

343-349 E.50th St., LLC v W. Designe, Inc.

2008 NY Slip Op 31955(U)

July 9, 2008

Supreme Court, New York County

Docket Number: 0117129/2007

Judge: Marilyn Shafer

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

PRESENT: SHAFER
Justice

PART 8

343-349 EAST 57th
W. Design, Inc

INDEX NO. 117129/07
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to 6 were read on this ~~motion~~ ^{petition} to ~~for~~ ^{to discharge lien}

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

PAPERS NUMBERED	
<u>1, 2</u>	
<u>3</u>	
<u>4</u>	
<u>5, 6</u>	

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ~~motion~~ ^{petition} is denied in accord with the annexed memorandum.

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

FILED
JUL 11 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/9/08

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

PRESENT: HON. MARILYN SHAFER
Justice

PART 8

343-349 EAST 50TH STREET, LLC and ADG 50TH

INDEX NO. 117129/07

Petitioners,

MOTION DATE

-against-

MOTION SEQ. NO. 001

W. DESIGNE, INC.,

MOTION CAL. NO.

Respondent.

The following papers, numbered 1 to 6, were read on this petition, pursuant to Lien Law §§ 9, 19 and 34, to discharge respondent's lien:

	<u>PAPERS NUMBERED</u>
Order to Show Cause, Affirmation – Exhibits	1,2
Answer	3
Affirmation	4
Reply Affirmation – Exhibits	5
Affirmation	6

FILED
JUL 11 2008
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that the petition is denied.

This is a petition, pursuant to Lien Law §§ 9, 19, and 34, by the owner and the general contractor of a high-rise condominium development to discharge a mechanic's lien filed against the condominium by a subcontractor.

Background

On November 20, 2007, respondent, W. Designe, Inc., duly filed a Notice of Mechanic's Lien against the property known as 343-349 East 50th Street, New York, New York, owned by petitioner 343-349 East 50th Street, LLC, claiming a lien in the amount of \$60,800.00 for labor and materials furnished to the property and owed by general contractor, ADG 50th Construction Group, LLC. The Notice of Lien identified the property as Block 1343, Lots 1201 through 1234 on the tax map of the County of New York, City of New York and stated the work was performed, and the materials provided, during the period from November 13, 2006 through July 21, 2007.

Designe had been working on at least two different construction projects for ADG corporations and, on July 23, 2007, entered into two agreements with ADG, each of which concerned both projects:

(1) The "Unconditional Waiver and Release upon Progress Payment", which provided that Designe was to receive a "progress payment" of \$50,000 and

acknowledges receipt of the progress payment, approval of the requisition upon which it is based, and payment in full (less retention, if applicable) of invoice(s) for labor, services, equipment and/or material furnished through the date of the requisition and/or invoices(s) upon which this payment is made.; and

(2) The "Agreement", which provided that Designe would complete certain enumerated unfinished work on the projects by August 6, 2007, for which it would be paid only if the work were completed by that date.

On Sept. 10, 2007, ADG, through counsel, advised Designe it had failed to comply with its obligations under the Agreement and was terminated from the two projects.

Petitioners argue that, pursuant to the Waiver, Designe was paid in full as of July 23. Since there were no monies due to Designe for work performed prior to July 23rd the Notice of Mechanic's Lien is void. Designe acknowledges the error in the end date but denies that error invalidates the lien. Designe argues the Agreement is invalid for lack of consideration and that the Waiver does not state that the payment received constituted payment in full. Designe requests leave to amend the Notice *nunc pro tunc* to indicate an end date of August 4, 2007.

Petitioners reply that it has "just come to this firm's attention" that the Notice of Mechanic's Lien identified the property with superceded lot numbers. The property was originally designated as Block 1343, Lot Nos. 18 and 20. Upon the filing of a Condominium Declaration of Beekman Hill Condominium, it was assigned Lot Nos. 1201 through 1234. However, a Termination of Condominium Declaration was filed on October 12, 2007, and a Condominium Declaration of M at Beekman Condominium was filed on Nov. 15, 2007, five days before the filing of the Notice of Lien. Therefore, at the time the Notice was filed, the property was designated Block 1343 f/k/a Lot 18 n/k/a/ Lots 1401 through 1423.

Petitioners argue this misidentification renders the Notice fatally defective, precluding the possibility of its revival by amendment *nunc pro tunc*. Moreover, fifteen condominium units have been sold since the Notice was filed. Amending the Notice *nunc pro tunc* would be prejudicial to the new owners. Finally, petitioners argue Designe has submitted no invoices or bills to substantiate its claim that work was performed after July 23.

In light of petitioners' inclusion of wholly new information in its reply, this Court granted

Designé's request to serve a sur-reply.¹ Designé responds that the Notice is not fatally defective as a matter of law. Since, at the time the Notice was filed, no units had been sold, the new owners are indemnified by petitioner against liability for the lien. Moreover, Designé asserts that work was done between July 23 and August 4 and, the waiver is ambiguous and was executed under economic duress.

Discussion

Both sides seek to enforce documents containing errors and/or ambiguities. The first issue to be determined is whether the Notice of Mechanic's Lien, which contains admittedly mistaken information, is valid.

The law is clear 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. (Lien Law § 23) A technical construction would conflict with the Legislature's express declaration. (*Naclerio Contracting Co v Rialto Realty Corp*, 28 Misc 2d 957 [Bronx Cty 1961])

Lien Law §12-a(2) provides:

In a proper case, the court may, upon five days' notice to existing lienors, mortgagees and owner, make an order amending a notice of lien upon a public or private improvement, *nunc pro tunc*. However, no amendment shall be granted to the prejudice of an existing lienor, mortgagee or purchaser in good faith, as the case may be.

Consistent with the legislative intent, courts have held that the omission of the exact date marking the first and final dates between which the labor and materials were furnished is not of

¹ This Court did not grant permission for an additional Reply Affirmation, nor for an Affirmation responding thereto, for which reason neither of these submissions has been considered.

such consequence as to preclude necessary amendment *nunc pro tunc*. (*Application of Refrod Realty Corp*, 216 NYS2d 564 [Kings Cty 1961]; *Nacliero, supra*)

On the other hand, while, historically, the property description requirement of Lien Law § 9(7) could be satisfied by a description that was sufficient to identify the premises, a more stringent rule applies to liens on the unique legal identity created by the Condominium Act. (*Westage Towers v ABM Air Conditioning and Refrigeration, Inc*, 187 AD2d 600 [2d Dept 1992]); *In the Matter of MME Power Enterprises, Inc v Wolf & Son Enterprises, Inc*, 205 AD2d 631 [2d Dept 1994]); *Northeastern Restoration Corp v K&J Construction Co, LP et al*, 304 AD2d 306 [1st Dept 2003]).

In all of the above cases, mechanic's liens filed against condominium projects were found to be invalid under Lien Law § 9 (7) because their property descriptions contained superseded lot numbers identifying the property prior to the filing of the condominium declaration. Such a designation failed to properly describe the specific units sought to be encumbered and created an improper "blanket lien" on the entire property, including property not then owned by the named owner. (*Matter of Atlas Tile & Marble Works*, 191 AD2d 247 [1st Dept 1993]) Moreover, under Real Property Law § 339-l (1), a postdeclaration lien is invalid as against the building's common elements because it was filed without the unanimous consent of the unit owners. (*Id*)

The lien in the instant action is distinguished in that it did not impose a "blanket lien" against the entire property, but limited itself to specific lot numbers, all of which, at the time of filing, were owned by the petitioner. While those lot numbers have been superseded, there is no *per se* rule that the use of superseded block and lot numbers in a Notice of Lien is a fatal defect. Rather, the property description must be sufficient for the lien to be limited, on its face, to that

property which the lienor seeks to encumber. (*SGS Associates, LLC v RA German Constr Corp and RA German Architect, PC*, 2007 NY Slip Op 5100 (U) [Kings Cty 2007])

This Court finds the alleged defects are not such as to preclude the existence of a valid lien, having in mind the requirement of substantial compliance imposed by §23 of the Lien Law. The lien is, therefore, susceptible of amendment within the provisions of §12-a of the Lien Law. (*Naclerio, supra*) Nor would such an amendment prejudice subsequent purchasers since liability remains with the petitioners. At the time petitioners conveyed the apartments, they were aware of the existence of Designe's lien which, since they were unaware that it referenced superceded lot numbers, they believed to be valid.

Designe has submitted a proposed Amended Notice of Mechanic's Lien correcting only the end date. It may file an Amended Notice of Mechanic's Lien *nunc pro tunc* which reflects the amended end date as well as accurate lot numbers.

Questions of fact as to the amount of the claims asserted by lienors and contested by petitioners, including the validity and interpretation of the Agreement and the Waiver, await resolution at trial.

We have considered the other arguments of the parties and find them to be without merit.

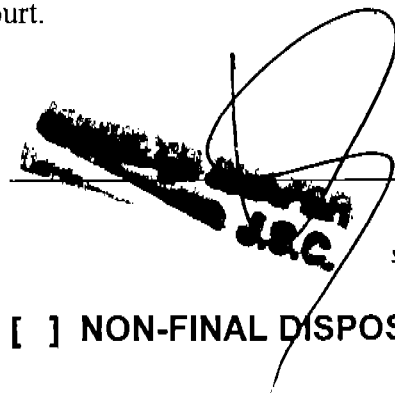
Accordingly, it is

Ordered that the petition to invalidate the lien is denied; and it is further

Ordered that respondent file an Amended Notice of Lien *nunc pro tunc*.

This reflects the decision and order of the court.

Dated: 9/9/08


J.S.C. J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

FILED
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