

McHugh Divincent Alessi, Inc. v 195 Property Co.

2003 NY Slip Op 30153(U)

February 7, 2003

Supreme Court, New York County

Docket Number: 0104491/2001

Judge: Marilyn Shafer

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

PRESENT: HON. MARILYN SHAFER PART 36
Justice

McHUGH DIVINCENT ALESSI, INC.,

Plaintiff(s),

-against-

195 PROPERTY CO., RESOURCE NEW YORK,
INC., GENSLER ARCHITECTURE DESIGN
and FEDERATED CONTRACTING CORP.,

Defendant(s).

INDEX NO. 104491/01

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

INTERWORKS SYSTEMS, INC.,

Plaintiff,

-against-

195 PROPERTY ASSOCIATES, PETER S.
KALIKOW, 195 PROPERTY CORPORATION,
THE DIME SAVINGS BANK OF NEW YORK,
FEDERATED CONTRACTING CORP., FEDERATED
MECHANICAL CORP., GENSLER ARCHITECTURE
DESIGN, RESOURCE NEW YORK, INC., McHUGH
DIVINCENT ALESSI, INC., and CDL (NEW
YORK) L.L.C.,

Defendants.

INDEX NO. 603915/01

The following papers, numbered 1 to _____ were read on this motion to/for

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that

Defendant in Index No. 104491/01 (Action 1), 195 Property Co.,
and defendants in Index No. 603915/01 (Action 2), 195 Property

Associates, Peter S. Kalikow, and 195 Property Corporation (collectively, the Owners), move, pursuant to CPLR **3212**, for summary judgment in their favor, dismissing the claims and cross claims that seek a judgment against any of the movants or seek to foreclose mechanic's liens asserted against real property known as, and located at, 195 Broadway, New York, New York (the property).

Plaintiff McHugh DiVincent Alessi, Inc. (MDA) cross-moves, pursuant to CPLR **3212**, for summary judgment in its favor against defendant 195 Property Co. foreclosing the mechanic's lien asserted by the plaintiff against the property.

Defendant Federated Contracting Corp. (Federated) cross-moves for partial summary judgment against MDA on the issue of liability with respect to Federated's counterclaim for breach of contract. Federated also cross-moves for partial summary judgment with respect to liability relating to its cross claim for foreclosure of its mechanic's lien against the property.

Defendant Gensler Architecture, Design & Planning P.C. (Gensler) cross-moves, pursuant to CPLR **3212**, for summary judgment on its cross claims in Actions 1 and 2 seeking foreclosure of its mechanic's lien on the property.

Finally, plaintiff in Action 2, Interworks Systems, Inc., has decided to discontinue with prejudice the claims in Action 2, and, by the affirmation of its attorney, David J. Sutton, requests that the court issue an order accordingly.

This matter relates to work commissioned by U.S. Interactive, Inc., a tenant in the building located at 195 Broadway.

U.S. Interactive (the Tenant) entered into a lease with the Owners for the entire 15th and 16th floors at 195 Broadway. U.S. Interactive then hired plaintiff MDA to act as construction supervisor of the work to be done, including infrastructure and distribution upgrades to the heating ventilation and air conditioning (HVAC), electrical, plumbing and fire protection systems throughout the leased space, and the installation of drywall offices, support spaces, flooring, ceilings and woodwork. The contract price for the work was \$5,519,475.00. During the summer of 2000, the Tenant informed MDA of its insolvency and the work was stopped. The Tenant subsequently filed a petition for bankruptcy. The Tenant allegedly failed to pay \$1,922,052.00, which it owed to MDA.

The Tenant also entered into a contract with defendant Gensler to perform architectural services for the project, at a total cost of \$203,000. The Tenant allegedly failed to pay Gensler \$27,946.34.

Defendant Federated was hired by plaintiff MDA to provide and install sprinkler systems and related equipment for the space leased by the Tenant. Federated allegedly completed 93% of the work on the 15th floor and 90% of the work on the 16th floor, when the project was halted by MDA, because MDA was not getting paid by the Tenant. MDA allegedly owes Federated \$46,990.00 for breach of contract.

Finally, defendant Resource New York, Inc. (Resource), which is in the business of furnishing and installing carpeting in

commercial projects, was hired by MDA to furnish materials in connection with the construction project. Resource submitted two invoices to MDA totaling \$155,500.49. On December 3, 2001, this court granted Resource's motion for partial summary judgment for liability on its counterclaim against MDA.

Mechanic's liens have been filed against the property by MDA, Gensler, Federated and Resource for the amounts allegedly owed to each of them.

The Owners move for summary judgment, pursuant to CPLR 3212, dismissing all claims and cross claims against them on the grounds that the liens resulted from work commissioned by the Tenant, and the Owners took no affirmative steps to procure the work or materials on which the mechanic's liens are based, and did not consent to the work to be performed within the meaning of section 3 of the Lien Law. The Owners argue that, under the lease, any work undertaken to equip or decorate the rented space was to be performed by the Tenant, at the Tenant's expense, and that the lease did not require any specific improvements to the space. The Owners also argue that they should not be financially responsible for the work done, relying on Article 14.02 of the lease, which provides that the Tenant, rather than the landlord, is entitled to retain the benefit of much of the improvements to the vacant space. The Owners submit the affidavit of Brian Principe, a registered architect employed by H.J. Kalikow & Co., an entity affiliated with the Owners, who states that, although he reviewed construction plans and work plans submitted by the tenant, his review was

"extremely limited - it was only to ensure that the proposed Tenant Work would not damage or harm the Building or its mechanical, electrical, or other systems." Affidavit of Brian Principe, August 1, 2002, ¶¶ 2 & 10.

In opposition to the Owners' motion and in support of MDA's own cross motion for summary judgment foreclosing on its mechanic's lien, MDA submits the affidavits of Robert DiVincent, one of the principals of MDA; Richard Jantz, Vice President and Director of Operations of Quartararo & Associates (Q & A), the firm hired by the Tenant to be the project supervisor; Joseph Cermele, MDA's project manager for the construction work at the site, who was responsible for overseeing the work and "liasing" with the Tenant and with Q & A; and Brett Weiner, MDA's project supervisor, who was in charge of MDA's day-to-day operations at the site. On the basis of these affidavits, which provide details of its interactions with the Owners on the project, MDA argues that the Owners were aware of all of the proposed work before it was carried out, reviewed the drawings, required that changes be made in the drawings, approved the changes, and supervised the work on a regular basis. According to MDA, some of the work requested, such as changing valves, was requested by MDA because existing valves were old and did not function. MDA also states that the Owners took charge of the area after work was stopped, became the owner of the work, benefitted from the work, and has advertised that the space has "brand new installations" and used the work as the basis for asking for a higher rent for the space. MDA also counters the Owners' reliance

on Section 14.02 of the lease with reference to section 14.01, which states:

All fixtures, equipment, improvements and appurtenances attached to or built into the Demised Premises at the commencement of or during the term of this lease, whether or not by or at the expense of Tenant, shall be and remain a part of the Demised Premises, shall be deemed the property of Landlord and shall not be removed by Tenant, except as hereinafter in this Article expressly provided.

Affirmation of Andre J. Luskin, Exh. V. MDA also notes that the Owners obtained a security deposit from the Tenant in the amount of \$2,845,463.00.

Defendant Federated also opposes the Owners' motion and cross-moves for summary judgment on its mechanic's lien, and on its counterclaim for breach of contract against MDA, arguing that the sprinkler systems installed by Federated are still on the premises and constitute a permanent improvement to the space, to the benefit of the Owners. Federated also argues that Federated relies on, among other things, the depositions of Robert DiVincent and the Owners' experts, Jack Kagan and Robert G. Weiland, concerning the extent of completion of the sprinkler installation and the permanent nature of the work.

Defendant Gensler submits the affidavit of Robert Seitz, a Senior Associate at Gensler, and project manager of the project involving design of the space leased by the Tenant. Gensler argues that, although it was hired by the Tenant, the Owners were aware of, consented to, and approved the architectural work that it did, that Gensler provided the Owners with information throughout the

design process, and that he met with the owner twice to obtain the owner's input and respond to the Owners' concerns and their requests for modifications.

The Owners submit a responsive affidavit of Brian Principe, as well as affidavits of James Sullivan, a former employee of **H.J. Kalikow & Co., LLC**; Robert **G.** Weiland, an architect with the firm of Merritt & Harris, Inc.; Jack M. Kagan, a mechanical engineer and principle of Merritt & Harris; and Arthur Rosenbloom, a licensed real estate broker and Vice President and Chairman of Newmark & Company Real Estate, Inc.; who contend that, although the Owners have sought to rent the space advertising "brand new installations," the advertisement is a marketing tool and does not establish that the Owners consented to the work, or that it will in fact even benefit from the work that was done. According to Weiland, who visited the space, the renovation work was not completed, the planned improvements were made for the specifications of the Tenant, which was in the high tech industry, and would not necessarily be useful to a normal commercial tenant, and did not necessarily add to the base value of the building. Similarly, Kagan states that the plumbing and **HVAC** work was not complete, would not necessarily be used by a new tenant in their current locations, and therefore would have to be moved at substantial cost. Finally, Rosenbloom states that in the current economy, there are few high-tech tenants such as the Tenant, and that it is likely that a new tenant would want the work that was done demolished, before it occupied the space.

Pursuant to section 3 of the Lien Law, a contractor or subcontractor "who performs labor or furnishes materials for the improvement of real property with the consent ... of the owner thereof," shall have a lien on the property for the price or value of the labor. Here, although the Owners do not dispute that they were aware of the work done on the property and permitted it to be carried out, they argue that they did not "consent" to the work, as contemplated by the Lien Law.

It is undisputed that "mere acquiescence" to the work is not enough to establish consent. *GCDM Ironworks, Inc. v GJF Constr. Corp.*, 292 AD2d 495 (2d Dept 2002). This is true even when the owner is aware of the improvements and they could be of "potential benefit" to the owner. *Beudet v Saleh*, 149 AD2d 772 (3d Dept 1989). However, "[w]here the circumstances are such that an owner may be said to have consented so far as the contractor is concerned, the owner is deemed also to have consented to the furnishing of labor and materials to the contractor with the latter's consent." *GCDM Ironworks, Inc. v GJF Constr. Corp.*, 292 AD2d at 496 (citation omitted). For example, where the installations are required and become part of the premises and ultimately inure to the benefit of the Owner, the fact that the Owner is not in privity with the contractor does not vitiate the lien. *Matter of City of New York v New York Iron Works, Inc.*, 292 AD2d 176 (1st Dept 2002).

Here, the affidavits submitted by the parties present sharp conflicts concerning the nature of the Owners' involvement in the approval process and the extent to which the work inures to the benefit of the Owners, and raise sufficient questions of fact to preclude summary judgment with respect to the motions and cross motions addressed to the mechanic's liens.

With respect to that part of Federated's cross motion which seeks partial summary judgment against MDA for liability on its breach of contract cause of action, that situation appears to be comparable to that of MDA and Resource New York, which this court considered in the order of December 3, 2001, granting partial summary judgment as to liability. Therefore, Federated's cross motion will be granted as to the issue of liability on its counter claim against MDA.

Accordingly, it is hereby

ORDERED that the request of plaintiff Interworks Systems, Inc., in Index No. 603915/01 to discontinue the action with prejudice is granted and the case is dismissed; and it is further

ORDERED that the motion of defendants 195 Property Associates, Peter S. Kalikow, and 195 Property Corporation in Index No. 603915/01 dismissing the claims and cross claims against them is denied as moot; and it is further

ORDERED that the motion of defendant 195 Property Co. in Index No. 104491/01 for summary judgment dismissing the various mechanic's liens is denied; and it is further

ORDERED that the cross motion of plaintiff McHugh DiVincent Alessi, Inc. in Index No. 104491/01 for summary judgment foreclosing its mechanic's lien is denied; and it is further

ORDERED that the branch of defendant Federated Contracting Corp.'s cross motion for summary judgment in Index No. 104491/01 foreclosing its mechanic's lien is denied, and the branch of its cross motion seeking partial summary judgment for liability on its counter claim for breach of contract against McHugh DiVincent Alessi, Inc. is granted; and it is further

ORDERED that defendant Gensler Architecture, Design & Planning P.C.'s cross motion for summary judgment in Index No. 104491/01 foreclosing its mechanic's lien is denied.

Dated: 2/7/07

MARILYN SPAFER
J.S.C.
J.S.C.

Check one: [] FINAL DISPOSITION [X] NON-FINAL DISPOSITION