

**In House Constr. Servs., Inc. v East 51st
St. Dev., Co., LLC**

2008 NY Slip Op 31680(U)

May 23, 2008

Supreme Court, New York County

Docket Number: 0100144/2008

Judge: Shirley Werner Kornreich

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

PRESENT: HON. SHIRLEY WERNER KORNREICH

PART 54

Index Number : 100144/2008
IN HOUSE CONSTRUCTION SERVICES
vs
EAST 51ST STREET DEVELOPMENT
Sequence Number : 001
MECHANICS LIEN

INDEX NO. 100144/08
MOTION DATE 5/26/08
MOTION SEQ. NO. 1
MOTION CAL. NO. _____

... on this motion to/for Mechanics Lien

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

PAPERS NUMBERED

1

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
JUN 04 2008
COUNTY CLERK'S OFFICE
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

Dated: 5/23/08

HON. SHIRLEY WERNER KORNREICH

J.S.C.

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

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
IN HOUSE CONSTRUCTION SERVICES, INC.,

Plaintiff,

Index No.: 100144/08

-against-

DECISION
and ORDER

EAST 51 ST STREET DEVELOPMENT, CO., LLC. c/o
KENNELLY DEVELOPMENT CO., LLC. and
968 KINGSMEN, LLC., Owner,
ARBOR REALTY FUNDING LLC., Mortgagee and Creditor
JBS CONSTRUCTION MANAGEMENT, INC., Lienor,
FIDIAS CONTRACTING, INC., Lienor, and
JOHN DOE #1 through JOHN DOE # 50, such names
being fictitious and intended to refer to all other parties
who may have some interest or lien upon the premises
sought to be foreclosed herein.

Defendants.

-----X
KORNREICH, SHIRLEY WERNER, J.:

FILED
JUN 04 2008
COUNTY CLERK'S OFFICE
NEW YORK

This action arises out of four mechanics' liens filed against defendants East 51st Street Development Co., LLC c/o Kennelly Development Co., LLC (East 51st) and 968 Kingsmen LLC (Kingsmen). East 51st and Kingsmen now move: (1) pursuant to Lien Law § 19(4), to discharge liens filed both by plaintiff and defendant JBS Construction Management, Inc. (JBS); and (2) to vacate and cancel the lien filed by defendant Fidias Contracting, Inc. (Fidias). No party has opposed.

I. Background

On or about September 13, 2007, JBS filed a mechanic's lien in the amount of \$82,515 against property owned by East 51st and Kingsmen, known as 968 Second Avenue, 303 East 51st Street, 307 East 51st Street, 972 Second Avenue, 974 Second Avenue, 976 Second Avenue, 309

* 3]

East 51st Street (the JBS Lien). On or about September 18, 2007, plaintiff filed four mechanics liens totaling \$54,050 against real estate owned by East 51st located at 972-974 Second Avenue, New York, New York. On or about September 25, 2007, Fidias filed its lien for \$21,500 against property owned by Kingsmen located at 972, 952, and 976 Second Avenue, New York, New York, Block 1344, Lots 3, 4, and 52 (the Fidias Lien). On or about December 8, 2007, defendants served Fidias with notice, pursuant to Lien Law § 59, to commence an action to enforce its lien within 30 days or show cause why an order should not be entered vacating the lien. Fidias did not respond. Plaintiff commenced the instant action on or about January 7, 2008, to foreclose on the four mechanics liens it filed.

II. *Conclusions of Law*

A. *Discharge of Plaintiff's & Fidias' Liens*

In 2003, Lien Law § 19 was amended to allow for the discharge of mechanics' liens by bond without a court order. *Sanco Mechanical, Inc. v. DKS General Contractors & Construction Managers, Inc.*, 34 A.D.3d 271, 272 (1st Dept 2006). Lien Law § 19(4)(a) now provides that a lien may be discharged without a court order where the owner or contractor executes a bond or undertaking equal to 110% of the lien amount from a surety authorized to do business in New York. *Sanco Mechanical*, 34 A.D.3d at 273; Lien Law 19(4)(a). In the absence of a bond issued by a surety authorized to transact business in New York, a court order is required to discharge the lien. *Id.*, Lien Law 19(4)(b). In such a case, "the owner or contractor shall execute an undertaking with two or more sufficient sureties, who shall be free holders, to the clerk of the county where the premises are situated. The sureties must together justify, in at least double the sum named in the undertaking." Lien Law 19(4)(b). The procedures outlined in the Lien Law

* 4]
must be strictly adhered to and the court has no discretion to excuse a party's noncompliance.

Sanco Mechanical, 34 A.D.3d at 274, citing *HMB Acquisition Corp. v. F&K Supply*, 209 A.D.2d 412 (2nd 1994).

Here, defendants have not offered any information as to the identity of the surety that will execute the undertaking necessary to release the liens. As a result, this portion of defendants motion is denied, with leave to renew, upon compliance with the procedures outlined in Lien Law § 19(4).

B. Cancellation of The Fidias Lien

Lien Law § 59 requires that a lienor, upon being served with notice, must commence an action to enforce its lien within 30 days from the date of service, or show cause why the lien should not be canceled or vacated. *See* Lien Law 59; *In re Application for the Cancellation of a Mechanic's Lien on Real Prop. at 81 Brookline Ave.*, 2004 NY Slip Op 50426U (Sup Ct, Albany County 2004). Upon proof that service of the notice was made on the lienor, and that the lienor failed to commence an action to foreclose the lien, the court may grant an order to vacate and cancel the lien. *Id.* Whether the court should use its discretionary power to vacate a mechanic's lien depends on the facts of each case. *Id.*, citing *Kushaqua Estates, Inc. v. Bonded Concrete, Inc.*, 215 A.D.2d 993 (3rd Dept 1995); *In Re Weeks*, 73 Misc. 242, 243 (Sup Ct, Queens County 1911). The lien should be discharged unless some contrary cause is shown. *Id.*, citing *In Re Weeks*, 73 Misc. at 243. Sufficient cause should include a reason why the lienor failed to prosecute the lien. *Id.*

Here, the Fidias Lien should be vacated. Fidias was served with notice on or about November 6, 2007, to commence a lien enforcement action within 30 days. Fidias failed to

initiate any such action. In addition, Fidias defaulted on this motion. Therefore, no sufficient cause has been shown as to why the lien should not be vacated. Accordingly, it is

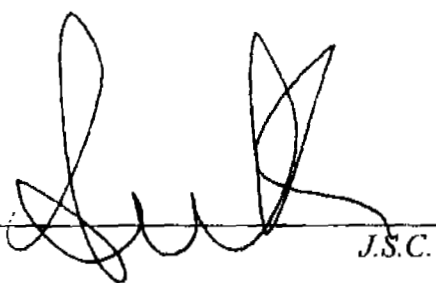
ORDERED that defendants motion to discharge the mechanics liens filed by plaintiff and defendant JBS Construction management Inc., is denied, with leave to renew, upon compliance with the procedures outlined in Lien Law § 19(4); and it is further

ORDERED that defendants motion to vacate the lien filed by defendant Fidias Contracting, Inc., is granted. The court hereby orders that the mechanic's lien dated September 25, 2007, and filed by defendant Fidias Contracting Inc. on September 25, 2007, in the New York County Clerk's Office be vacated and cancelled upon the filing of proof of service of this order and decision upon Fidias Contracting, Inc.; and it is further

ORDERED that the remainder of this action is severed and shall continue; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

ENTER


J.S.C.

DATE: May 23, 2008
New York, NY

FILED
JUN 04 2008
COUNTY CLERK'S OFFICE
NEW YORK
4