SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 44

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CHAMPION WINDOW & DOOR CORP.,

Plaintiff,

Index No.: 600857/07

001

-against-

DECISION AND ORDER

860 BROADWAY LLC, VALERIE COSTER, ROSS WINDOW CORP. doing business as ROSS WINDOWS, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, and "JOHN DOE 1-100" and "JANE DOE 1-100" being fictitious names of persons unknown who may have an interest in the premises herein,

Defendants.

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MILTON A. TINGLING, J.

FACTUAL BACKGROUND

This action commenced as a foreclosure on a mechanics lien filed by plaintiff against defendant 860 Broadway LLC (860 Broadway) and defendant Ross Window Corp. (Ross). Defendants now move for summary judgment, pursuant to CPLR 3212.

By written order on July 19, 2005, 860 Broadway contracted with Ross to purchase and install 18 window replacements. The replacement windows were specified to be Champion Series 6500 windows. On August 19, 2005, Ross placed an order for the windows with plaintiff, which order was subsequently modified on August 24, 2005.

On September 27, 2005, plaintiff confirmed, by written order

form, and agreed to provide the windows ordered by Ross. The windows were delivered on January 3, 2006. On January 5, 2005, the windows were inspected on site by defendant Coster and the owner of Ross. Defendants allege that the windows were defective and non-conforming. On January 17, 2005, 860 Broadway rejected the windows in a letter sent to Ross.

On January 26, 2005, plaintiff wrote to defendants, stating that it had spoken to a representative from Ross and was going to send someone for an on-site inspection of the windows. In the letter, plaintiff further agreed to refinish a number of the windows that had been sent.

After inspection, plaintiff alleges that any defect in the windows was caused by defendants when the windows were unpacked and carried upstairs prior to the inspection by 860 Broadway. It is noted that some of the windows had been installed prior to the inspection by 860 Broadway. Plaintiff also alleges that many of the windows were not only unpacked, but disassembled.

When defendants failed to pay the amount still due under the order, plaintiff filed the instant lien, and subsequently filed this action.

Defendants allege that the windows were defective and non-conforming when they arrived, and, consequently, that they timely repudiated the contract and returned the windows. Defendants subsequently ordered windows from a different manufacturer.

Defendants move for summary judgment, pursuant to CPLR 3212 (a), and for sanctions against plaintiffs for filing a frivolous lawsuit.

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); *see Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. *See Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

Section 19 of the New York Lien Law (Lien Law) provides for six circumstances under which a mechanics' lien may be discharged: one, by certificate of the lienor; two, by failure to bring an action to foreclose; three, by court order for neglect to prosecute; four, by the owner or contractor executing a bond; five, upon filing of a judgment; and six, where the notice of lien is invalid. As a general rule, in order to be allowed a

summary discharge based on an invalid lien, the notice of lien must be defective on its face. *See Matter of Lowe*, 4 AD3d 476 (2d Dept 2004).

Defendants assert that the lien is invalid on its face because they do not owe any money to plaintiffs as the windows were rightfully and promptly rejected as non-conforming and were returned to plaintiff. In support of their contention, defendants cite *Strongback Corp. v N.E.D. Cambridge Avenue Development Corp.* (25 AD3d 392 [1st Dept 2006]), in which the court granted summary judgment when the purported lienor substantially inflated the amount owed on the face of the lien. Defendants assert that this case is on point, because they do not owe anything to plaintiff due to the non-conforming goods, and hence any amount appearing on the lien is inflated.

However, in *Strongback,* the documentary evidence proved that the lienor had been overpaid more than $100,000 at the time the lien was filed. In the case at bar, there is a dispute as to whether any amount at all is owed, and no facial defect, other than an allegedly inflated amount, is alleged to appear on the face of the lien or notice of lien.

Plaintiff claims that the windows met the requisites of the order, and that any damage or non-conformity was caused by defendants when they unpacked the windows. Conversely, defendants assert that the windows arrived non-conforming and

damaged. Defendants' assertion that plaintiff acknowledged its error in the letter of January 26, 2005, is misleading; plaintiff merely indicates that it would conduct an on-site inspection and that it would refinish some of the windows. Plaintiff never states that the windows were non-conforming, and the letter can be read as a business trying to placate a disgruntled customer.

Since the lien and notice of lien are not defective on their faces, and there are triable issues of fact as to whether the windows were non-conforming when shipped, or damaged when unpacked, summary judgment is precluded. Defendants' other cause of action seeking sanctions is moot.

CONCLUSION

It is hereby

ORDERED that defendants' motion for summary judgment is denied.

Dated: 8/19/08

Milton A. Tingling, J.S.C.

JUDGE MILTON A. TINGLING