

Matter of 48 Laight St. Assoc., LLC v DCBE, Inc.

2007 NY Slip Op 30757(U)

April 12, 2007

Supreme Court, New York County

Docket Number: 0108833/2006

Judge: Walter B. Tolub

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

PRESENT: TOLUB
Justice

PART 15

Y & LAUGHTON ASSOCIATES

- v -

DCBE, INC

INDEX NO. 108833/06

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this 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

IS DECIDED

**IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION
IN ACCORDANCE**

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 4/12/07

WALTER B. TOLUB 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: IAS PART 15

-----X

In the Matter of the Application of
48 LAIGHT STREET ASSOCIATES, LLC,

Petitioner,

Index No.: 108833/05

For an Order vacating a certain Notice Under Mechanic's
Lien Law pursuant to Lien Law §§ 19(6) and 59, or
alternatively, to compel responses to Demands pursuant to
§§ 38 and 76 of N.Y. Lien Law

-against-

DCBE, Inc.,

Respondent.

-----X

WALTER B. TOLUB, J.

UNFILED JUDGMENT
*This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).*

In this proceeding, Petitioner, the former property owner of certain real property, located at 48 Laight Street (the Property), upon which it has recently completed construction on a six-story residential building (the Project), seeks, among other things, an order cancelling, vacating and discharging Respondent's notice of mechanic's lien (Notice of Lien) because the Notice of Lien does not comply with Lien Law §§ 9 (2), (7), and violates New York Real Property Law (RPL) § 339-1 (1). Respondent opposes the petition and cross-moves for an order, pursuant to Lien Law § 12-a (2), amending, nunc pro tunc, the Notice of Lien to name only those units and the common area retained by Petitioner at the time the Notice of Lien was filed.

It is undisputed that the Project consists of nine individual residential condominium units, all of which have been sold. Four of the units were sold at the time the Notice of Lien was filed on June 12, 2006.

The parties herein state that they entered into an oral agreement concerning work on the Project, and that the work commenced in April 2005. Petitioner states that Respondent was the general contractor or construction manager for the entire Project. Respondent describes its work on the Project as limited to the “fit out of the interior work at the project and to supervise certain other trade work” (Resp. Op. Aff., ¶ 6).

On October 21, 2005, Petitioner filed a Declaration Establishing a Plan for Condominium Ownership of the Property (the Declaration) with the Office of the City Register of the City of New York (City Register) for recording (Exh. A). Prior to the Declaration’s filing, the Property was designated by the City Register as “Block 220, Lot 34.” After the Declaration’s filing, however, while the block number remained the same, the City Register created a new lot number for each condominium unit; that is each of the respective single residential condominium units was designated as a separate lot and assigned a lot number, ranging from 1301 to 1310.

Although the parties dispute how their relationship ended, there is no dispute that it did end, on a sour note, in November 2005. Respondent does not dispute Petitioner’s sworn statement that it had paid Respondent \$748,705 as of then.

Respondent initially filed a lien notice on January 25, 2006 in the amount of \$264,000 which was discharged by bond, and, subsequently, discharged by court order dated May 4, 2006 (Sup Ct, NY County, Index No. 105160/06, Gische, J.). Respondent filed a second Lien Notice on May 18, 2006, in the amount of \$1,208,672, which was also discharged, by court order, on June 5, 2006 (*id.*).¹ Both notices described the property as 48 Laight Street, “Block 220, Lot 34.”

¹Neither party argues that the reasons for the prior discharges are relevant here.

On June 12, 2006, Respondent filed the subject Notice of Lien, with the County Clerk's Office in New York County, in the amount of \$1,208,672, and served a copy of it on Petitioner. The Notice of Lien describes the property subject to the lien as "48 Laight Street, New York, NY" situated in the County and State of New York (Pet., Exh. D, at 1). On the left hand side of the Notice of Lien is typed in "Block 220, Lot 34" (*id.*).

Petitioner contends that the Notice of Lien is invalid, pursuant to Lien Law § 19 (6),² because it does not comply with the requirements of Lien Law § 9 (2), (7) in that it contains the superseded block and lot number (Block 220, Lot 34), rather than the block and lot numbers for the individual condominium units described in the Declaration (Block 220, Lots 1301-1310), and does not specify the correct names of the four individual unit owners who had already purchased units at the time the Notice of Lien was filed. Petitioner further contends that the Notice of Lien also violates RPL § 339-1 (1), because it is a blanket lien against the Property, rather than a lien against the individual units, and impermissibly includes the condominium's common elements without the unanimous consent of the unit owners.

Respondent argues that the Notice of Lien is correct except that it does not specifically identify the condominium units still controlled by Petitioner (Morris Aff., ¶ 3). Respondent states that it seeks merely to reduce the extent of property that is the subject of the lien, and to remedy the lien's defect by amendment. It further states that if the motion is granted, it will promptly amend the lien to name fewer units. Respondent contends that there is no prejudice to Petitioner or other lienors or mortgagees as the Notice of Lien was timely, Petitioner has known

²Lien Law § 19 (6) provides for summarily discharging a lien notice filed "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 . . .".

about it, and it conforms to the law in all respects, except that the description includes units that may now be owned by third parties.

Lien Law § 9 (7) requires that the lien contain a description of the property “sufficient for identification” (Lien Law § 9 [7]). Lien Law § 9 (2) requires that the lien state “the name of the owner of the real property against whose interest therein a lien is claimed, and the interest of the owner as far as known to the lienor.” RPL § 339-1 (1) prohibits creation of a lien against the common elements of the condominium subsequent to the recording of the condominium declaration without the unanimous consent of the unit owners.

The disposition of this case is governed by *Northeast Restoration Corp. v K & J Construction Co., L.P.* (304 AD2d 306 [1st Dept 2003]), in which the Court determined that a mechanic’s lien filed after the filing of a condominium declaration was invalid where it identified the property sought to be liened by a single lot number (*see also Matter of Atlas Tile and Marble Works, Inc.*, 191 AD2d 247 [1st Dept 1993]). Like the owner here, the developer in *Northeast Restoration Corp.* (304 AD2d 306, *supra*), at the time of filing the lien, retained units in the building and the Court, referring to the former single lot number as “superseded,” determined that the lien was invalid as against the individual condominium units for failure to describe them and as against the common areas for failure to procure the unanimous consent of the unit owners (*see also Matter of Westage Towers Assocs. v ABM Air Conditioning & Refrigeration*, 187 AD2d 600 [2d Dept 1992] [discharging “blanket” lien, pursuant to Lien Law § 19 (6), as invalid against the individual condominium units, including retained unsold units and the common elements]). The Notice of Lien describes the Property using the former superseded lot number, and thus does not describe the individual condominium units, including those units that were unsold at the time

the notice was filed.³

Respondent's citation to *A.C. Green Electrical Contractors, Inc. v Sau Liong Fu* (240 AD2d 243 [1st Dept 1997]) is unpersuasive. In *A.C. Green Electrical Contractors, Inc.*, the work on the property was done both before and after the individual owners allegedly purchased the units, and the plaintiff raised an issue of fact as to whether the defendant individual unit owners, allegedly partners and "alter egos" of the defendant developer, were still the fee owner of the property, and therefore not among those intended to be protected by the Condominium Act. In addition, the Court emphasized that, at the time the lien was filed, the developer retained ownership of both "an individual unit *and* the common elements" (*id.* at 245 [emphasis in original]). Such facts are not found here where there are no allegations that the condominium unit purchasers are the *alter egos* of the developer, that they retained ownership of the common elements at the time the lien was filed, or that work was done after the units were purchased.

Respondent is also not aided by its citation to *United Brotherhood of Carpenters and Joiners of America v Nyack Waterfront Assocs.* (182 AD2d 16 [3d Dept 1992]), where the Court found a lien notice valid on certain undeveloped land retained by the developer/landowner. In that case, the Court stated that the lien was not, as it is here, "coextensive with the condominium property so as to come directly within the purview of Real Property Law § 339-*l*" (*id.* at 20).⁴

³With a letter sent to the court after oral argument, Respondent submits the affidavit of the president of the lien company it used, who states that his "last owner" search revealed no owners other than 48 Laight Street Associates, LLC, and that the correct block and lot numbers were indicated on the Notice of Lien. The court will not consider arguments raised for the first time in a sur-reply (*Schultz v 400 Co-op. Corp.*, 292 AD2d 16, 17 [1st Dept 2002]), especially as clearly upon inquiry, such information was available at the time of the filing of the petition and, in any event, Respondent has not proffered an argument as to the significance of the submission.

⁴The Court in *United Brotherhood of Carpenters* did not address the lower court's determination that the mechanic's lien was invalid as to the condominium property as that issue was not presented for review (182 AD2d at 19-20).

In addition, Lien Law § 12-a (2) provides that:

“In a proper case, the court may, upon five days’ notice to existing lienors, mortgagees and owner, make an order amending a notice of lien upon a public or private improvement, nunc pro tunc. However, no amendment shall be granted to the prejudice of an existing lienor, mortgagee or purchaser in good faith, as the case may be.”

The statute “presupposes the existence of a valid lien and may not be construed to revive an invalid notice of lien” (*Matter of Atlas Tile and Marble Works, Inc.*, 191 AD2d at 248).

Furthermore, Respondent has failed to demonstrate, as it must, that the proposed amendment would not prejudice any existing lienor, mortgagee or purchaser in good faith. While Respondent contends that there will no prejudice to any party, it ignores the fact that there are existing mortgagees and owners. Accordingly, the cross motion to amend the lien must be denied, and the petition granted.

As the Notice of Lien is vacated by this order, the court need not address Petitioner’s additional arguments and its request for alternative relief.⁵ In addition, Petitioner has not demonstrated entitlement to attorneys’ fees or “expenses,” but is awarded costs and disbursements as the prevailing party.

Accordingly, it is hereby

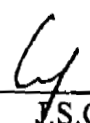
ADJUDGED that the petition is granted, with costs and disbursements, and that the Notice Under Mechanic’s Lien Law filed by DCBE, Inc. on the property located at 48 Laight Street, New York, New York is vacated; and it is further

⁵Petitioner also contends that Respondent has failed to timely commence a foreclosure action pursuant to Lien Law § 59 and requests, as alternative relief, an order compelling Respondent to provide a detailed itemized statement of its mechanic’s lien pursuant to Lien Law § 38, and a “Verified Statement” detailing its utilization of trust fund monies received from Petitioner.

ORDERED that the cross motion to amend the Mechanic's Lien filed by DCBE, Inc. against the property located at 48 Laight Street, New York, New York is denied.

This Constitutes the order and judgment of the court.

Dated: 4/12/07



J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based thereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).