

Oldcastle Precast, Inc. v Hancock Indus., Ltd.

2007 NY Slip Op 32298(U)

July 20, 2007

Supreme Court, Kings County

Docket Number: 0034405/2006

Judge: Carolyn E. Demarest

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Original

At an IAS Term, Part Comm-1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 20th day of July , 2007.

P R E S E N T:

HON. CAROLYN E. DEMAREST,
Justice.

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OLDCASTLE PRECAST, INC., on behalf of itself and on behalf of all persons entitled to share in the funds received by HANCOCK INDUSTRIES, LTD., in connection with a project identified as 2918 BRIGHTON 6TH STREET, located at 2918 Brighton 6th Street, Brooklyn, New York,

Index No. 34405/06

Plaintiff,

- against -

HANCOCK INDUSTRIES, LTD., et al.,

Defendants.

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The following papers numbered 1 to 7 read on this motion:

	<u>Papers Numbered</u>	
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	<u>1-2</u>	<u>5-6</u>
Opposing Affidavits (Affirmations)_____	<u>3</u>	<u>7</u>
Reply Affidavits (Affirmations)_____	<u>4</u>	
_____ Affidavit (Affirmation)_____		
Other Papers_____		

Upon the foregoing papers in this action to, inter alia, foreclose a mechanic's lien,

plaintiff Oldcastle Precast, Inc. (Oldcastle) moves¹ for an order, pursuant to Lien Law § 12-a, granting it leave to amend, nunc pro tunc, its notice of mechanic's lien, filed with the Kings County Clerk on October 25, 2006, against real property known as 2918 Brighton 6th Street, Block 8665, Lot 566, in Brooklyn, New York, to include Archco General Construction, LLC (Archco), as general contractor, and to allow it to serve the amended notice of mechanic's lien upon all required parties, including Archco, pursuant to the Lien Law. Defendant 2918 Brighton 6th Street, Inc. (Brighton) cross-moves for an order: (1) pursuant to Lien Law § 11-b, directing the Kings County Clerk to cancel the notice of mechanic's lien in the amount of \$107,223.77 filed by Oldcastle against the subject real property on October 25, 2006, and to discharge the same of record, upon the ground that Oldcastle has failed to serve Archco, the general contractor, with a notice of lien and to file proof of such a service on Archco with the Kings County Clerk, (2) pursuant to CPLR 3212, granting it summary judgment dismissing Oldcastle's fourth cause of action for foreclosure of its mechanic's lien as against it on the alleged basis that the lien has been terminated, and (3) pursuant to CPLR 6514 (a), directing the Kings County Clerk to cancel the notice of pendency docketed by Oldcastle on November 13, 2006 and to discharge the same of record upon the alleged ground that Oldcastle's foreclosure cause of action has been abated.

¹ Oldcastle's motion as against Hancock Industries, Ltd. (Hancock) to provide it with a verified statement and for certification pursuant to Lien Law article 3-A was granted at oral agreement.

Brighton is the owner of real property known as 2918 Brighton 6th Street, Block 8665, Lot 566, in Brooklyn, New York. By a contract dated March 21, 2005, Brighton hired Archco, as a general contractor, to construct a five-story building on its property (the project). The contract price of \$1,225,000 included the supply and installation of pre-fabricated concrete planks for the project. By a subcontract agreement dated July 7, 2005, Archco hired Hancock as a subcontractor for the project. Said subcontract was executed by Archco, Hancock, and Brighton. By a subcontract dated August 4, 2005 between Hancock and Oldcastle, Oldcastle agreed to prepare shop drawings, specifically manufacture, and deliver the pre-cast concrete plank units for the project for the agreed price, exclusive of extra work, of \$126,000. On August 8, 2005, Thomas Hancock executed a personal guarantee, guaranteeing payment of Hancock's obligations under the subcontract.

On October 25, 2006, within eight months after May 12, 2006, the date the last item of work had been performed and materials had been furnished by Oldcastle (*see* Lien Law § 10), Oldcastle filed a notice of mechanic's lien on the subject real property with the Kings County Clerk for the sum of \$107,223.77. The notice of mechanic's lien set forth that the owner of the real property was Brighton, and the name of the person with whom the contract was made was Hancock. On October 26, 2006, within 30 days after filing the notice of lien (*see* Lien Law § 11), Oldcastle served the notice of lien on Brighton, Hancock, and The Community Preservation Corporation

(CPC).² On October 30, 2006, Oldcastle served a Demand for Verified Statement and Demand for Terms of Contract upon Brighton in order to ascertain the parties involved in the project. Brighton, however, did not respond to Oldcastle's demand. On November 1, 2006, Oldcastle filed proof of service of the notice of lien on Brighton, Hancock and CPC.

On November 13, 2006, Oldcastle, on behalf of itself and all persons entitled to share in the funds received by Hancock in connection with the project, filed this action against Hancock, Brighton, CPC, Thomas Hancock, and Robert Hancock. Oldcastle's complaint alleges that it performed its obligations pursuant to its agreement with Hancock for the project, and became entitled to receive payment from Hancock in the amount of \$121,293.62, but was paid only \$6,828, leaving a balance due and owing to it in the amount of \$114,465.62. Oldcastle's first and second causes of action are asserted against Hancock and allege claims for breach of contract and unjust enrichment, respectively. Oldcastle's third cause of action seeks recovery against Thomas Hancock based upon his personal guarantee. Oldcastle's fourth cause of action, which is asserted as against all of the defendants, seeks foreclosure of its mechanic's lien in the sum of \$107,223.77. Oldcastle's fifth cause of action asserts a claim of diversion of trust fund assets, in violation of Lien Law article 3-A, against Hancock, Thomas Hancock, and Robert Hancock. Oldcastle, on November 13, 2006, also docketed a notice of pendency against

² CPC is the mortgagee of the property.

the property.

All of the defendants, subsequently, have filed answers to Oldcastle's complaint. Hancock's answer asserts four cross claims against Brighton. Hancock's first cross claim alleges that its July 7, 2005 subcontract was between it and both Archco and Brighton, and it seeks recovery under that subcontract from Brighton in the amount of \$179,453.

In addressing Oldcastle's motion and Brighton's cross motion, it is noted that Lien Law § 9 (3) requires the notice of lien to state:

"3. The name of the person by whom the lienor was employed, or to whom he furnished or is to furnish materials; or, if the lienor is a contractor or subcontractor, the person with whom the contract was made."

Here, "the person with whom [Oldcastle's sub]contract was made" was Hancock (Lien Law § 9 [3]). In addition, Lien Law § 9 (7) provides that "[a] failure to state the name of the true . . . contractor . . . shall not affect the validity of the lien."

With respect to service of the notice of lien, Lien Law § 11-b provides:

"Within five days before or thirty days after filing a notice of lien in accordance with section ten of this chapter or the filing of an amendment of notice of lien in accordance with section twelve - a of this chapter the lienor shall serve a copy of such notice or amendment by certified mail on the contractor [or] subcontractor . . . for whom he was employed or to whom he furnished materials or if the lienor is a contractor or subcontractor to the

person, firm or corporation with whom the contract was made. A lienor having a direct contractual relationship with a subcontractor or a sub-subcontractor but not with a contractor shall also serve a copy of such notice or amendment by certified mail to the contractor. Failure to file proof of such a service with the county clerk within thirty-five days after the notice of lien is filed shall terminate the notice as a lien . . .”

Oldcastle, by its motion, seeks to amend its notice of lien nunc pro tunc to include Archco, as the general contractor, since it did not name it in its notice of lien or serve it with a copy of the notice of lien. In support of its motion, Oldcastle asserts that due to Brighton’s failure to respond to its Demand for Terms of Contract within the statutorily required 30 days (*see* Lien Law § 8), it did not become aware of Archco’s existence until January 26, 2007, when Hancock served its answer³, which (as noted above) alleged, in its first cross claim, that Hancock entered into the July 7, 2005 subcontract with Archco, as general contractor, and Brighton, as owner of the property. Oldcastle asserts that, therefore, in the interests of equity, it should be permitted to amend its notice of lien pursuant to Lien Law § 12-a, which provides:

“2. 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.”

³ Hancock’s answer is actually dated February 2, 2007.

Brighton's attorney, in opposition to Oldcastle's motion, asserts that it personally provided Oldcastle's attorney with the contract between Brighton and Archco. However, the letter enclosing that contract is dated January 26, 2007, the date on which Oldcastle states that it first learned of Archco's existence.

Brighton also contends that its compliance with Lien Law § 8 would not have aided Oldcastle because even if it gave Oldcastle the information on November 29, 2006 (within 30 days of Oldcastle's Demand), Oldcastle had to serve its notice of lien on Archco on or before November 24, 2006 (within 30 days after the notice of lien was filed on October 25, 2006) which could no longer have been done timely. Brighton's contention is without merit. Oldcastle could have refiled a notice of lien to include Archco within eight months after its completion of the contract on May 12, 2006 (i.e., by January 12, 2007), pursuant to Lien Law § 10, and served it upon Archco.

Brighton further argues that Oldcastle's lien has lapsed, and that this court, therefore, does not have the discretion to permit the amendment of the notice of lien. Brighton points out that Lien Law § 12-a "presupposes the existence of a valid lien and may not be construed to revive an invalid notice of lien" (*Matter of Atlas Title & Marble Works [S & H 88th St. Assocs.]*, 191 AD2d 247, 248 [1993]).

Brighton asserts that, pursuant to Lien Law § 11-b, a lienor's failure to file a proof of service of a notice of lien on a contractor with the County Clerk within 35 days after the notice of lien is filed terminates the lien as a matter of law (*see Bruno Frustaci Contr.*

v Georgie Enters. LLC, 6 Misc 3d 1021 [A],* 3 [2005]; *Matter of Denoyelles Co. v Requa Elec. Supply Co.*, 155 Misc 2d 451, 452 [1992]; *Paolangeli v Sopp*, 145 Misc 2d 259, 261 [1989]), and that, therefore, Oldcastle's mechanic's lien was terminated by its failure to serve its notice of lien upon Archco within 35 days after the notice of lien was filed. It contends that this mandates that the notice of lien be cancelled and discharged of record since the "invalidation of [a] lien where proof of service is not filed is mandatory leaving no discretion in the court" (*Outrigger Constr. Co. v Nostrand Ave. Dev. Corp.*, 217 AD2d 689, 690 [1995], quoting *Matter of Northport Marina Assocs. v J.M. Cashman, Inc.*, 146 BR 60, 62-63 [Bankr. ED NY 1992]; see also *Matter of Podolsky v Narnoc Corp.*, 196 AD2d 593, 594-595 [1993]; *Matter of PKS Dev. Co. v Kahn Lbr. & Millwork Co.*, 187 AD2d 656, 656 [1992]). Brighton further contends that since Oldcastle's lien has terminated, no judgment of foreclosure and sale can be directed. Brighton argues that this court should, therefore, deny Oldcastle's motion and grant its cross motion for an order discharging the lien, granting it summary judgment dismissing Oldcastle's fourth cause of action for foreclosure of its mechanic's lien (the sole cause of action asserted as against it), and, pursuant to CPLR 6514 (a), directing the Kings County Clerk to cancel the notice of pendency docketed by Oldcastle against its property.

Brighton's contentions are without merit. While it is true that once a lien has lapsed, such a lapsed lien cannot be amended and no judgment of foreclosure and sale can

be directed (*see Hanson Heating & Plumbing v Stout*, 88 Misc 2d 241, 242 [1976]; *Meszaros v Indiveri*, 36 Misc 2d 632, 634 [1962]), Oldcastle does not seek to revive an invalid or defective lien. Oldcastle has substantially complied with Lien Law § 9 by naming the correct owner and the contractor with whom it directly contracted, a description of the property, and the amount owed to it. Oldcastle has also filed proof of service with the Kings County Clerk upon the owner, Brighton, and the contractor, Hanson.

Mechanic's liens have been amended nunc pro tunc where the lienor failed to name the true contractor (*see Lien Law § 9 [7]; San Marco Constr. v Gillert*, 15 Misc 2d 208, 211 [1958]). Lien Law § 23 provides:

"[Lien Law] article [2] is to be construed liberally to secure the beneficial interests and purposes thereof. A substantial compliance with its several provisions shall be sufficient for the validity of a lien and to give jurisdiction to the courts to enforce the same."

Thus, an amendment of a notice of lien is permissible where there has been "substantial compliance" with article 2 of the Lien Law and no prejudice will result to any existing lienor, mortgagee, or purchaser (*see Matter of Marshall Constr. Co. v Brookdale Hosp. Ctr.*, 68 Misc 2d 20, 21 [1971]). Here (as previously noted), there was substantial compliance by Oldcastle. Oldcastle did not misidentify the owner or the person with whom its contract was made.

In addition, Brighton, as an owner, "cannot oppose the amendment to the notice of

mechanic's lien upon the ground of prejudice" because it is not an "existing lienor, mortgagee or purchaser in good faith" and, thus, it "do[es] not fall within any category enumerated in [Lien Law § 12-a]" (*Matter of Carboline Co. v Gold*, 94 AD2d 921, 921 [1983]; *see also Matter of Commander Elec. v Lerner*, 54 AD2d 698, 698 [1976]; *PM Contracting Co. v 32 AA Assocs., LLC*, 2003 WL 21960250, *4 [2003], *affd as mod on other grounds* 4 AD3d 198 [2004]). Brighton also will not be prejudiced in any way since it was named in the notice of lien and had adequate notice of the lien. There can also be no prejudice to any party since Hancock was the contractor with whom Oldcastle contracted to perform the job and it had a contractual relationship with and received its only payment to date from Hancock, not Archco (*see Bran Elec. v MHA, Inc.*, 269 AD2d 231, 232 [2000]). The defect was, thus, not one of substance (*compare Houseknecht v Reeve*, 108 NYS 2d 917, 919 [1951]).

The court has the power to permit an amendment nunc pro tunc to add the name of a party where through ignorance, being misled, or inadvertence, that party's name was omitted, and where, as here, no prejudice to existing lienors, mortgagees, or purchasers in good faith is shown (*see Matter of Boulder Apts. v Walsh*, 14 Misc 2d 287, 289 [1956]). Here, since Brighton's failure to timely comply with Lien Law § 8 by not serving its response to Oldcastle's Demand for Terms of Contract frustrated Oldcastle's attempt to comply with the statutory mandate of Lien Law § 11-b by preventing it from timely refiling the lien to include Archco and timely serving Archco with the notice of lien,

Brighton should not be rewarded for its own wrongdoing by being allowed to use its own lack of compliance for its benefit. To permit it to do so would result in a gross inequity. Furthermore, it is noted that Lien Law § 11-b, unlike Lien Law § 11 (which addresses service of a copy of the notice of lien upon the owner and filing proof of service with respect to the owner) specifically refers to service upon the general contractor or of an amendment of notice of lien in accordance with Lien Law § 12-a, supporting the court's discretion to permit the amendment herein and to sustain the validity of Oldcastle's mechanic's lien.

Additionally, it is noted that, as Oldcastle argues, service of the notice of lien upon Archco may have been, in any event, unnecessary on the basis that there may have been privity of contract between Brighton and Hancock. The existence of privity of contract between Brighton and Hancock would, in effect, render Hancock the "contractor" pursuant to Lien Law § 11-b and Oldcastle would have no obligation to serve Archco with the notice of lien.

Oldcastle's argument is supported by the fact that the subcontract between Archco and Hancock (although stating that it was between Archco and Hancock), was actually executed by Brighton, along with Hancock and Archco, indicating, by Brighton's being a signatory to this subcontract, that it may have been a party thereto and, thus, in privity with Archco and Hancock. Indeed, as noted above, Hancock's first cross claim alleges that Hancock had a direct contract with Brighton. Furthermore, Oldcastle asserts that

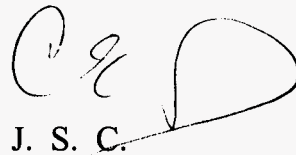
even if Brighton did not initially contract with Hancock, Brighton may have terminated Archco or assumed Archco's responsibilities since there is evidence of seven checks issued, dated as early as September 20, 2005 (prior to Oldcastle's filing of the notice of lien), from Brighton to Hancock, totaling \$90,760 for payment for work performed by Hancock for Brighton at the project.

Thus, inasmuch as the court finds that there was no fatal substantial defect in the notice of lien, Brighton's cross motion cannot be granted. Additionally, in the interests of equity, Oldcastle must be granted leave to amend its notice of lien nunc pro tunc (*see* Lien Law § 12-a).

Accordingly, Oldcastle's motion for an order, pursuant to Lien Law § 12-a, granting it leave to amend, nunc pro tunc, its notice of mechanic's lien to include Archco as a general contractor and to allow it to serve the amended notice of mechanic's lien upon all required parties, including Archco, pursuant to the Lien Law, is granted. Brighton's cross motion is denied in its entirety.

This constitutes the decision and order of the court.

E N T E R,

A handwritten signature in black ink, appearing to be "J. S. C.", written over a horizontal line.

NON. CAROLYN E. DEMAREST