

**ACCS, Inc. v New York City Dept. of  
Sanitation**

2007 NY Slip Op 31100(U)

April 26, 2007

Supreme Court, New York County

Docket Number: 0104621/2006

Judge: Eileen A. Rakower

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

PART 5

PRESENT.

Index Number : 104621/2006

ACCS

vs

DEPARTMENT OF SANITATION

Sequence Number : 001

AMEND SUPPLEMENT PLEADINGS

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

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

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

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

1  
2  
3, 4, 5

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

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

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED  
MAY 08 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 4/26/07

  
EILEEN A. RAKOWER s.c.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION  
J.S.C.

Check if appropriate:  DO NOT POST

DEFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 5

-----X  
ACCS, INC. d/b/a ATLAS CONCRETE  
CUTTING AND BREAKING,

Plaintiff,

Index No.  
104621/06

- against -

Decision and Order

THE NEW YORK CITY DEPARTMENT OF  
SANITATION, ARKAY CONSTRUCTION  
CO., INC., CITY OF NEW YORK, NEW  
YORK DEPARTMENT OF FINANCE,  
JOHN DOE 1-25, JANE DOE 1-25 and  
ABC CORPORATIONS 1-10,

Defendants.

-----  
HON. EILEEN A. RAKOWER

**FILED**  
MAY 08 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiff, a subcontractor, brings this action to recover money it is allegedly owed as the result a demolition project performed at the "Riker's Island Project" ("Riker's"). Plaintiff now moves for leave of the court to file an amended complaint which would include: 1) substitution of the New York City Department of Design and Construction ("DDC") for the New York City Department of Sanitation ("DOS") as a defendant; 2) leave to add Asbestolith Manufacturing Corporation as a defendant; 3) leave to answer defendant Arkay Construction Company, Inc.'s ("Arkay") counterclaims out of time and 4) leave to file a notice of pendency or substitute its expired lien with a new lien; and 5) granting a stay of the note of issue. Defendant Arkay opposes plaintiff's motion. Defendants DOS, the City of New York ("City") and the New York Department of Finance ("Finance") do not submit papers.

The subcontract was entered into on February 23, 2005 and the labor and equipment was provided from February 23, 2005 until May 12, 2005. By the terms of the contract, defendant Arkay Construction Co., Inc. was to provide \$38,000.00 to plaintiff upon completion of the demolition. When Arkay did not pay, plaintiff filed a mechanic's lien (#49890) for the amount owed on December 19, 2005. Plaintiff did not file a notice of pendency nor for an extension and the lien expired by its terms on December 19, 2006. Plaintiff filed a complaint against City, DOS and Arkay on April 5, 2006. Arkay filed its answer and counterclaims on June 29, 2006. Arkay filed its note of issue on November 30, 2006. On February 21, 2007 plaintiff filed another lien

(#50301) in the amount of \$38,000.00.

CPLR 3025(b) states:

A Party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of all costs and continuances.

Plaintiff commenced its action on April 5, 2006. Plaintiff now claims that "due to inadvertence" it failed to file 1) an answer to the counterclaims; 2) a notice of pendency; or 3) an extension of the lien. Additionally, plaintiff seeks to substitute one city department for another and to add an additional defendant. Arkay does not oppose plaintiff's motion for leave to file a late reply to its counterclaims.

Regarding plaintiff's request for leave to file a notice of pendency and to substitute lien (#50301), purchased after the old lien expired in place of the expired lien (#49890), Section 17 of the Lien Law states, in relevant part:

No lien specified in this article shall be a lien for a longer period than one year after the notice of lien has been filed, unless within that time an action is commenced to foreclose the lien, and a notice of pendency of such action...or unless an extension to such lien...is filed with the county clerk...within one year from the filing of the original notice of lien.

The court in *Meszaros v. Indiveri*, 36 Misc.2d 632, found that despite the fact that an action for foreclosure was commenced within the one year lien period, the lien lapsed because the plaintiff failed to extend the lien or file a notice of pendency before the lien expired by its terms. *Id.* at 633.

Finally, plaintiff seeks to substitute DDC for DOS as it is the City agency that entered into a contract with Arkay. Additionally, plaintiff seeks to add as a party defendant Asbestolith Manufacturing Corporation, which has a prior mechanics lien and may be affected by this action. The City does not oppose the substitution of one of its agencies for the other.

Wherefore it is hereby

ORDERED that plaintiff's motion for leave to amend its complaint to substitute The New York City Department of Design and Construction for the New York City Department of Sanitation and to add Asbestolith Manufacturing Corporation as a defendant is granted and the amended complaint in the form proposed as annexed to the moving papers shall be deemed served upon service of the proposed complaint with a copy of this order along with notice of entry, and it is further

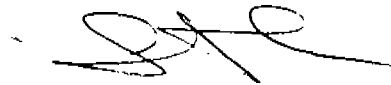
ORDERED that plaintiff's motion for leave to file a late reply to defendant Arkay's counterclaims in granted and the Reply to Counterclaim in the form proposed as annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry, and it is further

ORDERED that plaintiff's motion for leave to substitute lien #50301 for lien #49890 is denied, and it is further

ORDERED that plaintiff's motion to "stay" the note of issue is denied.

This constitutes the Decision and Order of the Court. The case in all other respects continues.

DATED: April 26, 2007



EILEEN A. RAKOWER, J.S.C

**FILED**  
MAY 08 2007  
NEW YORK  
COUNTY CLERK'S OFFICE