Vanguard Constr. & Dev. Co., Inc. v 400 Times Sq. Assoc., LLC.
2024 NY Slip Op 31229(U)
April 8, 2024
Supreme Court, New York County
Docket Number: Index No. 155877/2020
Judge: Richard G. Latin
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. RICHARD LATIN** **PART** **46M**

Justice

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VANGUARD CONSTRUCTION & DEVELOPMENT COMPANY, INC.,

Plaintiff,

-against-

400 TIMES SQUARE ASSOCIATES, LLC., WELLS FARGO BANK, N.A., CORE FLOORING INTERNATIONAL CONTRACTING CORP/DBA CFI STONE, HENICK-LANE, INC., HENICK-LANE SERVICE CORP., BAYPORT CONSTRUCTION CORP., O'KEEFFE'S, INC., TRANSEL ELEVATOR & ELECTRIC INC., TRI BOROUGH SCAFFOLDING & HOISTING, INC., WILLIAM C. GERAKARIS PLUMBING & HEATING CORP., and JOHN DOES #1 through #10, the other such names being fictious and unknown defendants, the persons or business entities parties intended being additional contractors and subcontractors who performed construction work on the subject project and those with an interest in the case at bar,

Defendants.

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INDEX NO. 155877/2020

MOTION DATE 02/09/2023, 03/07/2023

MOTION SEQ. NO. 007 008

DECISION + ORDER ON MOTION

BAYPORT CONSTRUCTION CORP.,

Third-Party Plaintiff,

-against-

BRF CONSTRUCTION CORP.,

Third-Party Defendant.

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Third-Party
Index No. 595070/2021

The following e-filed documents, listed by NYSCEF document number (Motion 007) 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 235, 236, 237, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 314, 315, 316, 317, 318, 319

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 312, 313

were read on this motion for SUMMARY JUDGMENT.

Motion sequence numbers 007 and 008 are consolidated for disposition.

In this action to foreclose mechanic's liens, plaintiff Vanguard Construction & Development Company, Inc. (Vanguard) moves, pursuant to CPLR 3212, for summary judgment to foreclose on its first mechanic's lien filed June 25, 2020 and its second mechanic's lien filed July 16, 2020 against the condominium building located at 400 West 42nd Street, New York, New York owned by defendant 400 Times Square Associates LLC (400 Times Square) (motion sequence number 007).[1]

400 Times Square cross-moves, pursuant to CPLR 3212, for summary judgment vacating the notices of mechanic's lien and notice of pendency filed by Vanguard and for summary judgment dismissing the complaint.

Defendant Henick-Lane, Inc. (HLI) moves, pursuant to CPLR, for summary judgment on its complaint in *Henick-Lane, Inc. v Vanguard Constr. & Dev. Co., Inc.*, Index No. 153597/20.[2] HLI also moves for summary judgment dismissing Vanguard's affirmative defenses. In addition, HLI also requests its costs and attorney's fees incurred to date (motion sequence number 008).

BACKGROUND

Nonparty Pip's Island New York Corp. (Pip's) retained Vanguard as a general contractor to construct an immersive theater performance center on the first and second floors of the premises, known as Master Unit 1 and Master Unit 2 (NY St Cts Elec Filing [NYSCEF] Doc No. 136).

[1] In reply, Vanguard asserts that the second lien filed on July 16, 2020 has been withdrawn and released of record (NYSCEF Doc No. 295). Accordingly, this lien is no longer at issue.
[2] HLI made identical motions in this action and in index No. 153597/20.

Vanguard's scope of work was to "build the retail space on the first floor and build the white box basement mechanical systems and sprinkler systems and electrical lighting systems on the second floor and coordinate the electrical vendors' activities and take the project to [temporary certificate of occupancy]" (NYSCEF Doc No. 229, Ataselim tr at 14). On or about January 4, 2017, 400 Times Square established a plan for condominium ownership of the premises (NYSCEF Doc No. 245). Pursuant to that plan, Section 4, Block 1051, Lot Number 35 was established as new Lot Numbers 1501, 1502, 1503, 1504, and 1505 (*id.*).

In a purchase order agreement dated November 26, 2018, Vanguard retained HLI as a subcontractor to perform HVAC work (NYSCEF Doc No. 213; NYSCEF Doc No. 212, Henick aff, ¶ 4). The parties subsequently entered into eight change orders for additional work (NYSCEF Doc No. 212, Henick aff, ¶ 7; NYSCEF Doc No. 215).

On or about June 8, 2018, 400 Times Square, as the lessor, entered into a lease agreement with Pip's, as the tenant, to lease Master Unit 1 and Master Unit 2 of the premises, also designated as Tax Lot Nos. 1501 and 1502 (NYSCEF Doc No. 180). The leased premises was a "cold shell" with "literally nothing there," and "it was understood that [Pip's] would need to do a a very significant construction job on the site" (NYSCEF Doc No. 175, Ajami tr at 22, 105).

On February 20, 2020, HLI filed a mechanic's lien against the building, described as "Block 1051, Lots 1501, 1502, 1503," stating that the last item of work and materials furnished by HLI occurred on December 1, 2019 (NYSCEF Doc No. 221). The notice of lien states that it "Supplied and installed HVAC Equipment, Pipe, etc." (*id.*).

HLI also filed a notice of pendency against the property on January 20, 2021 (NYSCEF Doc No. 230).

On June 25, 2020, Vanguard filed its first lien with the New York County Clerk, describing the property subject to the lien as "specifically designated as Block 1051, Lots 35, 1501, 1502, 1503" (NYSCEF Doc No. 152 at 2). The notice of lien stated that the labor included "furnishing labor for demolition, scaffolding, structural, soundproofing, tile, stone, carpentry, painting, plumbing, electrical, mechanical, fire protection" and the material furnished included "wood, steel, piping, wire, metal, hardware, HVAC equipment . . ." (*id.*).

On July 16, 2020, Vanguard filed a second lien against the property, describing the property as "specifically designated as Block 1051, Lots 1504, 1505" (NYSCEF Doc No. 153 at 3).

Vanguard also filed notices of pendency against the premises (NYSCEF Doc Nos. 4-9).

PROCEDURAL HISTORY

On July 30, 2020, Vanguard commenced this action seeking to foreclose on its two mechanic's liens in the amount of $1,331,012.05 (NYSCEF Doc No. 1). 400 Times Square admitted ownership of Lots 1501 and 1502 but denied ownership of Units 1503, 1504, and 1505 (NYSCEF Doc No. 241). 400 Times Square interposed an affirmative defense that "[t]he plaintiff's cause of action should be dismissed because the First Lien and Second Lien are invalid under N.Y. Lien Law 3 because 400 Times Square Associates did not consent or request any work that was performed by the plaintiff or any material that was supplied by the plaintiff to [Pip's] under its contract with [Pip's]" (NYSCEF Doc No. 158 at 6).

On May 28, 2020, HLI commenced a separate action against Vanguard and 400 Times Square, among others, asserting two causes of action for: (1) foreclosure on its mechanic's lien against all defendants; and (2) breach of contract against Vanguard (the *HLI* action) (NYSCEF Doc No. 1 in *Henick-Lane, Inc. v Vanguard Constr. & Dev. Co., Inc.*, index No. 153597/20). Vanguard asserted eighteen affirmative defenses, including an affirmative defense alleging that

HLI's "claims are barred due to the failure of 400 Times Square Associates, LLC ('Owner') to pay Vanguard for [HLI's] alleged work as provided in Paragraph '4' of the [subcontract] which is a condition precedent to payment" (NYSCEF Doc No. 223 at 5).

By decision and order dated March 24, 2021, the court ordered a joint trial of this action and the *HLI* action (NYSCEF Doc No. 58).

Subsequently, Vanguard commenced a special proceeding pursuant to Lien Law § 12-a (2) to amend its notice of mechanic's lien dated June 23, 2020 (NYSCEF Doc No. 1 in *Matter of Vanguard Constr. & Dev. Co., Inc.*, index No. 155792/23). By decision and order dated December 27, 2023, the court permitted amendment of Vanguard's lien to the extent that any reference to Lot 35 and Lot 1503 were removed nunc pro tunc to June 23, 2020 (NYSCEF Doc No. 54 in *Matter of Vanguard Constr. & Dev. Co., Inc.*, index No. 155792/23).

DISCUSSION

"On a motion for summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Trustees of Columbia Univ. in the City of N.Y. v D'Agostino Supermarkets, Inc.*, 36 NY3d 69, 73-74 [2020] [internal quotation marks and citation omitted]; *see also* CPLR 3212 [b]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the moving party meets that burden, the burden shifts to the non-moving party "to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "On a motion for summary judgment, facts must be viewed 'in the light most favorable to the non-moving party'" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]).

A. Vanguard's Motion for Summary Judgment (Motion Sequence Number 007)/400 Times Square's Cross-Motion for Summary Judgment

Vanguard moves for summary judgment to foreclose its mechanic's liens against 400 Times Square. Vanguard contends that there is an undisputed balance owed of $1,331,012.50. Vanguard further asserts that all of its tenant work complies with Lien Law § 2, and its notices of mechanic's lien were filed within eight months after the final performance of work and final furnishing of labor on December 10, 2019. In addition, Vanguard maintains that its notices of mechanic's lien have not expired and contain all of the elements required by Lien Law § 9. Furthermore, Vanguard contends that the lease conclusively demonstrates 400 Times Square's consent to the work as required by Lien Law § 3. According to Vanguard, the lease includes a provision requiring Pip's to submit its list of subcontractors for 400 Times Square's approval and a provision showing that 400 Times Square had approved schematic drawings for the alteration work. Vanguard argues that 400 Times Square manifested consent by coordinating, inspecting, and facilitating the work. 400 Times Square executed multiple forms for the New York City Department of Buildings, which were necessary for the work.

400 Times Square cross-moves to vacate the notices of mechanic's lien and notice of pendency filed by Vanguard. According to 400 Times Square, the notices of mechanic's lien are invalid blanket liens because they failed to identify the units that were subject to the liens. The notices of lien were not limited to Master Unit 1, Block 1051, Lot 1501, and Master Unit 2, Block 1051, Lot 1502, and covered the common elements of the condominium building without unanimous consent of the owners. Additionally, 400 Times Square asserts that the liens are void since they were not filed in a timely manner in accordance with Lien Law § 10. In an email dated August 22, 2019, Vanguard's president admitted that it completed its work by March 19, 2019 and had until November 19, 2019 to file any liens, but did not file any liens until June and July of 2020.

400 Times Square also argues that it did not consent to the work. 400 Times Square asserts that it was not an affirmative factor in procuring the work, and did not exercise supervision or control over the work performed by Vanguard.

In opposition to 400 Times Square's cross-motion and in reply, Vanguard argues that 400 Times Square has failed to raise an issue of fact as to its first notice of mechanic's lien. Vanguard contends that it did not file an unenforceable blanket lien; it was asserted against three condominium lots and referenced the former lot number 35 for information only and was not asserted against the entire condominium property. Vanguard maintains that it made a thorough search of the relevant public records to identify the particular condominium lots at issue for the project. Additionally, Vanguard contends that 400 Times Square may not raise the Condominium Act as a defense because it was not asserted in its answer. Further, according to Vanguard, 400 Times Square's cross-motion is untimely and raises new issues outside the scope of Vanguard's motion for summary judgment. Vanguard also asserts that 400 Times Square should have challenged the mechanic's lien in a special proceeding brought pursuant to Lien Law § 19 (6), rather than on summary judgment. Finally, Vanguard argues that, even if its first lien misdescribed the property, the court should allow Vanguard to amend the first lien nunc pro tunc to drop references to Lots 1501 and 1502, or should grant Vanguard leave to bring a formal Lien Law § 12-a (2) application.

In its own reply, 400 Times Square responds that the notices of lien are void since they failed to identify the units in the building that were subject to the lien. 400 Times Square did not waive the invalidity of the notices of lien because it specifically asserted in its answer that the first and second liens failed to comply with Lien Law § 9. And, Vanguard's lien cannot be amended nunc pro tunc because the liens are void and cannot be corrected by an amendment. Furthermore,

400 Times Square contends that a mechanic's lien can be discharged either under Lien Law § 19 (6) or on summary judgment. Finally, the affidavits submitted by Vanguard in its reply to establish that it timely filed its lien are inadmissible.

Timeliness of 400 Times Square's Cross-Motion for Summary Judgment

The court must first consider whether to entertain 400 Times Square's cross-motion for summary judgment.

The preliminary conference order directed that motions for summary judgment were to be made "Per CPLR" (NYSCEF Doc No. 68 at 2). CPLR 3212 (a) provides that motions for summary judgment "shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown." Although Vanguard filed the note of issue on August 18, 2022 (NYSCEF Doc No. 127), 400 Times Square filed its cross-motion for summary judgment after the deadline on February 2, 2023 (NYSCEF Doc No. 239). 400 Times Square does not offer any "good cause" in its moving papers (*see Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 726-727 [2004]; *Brill v City of New York*, 2 NY3d 648, 652 [2004] ["'good cause' in CPLR 3212 (a) requires a showing of good cause for the delay in making the motion – a satisfactory explanation for the untimeliness . . ."]). "No excuse at all, or a perfunctory excuse, cannot be 'good cause'" (*Brill*, 2 NY3d at 652).

"Although a court may decide an untimely cross motion, it is limited in its search of the record to those issues or causes of action 'nearly identical' to those raised by the opposing party's timely motion" (*Guallpa v Leon D. DeMatteis Constr. Corp.*, 121 AD3d 416, 419 [1st Dept 2014], quoting *Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept 2006], *appeal dismissed* 9 NY3d 862 [2007]; *see also Royland v McGovern & Co., LLC*, 203 AD3d 677, 678 [1st Dept 2022]; *Jarama v 902 Liberty Ave. Hous. Dev. Fund Corp.*, 161 AD3d 691, 691 [1st Dept

2018]). Courts have explained that an untimely cross-motion for summary judgment may be considered, even in the absence of "good cause," because the court may search the record pursuant to CPLR 3212 (b), and grant summary judgment to any party even if a cross-motion has not been made (*see Filannino*, 34 AD3d at 281). Here, the court shall consider 400 Times Square's cross-motion because it addresses the same cause of action and nearly identical issues as Vanguard's timely motion for summary judgment.

Whether 400 Times Square Waived the Condominium Act as a Defense

Additionally, the court finds that 400 Times Square did not waive the Condominium Act as a defense because it did not assert the statute in its answer. As pointed out by 400 Times Square, it asserted a fourth affirmative defense in its answer that Vanguard's "First Lien and Second Lien are invalid since neither the First Lien nor the Second Lien complied with the requirements of N.Y. Lien Law § 9" (NYSCEF Doc No. 241 at 7). Even if 400 Times Square was required to plead the Condominium Act as an affirmative defense, courts have held that where a defendant fails to plead an affirmative defense, and then asserts that defense in connection with a motion for summary judgment, the waiver is deemed retracted (*Diversified Group, Inc. v Marcum & Kliegman LLP*, 129 AD3d 552, 553 [1st Dept 2015], *lv denied* 27 NY3d 903 [2016]; *Kirilescu v American Home Prods. Corp.*, 278 AD2d 457, 458 [2d Dept 2000], *lv denied* 96 NY2d 933 [2001]). "The relevant inquiry for the court to hear the never-plead affirmative defense is the prejudice or surprise associated with the assertion of a never plead affirmative defense" (*Strauss v BMW Fin. Servs. Veh. Leasing*, 29 Misc 3d 362, 364 [Sup Ct, Kings County 2010]). Prejudice and surprise are "'ameliorated when it is shown that the plaintiff has had a full and fair opportunity to respond and oppose the defense being asserted in connection with summary judgment'" (*Diversified Group, Inc.*, 129 AD3d at 553, quoting *Strauss*, 29 Misc 3d at 364). Vanguard does

not claim any prejudice, and in fact, had a full and fair opportunity to respond to 400 Times Square's argument in its reply.

On the merits, however, the court has previously considered and rejected 400 Times Square's argument that the notice of mechanic's lien was an invalid blanket lien. The court granted amendment of Vanguard's mechanic's lien dated June 23, 2020 to the extent that any reference to Lot 35 and Lot 1503 were removed nunc pro tunc to June 23, 2020 (NYSCEF Doc No. 54 in *Matter of Vanguard Constr. & Dev. Co., Inc.*, Sup Ct, NY County, index No. 155792/23). As amended, the notice of lien is limited to the units leased by Pip's, Units 1501 and 1502. Thus, the court rejects 400 Times Square's argument that the lien was an invalid blanket lien.[3]

Amount of Outstanding Debt Owed to Vanguard

Lien Law § 3, entitled "Mechanic's lien on real property," provides as follows:

> "A contractor, subcontractor, laborer, materialman, landscape gardener, nurseryman or person or corporation selling fruit or ornamental trees, roses, shrubbery, vines and small fruits, who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof, or of his agent, contractor or subcontractor, and any trust fund to which benefits and wage supplements are due or payable for the benefit of such laborers, shall have a lien for the principal and interest, of the value, or the agreed price, of such labor, including benefits and wage supplements due or payable for the benefit of any laborer, or materials upon the real property improved or to be improved and upon such improvement."

The Lien Law is "remedial in nature and intended to protect those who have directly expended labor and materials to improve real property at the direction of the owner or a general contractor," and "is to be construed liberally to secure the beneficial interests and purposes thereof"

[3] In light of this determination, the court need not determine whether 400 Times Square should have brought a special proceeding pursuant to Lien Law § 19 (6) to discharge the lien.

(*West-Fair Elec. Contrs. v Aetna Cas. & Sur. Co.*, 87 NY2d 148, 156, 157 [1995] [internal quotation marks and citation omitted]).

"'The lienor must establish the amount of the outstanding debt by submitting proof of either the price of its contract or the value of the labor and materials supplied'" (*NGU, Inc. v City of New York*, 189 AD3d 850, 852 [2d Dept 2020], quoting *DHE Homes, Ltd. v Jamnik*, 121 AD3d 744, 745 [2d Dept 2014]). "The amount of the lien is limited by the contract under which it is claimed, and ordinarily a lienor is bound by the price term contained in the contract to which it is a party" (*C.C.C. Renovations, Inc. v Victoria Towers Dev. Corp.*, 168 AD3d 664, 666 [2d Dept 2019]). Vanguard has offered prima facie evidence of the amount of the outstanding debt. Indeed, Vanguard has offered proof indicating that amount due and owing to it is $1,331,012.05 (NYSCEF Doc No. 135, Ataselim aff, ¶¶ 28-31; *see also* NYSCEF Doc No. 148, 149; NYSCEF Doc No. 175, Ajami tr at 93-94).

Whether 400 Times Square Consented to the Work

"The term 'consent' within the meaning of Lien Law § 3 is not mere acquiescence and benefit, but [it is] some affirmative act or course of conduct establishing confirmation" (*Murnane Bldg. Contrs., LLC v Cameron Hill Constr., LLC*, 159 AD3d 1602, 1604 [4th Dept 2018]). To sustain the lien, "'the owner must either be an affirmative factor in procuring the improvement to be made, or having possession and control of the premises assent to the improvement in the expectation that he will reap the benefit of it'" (*Ferrara v Peaches Café LLC*, 32 NY3d 348, 353 [2018], quoting *Rice v Culver*, 172 NY 60, 65-66 [1902]). The "consent [for purposes of Lien Law § 3] may be inferred from the terms of the lease and the conduct of the owner" (*Murnane*, 159 AD3d at 1604 [internal quotation marks and citation omitted]; *accord Harner v Schecter*, 105

AD2d 932, 932 [3d Dept 1984]). Lien Law § 3 does not require a direct relationship between the property owner and the lienor (*Ferrara*, 32 NY3d at 356).

In *Ferrara, supra*, the Court of Appeals held that an owner was not entitled to summary judgment dismissing a contractor's action to foreclose on a mechanic's lien (*Ferrara*, 32 NY3d at 355). In that case, the Court explained that "[t]he language of the lease agreement not only expressly authorized Peaches to undertake the electrical work, but also required it to do so to effectuate the purpose of the lease" (*id.*). In addition, "the detailed language makes clear that [the owner] was to retain close supervision over the work and authorized it to exercise at least some direction over the work by reviewing, commenting on, revising, and granting ultimate approval for the design drawings related to the electrical work" (*id.*). In light of these terms, the Court held that the terms of the lease were sufficient to establish the owner's consent under Lien Law § 3.

As in *Ferrara*, the court finds that the lease language is sufficient to infer 400 Times Square's consent. The lease makes clear that 400 Times Square was "an affirmative factor in procuring the improvement to be made" (*Ferrara*, 32 NY3d at 353 [internal quotation marks and citation omitted]). To be sure, the lease agreement included an Exhibit C-4 approving Pips' schematic drawings for the work and included an article 4.1.2 pursuant to which 400 Times Square agreed to file a specific amendment with the New York City Department of Buildings for theater use and retail use for the leased space (NYSCEF Doc No. 180 at 15, 86-87). The lease also gave 400 Times Square the authority to supervise the work, including reviewing and approving the tenant work and subcontractors (*id.* at 28-29). This was to allow Pip's to effectuate the purpose of the lease, i.e., for Pip's to operate a theater.

Whether Vanguard's Lien Filed on June 23, 2020 Was Timely Filed

The court must next determine whether Vanguard's lien dated June 23, 2020 was timely filed. Vanguard's contract states in article 15.2.8 that "[i]f a Claim relates to or is the subject of a mechanic's lien, the party asserting such Claim may proceed in accordance with applicable law to comply with the line notice or filing deadlines" (NYSCEF Doc No. 249 at 58).

In pertinent part, Lien Law § 10 provides:

> "Notice of lien may be filed at any time during the progress of the work and the furnishing of the materials, or, 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."

Thus, "[t]o be timely, a notice of lien on a private commercial project such as the one at issue here must be filed within eight months of the completion of the contract, or the final performance of work or furnishing of materials under the contract" (*Manhattan Mech. Contrs., Inc. v Nissan N. Am.., Inc.*, 2019 NY Slip Op 30223[U], *2 [Sup Ct, NY County 2019]). "[T]he 'work' referenced in the lien must be performed under the contract. Thus, for example, warranty or repair work, or new work performed outside the original contract, does not extend the time to file a lien with respect to the original contract" (*id.*, citing *Nelson v Schrank*, 273 App Div 72, 73 [2d Dept 1947] [mechanic's lien was invalid where mechanic's lien was not filed within time required by Lien Law § 10 and there was no proof that additional work was part of original contract]).

Applying these precepts, Vanguard has failed to dispel questions of fact as to whether it filed its lien within eight months from "the last item of work performed or materials furnished" (Lien Law § 10; *see also Winegrad*, 64 NY2d at 853; *Ward-Carpenter Engrs. v Sassower*, 163 AD2d 304, 305 [2d Dept 1990]). In its moving papers, Vanguard's vice president, Neslihan Ataselim, equivocally states, and without indicating what documents she is relying on, that

"Vanguard last performed its Tenant Work on December 10, 2019 which was the date stated in the Mechanic's Lien" and that "Vanguard was working on the project through the December 2019 date, even though most of the Project work had been completed by May or June 2019. Hence I believe the Vanguard liens were timely filed" (NYSCEF Doc No. 135, Ataselim aff, ¶¶ 36, 37). While Vanguard submits an affidavit from Ataselim in reply, this "more detailed affidavit . . . cannot be considered in support of [Vanguard's] prima facie burden" (*Hoffman v Taubel*, 208 AD3d 1099, 1101 [1st Dept 2022]).

Turning to the cross-motion, 400 Times Square relies on an email dated August 22, 2019 from Vanguard's president, in which he indicated that it had completed all of its work on March 19, 2019 (NYSCEF Doc No. 253 at 1), and the application and certification of payment submitted by Vanguard, which indicates that the last items of work were contained in an invoice dated April 30, 2019 (NYSCEF Doc Nos. 148, 149). In response, Ataselim states that Vanguard's contract work included installing hot water pumps for each air conditioning unit, and that in December 2019, Vanguard was supervising the pump work, and was present during the installation (NYSCEF Doc No. 303, Ataselim reply aff, ¶¶ 6-7; NYSCEF Doc Nos. 304-309). Given the conflicting evidence, there is a triable issue of fact as to whether Vanguard timely filed its lien in accordance with Lien Law § 10 (*see Icdia Corp. v Visaggi*, 135 AD3d 820, 821 [2d Dept 2016]; *Matell Contr. Co., Inc. v Fleetwood Park Dev., LLC*, 111 AD3d 681, 683 [2d Dept 2013]).

In sum, Vanguard's motion for summary judgment, and 400 Times Square's cross-motion for summary judgment, are denied.

B. HLI's Motion for Summary Judgment (Motion Sequence Number 008)

1. Breach of Contract (Second Cause of Action)

HLI moves for summary judgment on its breach of contract against Vanguard, asserting that the parties entered into a subcontract, change orders, and respective purchase orders, that HLI satisfactorily performed, and that Vanguard failed to pay HLI $138,135.50.

In opposition, Vanguard argues that the subcontract's pay-when-paid provision is enforceable, and entitles Vanguard to wait for payment from Pips before paying HLI. As support for this argument, Vanguard relies on the Prompt Payment Act's requirement that a subcontractor be paid within a week of the general contractor being paid by the owner.

Section 4 of HLI's subcontract provides as follows:

> "Notwithstanding anything to the contrary contained herein, *Subcontractor[']s invoice, whether for progress payment, final payment or payment of retained sums, shall be paid, in the net amount of its request, if any only if, Contractor receives payment from the Owner for said invoice*. Receipt of payment from Owner for Subcontractor's work is a condition precedent to Contractor making any payment to Subcontractor. Subcontractor relies on credit of Owner, not Contractor, for payment. If Contractor has withheld retention, same shall be paid to the Subcontractor after approval and acceptance of the entire project by the Owner. Final payment will be due when all governmental signoffs are completed. Subcontractor acknowledges <u>all payments</u> are contingent upon the Owner paying the Contractor"

(NYSCEF Doc No. 213 at 3 [emphasis added]).

To establish a breach of contract, the party asserting the claim must establish the existence of the parties' agreement, its performance thereunder, the other party's failure to perform, and harm (*Nevco Contr. Inc. v R.P. Brennan Gen. Constrs. & Bldrs., Inc.*, 139 AD3d 515, 515 [1st Dept 2016]; *Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]).

Here, HLI has made a prima facie showing of entitlement to summary judgment on its breach of contract claim against Vanguard. There is no dispute that the parties entered into a purchase order agreement and change orders for HLI to provide HVAC services at the premises.

Vanguard's vice president testified that HLI's work was satisfactory, and that the only reason why Vanguard did not pay HLI was because Vanguard had not been paid (NYSCEF Doc No. 229, Ataselim tr at 114). HLI has also demonstrated that the outstanding balance owed to it is $138,135.50 (NYSCEF Doc No. 212, Henick aff, ¶ 18).

Vanguard has failed to raise an issue of fact on HLI's breach of contract claim. Contrary to Vanguard's contention, "[t]he 'pay-when-paid' provision in the subcontract is not an effective condition precedent to defendant's duty to perform, since such provisions are 'void and unenforceable as contrary to public policy'" (*Nevco Contr. Inc.*, 139 AD3d at 516, quoting *West-Fair*, 87 NY2d at 158; *see also Hugh O'Kane Elec. Co., LLC v MasTec N. Am., Inc.*, 19 AD3d 126, 126 [1st Dept 2005]).

Although Vanguard relies on *Entech Eng'g, P.C. v Dewberry Engrs. Inc.* (204 AD3d 467 [1st Dept 2022]), the court finds this case to be distinguishable. There, the First Department explained that:

> "as the court also correctly found, where a subcontractor has no such Lien Law rights, there is no basis for finding that a pay-if-paid clause violates New York public policy. Because the court had dismissed plaintiff's cause of action for foreclosure on a public improvement lien, plaintiff no longer had any Lien Law rights, and there was no impediment to enforcement of the pay-if-paid clause"

(*id.* at 468). By contrast, in this case, the court has not dismissed HLI's foreclosure cause of action. HLI only moved for summary judgment on this cause of action.

Moreover, the First Department has held that a pay-when-pay valid clause is void and unenforceable notwithstanding the recent enactment of the Prompt Payment Act (*see Bank of Am., N.A. v ASD Gem Realty LLC*, 205 AD3d 1, 6 [1st Dept 2022]). In affirming the trial court's conclusion that courts have continued to hold that pay-when-paid clauses are void and against public policy, the First Department has explained that:

> "The PPA is concerned with only one thing: the timing of payments. It is not concerned with exculpating an agent or providing a safe harbor. It is also not intended to benefit a higher-tiered party at the expense of a lower-tiered party or "strike [ ] a balance between protecting contractors and subcontractors" as Sweet contends. Rather, the purpose of the PPA is to protect those lowest in the construction chain from those highest in the construction chain by mandating prompt payments (see Sponsor's Mem, reprinted in 2002 N.Y. Legis Ann at 81–82)"

(*id.* at 6, 11).

HLI also moves for summary judgment dismissing Vanguard's eighteen affirmative defenses. Vanguard only opposed dismissal of its sixteenth affirmative defense, which alleges that HLI's claims are barred due to the pay-when-paid provision (NYSCEF Doc No. 223 ¶ 38). Vanguard thus abandoned the remaining seventeen affirmative defenses (*see Gamez v Sandy Clarkson LLC*, 221 AD3d 453, 455 [1st Dept 2023]). Accordingly, these affirmative defenses must be dismissed. For the foregoing reasons, Vanguard's sixteenth affirmative defense is void and unenforceable under *West-Fair* and must be dismissed.

HLI is also entitled to prejudgment interest. In a breach of contract case, prejudgment interest be awarded to the prevailing party and such interest runs from the date of the breach (*see Sokolik v Pateman*, 114 AD3d 839, 841 [2d Dept 2014]). Interest may also be awarded "from a single reasonable intermediate date" (CPLR 5001 [b]).

Vanguard's argument that the public policy behind the statute would not be served is without merit. In *J. D'Addario & Co., Inc. v Embassy Indus., Inc.* (20 NY3d 113, 117-118 [2012]), the Court of Appeals clarified a party's statutory entitlement to interest:

> "In breach of contract cases where parties do not specify the exclusive remedy, CPLR 5001 (a) requires that statutory interest be paid. CPLR 5001 (a) states that '[i]nterest shall be recovered upon a sum awarded because of a breach of performance of a contract' (emphasis added). The plain language of CPLR 5001 (a) 'mandates the award of interest to verdict in breach of contract actions' (*Spodek v Park Prop. Dev. Assoc.*, 96 NY2d 577, 581 [2001]). There is no requirement that

> the breaching party obtain some benefit from the wronged party's money for statutory interest to be paid. The principle behind prejudgment interest is that the breaching party should compensate the wronged party for the loss of use of the money."

Furthermore, HLI has submitted evidence that it last requested payment from Vanguard on February 11, 2020 (NYSCEF Doc No. 219). Accordingly, the court awards HLI interest from February 11, 2020.

2. Lien Foreclosure (First Cause of Action)

HLI also moves for summary judgment to foreclose on its mechanic's lien, relying upon invoices and requests for payment indicating the status of completion of the base contract work (NYSCEF Doc No. 217). HLI contends that it timely commenced its foreclosure action within one year after its mechanic's lien was recorded, and that there is no dispute as to the amount of monies owed to HLI. HLI further asserts that 400 Times Square consented to the work as required by Lien Law § 3.

However, HLI has failed to establish entitlement to judgment as a matter of law, as HLI has failed to demonstrate that it timely filed its lien (*see generally* NYSCEF Doc No. 212, Henick aff, ¶ 15). HLI only makes a conclusory statement in its memorandum of law that it timely filed its lien.

In any event, viewing the evidence in the light most favorable to 400 Times Square, it has raised an issue of fact as to whether HLI's lien was timely filed (*see* Lien Law § 10; *see also Icdia Corp.*, 135 AD3d at 821). In an email dated August 22, 2019, Vanguard's president stated that "Vanguard's subcontractors last completed work on the premises on March 1st, 2019," and "[t]he time period during which the subcontractors can seek recourse concludes October 31st, 2019" (NYSCEF Doc No. 286 at 1). 400 Times Square also submits invoices from a separate entity, Henick-Lane Services Corp., indicating that it performed HVAC work at the premises as late as

December 2019 (NYSCEF Doc No. 287). Accordingly, HLI is not entitled to summary judgment on its lien foreclosure cause of action.[4]

3. Costs and Attorney's Fees

Finally, HLI's request for its costs and attorney's fees is denied. It is well settled in New York that a prevailing party may not recover attorney's fees from the losing party except where authorized by statute, agreement or court rule (*see Chapel v Mitchell*, 84 NY2d 345, 349 [1984]). This is not a case where Vanguard "*contumaciously* deprived [HLI] of [a] clear legal entitlement, forcing [HLI] to rescue [itself] through legal action" (*Check-Mate Indus. v Say Assoc.*, 192 AD2d 690, 690 [2d Dept 1993] [internal quotation marks and citation omitted and emphasis added]).

CONCLUSION

Accordingly, as to index No. 155877/20, it is

ORDERED that the motion (sequence number 007) of plaintiff Vanguard Construction & Development Company, Inc. for summary judgment to foreclose its mechanic's liens is denied; and it is further

ORDERED that the cross-motion of defendant 400 Times Square Associates, LLC to vacate the notices of mechanic's lien and notice of pendency and for summary judgment dismissing the complaint is denied; and it is further

ORDERED that the branch of the motion (sequence number 008) of plaintiff Henick-Lane, Inc. for summary judgment on the second cause of action for breach of contract is granted and the Clerk of the Court is directed to enter judgment in favor of Henick-Lane, Inc. and against defendant Vanguard Construction & Development, Inc. in the amount of $138,135.50, together with statutory

[4] 400 Times Square requested, in opposition, that the court dismiss HLI's lien foreclosure cause of action. However, "[i]t is not as a rule sufficient to demand such relief in opposing affidavits or memoranda; an outright notice is required, to avoid any surprise at all to the original movant" (*Guggenheimer v Guggenheimer*, 109 AD2d 1012, 1013 [3d Dept 1985] [internal quotation marks and citation omitted]).

interest from February 11, 2020 until the date of entry of this judgment, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the branch of the motion (sequence number 008) of plaintiff Henick-Lane, Inc. for summary judgment on its first cause of action to foreclose its mechanic's lien is denied; and it is further

ORDERED that the branch of the motion (sequence number 008) seeking costs and attorney's fees is denied; and it is further

ORDERED that the balance of plaintiff Henick-Lane, Inc.'s claims are severed and continued.

This constitutes the decision and order of the Court.

4/8/2024
DATE

RICHARD G. LATIN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE