

<b>Diamond Waterproofing Sys., Inc. v WP Owners Corp.</b>
2007 NY Slip Op 30085(U)
February 27, 2007
Supreme Court, Queens County
Docket Number: 0000616
Judge: Orin R. Kitzes
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**Short Form Order**

**NEW YORK SUPREME COURT -QUEENS COUNTY**

**PRESENT: ORIN R. KITZES**  
**Justice**

**PART 17**

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**DIAMOND WATERPROOFING SYSTEMS, INC.,**  
**Plaintiff,**

**Index No.:616/06**  
**Motion Date: 2/21/07**  
**Motion Cal. No.: 29**

**-against-**

**WP OWNERS CORP; FRANCIS A. LEE COMPANY,**  
**A CORPORATION FORMERLY KNOWN AS**  
**FRANCIS A. LEE EXTERIOR RESTORATION CORP.,**  
**and SCALCO CONSTRUCTION CORP. A JOINT**  
**VENTURE; PEOPLE OF THE STATE OF NEW YORK**  
**and CITY OF NEW YORK**  
**Defendants.**

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The following papers numbered 1 to 20 read on this motion by defendant WP Owners Corp. (hereinafter, "WP") for an order pursuant to CPLR § 3211 (a)(1) & (7), dismissing plaintiff's complaint as against it; and cross-motion by defendant Scalco Construction Corp. (hereinafter, "Scalco") for an order pursuant to CPLR § 3211 (a)(1) & (7), dismissing plaintiff's complaint as against it and dismissing the second cross-claim by WP.

	PAPERS NUMBERED
Notice of Motion-Affidavit-Exhibits.....	1-4
Notice of Cross-Motion-Affidavit-Exhibits.....	5-8
Affirmation in Opposition-Exhibits.....	9-11
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Affirmation in Reply-Exhibits.....	18-20

Upon the foregoing papers it is ordered that the motions by defendant WP Owners Corp. (hereinafter, "WP") for an order pursuant to CPLR § 3211 (a)(1) & (7), dismissing plaintiff's complaint as against it; and cross-motion by defendant Scalco Construction Corp. (hereinafter, "Scalco") for an order pursuant to CPLR § 3211 (a)(1) & (7), dismissing plaintiff's complaint as against it and dismissing the second cross-claim by WP are decided as follows:

This is an action to foreclose a Mechanics Lien on a private improvement, stemming from work plaintiff performed for the defendants at the premises located at 213-05 75<sup>th</sup> Avenue, Bayside New York. Plaintiff performed labor and furnished material during the course of work that included the installation of sand, cement, paint, and waterproofing and claims that it has not received payment for this work. The complaint contains one cause of action, which is to

foreclose a mechanic's lien. According to the complaint, the lien was filed and docketed on March 15, 2001 in the Office of the Clerk of Queens County. Plaintiff claims that the lien was extended by filing an extension on February 25, 2002, and then by three successive orders of the Court, dated February 18, 2003, February 9, 2004, and January 19, 2005. This action was commenced on January 10, 2006.

Defendant Scalco now seeks an order dismissing the complaint pursuant to CPLR 3211(a)(1) based upon the invalidity of the lien that plaintiff seeks to foreclose. According to defendant Scalco, the lien which plaintiff seeks to foreclose became void as of the end of the second court-ordered extension of the lien and was not properly extended by the third court-ordered extension. Plaintiff opposes this motion, claiming that the court was authorized to extend the lien a third time.

CPLR 3211 (a) (1) provides that "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. a defense is founded on documentary evidence . . . ." In order to prevail on a CPLR 3211(a)(1) motion, the documentary evidence submitted "must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim . . . ." (Fernandez v Cigna Property and Casualty Insurance Company, 188 AD2d 700 (3<sup>rd</sup> Dept 1992.)Bronxville Knolls, Inc. v Webster Town Center Partnership, 221 AD2d 248 (1<sup>st</sup> Dept 1995.) The court orders and other signed documents submitted by defendant Scalco on this motion qualify as "documentary evidence" within the meaning of CPLR 3211(a)(1). This evidence shows that the lien was extended three times after its initial extension.

Pursuant to Lien Law § 17, a mechanics' lien terminates one year after the notice of lien is filed, unless: (1) both an action is commenced to foreclose the lien and a notice of pendency is duly filed (with county clerk, in case of private improvements, and with applicable public official, in case of public improvements); or (2) in the case of property other than a single-family dwelling, an extension of the lien is filed with the county clerk within such one-year period. Such extension is effective for up to one year. A mechanics' lien may also be continued by court order for up to one year at a time in each of two successive years. Unless such action is commenced, and a notice of pendency is filed, and is then extended or continued, within these periods, then the mechanics' lien is deemed to be extinguished.

It is undisputed that plaintiff filed the subject lien on March 15, 2001 and filed an extension on February 25, 2002. Plaintiff then sought and received three successive orders of the Court, dated February 18, 2003, February 9, 2004, and January 19, 2005. Accordingly, the lien extinguished as of the termination of the February 9, 2004 extension, since that was the second and final court ordered extension allowed by Lien Law § 17. Consequently, the extension granted on January 19, 2005 was not authorized and was a nullity. 240-35 Assocs. v. Major Builders Corp., 234 A.D.2d 234 (1st Dept 1996.) *See*, Sunny Constr., Inc. v. Revella, 131 A.D.2d 560 (2d Dept 1987.) When plaintiff commenced the instant action on January 10, 2006, the lien was no longer in existence and this action to foreclose the lien is not valid. Lien Law § 17. *See*, Ward-Carpenter Eng'rs, Inc. v. Sassower, 163 A.D.2d 304 (2d Dept 1990.) Accordingly, defendant Scalco's cross-motion to dismiss the complaint pursuant to CPLR 3211 (a)(1) is granted. Since there are no other causes of action in the complaint, the complaint is dismissed in its entirety as against all defendants. However, plaintiff is not without recourse since the Lien Law permits a personal judgment to be obtained where the complaint contains allegations sufficient to state a cause of action in contract. Lien Law § 54; Noce v Kaufman, 2 NY2d 347 (1956.) Here, such allegations are made out and plaintiff is granted leave to plead

such a cause of action in a new action.

Based upon the above, there is no reason to address defendant WP's motion wherein it claims dismissal against it is warranted, based upon it not being liable due to it having paid Scalco in full for services rendered and materials furnished.

Finally, the branch of the cross-motion seeking an order dismissing the second cross-claim alleged by WP against Scalco is granted. This cross-claim is for indemnification for expenses allegedly incurred by WP in obtaining cancellation and discharge of the lien. WP has not opposed dismissal of this cross-claim; in any event, there is no indication that WP ever sought to cancel and discharge the lien.

**Dated: February 27, 2007**

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**ORIN R. KITZES, J.S.C.**