

At an IAS Term, Part Comm-1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 16th day of December, 2010.

P R E S E N T:
HON. CAROLYN E. DEMAREST,

Justice.

-----X

I VM GENERAL CONSTRUCTION,

Plaintiff,

- against -

NEPTUNE ESTATES, LLC, ET AL.,

Defendants.

-----X

Index No. 19311/10
**DECISION
AND
ORDER**

The following papers numbered 1 to 4 read on this motion:

Papers Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed_____

1

Opposing Affidavits (Affirmations)_____

3

Reply Affidavits (Affirmations)_____

4

_____Affidavit (Affirmation)_____

Other Papers (Memoranda of Law)_____

2

Defendant Neptune Estates, LLC moves for summary judgment pursuant to CPLR 3212(b) to dismiss the complaint, discharge the plaintiff’s mechanic’s lien and cancel the notice of pendency.

BACKGROUND

On August 21, 2008, defendant Neptune Estates, LLC (“Neptune”), owner of 380 Neptune Avenue, Brooklyn,, NY (“Property”), entered a contractor’s agreement with defendant Big Poll Construction, Inc. (“Big Poll”) whereby Big Poll would act as the general contractor on a construction project on the Property (“Project”). In February 2009, plaintiff entered two

subcontractor agreements with Big Poll whereby plaintiff agreed to perform the structural steel work, masonry, and concrete slabs on the Project.

Neptune alleges that on or about February 22, 2009, Neptune removed Big Poll for cause and hired non-party Future City Plus, Inc. (“Future City”) to act as the new general contractor on the Project. A construction contract between Neptune and Future City was executed on April 4, 2009. On March 15, 2009, plaintiff entered two subcontractor agreements with Future City whereby plaintiff was to be paid \$181,000 and \$191,000, respectively, for the structural steel and masonry and concrete slabs on the Project. Neptune alleges that Future City subsequently terminated these subcontracts with plaintiff for cause on December 15, 2009.

On January 4, 2010, exactly nine months after Future City entered the contractor agreement with Neptune, plaintiff filed a mechanic’s lien (“January Lien”) against the Property and, pursuant to Lien Law § 9(3), plaintiff identified the person with whom the contract was made as “Big Poll & Son Construction, LLC and Future City Plus, Inc.”. On, March 10, 2010, after Neptune moved to discharge the January Lien, Justice Bunyan vacated the January Lien without prejudice in a short form order with the consent of the parties. The order indicated that “a new Mechanic’s Lien may be filed in a timely manner. This is without costs to any party.” On April 1, 2010, plaintiff filed a second mechanic’s lien (“Lien”)¹ and identified the person with whom the contract was made as “Big Poll & Son Construction, LLC. There may be a claim against the successor on the project, Future City Plus, Inc., if this company agreed to assume the obligation of its predecessor.” This is the only substantive change from the January Lien other than the identity of the plaintiff’s attorney and the signatories to the Lien.

¹ This lien is the subject of the present mechanic’s lien foreclosure action.

Neptune argues that the mechanic's lien should be discharged and this mechanic's lien foreclosure action should be dismissed for four reasons: 1) The Lien is invalid pursuant to Lien Law § 4(1) as Neptune did not owe an amount to Big Poll when the Lien was filed; 2) The existence of an express written contract between Big Poll and IVM precludes recovery against Neptune on an implied or quasi-contract theory; 3) The Lien is invalid pursuant to Lien Law § 10(1) because the Lien was filed more than eight months after last furnishing materials or performing work for Big Poll; 4) The Lien is invalid pursuant to Lien Law § 9(4) because the Lien fails to separately identify the amounts allegedly due under the two subcontracts with Big Poll and Future City and plaintiff waived and released Neptune from all liens.

It is noted that one page of the four page complaint was not included in the motion papers and, upon review of the County Clerk files and Neptune's answer, the complete complaint does not appear to have ever been filed with the County Clerk or served upon Neptune. However, it is clear that this action was solely to foreclose upon the Lien.

DISCUSSION

In order to obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]). Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]). The parties' competing

contentions are viewed in the light most favorable to the party opposing the motion (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2d Dept 1990]).

Defendant's motion for summary judgment pursuant to Lien Law § 4(1) is denied as there are issues of fact as to whether Neptune owed funds to Big Poll when the Lien was filed. Pursuant to Lien Law §§ 3 and 4(1), a subcontractor may file a mechanic's lien on the improved property for a sum not "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." While it appears that the plaintiff and Neptune did not enter into any direct contracts, and the plaintiff would not be able to maintain a direct breach of contract cause of action against Neptune,² the mechanic's lien is "valid only to the extent that there was a sum due and owing" from Neptune to the general contractor named in the Lien at the time of the filing of the notice of lien (*Perma Pave Contracting Corp. v Paerdegat Boat & Racquet Club, Inc.*, 156 AD2d 550, 552 [2d Dept 1989]; *see* Lien Law [4]).

In this action, there are issues of fact as to whether Neptune owed funds to Big Poll when the Lien was filed. Neptune provided a final lien waiver, signed by the president of Big Poll, which stated that Big Poll was not owed any money by Neptune and Big Poll did not have any claims against Neptune. However, although Neptune claims that the waiver was signed "[o]n or about April 2[, 2009]", the waiver is undated. Further, plaintiff provided a copy of an affidavit in a related matter³ signed by the president of Big Poll claiming that Big Poll was not paid in full and if it "did not sign the document, the project could not continue." Neptune also provided a July 23, 2009

² However, it is also noted that there is evidence that Neptune directly paid plaintiff at least \$25,000 in November 2008, prior to the plaintiff's subcontract with Big Poll.

³ *Neptune Estates, LLC v IVM General Construction, Inc.*, Sup Ct, Kings County, Demarest, J., index No. 10075/10

document titled “FINAL RELEASE” and “FINAL WAIVER OF CLAIMS AND LIENS AND RELEASE OF RIGHTS” signed by the president of plaintiff, Vadim Gorshkov (“Gorshkov”) on July 27, 2009 “waiv[ing] and releas[ing Neptune] from any and all claims and liens and rights of liens upon the [Property] . . .” However, in Gorshkov’s affidavit submitted in opposition to the motion, Gorshkov claims that he signed the document “which [he] understood to be a receipt” and “was told that [a] partial payment would not be paid unless they signed [the] document.” This release also notes a “contract date” of 12/1/2008 and a “contract price” of \$1,204,901.00. However, the date and amount of the contract price do not correspond to the February 2009 contracts between Big Poll and the plaintiff. Further, the release does not reference Big Poll. As there are issues of fact as to whether Big Poll was owed sums by Neptune at the time of the filing of the notice of the Lien, defendant’s motion for summary judgment pursuant to Lien Law § 4(1) is denied (*see Perma Pave*, 156 AD2d at 552; Lien Law [4] [1]).

Defendant’s motion for summary judgment pursuant to Lien Law § 10(1) is denied as there are issues of fact as to when plaintiff finished performing work under it’s contracts with Big Poll. Pursuant to Lien Law § 10(1), notice of lien may be filed “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.” Neptune argues that plaintiff last performed work for Big Poll on February 22, 2009, the date that Big Poll was purportedly removed from the Project. However, it is uncontested that plaintiff continued to work on the Project with Future City as the general contractor until at least December 15, 2009. While Big Poll was purportedly removed from the Project on February 22, 2009, there are issues of fact as to when Big Poll actually completed their contract and when the plaintiff last performed work on the Project.

Pursuant to Lien Law § 9(3), a mechanic's lien by a subcontractor must identify the "person with whom the contract was made." The January Lien improperly listed two general contractors and identified the person with whom the contract was made as "Big Poll & Son Construction, LLC and Future City Plus, Inc." Pursuant to an order to show cause in an earlier matter before Justice Bunyan,⁴ upon consent of the parties, Justice Bunyan vacated⁵ the January Lien on March 20, 2010, without prejudice, and granted IVM leave to re-file the lien "in a timely manner." On April 1, 2010, plaintiff re-filed the Lien. The Lien modified the person with whom the contract was made to "Big Poll & Son Construction, LLC" and indicated that "[t]here may be a claim against the successor on the project, Future City Plus, Inc., if this company agreed to assume the obligation of its predecessor."

The Lien only applies to plaintiff's claim for sums earned and unpaid with respect to the work performed under the contracts for Big Poll as of the original filing date, January 4, 2010.⁶ Lien Law § 9(3) provides for the listing of a singular "person by whom the lienor was employed" and does not provide for a lienor to include multiple employers in a lien. Although plaintiff improperly referenced Future City in the Lien, the misdescription of the entity by whom the lienor was employed does not invalidate the lien (*see In re Application of Suffolk Academy of Medicine*, 151

⁴ Prior to the commencement of the present action, Neptune attempted to bring a petition to discharge the January Lien (*In the Matter of the Application of Neptune Estates, LLC v IVM General Construction, Inc.*, Sup Ct, Kings County, Bunyan, J., index No. 3575/10). Before the action was ultimately withdrawn, apparently due to a procedural defect in bringing a petition solely to challenge a mechanic's lien, Justice Bunyan addressed an order to show cause by Neptune seeking to discharge the January Lien pursuant to Lien Law § 9.

⁵ Lien Law § 12-a grants the court authority to amend a notice of lien *nunc pro tunc*.

⁶ The Lien filing date is deemed to be January 4, 2010 as the lienor was granted leave to re-file the lien, upon consent of the parties, by Justice Bunyan (*see generally In re Application of Suffolk Academy of Medicine*, 151 Misc 2d 976, 979 [Sup Ct, Suffolk County 1991]).

Misc 2d 976, 978 [Sup Ct, Suffolk County 1991]). As paragraph “(3)” of the Lien clearly refers to a claim with respect to the plaintiff’s contracts with Big Poll, the statement substantially complies with Lien Law § 9(3) (*see Martin v Ambrose A. Gavigan Co.*, 107 AD 279, 282 [2d Dept 1905]). To the extent that plaintiff seeks to foreclose upon a lien for sums unpaid by Future City under plaintiff’s separate contracts with Future City, that claim would necessitate a separate lien (*see generally A. L. Plumbing & Heating Co. v Kesdeit Realty Corp.*, 15 AD2d 546, 547 [2d Dept 1961]). As it is uncontested that plaintiff last performed work for Future City on December 15, 2009, if plaintiff has not filed a separate lien against Future City, it’s time to do so has expired pursuant to Lien Law § 10.

Although Neptune contends that plaintiff’s time to file a lien expired on October 22, 2009, eight months after Big Poll was removed from the Project on February 22, 2009, there are issues of fact as to when Big Poll stopped completing the terms of the contracts with plaintiff. Based on the documents submitted in support of the motion, it appears that plaintiff entered its subcontracts with Future City on March 15, 2009 which was before Future City entered its contractor agreement with Neptune on April 4, 2009. Therefore, there are issues of fact as to the date the plaintiff stopped working on its contracts with Big Poll, under what contracts, if any, the plaintiff was performing after Big Poll was removed from the Project, and when plaintiff commenced work under its contracts with Future City. Further, in opposition to the motion, plaintiff provided a \$2000 check from Big Poll, dated May 28, 2009, for plaintiff’s work on the Project. Therefore, Big Poll was still issuing payments to plaintiff under the terms of their contracts, less than eight months before the January 4, 2010 Lien filing date. As there is an issue of fact as to the date of the completion of the contracts between plaintiff and Big Poll, the court cannot grant summary judgment for Neptune at this early

stage of the litigation (*see Higgins v G. Piel*, 208 AD 729, 731-732 [2d Dept 1924] (where an architect, as part of its contract and its last act of performance, forwarded to the owner a bill from a contractor for payment, the mailing of the bill was to be considered in calculating the limitation of time to file a lien); 8-92 Warren's Weed New York Real Property § 92.15[1][b][i]). While it is noted that the final performance date under the plaintiff's contracts with Big Poll was not extended due to the performance of their subsequent contracts with Future City (*see Locke v Goode*, 10 Misc 2d 65, 67 [Sup Ct, New York County 1957]; 8-92 Warren's Weed New York Real Property § 92.15[1][b][i]), that date cannot be affirmatively established at this stage of the litigation and remains an issue of fact. Accordingly, Neptune's motion for summary judgment pursuant to Lien Law §10(1) is denied.

Defendant's motion for summary judgment pursuant to Lien Law § 9(4) is denied as the plaintiff substantially complied with the requirements of Lien Law § 9(4). Pursuant to Lien Law § 23, the Lien Law is to be "construed liberally" and "substantial compliance with its several provisions shall be sufficient for the validity of a lien." Lien Law § 9(4) requires the lienor to identify the "labor performed or materials furnished and the agreed price or value thereof." The Lien identifies the labor performed and materials furnished as "steel, masonry and concrete," and the value of the labor performed and materials furnished as "\$2,126,900.00." Neptune's argument that the Lien is invalid because it fails to distinguish the amount claimed in each of the two subcontracts between Big Poll, pursuant to the decision *In re Flushing Asphalt Corp.*, 188 Misc 304 [Sup Ct, Special Term, Queens County 1946], is unavailing as that matter is distinguished from the present action. *In re Flushing Asphalt Corp.* dealt with three separate contracts with respect to three separate public improvement projects at "scattered locations" (*In re Flushing*, 188 Misc at 306). In

the present matter, the contracts between plaintiff and Big Poll were entered for the same project at one location.

Neptune also argues that the \$2,126,900.00 value of labor and materials listed in the Lien is inaccurate as Big Poll was removed from the Project before IVM completed the work in its contracts with Big Poll. However, there are issues of fact as to the value of work performed and materials furnished to Big Poll. Although inartfully drafted, plaintiff provided a statement to Neptune, pursuant to Lien Law § 38, that addresses the value of the plaintiff's "unfinished work" on the Project in its computation of the Lien value. Despite the reference to payments by Future City in the Lien Law § 38 statement, it is premature to dismiss the action as there are issues of fact as to the value of the work performed under its contracts with Big Poll. Accordingly, Neptune's motion for summary judgment pursuant to Lien Law § 9(4) is denied.

However, Neptune's request for an undertaking is granted in light of the evidence that IVM executed a Waiver and Final Release of Neptune in July 2009 which is insufficiently explained (*see W. End Interiors, Ltd. v Aim Constr. & Contr. Corp.*, 286 AD2d 250, 251-252 [1st Dept 2001])(holding that "[w]here a waiver form purports to acknowledge that no further payments are owed, but the parties' conduct indicates otherwise, the instrument will not be construed as a release"); *Spectrum Painting Contrs., Inc. v Kreisler Borg Florman Gen. Constr. Co., Inc.*, 64 AD3d 565, 578 [2d Dept 2009]). Plaintiff shall therefore post an undertaking in the sum of \$100,000 on or before December 31, 2010 as a condition of continuing the Lien. Failure to comply will result in the discharge of the Lien and cancellation of the notice of pendency.

As defendant's motion is denied, plaintiff's remaining contentions are moot. However, it is noted that to the extent that plaintiff argues that *res judicata* and collateral estoppel preclude the

relief sought by defendant due to a prior order regarding the Lien, that argument is unavailing as Justice Rivera's May 7, 2010 decision was decided on other procedural grounds that are now cured with the commencement of the present lien foreclosure action. Plaintiff's contention that the motion should also be denied due to Neptune's failure to serve all defendants is also unavailing as Neptune complied with this court's order to show cause and, pursuant to CPLR 2103(e), service of this motion was not required on the remaining defendants as they have not appeared in this action.

Plaintiff is directed to file a complete copy of the complaint with the county clerk and serve it on all parties within 20 days. All parties are granted leave to file an answer or amended answer, with respect to the complete complaint, within thirty days of service of the entire complaint.

CONCLUSION

Accordingly, defendant's motion for summary judgment is denied. Defendant's motion for an undertaking is granted and plaintiff shall post an undertaking in the sum of \$100,000 on or before December 31, 2010.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.