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

PRESENT: PART 10

Index Number : 601895/2005

PARSONS CONSTRUCTION

vs

PICKLED PUNK PICTURES

Sequence Number : 003

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 _____

	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

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: JAN 03 2007

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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PARSONS CONSTRUCTION LLC d/b/a C. GREG PARSONS and d/b/a PARSONS CONSTRUCTION DEVELOPMENT,

Plaintiff,

-against-

PICKLED PUNK PICTURES, INC., RICHMOND HILL COMPANY, LLC and DOT HILL SYSTEMS CORP. (DELAWARE), M&T REAL ESTATE, INC., "JOHN DOES 1-10", "ABC CORPS. 1-10", "DEF PARTNERSHIPS 1-10", "XYZ, LLC 1-10", the last 40 names being fictitious and unknown to plaintiff and intended to be persons or entities, if any, being in possession or having a right to possession to the premises described in this complaint,

Defendants.

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Decision/Order
Index No.: 601895/05
Seq. No. : 003

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**
Pltf's motion [sj] w/NAG affirm in support, affid in support (CGP), exhs	1
Defs x-motion w/DY affirm in support and in opp, exhs	2
Defs supplemental affirm in support and in opp (DY) w/exhs	3
Pltf's affirm in reply and in further support (NAG)	4
Defs affirm in further support and in further opp (DY)	5

Upon the foregoing papers, the decision and order of the court is as follows:

Gische J.:

This is an action by Parsons Construction LLC d/b/a C. Greg Parsons and d/b/a Parsons Construction Development (collectively "plaintiffs") to foreclose on liens filed on March 14, 2005 and May 17, 2005. Plaintiffs have moved for summary judgment on

their complaint and dismissal of the answer with counterclaims. Alternatively they seek summary judgment on defendants' counterclaims. Defendants Pickled Punk Pictures, Inc., Richmond Hill Company, LLC and Dot Hill Systems Corp. (Delaware) have cross moved for partial summary judgment, dismissing plaintiffs' 6th cause of action, which is to foreclose on the liens.

Since issue has been joined and no note of issue has been filed, these motions are considered by the court. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004).

Plaintiffs are in the construction business. They renovated the 11th floor of the building located at 161 Avenue of the Americas in New York County ("11th floor"). The building is owned by defendant Richmond Hill Company, LLC ("owner"), the entity against whom the liens were filed. Defendant Pickled Punk Pictures, Inc. ("Pickled Punk) subleases the 11th floor from defendant Dot Hill Systems, Inc., the over-tenant. Defendant M & T Real Estate, Inc., is the mortgagee; it has defaulted in this action and takes no position on these motions.

It is unrefuted that plaintiffs renovated the 11th floor. It is also unrefuted that the 11th floor is occupied by Pickled Punk. Mr. Parsons, on behalf of all the plaintiffs, has testified at his examination before trial that he had an agreement with Pickled Punk to do the renovation work. Mr. Parsons further testified that they agreed on the terms of the work and that he personally met with Mr. Halpern, principal of Pickled Punk, on several occasions throughout the project. Mr. Halpern made useful comments about the work being done that were incorporated by the plaintiffs into their plans.

Plaintiffs filed two mechanics liens; they are in identical amounts ($32,794.68)

and for the same period of time. No dispute is presented about the timeliness of either lien; both were filed within 8 months of the work performed and materials provided. The first lien filed on March 14, 2005 misidentifies the lot the building occupies (e.g. "Block 505 Lot 32"). The second lien filed May 17, 2005 correctly identifies it (e.g. "Block 505 Lot 31"). Thus, plaintiffs contend that the duplicate filings were due to an honest mistake that it attempted to correct. Plaintiffs concede that they cannot foreclose on both liens because it would be a duplication. They further agree that the March 14, 2005 lien has to be vacated, effectively withdrawning their 5th cause of action to foreclose on that defective lien.

Plaintiffs have withdrawn their motion to the extent they originally sought summary judgment on their other four (4) causes of action, all of which are in contract or quasi-contract. Consequently, they now only seek summary judgment on their 6th cause of action, which is to foreclose upon the May 17, 2005 lien.

Based upon the foregoing, Mr. Parsons contends that plaintiffs are entitled to summary judgment allowing them to foreclose on the May 2005 lien because they performed services that were accepted and were not paid for. Lien Law § 3. Thus, plaintiffs contend that regardless of whether there was any written contract or other agreement between themselves and Pickled Punk for the renovation of the 11th floor, they have a statutory basis to foreclose on the lien. Plaintiffs also seek summary judgment dismissing the answer, with counterclaims.

Defendants have cross moved for summary judgment dismissing plaintiff's 6th cause of action and they also oppose plaintiffs' motion to dismiss their counterclaims for willful exaggeration because of the duplicate liens that were filed (1st and 2nd

counterclaims), and abuse of process (3rd counterclaim) predicated upon the filing of the two liens. Defendants have withdrawn their 4th counterclaim for malicious prosecution.

Mr. Halpern argues that the work may have been done on the 11th floor for Pickled Punk, but that it was at the behest, urging, or for the actual benefit of, another company who is not a party to this action. Defendants contends that Pickled Punk and that nonparty company, PostWorks, LLC ("PostWorks") are locked in extensive litigation elsewhere[1] over a failed license agreement between them and that this case is yet another of their disputes. As per that purported license agreement, PostWorks agreed to pay Pickled Punk's expenses for a period of time (encompassing these renovations), with the added agreement it could retain its revenues. Thus, Mr. Halpern contends Pickled Punk only agreed to have the renovation done for that reason (to maximize profits for PostWorks). Apparently, PostWorks later either terminated the agreement or defaulted under it, and litigation before another Justice of this court ensued.

Mr. Halpern separately contends that the two liens were filed by plaintiffs against Pickled Punk because of the other lawsuits and that somehow plaintiff is collaborating with PostWorks to force Pickled Punk into a settlement, or otherwise influence the other litigation. Significantly, Mr. Halpern has not denied that the work was done with Pickled Punk's consent, or that he was involved. Further, he does not deny that the work was completed, or even that it costs too much. His main defense is that since there is no

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[1] Pickled Punk Pictures, Inc. d/b/a/ Post Factory, NY and Alex Halpern, et al., Supreme Court N.Y. Co, Index No. 600266/05 and PostWorks LLC v. Pickled Punk Pictures and Alex Halpern, Supreme Court N.Y. Co. Index No. 600273/05, both consolidated before Hon. Paul Feinman.

proof of a contract or agreement between Pickled Punk and plaintiffs, the lien cannot be foreclosed against any of the defendants.

Defendants further contends that a purchase order dated September 16, 2004 which plaintiffs produced in response to their discovery demands proves that it was PostWorks - not Pickled Punk - with whom plaintiffs have a contract. This document, not relied upon by plaintiffs to prove their case, identifies the "ship to" company as Post Factory on the 11th floor. It has a notation that "construction and materials NOT TO EXCEED $40,0000." Defendants contend the signature on this purchase order is that of Mr. DeMartin, manager of PostWorks, and defendants deny that the purchase order is authentic, even though it the words "Post Factory" are printed at the top. Mr. Halpern acknowledges in his affidavit that Post Factory is a "d/b/a" for Pickled Punk.

Finally, Mr. Halpern denies ever seeing any invoices for the renovation work, but believes and contends they were actually sent to PostWorks. He offers invoices reportedly sent by plaintiffs (provided in discovery) to "Patrick Fallo[n]" at Pickled Punk. Mr. Fallon is not employed by Pickled Punk, but by PostWorks. The address on these invoices is that of Pickled Punk at 161 Avenue of the Americas.

In support of their three counterclaims, defendants contend that plaintiffs, by filing two liens and then asserting two causes of action (one on each lien) willfully exaggerated their claims, entitling defendants to damages. Defendants separately contend that the filing of the liens is itself an abuse of process because they were filed to help PostWorks in the litigation before Justice Feinman.

Discussion

The party seeking summary judgment in its favor has the initial burden that it is

entitled to summary judgment as a matter of law. Only if this initial burden is established must the opponent demonstrate, by admissible evidence, the existence of a factual issue requiring a trial. Zuckerman v. City of New York, 49 NY2d 557 (1980). The disputed issues must be real and not just shadowy semblances, which is why summary judgment requires parties to lay bare their proof. SJ Capelin v. Globe, 34 NY2d 338 (1974).

Under section 3 of the Lien Law, a contractor who performs services or furnishes materials for the improvement of real property is entitled to a lien equal to the principal and interest of the value, or the agreed to price, of labor, materials, of improvements.. Claudio Perfetto v. Waste Management or New York, LLC, 274 AD2d 389 (2nd Dept 2000). Thus an improvement upon real property can form the basis for a filing of a mechanic's lien on the theory that the lienor has added something to the value of the property. Lien Law § 3; PT&L Const Co. v. Winnick, 59 AD2d 368 (3rd dept 1977).

Although defendants contend that there is no written contract between plaintiffs and themselves, a party may resort to, and relief can be had, in a proper case under, a mechanics' lien absent any contractual privity. Jenkin Contracting Co. v. Sixth Ave. & 57th St. Corp., 282 AD 662 *mot. for lv. to app. den.* 306 NY 980 (1953). Therefore, any argument by Pickled Punk that plaintiffs' agreement to undertake the construction work was with a non-party (PostWorks, or anyone else) does not defeat plaintiffs' motion for summary judgment on their lien foreclosure (6th) cause of action. Consequently, if plaintiffs have made a prima facie showing that they performed the renovations of the 11th floor, but they were not paid for the work by Pickled Punk, they have proved their case. The burden then shifts to the defendants who must produce evidentiary proof in

admissible form sufficient to establish the existence of material issues of fact which require a trial of that cause of action. Blue Grey Dev., Inc. v. Rainer Realty Corp., 269 AD2d 553 (2nd Dept 2000).

Plaintiffs have proved they renovated the 11th floor occupied by Pickled Punk and that the work was done with the occupant's consent, knowledge and approval. Plaintiffs have also proved that they sent invoices to Pickled Punk bearing its name and correct address. Robert H. Finke, Inc. & Sons v. Sears Oil Co., Inc. 256 AD2d 868 (3d dept 1998) Though Mr. Halpern claims they had the wrong name on them (e.g. Mr. Fallon's), this argument does not defeat plaintiffs' motion, nor frame a material factual dispute for trial. Not only were the invoices provided to Pickled Punk (and its lawyer) before plaintiffs filed their lien in May 2005, plaintiffs complied with Pickled Punk's demand for an itemized statement in connection with the defective lien and the effective May 2005 lien. Plaintiffs, therefore, complied with their disclosure requirements under the lien law. Lien Law § 38; DePalo v. McNamara, 139 AD2d 646 (2nd Dept 1988).

Defendants have also failed to prove that their counterclaim for willful exaggeration either defeats plaintiffs' motion for summary judgment on their 6th cause of action, or that it survives plaintiffs' motion for summary judgment dismissing that counterclaim. Lien Law § 39-a imposes a civil penalty upon a contractor who has willfully exaggerated the amount of the lien it has filed. Goodman v. Del-Sa-Co Foods, Inc., 15 NY2d 191, 195 (1965). Inaccuracy in the amount of lien filed, if no exaggeration is intended, does not void a mechanic's lien. Goodman v. Del-Sa-Co Foods, Inc., supra at 194. In a case involving a mere inaccuracy or honest mistake in setting the amount of the lien, damages under Lien Law § 39-a may not be imposed. Strongback Corp. v.

N.E.D. Cambridge Ave. Development Corp., 25 AD3d 392 (1st dept. 2006.). Moreover, when a mechanic's lien has been discharged for reasons other than 'wilful exaggeration' or withdrawn, such penalty is not applicable. In re Mohawk Frozen Foods, Inc. v. George A. Nole & Sons, Inc., 780 F.2d 7, 9 (2d Cir. 1985).

Not only have plaintiffs withdrawn their cause of action premised on the March 2005 lien, it would have been subject to dismissal by the court in any event because it has the wrong block number on it. It is therefore defective on its face. Under either of these scenarios, damages under Lien Law § 39-a are unavailable to the defendants. Wellbilt Equipment Corp. v. Fireman, 275 AD2d 162, 163 (1st Dept. 2000).

Plaintiffs have established that neither lien was for an amount in excess of the actual services rendered. Therefore, neither of these liens were for an exaggerated amount. Simply because two liens were filed, and the two amounts, cumulatively, exceeded the value of services rendered does not make this a situation where the contractor is exaggerating his lien, in violation of the mechanic's law. *See*: Fidelity N. Y. v. Kensington-Johnson Corp., 234 AD2d 263 (2nd dept 1996). Only one of the liens is enforceable because the other is defective on its face; therefore, there is no claim for wilful exaggeration to be tried. *See*: Coppola General Contracting Corp. v. Noble House Const. of NY Inc., 224 A.D.2d 856 (3rd dept 1996). Plaintiffs' motion, for summary judgment dismissing defendants' 1st and 2nd counterclaims for willful exaggeration is, therefore, granted.

Plaintiffs also seek summary judgment dismissing defendants' counterclaim for abuse of process. Abuse of process has three essential elements: (1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification,

and (3) use of the process in a perverted manner to obtain a collateral objective. Curiano v. Suozzi, 63 NY2d 113 (1984). Where, as here, there is no proof that plaintiffs sought some collateral advantage or corresponding detriment to defendants, which was outside the legitimate ends of filing a mechanic's lien, a claim for abuse of process does not lie. See: New York State Properties, Inc. v. Clark, 183 AD2d 1003 (3rd Dept.1992).

Plaintiffs have shown that their purpose in filing the liens was to get paid for the services and materials provided. Defendants have not come forward with any other reason for plaintiff filing the lien, and their assertion of collusion with PostWorks lacks any evidentiary support. Therefore, plaintiffs are entitled to summary judgment on defendants' 4th counterclaim, as a matter of law, dismissing this counterclaim.

Plaintiffs have proved that they are entitled to summary judgment on their 6th cause of action which is to foreclose the lien they filed on May 14, 2005 in the amount of $32,794.68. Defendants have not challenged the amount of the lien as being incorrect, nor have they raised any factual disputes that have to be decided at trial. Therefore, plaintiffs' motion for summary judgment on their 6th cause of action is granted. Defendants' cross motion to dismiss that cause of action is, therefore, denied.

Plaintiffs' motion for summary judgment dismissing defendants' three remaining counterclaims is also granted and those counterclaims are hereby dismissed.

Although plaintiff has withdrawn its motion for summary judgment on its contractual and quasi-contractual causes of action, they are based on the same claims as the 6th cause of action, and in the same amount. Those remaining causes of action (1st through 4th) are hereby severed and dismissed (plaintiff previously withdrew its 5th cause of action). Since the remaining defenses asserted in the answer address the now

severed and dismissed claims, the answer and remaining defenses is dismissed as well. Plaintiff is entitled to a judgment against the defendants, jointly and severally, on the 6th cause of action which is to foreclose on the lien filed with the New York County Clerk on May 17, 2005 against Block in the amount of $32,794.68.

Settle judgment on notice.

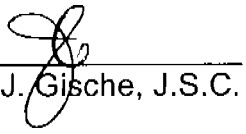
Conclusion

Plaintiffs' motion for summary judgment on its 6th cause of action and for the dismissal of defendants' counterclaims is granted. Defendants' cross motion is denied in all respects.

Settle judgment on notice.

Dated: New York, New York
January 3, 2007

So Ordered:



Hon. Judith J. Gische, J.S.C.