

Matros Automated Electrical Const. Corp. v Libman
2005 NY Slip Op 30211(U)
November 21, 2005
Supreme Court, New York County
Docket Number: 0121971/2003
Judge: Barbara Kapnick
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. **BARBARA R. KAPNICK**

PART 12

Justice

MATROS

INDEX NO. 121971/03
~~19107/03~~

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -
LIBMAN, KENNETH et al.

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion and cross-motion
are decided in accordance with
the accompanying memorandum
decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO

JUSTICE

J.S.C.

DATED: _____

Dated: 11/21/05

Check one: FINAL DISPOSITION

[Signature]
BARBARA R. KAPNICK J.S.C.
 NON-FINAL DISPOSITION

FILED
NOV 28 2005
NEW YORK
COUNTY CLERK'S OFFICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 12

-----X
MATROS AUTOMATED ELECTRICAL CONST. CORP.,
CENTRAL LATHING, LLC., METRO INTERIOR
DISTRIBUTORS CORP., and all those
situated,

121971/03

DECISION/ORDER
Index No. ~~119107/03~~
Motion Seq. No. 001

Plaintiffs,

- against -

KENNETH LIBMAN, LWC INC., d/b/a LWC
CONSTRUCTION, 230 PARK INVESTORS, LLC.,
TOKIO MARINE MANAGEMENT, INC., NASTASI
WHITE, INC., "John" WOLF and "WILLIAM"
COUPLES, said names "JOHN" AND "WILLIAM"
being fictitious and used to designate
officers, directors and principals of
LWC, Inc., who are fiduciaries of Trust
Funds under Article 3-A, Lien Law, and
"JOHN DOE NO. 1" through "JOHN DOE NO. 10",
said names being fictitious and intended
to designate the class of unknown persons
or entities who have claims under
Article 3-A, Lien Law, against LWC, Inc.,
KENNETH LIBMAN, "JOHN" WOLF, and "WILLIAM"
COUPLES" as fiduciaries of trust funds,

Defendants.

-----X
BARBARA R. KAPNICK, J.:

FILED

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Plaintiffs' Complaint in this action seeks, inter alia, to enforce a trust created pursuant to Article 3-A of the Lien Law when LWC Construction ("LWC") and its principal, defendant Kenneth Libman, received funds in connection with the improvement of the property located at 230 Park Avenue, New York, New York ("the building") and allegedly applied the funds to purposes other than those permitted under section 77 of the Lien Law. The Complaint also asserts claims arising out of six other construction projects.

The building is owned by defendant 230 Park Investors, LLC ("230 Park"). The second and third floors of the building are occupied by defendant Tokio Marine Management, Inc. ("Tokio Marine").

LWC, a construction company that leased space in the building for its corporate headquarters, served as the general contractor for the project.

Plaintiff Matros Automated Electrical Constr. Corp. ("Matros"), a subcontractor hired by LWC, claims that it is owed \$100,724.14 for improvements made to the property, as well as an additional \$16,898.56 for its work on the second and third floors.

Plaintiff Central Lathing, LLC ("Central"), which was hired by defendant Nastasi White, Inc. ("Nastasi"), a subcontractor to defendant LWC, claims that it is owed \$32,576.00 for improvements it made to Tokio's premises.

Plaintiff Metro Interior Distributors Corp. ("Metro") claims that it is owed \$70,682.15 for materials it supplied to defendant Nastasi in connection with improvements to Tokio Marine's premises.

Plaintiffs Matros, Central, and Metro now move pursuant to CPLR § 902 for an order allowing this action to proceed as a class

action to include all claims arising out of work performed by subcontractors and/or materialmen to LWC.¹

Defendants 230 Park and Tokio Marine oppose the motion and cross-move for summary judgment dismissing plaintiffs' claims against them (namely, the third, sixth, ninth and twelfth causes of action) and vacating, dismissing and cancelling each of plaintiffs' mechanic's liens against the building which were filed in the New York County Clerk's office on or about March 10, March 17, and March 24, 2003.

Cross-motion

Pursuant to Lien Law § 4(1), "[i]f labor is performed for, or materials furnished to, a contractor or subcontractor for an improvement, the lien shall not be for a sum greater than the sum earned and unpaid on the contract at the time of filing the notice of lien, and any sum subsequently earned thereon."

The "subcontractor bears the burden of demonstrating that there is money due and owing to the general contractor from the owner based on the primary contract (citations omitted)." Timothy Coffey Nursery/Landscape, Inc. v. Gatz, 304 A.D.2d 652, 654 (2nd

¹ Defendant Nastasi submitted an Affidavit in Support of plaintiffs' motion to the extent that it is granted only as against LWC and not as against Nastasi.

Dep't 2003). See also, 104 Contractors, Inc. v. R.T. Golf Assocs., L.P., 270 A.D.2d 817 (4th Dep't 2000).

In the instant case, the documentary evidence demonstrates that the owner, 230 Park, paid all sums it owed to the contractor, LWC, before any of the liens were filed. Thus, no money was due and owing to LWC from 230 Park at the time of filing of the notices of lien.²

Plaintiffs argue that the liens were nonetheless properly filed because LWC was not merely a general contractor but also a tenant in the building. They argue that a lien attaches when improvements to a property are made by a tenant "with the consent" of the owner (see, Osborne v. McGowan, 1 A.D.2d 924, 925 [3rd Dep't 1956]) and there is no dispute that LWC made improvements to the 3rd floor East Annex space which it rented from 230 Park.

Article 4.01 (b) of the Lease provides, in relevant part, that:

[a]s a material inducement for Landlord to enter this lease, ... at Tenant's sole cost and expense, Tenant agrees to promptly perform, at a minimum, sufficient

² By Decision/Orders dated September 27, 2004 (as amended by Stipulation dated November 3, 2004), this Court made the same finding in two related actions, Resource New York, Inc. v. LWC Construction Group, Inc., Index Nos. 119107/03 and 119108/03, which were brought against the same defendants to foreclose on a mechanic's lien asserted against the same property on March 13, 2003.

Tenant's Work so as to completely build out the Demised Premises to a first class office installation comparable to other first class offices in the Building

The Lease also provides that all work that LWC required for its leased space (Tenant's Work) "shall be completed ... at Tenant's sole cost and expense," but that, notwithstanding that provision, 230 Park would pay LWC \$125,000 in "Construction Reimbursement." By Lease amendment dated October 10, 2001, the Construction Reimbursement amount was increased to \$720,880, and LWC agreed to perform Additional Tenant's Work, which had originally been a portion of Landlord's Work under the Lease, for a payment of \$137,500 in Additional Construction Reimbursement.

While plaintiffs contend that LWC leased the entire third floor, and that plaintiffs' work was performed solely in the space leased by LWC, the Lease in fact provides that the demised premises thereunder consist of "the entire third (3rd) floor East Annex of the Building". Moreover, while LCW did perform work in its own leased space, it also performed work in the second and third floor West Annex space that was to be occupied by Tokio Marine. LWC was, therefore, a "contractor" within the meaning of Lien Law § 2 (9); namely "a person who enters into a contract with the owner of real property for the improvement thereof" The mere fact that LWC also entered into a lease with 230 Park as its tenant, and that the parties to the Lease chose to characterize 230 Park's payments for LWC's construction work in the demised premises as

"Reimbursements", does not alter LWC's primary status as the general "contractor" at the Building who was paid in full for its work prior to the filing of the liens.

Thus, this Court finds that the cross-motion must be granted and the liens vacated pursuant to Lien Law § 4(1).

Motion

Lien Law § 77 (1) provides, in relevant part, that:

A trust arising under this article may be enforced by the holder of any trust claim ... in a representative action brought for the benefit of all beneficiaries of the trust. ... In any such action ... the practice, pleadings, forms and procedure shall conform as nearly as may be to the practice, pleadings, forms and procedure in a class action as provided in article nine of the civil practice law and rules[.]

It is has been repeatedly held that:

[a] party seeking class action certification in the context of an action pursuant to Lien Law article 3-A must establish that: (1) there are questions of law or fact common to the class which predominate over any questions affecting only individual members, (2) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (3) the representative parties will fairly and adequately protect the interests of the class (citations omitted).

Yonkers Contr. Co., Inc. v. Romano Enterprises of New York, Inc.,
304 A.D.2d 657, 658 (2nd Dep't 2003).

Plaintiffs have submitted an attorney's affirmation arguing that the required conditions have been met. However,

"[a] class action certification must be founded upon an evidentiary basis" (Yonkers Contracting Co., Inc., supra at 658) and may not be granted "solely on the basis of the pleadings and the affidavit by plaintiff's counsel which contain conclusory allegations that the requirements are met (citation omitted)." (Chimenti v. American Express Co., 97 A.D.2d 351, 352 [1st Dep't 1983], app. dismiss'd, 61 N.Y.2d 669 [1983]; see also, Rallis v. City of New York, 3 A.D.3d 525 [2nd Dep't 2004]).

Moreover, it appears that there is a lack of unanimity among the proposed class members and that the claims do not present common questions of law and fact since they involve different construction projects, financing owners, leasehold interests, sub-contractors, secondary sub-contractors and suppliers.

Accordingly, it is hereby

ORDERED that plaintiffs' motion for an order allowing this action to proceed as a class action is denied; and it is further

ORDERED that the cross-motion is granted, and the Clerk may enter judgment dismissing plaintiffs' Complaint (namely, the third, sixth, ninth and twelfth causes of action) against defendants 230 Park Investors, LLC and Tokio Marine Management, Inc. only; and it is further

ORDERED that each of plaintiffs' mechanic's liens filed against the building at 230 Park Ave. in the New York County Clerk's office on March 10, 17, and 24 2003 be vacated and cancelled; and it is further

ORDERED that plaintiffs' remaining claims are severed and continued.

This constitutes the decision and order of this Court.

Dated: November 21, 2005



Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.

FILED
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