

**Scientific Elec. Co., Inc. v ADG Park  
Constr. Group, LLC**

2007 NY Slip Op 33139(U)

September 27, 2007

Supreme Court, New York County

Docket Number: 0118579/2006

Judge: Barbara Kapnick

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

**BARBARA R. KAPNICK**

PRESENT: \_\_\_\_\_  
*Justice*

PART 12

*Scientific Electric Co.*

INDEX NO. 118579/06

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

- v -  
*AD & Park Constructors*

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 \_\_\_\_\_

**MOTION IS DECIDED IN ACCORDANCE WITH  
ACCOMPANYING MEMORANDUM DECISION**

**FILED**

OCT - 3 2007

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 9/27/07

**BARBARA R. KAPNICK** J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO  
JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 12

-----X  
SCIENTIFIC ELECTRICAL COMPANY, INC.,

Plaintiff,

-against-

ADG PARK CONSTRUCTION GROUP, LLC a/k/a  
AMERICAN DEVELOPMENT GROUP, PARK SOUTH  
LOFTS, LLC, 43 PARK OWNERS GROUP, LLC,  
BOARD OF MANAGERS OR PARK SOUTH LOFTS  
CONDOMINIUM, NORTH FORK BANK, JOHN DOES  
"1" through "10" being intended to be  
those persons or entities with an interest  
in real property,

Defendants.

-----X  
BARBARA R. KAPNICK, J.:

DECISION/ORDER

Index No. 118579/06  
Motion Seq. No. 001

**FILED**  
OCT -3 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiff Scientific Electric Company, Inc. was an electrical sub-contractor at a construction project known as the Park South Lofts Condominium, located at 43-45 East 30th Street in Manhattan.

Defendant ADG Park Construction Group, LLC a/k/a American Development Group ("ADG") was the prime contractor. Defendant Park South Lofts, LLC ("Park South") was the owner and developer of the building. Defendant 43 Park Owners Group LLC ("43 Park") was the previous owner and developer.

In this action, plaintiff seeks to recover damages: (i) against defendant ADG for breach of contract (first cause of action); (ii) against defendant Park South for unjust enrichment

(second cause of action); and (iii) against defendant 43 Park for unjust enrichment (third cause of action).

In addition, plaintiff seeks to foreclose on a mechanic's lien in the amount of \$68,000, which plaintiff claims was due and owing from ADG to plaintiff (fourth cause of action).

Defendants now move by Order to Show Cause for an order:

(1) pursuant to CPLR § 3211(a)(1) dismissing the Complaint based upon documentary evidence;

(2) pursuant to Lien Law § 39 summarily discharging, canceling and vacating of record the Notice of Lien filed by plaintiff against the property;

(3) pursuant to CPLR § 6514(a) or (b) canceling the Notice of Pendency filed by plaintiff against the property;

(4) preventing plaintiff from placing any additional Notice of Lien or Notice of Pendency on the property;

(5) pursuant to CPLR § 6514(c) awarding costs and expenses to defendants; and

(6) pursuant to Lien Law § 39-a awarding costs, attorneys' fees, expenses and damages in an amount to be determined but in no event less than \$55,805.

Defendants deny plaintiff's claim that they owe plaintiff any funds for work allegedly completed by plaintiff at the building. However, they argue that even if defendants owed funds to plaintiff, plaintiff waived its right to collect those monies pursuant to an 'Unconditional Waiver and Release Upon Progress Payment' ("the release").

Plaintiff represented in the release that it had been paid and had received a progress payment in the sum of \$31,470 for labor, services, equipment or material furnished to ADG on the job through June 15, 2006, and acknowledged

receipt of the progress payment, approval of the requisition upon which it is based, and payment in full (less retention, if applicable) of invoice(s) for labor, services, equipment and/or material furnished through the date of the requisition and/or invoice(s) upon which this payment is made.

The undersigned does hereby release pro tanto any mechanic's lien, stop notice or bond right that the undersigned has on the above referenced job. If a mechanic's lien has been filed by the undersigned prior to this date, this release shall serve to authorize the immediate cancellation and discharge of same and the undersigned hereby undertakes to sign and/or execute any additional documents which may be necessary in order to discharge said lien.

In addition, the release contained the following language on the bottom of the page under the signature line:

NOTICE: THIS DOCUMENT WAIVES RIGHTS UNCONDITIONALLY AND STATES THAT YOU HAVE BEEN PAID FOR GIVING UP THOSE RIGHTS. THIS DOCUMENT IS ENFORCEABLE AGAINST YOU IF YOU SIGN IT, EVEN IF YOU HAVE NOT BEEN PAID. IF YOU HAVE NOT BEEN PAID, DO NOT SIGN THIS OR USE A CONDITIONAL RELEASE FORM.

Plaintiff argues in opposition that plaintiff's course of prior dealings with defendant ADG (and specifically, the prior course of dealings between Scientific's corporate president, Thomas E. Jocelyn and ADG's owner, Perry Finkelman) completely refutes defendants' interpretation of the documentary evidence.

It is well settled that "[w]here a waiver form purports to acknowledge that no further payments are owed, but the parties' conduct indicates otherwise, the instrument will not be construed as a release." West End Interiors, Ltd. v. Aim Construction & Contracting Corp., 286 A.D.2d 250, 252 (1<sup>st</sup> Dep't 2001). See also, E-J Electric Installation Co. v. Brooklyn Historical Society, \_\_\_ A.D.3d \_\_\_, 2007 WL 2493141 (1<sup>st</sup> Dep't).

In the instant case, plaintiff has submitted a sworn affidavit from Mr. Jocelyn who claims that on a prior occasion, on February 25, 2004, "under almost identical circumstances" he signed another waiver "drafted by ADG with the exact same language as the instant waiver", "even though Scientific was still owed additional sums of over \$27,000 because ADG's Perry Finkelman explained to [him] at

that time that the 2/25/04 waiver did **not** discharge all outstanding change orders, but instead it only covered work contemplated by the current requisition." He claims that plaintiff subsequently received payment for the additional work performed prior to signing the waiver.

According to Mr. Jocelyn, "[t]he fact remains that there is \$67,805.00 worth of work performed both before and after the execution of the waiver that falls outside the scope of the waiver." He contends that "based on [his] previous dealings under almost identical circumstances [with ADG], it was reasonable for [him] to conclude that the finality of the waiver's language, as was the case in the past, did not apply to outstanding change orders which were not the subject of the requisition contemplated by the waiver."

Defendants argue in reply that one prior instance of a change in conduct does not constitute a "course of dealing." In addition, defendants argue that Article 5 of the contract executed by Scientific and ADG required that any modifications in the scope of the work are to be made in writing, and that there is no evidence that any change work order was submitted by ADG to Scientific, nor is there anything in writing to indicate that Scientific made any claims to ADG for additional costs or other damages.

Thus, defendants argue that the unconditional release must be enforced as written. See, Tri-State Environmental Contracting, Inc. v. PT&L Contracting Corp., 5 A.D.3d 127 (1<sup>st</sup> Dep't 2004), in which the court dismissed a subcontractor's complaint on the basis of a document denominated "Full and Final Waiver of Lien", which stated that plaintiff had accepted a sum certain as "a full and final payment" and would "make no further claim of any nature for additional compensation (either base contract or additional work) .. for this project."

In that case, the court found that the parties' past practice did not show that the waiver in issue was intended merely as receipt for partial payment since the four prior waivers between the parties all contained language clearly evincing their understanding that further payments were to be made, while the final waiver contained no such language. Tri-State Environmental Contracting, Inc. v. PT&L Contracting Corp., supra at 128.

Here, however, the release in question contains no language indicating that the monies received by plaintiff constituted "a full and final payment" for plaintiff's work on the project. Moreover, defendants have not submitted any affidavit from a person with knowledge refuting Mr. Jocelyn's claim of his prior dealings with ADG regarding payments for outstanding change orders.

Accordingly, based on the papers submitted and the oral argument held on the record on February 21, 2007, this Court finds that there are triable issues of fact as to whether or not the parties intended for the subject release to be construed as a waiver of all future payments. See, e.g., Allied Environmental Group, Inc. v. Samson Construction Co. Inc., 36 A.D.3d 521 (1<sup>st</sup> Dep't 2007).

That portion of defendants' motion seeking to dismiss this action based on said release is, therefore, denied as premature with respect to defendant ADG.

This portion of the motion is also denied with respect to the co-defendants since neither Park South nor 43 Park was a party to that document.

Defendants alternatively argue that this Court should vacate the mechanic's lien and award damages to defendants based on Lien Law § 39 which provides:

In any action or proceeding to enforce a mechanic's lien upon a private or public improvement or in which the validity of the lien is an issue, if the court shall find that a lienor has wilfully exaggerated the amount for which he claims a lien as stated in his notice of lien, his lien shall be declared to be void and no recovery shall be had thereon. No such lienor shall have a right to file any other or further lien for the same claim. A second or subsequent lien filed in contravention of this

section may be vacated upon application to the court on two days' notice.

See, Strongback Corp. v. N.E.D. Cambridge Avenue Development Corp., 25 A.D.3d 392 (1<sup>st</sup> Dep't 2006); Westbury S & S Concrete, Inc. v. Manshul Construction Corp., 212 A.D.2d 596 (2<sup>nd</sup> Dep't 1995).

Plaintiff argues that the issue of whether or not it willfully exaggerated the amount of the mechanic's lien filed in this case is an issue of fact to be determined at trial. See, Matter of Lustbader Contracting Corp., 144 Misc.875 (Sup. Ct., N.Y. CO. 1932).

It is well settled that "[a] determination of willful exaggeration requires proof that the lienor deliberately and intentionally exaggerated the lien amount (citation omitted)." Barden & Robeson Corp. v. Czyz, 245 A.D.2d 599 (3<sup>rd</sup> Dep't 1997). See also, J. Sakaris & Sons, Inc. v. Terra Firma Construction Management & General Contracting, LLC, 14 A.D.3d 538 (2<sup>nd</sup> Dep't 2005), lv. to app. denied, 4 N.Y.3d 878 (2005).

This Court finds that the conflicting affidavits presented raise triable issues of fact which preclude a finding at this time that plaintiff deliberately and intentionally exaggerated the lien amount.

Accordingly, defendants' motion is denied in its entirety. Defendants are directed to serve an Answer to plaintiff's Complaint within 20 days of service of a copy of this order with notice of entry.

A preliminary conference shall be held in IA Part 12, 60 Centre Street, Room 341 on November 14, 2007 at 9:30 a.m.

This constitutes the decision and order of this Court.

Date: September 27, 2007

  
Barbara R. Kapnick  
J.S.C.

**BARBARA R. KAPNICK  
J.S.C.**

**FILED**  
OCT -3 2007  
NEW YORK  
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