

**White v Guerrero**

2005 NY Slip Op 30434(U)

May 17, 2005

Supreme Court, New York County

Docket Number: 29992-2003

Judge: Sandra L. Sgroi

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SUPREME COURT - STATE OF NEW YORK  
SPECIAL TERM, PART 45 SUFFOLK COUNTY

Present:

Hon SANDRA L. SGROI

Mot Seq: 004 MotD  
 005 MotD  
 006 MotD  
 007 MotD  
 008 MotD

Adj. Date: 4-12-2005  
 Return Date: 1-31-2005

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MICHAEL C. WHITE and HAMPTONS  
 STRUCTURAL INC.,

Plaintiffs,

-against-

SALVATORE GUERRERA , JOHN OR  
 MARY DOES 1 -5 and DOE ENTITIES 1-5,  
 Defendants.

Attorney for Plaintiffs  
 Richard Bartel, Esq.  
 Box 5, 179  
 Montauk Highway  
 Remsenburg, NY 11960

Attorney for Defendant  
 Robert J. Zysk, Esq.  
 629 Route 112, Suite 2  
 Patchogue, New York 11772

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Upon the following papers numbered 1 to 89 read on these motions for various relief:  
 Notice of Motion/Order to Show Cause and supporting papers 1-11; Notice of Cross Motions  
 and supporting papers 12-16,17-27,28-32, 33-36,37-74; Answering Affidavits and  
 supporting papers 75-82, 83-89; it is,

**ORDERED** that this motion by the Plaintiffs, Michael C. White and Hamptons Structural Inc., for a preliminary injunction restraining the defendants in this action from transferring or encumbering the premises that is the subject of this action (#004), the cross motion by the Defendant, Salvatore Guerrero, for various relief (#005), the motion by the Defendant, Salvatore Guerrero, to discharge the mechanics lien (#006), the motion by Salvatore Guerrero, for a protective order (#007), and the cross motion by the Plaintiffs for summary judgment and other relief (#008) are decided as follows:

1. If this issue has not been resolved by the Parties by previous agreement, a deposition of

- Salvatore Guerrero shall be held on June 15, 2005 at the Central Islip Courthouse at 9:30 am with a one hour break for lunch and shall continue until 4:30 p.m. of that day and if said deposition is not concluded on June 15, 2005, it shall recommence at the same place on June 16, 2005 at 9:30 am and continue in the same manner as the previous deposition from day to day until it is concluded;
2. The attorneys for the parties are directed to appear at the John P. Cohalan Courthouse Courtroom S23 on June 7, 2005 at 9:30 am for a conference;
  3. The motions for preliminary injunctions are granted only to the extent that the court directs that all of the gross proceeds of the sale be paid into Court and deposited with the County Treasurer with the exception that any transfer tax or other fees owed to municipalities or to the State and the Real Estate Commission to a maximum of Six (6%) Per Cent of the purchase price may be deducted from the gross proceeds and paid to the party to which it is owed prior to the proceeds being deposited into Court;
  4. All other injunctive relief requested is denied;
  5. The Plaintiffs are directed to file an undertaking in the amount of Ten Thousand (\$10,000.00) Dollars within thirty days of service of this order or the injunction shall lapse and become void and a copy of said undertaking shall be served on the attorney for the Defendant within three (3) days of filing the undertaking with the Court or the County Treasurer;
  6. If the real property is sold, a final closing statement listing all disbursements and receipts shall be served on the attorney for the Defendant within two (2) days of the closing;
  7. The Defendant is directed to comply with the directives in the order of this Justice dated January 12, 2005 and immediately permit the Plaintiffs and their experts to inspect the premises both inside and outside unless said inspection has already been conducted;
  8. The motion to vacate the notice of pendency is granted and the notice of pendency covering property described by SCTM # 0900 045.00 01.00 087.007 and filed on December 17, 2003, is vacated and the Defendant may prepare such order as is necessary to permit the Clerk to so discharge the Notice of Pendency;
  9. The request by the Defendant for damages under the lien law and for "disparaging" remarks is denied;
  10. All other relief requested in the motions before this Court not heretofore addressed is denied.

The Plaintiffs herein have commenced an action for breach of contract, unjust enrichment, conversion, and breach of fiduciary duty against the Defendant, Salvatore Guerrero. The Plaintiffs and the Defendant are in the business of purchasing, improving and reselling residential properties for profit. Michael White and Salvatore Guerrero entered into a written joint venture agreement to construct and then sell a single family dwelling on a vacant parcel of real estate owned by Salvatore Guerrero. The vacant parcel was valued at Two Hundred and Eighty Thousand (\$280,000.00) Dollars and the agreement provided that after the improved property was sold and all normal and customary closing costs and legal fees were paid, Guerrero would be reimbursed the sum of Two Hundred and Eighty Thousand (\$280,000.00) Dollars. After this reimbursement of monies to Guerrero, both Guerrero and White would be reimbursed for any monies advanced by them for

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labor and services to improve the property. Thereafter, the parties would distribute equally any remaining monies realized from the sale of the property. In the agreement, it stated that Guerrero “acknowledges that he will hold title for the benefit of the party of the first part and for the party of the second part as equal owners\*\*\*.” The Plaintiff White further alleges that he has invested more than Four Hundred Thousand (\$400,000.00) Dollars in the property and White alleges that now he has been denied access to the premises and that Guerrero is attempting to convey this property to a third person without his consent.

Guerrera alleges that the Plaintiff White has not invested Four Hundred Thousand (\$400,000.00) Dollars in the property, that White abandoned the joint venture and that Guerrero was forced to complete the project and spent more than Three Hundred Twenty Five Thousand (\$325,000.00) to finish construction of the house on the real property. The house, which is located in Southampton is either completed or almost completed and was being marketed for One Million Five-Hundred Thousand (\$1,500,000.00) Dollars. Guerrero now has entered into a contract to sell the house to a third party for One Million Four-Hundred Thousand (\$1,400,000.00) Dollars and Guerrero seeks to close that real estate transaction.

While the lien that was initially filed by White previously was vacated by this Court, it was vacated because although White filed the lien, the work actually was performed by Hamptons Structural Inc. Hamptons Structural Inc. filed a lien for Four Hundred Thousand (\$400,000.00) Dollars and Guerrero has moved as part of this civil action to vacate the mechanics lien of Hamptons Structural Inc. pursuant to Lien Law §§ 20 and 59. While Guerrero has labeled order to show cause #006 with the caption of this civil action, he has attached a petition and apparently attempted to commence a proceeding under the lien law under the civil index number of this action. This is improper and an index number must be purchased for the proceeding and a proper caption should appear on the papers listing Guerrero as the Petitioner and Hamptons Structural Inc. as the Respondent (see *CPLR* § 304). The court however notes that the mechanics lien attached to order to show cause # 006 has a lien attached that indicates that it was filed on December 17, 2003. It does not appear that this lien has been extended and since a lien has only the duration of one year, it would no longer be valid after this order is issued.

Since this action was commenced in 2003, discovery has commenced and Guerrero was deposed on February 9, 2005 at his attorney’s office as part of this process. The deposition lasted approximately three and one half hours and then was adjourned at 1:30 p.m. of that day with the understanding that it would be rescheduled later. The attorney for the Defendant, Robert Zysk, contacted the attorney for the Plaintiffs and provided him with three different days that his client would be available for depositions. Apparently the attorney for the Plaintiffs, Richard Bartel, informed attorney Zysk that he would depose the Defendant on all three dates. This motion for a protective order resulted when Bartel requested that the deposition for Guerrero be scheduled for all three days. Attorney Zysk alleges that it is unnecessary to have three days of deposition testimony of his client and that the request to schedule a deposition for three days is harassment.

This is clearly a case that involves an accounting involving a myriad of transactions and as such also involves voluminous discovery. It is impossible at this time on the basis of this record to determine the reasonable length of a deposition for the parties. The court at the present time has scheduled and ordered the continued deposition of Guerrero at the Courthouse. The parties are directed to cooperate to ensure that the deposition

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be completed within a reasonable time period. There shall be no further adjournments of the compliance conferences scheduled before this Court and the attorneys for the parties are directed to appear on June 7, 2005 at 9:30 am for a conference.

The Plaintiff has moved for a Preliminary injunction restraining the Defendant Guerrero from selling or conveying the premises and for various other relief. This action has been presently pending for a year and a half and the house that the joint venture was formed to build was completed and marketed during that time. It is under contract for sale at One Million Four-Hundred Thousand (\$1,400,000.00) Dollars, and no one has even suggested that this price is improper, insufficient or unreasonable. Additionally, the innocent purchaser has not been noticed with these proceedings.

A preliminary injunction is a drastic remedy which is used sparingly, (see, *McLaughlin, Piven, Vogel, Inc. v. W.J. Nolan & Company, Inc.*, 114 A.D.2d 165, 498 N.Y.S.2d 146, 151 [2d Dept.1986] ) and the movant has the burden of establishing a clear right to this equitable remedy (see, *J.S. Anand Corp. v. Ariel Enterprises*, 148 A.D.2d 496, 538 N.Y.S.2d 840 [2d Dept.1989] ) and must demonstrate (1) a likelihood of success on the merits; (2) irreparable harm absent the granting of the preliminary injunction; and (3) that the balancing of the equities favors the granting of an injunction (see, *CPLR 6301; Di Stefano v. PSFB Associates*, 103 A.D.2d 839, 478 N.Y.S.2d 360 ( 2 Dept., 1984) *appeal dismissed by* 64 N.Y.2d 776, 1985 WL 308137 (1985); *Equestrian Associates v. Freidus*, 192 A.D.2d 572, 573 , 595 N.Y.S.2d 984, 985, ( 2 Dept. 1993) *Preferred Equities Corp. v. Ziegelman*, 155 A.D.2d 424, 426 , 547 N.Y.S.2d 355, 356,(2 Dept. 1989)).

As in *Di Stefano v. PSFB Associates* (supra), the Plaintiffs' claims against the Defendant sound in breach of contract and should they prevail, they could be fully compensated pursuant to the terms of the joint venture by money damages representing a division of the proceeds of the sale of the property after an accounting (see *Haulage Enterprises Corp. v. Hempstead Resources Recovery Corp.*, 74 A.D.2d 863, 426 N.Y.S.2d 52); *IVI Environmental, Inc. v. McGovern*, 269 A.D.2d 497, 707 N.Y.S.2d 107 [2d Dept.2000]

The Court will not halt the sale of the property on the basis of this record. However, the Court will direct that all of the gross proceeds of the sale be paid into Court and deposited with the County Treasurer. The Court has not directed that the net proceeds be paid into Court because the Court is unaware of the settlement costs of this real estate transaction and cannot determine if said settlement costs would be reasonable on the basis of this record. However, the Plaintiff may pay the cost of any and all transfer tax or other fees owed to municipalities or the State, a fee to the attorney representing the seller Guerrero in the amount of THREE THOUSAND (\$3,000.00) DOLLARS (an additional fee for professional services provided by the attorney representing the seller may be permitted by the Court in the future upon proper showing), and the Real Estate Commission to a maximum of Six (6%) Per Cent of the purchase price from the proceeds of the sale of the property. If the property is sold, a final closing statement listing all disbursements and receipts shall be served on the attorney for the Defendant within two (2) days of the closing.

The motion for summary judgment by the Plaintiff must be denied. Depositions have not been completed and both parties dispute the reasonableness of the amount of goods and services that they contributed to the joint

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venture (the construction of the house on the property) thus raising issues of fact (see generally, *Cytron v. Malinowitz*, 1 Misc.3d 907(A), 781 N.Y.S.2d 623, 2003 N.Y. Slip Op. 51555(U) [N.Y.Sup., 2003]).

The Defendant Guerrera has sought an order that the “lis pendens” be vacated. A copy of the notice of pendency is attached to the papers and it appears that one may have been filed with the Clerk on December 17, 2003. CPLR 6501 permits the filing of a notice of pendency only where the action can “affect title to or the possession, use or enjoyment of real property”(CPLR 6501). However, this is a dispute over the share of money and a dispute over the share of money that a party should receive from the sale of property cannot support the filing of a notice of pendency (see, *5303 Realty Corp. v. O & Y Equity Corp.*, 64 N.Y.2d 313, 476 N.E.2d 276, 486 N.Y.S.2d 877(1984); *Savasta v. Duffy*, 257 A.D.2d 435, 683 N.Y.S.2d 511[1st Dep't 1999]). Since no action has been commenced to foreclose a mechanics lien (*Lien Law* § 17) and the action commenced by the Plaintiffs does not support the filing of a notice of pendency, the motion to vacate the notice of pendency is granted.

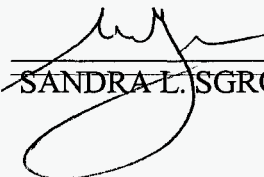
The request by the Defendant for damages under the lien law and for alleged “disparaging” remarks is denied. There is no counterclaim for this relief in the answer and the Defendant has not moved to amend his answer. The Court notes that an attempt to interpose a frivolous claim can result in sanctions.

The relief requested in the order to show cause brought by the Defendant to discharge a mechanics lien (#006) is denied. The Defendant has not properly commenced a proceeding for the relief requested in that order to show cause in this civil action.

The Plaintiff has also moved to extend the mechanics lien but the attorney for the Plaintiff has not clearly identified the lien that is sought to be extended and has not attached a copy of the lien to the papers. The Court cannot ascertain from the motion papers if the mechanics lien has already lapsed and it will therefore not issue an order extending the mechanics lien at this time.

The purpose of this order is to permit the sale of the property to proceed and to preserve the monies from that sale in a fund for the purpose of conducting an accounting between the parties for an equitable division of the monies reflecting the real contributions to the joint venture by the parties.

Dated: May 17, 2005

  
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SANDRA L. SGROI, J. S. C.