

SR City Entertainment, LLC v Yoon & Guy Elec.

2011 NY Slip Op 32131(U)

July 21, 2011

Sup Ct, NY County

Docket Number: 101132/2011

Judge: Lucy Billings

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SCANNED ON 8/4/2011

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

PRESENT: LUCY BILLINGS
Justice

PART 46

SR City Enforcement
- v -
Xoon & Guy

INDEX NO. 10 1137/11
MOTION DATE _____
MOTION SEQ. NO. 01
MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1, 2</u>
Answering Affidavits — Exhibits _____	<u>3</u>
Replying Affidavits _____	

Cross-Motion: Yes 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 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 141B).

Dated: 7/21/11 Lucy Billings
LUCY BILLINGS J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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

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 141B).

-----x

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); see N.Y. Gen. Oblig. 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 Env'tl. 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

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.

UNFILED JUDGMENT

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