

**Chelsea Rose Constr. Corp. v Big Al's  
Landscaping, Inc.**

2007 NY Slip Op 30155(U)

February 6, 2007

Supreme Court, Suffolk County

Docket Number: 0030034

Judge: Thomas F. Whelan

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impasse as to amounts due and owing on various job sites and the affidavit of its president, William Renter. Mr. Renter states in his affidavit that a meeting was held with defendant and plaintiff's principals, Michelle DeBatto and Al DeBatteo, at the attorney's office of defendant's counsel on August 15, 2006; that as a result of this meeting, defendant agreed to submit to plaintiff its records in an attempt to resolve the billing dispute; that when the records were received and reviewed by plaintiff, plaintiff could not come to an accord as to settling the matter; that subsequent to the submission of the records to plaintiff, on September 26, 2006, defendant filed mechanic's liens against several properties where defendant either performed services or provided labor at plaintiff's direction; that upon a review of the filed liens and comparing them to the records submitted by defendant in accordance with settlement negotiations, plaintiff found them to be exaggerated and in violation of Lien Law § 39; and that notwithstanding the discounted amounts defendant was seeking for settlement purposes on the job reconciliation statements, the liens were still exaggerated when compared to the full purported amounts being sought by defendant.

Plaintiff also contends in its supporting affidavit that by filing the exaggerated liens, defendant not only violated Lien Law § 39, but set forth in writing that plaintiff failed to pay an amount, which is not in fact due at all, as demonstrated by the records sent to plaintiff after the parties' meeting; that the exaggerated and wilfully misleading filings has infuriated several of plaintiff's clients and resulting in plaintiff's reputation being tarnished; and that it is entirely unfair to the owners of the premises against whom the liens have been filed since the filings will cause them to incur problems with respect to any legal or financial endeavor they may undertake regarding their properties (*see* *affd. William Renter*, 11/3/06).

Defendant opposes the motion and submits the affidavit of its president, Michelle DeBatteo, who states that the terms of the agreement called for defendant to receive 60% of any profit realized from physical landscaping; that plaintiff would be responsible for the purchase of any materials required for the landscaping project; that initially, the parties worked harmoniously under the agreement; that defendant's performance under the agreement became haphazard and plaintiff terminated defendant's services on the grounds that defendant's quality of work did not meet plaintiff's standards; that as a result of this severance of the agreement, defendant was owed a significant amount of money; that the reconciliation statements sent to plaintiff after the parties' meeting were deeply discounted in an effort to reach an amicable settlement; that when the parties were unable to reach a settlement, defendant filed the mechanic's liens for the amount defendant contends is due and owing from plaintiff for each of the jobs performed; and although defendant admits to a clerical error in one lien filed, defendant contends it was not done to mislead anyone but, rather, was simply a scrivener's error (*see* *affd. Michelle DeBatto*, 11/13/06).

"In an appropriate action, Lien Law § 39 authorizes the court to declare a lien void upon a finding that it has been wilfully exaggerated" (*Executive Towers at Lido v Metro Constr. Serv., Inc.*, 303 AD2d 545, 756 NYS2d 461 [2d Dept 2003]). "Lien Law § 39-a provides, in relevant part, that a willfully exaggerated mechanic's lien may be voided by a court and the person filing such a notice of lien shall be liable in damages to the owner of the property. The burden is on the opponent of the lien to show that the amounts set forth were intentionally and deliberately exaggerated" (*Garrison v All Phase Structure Corp.*, 33 AD3d 661,622, 821 NYS2d 898 [2d Dept 2006], *citations omitted*).

However, the fact of wilful exaggeration cannot be established on the basis of affidavits submitted on a motion to dismiss the liens. This can only be done at a trial on that lien to either enforce or foreclose the lien (*see Executive Towers at Lido v Metro Constr. Serv., Inc.*, 303 AD2d 545, *supra*; *Aaron v Great Bay Contr., Inc.*, 290 AD2d 326, 736 NYS2d 359 [1<sup>st</sup> Dept 2002]; *Guzman v Estate of Fluker*, 226 AD2d 676, 641 NYS2d 721 [2d Dept 1996]; *Tully Const. Co. v United Minerals, Inc.*, 221 AD2d 697, 633 NYS2d 91 [3d Dept 1995]; *Reeve Serv. Corp. v Raab*, 64 AD2d 826, 407 NYS2d 314 [4<sup>th</sup> Dept 1978]; *T.A. Maloney Contr. Corp. v William E. Blume, Inc.*, 85 Misc2d 838, 380 NYS2d 585 [Sup. Ct. Queens County 1976]; *Upstate Bldg. Supply Corp. v Maple Knoll Apts., Inc.*, 37 AD2d 901, 325 NYS2d 509 [4<sup>th</sup> Dept 1971], *app disp* 30 NY2d 515, 330 NYS2d 62 [1972]; *Finger v Roth Bros. Regal Rest. Supply Corp.*, 2 Misc2d 944, 150 NYS2d 522 [Sup. Ct. Nassau County 1956]; *Durand Realty Co., Inc. v Stolman*, 197 Misc 208, 94 NYS2d 358 [Sup. Ct. New York County 1949], *affd* 280 AD 758, 113 NYS2d 644 [1<sup>st</sup> Dept 1952]; *In Re Lustbader Contr. Corp.*, 144 Misc 875, 259 NYS 103 [Sup. Ct. New York County 1932]). Both

plaintiff and defendant having failed to produce evidence indicating defendant has commenced an action or proceeding to enforce or foreclose the liens (*see Wellbilt Equip. Corp. v Fireman*, 275 AD2d 162, 719 NYS2d 213 [1<sup>st</sup> Dept 2001]), the motion is denied (*see Guzman v Estate of Fluker*, 226 AD2d 676, *supra*; *Tully Const. Co. v United Minerals, Inc.*, 221 AD2d 697, *supra*).

Additionally, a lienor's honest mistake, as noted in the DeBatto affidavit regarding the lien filed against at 1930 Midland Road, Muttontown, New York, 11791, does not void a mechanic's lien under Lien Law § 39 (*see East Hills Metro., Inc. v J.M. Dennis Constr. Corp.*, 277 AD2d 348, 717 NYS2d 202 [2d Dept 2000]; *Goodman v Del-Sa-Co Foods, Inc.*, 15 NY2d 191, 257 NYS2d 142 [1965]).

This Court has only rendered a decision on the issue of the application by plaintiff to dismiss the mechanic's liens filed by defendant and no other issue.

Accordingly, the motion is denied as indicated herein. This constitutes the Order and decision of the Court.

DATED: 2/6/07

  
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THOMAS F. WHELAN, J.S.C.