

**Marson Contr. Co., Inc. v All Rock Crushing
Inc.**

2008 NY Slip Op 32559(U)

September 19, 2008

Supreme Court, New York County

Docket Number: 0110894/2008

Judge: Joan B. Lobis

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

PRESENT: ~~EDWARD~~ JOAN B. LOBIS
Justice

PART 35

MARSON CONTRACTING CO., INC.

INDEX NO. 110894/08

MOTION DATE 9/10/08

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

- v -

ALL ROCK CRUSHING INC

The following papers, numbered 1 to 20 were read on this motion to for discharge lien.

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-8
9-15 B
16-20

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

UNFILED JUDGMENT
Judgment has not been entered by the County Clerk
and no entry of entry cannot be served hereon. To
make entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
117)

**MOTION DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION AND ORDER**

Dated: 9/19/08

[Signature]
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
NEW YORK COUNTY: IAS PART 6

-----X
MARSON CONTRACTING CO., INC.,

Petitioner,

Index No. 110894/08

-against-

Decision and Order

ALL ROCK CRUSHING INC.,

Respondent

JOAN B. LOBIS, J.S.C.:

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

This is a special proceeding concerning a Mechanic's Lien (the "Lien") in the amount of \$2,145,702 that was filed by respondent All Rock Crushing Inc. ("All Rock") on July 31, 2008. All Rock was a subcontractor at a construction project being built at 29 Overlook Terrace (the "Project"), a property that is owned by Fort Tryon Tower SPE LLC (the "Owner"). Petitioner Marson Contracting Co., Inc. ("Marson"), the construction manager of the Project, brings this application, by order to show cause, for an order summarily discharging All Rock's Notice of Mechanic's Lien, claiming that the Lien is exaggerated.¹ Petitioner seeks to discharge the Lien, pursuant to Lien Law § 19(6), on the ground that the Lien fails to comply with the provisions of § 19. Marson further contends that All Rock's Lien is void, pursuant to New York State Lien Law § 39, because of its "willful exaggeration."

The order to show cause was brought on August 11, 2008, and this matter was assigned to the Hon. Michael D. Stallman. Justice Stallman made the application returnable in the Motion Submissions Part on September 10, 2008. On that date, my court attorney was contacted by

¹ The Owner authorized and directed Marson to act on its behalf and seek court intervention. Therefore, All Rock's claim that Marson lacks standing is without merit.

the Part Clerk for the Administrative Judge, because the attorney for Marson was seeking immediate reassignment to another judge so that the matter could be argued orally; counsel for petitioner was contending that emergency circumstances existed because the construction work has been stalled as a result of the Lien. Marson demanded an immediate hearing, arguing that failure to remove the Lien may result in severe economic burdens to the Owner, and also to the many other contractors who employ hundreds of workers. Marson also claimed that this matter must be heard immediately and the Lien must be set aside because the work, which is adjacent to the Fort Tryon Jewish Center, is prohibited or is severely restricted during the upcoming Jewish holidays.² While the claimed emergency was questionable, this court agreed to hear the application.

At the conclusion of oral argument, the parties were asked to consider whether they could agree that All Rock would reduce the amount of the Lien or whether the parties could otherwise resolve this matter. It was hoped that a settlement would relieve the claimed "cash flow" problem for the Owner and allow the work to continue immediately, since it would necessarily take time to issue a written decision. The parties had a conference call on September 11 with my court attorney. During the call, All Rock refused to reduce the amount of the Lien and Marson refused to agree to allow the Lien to remain, without amendment, and/or bond the Lien.

All Rock and Marson entered into a contract for All Rock to perform all contractual excavation work for the Project. The amount of the contract was \$2,900,000. According to the Lien,

² According to the papers, there is an agreement between the Owner and the Jewish Center to restrict work during the religious holidays.

Marson performed additional work at the price of \$285.25 per cubic yard for 5,750 cubic yards, which, when added to the contract price of \$2,900,000, yields a total cost of improvements in the amount of \$4,568,761. The Lien sets forth that the unpaid balance for labor and materials is \$2,145,702.

According to Marson, All Rock has been paid \$2,116,958.08. Marson further contends that the lien waivers annexed to the papers reflect that the adjusted contract amount is \$2,910,375.57, and not \$4,568,761. Marson asserts that the amount unpaid is \$793,417.49, and not the \$2,145,702 that is set forth on the face of the Lien. Marson further asserts in its affidavit that as further “proof” of the exaggeration of the Lien, All Rock’s July 31, 2008 Demand for Verified Statement sets forth that the amount due to All Rock is \$1,617,914. Marson contends that this constitutes an admission by All Rock that the amount of the Lien should really be \$1,617,941, which is an overstatement of 33%. Marson argues that this is a willful exaggeration.

All Rock asserts that the value of the work performed and in place as of the date of the filing of the Lien was actually higher than the amount of the Lien. In its opposition papers, All Rock contends that it is actually owed at least \$2,232,147. Therefore, it argues, the Lien actually could have been higher.

In addition to claiming that All Rock overstated the amount of the Lien, Marson also asserts that the Lien is invalid on its face because it fails to state “[t]he labor performed or materials furnished,” as required by Lien Law §9(4). The Lien sets forth that the labor performed included

“the fracturing, excavation and removal of rock using hydraulic rock hammers, hydraulic excavators and hydraulic rock drills.” The Lien further sets forth that the materials furnished were “all items necessary for the fracturing, excavation and removal of rock.” These descriptions are sufficient under § 9(4).³ EFCO Corp. v. Helena Assoc. LLC, 45 A.D.3d 399 (1st Dep’t 2007) (holding that a mechanic’s lien “substantially complied” with the statute, despite its failure to set forth the labor performed or materials furnished and the agreed price, and allowing an amendment); A. R. T., Ltd. v. Simpson, 114 Misc.2d 662, 667 (Civ. Ct. N.Y. Co. 1982). If Marson or the Owner really desired more information as to the value of labor performed and material furnished, they could have demanded an itemized statement, pursuant to Lien Law § 38.⁴ A. R. T., Ltd., supra, 114 Misc.2d at 666-67.

Marson asserts that the Lien fails to comply with § 19(6) of the Lien Law. Section 19(6) of the Lien Law provides that

[w]here it appears from the face of the notice of lien that the claimant has no valid lien by reason of the character of the labor or materials furnished and for which a lien is claimed, 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, or where it appears from the public records that such notice has not been filed in accordance with the provisions of section ten of this article, the owner or any other party in interest, may apply to the supreme court of this state, or to any justice thereof, or to the county judge of the county in which the notice of lien is filed, for an order summarily discharging of record the alleged lien. A copy of the papers upon which application will be made together with a notice setting forth the court or the

³ Alternatively, if this court had determined that the description was somehow insufficient, this court would have issued an order amending the Lien, nunc pro tunc. Lien Law § 12-a.

⁴ Indeed, after the commencement of this proceeding, Marson served such a demand, to which All Rock responded.

justice thereof or the judge to whom the application will be made at a time and place therein mentioned must be served upon the lienor not less than five days before such time. If the lienor can not be found, such service may be made as the court, justice or judge may direct. The application must be made upon a verified petition accompanied by other written proof showing a proper case therefor, and upon the approval of the application by the court, justice or judge, an order shall be made discharging the alleged lien of record.

There is no basis to summarily discharge the Lien in the context of this proceeding. As set forth above, the description of the labor performed or material furnished is sufficient under Lien Law § 9. As to the amount claimed in the Lien, “[i]n the absence of a defect upon the face of the notice of lien, any dispute regarding the validity of the lien must wait trial of the foreclosure action.” Coppola Gen. Contract. Corp. v. Noble House Constr., 224 A.D.2d 856, 857 (3d Dep’t 1996), quoting, Care Sys. v. Laramée, 155 A.D.2d 770 (3d Dep’t 1989). In Coppola, the subcontractor filed a mechanic’s lien in the amount of \$13,643. The general contractor and property owner contended that the amount of the undistributed balance was \$7,152; thus, the amount of the mechanic’s lien was 48% higher than the amount that was claimed to be owed. The lower court granted the motion to vacate the lien “in the interests of justice.” The Third Department reversed, holding that defendants failed to meet their burden for summary discharge and, in the absence of a defect on the face of the lien, the issue of its validity must await a trial of the foreclosure action. Coppola, supra, 224 A.D.2d at 857. Similarly, Marson’s remedy is to either bond the Lien or compel All Rock to commence a foreclosure action and then move for summary judgment, if Marson believes there are no issues of fact. See, Di Camillo v. Navitsky, 90 Misc. 2d 923, 925 (Sup. Ct. Putnam Co. 1977).

Marson’s claim for damages pursuant to § 39 and 39-a is similarly without merit. The remedies under these statutes are available only in proceedings to enforce a mechanic’s lien if the

lien is invalidated solely as a result of willful exaggeration. Cases interpreting these sections of the Lien Law have held that this provision, by its own terms, only applies in an action to enforce a mechanic's lien, and can only be determined at the trial of the foreclosure action. Wellbilt Equip. Corp. v. Fireman, 275 A.D.2d 162, 166 (1st Dep't 2000); see also, Atlas Refrigeration-Air Conditioning, Inc. v. Lo Pinto, 33 A.D.3d 639, 640 (2d Dep't 2006); Ahava Mcd. & Rehab. Cen., LLC v. Berkovitch, 20 Misc. 3d 1138(A) (Table), 2008 WL 3932152 at *10 (Sup. Ct. Kings Co. 2008). Moreover, the issue of whether a lien is willfully exaggerated is generally a question of fact, which cannot be determined on these papers. Washington 1993 Inc. v. Reles, 255 A.D.2d 745, 747 (3d Dep't 1998) (issue of fact whether mechanic's lien in the amount of \$4,201.30 was willfully exaggerated); cf., Strongback Corp. v. N.E.D. Cambridge Ave. Dev. Corp., 25 A.D.3d 392, 394 (2006) (where contractor admitted that it had been overpaid by almost double the amount of the lien, the owner established willful exaggeration as a matter of law).

For all of these reasons, the petition is dismissed. This constitutes the decision, order and judgment of the court.

Dated: September 19, 2008



 JOAN B. LOBIS, J.S.C.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Entry Office, Room 1419A.