

**Gilston Elec. Contr. Corp. v New
York Life Ins. Co.**

2007 NY Slip Op 31249(U)

May 10, 2007

Supreme Court, New York County

Docket Number: 0601689/2005

Judge: Marcy S. Friedman

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

Hon. Marcy S. Friedman

57

PART

Index Number : 601689/2005

GILSTON ELECTRICAL CONTRACTING

vs

NEW YORK LIFE INSURANCE

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for summary judgment

PAPERS NUMBERED

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

1

Answering Affidavits — Exhibits _____

2

Replying Affidavits _____

3

Supp Aff to Opp & Supp Reply

4-5

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is granted as per

accompanying decision/order dated 5/10/07.

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

FILED

MAY 17 2007

NEW YORK COUNTY CLERK'S OFFICE

Dated: 5-10-07

Hon. Marcy S. Friedman J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

Leave to submit supp. opp was granted on plaintiff's application

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

GILSTON ELECTRICAL CONTRACTING
CORPORATION,

Plaintiff(s),

- against -

NEW YORK LIFE INS. CO., et al.,

Defendant(s).

_____ x

FILED
MAY 17 2007
NEW YORK
COUNTY CLERK'S OFFICE

Index No.: 601689/05

DECISION/ORDER

This is an action for foreclosure of a mechanic's lien and damages brought by plaintiff, Gilston Electrical Contracting Corporation ("Gilston"), a subcontractor on a construction project at a site owned by defendant New York Life Insurance Co. ("New York Life"). New York Life moves for summary judgment dismissing the complaint against it.

Gilston's first cause of action to foreclose on its mechanic's lien must be dismissed. Plaintiff makes a prima facie showing that it served the lien and filed proof of service with the Clerk of the Court. However, it is undisputed that plaintiff filed the lien on April 19, 2004 and did not commence the instant action until May 11, 2005, more than one year later. Under settled law, the lien is accordingly unenforceable. (See 240-35 Assocs. v Major Bldrs. Corp., 234 AD2d 234 [1st Dept 1996]; Malafsky v Becker, 255 AD 444 [1st Dept 1938], appeal conditionally dismissed 280 NY 685 [1939]; Lien Law § 17.) In so holding, the court rejects plaintiff's contention that defendant agreed to a stay of commencement of the foreclosure action. Defendant's December 20, 2004 letter cannot be construed as consenting to a stay. The court has considered plaintiff's remaining bases for opposing dismissal of the foreclosure cause of action

and finds them to be without merit. The notice of pendency that Gilston filed against New York's Life's premises should therefore also be vacated.

New York Life further moves for summary judgment dismissing Gilston's claim for implied contract or unjust enrichment, on the grounds that it did not enter into an agreement to pay Gilston, and that Gilston's contract was with New York Life's contractor, non-party McCann Inc. "It is well established that a landowner who has had the benefit of a subcontractor's services, pursuant to a contractual obligation with a general contractor in a construction contract, is not liable for the work done by the subcontractor unless he has, in some way, agreed to pay therefor." (Sybelle Carpet & Linoleum of Southampton, Inc. v East End Collaborative, Inc., 167 AD2d 535, 536 [2d Dept 1990] [internal quotation marks and citations omitted].) "[T]he mere fact that [the landowner] has consented to the improvements provided by the subcontractor and accepted their benefit does not render him liable to the subcontractor, whose sole remedy lies against the general contractor." (Id. at 536 [internal quotation marks and citation omitted].)

On this record, plaintiff's wholly conclusory assertion that New York Life agreed to pay plaintiff is insufficient to raise a triable issue. Plaintiff also fails to make any showing that discovery would lead to relevant evidence, and that this motion should be held in abeyance. (Harris v Alcan Aluminum Corp., 91 AD2d 830, 831 [4th Dept 1982], affd for reasons stated below 58 NY2d 1036 [1983].)

It is accordingly hereby ORDERED that defendant's motion for summary judgment is granted to the extent of dismissing the complaint in its entirety; and it is further

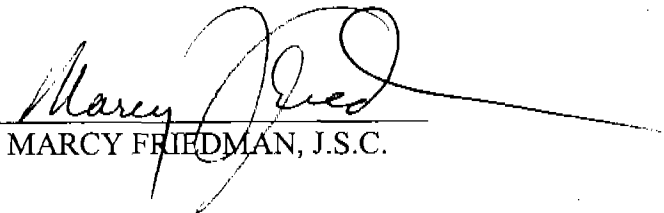
ORDERED that the Notice of Mechanic's Lien dated April 16, 2004, and filed in the office of the Clerk of New York County in the sum of \$110,000.00 against New York Life Insurance Co. as owner and affecting the premises described as 45-55 Madison Avenue, New

York, New York (Block 856, Lot 24) is hereby vacated and canceled and the said Clerk of the County of New York is hereby directed to cancel such lien of record and to mark on the docket of such lien a statement of such cancellation with a reference to this order and its date of entry; and it is further

ORDERED that the Clerk of the County of New York is directed to cancel the notice of pendency of this action filed by the plaintiff on May 11, 2005, and to enter a note of that cancellation on the margin of the record of the notice of pendency referring to this order and its date of entry.

This constitutes the decision and order of the court.

Dated: New York, New York
May 10, 2007


MARCY FRIEDMAN, J.S.C.

FILED
MAY 17 2007
NEW YORK
COUNTY CLERK'S OFFICE