

ZDG, LLC v 310 Group, LLC

2024 NY Slip Op 31586(U)

May 1, 2024

Supreme Court, New York County

Docket Number: Index No. 656537/2016

Judge: Suzanne J. Adams

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. SUZANNE J. ADAMS PART 39M

Justice

ZDG, LLC,

Plaintiff,

- v -

310 GROUP, LLC, NY MANHATTAN 40TH ST. LENDERS,
L.P., METAL PARTNERS REBAR LLC, TSC 2014,
LLC, CANY TECHNICAL SERVICES, LLC, MCLNY
PLUMBING & HEATING LLC, LEVERAGE BUILDERS
GROUP INC., STRUCTURETECH, NEW YORK, INC., JOHN
DOES 1 -10, BEING FICTITIOUS AND UNKNOWN TO
PLAINTIFF BUT INTENDED TO BE THOSE PARTIES
HAVING OR CLAIMING AN INTEREST IN OR LIEN UPON
THE IMPROVEMENT KNOWN AS 310 312 40TH STREET,
NEW YORK, NEW YORK,

Defendant.

INDEX NO. 656537/2016
MOTION DATE 06/05/2023
MOTION SEQ. NO. 007

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 007) 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER

This matter arose out of the design and construction of a hotel on the real property located at 310-312 West 40th Street, New York, New York, owned by defendant 310 Group, LLC. Plaintiff was retained by defendant in September 2014 pursuant to contract to provide certain construction management services in connection with the aforementioned construction project. Defendant's termination of plaintiff's services in December 2016 resulted in the commencement of this action. This court's decision dated August 9, 2019 (Kennedy, J.), struck defendant's answer to the complaint and counterclaims, and dismissed defendant's third-party complaint. On November 22, 2021, February 25, 2022, and April 7, 2022, this court conducted an inquest and directed the parties

to submit post-inquest memoranda of law. Thereafter, the Decision/Order After Inquest of this court dated May 24, 2023 (Love, J.), awarded plaintiff damages in the total amount of \$1,720,218.00. Defendant now moves by order to show cause pursuant to CPLR 2221(d) for leave to reargue the May 24, 2023, order, and upon reargument, to modify the amount awarded to plaintiff; and pursuant to CPLR 2221(e) for leave to renew the May 24, 2023, order, and upon renewal, to modify the amount awarded plaintiff and order that plaintiff is not entitled to any monetary judgment on the grounds it was paid all amounts due subsequent to the conclusion of the inquest hearings. Plaintiff opposes the motion. For the reasons set forth below, defendant's motion is granted to the extent that reargument is granted, and upon reargument, the May 24, 2023, order is modified such that the last paragraph awards plaintiff the sum of \$823,684.00.

CPLR 2221(d)(2) requires that a motion for leave to reargue be "based on matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion." Defendant argues that this court's award to plaintiff of a total of \$1,720,218.00 in damages in the last paragraph of the opinion does not appear to be explained or justified. The opinion describes at length its analysis of plaintiff's recoverable damages, and finds that the evidence established that plaintiff earned 55% of its fee under the agreement. The court then calculates the various components of the damages claim and determines that plaintiff's recoverable amount of damages is \$823,684.00. However, in addressing plaintiff's seeking of foreclosure on its mechanic's lien, the court appears to have considered the amount sought to be foreclosed upon – \$896,534.00 – as separate from the amount claimed in damages, and after determining the aforesaid amount of plaintiff's damages, then added the two sums together to award plaintiff the total amount of \$1,720,218.00. The plain language of Lien Law § 3 states that a mechanic's lien amount is the value or agreed price of labor or materials used for the improvement of real property. *See also*

NGU, Inc. v. City of New York, 189 A.D.3d 850, 852 (2nd Dep't 2020). There is no support in the record of this action for a monetary award on the mechanic's lien claim that is separate from the award of damages, and it is apparent that the court mistakenly calculated plaintiff's damages to include the amount pled in the complaint. Rather, as the court notes that plaintiff's mechanic's lien claim may be adjudicated in the May 24, 2023, order, the court should have ordered that the amount plaintiff is entitled to foreclose upon is the amount it determined was due and owing plaintiff, namely \$823,684.00. In arguing that it is entitled to the combined amount, plaintiff appears to revisit its original claim that its entire fee is due, but that claim was already rejected by the court's analysis in the May 24, 2023, order and plaintiff never moved to reargue or renew. Thus, the last paragraph of the May 24, 2023, order, should be revised.

CPLR 2221(e) provides that a motion for leave to renew be based upon, *inter alia*, "new facts not offered on the prior motion that would change the prior determination." Defendant maintains that the "new facts" not offered was defendant's payment to plaintiff of the principal sum of \$823,684.00, plus interest accrued, made subsequent to the inquest hearings. However, defendant could have so advised the court, as the payments occurred two months before the court rendered its decision. Moreover, plaintiff has acknowledged payments by defendant and the mechanic's lien has been bonded off. There appears to be no basis for an award of sanctions. In sum, renewal is not warranted here.

Accordingly, it is hereby

ORDERED that defendant's motion for leave to reargue is granted, and the remainder of the motion is denied; and it is further

ORDERED that upon reargument, the last paragraph of the order of this court dated May 24, 2023, awarding plaintiff damages, is modified to read as follows:

“ORDERED that the Clerk is directed to enter judgment in favor of plaintiff and against defendant, 310 Group, LLC in the sum of \$823,684.00, with interest at the statutory rate from December 15, 2016, until entry of judgment, as calculated by the Clerk, together with costs and disbursements, as taxed by the Clerk.”

This constitutes the decision and order of the court.



<u>5/1/2024</u>					<u>SUZANNE J. ADAMS, J.S.C.</u>	
DATE						
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>		<input type="checkbox"/>		<input type="checkbox"/>	
	<input type="checkbox"/>		<input type="checkbox"/>		<input type="checkbox"/>	
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