

EFCO Corp. v Helena Assoc. LLC

2007 NY Slip Op 31668(U)

June 8, 2007

Supreme Court, New York County

Docket Number: 0601933/2006

Judge: Judith J. Gische

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: JUDITH J. GISCHÉ, J.S.C.
Justice

PART _____

Index Number : 601933/2006
EFCO CORPORATION
vs
HELENA ASSOCIATES LLC
Sequence Number : 002
REARGUMENT/RECONSIDERATION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
JUN 18 2007
COUNTY CLERK'S OFFICE
NEW YORK

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

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

Dated: 6/08/07

JUDITH J. GISCHÉ, J.S.C. *J.S.C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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. : 002

Present:

Hon. Judith J. Gische

J.S.C.

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

Papers	Numbered
Dfdt's motion [reargue] w/KK affirm in support, exhs	1
Pltf's opp w/HB affirm in support, exhs	2

-----X

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" or plaintiff), and defendant, Helena Associates, LLC ("Helena" or defendant), for labor and materials, provided for the improvement of a residential tower located at 601 West 57th Street,

New York, New York (the "Property"). Defendant Helena holds a leasehold interest in the Property. Defendant previously brought a motion for an order: granting summary judgment, summarily discharging of record EFCO's lien, and canceling EFCO's Notice of Pendency and plaintiff EFCO cross moved for an order granting permission to: serve an amended Verified Complaint, and file an amended lien.

The court denied Helena's motion for summary judgment, granted Helena's motion to cancel EFCO's notice of pendency and granted EFCO's cross motion for the reasons set forth in the court's decision and order of March 6, 2007.

Helena now moves to reargue the court's decision denying defendant's motion for summary judgment and granting plaintiff's cross motion.

The gravamen of defendants' motion to reargue is that because EFCO failed to state the contract price or value of the labor performed and materials furnished as required by Lien Law 9(4), the court misapplied the law when it held that EFCO's Notice of Mechanic's Lien substantially complied with the requirements of the Lien Law. Defendant relies upon Brescia Const. Co., Inc. v Walart Const. Co., Inc., 249 A.D. 151 (1st Dept. 1936), *aff'd*, 273 N.Y. 648 (1937), which it claims this court failed to follow. Defendant contends that Brescia is directly on point and that upon application of Brescia, this court must find that EFCO's Notice of Mechanic's Lien is invalid.

As more fully set forth below, the court hereby grants reargument of defendant's original motion and the court's decision. Upon reargument, the court finds that the Brescia decision does not affect the outcome of the underlying motions or the original decision and order dated March 6, 2007.

Brescia, and the related decisions in Matter of Brescia Const. Co., Inc. v. Walart

Const. Co., Inc., 238 A.D. 45 (1st Dept. 1933), *aff'd*, 264 N.Y. 260 (1934), Brescia Const. Co. Inc. v. Walart Const. Co., Inc., 238 A.D. 360 (1st Dept. 1933), and Brescia Const. Co., Inc. v. Walart Const. Co., 245 A.D. 105 (1st Dept. 1935), involved a notice of lien which had “not stated the value of the labor performed and materials furnished, but merely has stated the amount unpaid as *the whole value of the services performed and materials furnished.*” . Specifically, the notice of lien in Brescia stated that “the value or agreed price of the labor and materials [was] \$11,490.65, and that the amount unpaid thereon [was] in that sum,” while the complaint alleged that “the agreed price and reasonable value of the labor performed and materials furnished [was] the sum of \$18,788.20, upon which has been paid the sum of \$7,297.55, leaving a balance of \$11,490.65 (*supra*, 328 A.D. 360).

The courts in both Brescia, 238 A.D. 360 and Brescia, 249 A.D. 151 each cite Mitchell v. Dunmore Realty Co., 126 A.D. 829 (1st Dept. 1908) as controlling precedent. In Mitchell, the court held that where the agreed price and value of materials in a notice of lien differs from the complaint, “this cannot... be deemed a compliance with the requirements of the Lien Law, if the notice of lien is to be understood as referring to the same contract that is set forth in the complaint.”

The notice of liens in Brescia and Mitchell are readily distinguishable from the instant notice of lien. Defendant does not now contend (nor in its prior motion state) that the contract price or value of the labor performed and materials furnished differed between the complaint and the notice of lien. Instead, the instant notice of lien merely omitted the contract price or full value of all the labor performed and materials furnished. Appropriate reference to the correct contract, however, was clearly made.

Therefore, the issues raised in Brescia are factually distinguishable.

Even were the court to find that Brescia is indistinguishable from the case at bar, the court would still adhere to its March 6, 2007 decision. Brescia is a 1933 decision that stands alone. More modern appellate authority, including the authority of this department, have held that notices of lien, which deviate even more substantially from the claimed defects in this case, are amendable. PM Contr. Co. Inc. v. 32 AA Assoc., 4 A.D.3d 198 (1st Dept. 2004); Peachy v. First 97-101 Reade St. Assoc., 180 A.D.2d 474 (1st Dept. 1992); Matter of Perrin v. Stempinski Realty Corp., 15 A.D.2d 48 (1st Dept. 1961), *appeal dismissed*, 11 N.Y.2d 931 (1962); Melniker v. Grae, 82 A.D.2d 798 (2d Dep't 1981); Matter of Nimke v. Inta-State, Inc., 34 A.D.2d 675 (2d Dept. 1970); Matter of Forman v. Pala Const. Co., Inc., 124 A.D.2d 453 (3d Dept. 1986); and Matter of Meo v. Skellyway Const. Co., 30 A.D.2d 606 (3d Dept. 1968).

Accordingly, Helena's motion to reargue is hereby granted and the court adheres to its prior decision dated March 6, 2007.

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
June 8, 2007

So Ordered:



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

FILED

JUN 18 2007

COUNTY CLERK'S OFFICE
NEW YORK