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SCANNED ON 10/4/2005

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

PRESENT: HON. MARILYN SHAFER, JSC PART 36

Justice

Masaryk Tower Corp

- v -

John Anastasi

INDEX NO. 115324/04

MOTION DATE

MOTION SEQ. NO. 001

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 decided pursuant to attached rem

Proceeding stayed pending mediation

FILED
OCT - 4 2005
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/26/05

HON. MARILYN SHAFER, JSC

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

----------X

MASARYK TOWER CORPORATION,

Plaintiff,

Index No. 115324/04

- against -

JOHN ANASTASI, ADEDOSU JOSHUA ARCHITECT f/k/a/ Anastasi & Associates, and ZEITLIN & DE CHIARA, LLP,

Defendants.

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SHAFER, J.:

Plaintiff, operator of a cooperative housing complex, commenced this action to vacate a notice of lien. Defendants move to dismiss the complaint, pursuant to CPLR 3211 (a) (7), and for sanctions against plaintiff and its attorney, on the basis of making frivolous claims, pursuant to 22 NYCRR 130-1.1. Plaintiff cross-moves for partial summary judgment.

Defendants consist of John Anastasi, an architect, the architectural firm in which he is a principal, and the law firm representing them. Plaintiff and the architectural firm entered into an agreement (hereinafter, the Agreement) for architectural services for the cooperative. The architects' tasks included drawing up plans and specifications, filing papers with the New York City Department of Housing Preservation and Development (HPD), administering bids for construction, and overseeing construction. The agreement, dated January 2, 2001, divided the services into four stages, and each stage into five phases. The architects would be paid a total of $360,000.

By letter dated November 3, 2003, while the project was ongoing, HPD wrote to plaintiff, stating that Anastasi's professional license had been suspended. The letter stated that Anastasi had informed HPD that because of the suspension he could no longer provide architectural services, nor be a partner in a firm providing such services. The letter went on to say that plaintiff "must contract" with an architect that had no professional relationship with Anastasi to provide the services covered by the Agreement (Notice of cross motion, Ex. A).

HPD's letter does not give a date for the license suspension, but plaintiff alleges that it dates from June 17, 2003. Plaintiff alleges that Anastasi worked from January 1, 2001 to June 17, 2003, for which he was paid $199,921.82. Plaintiff alleges that Anastasi completed all of the first stage of the project, which involved facades and roofs, but only phase one of the second, third, and fourth stages. Plaintiff alleges that Anastasi was overpaid, and that the actual value of his services amounts to $100,000. Anastasi claims that plaintiff owes him more money. To that end, on April 5, 2004, the architectural firm filed a notice of mechanic's lien against the cooperative in the amount of $167,213.20.

By letters dated April 21, 2004 and October 15, 2004, plaintiff wrote to defendant law firm, requesting withdrawal of the lien on the basis that the amount was wrong. The last letter stated that the lien could jeopardize plaintiff's ability to obtain a loan. Plaintiff alleges that the lien caused it various injuries related to obtaining a $1 million bank loan. Plaintiff alleges that it obtained the loan at a higher rate of interest than would have been required if the lien had not existed.

Of the five causes of action in the complaint, the third is against Anastasi and his firm only. The others are against all of the defendants. The first cause of action is based on Lien Law

§ 39, which provides for the voiding of a lien containing a wilful exaggeration of the amount owed. The second cause of action requests damages that plaintiff incurred as a result of the lien, pursuant to Lien Law § 39-a. The third is for unjust enrichment, on the basis that plaintiff paid Anastasi and his firm money that they did not earn. The fourth is for sanctions, pursuant to 22 NYCRR 130-1.1, for refusing to cancel the lien upon plaintiff's request. The fifth is for attorneys' fees incurred in connection with the bank loan and this action, pursuant to Lien Law § 39-a.

I. Cross Motion for Partial Summary Judgment

Plaintiff cross-moves for partial summary judgment on the first, second, fourth, and fifth causes of action, which are related to the lien. As defendants have not answered the complaint, plaintiff's motion is premature (CPLR 3212 [a]). Although moving for summary judgment before issue is joined may be appropriate in some instances (*see TST/Impreso, Inc. v Cosmos Forms, Ltd.*, 202 AD2d 493, 494 [2d Dept 1994]), such is not the case now. Plaintiff's arguments for summary judgment rely on factual matters, such as how long the architects worked and whether plaintiff owes them any more money. Plaintiff does not prove its contentions and, in any event, defendants have a different version of events. Even if the cross motion were not premature, plaintiff's present arguments would not warrant the grant of summary judgment. The cross motion is denied.

II. Motion to Dismiss the Complaint

In considering a motion to dismiss, pursuant to CPLR 3211 (a) (7), the court should "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable

legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "[T]he criterion is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

A. Causes of Action against Defendant Law Firm

Plaintiff claims that the filing of the lien and the refusal to withdraw it upon request constitute actionable conduct on the part of defendants' attorneys. An attorney may be held liable to one that is not a client upon a showing of fraud, collusion, or a malicious or tortious act (*Nicoleau v Brookhaven Mem. Hosp. Ctr.*, 181 AD2d 815, 816 [2d Dept 1992]). The allegations here do not support any such claims. The attorney's duty is to represent his or her client. The attorney is not bound to accept the opponent's view of the case. Here, there appears to be a legitimate disagreement over amounts owed. Plaintiff makes none but conclusory allegations that the attorneys had proof that their clients were wrong. The causes of action against the attorneys are dismissed. If, as plaintiff claims, proof later shows that the lien was frivolously filed, and that the attorneys knew so, plaintiff may move for sanctions against the attorneys, pursuant to 22 NYCRR130-1.1.

B. Causes of Action Related to the Lien

Lien Law §§ 39 and 39-a both begin with the phrase "[i]n any action or proceeding to enforce a mechanic's lien ... ." As defendants correctly state, the statutes provide that a claim to void a lien because of wilful exaggeration may be maintained only where the lienor commences an action to enforce the lien (*Matter of Tully Constr. Co. v United Minerals, Inc.*, 221 AD2d 697, 698 [3d Dept 1995]; *Matter of Upstate Bldrs. Supply Corp. [Maple Knoll Apts.]*, 37 AD2d 901, 902 [4th Dept 1971]). Here, the lienors have not commenced an action to enforce the lien.

Therefore, plaintiff may not maintain a cause of action based on Lien Law § 39. However, if defendants seek to foreclose the lien in their answer to the complaint, plaintiff may present a counterclaim based on Lien Law § 39.

In response to defendants' showing that plaintiff may not maintain a claim based on wilful exaggeration of the lien amount, plaintiff asks that it be allowed to proceed on the theories of fraud, slander of title, abuse of process, and interference with prospective business advantage. Plaintiff claims that the filing of the notice of lien constitutes these torts. Because the inquiry on a CPLR 3211 motion centers on whether the factual allegations discernable from the four corners of the pleadings, taken together, manifest any causes of action cognizable at law (*see Tenzer, Greenblatt, Fallon & Kaplan v Ellenberg*, 199 AD2d 45, 45 [1st Dept 1993]), the court will examine the complaint to see if it contains any of the proposed causes of action.

The elements of a cause of action for fraud are a material misrepresentation of fact, made with knowledge of its falsity, with intent to deceive, justifiable reliance on the misrepresentation by the party claiming that it was deceived, and damages suffered by that party as a result of the reliance (*Desideri v D.M.F.R. Group [USA] Co.*, 230 AD2d 503, 505 [1st Dept 1997]; *Swersky v Dreyer and Traub,* 219 AD2d 321, 326 [1st Dept 1996]). The complaint here does not contain all of the necessary elements. Although the filing of the lien may have injured plaintiff, plaintiff does not allege that it was deceived by the lien. If, as plaintiff alleges, the lien amount is false, plaintiff knew that from the time that the lien was filed. Since there was no deception, there was no reliance on deception, and no damages due to reliance.

Slander of title is a species of injurious falsehood (Restatement [Second] of Torts § 624). Injurious falsehood consists of the publication of a false statement, that is disparaging to the

interests of another, made in the knowledge that it is false or with reckless disregard of its truth or falsity (Restatement [Second] of Torts § 623A). A statement is harmful or disparaging if it casts doubt on the quality of another's land or things, or upon the existence or extent of his ownership in them (Restatement [Second] of Torts § 629). The publication must be made to third persons, and it must be the conduct of the third person, as influenced by the statement, that causes harm to the one about whom the statement is made (Restatement [Second] of Torts §§ 624, 630). The maker of the statement must intend for the statement to disparage the other's interests (Restatement [Second] of Torts § 629). Alternatively, the third person's belief that the statement is disparaging must be reasonable (*id.*).

To be liable for an injurious falsehood, the maker need not intend to influence the conduct of a third person or even have the knowledge that the third person will be influenced (Restatement [Second] of Torts § 623A, Comment *b*). However, the maker must "recognize the likelihood that some third person will act in reliance upon his statement, or that it will otherwise cause harm to the pecuniary interests of the other because of the reliance" (*id.*). Lastly, injurious falsehood is actionable only if it results in a pecuniary loss to another's interests, that is, if it causes special, rather than general, damages (Restatement [Second] of Torts § 623A; *Liberman v Gelstein*, 80 NY2d 429, 434-435 [1992]).

Slander of title is an injurious falsehood that casts doubt on the validity of the complainant's title to real property (*Fink v Shawangunk Conservancy, Inc.*, 15 AD3d 754, 756 [3d Dept 2005]). As the lien does not cast doubt on the validity of plaintiff's title, slander of title is not successfully alleged (*see Hirschhorn v Town of Harrison*, 210 AD2d 587, 588 [3d Dept 1994]; *Carnival Co. v Metro-Goldwyn-Mayer, Inc.*, 23 AD2d 75, 77 [1st Dept 1965]). However,

plaintiff does have a cause of action for another kind of injurious falsehood.

Plaintiff claims that defendants intentionally distorted the lien amount. In fact, plaintiff alleges that it owes defendants nothing at all. A lien is an encumbrance on property. The purpose of filing the lien with the county clerk is to provide notice of the encumbrance to anyone who may be interested (Lien Law § 10; *Matter of Niagara Venture v Sicoli & Massaro, Inc.*, 77 NY2d 175, 181 [1990]). Plaintiff sufficiently alleges that, by filing the lien, defendants published a statement disparaging to plaintiff's interests, and a third party, that is, the bank understood the lien as disparaging to plaintiff's interest in the property.

The next question is whether plaintiff has pleaded special damages, that is, pecuniary loss that results directly and immediately from the effect of the conduct of third persons, as influenced by the disparaging statement (Restatement [Second] of Torts § 633). Pecuniary loss also includes the expense of measures to counteract the statement, including litigation to remove the doubt cast upon the value of the disparaged thing (*id.*). Special damages "do not include any loss resulting from the plaintiff's failure to make an advantageous use of money" that he or she would have had or made if not for the injurious falsehood (Restatement [Second] of Torts 633, Comment *i*). Those are consequential damages (*id.*). In pleading special damages, the complaining party must identify actual losses and causally relate them to the alleged tortious act (*L.W.C. Agency, Inc. v St. Paul Fire & Marine Ins. Co.*, 125 AD2d 371, 373 [2d Dept 1986]). Plaintiff must allege specific and measurable losses (*Freihofer v Hearst Corp.*, 65 NY2d 135, 143 [1985]; *Nu-Life Constr. Corp. v Board of Educ.*, 204 AD2d 106, 108 [1st Dept 1994]).

Allegedly, because of the lien, as a condition of receiving the bank loan, plaintiff had to: 1) borrow additional monies it would not otherwise have had to borrow; 2) deposit in a reserve fund

the full amount of the lien pending elimination of the lien; 3) incur additional legal fees and bank counsel fees; 4) lose the use of $58,000; 5) pay interest expenses on additional monies required to be borrowed; and 6) commence this action.

Items number three, five, and six constitute special damages, as direct economic losses caused by the lien. The other items do not count as special damages. Plaintiff does not explain what the $58,000 is and, in any event, plaintiff may not recover for the loss of use of money.

Plaintiff sufficiently states a cause of action for injurious falsehood.

The elements of abuse of process are regularly issued process, with an intent to do harm without excuse or justification, and use of the process to obtain a collateral objective, outside the legitimate uses of the process (*Curiano v Suozzi*, 63 NY2d 113, 116 [1984]; *Key Bank of N. New York, N.A. v Lake Placid Co.*, 103 AD2d 19, 26 [3d Dept 1984]). The complaining party's allegations must point to an unlawful interference with plaintiff's person or property, after the process is issued (*Curiano*, 63 NY2d at 117).

Plaintiff does not allege that defendants filed the lien for any purpose but to enforce claims for work done on the cooperative, which is proper (*see Key Bank*, 103 AD2d at 27). Nor does plaintiff allege that defendants used the lien in an improper fashion after filing it. Therefore, plaintiff has no claim for abuse of process.

A cause of action for tortious interference with prospective contract requires an allegation that plaintiff would have entered into an economic relationship with a third party but for the defendant's wrongful conduct (*Vigoda v DCA Prod. Plus, Inc.*, 293 AD2d 265, 266 [1st Dept 2002]). Wrongful conduct includes physical violence, fraud, and lawsuits (*American Para Professional Sys., Inc. v Hooper Holmes, Inc.*, 13 AD3d 167, 169 [1st Dept 2004]), which must be

directed at the third party (*Carvel Corp. v Noonan*, 3 NY3d 182, 191 [2004]). In the absence of wrongful conduct directed to the third party, the defendant must have acted with the sole purpose of harming plaintiff (*Lerman v Medical Assoc. of Woodhull, P.C.*, 160 AD2d 838, 839 [2d Dept 1990]).

Plaintiff alleges that it would have entered into a different, more favorable, loan arrangement with the bank, if not for the lien being filed. Plaintiff does not allege that defendants acted with malice, that defendants knew about the prospective loan from the bank, or that they aimed to communicate with the bank in any fashion. Nor does plaintiff allege that defendants acted fraudulently or in any other wrongful manner. Plaintiff does not state a cause of action for tortious interference.

Therefore, plaintiff has a cause of action for injurious falsehood. The court will consider that the complaint has been de facto amended to include that cause of action (*see Rosenbaum v City of New York*, 5 AD3d 154, 154-155 [1st Dept 2004]).

C. Cause of Action for Unjust Enrichment

The third cause of action for unjust enrichment is based on plaintiff's allegation that it overpaid the architects. Defendants allege that the dispute over payment must be handled through mediation and arbitration, pursuant to the Agreement. Under the Agreement, if "any dispute arise[s] with respect to services performed, to be performed or the content of this Agreement, both parties agree to enter into non-binding mediation prior to arbitration ..." (Notice of motion, Ex. A, Agreement, ¶ 7.1). In the next paragraph, the Agreement states "[a]ll claims, disputes and other matters in question between the parties to this Agreement arising out of or relating to this Agreement or the breach thereof, may be decided by arbitration ... unless the parties mutually

agree otherwise" (*id.*, ¶ 7.2).

The interpreter of a contract must read all of its clauses together and give meaning to all (*HSBC Bank USA v National Equity Corp.*, 279 AD2d 251, 253 [1st Dept 2001]). When a contract has seemingly conflicting provisions and they can reasonably be reconciled, the court must do so and give both provisions effect (*id.*; *Isaacs v Westchester Wood Works, Inc.*, 278 AD2d 184, 185 [1st Dept 2000]). In addition, where an inconsistency exists, the more specific contract provision takes precedence over the more general provision (*Bank of Tokyo-Mitsubishi, Ltd., New York Branch v Kvaerner a.s.*, 243 AD2d 1, 8 [1st Dept 1998]).

Paragraph 7.1 of the Agreement concerns disputes over the extent or quality of architectural services. Such disputes seem to be at issue here. Plaintiff argues that the architects did not perform all of the agreed upon services. Defendants' moving affidavit asserts the contrary. In addition, plaintiff appears to argue that, regardless of the work that the architects actually performed, the license suspension prevents them from receiving payment. Paragraph 7.1 applies to the parties' present dispute over services and payment. Paragraph 7.2 applies to disputes that would not arise under paragraph 7.1, though it is not clear what disputes those would be.

Applying the more specific provisions of paragraph 7.1 over the more general provisions of paragraph 7.2, the court concludes that the parties should mediate their dispute over payment and services. If mediation does not succeed, paragraph 7.1 provides that arbitration follows. This is the most reasonable interpretation of the Agreement (*see Abiele Contr., Inc. v New York City School Constr. Auth.*, 91 NY2d 1, 9-10 [1997]).

Plaintiff incorrectly argues that defendant waived mediation and arbitration by filing a

lien. Lien Law § 35 provides that a lien is not a waiver of the right to arbitrate. "The intent of the statute is to permit a subcontractor to protect its lien rights and at the same time pursue arbitration" (*Sommer v Anthony J. Quarant Contr., Inc.*, 40 AD2d 95, 97 [1st Dept 1972]). While an arbitrator's decision as to the value of labor is conclusive as to all parties to the arbitration in any action to foreclose a mechanic's lien, it is not conclusive as to the validity of the lien itself (Lien Law § 35; *Sette-Juliano Contr., Inc./Halcyon Constr. Corp. v Aetna Cas. & Sur. Co.*, 246 AD2d 142, 148 [1st Dept 1998]). Therefore, while the cause of action for unjust enrichment must be dismissed because it must be arbitrated, the rest of plaintiff's claims, which are based on the alleged invalidity of the lien, remain.

Pursuant to CPLR 2201, the court will sua sponte stay this proceeding (*see Halloran v Halloran*, 161 AD2d 562, 564 [2d Dept 1990]; *Pappas v Freund*, 172 Misc 2d 466, 472 [Sup Ct, NY County 1997]). As defendants have made the argument in favor of mediation and/or arbitration, they must apply for it, pursuant to the provisions of the Agreement.

D. Cause of Action for Sanctions

The cause of action seeking sanctions against the architects due to frivolous conduct will not be dismissed. Conduct is frivolous if it: (1) completely lacks legal merit and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) is undertaken primarily to harass or maliciously injure another; or (3) asserts material factual statements that are false (22 NYCRR 130-1.1 [c]). If, as plaintiff alleges, the lien completely lacks legal merit or contains significant falsehoods, sanctions may be appropriate.

The court will not order sanctions against plaintiff, because the complaint is not frivolous.

E. Conclusion

Based on the foregoing, it is

ORDERED that defendants' motion to dismiss the complaint is granted to the extent that:

1. The entire complaint is dismissed in regard to defendants Zeitlin & De Chiara, LLP; and

2. Causes of action one, two, three, and five are dismissed in regard to defendants John Anastasi and Adedosu Joshua Architect f/k/a Anastasi & Associates; and the motion is otherwise denied; and it is further

ORDERED that defendants John Anastasi and Adedosu Joshua Architect f/k/a Anastasi & Associates shall demand mediation; and it is further

ORDERED that this proceeding is stayed, pending mediation.

Dated: Sept 26, 2005

MARILYN SHAFER
J.S.C.

FILED
OCT - 4 2005
COUNTY CLERK'S OFFICE
NEW YORK