

Marjam Supply Co., Inc. v A.L.S. Constr., Inc.

2008 NY Slip Op 30688(U)

March 5, 2008

Supreme Court, Suffolk County

Docket Number: 0032166/2007

Judge: Paul J. Baisley

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SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

COPY

PRESENT:

Hon. Paul J. Baisley, Jr.

MARJAM SUPPLY CO., INC.,

Plaintiff,

-against-

A.L.S. CONSTRUCTION, INC., ANTHONY SALUCCI, MARY SALUCCI, 214 WALL STREET ASSOCIATES, LLC., KULKA CONTRACTING, LLC., HSBC BANK USA, NATIONAL ASSOCIATION and COMMERCE BANK, N.A.,

Defendants,

ORIG. RETURN DATE: January 29, 2008
FINAL RETURN DATE: February 22, 2008
MTN. SEQ. #: 001-MG, 002-MotD

PLTF'S ATTORNEY:

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Upon the following papers numbered 1 to 25 read on this motion to dismiss and this cross motion for leave to amend the caption, summons, verified complaint and notice of pendency: Notice of Motion and supporting papers 1 - 7; Affirmation in Support and supporting papers 8 - 11; Notice of Cross Motion and supporting papers 12 - 17; Affirmation in Reply and in Opposition 18 - 21; Reply Affirmation 22 - 25; it is,

ORDERED that the defendant Kulka Contracting, LLC's motion (001) to dismiss the third cause of action for a foreclosure of a mechanic's lien is granted and said cause of action is dismissed; and it is further

ORDERED that that part of the plaintiff's cross motion (002) seeking permission to discontinue the action as to the defendant 214 Wall Street Associates, LLC is granted; and it is further

ORDERED that that part of the plaintiff's cross motion for leave to amend the caption, summons and verified complaint is granted as provided herein and that part of this cross motion seeking leave to amend the notice of pendency is denied as moot; and it is further

ORDERED that the plaintiff is directed to serve said supplemental summons and amended verified complaint within 30 days of the date herein by service upon the additional defendant Medical Arts-Huntington Realty, LLC. pursuant to CPLR 308 and upon the remaining original defendants pursuant to CPLR 2103(b)(1), (2) or (3) and to file said supplemental summons and amended verified complaint along with proofs of service with the County Clerk ; and it is further

ORDERED that the defendants Kulka Contracting, LLC, 214 Wall Street Associates, LLC, HSBC Bank USA, National Association and Commerce Bank, N.A. are hereby severed from this action; and it is further

ORDERED that the caption in this action shall now read as follows:

MARJAM SUPPLY CO., INC.,

Plaintiff,

Index No. 32166/07

-against-

A.L.S. CONSTRUCTION, LLC, ANTHONY SALUCCI, MARY SALUCCI and MEDICAL ARTS-HUNTINGTON REALTY, LLC,

Defendants.

;and it is further

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ORDERED that pursuant to 22 NYCRR 202.8(f) the parties are directed to appear for the preliminary conference already scheduled for March 31, 2008 at the Supreme Court, DCM Part, Room A362, One Court Street, Riverhead, New York at 10:00 a.m.

This action arises out of a claim for monies due for supplies and services rendered on a construction job. The plaintiff filed a notice of mechanic's lien properly naming and serving the owner of the property and the contractor for which the work was performed (*see* Lien Law §§11 and 11-b).

Subsequently, and within one year of filing and serving the notice of lien, this action was commenced to foreclose upon the lien as well as to recover on the underlying debt. The plaintiff, however, failed to name the proper owner of the property (although named in the notice of lien) and, instead, mistakenly named as the owner an entirely different entity. Consequently, no action has, as yet, been commenced against the proper owner and, in addition, no extension of time has been sought for the lien which was filed over a year ago (*see* Lien Law §17).

The third cause of action contains the claim to foreclose on the lien and names three other lienors, namely, the defendants Kulka Contracting, LLC (hereinafter Kulka), LLC, HSBC Bank USA, National Association and Commerce Bank, N.A.

Kulka now moves (001) to dismiss as to that third cause of action on the ground that the lien has expired pursuant to Lien Law §17. The plaintiff cross-moves for denial of the Kulka motion, for leave to serve and file an amended notice of pendency, summons and complaint, and to discontinue as to the defendant 214 Wall Street Associates, LLC (the entity improperly named as the owner of the property).

Lien Law §17 provides that a notice of lien expires after one year unless an action to foreclose on the lien is commenced against the owner and a notice of pendency is filed with the names of the parties to the action or unless the plaintiff obtains a court-ordered extension of the lien within one year from its original filing. Here, although an action with a claim of foreclosure of the lien was filed within one year, the action did not name the known actual owner of the property. In addition, the plaintiff did not seek within that year an extension of the notice of lien. Accordingly, the lien is extinguished as a matter of law (*see* Lien Law §17; *Bretzfelder v Froman*, 76 Misc 2d 1063, 352 NYS2d 549 [Co Ct, Westchester County 1973]; *Gelles-Berger Co. v Boynwat Props.*, 37 Misc 2d 126, 234 NYS2d 234 [Sup Ct, Bronx County 1962]) and the third cause of action is dismissed for failure to state a cause of action (*see* CPLR 3211[a][7]). As a consequence of this dismissal, the three named lienors are severed from this action as provided herein.

Turning now to the plaintiff's cross motion, that part of its application to deny the dismissal of the third cause of action is denied but that part seeking leave to amend the summons and complaint is granted as provided herein as is its request to discontinue the action as to 214 Wall Street Associates, LLC.

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Leave to amend a pleading should be freely granted in the absence of prejudice or surprise to the opposing parties (see, CPLR 3025 [b]; *Sarro v Sarro*, 238 AD2d 330, 656 NYS2d 916 [1997]). Inasmuch as the defendants do not oppose this part of the application and do not claim any prejudice if this relief is granted and, in addition, the fact that no preliminary conference order has been entered into as yet, this application for leave to amend the caption, summons and verified complaint and to serve same is granted.

The request to amend the notice of pendency is denied, however, as it is now moot in view of the dismissal of the cause of action seeking foreclosure of the lien due to the lien being extinguished as a matter of law.

Lastly, the unopposed request to discontinue the action as to the defendant 214 Wall Street Associates, LLC is granted pursuant to CPLR 3217(b).

This decision constitutes the order of the court.

Dated:

3/5/08

HON. PAUL J. BAISLEY, JR.

HON. PAUL J. BAISLEY, JR. J.S.C.