FLORIO
DANIEL D. ANGIOLILLO, JJ.

2008-01399

DECISION & ORDER

Naber Electric Corp., plaintiff, v George A.
Fuller Company, Inc., et al., defendants, LC White
Plains, LLC, et al., respondents, Rocco J. Russo, Ltd.,
appellant.

(Index No. 15887/04)

The DeIorio Law Firm, LLP, Rye Brook, N.Y. (Robert G. Rafferty of counsel), for
appellant.

DelBello, Donnellan, Weingarten, Wise & Wiederkehr, LLP, White Plains, N.Y.
(Patrick M. Reilly and Daniel G. Walsh of counsel), for respondents.

In a consolidated action to recover damages, inter alia, for breach of contract and to
foreclose mechanics' liens pursuant to Lien Law article 3, the defendant Rocco J. Russo, Ltd.,
appeals from an order of the Supreme Court, Westchester County (Rudolph, J.), entered January 29,
2008, which denied its motion to sever and continue a mechanic's lien foreclosure claim it asserted
against the defendants LC White Plains, LLC, and Westchester County Industrial Development
Agency and granted the cross motion of the defendants LC White Plains, LLC, and Westchester
County Industrial Development Agency, in effect, to dismiss the affirmative defense of the defendant
Rocco J. Russo, Ltd., insofar as asserted against them.

ORDERED that the order is affirmed, with costs.

In this action, the plaintiff, Naber Electric Corp. (hereinafter Naber), seeks, among
other relief, damages for breach of contract and to foreclose mechanics' liens for work allegedly
performed at a property owned by the defendants LC White Plains, LLC, and Westchester County
Industrial Development Agency (hereinafter the owners). Pursuant to Lien Law § 44, Naber added

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Rocco J. Russo, Ltd. (hereinafter Russo), as a necessary party to the action due to a notice of mechanic's lien Russo previously had filed against the property. Russo interposed a verified answer asserting its lien in an affirmative defense and demanding judgment on it in the "wherefore" clause.

Russo moved pursuant to CPLR 603 to sever and continue its mechanic's lien foreclosure claim against the owners. The owners opposed the motion and cross-moved, in effect, to dismiss Russo's affirmative defense insofar as asserted against them on the grounds, inter alia, that Russo had waived its lien by failing to commence an action to foreclose the lien within the statutory period and that Russo had failed in its answer to set forth its lien pursuant to Lien Law § 44.

Generally, a mechanic's lien is valid for one year from the date of filing, unless within that time an action is commenced to foreclose the lien or an extension for an additional one year is filed (*see* Lien Law §§ 17, 19). Pursuant to Lien Law § 44(5), a lienor like Russo, which has been added as a defendant must set forth his or her lien in his or her answer, unless the complaint admits and no other defendant contests the existence and validity of the defendant's lien, or the defendant lienor will be deemed to have waived the lien (*see* Lien Law § 44[5]). Naber did not admit the existence and validity of Russo's lien in its complaint and, by denying information and belief as to the lien-related allegations, the owners' answer had the effect of denying the existence and validity of Russo's lien (*see* CPLR 3018[a]). Moreover, Russo's assertion of an affirmative defense does not satisfy the requirement that the lien be "set forth" in the answer. The statute contemplates that a defendant seek affirmative relief in the nature of a counterclaim and/or cross claim and allege all the facts necessary for the foreclosure of its lien in the original action (*see Lincoln Nat. Bank of City of New York v John Peirce Co.*, 228 NY 359, 369). Lien Law § 44(5), which provides, inter alia, that the allegations in the defendant's answer "shall be deemed denied by the other lienors . . . without the necessity of serving replies," read in conjunction with CPLR 3011 that "there shall be a reply to a counterclaim . . . and an answer to a cross-claim," clearly requires that the defendant set forth its lien as an independent cause of action by way of counterclaim and/or cross claim. The assertion of an affirmative defense does not satisfy this requirement (*see* CPLR 3018[b]; *see generally McGee v Felter*, 75 Misc 349, 356, *affd* 154 AD 957). Accordingly, in light of Russo's failure to commence an action foreclosing its lien or to seek an extension within the statutory period, Russo's failure to set forth its lien by way of a counterclaim and/or cross claim within its answer constituted a waiver of the lien (*see* CPLR 3013; Lien Law § 44(5); *Entenman v Anderson*, 106 App Div 149, 150).

The parties' remaining contentions are without merit.

SPOLZINO, J.P., DILLON, FLORIO and ANGIOLILLO, JJ., concur.

ENTER:


James Edward Pelzer
Clerk of the Court