

**Matter of Informart New York LLC v Hugh O'Kane
Elec. Co. LLC**

2003 NY Slip Op 30231(U)

January 6, 2003

Supreme Court, New York County

Docket Number: 117964/2002

Judge: Emily Jane Goodman

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

PRESENT: **EMILY JANE GOODMAN**

Justice

PART 17

IN Formant New York LLC, INDEX NO.

1/17/04/02

MOTION DATE

02/1

MOTION SEQ. N^o

Hugh O'Kane Electric Co.

MOTION CAL. NO.

The following papers, numbered 1 [redacted] are read on this motion to for

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits

Answering Affidavits —

Replying Affidavits

SCANNED
JAN 22 2003

Cross-Motion: Yes **NO**

Upon the foregoing papers, it is ordered that this motion

**THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION**

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE _____

Dated: _____

1/6/03

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

J.S.C.

EMILY JANE GOODMAN

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

-----X

In the Matter of the Application of

INFOMART NEW YORK LLC,

Petitioner.

- against -

Index No.: 117964/2002

HUGH O’KANE ELECTRIC CO. LLC,

Respondent.

..... X

EMILY GOODMAN, J.

This petition arises out of a larger dispute among various contractors, subcontractors, and other laborers and materialmen seeking to recover payment from petitioner infomart new york, llc (“Infomart”), for unpaid work done at a property located at 636 Eleventh Avenue, New York, New York 10036 (the “Premises”), at the request of Infomart’s former tenant, Globalcenter Inc.¹ In this proceeding, and in other related proceedings, Infomart is attempting to vacate and discharge the notices of lien filed against the Premises, on the grounds of alleged non-compliance with the Lien Law. Here, pursuant to Lien Law § 11, Infomart petitions for an order vacating and canceling a mechanic’s lien filed by respondent Hugh O’Kane Electric Co., LLC (“HOK’), in the amount of \$28,075.11, on the ground of defective service.

¹ Globalcenter Inc. is currently in bankruptcy.

Discussion

Lien Law § 11 provides that, “within five days before or thirty days after filing the notice of lien, the lienor shall serve a copy of such notice upon the owner,” and if the owner is a corporation,

“service shall be made (i) by delivering such copy to and leaving the same with the president, vice-president, secretary or clerk to the corporation, the cashier, treasurer or a director or managing agent thereof, personally, within the state, or (ii) if such officer cannot be found within the state by affixing a copy thereof conspicuously on such property between the hours of nine o’clock in the forenoon and four o’clock in the afternoon, or (iii) by registered or certified mail addressed to its last known place of business”

(Lien Law § 11). “[T]he current provisions of Lien Law § 11 do not require an attempt at personal service of the mechanic’s lien, before resorting to service by registered or certified mail addressed to the corporation’s last known address” (L&J Plumbing & Heating Co. v Gateway Demolition Corp., 176 Misc 2d 277,278 [Sup Ct, Queens County 1998]).

Here, Infomart claims that it was not served with, nor received, a copy of the lien notice. HOK maintains that service was made by certified mail to Infomart’s last known place of business. According to the affidavit of service, a copy of the lien notice was sent to Infomart on October 26, 2001, via certified mail, at “c/o 841 SEVENTH AVE. CORP. at 636 11th Avenue, #700, New York, **NY** 10036” (Verified Petition, Ex B). However, Infomart claims that it does not maintain an office in # 700 at the premises, and that it is not affiliated with 841 Seventh Ave. Corp.

HOK argues that petitioner's only business address known to it was the address where the lien notice was served. HOK submits a copy of a LEXIS search of property records reflecting Infomart's address as "c/o 841 SEVENTH AVE CORP., 636 11TH AVE # 700, NEW YORK, NY 10036-2010" (Verified Answer, Ex A). It also submits a copy of a City of New York real property tax bill, dated September 11, 2002, listing Infomart's address as "636 11TH AVE RM 700, NEW YORK, NY 10036-2010" (*id.*, Ex B).

In reply, Infomart argues that the LEXIS search is unreliable. It further contends that had HOK consulted the telephone book, or mortgage or UCC filings, it would have discovered addresses of "636 11 Av @ W 47," "636 Eleventh Ave" and "636 Eleventh Avenue, New York, NY 10036" (*see* Abelman Aff., Exs B-E). Moreover, because its designated agent for service of process is CT Corporation System, which is located elsewhere (*id.* ¶ 13, Ex G), Infomart argues that service is defective, citing Tadir Air, Inc. v FGH Realty, Inc. (297 AD2d 230 [1st Dept 2002]). Infomart assumes that HOK mistakenly mailed a copy of the lien notice to its mortgagee, 636 Eleventh Ave. Realty Co., whose former address was "c/o 841 Seventh Ave. Corp., 636 Eleventh Ave. Room 700, New York, NY 10036." That corporation, allegedly an occupant of Room 700 for many years prior to April 2000, submits an affidavit stating that it had never shared an office with Infomart (Stern Reply Aff. ¶¶ 4-6).

Although LEXIS expressly disclaims the "accuracy, completeness, adequacy, and

currency” of its content (*see* Abelman Reply Aff., Ex A), Infomart does not dispute the validity of its address as reflected on the New York City tax bill (indicating the address of 636 11th AVE RM 700, NEW YORK, **NY** 10036-2010). The Court finds that HOK properly relied on this public document for Infomart’s last known address (*cf.* Follum v Commr. of Internal Revenue, 128 F3d 118, 119 [2d Cir 1997] [“the address shown on the taxpayer’s most recently filed return is his last known address unless the taxpayer has sent a notice of change of address”]). Infomart’s argument that it never shared an office with 636 Eleventh Ave. Realty Co. is irrelevant because the law draws a distinction between one’s “last known” address and one’s “actual” address (*see* Feinstein v Bergner, 48 NY2d 234,241 [1979] [service was defective because it was affixed to defendant’s last known residence rather than his actual dwelling place or usual place of abode, as required under CPLR 308 (4)]). Contrary to Infomart’s arguments, mail sent to a “last known” address does not require proof that the recipient is actually there (*see* Parks v Steinbrenner, 115 AD2d 395, 396-397 [1st Dept 1985] [partner’s address listed in a business certificate on file with County Clerk is the last known residence, even though partner claimed he resided elsewhere]; Saralloyd CC v Mitchell DD, 197 AD2d 304 [3d Dept 1994] [under former service provisions of Family Court Act, which required service to last known address, it was irrelevant whether the person served resided at the address]; Porta v Otis Glazebrook Assoc.. Inc., 81 AD2d 710 [3d Dept 1981] [notice of cancellation, sent to last known place of business, as required under Workers’ Compensation Law, was validly

mailed, even though insurance agency requesting cancellation of the policy was aware that the employer's president was living elsewhere)).

Accordingly, the sole issue is whether the inclusion of "c/o 841 Seventh Ave. Corp." in the mailing address rendered service defective. Not every mistake made to a last known mailing address renders service defective. In Brownell v Feingold (82 AD2d 844 [2d Dept 1981]), plaintiff mailed a copy of the summons and complaint to defendant's last known residence at 29 Frankie Lane, Bethpage, NY 11714, but defendant's correct address was 29 Frankie Lane, Old Bethpage, NY 11804. The court sustained service of process, stating:

"we cannot agree with the defendant's suggestion that any mistake in the address to which the summons is mailed -- no matter how minor -- will render the service of process void. Where, despite an error in the address, it is virtually certain that the summons will arrive at the defendant's last known residence, the 'mailing' requirement of 'delivery and mail' service should be considered satisfied"

(~~id.~~ at 844; accord Taft v Lesko, 182 AD2d 1008 [3d Dept 1992]).

Federal courts have adopted similar reasoning in cases involving mail erroneously addressed in care of another (see Hoffenberg v Commr. of Internal Revenue, 905 F2d 665 [2d Cir 1990]; Rabb v Kaye, 1994 WL 330161; 1994 US Dist LEXIS 9162 [SD NY, July 7, 1994]). In Hoffenberg, the court rejected the petitioner's contention that the Commissioner did not use the proper address in a tax deficiency notice because the Commissioner addressed the notice in care of another. The court noted that, according to postal regulations, "the addition of a 'care of' line does not constitute a defect in the

address, but merely adds a person at that address who may claim the mail” (Hoffenberg, 905 F2d at 666).² In Rabb, plaintiff’s process server mailed a copy of the complaint to defendant, in care of a company not affiliated with defendant, but the address was otherwise correct. The court held that service was proper, stating, “[t]he fact that the process server identified Mr. Kaye’s address as c/o L.B. Kaye International is not important” (Rabb, 1994 WL 330161, * 1; 1994 US Dist LEXIS, * 2).

Accordingly, in this case, the addition of “c/o 841 Seventh Ave Corp.” is not a fatal defect where the lien notice was mailed to the street address, room number, and ZIP code as reflected on Infomart’s property tax bill. Tadir Air, Inc., *supra*, does not dictate a contrary result. There, in an action seeking foreclosure of a mechanic’s lien, the issue was whether service of a summons and complaint was validly made upon a corporation through an agent pursuant to CPLR §3 11 (a) (1). Because the affidavit of service of the summons and complaint was not included in the record, the court looked to the affidavit of service of the notice of lien, which reflected service on “FGH, c/o Cushman & Wakefield, 90 West Street, Room 612, New York, NY.” The court found that service was inadequate because it was made at Cushman & Wakefield’s office, and the plaintiff did not dispute that Cushman & Wakefield was not an agent authorized to receive process. Here, HOK is not claiming that 841 Seventh Ave. Corp. is an agent authorized

²See 39 CFR 211.2(a) (2) (“The regulations of the Postal Service consist of: * * * [t]he Domestic Mail Manual, the Postal Operations Manual”).

by appointment or law to receive process under CPLR §311 (a) (1). More importantly, the court expressly declined to decide whether the plaintiff had failed to comply with the service provisions of the Lien Law (Tadir Air. Inc., 297 AD2d at 231).


Accordingly, it is

ADJUDGED that the petition is denied and the proceeding is dismissed.

This constitutes the Decision and Judgment of the Court.

Dated: January 6, 2003

ENTER:



J.S.C.
EMILY JANE GOODMAN