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

PRESENT: KORNREICH Justice PART 54

135 WEST 14ST

-v-

ROSMY BUILDERS CORP

INDEX NO. 115395/07

MOTION DATE

MOTION SEQ. NO. 001

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 IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

FILED
MAR 28 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 3/24/08

HON. SHIRLEY WERNER KORNREICH
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 54

----------X

In the Matter of the Application of 135 WEST 14th STREET, LLC, Petitioner, for an Order Summarily Discharging of Record a Notice Under Mechanic's Lien Law dated March 1, 2007, filed by REMY BUILDERS CORP., Lienor

INDEX NO. 115395/2007

DECISION AND ORDER

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KORNREICH, SHIRLEY WERNER, J.:

By order to show cause dated November 19, 2007, 135 West 14th Street, LLC (petitioner), as the owner of certain premises, seeks an order, pursuant to Lien Law §19, summarily discharging a certain Notice of Lien filed by Remy Builders Corp. ("Lienor") against the building located at 135 West 14th Street in New York City (the building), for services rendered as a subcontractor. Petitioner argues that the mechanic's lien is defective on its face because (1) the lien identifies the wrong owner of the building, and (2) the lien is "willfully exaggerated." Petitioner opposes.

I. *Undisputed Facts*

Petitioner is a New York limited liability company with its principal place of business at 15 West 39th Street, New York. Petitioner contracted with a construction manager named Hudson Meridian Construction Group, LLC (Hudson) to renovate and expand its 14th Street building into a condominium. The contract identifies the building owner as 135 West 14th Street, LLC c/o The Vintage Group, LLC, 15 West 39th Street, New York. Hudson then entered into a subcontract with Lienor. In a December 22, 2006 letter to Hudson from its attorney, Lienor sought recovery of "$61,000.00 less retainage (10%) for work, labor and services performed as of November 27th,

2006. ... [and] more than $55,000.00 ... due from change orders." Exh. C, Petition. Lienor then filed a Notice Under Mechanic's Lien Law dated March 1, 2007 (Notice). Exh. D, Petition. The Notice identifies the owner of the property as Vintage Group, LLC, and lists $313, 686.50 as the total unpaid amount. After the lien was filed, petitioner, who identified itself as "135 West 14th Street, LLC c/o Vintage Group, LLC," served Lienor with a demand pursuant to Section 38 of the Lien Law. Exh. A, Opposition. The demand was sent by certified mail enclosed in an envelope showing the sender as Vintage Group, LLC, and with the same return address as petitioner. Exh. B, Opposition. Lienor responded to the demand with summaries of invoices for work performed, overhead and profit. Exh. C, Opposition.

II. *Legal Discussion and Rulings*

Petitioner seeks an order, pursuant to Lien Law § 19(6), summarily discharging the mechanic's lien filed against its building. Section 19(6) provides for such a discharge where, among other grounds, the lien is "invalid on its face," or "where for any other reason the notice of lien is invalid by reason of failure to comply with the provisions of section nine of this article." *Id. See In Re Lowe*, 4 A.D.3d 476 (2d Dept. 2004). "It is well settled that a court has no inherent power to vacate or discharge a notice of lien except as authorized by Lien Law § 19 (6)." *Id.* Lien Law § 23 provides that the Lien Law "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."Any dispute regarding the validity of the liens, where there is otherwise no defect upon the face of the Notice of Lien, must await trial by foreclosure. *Retek v. City of New York*, 14 A.D.3d 708, 709 (2d Dept. 2005).

Lienor, in an affidavit by its assistant treasurer, admits that it named the wrong property owner on the Notice, but argues that the mistake does not invalidate the mechanic's lien because the two entities are affiliated. Petitioner also alleges that Lienor willfully exaggerated the amount owed for services rendered. Relevant to the discussion here, Lien Law § 9 provides:

> The notice of lien shall state:
> ...
> 3. The name of the owner of the real property against whose interest therein a lien is claimed, and the interest of the owner as far as known to the Lienor.
> ...
> 5. The amount unpaid to the Lienor for such labor or materials.
> ...
> 7. ... A failure to state the name of the true owner or contractor, or a misdescription of the true owner, shall not affect the validity of the lien.

A. *Wrong Owner Named in Lien*

Instead of naming petitioner as the owner of the building, Lienor named The Vintage Group, LLC. Although Lien Law § 9(7) provides that a misdescription of the owner does not affect the validity of a lien [*GS Assoc., LLC v. R.A. German Constr., Corp.*, 15 Misc. 3d 1135A (Sup. Ct. Kings Cty 2007], a *misidentification* of the true owner is a jurisdictional defect which cannot be cured by an amendment *nunc pro tunc*. *See Tri-State Sol-Aire Corp. v. Lakeville Pace Mech.*, 221 A.D.2d 519 (2d Dept. 1995). The issue then is whether the naming of Vintage as opposed to petitioner was a misdescription or a misidentification, the latter being fatal to the court's jurisdiction. *Id.* The record before the court is not sufficient to answer this question, but it does raise a factual issue to be resolved at trial by foreclosure.

The documentation supporting the petition shows that petitioner and Vintage were affiliated entities and that petitioner wore Vintage's hat in its relations with Lienor. They were

located at the same address, petitioner received its mail (including the notice of lien) "c/o" Vintage, and the Lien Law § 38 demand was sent to Lienor by petitioner "c/o" Vintage. Further, the demand, which was verified by an authorized signatory of petitioner, was sent in an envelope bearing the name and address of Vintage. This shows that the two entities were at least somewhat affiliated. *Peachy v. First 97-101 Reads Street Associates, Inc.*, 180 A.D.2d 474, 476 (1st Dept. 1992) (lien that misdescribed owner not invalidated where affidavit showed actual owner and named owner were closely affiliated). But the court needs more information to determine whether Vintage controlled petitioner to such an extent that it could be considered the beneficial owner, as opposed to the record owner of the building. *See Pm Contr. Co. v. 32 Aa Assocs. Llc*, 2003 N.Y. Misc. LEXIS 1070, 2003 NY Slip Op 51188U (Sup.Ct. N.Y. County), *modified on other grounds*, 4 A.D.3d 198 (1st Dept. 2004) (lien not discharged because LLC named as owner controlled separate LLC that was record owner of property, making named LLC "beneficial owner"). In the *Pm* case, acting on a motion to dismiss, the court had before it evidence showing the history and extent of the two LLCs' relationship. Without evidence equally relevant to the extent of control Vintage had over petitioner, both generally and in regard to the building subject to the lien, the petition must be denied on this ground, without prejudice to re-filing as a counterclaim in a foreclosure action.

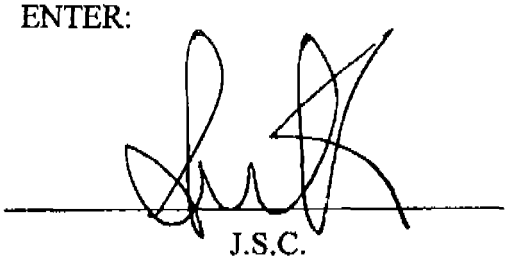
B. *Willful Exaggeration of Amount Owed*

Petitioner's contention that the lien may have been willfully exaggerated also is not cognizable on this petition for summary disposition. Willful exaggeration is not a violation determinable on the face of the lien and is not a violation of Sections 9 or 10 of the Lien Law, as required by Lien Law § 19 (6) for summary discharge. Pursuant to Lien Law § 39, willful

exaggeration can only be asserted in an action to enforce a mechanic's lien and it is only in such a proceeding that a finding of willful exaggeration will render a lien void. *Strongback Corp. v. N.E.D. Cambridge Ave. Dev. Corp.*, 25 A.D.3d 392, 394 (1st Dept. 2006). Moreover, a finding of willful exaggeration "requires proof that the Lienor deliberately and intentionally exaggerated the lien amount." *J. Sackaris & Son, Inc. v Terra Firma Const. Mgt. & Gen. Contr., LLC*, 14 A.D.3d 538, 541 (2d Dept. 2005). Accordingly, it is

ORDERED that the petition by 135 West 14th Street, LLC for an order summarily discharging a March 1, 2007 mechanic's lien filed by Remy Builders Corp. is denied without prejudice to re-filing as a counterclaim in an action to foreclose on the lien.

ENTER:



J.S.C.

Date: March 24, 2008
New York, N. Y.