Preserv Bldg. Tech., Inc. v MC Constr. Consulting, Inc.
2011 NY Slip Op 32698(U)
October 7, 2011
Supreme Court, New York County
Docket Number: 108867/11
Judge: Joan M. Kenney
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SCANNED ON 10/18/2011

[* 1]

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

PRESENT: KENNEY, Justice — PART 8

PRESERV BUILDING TECHNOLOGIES, INC.

-v-

ML CONSTRUCTION CONSULTING, INC.

INDEX NO. 108867/11

MOTION DATE 8/26/11

MOTION SEQ. NO. 01

MOTION CAL. NO.

The following papers, numbered 1 to 34 were read on this motion to/for discharge mechanic's lien

	PAPERS NUMBERED
~~Notice of Motion~~/ Order to Show Cause — Affidavits — Exhibits ...	1-7
Answering Affidavits — Exhibits Answer	8-34
Replying Affidavits No reply as per Court order	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

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 (Rm. 141B).

Dated: 10/7/11

JOAN M. KENNEY J.S.C.
J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8
----------x
PRESERV BUILDING TECHNOLOGIES, INC.,
Petitioner-General Contractor,

DECISION & JUDGMENT
Index No.: 108867/11

-against-

MC CONSTRUCTION CONSULTING, INC.,
Respondent-Lienor.
----------x

JOAN M. KENNEY, J.:

Papers considered in review of this motion:

Papers	**Numbered**
Order to Show Cause & Aff., Exhibits	1-7
Answer and Affidavits in Opp & Exhibits	8-34

Petitioner moves, pursuant to New York Lien Law §§ 19 (6) and 39, to discharge the mechanic's lien filed on July 5, 2011 against the real property known as 101 East 69th Street, New York, New York, more particularly known as Block 1404 and Lot 1. Additionally, petitioner seeks to compel respondent to commence an action to foreclose on the lien, pursuant to Lien Law § 59.

FACTUAL & PROCEDURAL BACKGROUND

Respondent was engaged to work at the property as a subcontractor for petitioner, providing brick replacement, limestone repair, repointing, helifix anchors and window caulk and repair. It is petitioner's contention that the lien must be discharged and canceled because it is wilfully exaggerated and void because respondent is not owed the amount asserted in the lien. Further, petitioner claims that the lien fails to state the correct last date of work performed by respondent.

According to the agreement between the parties, respondent was

to be paid a total of $164,667.00, pursuant to an amended contract entered into on July 6, 2010. Petition, Ex. C. On or about April 6, 2011, respondent submitted an invoice to petitioner alleging that it was owed $105,137.00 for work performed, which includes a $50,000.00 change order charge. Petition, Ex. D. Petitioner claims that it never signed a change order. Aff. of Carl Culbreth, petitioner's president.

On April 13, 2011, Elizabeth Majewska, on behalf of respondent, e-mailed respondent for a written copy of the change order, based on an alleged oral agreement, because she could not locate a copy. Petition, Ex. E. The contract between the parties specifically states that "any additional work must be authorized by the contractor in writing to be valid." Petition, Exs. B & C.

Since petitioner asserts that there was no written change order that it authorized, it claims that only $55,137.00 remains due and owing to respondent. The lien indicates an amount due of $105,137.00, and states that the last day on which work was performed was December 15, 2010. Petition, Ex. A.

In opposition to the instant motion, respondent argues that whether or not the work was authorized presents a question of fact for a jury and cannot be summarily disposed of by the instant order to show cause. Further, respondent avers that there is no defect on the face of the lien, which prevents granting petitioner the relief that it seeks. Finally, respondent maintains that it cannot

be compelled to commence a foreclosure action by the instant motion because petitioner has failed to provide the requisite notice pursuant to Lien Law § 59.

DISCUSSION

Petitioner's motion is denied.

> "A court has no inherent power to vacate or discharge a mechanic's lien except as authorized under Lien Law § 19 (6). 'Lien Law § 19 provides the grounds for the discharge of a mechanic's lien for private improvement' [internal citations omitted]."

Matter of Luckyland (N.Y.), LLC v Core Continental Construction, LLC, 83 AD3d 1073, 1074 (2d Dept 2011).

In the case at bar, petitioner asserts that the amount appearing on the face of the notice of lien indicates an incorrect amount as the amount owed, and that the date of work performed indicates an incorrect date as the last date on which respondent worked. Neither of these assertions consists of a contention that there is a facial defect on the notice of lien.

The validity of the charges appearing on the notice of lien is a matter that must await trial. *Matter of Northside Tower Realty, LLC v Klin Construction Group, Inc.,* 73 AD3d 1072 (2d Dept 2010). "[I]n the absence of a defect upon the face of the notice of the lien, 'any dispute regarding the validity of the lien must await trial thereof by foreclosure' [internal citation omitted]." *Bryan's Quality Plus, LLC v Dorime,* 80 AD3d 639, 641 (2d Dept 2011); *Pontos Renovation Inc. v Kitano Arms Corp.,* 204 AD2d 87 (1st

Dept 1994).

Therefore, that branch of the motion seeking to discharge and cancel the lien, pursuant to Lien Law § 19 (6), is denied.

Similarly, "[a]lthough Lien Law § 39 provides that a wilfully exaggerated lien is void, the issue of willful or fraudulent exaggeration is one that also ordinarily must be determined at the trial of the foreclosure action." *Aaron v Great Bay Contracting, Inc.*, 290 AD2d 326, 326 (1st Dept 2002).

Lastly, the court cannot grant petitioner's alternate relief, pursuant to Lien Law § 59, of compelling respondent to commence a foreclosure action. Lien Law § 59 requires that a petitioner personally serve a 30-day notice on a lienor in order to trigger the foreclosure, and petitioner has failed to provide any evidence that it has served such predicate notice on the corporate respondent. Moreover, respondent asserts that it will determine whether to commence such a proceeding after petitioner provides it with a trustee's statement. Accordingly, it is

ORDERED and ADJUDGED that petitioner's motion is denied.

Dated: October 7, 2011

ENTER:

Joan M. Kenney, J.S.C.