

Matter of Meyer v S & Alb Constr. Inc.

2001 NY Slip Op 30060(U)

August 22, 2001

Supreme Court, New York County

Docket Number: 124283/00

Judge: Martin Schoenfeld

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 28

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In the Matter of the Application of RISA MEYER,

Petitioner,

INDEX NO. 124283/00

For an Order Summarily Discharging of
Record Notices of Mechanics Lien Filed
by S & ALB CONSTRUCTION INC. d/b/a
S & A CONSTRUCTION and by A & Z STORE
FRONTS, INC.,

DECISION AND ORDER

#001

Respondents.

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MARTIN SCHOENFELD, J.:

In this special proceeding petitioner Risa Meyer seeks to vacate mechanic's liens totaling \$286,000 filed against petitioner's real property by respondents S & Alb Construction Inc. (d/b/a S & A Construction) ("S & A") and A & Z Store Fronts, Inc. ("A & Z"). Petitioner now moves, pursuant to Lien Law § 19 and New York City Administrative Code ("Administrative Code") Title 20, Chapter 2, Subchapter 22, for the relief demanded in the petition. For the reasons set forth herein, the petition is denied and dismissed and the clerk is directed to enter judgment accordingly.

Background

Petitioner is the owner of the five-story townhouse located at and known as 10 East 67th

Street, New York, NY. In December 1997 the building was, apparently, occupied by petitioner's parents—Catalina Meyer ("Catalina") and Alvin Meyer ("Alvin"). That month the building was substantially damaged by a fire in which Catalina perished. In December 1999 S & A contracted with Catalina's estate, represented by Barbara Jaffee ("Jaffee"), to repair and renovate the building (see Moving Exhibit 1). S & A hired a subcontractor which, in turn, hired A & Z to do some of the work. In 2000 respondents worked on the building and received payments in the form of checks (Moving Exhibit 3) from "The Estate of Catalina K. Meyer."

On October 25, 2000, Catalina's estate terminated S & A's contract allegedly because of S & A's failure to cure certain defaults. On November 14, 2000, S & A filed a mechanic's lien (Moving Exhibit 4) against the building for \$280,000 and A & Z filed a lien for \$6,000 (Moving Exhibit 5). Petitioner argues that the liens must be vacated because Administrative Code § 20-387 bars S & A and A & Z from collecting payment for or enforcing any liens based upon any home improvement work done by them since neither is licensed by the City's Department of Consumer Affairs. S & A and A & Z do not dispute they are unlicensed; rather, they argue that the proscriptive Administrative Code provision does not apply in this instance because (i) the work they performed was not within the ambit of the statute, (ii) petitioner is not an "owner" as defined in the Administrative Code, and (iii) the building is not petitioner's residence.

Administrative Code

Administrative Code § 20-387(a) provides that "[n]o person shall solicit, . . . perform or

obtain a home improvement contract as a contractor or salesperson from an owner without a license therefor." A contractor that fails to comply with § 20-387(a) "may neither enforce a home improvement contract against an owner nor seek recovery in quantum meruit." Blake Electric Contracting Co., Inc. v. Paschall, 222 AD2d 264, 266 (1st Dept 1995). A mechanic's lien asserted by an unlicensed home improvement contractor must be vacated. See Chosen Construction Corp. v. Syz, 138 AD2d 284, 286 (1st Dept 1988).

Construction of a New Home

Administrative Code § 20-386(2) defines a "home improvement" as "the construction, repair, replacement, remodeling, alteration, conversion, rehabilitation, renovation, modernization, improvement, or addition to any land or building, or that portion thereof which is used or designed to be used as a residence or dwelling place." The statute excludes "the construction of a new home or building" (ibid.). The work at issue included demolishing floors, ceilings, and walls on all five floors; removing skylights, ductwork and floor joists; installing new floors, insulation, stairs, doors, windows, a skylight, fire escapes and moldings; and fixing the exterior of the building. Such work falls within the Administrative Code's definition of home improvement. "The statutory exemption for 'construction of a new home' is limited to the creation of a structure, where none previously existed, that is to be used for residential purposes. Even if a dwelling is stripped to the frame and rebuilt, the work constitutes the renovation of an existing home, not the erection of a new one." Blake Electric Contracting Co., Inc. v. Paschall, 222 AD2d 264, 266 (1st

Dept 1995).

"Owner" of the Building

Administrative Code § 20-386(4) defines "owner" as "any homeowner, cooperative shareholder, condominium unit owner, tenant, or any other person who orders, contracts for or purchases the home improvement services of a contractor or the person entitled to the performance of the work of a contractor pursuant to a home improvement contract." Legal title to the building appears to have been in a state of flux since the property came into the possession of petitioner's family. Catalina acquired the building in September 1982 (Jaffee Exhibit 2). In January 1984 Catalina transferred it to herself and petitioner as tenants in common. In Catalina's will, which was probated in April 1998, Catalina bequeathed a life estate in the building to Alvin and the remainder interest to petitioner. In August 1998, petitioner and Alvin renounced their interest in Catalina's estate per Internal Revenue Code § 2518 (Jaffee Exhibit 3). In September 2000 petitioner, individually and as executrix of Catalina's estate, and Alvin, as beneficiary of the estate, jointly conveyed their interest in the building to petitioner as an individual (Jaffee Exhibit 2). Petitioner appears to qualify as an "owner."

Use of Building as Residence

To come within the statute's protection petitioner must show the building's use "as a residence or dwelling place." Administrative Code § 386(2). "The term 'owners' ... does not

apply to speculators and real estate investors who have no intention of residing in the subject premises. These latter classes of individuals are business people who have other remedies available to them and who may not rely on consumer-type statutes for protection." Routier v Waldeck, 184 Misc 2d 487, 490 (Nassau Dist Ct 2000). Petitioner states (Supplemental Affidavit ¶ 4) that her parents had lived in the building since 1983 and (¶ 5) that the building was her own primary residence from 1983 through 1993. However, these sworn statements seem contradicted by the documentary evidence submitted by petitioner: the 1984 indenture (Jaffee Exhibit 2, at 3rd page) states that both petitioner and Catalina live at 100 Central Park South. Petitioner also states (Supplemental Affidavit ¶ 8) that she and Alvin lived in the building in December 1999 and throughout the period of work on the building. Yet, the 2000 indenture (Jaffee Exhibit 2, at 5th and 6th pages) lists both petitioner and Alvin as residents of 100 Central Park South, Apt 13A.

Furthermore, the parties' submissions indicate that petitioner intended to renovate the building in order to make it an income-producing vehicle rather than a residence. S & A's president states (Albo Answering Affidavit ¶¶ 8-9, 11, 13; Albo Reply affidavit ¶¶ 12-13) that when he agreed to do the renovations, Jaffee told him that the work was being done in order to sell the building. A & Z's president makes the same averments (Glambosky Supplemental Affidavit ¶¶ 7-10). Jaffee has submitted an affidavit in order to "respon[d] to the misleading statements in the affidavits submitted by . . . Albo . . . and . . . Glambosky" (Jaffee Reply Affidavit ¶ 2). Interestingly, although Jaffee attempts to refute the lienors' contentions that the building was used for commercial purposes and that the renovation done was so extensive as to

constitute a new building, she does not deny telling the lienors that the building was to be sold after their work was finished. Petitioner herself (Supplemental Affidavit ¶ 10) does not deny that the lienors were told the building was to be sold; her response is only the ambivalent, "I have not yet decided what to do with the Premises There is no contract to sell the Premises, and the Premises are not now on the market." This does not satisfy the "residence" requirement. "Should the [building] not be p[etitioner]'s residence, the [home improvement] contract . . . would be enforceable despite [respondents'] lack of license, because no license is required . . . where the work is not for a . . . residence." Ayres v. Dunhill Interiors, Ltd., 138 AD2d 303, 305 (1st Dept 1988).

Conclusion

In the final analysis, two factors convince this Court that the statute does not apply. First, the instant property appears, in its post-conflagration state, to have been more of an investment property than a "home." Second, and perhaps more importantly, the contractors did not have actual or constructive notice that they were working on a "home." A contractor cannot close its eyes to reality, cannot plead ignorance of the function of a house. But when a contractor contracts (Moving Exhibit 1) with an "estate," the address of which is an "office," whose signature is that of a person who does not purport to live on the premises—indeed, when, obviously, nobody lives on the premises, and the person who appears to have owned the premises is deceased—and periodic payments are made on "estate" checks; and when the contractor testifies,

without clear contradiction, that the contractor was told that the property was being fixed up for investment purposes, application of the statute would not further its purpose and would, apparently, deny due process to the contractor.

Today's decision may be "close." And it should be limited to its express facts. But a contrary decision would punish contractors with a reasonable, good-faith belief that they did not need a license, without any countervailing benefit to the statute's salutary purpose of preventing "sharp practices" within the home improvement business.

Thus, for the reasons set forth herein, the petition is denied and dismissed and the clerk is directed to enter judgment accordingly.

This opinion constitutes the decision and order of the Court.

DATED: August 22, 2001



J.S.C.