

Matter of 49 East 21 LLC v C.H. Schmitt & Co., Inc.

2006 NY Slip Op 30034(U)

September 27, 2006

Supreme Court, New York County

Docket Number: _300601/8212

Judge: Robert D. Lippmann

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

PRESENT: HON. ROBERT D. LIPPMANN

Justice

PART 21

In the Matter of the Application of
49 East 21 LLC,

INDEX NO. 601821/06

Petitioner,
For an Order Discharging Certain Notices Under
Mechanic's Lien Law Filed by:

MOTION DATE _____

MOTION SEQ. NO. _____

- v -

MOTION CAL. NO. _____

C.H. SCHMITT & CO., INC., CONSTRUCTION
PERSONNEL BY GRUS INTERNATIONAL,
DANICA PLUMBING & HEATING, DRAGON
CONTAINER SERVICE, KAYLIM SUPPLIES T/A
GREENHILL IND. SUPPLY, KILROY METAL
PRODUCTS, KING FREEZE MECHANICAL CORP.,
MAKUNA TILE, INC., SEAVIEW MARBLE
RESTORATION, and SERVETECH CORP.,

Respondents-Lienors.

FILED
OCT 05 2006
NEW YORK
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 12 were read on this motion to discharge mechanic's lien.

	<u>PAPERS NUMBERED</u>
Notice of Motion/Order to Show Cause – Affidavits – Exhibits	<u>1,2</u>
Answering Affidavits -- Exhibits _____	<u>3,4,5,6,7,8, 9, 10</u>
Replying Affidavits _____	<u>11, 12</u>

Cross-Motion: Yes No

Upon the fore going papers, petitioner 49 East 21 LLC (LLC) moves, by order to show cause, for an order, pursuant to Lien Law § 19 (6), vacating the Notices Under Mechanic's Lien Law (Notices) filed by respondents-lienors. Respondents-lienors Kaylim Supplies t/a Greenhill Ind. Supply (Kaylim) and Dragon Container Service, Inc. (Dragon) cross-move for an order, pursuant to Lien Law § 12-a (2), amending, nunc pro tunc, the

Notices that they have filed as properly filed against all the block and lots set forth in petitioner's condominium declaration.

With the exception of one parcel of commercial property, of which the LLC has retained ownership, the LLC is the former owner of certain real property located at 49 East 21st Street, in Manhattan (the Property), which it purchased with the intention of creating individual condominium units for resale. The LLC hired non-party Matrix Construction Co., Inc. (Matrix) as the general contractor to create the condominium units. Respondents all claim that they entered into agreements with Matrix, or with one or another of its subcontractors, to furnish labor or materials, and that they have not been fully paid for the labor and materials that they supplied. On July 30, 2004, the New York City Department of Finance, Office of the City Register (City Register) accepted a Declaration Establishing a Plan for Condominium Ownership of the Property (Plan) for filing and recording. Prior to July 30, 2004, the Property was designated by the City Register as Block 850, Lot 33. As a result of the Plan, the City Register created new tax lots for each condominium unit. On the Recording and Endorsement Cover Page of the filing, the City Register continued to designate the Property as Block 850, Lot 33, while designating each single residential condominium unit as Block 850, Lots 1701-1744, respectively. All of the respondents-lienors filed their Notices subsequent to July 30, 2004. Each of the Notices describes the subject property as Block 850, Lot 33. Plaintiff sold at least four condominium units before the first of the subject liens was filed.

Petitioner contends that all of the Notices are invalid, as a matter of law, because they represent either an attempt to create a lien on the common areas of the condominium, without the unanimous consent of the condominium owners, in violation of Real Property Law § 339-1 (1), or an attempt to lien the individual condominium units by filing a lien against the block and lot for the entire Property, in violation of Lien Law § 9 (7).

While the court is sympathetic to a number of the respondents-lienors' arguments, the disposition of this motion is completely governed by Northeast Restoration Corp. v K & J Construction Co., L.P. (304 AD2d 306 [1st Dept 2003]) and Matter of Atlas Tile and Marble Works, Inc. (191 AD2d 247 [1st Dept 1993]). In each of those cases, the Court held that a mechanic's lien that is filed subsequent to the filing of a condominium declaration, and that identifies the property sought to be liened by the single lot number for the entire building, is invalid against any of the individual condominium units, for failure to describe them, and invalid against the common areas, for failure to procure the unanimous consent of the unit owners. That, in each of those cases, the Court referred to the single lot number as "superseded," while, here, the single block number remains in use for certain building-wide purposes, such as amendments to the certificate of occupancy, is of no legal consequence. The fact remains that the subject liens do not describe the individual condominium units, or the commercial space, of which petitioner has retained ownership.

The cross motions to amend must be denied, because Lien Law § 21-a "presupposes the existence of a valid lien and may not be construed to revive an invalid

notice of lien" (Northeast Restoration Corp., 304 AD2d at 307, quoting Matter of Atlas Tile and Marble Works, Inc., 191 AD2d at 248).

Respondents-lienors are not entirely without remedy. In addition to suing Matrix, or its subcontractors, for breach of contract, they may proceed against the trust fund established pursuant to Lien Law § 13 (5). The court recognizes, however, that the amounts of some of the subject liens would make a lawsuit impractical.

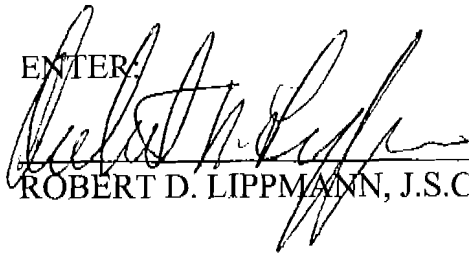
Accordingly, it is hereby

ORDERED that the motion is granted, and the Notices Under Mechanic's Lien Law that respondents-lienors have filed against the property located at 49 East 21st Street, in Manhattan, are vacated; and it is further

ORDERED that the cross motions to amend are denied.

Dated: September 27, 2006

FILED
OCT 05 2006
NEW YORK
COUNTY CLERK'S OFFICE

ENTER:

ROBERT D. LIPPMANN, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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