

Isacowitz v Presidential Towers Residence, Inc.

2006 NY Slip Op 30089(U)

June 20, 2006

Supreme Court, New York County

Docket Number: 0600487/0487

Judge: Kibbie F. Payne

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

PRESENT: KIBBIE F. PAYNE
Justice

PART 4

ALVIN ISACOWITZ d/b/a EXCELLENCE IN PLUMBING,

INDEX NO. 600487/06

Plaintiff,

MOTION DATE 4/24/06

- v -

MOTION SEQ. NO. 001

PRESIDENTIAL TOWERS RESIDENCE, INC., KG
PROPERTIES ASSOCIATES, INC., JEFFREY
SRULOWITZ, NURIT SRULOWITZ and JOHN DOES 1-10,

MOTION CAL. NO. _____

Defendants.

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, defendant KG Properties Associates, Inc. moves pursuant to CPLR 3211 (a) (1) and (a) (7) to dismiss the complaint in this action to foreclose on a mechanic's lien. For the reasons set forth in the attached memorandum, it is ORDERED that this motion is denied.

The foregoing constitutes the decision and order of the court.

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NEW YORK

Dated: June 20, 2006

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 4**

ALVIN ISACOWITZ D/B/A EXCELLENCE IN
PLUMBING,

Index No. 600487/06

Plaintiff,

DECISION & ORDER

-against-

PRESIDENTIAL TOWERS RESIDENCE, INC., KG
PROPERTIES ASSOCIATES, INC., JEFFREY
SRULOWITZ, NURIT SRULOWITZ and JOHN
DOES 1-10,

Defendants.

KIBBIE F. PAYNE, J.:

Plaintiff, a subcontractor, brought this action to foreclose on a mechanic's lien filed on December 7, 2005 against property known as 315 West 70th Street, Apt. 1C and 1D, New York, New York for work it performed on a construction project on such premises. In lieu of an answer, defendant KG Properties Associates, Inc. (KG Properties), the subcontractor on the project, moves pursuant to CPLR 3211 (a) (1) and (a) (7) to dismiss the complaint. Section 3211 (a) (1) governs dismissal of a cause of action based on a defense founded upon documentary evidence, and CPLR 3211 (a) (7) governs such dismissal for legal insufficiency. Despite moving pursuant to these subsections, KG Properties does not provide any documentary evidence to counter plaintiff's allegations that it furnished certain labor and material to

defendants for which it is owed money. Further, KG Properties fails to make any argument that, giving plaintiff the benefit of every possible favorable inference, the complaint fails to state a cause of action (see AG Capital Funding Partners, L.P. v State Street Bank and Trust Co., 5 NY3d 582, 577-578 [2005] [providing that, "when accessing the adequacy of a complaint in light of a CPLR 3211 (a) (7) motion to dismiss, the Court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide" every possible favorable inference to the plaintiff]).

Instead, KG Properties argues that the court should dismiss this proceeding "upon the ground that the mechanic's lien is . . . void" pursuant to Lien Law § 39. Section 39 provides: "In any action . . . to enforce a mechanic's lien . . . or in which the validity of the lien is an issue, if the court shall find that a lienor has wilfully exaggerated the amount for which he claims a lien as stated in his notice of lien, his lien shall be declared to be void and no recovery shall be had thereon"

FILED

(emphasis added). The section 39 remedy of voiding a mechanic's lien, "is available only where the lien is valid in all other respects and is declared void by willful exaggeration after a trail of the foreclosure action" (8-92 Warren's Weed, New York Real Property, Mechanics' Liens § 92.14 [5th ed.]; see also Bowmar, Mechanics' Liens in New York § 3:12 [2005]; Aaron v Great

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Bay Contracting, Inc., 290 AD2d 326, 326 [1st Dept 2002] [stating that the issue of willful exaggeration is one ordinarily "determined at trial of the foreclosure action"). "[T]here can be no summary discharge of a lien [for willful exaggeration], based upon affidavits submitted in support of a motion before trial" (Bowmar, Mechanics' Liens in New York § 3:12).

Accordingly, it is

ORDERED that this motion to dismiss the complaint is denied.

The foregoing constitutes the decision and order of the court.

DATE: June 20, 2006



Hon. Kibbie F. Payne, J.S.C.

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