

**EFCO Corp. v Helena Assoc. LLC**

2007 NY Slip Op 30079(U)

March 6, 2007

Supreme Court, New York County

Docket Number: 0601933

Judge: Judith J. Gische

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SCANNED ON 3/13/2007  
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE  
J.S.C. *Justice*

PART \_\_\_\_\_

Index Number : 601933/2006

EFCO CORPORATION

vs

HELENA ASSOCIATES LLC

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ s motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this ~~motion~~

**FILED**

MAR 13 2007

NEW YORK  
COUNTY CLERK'S OFFICE

motion (s) and cross-motion (s) decided in accordance with the annexed decision/order of even date.

Dated: MAR 06 2007

HON. JUDITH J. GISCHE J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10

-----X

EFCO CORPORATION,

Plaintiff,

-against-

HELENA ASSOCIATES LLC, FOUR PLUS CORPORATION, THE CHASE MANHATTAN BANK N.A. (N/k/a JPMorgan Chase Bank) as Trustee under Article Sixth of the Last Will and Testament of Edgar T. Appleby, JPMORGAN CHASE BANK, Trustee of the Elizabeth Endicott Revocable Trust, WALDO HUTCHINS III and CHEMICAL BANK (n/k/a JPMorgan Chase Bank) as Trustee of a Trust established under the Last Will and Testament established under the Last Will and Testament of Eva Lee Appleby, deceased, NEW YORK STATE HOUSING FINANCE AGENCY, FLEET NATIONAL BANK and DURST DEVELOPMENT,

Defendants.

-----X

**Decision/Order**

Index No.: 601933/06

Seq. No. : 001

Present:

Hon. Judith J. Gische

J.S.C.

**FILED**  
MAR 13 2007  
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Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this (these) motion(s):

<b>Papers</b>	<b>Numbered</b>
Dfdt's motion [sj/mt] w/LJE affirm in support, exhs, memo of law . . . . .	1
Pltf's cross motion [amend/mt] w/HB affirm in support, exhs, memo of law . . . . .	2
Dfdt's reply affd of KK, reply memo of law . . . . .	3

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*Upon the foregoing papers, the decision and order of the court is as follows:*

The underlying action is for breach of payment allegedly due under a contract dated April 18, 2003 between plaintiff EFCO Corporation ("EFCO"), and defendant, Helena Associates, LLC ("Helena"), for labor and materials, provided for the

improvement of a residential tower located at 601 West 57<sup>th</sup> Street, New York, New York (the "Property"). Defendant-movant, Helena, holds a leasehold interest in the Property. Presently before the court is defendant's motion for an order: granting summary judgment, summarily discharging of record EFCO's lien, and canceling EFCO's Notice of Pendency. EFCO cross moves for an order granting permission to: serve an amended Verified Complaint, and file an amended Lien. Helena opposes EFCO's cross motion in its entirety.

Since issue has been joined, but note of issue has not yet been filed, summary judgment relief is available. Brill v. City of New York, 2 N.Y.3d 648 (2004). The court's decision follows.

### **Facts of the Case**

The facts relevant to these motions are undisputed. Helena is the lessor of the Property. On April 18, 2003, Helena and EFCO entered into a contract, whereby EFCO agreed to provide labor and material for the construction of an aluminum window wall and related work in connection with Helena's improvement of a residential tower at the Property. EFCO last performed work in connection with the Property on January 26, 2006. On April 24, 2006, EFCO filed a Notice of Mechanic's Lien in the office of the Clerk of New York County with regard to the Property.

Although EFCO's Notice of Mechanic's Lien provided such relevant information to identify the interested parties, the disputed amount, the property involved and the work done, it failed to state the entire contract price or full value of all the labor performed and materials furnished.

On June 23, 2006, Helena filed a Lien Discharge Bond, with Platte River Insurance Company, as surety, and Helena, as Principal, in the office of the Clerk of New York County; Pursuant to Lien Law § 19(4), such bond discharged EFCO's Lien and is substituted as security.

On August 29, 2006, defendants served and filed a Verified Answer to the Verified Complaint with affirmative defenses, denying that EFCO filed a valid mechanic's lien against the Property.

### **Discussion**

On a motion for summary judgment, it is the movant's burden to set forth evidentiary facts to prove its prima facie case that would entitle it to judgment in its favor, without the need for a trial. Only if this burden is met, must the party opposing the motion then demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action, or tender an acceptable excuse for his/her failure so to do. CPLR § 3212; Winegrad v. NYU Medical Center, 64 N.Y.2d 851 (1985); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Where, however, the proponent fails to make out its prima facie case for summary judgment, then the motion must be denied, regardless of the sufficiency the opposing papers. Alvarez v. Propect Hospital, 68 N.Y.2d 320 (1986); Ayotte v. Gervasio, 81 N.Y.2d 1062 (1993).

When issues of law are the only issues raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. Hindes v. Weisz, 303 A.D.2d 459 (2<sup>nd</sup> Dept. 2003). In a proceeding to discharge a notice of mechanic's lien on the ground that no valid lien

existed, such issue can be determined summarily if it rests on facts appearing on the face of the notice and the record, and if the facts are undisputed. Metivier v. Sarandrea, 154 Misc.2d 355 (Sup 1992), *order aff'd*, 187 A.D.2d 963 (4<sup>th</sup> Dept 1992).

### The Notice of Lien

The purpose of the Lien Law is to provide an added degree of protection to workers who provide labor or material for construction projects by providing them with an independently enforceable security interest upon the construction property. Strober Bros., Inc. v. Kitano Arms Corp. 224 A.D.2d 351 (1<sup>st</sup> Dept. 1996); Chas. H. Sells, Inc. v. Chance Hills Joint Venture, 163 Misc.2d 814, (N.Y.Sup.1995). The filing of a Notice of Mechanic's Lien is governed entirely by statute.

Lien Law § 19(6) provides that:

“Where it appears from the face of the notice of lien that the claimant has no valid lien by reason of the character of the labor or materials furnished and for which a lien is claimed, or where for any other reason the notice of lien is invalid by reason of failure to comply with the provisions of section nine of this article... the owner or any other party in interest, may apply to the supreme court of this state... for an order summarily discharging of record the alleged lien.”

Lien Law § 9 provides that: “The notice of lien shall state:

...

4. The labor performed or materials furnished and the agreed price or value thereof, or materials actually manufactured for but not delivered to the real property and the agreed price or value thereof.”

Under Lien Law § 9(4), the agreed price means the contract price. Fyfe v. Sound Development Co., Inc., 235 N.Y. 266 (1923).

Further, Lien Law § 23 requires that the Lien Law:

“... be construed liberally to secure the beneficial interests and purposes thereof. A substantial compliance with its several provisions shall be sufficient for the validity of a lien and to give jurisdiction to the courts to enforce the same.”  
(Emphasis added).

It is undisputed that plaintiff failed to state the contract price or value of the labor performed and materials furnished. Helena argues that this defect on the face of the Notice of Lien, under Lien Law § 19(6), renders the Notice of Lien void and invalid, as a matter of law. Plaintiff denies that the defect invalidates the Notice of Lien, and argues instead that the defect is amendable. For the reasons that follow, this court finds that the defect in this case does not invalidate the lien, is not prejudicial to any interested party, and is amendable.

Before 1932, the Court of Appeals routinely held that a Notice of Lien was invalid when it failed to state explicitly or by plain language inference the value or agreed price of the labor performed or materials furnished. Finn v. Smith, 186 N.Y. 546 (1906); Pascual v. Greenleaf Park Land Company, Inc., 254 N.Y. 294 (1927); Flaum v. Picarreto, 226 N.Y. 468 (1919). However, in 1932, the Legislature enacted what is now Lien Law § 12-a which provides that “[i]n a proper case, the court may... make an order amending a notice of lien, ... nunc pro tunc. However, no amendment shall be granted to the prejudice of an existing lienor.”

Since 1932, amendment of liens defective in their recitals or execution have been allowed. Teitler v. McDermott & McDonald, 282 A.D. 953 (2<sup>nd</sup> Dept. 1953) *aff'd*, 306 N.Y. 953 (1954) (distinguishing defect subject to amendment from defect from defect of substance); Matter of Perrin v. Stempinski Realty Corp., 15 A.D.2d 48 (1<sup>st</sup>

Dept. 1961) *appeal dismissed*, 11 N.Y.2d 931 (1962) (“[f]igures and amounts have been allowed to be corrected but only where the amount of the lien was unchanged”). The overriding consideration for determining whether a defect renders a Notice per se invalid or amendable is prejudice to the interested parties.

Here, the Notice of Lien correctly sets out the parties, the property, the amount claimed owed and the work done and materials furnished. While this Notice technically does not satisfy Lien Law § 9(4) because it fails to include the full contract price, it is sufficient to put Helena on notice as to the nature and substance of the specific claim in this case. EFCO’s failure to comply with Lien Law § 9(4) does not render EFCO’s notice per se invalid, because it substantially complies with the requirements of Lien Law § 9. Further, since the Notice of Lien provides sufficient information to the put the parties on notice of the claim, there is no prejudice. Thus, the facial defect is amendable under Lien Law § 12-a. Perrin supra; Nimke v. Inta-State, Inc., 34 A.D.2d 675 (2<sup>nd</sup> Dept. 1970).

Helena’s reliance on Court of Appeals cases that predate the enactment of Lien Law § 12-a are inapposite to the case at bar. In those cases the court was not empowered to allow amendment of a facially defective Notice of Lien, and consequently, they did not consider whether the defect was substantial or insubstantial. See Finn v. Smith, supra; Pascual v. Greenleaf Park Land Company, Inc., supra; Flaum v. Picarreto, supra. Helena also argues “it is only one of the defendants having an ownership interest in the subject real estate.” It does not further elaborate and the court cannot conclude any defect or prejudice in this record. Accordingly, EFCO is permitted to amend the Notice of Lien, pursuant to Lien Law §

12-a, to include the full contract price.

#### Cancellation of EFCO's Notice of Pendency

CPLR § 6515 states in pertinent part: "In any action other than a foreclosure action... the court... may direct any county clerk to cancel a notice of pendency... if the moving party shall give an undertaking in an amount to be fixed by the court."

A party may apply to the court, pending a suit to foreclose a lien, to discharge the lien, upon the ground that the party has posted a bond pursuant to Lien Law § 19(4). Upon approval of such bond and the discharge of the lien by order of the court, the lien shall be transferred from the property to the bond. Keating v Hammerstein 196 App Div 18 (1<sup>st</sup> Dept. 1921)

On June 23, 2006, Helena filed a lien discharge bond, pursuant to Lien Law § 19(4), in the office of the Clerk of New York County, which discharged EFCO's Notice of Lien. Accordingly, Helena is entitled to an order cancelling EFCO's Notice of Pendency, pursuant to CPLR § 6515.

#### EFCO's Cross Motion to Amend the Complaint

On June 23, 2006, Helena filed a Lien Discharge Bond with Platte River Insurance Company as Surety, which discharged EFCO's Lien and substituted said bond as security in its place. As a result, EFCO now cross moves to amend the complaint to add the surety as a defendant in this action.

CPLR § 3025(b) permits liberal amendment of pleadings, absent prejudice to the other side. It is therefore appropriate to grant EFCO's motion to amend, so that a

resolution of all of the parties' obligations arising under the principal-surety relationship may be achieved in the same proceeding.

### Conclusion

In accordance herewith, it is hereby:

**ORDERED** that defendant's motion for summary judgment dismissing this action and vacatur of Notice of Mechanic's Lien is hereby denied; and it is further

**ORDERED** that defendant's motion for cancellation of Notice of Pendency is hereby granted; and it is further

**ORDERED** that plaintiff is hereby granted leave to file an amended Notice of Mechanic's Lien with the changes permitted herein; and it is further

**ORDERED** that plaintiff is hereby granted leave to file and serve an Amended Verified Complaint on all parties within 20 days of filing of this order; and it is further

**ORDERED** that a preliminary conference before this court is set for May 10, 2007 at 9:30 a.m. (80 Centre Street, Room 122, New York, New York).


Any relief not expressly addressed herein has nonetheless been considered by the Court and is denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York  
March 6, 2007

**FILED**  
MAR 13 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

So Ordered:

  
\_\_\_\_\_  
HON. JUDITH J. GISCHE, J.S.C.