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

PRESENT: HON. JOAN A. MADDEN J.S.C. Justice PART 11

National

- v -

111 Chelsea

INDEX NO. 111663/07

MOTION DATE

MOTION SEQ. NO. 01

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 is determined in accordance with the annexed decision and order.

FILED

AUG 13 2008

NEW YORK COUNTY CLERK'S OFFICE

Dated: August 5, 2008

HON. JOAN A. MADDEN 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 11

----------X

NATIONAL LIGHTING COMPANY, INC.,

Plaintiff,

INDEX NO. 111663/07

-against-

111 CHELSEA COMMERCE, LP, HALLMARK ELECTRICAL SUPPLIES LLC, LEHR CONSTRUCTION CORP., ACUMEN FUND, INC., TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA,

Defendants.

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JOAN A. MADDEN, J.:

In this action to foreclose on a mechanic's lien, defendants Lehr Construction Corp. ("Lehr") and Travelers Casualty and Surety Company of America, move for an order pursuant to CPLR 3211(a)(7) dismissing the action for failure to state a cause of action.[1]

The following facts are not disputed unless otherwise noted. On or about October 4, 2006, defendant Lehr, entered into a contract with non-party Google, Inc. ("Google"), for Lehr to serve as general contractor for a construction project (the "Project") at the premises occupied by Google, in the building owned by defendant 111 Chelsea Commerce, LP ("111 Chelsea"). On or about October 4, 2006, Lehr, as the general contractor, entered into a contract with defendant Hallmark Electrical Supplies LLC ("Hallmark") for Hallmark to perform certain electrical work in connection with the Project. On or about October 6, 2006, Hallmark contracted with plaintiff National Lighting Company, Inc. ("National"), for National to manufacture, furnish and deliver

[1]The court notes that by stipulation dated April 1, 2008, the action has been discontinued with prejudice as to defendant Acumen Fund, Inc.

light fixtures for the Project.

On May 18, 2007, National filed a Notice Under Mechanic's Lien Law ("Notice of Lien") listing the sum of $9,480.00 as the "agreed price and value of the material furnished" and the "amount unpaid . . . for said material furnished." In its Notice of Lien, National states that "111 Chelsea LLC" is the "owner of the real property"; defendant Hallmark is the "person by whom the lienor(s) [National] was employed" and the "person with whom the contract was made"; and defendant Lehr is the "person to whom [National] . . . furnished . . . materials." On or about August 27, 2007, plaintiff commenced the instant action to foreclose on its mechanic's lien, asserting that no part of the $9,480.00 has been paid.

In seeking to dismiss the complaint for failure to state a cause of action, defendants argue that the complaint is fatally defective for not alleging that Hallmark, the subcontractor who hired National, is owed certain monies under its contract with Lehr. In the alternative, defendants argue that National's recovery under the mechanic's lien is limited to $706.00, which is the amount purportedly due and unpaid to Hallmark on May 18, 2007, the date National filed its mechanic's lien, and thereafter.

In opposing the motion, National contends that the complaint need not allege that monies are owed to Hallmark, arguing that since this is a private as opposed to a public lien, a "more expansive rule applies," in which the lien attaches not only to the amount owed to subcontractor Hallmark, but also to the property interest of the owner, 111 Chelsea. National further contends that its lien is not limited to the $706.00 owed to Hallmark, arguing that as it furnished and delivered the materials "directly" to general contractor Lehr at the premises, the only limitations on the amount of the lien are the "total amount due National under its supply contract" and "the

amount owed by the owner to contractor Lehr at the time of the lien's filing." Alternatively, National contends that defendants' motion to dismiss is premature, and in the event the motion is granted, National should be permitted to conduct discovery and amend its complaint, as to the amount owed to Lehr, the general contractor, when the lien was filed.

While a mechanic's lien provides a means for obtaining payment for services rendered, where as here, the lienor is a sub-subcontractor, the mechanic's lien is based on the subrogation doctrine, and it is valid and enforceable only up to the amount, if any, still due and unpaid to the subcontractor, i.e. Hallmark. See C.S. Behler, Inc. v. Daly & Zilch, Inc., 277 AD2d 1002 (4th Dept 2000); Maneely v. City of New York, 119 App Div 376, 389-390 (1st Dept 1907); Ace Contracting Co. v. Garfield & Arma Assocs, 148 Misc2d 475 (Sup Ct, NY Co 1990); E.F. Curialle & Co. v. Kenray Realty Corp., 25 Misc2d 745, 748 (Sup Ct, Kings Co 1960); 76A NY Jur2d Mechanics' Liens §§ 19, 23. Analyzing the parties' relationship from another perspective, the mechanic's lien of a material supplier such as National is derivative in the sense that it is derived from and limited by what is owed to Hallmark, as the subcontractor with whom National is in privity. See LOP Development LLC v. ZHL Group, Inc., 20 Misc3d 1109(A) (Sup Ct, Kings Co 2008); H. Verby Co., Inc. v. Plainview Assocs, 6 Misc3d 1011(A) (Sup. Ct, Nassau Co. 2005); 76A NY Jur2d Mechanics' Liens §§ 19, 23. In other words, "[e]ach tier of subcontractors, materialmen and laborers has its own lien fund and may look only to its own lien fund for recovery. A lien attaches only to the funds owed to the party directly above the lienor." Robert A. Rubin and Sarah B. Biser, *New York Construction Law Manual*, Chapter 9, Mechanics' Liens, §9:50 (citing Philan Department of Borden Co. v. Foster-Lipkins Corp., 39 AD2d 633 [4th Dept 1972], aff'd 33 NY2d 709 [1973]). Thus, if a materialman cannot establish

that monies were due or thereafter became due, from the contractor to the subcontractor with whom the materialman dealt, no fund exists to which the materialman's lien can attach. Id.

Based on these long-settled principles, National, as a material supplier to subcontractor Hallmark, must allege that monies are due and owing to Hallmark from the contractor Lehr, and National is limited in enforcing its lien to the extent of monies owed to Hallmark by Lehr. See C.S. Behler, Inc. v. Daly & Zilch, Inc., supra; Staten Island Supply Co., Inc. v. Beverly-Glenwood Richmond Corp., 96 AD2d 553 (2nd Dept 1983); Callanan Industries, Inc. v. Fretto, 42 AD2d 664 (3rd Dept 1973); Philan Department of Borden Co. v. Foster-Lipkins Corp., 39 AD2d 633 (4th Dept 1972), aff'd 33 NY2d 709 (1973); Wright v. Schoharie Valley Ry Co., 116 App Div 542 (3rd Dept 1906), aff'd 191 NY 549 (1908); Ace Contracting Co. v. Garfield & Arma Assocs, supra; Chelsea Equipment & Services Corp. v. New York City Health & Hospitals Corp., 1997 WL 790581 (U.S. Dist. Ct., SDNY 1997) (n.o.r.).

National's arguments to the contrary are without merit. The fact that this is a private as opposed to a public improvement project, does not alter the court's conclusion, as the cases cited above involve both private and public projects. See e.g., Maneely v. City of New York, supra (public); C.S. Behler, Inc. v. Daly & Zilch, Inc., supra (private); Staten Island Supply Co., Inc. v. Beverley-Glenwood Richmond Corp., supra (private); Callanan Industries, Inc. v. Fretto, supra (public); Philan Department of Borden Co. v. Foster-Lipkins Corp., supra (public); H. Verby Co., Inc. v. Plainview Assocs, supra (private); Ace Contracting Co. v. Garfield & Arma Assocs, supra (private); E.F. Curialle & Co. v. Kenray Realty Corp., supra (private); Chelsea Equipment & Services Corp. v. New York City Health & Hospitals Corp., supra (public).

National further asserts that it furnished and delivered the materials "directly" to the general contractor. However, since National expressly stated in its Notice of Lien that it was employed by and had a contract with the subcontractor Hallmark, this is not an instance where a materialman had a direct contractual relationship with the general contractor or the owner. Moreover, National provides no case law authority holding that where a materialman merely furnishes and delivers materials to the general contractor, the materialman's lien can be enforced to the extent of monies owed to the general contractor. Rather, in each case involving the lien of a materialman or another type of sub-subcontractor, courts have consistently followed the principle enunciated by the Appellate Division First Department in 1907 that "the lienor of a sub-contractor is obligated to show not only the amount due from the sub-contractor to him, but also that *moneys have become due from the contractor to the sub-contractor* which were not paid prior to the filing of the lien, because the lienor of the sub-contractor claims in the right of the sub-contractor" (emphasis added). Maneely v. City of New York, supra at 390.

Defendants, therefore, are correct that plaintiff's complaint is defective for failing to allege that at the time the notice of lien was filed, or thereafter, any sum of money was due to Hallmark under its contract with Lehr. The complaint, however, need not be dismissed, as the court in its discretion will permit plaintiff to amend the complaint to cure the defect. See Lehmann v. Kingston Plaza, Inc., 44 Misc2d 63 (Sup Ct, Ulster Co 1964); Ball & Wood Co. v. Jonathan Clark & Sons Co., 31 App Div 356 (4th Dept 1898). The court notes that at this pleading stage of the action, plaintiff need only allege generally that monies are owed to Hallmark, without specifying the precise amount. See Palmer Lumber Co. v. Stern, 140 App Div 680 (4th Dept 1910). While defendants assert that the amount Lehr owes Hallmark is limited to

$706.00, the determination of that issue is premature, as defendants have yet to answer.

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss the complaint is denied; and it is further

ORDERED that within 20 days of the date of this decision and order, plaintiff shall serve and file an amended complaint in compliance with the foregoing decision, and within 15 days of defendants' receipt of the amended complaint, defendants shall serve and file an answer; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on September 25, 2008 at 9:30 a.m.

The court is notifying the parties by mailing copies of this decision and order.

DATED: August 5, 2008

ENTER:

J.S.C.