

Port Fab LLC v Progressive Constr. Inc.

2007 NY Slip Op 33260(U)

October 2, 2007

Supreme Court, New York County

Docket Number: 0604229/2006

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris Ling-Cohan

PART 36

Index Number : 604229/2006

PORT FAB LLC

INDEX NO. _____

vs

PROGRESSIVE CONSTRUCTION INC

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. _____

SUMMARY JUDGMENT

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for Cross-Motion Summary Judgment

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

PAPERS NUMBERED

1, 2

Answering Affidavits — Exhibits _____

Replying Affidavits _____

5, 6

Cross-Motion: Yes No

3, 4

Upon the foregoing papers, it is ordered that this motion & cross-motion for, inter alia, summary judgment are denied, in accordance with the attached memorandum decision.

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

FILED
OCT 11 2007
NEW YORK
COUNTY CLERK'S OFFICE

JUSTICE DORIS LING-COHAN

Dated: 10/2/07

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

[* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 36

-----x
PORT FAB LLC d/b/a THE WENIG COMPANY,

Plaintiff,

- against -

PROGRESSIVE CONSTRUCTION, INC. and
CAROLINA CASUALTY INSURANCE COMPANY

Defendants.
-----x

Index No. 604229/06

Motion Seq. No:001

FILED

OCT 11 2007

NEW YORK
COUNTY CLERK'S OFFICE

HON. DORIS LING-COHAN, J.:

In this action to recover damages for services rendered, plaintiff, Port Fab LLC d/b/a the Wenig Company ("Wenig"), moves, pursuant to CPLR 3212, for summary judgment (1) on the first, second, and third causes of action in the Complaint; (2) granting it prejudgment interest at a rate of 9% per annum from October 16, 2006; (3) dismissing the affirmative defenses of defendants Progressive Construction, Inc. ("Progressive") and Carolina Casualty Insurance Company ("CCIC"); and (4) dismissing defendants' counterclaims. Plaintiff also seeks sanctions against defendants, pursuant to NYCRR 130-1.1(a).

Defendants oppose the motion and cross-move for summary judgment (1) declaring that the Notice under Mechanic's Lien Law was willfully exaggerated; (2) vacating the Notice under Mechanic's Lien Law; (3) declaring that plaintiff cannot recover under the Notice under Mechanic's Lien Law; and (4) awarding Progressive attorney's fees.

BACKGROUND

Wenig is a New York limited liability company engaged in the business of manufacturing and installing convector covers for residential and commercial construction projects. Progressive is a New York general contracting firm and the general contractor for a renovation project on the 6th and 17th floors at One Chase Manhattan Plaza, New York, New York (the "Premises"). CCIC, a foreign corporation authorized to do business in this State, served as surety for the renovation project.

By Purchase Order No. 7864, dated July 7, 2006, Progressive retained Wenig as subcontractor to supply and install certain convector covers for a renovation project at the Premises. Wenig reportedly performed the required work and submitted two invoices to Progressive. Invoice No. 13188 requested payment in the amount of \$25,000, and Invoice No. 12197 sought payment in the amount of \$67,000. Progressive allegedly failed to pay the invoices.

On or about September 15, 2006, Wenig filed a Notice under Mechanic's Lien Law against the Premises in the amount of \$92,000. However, by letter, dated September 25, 2006, Progressive informed Wenig that it was back-charging Wenig's account in the amount of \$18,000 based on a reduction in the scope of Wenig's work at the Premises. Thus, Wenig agreed to reduce the balance due under the two invoices to \$74,000.

On September 29, 2006, Progressive issued a punch list based on Wenig's failure to complete certain tasks on the renovation project. Wenig reportedly completed the tasks on the punch list. An email message, dated On October 16, 2006, from Progressive's

vice president, Thomas Rogan, to Wenig's president, William Friedman, states:

Thanks for taking care of the punch list. The check is cut and waiting for you to provide the Discharge of Lien to remove the Lien from the county clerks records. A satisfaction of lien is a necessary first step but the process is not complete until the discharge is issued by the clerk. When original is provided, you will be given the check.

(Friedman Affid., Amended Not of Mot, Exh G).

Wenig filed a Satisfaction of the Mechanic's Lien on October 11, 2006. However, Progressive never paid the invoices. Thus, on or about October 18, 2006, Wenig filed another Notice under Mechanic's Lien Law, in the amount \$74,000, against the Premises. On October 31, 2006, Progressive, as principal, and CCIC, as surety, issued Bond No. 0109159 in the amount of \$81,400. By order, dated November 21, 2006, this Court (Gische, J.) granted Progressive's application to discharge the Mechanic's Lien in lieu of the Bond.

Progressive again failed to pay the \$74,000. As a result, Wenig commenced this action alleging causes of action for foreclosure of the Mechanic's Lien (first cause of action), breach of contract (second cause of action), an account stated (third cause of action), and quantum meruit (fourth cause of action).

Defendants answered generally denying the allegations in the complaint, asserting as affirmative defenses that (1) the Complaint fails to state a cause of action; (2) the claims are

* 5]

barred by the doctrines of waiver, estoppel, and unclean hands; (3) the claims are barred since Wenig did not fulfill its obligations under the Purchase Order; (4) the claims are barred because Wenig failed to satisfy the conditions precedent to payment under the Purchase Order; (5) Wenig willfully exaggerated the Notice under Mechanic's Lien Law in violation of New York Lien Law § 39; and (6) Progressive is entitled to reasonable attorney's fees, pursuant to New York Lien Law § 39(a). Defendants also allege two counterclaims for violation of New York Lien Law § 39.

Wenig replied denying the allegations in the counterclaims and asserting various affirmative defenses.

Wenig now seeks summary judgment on the first, second, and third causes of action in the Complaint, with interest, as well as an order dismissing defendants' affirmative defenses and counterclaims, and the imposition of sanctions against defendants for frivolous conduct.

Defendants seek to vacate the Mechanic's Lien Law and to recover attorney's fees.

DISCUSSION

It is well settled that "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law", tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; see also *Zuckerman v*

City of New York, 49 NY2d 557, 562 [1980]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, *supra*). "Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient" to defeat summary judgment (*id.*).

Here, Wenig argues that it is entitled to summary judgment on the causes of action for foreclosure of the October 18, 2006 Mechanic's Lien (first cause of action); breach of contract (second cause of action); and an account stated (third cause of action). Wenig asserts that it completed the work in accordance with the Purchase Order between the parties, and that defendants are not justified in withholding payment. Wenig further contends that it is entitled to summary judgment on the third cause of action for an account stated in the amount of \$74,000 since Progressive agreed to pay the invoices after Wenig filed the Satisfaction of Lien. Wenig relies primarily on the October 16, 2006 email message from Thomas Rogan to support its position.

In opposition, however, defendants contend that the October 18, 2006 Mechanic's Lien is void under New York Lien Law § 39 since Wenig willfully exaggerated the amount due thereunder. To support their position, defendants maintain that Wenig deliberately filed an exaggerated Notice under Mechanic's Lien Law on September 17, 2006, at significant cost to Progressive;

that Wenig admitted the falseness of the September 17, 2006 lien and agreed to bear the cost of same, as evidenced by back charge #310; and that Wenig has failed to obtain a certified discharge of the September 15, 2006 Mechanic's Lien despite agreeing to do so. Defendants further contend that Wenig disregarded back charge #310 when filing the October 15, 2006 Mechanic's Lien merely a few days after the parties agreed on back charge #310.

Defendants also argue that triable issues of fact exist as to Wenig's work performance pursuant to the Purchase Order between the parties and the amount owed to it under said agreement.

On review of the submissions, the Court concludes that the request for summary judgment on the first, second, and third causes of action in the Complaint, as well as on the claim for prejudgment interest, must be denied. Lien Law § 39 states, in part:

"In any action or proceeding to enforce a mechanic's lien upon a private or public improvement or in which the validity of a lien is an issue, if the court shall find that that a lienor has willfully 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..."

"Willful" within the meaning of § 39 is defined as being willing, ready, self-determined, intentional, and deliberate (*id.*). Furthermore, the issue of whether a contractor had deliberately and intentionally exaggerated the amount of a mechanic's lien

which was filed, making the lien invalid, is a question of fact for the jury (see *Washington 1993 Inc. v Reles*, 255 AD2d 745 [3d Dept 1998]). The burden is on the property owner to show that the amount set forth in the mechanic's lien was willfully exaggerated (see *Schenectady Homes Corp. v Greenside Painting Corp.*, ___ Misc ___, 37 NYS2d 53 [County Ct, Schenectady County 1942]). Under § 39, proof of willful exaggeration of a mechanic's lien must be established by the property owner by a fair preponderance of the evidence upon the trial of the action or proceeding to enforce the lien, and not upon a motion prior to trial based merely upon affidavits (*id.*).

Here, the Court determines that Wenig's failure to apply a credit for a reduction in the work it performed for the renovation project toward the amount of the September 15, 2006 lien, coupled with its failure to apply a recently agreed upon back charge to the amount of the October 18, 2006 lien, at the very least, raises a triable issue of fact as to whether the exaggeration in the amount of the lien was willful.

Furthermore, since Wenig commenced this action to foreclose a mechanic's lien, defendants' answer alleging willful exaggeration of the amount for which the lien was claimed states proper defenses and counterclaims (see *Frederick J. Fox Constr. Corp. v Halikman*, ___ Misc ___, 88 NYS2d 156 [Sup Ct, Queens County 1949]). Thus, the branch of the motion seeking dismissal of defendants' affirmative defenses and counterclaims must be denied.

In addition, the request for sanctions is denied (see 22 NYCRR 130-1.1), as frivolous conduct has not been established in the submitted papers.

Furthermore, in light of the existence of triable issues of fact, the cross motion is denied in its entirety.


Accordingly, it is

ORDERED that the motion and cross motion for summary judgment are denied; it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon defendant with notice of entry.

Dated:

10/26/07



Hon. Doris Ling-Cohan, J.S.C.

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