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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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WILLIAM SOMERVILLE, INC.,

Index No. 101084-2004

Plaintiff,

DECISION/ORDER

-against-

THE A.J. GROUP, INC., 1114 AVENUE OF THE AMERICAS, LLC and EUROHYPO, et al.,

Defendants.

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HON. CAROL EDMEAD, J.S.C.

MEMORANDUM DECISION

By order to show cause, defendants 1114 Avenue of Americas ("Trizec") and Eurohypo ("Eurohypo")[1] (collectively the "moving defendants") move to discharge the notices of mechanic's liens filed by plaintiff William Somerville, Inc. ("Somerville") and co-defendants, and to dismiss the Second Amended Complaint as to Trizec and Eurohypo. As a result of an in-court conference with all parties, it is understood that two remaining issues are to be determined by the Court on the instant motion: (1) whether the mechanic's liens filed by defendant Europa and plaintiff Somerville are valid;[2] and (2) whether the notices of mechanic's liens filed against the real property owned by Trizec known as 1114 Avenue of the Americas, New York, New York (the "Grace Building") should be discharged based on the failure of any lienor to obtain the

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[1] Defendant 1114 TrizecHahn-Swig, L.L.C. is sued herein as 1114 Avenue of Americas, L.L.C. and defendant Eurohypo AG is sued herein as Eurohypo.

[2] For purposes of this motion, the validity of Europa's mechanic's lien is limited to the issue of whether or not early service of its mechanic's lien filed on August 20, 2003 renders the lien fatally defective.

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affirmative consent of Trizec.[3]

Defendant Trizec is the owner of the Grace Building and lessor of the 29th floor to defendant Eurohypo pursuant to a lease, dated October 29, 2002 ("lease"). In November 2002, Eurohypo hired defendant The A.J. Group, Inc. ("A.J.") as General Contractor to construct new office space for Eurohypo on the 29th Floor (the "project"). The final Contract price, inclusive of change orders and adjustments, was $4,742,049 (the "Contract Sum"). In connection with the project, A.J. hired various subcontractors, who in turn, hired sub-subcontractors from Fall 2002 through Spring 2003. Defendant A.J. submitted its Final Invoice for the project, dated June 16, 2003. It is alleged that defendant A.J. failed to complete the project, and as a result, defendant Eurohypo did not pay A.J. the entire balance set forth in the Final Invoice. At least eleven subcontractors/sub-subcontractors have not been paid sums purportedly due them by A.J. for material and labor provided on the project, resulting in mechanic's liens being filed against the Grace Building.

The moving defendants now argue that the mechanic's liens should be discharged because Trizec never consented to the improvements. Trizec never engaged or contracted with A.J. or any of the subcontractors/sub-subcontractors in connection with the project, or made any requests for work

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[3] The moving defendants' order to show cause also sought the additional relief: (1) pursuant to Lien Law §4, (a) establish and fix Eurohypo's liability under the Lien Law for material and services provided by defendant The A.J. Group, Inc., in the amount of $94,736.00, (b) direct Eurohypo to deposit with the Court $94,736.00 for the benefit of the Mechanic Lienors, and (c) discharge mechanic's liens filed against the Grace Building; or alternatively, (2) discharge the mechanic's liens pursuant to Lien Law §§ 9, 10, 11, 19(3), 19(6), and/or 59; (3) dismiss the Second Amended Verified Complaint and all cross claims and counterclaims as against Eurohypo and Trizec; and (4) discharge the Notice of Pendency filed on September 9, 2004.

to A.J. or any of the subcontractors/sub-subcontractors. Trizec never held itself out as acquiescing in the giving of credit for the benefit of Eurohypo to A.J. or any of the subcontractors/sub-subcontractors in connection with the project. The fact that Trizec permitted Eurohypo, as lessee, to have improvements constructed under its lease and to permit the use of certain contractors/subcontractors does not constitute "owner's consent" to work as required by the Lien Law.

Trizec also relies on a provision in the lease which provides, in pertinent part:

> 11.1.2 Nothing in this Lease shall be deemed or construed in any way as constituting the consent or request of Landlord, express or implied, to any contractor, subcontractor, laborer or materialman for the performance of any labor or the furnishing of labor or materials for the specific improvement, alteration to or repair of the Premises or any part thereof, nor as giving Tenant any right, power or authority to contract for or permit the rendering of any services or the furnishing of any material that would give rise to the filing of any liens against the Land, Building, Premises or any part thereof. Notice is hereby given that Landlord shall not be liable for any work performed or to be performed at the Premises for Tenant or any subtenant, or for any material furnished or to be furnished at the Premises for Tenant or any subtenant upon credit, and that no mechanic's or other lien for such work or material shall attach to or affect the estate or interest of Landlord in and to the Land, Building or Premises.

Thus, it is argued, Trizec's real property, the Grace Building, is not subject to any of the mechanic's liens on record.

Furthermore, Somerville's mechanic's liens should be discharged for the additional reason that Somerville filed its mechanic's lien on July 16, 2004, more than eight months after it provided its last services or furnished its last materials to the project. According to Eurohypo's Legal Director, Larry Candido, Somerville's President advised Candido on November 4, 2003 that Somerville would "put a lien on the job" for $53,732, the identical amount noticed in its mechanic's lien, if Somerville was not paid by November 6, 2003. Therefore, the last date of Somerville's work or materials provided must be before the November 4, 2003 conversation, and

not December 30, 2003 as stated in the mechanic's notice.

Europa's mechanic's lien is also fatally defective for the following reasons: it fails to specify the agreed price and value of the labor allegedly performed or the agreed price and value of the materials allegedly furnished; it fails to specify the amounts allegedly unpaid for labor allegedly performed or materials furnished; the aggregate totals provided do not indicate what portions related to labor or materials; the description of the labor performed and the material furnished inadequately identifies the quantity supplied or which "ceramic, stone and marble" in connection with the project was provided and installed by Europa; and the service and filing of Europa's mechanic's lien violates Lien Law § 11, in that it was not served within "five days before or thirty days after filing."[4]

Blue Diamond and Millwork Design ("Blue/Millwork") opposes the motion, arguing that the moving defendants' interpretation of the Lien Law violates the purposes for which it was intended. The consent required by Lien Law § 3 may be consent as inferred from the terms of the lease. The consent requirement is fulfilled where the owner of the premises gains a benefit from the improvements made, gets the benefit of the improvements at the termination of the lease, or where the owner enters into a lease which requires the Tenant to make improvements to the real

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[4] The moving defendants allege that Europa's mechanic's lien is also fatally defective for the following reasons: it fails to specify the agreed price and value of the labor allegedly performed or the agreed price and value of the materials allegedly furnished; it fails to specify the amounts allegedly unpaid for labor allegedly performed or materials furnished; the aggregate totals provided do not indicate what portions related to labor or materials; the description of the labor performed and the material furnished inadequately identifies the quantity supplied or which "ceramic, stone and marble" in connection with the project was provided and installed by Europa. However, based on an in-court conference with counsel for all parties, the parties were directed to limit the challenge to Europa's mechanic's lien to the issue of lack of consent and timeliness of service of same.

property. Further, consent may be implied, where the owner is informed of intended improvements and knows of the work while it is in progress. The work herein involved substantial renovations to a floor of a large commercial building, and the subject lease contained provisions that allowed the Tenant to perform substantial renovations. Also, permits were filed by the plumber and electrician, which to the knowledge of Blue/Millwork, can only be obtained with Trizec's permission. Also, since freight elevators were used for the work and the use of such elevators is under the direct control of the owners or management, Trizec knew of the extent of the work and approved the work; thus, consent was not only actual, but implied. Further, since the work was tied into the building's mechanical systems and provided a direct benefit to Trizec, the work increased the value of the premises. Any doubt as to Trizec's consent should be resolved by a hearing to explore documents and testimony as to the exact provisions of the lease and permits obtained.

Somerville also opposes the motion, arguing that requiring that subcontractors obtain consent directly from the owner of the property places an improper burden upon them to ensure that contracts among third parties, i.e., the owner and lessee, adequately protect their interest before commencing work on a job, in contravention of the Lien Law. Somerville points out that Trizec does not assert any lack of knowledge of the project, willingly accepted the improvements made to the building without objection to the work, and the fact that Trizec did not hire A.J. or the subcontractors is irrelevant. Further, Trizec failed to provide a copy of the lease in order to determine the extent of Trizec's reversionary interest in the leased premises. Nor is there any indication whether or not Trizec may benefit from increased rents from Eurohypo as a result of the improvements, which would bring Trizec within the purview of the consent requirement under the

Lien Law. Further, the lease cannot take precedence over the Lien Law and it is impermissible for Trizec, by private agreement, to attempt to limit the rights of a lienor who has improved the value of the property. Somerville also contends that discovery is warranted. Furthermore, it is argued that Somerville's mechanic's lien is valid as against Eurohypo's leasehold interest. Pursuant to Lien Law § 2 (3), a mechanic's lien may attach to a leasehold interest in privately owned real estate, which defines "owner" to include the lessee. Somerville properly identified Eurohypo as the lessee when it filed its mechanic's lien on July 16, 2004. Additionally, Somerville's mechanic's lien is timely; Somerville's President states in an affidavit that the last day Somerville did work on the job or supplied materials was on or about December 30, 2003, when Somerville assembled the benches, which to this day are awaiting instructions for delivery because A.J. has refused to pay the outstanding amounts due Somerville. Therefore, Somerville's mechanic's lien is within the eight month statutory time frame.

Europa opposes discharge of its mechanic's lien, arguing that premature service of its mechanic's lien was not a material defect. Europa contends that its mechanic's lien indicates that it was served on August 7, 2003. The date stamp from the County Clerk indicates that the notice of lien was filed on August 20, 2003. Thus, under section 11 of the Lien Law, it appears that Europa's mechanic's lien was served eight days premature. Europa notes that prior to 1966, there was no provision for service of the lien prior to filing. Further, caselaw holds that where the notice is served too early and there is an absence of prejudice suffered as a result of premature service, the prematurely served mechanic's lien is yet valid.

According to Jordan Daniels Electrical Contractors, Inc. ("Jordan Daniels"), Trizec was fully aware of and consented to the work performed by Jordan Daniels, which consent may be

express or implied. Jordan Daniels argues that it in fact received payment directly from Trizec for the labor and materials furnished for the 29th floor of the premises. Jordan Daniels also submits insurance certificates for the project in favor of Trizec. Also submitted is a copy of the New York City Department of Buildings Bureau of Electrical Control application to perform the project, which was signed by William Bailey of Trizec. Thus, at the very least, discovery is necessary, including a copy of the subject lease, to determine whether Trizec consented to the improvements, and a triable issue of fact exists as to Trizec's consent.

Acme Architectural Products, Inc. ("Acme") contends that the doors, frames and hardware it supplied to the premises were taken to the job site via the owner's freight elevators, past the owner's employees. The owner was not an absentee landlord but had employees and agents on the premises. It was Acme's belief that since such deliveries were made to the owner's premises, using the owner's elevators, and for the improvement of the real property, that the materials were being supplied with the owner's consent.

In reply, Trizec contends that it is undisputed that an owner's contract with its general contractor will confer that owner's consent to the subcontractors such that a lien may attach to that owner's interest in the real property; however, the lienors here improperly attempt to convey the consent of the Tenant, Eurohypo, and liability to pay for the work to the owner, Trizec. The issue, it is argued, is whether Trizec required, requested or held itself out as financially responsible for the work being performed by the lienors, and, the evidence demonstrates that Trizec did not require, request or agree to be financially liable to the lienors. Trizec also contends that consent does not equate with a landlord's approval of a tenant's build-out, reiterating that only Eurohypo contracted with A.J., directed and supervised the work, was responsible for paying A.J., received

payment requests from A.J. and expected to benefit from the work.

Trizec also submits, *inter alia*, the lease and an affidavit from Andrew Vander Veen ("Vander Veen"), Trizec's Director of Design and Construction who was responsible for supervising compliance with building policies during Eurohypo's build out of its office space on the 29th floor, and its lease to Eurohypo. Vander Veen states that Trizec contracted with Jordan Daniels separately for certain electrical work that Trizec was obligated to perform as landlord pursuant to the lease, which work was not part of the project at issue. With respect to this separate contract for work, Jordan Daniels invoiced Trizec directly, and Trizec paid Jordan Daniels in full for this work. Further, although Trizec approved certain drawings and specifications relating to the project as required under the lease, it did so for purposes of protecting the structural integrity of the building and building systems and insuring that building operations are not disturbed by Eurohypo's work. And, in the case of the project herein, Trizec permitted A.J. to use the subcontractors selected by A.J. Trizec also requires that all contractors and subcontractors performing work for tenants carry sufficient insurance and insurance certificates to protect Trizec's interests. Eurohypo was fully responsible for the costs and expenses relating to the project, and at no time did Trizec become involved with the billing and invoice activity relating to the project. Further, except for coordinating and scheduling construction efforts, such as the use of the freight elevators, shutting of power or water, being undertaken by tenants, Trizec does not issue any orders or directions to workers, including A.J. or its subcontractors, in connection with tenant work being performed by the tenant. And, Trizec does not receive any direct benefit from build-outs by tenants, such as Eurohypo, since new tenants often require that the rented space be gutted for the new tenant's own purposes, which

makes the space often more difficult to lease than empty space. Nor does Trizec receive any rent increases from the work done by Eurohypo. The moving defendants also contend that the lienors failed to present any evidence to establish an issue of fact as to Trizec's lack of consent.

The moving defendants also insist that service of the notice nearly three times earlier than mandated by the Legislature is fatal, and that Europa also failed to file proof that it served its notice.

Finally, Somerville's second notice of lien filed on July 19, 2004 must be discharged because (1) Somerville failed to file proof of service of such notice pursuant to Lien Law 11, and since this section of the Lien Law is self-executing, Somerville's second notice automatically terminated on August 23, 2004, thirty-five days after it was filed; and (2) Somerville failed to adequately rebut the proof that the work allegedly performed and materials allegedly furnished were completed on or before November 4, 2003, and not December 30, 2003 claimed in Somerville's notice. Also, Somerville's recent claim that the unpaid work relates to custom benches that were assembled on December 30, 2003 but never delivered is belied by the mechanic's lien, which clearly states that the amount unpaid to Somerville for materials manufactured and not delivered is "$ none ." The moving defendants point to additional lease terms indicating that "Alterations" to the Eurohypo's leased space "shall . . . .be made only with the prior written consent of Landlord . . .and . . .not be subject to any lien" and that the Landlord's approval for such alteration "shall create no warranties or duties to Tenant or third parties."

The moving defendants also point out that the purchase order from A.J. to Jordan Daniels indicates that the "subcontractor shall be bound by the same terms and conditions of [A.J.'s] contract with [Eurohypo]" and that Eurohypo's contract with A.J. provides that Eurohypo shall

provide such information as contractor/subcontractor may request that is "necessary and relevant for the Contractor to evaluate, give notice of or enforce mechanic's lien rights. Such information shall include a correct statement of the record legal title to the property on which the Project is located . . .and the Owner's [i.e. Eurohypo's] interest therein." Therefore, Jordan Daniels cannot be heard to say now that it did not know it was dealing with the general contractor of a tenant not directly with the building owner.

Analysis

The Lien Law, section 3, creates the right to a mechanic's lien on real property in favor of a contractor or subcontractor "who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof, or of his agent, contractor or subcontractor." In this context, "consent . . . has a limited application," and consent need not be actual or contractual; it may be implied from the terms of the lease or from the acts of the owner (*Harner v Schecter*, 105 AD2d 932 [3d Dept 1984]; *Backstatter v Berry Hill Bldg. Corp.*, 56 Misc 2d 351 [Supreme Court Nassau County 1968]; *G & H Plumbing and Heating v Kew Management Corp.*, 39 Misc 2d 483 [Civil Court New York County 1963]). The consent contemplated by the statute is not a consent given to the tenant, but a consent given to the materialman (*Tri-North Builders Inc. v Di Donna*, 217 AD2d 886 [3d Dept 1995]; *Paul Mock, Inc. v 118 East 25th St. Realty Co.*, 87 AD2d 756 [1st Dept 1982]); it is a holding out of the owner as acquiescing in the giving of credit which is at the foundation of the right to a lien against the owner of the fee ..." (*Paul Mock, Inc. , supra*). There is a "marked distinction between the passive acquiescence of an owner in that he knows the improvements are being made, improvements which in many cases he has no right to prevent, and his actual and express consent or requirement that the improvement

shall be made. It is the latter that constitutes the consent mentioned in the statute" (*Backstatter v Berry Hill Bldg. Corp., supra*; *see also*, *Eisenson Elec. Serv. Co. v Wien*, 30 Misc 2d 926 [Supreme Court New York County 1961] [stating that mere knowledge that alterations are being made does not imply the consent set forth in the Lien Law]).

However, express consent is not required; consent may be implied from the conduct and attitude of the owner with respect to the improvements (*Dynaire Serv. Corp. v Embassy Terrace, Inc.*, 2 Misc 3d 1012, 784 NYS2d 920 [1st Dept]). Thus, it has been held that "consent" by the owner, as set forth in Lien Law 3, must either by an affirmative factor in procuring such work, or, having possession and control of the premises, assent to the improvements in the expectation that he will reap their benefit (*Paul Mock, Inc. v 118 East 25th St. Realty Co.*, 87 AD2d 756 [1st Dept 1982]; *Dash Contr. Corp. v Slater*, 142 Misc 2d 512; *Eisenson Electric Serv. Co. v Wien*, 30 Misc 2d 926 [Supreme Court New York County 1961]).

The consent of an owner may be implied in situations in which such owner receives direct benefits from the work performed (*see Harner v Schecter*, 105 AD2d 932 [3d Dept 1984]). Thus, where a lease requires that certain improvements or replacements be made, which will ultimately inure to the benefit of the owner by reversion at the end of the term, the owner's consent may be implied (*see Harner v Schecter*, *supra* [consent may be inferred from the terms of the lease and the various types of affirmative conduct of the owner]). An owner's consent may also be implied even where the lease *contemplates* that improvements would be made to the premises, and expressly provides that the resulting benefits would revert to owner upon expiration of the lease term, where other factors (i.e., owner's agent active in procuring services, present on site during work, retained lienor to do other work apart from subject services) demonstrate "consent" (*see*

Harner v Schecter, supra).

With respect to lease provisions expressing an owners lack of consent to improvements by tenants giving rise to a lien, i.e., a provision in a lease between and owner and its lessee merely stating that "(t)he Landlord's permission to make alterations . . .or improvements shall not be construed to be a consent of (the) Landlord to the right of mechanics' liens by materialmen, mechanics, laborers or other persons upon or about the demised premises, the entire liability therefor being assumed by the Tenant", is not necessarily dispositive on the issue of the implied consent of the owner (*In re City of New York*, 292 AD2d 176 [1st Dept 2002], *citing*, *Adler Const. Co., Inc. v County Holding Corp.*, 66 AD2d 789 [2d Dept 1978]). Thus, such a provision, when coupled with the absence of any benefits of such improvement received by the owner, is sufficient to demonstrate the absence of "implied consent" under the Lien Law to support a mechanic's lien, even where owner had knowledge that improvements were being made upon its premises (*see Backstatter v Berry Hill Building Corp.*, 56 Misc 2d 351 [Supreme Court Nassau County 1968] [personal, as opposed to real, property, which was required to be removed at the expiration of the lease term sufficiently showed that owner could not derive any benefit or reversionary interest to support an inference of consent]).

Assuming, arguendo, that the language in the lease expressing owner's lack of consent to work giving rise to any lien caused by work at the request of Eurohypo is binding upon the lienors herein, other factors giving rise to an implied consent are not precluded thereby (*In re City of New York*, 292 AD2d 176 [1st Dept 2002], *citing*, *Adler Const. Co., Inc. v County Holding Corp.*, 66 AD2d 789 [2d Dept 1978]). In this regard, there are sufficient facts in the record to raise an issue of fact as to whether Trizec "consented" to the improvements made by lienors herein as defined

under the Lien Law.

Although the lease herein did not require Eurohypo to make the subject improvements, the limited, conditional reimbursement to Eurohypo for alterations to the premises, the approved list of contractors, and the express references to Eurohypo's need to convert the space to office space, demonstrate that the improvements were clearly contemplated and expected under the lease. In Exhibit B to the lease, entitled "Leasehold Improvements Agreement," Trivec agreed to provide a construction allowance to reimburse Eurohypo for the costs of preparing the premises for Eurohypo's occupancy in the amount not to exceed $1,045,750.00, subject to certain terms and conditions.

Further, it is uncontested that Trizec signed the DOB application and other drawings and specifications concerning the work at issue.[5] The Court notes that Trizec retained one of the lienors to do certain other work on the building apart from the work procured by Eurohypo or A.J. herein (*see Harner, supra*). Therefore, there is an issue of fact as to whether the acts undertaken by Trizec were such that it may be reasonably inferred that Trizec was an active participant in the procurement of the subject work or controlled the premises and assented to the improvements (*see Dash, supra* [owner approved and consented to architectural plans, was on site supervising the work; contractor was required to name owner as beneficiary, and thus, was not a passive party to the renovation work; further, owner would undoubtedly reap benefits from the improvements]).

And, further, there is an issue of fact as to whether Trizec's lease confers a benefit of the

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[5] Jordan Daniels claims that the DOB application (Exh. C) was signed by Trizec's representative, William Bailey. Although such application contains Trizec's owner information, the signature line is blank. The Court notes that the moving defendants do not deny that Mr. Bailey signed such DOB application, and states that Trizec indeed "approved certain drawings, plans and specifications relating to the Project" (Vander Veen Reply Affidavit ¶ 9).

improvements, which are arguably permanent in nature, to Trizec, since the lease provides that the improvements revert back to Trizec at the expiration of the lease (see paragraph 10.1.5 of the lease);[6] and, it is alleged that Trizec received benefits through the work tied to the building's mechanical system. Although Trizec's President attests that the improvements do not benefit Trizec, since Trizec will be required to gut the improvements for any subsequent tenant, such statement simply raises an issue of fact on this point.

As such, it is this Court's opinion that the confluence of a number of independent factors, when taken together, may establish the consent required under said section (*W.J. Northridge Const. Corp. v Star Indus., Inc.*, 190 Misc 2d 256 [N Y Sup App Term 2001] [lease between owner and tenant provided for the alterations/improvements which were to be used to convert warehouse space to office space; lease had attached to it a copy of the blueprints which plaintiff was to use when performing the work for tenant; lease also called for owner to contribute certain sums for these improvements and provided that the permanent improvements became the property of owner at the end of the lease; during the course of the improvements, lienor went to owner's managing agent and obtained her assistance in turning off the sprinkler system so that plaintiff could continue with the work being done in the building]; *Tube Forgings of America, Inc. v Mobil Oil Corp*, 140 AD2d 334 [2d Dept 1988]; *cf. Mock v 118 East 25th Street Realty Co., supra* [lienor never dealt with owner regarding subject improvements; all transactions regarding improvements

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[6] Section 10.1.5 of the lease provides, in pertinent part, that "All Alterations, whether temporary or permanent in character, made or paid for by Landlord or Tenant will, without compensation to Tenant, become Landlord's property upon installation and shall be surrendered to Landlord upon the expiration or earlier termination of the Term . . ." except for Specialty Alternations, which definition includes "Alterations which are not customary for build-outs of tenant of first class office buildings in midtown Manhattan generally and are unusually expensive to demolish or remove."

were between lienor and tenant]; *Eisenson v Wien,* 30 Misc 2d 926 [Supreme Court New York County 1961] [no consent found where landlord had no dealings with lienors, lease warned that nothing therein shall be construed as consent, none of the work performed by lienors can be deemed in the nature of a permanent improvements, no proof of any benefits to anyone other than the sublessee]).

Somerville's Mechanic's Lien

There is an issue of fact as to whether Somerville's mechanic's lien was timely filed. According to the movants, on November 4, 2003, Somerville threatened to "put a lien on the job" if Somerville was not paid by November 6, 2003, indicating that the last date of Somerville's work or materials provided was before November 4, 2003. Somerville's mechanic's lien indicates that the amount unpaid to Somerville for materials manufactured and not delivered is "$ none ." Therefore, it can be argued that all of Somerville's work was completed by and materials provided by Somerville occurred no later than November 4, 2003, rendering the mechanic's lien filed on July 16, 2004, untimely by 12 days. However, Somerville's President states in an affidavit that the last day Somerville did work on the job or supplied materials was on or about December 30, 2003, when Somerville assembled the benches which have yet to be delivered. Although Somerville's President's attestation conflicts with the statement the mechanic's lien, such conflict cannot be resolved on a motion for summary judgment, but must be left to the trier of fact (*see Golden v Coinmach Indus., Inc.*, 273 AD2d 4 [1st Dept 2000]; *Color by Pergament, Inc. v Pergament*, 241 AD2d 418 [1st Dept 1997] [credibility of the parties is not a proper consideration in resolving conflicting evidence on a motion for summary judgment even where the non-moving party's own statements in the record may be in conflict with each other]).

The moving defendants further argue that Somerville failed to file proof of service within 35 days of the filing of the second notice of mechanic's lien (which was filed on July 19, 2004) pursuant to Lien Law 11, and since this section of the Lien Law is self-executing, Somerville's second notice automatically terminated on August 23, 2004, thirty-five days after it was filed. As this argument makes its initial appearance in the moving defendants' reply papers and goes well beyond merely addressing the arguments raised by Somerville in opposition, Somerville has not been afforded the opportunity to respond to this argument. Since consideration of an argument advanced at a time when the opposing party has no opportunity to respond to it is a procedure which the Appellate Division, First Department has consistently condemned, (*Schultz v 400 Coop. Corp.*, 292 AD2d 16, 21, 736 NYS2d 9 [1st Dept 2002]), the court declines to consider the moving defendants' argument in reply claiming the automatic termination of Somerville's mechanic's lien filed on July 19, 2004.

Europa's Mechanic's Lien

It is alleged that the service and filing of Europa's mechanic's lien violates Lien Law § 11, in that it was not served within "five days before or thirty days after filing." Europa argues that premature service of its mechanic's lien was not a material defect.

Europa's mechanic's lien indicates that it was served on August 7, 2003. The date stamp from the County Clerk indicates that the notice of lien was filed on August 20, 2003. Thus, under section 11 of the Lien Law, it appears that Europa's mechanic's lien was served eight days premature. However, that Europa's mechanic's lien was served eight days, instead of the required five days, before it was filed on August 20, 2003, does not render the mechanic's lien defective. Caselaw on this narrow issue holds that where the notice is served too early or and there is an

absence of prejudice suffered as a result of premature service, the prematurely served mechanic's lien is yet valid (*Interstate Home Builders, Inc. v D'Andrea Constr., Inc.*, 2001 NY Slip Op 40515U, *affd*, 306 AD2d 117 [1st Dept 2003]).

In *Interstate*, the lienor served a copy of its notice of mechanic's lien upon the owner six days before filing of the notice of lien with the County Clerk. The Court held that:

> Even though Interstate performed its work prior to July 11, 1996, and, arguably, its notice of lien should be governed by the rule of service upon the owner within the 5 day period before or 30 day period after the notice of lien was filed with the county clerk, the Court rules that Interstate's lien was timely served upon CityHome [the owner]. Such, allowance will not prejudice the Defendants. Furthermore, under New York law, Interstate has demonstrated substantial compliance with the mechanics' lien perfection requirements. Therefore, the Court determines that Interstate's lien was timely served upon CityHome. (*Interstate*, 2001 NY Slip Op 40515U [*11])

The record does not disclose any articulated prejudice suffered by Trizec of the early service of Somerville's mechanic's lien. Accordingly, the service of Europa's mechanic's lien thirteen days before it was filed does not warrant dismissal of such lien under the circumstances.

Based on the foregoing, it is hereby

ORDERED the motion by defendants 1114 Avenue of Americas (Trizec) and Eurohypo to discharge the notices of mechanic's liens filed by plaintiff William Somerville, Inc. and co-defendants, and to dismiss the Second Amended Complaint as to Trizec and Eurohypo, is denied; and it is further

ORDERED that the parties shall appear for a preliminary conference on February 8, 2005, 2:15 p.m. Part 35; and it is further

ORDERED that the moving defendants shall serve a copy of this order with notice of entry within 20 days of entry.

This constitutes the decision and order of the court.

Dated: January 14, 2005

Hon. Carol R. Edmead