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

PRESENT: HON. RICHARD B. LOWE, III PART 57

0117877/2004

D.A.G. FLOORS
vs
ST. PAUL MERCURY INSURANCE

INDEX NO. _____

MOTION DATE 7/19/05

SEQ 1

MOTION SEQ. NO. _____

SUMMARY JUDGMENT

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
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 this motion

FILED

NOV 18 2005

COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 11/7/05

HON. RICHARD B. LOWE, III
J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

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D.A.G. FLOORS, INC.,

Plaintiff,

-against- Index No. 117877/04

ST. PAUL MERCURY INSURANCE CO.,

Defendant.

----------X

RICHARD B. LOWE, III, J.:

In this action, plaintiff D.A.G. Floors, Inc. seeks to recover $197,721.18 on a bond that discharged its mechanic's lien on a public improvement contract. Defendant St. Paul Mercury Insurance Company now moves for summary judgment dismissing the complaint, and for sanctions against plaintiff for commencing and maintaining this allegedly frivolous lawsuit, pursuant to 22 NYCRR § 130-1.1. Plaintiff cross moves for summary judgment, and alternatively, to amend the complaint, pursuant to CPLR 3025 (b), to substitute two sureties, Seaboard Surety Company (Seaboard) and United States Fidelity and Guaranty Company, for defendant.

FACTS

Non-party Santa Fe Construction, Inc. (Santa Fe) was the general contractor on a construction project for the Dormitory Authority of the State of New York (DASNY) at Queens Hospital Center. On September 20, 1999, plaintiff entered into a subcontract with Santa Fe, whereby plaintiff was to provide labor and materials for the project. Seaboard and St. Paul Fire & Marine Insurance Company, as co-sureties, issued a labor and material payment bond in the amount of $19,251,000.

Between April and November 2001, plaintiff performed the labor and furnished the materials under the subcontract. However, Santa Fe failed to pay $343,997.09 to plaintiff. Thereafter, on October 17, 2002, plaintiff commenced an action in Supreme Court, New York County, entitled *D.A.G. Floors, Inc. v Santa Fe Constr., Inc. and St. Paul Mercury Ins. Co.* (Index No. 122696/02). Plaintiff sought to recover the sum due and owing from Santa Fe or from defendant pursuant to the payment bond. The complaint asserted causes of action for breach of contract, account stated, and quantum meruit.

On or about May 7, 2003, plaintiff filed a notice of mechanic's lien with the Chief Financial Officer of DASNY for the sum of $343,997.09. On July 29, 2003, Seaboard issued Bond No. 427099 (the discharge bond) in the amount of $378,396.79, which discharged the mechanic's lien.

Defendant and plaintiff negotiated a partial settlement of the breach of contract action. Defendant agreed to pay $265,000 in consideration for a stipulation of discontinuance of the action and a general release of related claims.

On or about November 24, 2004, plaintiff obtained a judgment against Santa Fe in the amount of $196,721.18. Santa Fe failed to pay any part of the judgment. Plaintiff then demanded payment of the judgment from defendant. Plaintiff commenced this action, on December 22, 2004, seeking full payment of the judgment from defendant pursuant to the discharge bond.

DISCUSSION

Defendant argues, as a first ground for summary judgment, that it is an improper party to this action because it did not issue the discharge bond, and because it is a separate entity from the

surety that did issue the bond, Seaboard.

Seaboard, not defendant, issued the discharge bond "in accordance with Section 21, Subdivision (5) (a) of the Lien Law," with Santa Fe as principal (Weinstock Aff., Exh. 2). While defendant and Seaboard are related entities, both affiliated with The St. Paul Travelers Companies, Inc., they are separate and distinct sureties that are independently authorized by the Superintendent of Insurance of the State of New York to issue surety bonds in New York (Weinstock Aff., ¶ 7). Plaintiff's argument that defendant is, in fact, a proper party, because defendant never advised plaintiff that it was an improper party in the prior action, is hollow. Plaintiff has failed to show that defendant is estopped from asserting this defense, or that any issue of fact exists. Therefore, plaintiff may not recover against defendant under the discharge bond. Although this mandates granting summary judgment in favor of defendant, the court will consider the parties' remaining arguments.

Second, defendant contends that plaintiff released defendant from the claim under the discharge bond. According to defendant, plaintiff is improperly attempting in this action to collect upon a default judgment obtained previously against Santa Fe.

The general release provides, in relevant part, that:

> D.A.G. FLOORS, INC., as Releasor, in consideration of the sum of Two Hundred Sixty-Five Thousand Dollars ($265,000.00) received from ST. PAUL MERCURY INSURANCE CO., as Releasee, and other good and valuable consideration, receipt whereof is hereby acknowledged, releases and discharges ST. PAUL MERCURY INSURANCE CO., the Releasee, . . . from all actions, causes of actions [sic], suits debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever, in law, admiralty or by the reason of any matter, cause or thing whatsoever . . . from the beginning of the world to the day of the date of this Release as such may relate to the claims as set forth in the New York Supreme Court case, *D.A.G. Floors Inc. v Santa*

Fe Construction, Inc. and St. Paul Mercury Insurance Co, bearing index number 122696/02.

(Weinstock Aff., Exh. 4). Plaintiff and defendant further agreed in the release that it would not in any way affect plaintiff's right to pursue claims against Santa Fe or execute any judgment against Santa Fe (*Id.*).

Plaintiff admits that it is attempting to collect the judgment against Santa Fe from defendant, due to Santa Fe's insolvency. Because plaintiff released defendant from any actions, causes of action, and judgments relating to the prior breach of contract action, plaintiff relinquished any claim to recover from defendant under the discharge bond (*see Rocanova v Equitable Life Assur. Soc. of U.S.*, 83 NY2d 603, 616 [1994]; *Matter of Schaefer*, 18 NY2d 314, 317 [1966]; *Coppola v WE Magazine, Inc.*, 268 AD2d 303, 304 [1st Dept 2000]).

Defendant further argues that plaintiff is precluded from recovering under the discharge bond because its mechanic's lien was extinguished as a matter of law, given that plaintiff failed to commence a foreclosure action or file a notice of pendency.

A mechanic's lien filed on a public improvement contract may be discharged by execution of a bond or undertaking in an amount of 110% of such lien (Lien Law § 21 [5]). Upon the filing of a discharge bond, a "shifting" occurs and the lien detaches from its original adherence to appropriated funds and attaches to the substitute, the bond. A surety obligation is then substituted (*see Milliken Bros. v City of New York*, 201 NY 65, 74, *rearg denied* 201 NY 589 [1911]; *Bat-Jac Contr., Inc. v Italia Constr. Co.*, 262 AD2d 314 [2d Dept 1999]; *Outrigger Constr. Co., Inc. v Nostrand Ave. Dev. Corp.*, 217 AD2d 689, 690 [2d Dept 1995]; *Tri-City Elec. Co., Inc. v People*, 96 AD2d 146, 150 [4th Dept 1983], *affd* 63 NY2d 969 [1984]). "The purpose

of [this provision of the Lien Law] is to relieve the contractor and municipality from the embarrassment of the lien without waiting for the result of an action to enforce the lien and without relieving the lienor from the necessity of enforcing his right to a lien and to payment from the fund, in all respects as provided by statute" (*Berger Mfg. Co. v City of New York*, 206 NY 24, 30 [1912]).

To recover on a bond, the plaintiff must still prove the existence of a valid mechanic's lien, since the bond does not acknowledge the validity thereof (*C.S. Behler, Inc. v Daly & Zilch, Inc.*, 277 AD2d 1002, 1003 [4th Dept 2000]; *Outrigger Contr. Co.*, 217 AD2d at 690; *Plattsburgh Quarries, Inc. v Palcon Indus., Inc.*, 111 AD2d 1069, 1071 [3d Dept 1985]). A public improvement lien is valid for one year from the filing of the notice of lien, unless an action to foreclose the lien is commenced and a notice of pendency is filed with the appropriate financial officer within that period, absent an extension of the lien (Lien Law §§ 18, 21 [2]; *CLG, Inc. v BAT-JAC Contr., Inc.*, 230 AD2d 701, 701-702 [2d Dept 1996]; *Tri-City Elec. Co.*, 96 AD2d at 150-151; *Matter of Syracuse Castings Sales Corp.*, 159 Misc 2d 61, 62 [Sup Ct, Monroe County 1993]). "Failure to file a *lis pendens* or obtain an order continuing the lien within the prescribed period is a fatal omission [citations omitted]. Once lapsed, it is not revived by the subsequent action" (*Tri-City Elec. Co.*, 96 AD2d at 151).

Here, plaintiff filed a mechanic's lien on May 7, 2003 with DASNY, which terminated automatically on May 7, 2004, unless a foreclosure action was commenced within that one-year period and a notice of pendency was filed with the Chief Financial Officer of DASNY. Plaintiff concedes that it failed to commence an action to foreclose on the mechanic's lien, that it failed to file a notice of pendency, and that it failed to amend the complaint in the prior action to include a

cause of action to foreclose on the mechanic's lien. Plaintiff does not argue that it obtained an extension of the lien by court order or otherwise.

Plaintiff, however, argues that the failure to commence a foreclosure action and file a notice of pendency is not fatal to its claim under the discharge bond. Plaintiff contends that sections 17 and 54 of the Lien Law specifically allow a plaintiff to recover a personal judgment upon failing to establish the validity of the lien. Relying upon *Sklar & Cohen Woodworking Co., Inc. v Owen* (177 App Div 796 [2d Dept 1917]) and *Scaccia Concrete Corp. v Hartford Fire Ins. Co.* (212 AD2d 225 [2d Dept 1995]), plaintiff argues that the discharge bond is a common-law agreement enforceable according to its terms.

Plaintiff points to the following language in section 17 of the Lien Law, entitled "Duration of lien":

> The failure to file a notice of pendency of action shall not abate the action as to any person liable for the payment of the debt specified in the notice of lien, and the action may be prosecuted to judgment against such person.

However, this section of the Lien Law applies only to private improvement contracts, and not public improvement contracts (*see William Bradley & Son v Henry Huber Co.*, 146 App Div 630, 633 [1st Dept 1911], *affd* 210 NY 627 [1914]; *Belt Painting Corp. v Edward L. Nezelek, Inc.*, 90 AD2d 188, 191 [3d Dept 1982], *appeal denied* 60 NY2d 558 [1983]), as here. Section 18 of the Lien Law is the analogous section for public improvement contracts and does not contain this language.

Section 54 of the Lien Law states:

> If the lienor shall fail, for any reason, to establish a valid lien in an action under the provisions of this article, he may recover judgment therein for such sums as are due him, or which he might recover in an action on a contract, against any party to the action.

Statutory bonds, as opposed to common-law bonds, are those which refer to a statute or employ the statute's terms (*see Scaccia Concrete Corp.*, 212 AD2d at 230, 234; 2-16 Warren's Weed New York Real Property § 16.25). Section 21 (5) of the Lien Law states that a public improvement lien may be discharged by executing an undertaking "conditioned for the payment of any judgement [sic] which may be recovered in an action to enforce the lien."

If the bond expands the statutory "lien shifting" language, the bond may be effective not only to discharge the lien, but also as a common-law agreement enforceable according to its terms (*see Sklar*, 177 App Div at 797 [undertaking did not agree to pay "any judgment which may be rendered against the property for the enforcement of the lien," as required by Lien Law § 19 [4], but agreed to pay "any and all judgments which may be rendered in any action or proceeding to enforce the aforesaid lien"]; *cf. Bat-Jac Contr., Inc.*, 262 AD2d at 314 [payment of any judgment to recover damages for work, labor, and services was not bonded by undertaking, which conditioned payment upon recovery of judgment in action to enforce lien]; *see also Copasso v Apfel*, 214 App Div 638, 639 [2d Dept 1925]).

Here, the discharge bond conditions payment upon "any and all judgments which may be rendered against the proceeds of such contract in favor of said Lienor, its successors, or assigns in any actions or proceedings to enforce said alleged lien." The language of the bond references Lien Law § 21. Under the terms of the bond, the judgment obtained in the prior action was not a judgment "against the proceeds of the contract . . . in any action or proceedings to enforce said alleged lien"; rather, it was obtained against Santa Fe in the prior action alleging breach of contract, account stated, and quantum meruit theories.

Although the Lien Law is to be "construed liberally" and "substantial compliance" is

sufficient in some circumstances (*see* Lien Law § 23), these rules of construction and substantial compliance cannot cure the failure to commence a foreclosure action and file a notice of pendency (*see Kellett's Well Boring, Inc. v City of New York*, 292 AD2d 179, 181 [1st Dept 2002] [commencing action to foreclose public improvement lien without timely filing notice of pendency was fatal defect which invalidated the lien under Lien Law § 18]). As a result, plaintiff has no recourse against the discharge bond.

Plaintiff requests leave to amend its complaint, pursuant to CPLR 3025 (b), to substitute Seaboard and United States Fidelity Guaranty Company, as defendants. While leave to amend is freely granted absent prejudice to the opposing party, a movant must also make some evidentiary showing that the proposed amendment has merit (*see* CPLR 1003, 3025 [b]; *Falmouth Bldg. Corp. v Zottoli*, 189 AD2d 569 [1st Dept 1993]; *Harry Levine Corp. v K. Gimbel Accessories, Inc.*, 41 AD2d 637, 638 [1st Dept 1973]; *Cushman & Wakefield, Inc. v John David, Inc.*, 25 AD2d 133, 135 [1st Dept 1966]). Plaintiff's proposed amendment lacks merit, because the lien expired as a matter of law. Plaintiff, thus, cannot recover under the discharge bond against either surety. Therefore, plaintiff's request to amend the complaint is denied.

Defendant's request for sanctions is denied. Sanctions may be imposed on a party if conduct is, *inter alia*, undertaken primarily to harass another party or if it is "completely without merit in law" (22 NYCRR § 130-1.1 [c] [1], [2]). Plaintiff's commencement and maintenance of this action does not rise to the level of harassing or totally devoid of merit, and therefore is not frivolous.

CONCLUSION and ORDER

Accordingly, it is

ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs, and denied in all other respects; and it is further

ORDERED that plaintiff's cross motion for summary judgment is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: November 7, 2005

ENTER:

HON. RICHARD B. LOWE, III
J.S.C.