[* 1]

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

PRESENT: HON. PAUL G. FEINMAN PART 52

Justice

Index Number : 600944/2008

406-408 WEST 45TH STREET HOLDINGS LLC

VS.

CRYSTAL WINDOW & DOOR SYSTEMS, LTD.,

SEQUENCE NUMBER : # 001

MECHANICS LIEN (DISCHARGE)

INDEX NO. 600944-08

MOTION DATE 6-18-08

MOTION SEQ. NO. #001

MOTION CAL. NO. 6

were read on this motion to/for Discharge Mech Lien

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-5
Answering Affidavits — Exhibits	6
Replying Affidavits Aff of Service	7, 8, 9

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that this ~~motion~~ and cross motion are

PETITION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION, ORDER AND JUDGMENT (MB).

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

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

Dated: 7/21/08

J.S.C.

Check one: [X] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION

Check if appropriate: [ ] DO NOT POST [ ] REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52
----------X
In the Matter of 406-408 WEST 45TH STREET HOLDINGS LLC,

Petitioner,

against

CRYSTAL WINDOW & DOOR SYSTEMS, LTD.,
Respondent.
----------X

Index Number	600944/2008
Submission Date	June 18, 2008
Mot. Seq. No.	001
Mot. Cal. No.	88

DECISION, ORDER AND JUDGMENT

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Papers considered in review of this petition to discharge mechanic's lien and cross-motion to amend the lien:

Papers	Numbered
Notice of Petition	1
Petition For Order	2
Affirmation in Support of Petition	3
Petitioner's Memorandum of Law	4
Affidavit of Service	5
Notice of Cross-motion and Opposition	6
Affirmation in Opposition of Cross-motion	7
Reply Affirmation	8
Affidavit of Service	9

PAUL G. FEINMAN, J.[1]**:**

In this proceeding, petitioner seeks an order discharging lienor's notice of mechanic's lien pursuant to NY Lien Law § 19(6). Respondent-lienor cross-moves for an order permitting it to amend the lien. For the reasons which follow, the petition is granted and the cross-motion is denied.

[1] The court gratefully acknowledges the assistance of Kevin Baum, 1-L, a summer intern from St. John's University School of Law, in the research and drafting of this decision.

Factual and Procedural Background

Petitioner, a real estate developer, owned all the real property located at 406–408 West 45th Street, New York, NY ("the premises") in fee simple until it converted the premises into a 22-unit condominium,[2] on or about May 11, 2007, by recording a Declaration of Condominium ("Declaration") with the Office of the City Register of the City of New York. Petitioner sold one residential unit on September 11, 2007, and two more residential units on September 14, 2007. Petitioner asserts that there is no relationship between it and the purchasers beyond that of a typical grantor/grantee relationship (Petitioner's Pet. ¶ 3). Lienor does not dispute this assertion. Petitioner currently owns the remaining 18 residential units and the commercial unit.

The Montauk Development Corp., petitioner's general contractor, hired lienor to furnish building supplies for the renovation of the premises. Petitioner was the sole owner of the premises and the Declaration had not been filed at the time of contract formation and shipment. Lienor shipped the goods to the premises. The contract price was for $187,976.44, of which lienor was paid $25,000. Lienor alleges that it has not received payment of the outstanding balance. On October 2, 2007, lienor filed a Notice Under Mechanic's Lien Law with the County Clerk of the County of New York, claiming $162,976.44 for labor and materials against the entire premises, including the common areas and sold units (Petitioner's Pet. Ex. C).

Analysis

Petitioner seeks to discharge the lien and argues that the "blanket lien" is invalid because it identifies the superceded block and lot number for the premises prior to its conversion into a condominium, instead of describing the units still owned by petitioner. Petitioner notes that by

[2] The condominium has 21 residential units and one commercial unit.

filing a "blanket lien," lienor has encumbered real property that is owned by third parties, who have no special relationship with petitioner. It further argues that the lien encumbers the condominium's common elements without unanimous consent of the unit owners, in violation of Real Property Law § 339-l(1). Petitioner also argues that lienor cannot amend the lien because it is invalid.

"The Lien Law is said to have a dual purpose: first to provide security for laborers and materialmen and second, to provide notice and a degree of certainty to subsequent purchasers" (*In the Matter of Niagara Venture v Sicoli & Massaro, Inc.*, 77 NY2d 175, 181 [1990]). The pertinent section of the Lien Law provides that a "subcontractor . . . who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof, or of his . . . contractor . . . shall have a lien for the principal and interest, of the value, or the agreed price, of such . . . materials upon the real property improved . . . from the time of filing a notice of such lien as prescribed in this chapter" (NY Lien Law § 3). 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" (NY Lien Law § 23 [emphasis added]).

Here the subcontractor provided material to the petitioner's premises and alleges that it was not paid in full. Under the law, there are certain restrictions placed on an aggrieved subcontractor seeking to place a lien on a condominium. Any "lien shall extend to the owner's right, title or interest in the real property and improvements, *existing at the time of filing the notice of lien,* or thereafter acquired" (NY Lien Law § 4 [emphasis added]). A creditor may not file a lien against property that the debtor no longer owns (*see Matter of Niagara Venture v*

Sicoli & Massaro, 77 NY2d 175, 180–82 [1990] [holding that a subcontractor's lien against a theme park was invalid as to the portion of property that a theme park no longer owned in fee simple]). Additionally, under the Condominium Law, "subsequent to recording the [condominium] declaration and while the property subject to this article [Real Property Law Art. 9-B], no lien of any nature shall thereafter arise or be created against the common elements except with the unanimous consent of the unit owners" (Real Property Law § 3-339-l [1]).

Petitioner relies on *Northeast Restoration Corp. v K & J Constr. Co.*, 304 AD2d 306 (1st Dept. 2003) and *Matter of 49 East 21 LLC v C.H. Schmitt & Co., Inc.*, 46 AD3d 391 (1st Dept. 2007) to support its petition to discharge the lien. In both cases a subcontractor filed a lien against an entire condominium building even though a declaration had been filed, units were sold to independent purchasers, and the subcontractor did not have the unanimous consent of the unit owners to encumber the common areas. The First Department held in *Northeast Restoration*, and reaffirmed in *49 East 21 LLC*, that a lien that (1) does not clearly identify the units of the condominium that the lienor seeks to encumber and (2) encumbers the common elements of the condominium without the unanimous consent is void *ab initio* and may not be modified (*Northeast Restoration*, 304 AD2d at 307; *49 East 21 LLC*, 46 AD3d at 391–92).

Here, as in *Northeast Restoration* and *49 East 21 LLC*, the lien identifies the superceded block and lot number for the premises prior to its conversion into a condominium. Moreover, lienor failed to identify the block and lot numbers for the units that the petitioner still owned. Additionally, like liens in *Northeast Restoration* and *49 East 21 LLC*, the lien at bar encumbers the common areas of the condominium without the unanimous consent of the unit owners.

Lienor argues that under common law principles an improper lien may be amended to identify the units that the petitioner still possesses. It cross-moves for permission to "amend its lien [to] cover those units and portions of the property that [petitioner[retained right, title and interest in at the time the [l]ien was filed" (Resp. Cross-Motion Pg. 5–6).

Lienor relies on three decisions decided prior to *Northeast Restoration* and *49 East 21 LLC* in support of modifying the lien in question. Lienor first cites *Matter of Niagara Venture v Sicoli & Massaro*, 77 NY2d 175, arguing that the Court of Appeals has indicated that the Lien Law should be liberally construed so as to fulfill its intent. In that case a subcontractor provided work for a local theme park (*id.* at 177). Prior to the subcontractor filing its lien, the theme park conveyed part of the land to the City of Niagara and then leased the land back[3] (*id.* at 178). The Court of Appeals held that the lien was valid against the undeveloped land that the theme park still owned in fee simple, even though the subcontractor had not improved that land (*id.* at 181–82). There the Court noted that "to say that [the theme park], simply by conveying the developed portion of the parcel, can free itself of all encumbrances relating to the improvements is wholly at odds with the intent of the Lien Law" (*id.* at 181). The Court allowed the lien to be modified to reflect the part of the property that the theme park still owned (*id.* at 181–82).

Lienor also relies on *United Bhd. of Carpenters and Joiners of Am. v Nyack Waterfront Assoc.*, 182 AD2d 16 (3rd Dept. 1992). There a subcontractor provided labor and materials for a three-phase condominium project (*id.* at 18). At the time that the subcontractor filed its lien on the entire property the developer had only recorded a condominium declaration on phase I and

[3] The agreement called for the theme park to pay rent in the amount of its debt service obligations to the City and had a provision to purchase the land back for a nominal amount once all of such obligations were paid. The theme park's taxes were based on the full size of the land.

had sold 25 of the 41 units to individual purchasers; phases II and III were not declared condominiums and the developer still owned those phases in fee simple (*id.*). Although the Third Department declared that the lien was invalid against phase I, it reversed the lower court and ordered the lien to be amended so as to be reinstated against phases II and III (*id.* at 20–21). The Third Department held that the Real Property Law § 339-l "protections extend only the common elements of a property for which a condominium has been filed [and] [i]nasmuch as phases II and III have not yet been completed and declarations have not yet been filed establishing them as condominiums, [it saw] no violation" (*id.* at 21).

Lienor lastly relies on *A.C. Green Elec. Contractors, Inc. v Sau Liong Fu*, 240 AD2d 243 (1st Dept. 1997) to support modification of the lien in question. There an electrical contractor performed work on the condominium "both before and after the Declaration of Condominium and before and after the individual owners purchased their units" (*id.* at 244). There was also "an issue . . . raised whether the individual owners were 'alter egos' of the project owner, and, thus, not intended to be protected by the Condominium Act" (*id.* at 245). Therefore the First Department reversed the lower court and reinstated the lien (*id.* at 243).

The cases relied upon by respondent-lienor to support amendment are distinguishable from *Northeast Restoration, 49 East 21 LLC* and this case. *Niagara* is not applicable not only because it does not involve condominiums, but also because its holding does not address the issue of filing liens against common areas in a declared condominium. Additionally, it differs in that, unlike here, *Niagara* involved an entity that retained control over the land after it was conveyed. There is no suggestion that petitioner sought, as did thetheme park in *Niagara*, to circumvent the Lien Law by filing the declaration and selling the individual units to an alter ego,

or that petitioner vicariously retains control of the units.

Similarly, although lienor asserts that the Court in *United Brotherhood* held that a mechanic's lien encumbers that portion of the property that the owner still had an interest in at the time of filing of the Mechanic's Lien" (Resp. Cross-Motion ¶ 8), its reading of that decision ignores that the Third Department was discussing the "retained, undeveloped portion" of the condominium development (182 AD2d at 20, emphasis omitted). Here as in *United Brotherhood*, there is a condominium in which a developer sold some, but not all of the units. Just as the lien was invalid against phase I, a declared condominium, of the development, here too the lien is invalid against the premises because it improperly names the property as a whole, instead of naming the individual units, and it names the common areas without the unanimous consent of the unit owners. Additionally, unlike *United Brotherhood,* this case does not involve a multi-phase development and, thus, there is no second or third phase for lienor to amend the lien against.

Finally, unlike in *A.C. Green*, here lienor performed work *prior* to the Declaration of Condominium being filed *only* for the petitioner, through its general contractor, and *not* for the individual unit owners. Further, lienor does not contend that in the case at bar the individual unit owners are "alter egos" of the petitioner, and, thus, the units fall with the intended reach of the Condominium Act (*id.* at 245).

Conclusion

Here, the lien was filed after the Declaration of Condominium and the unit sales were recorded, putting lienor on notice that any lien would need to specify the individual unit. Nonetheless, as in *49 East 21 LLC*, "[t]he lien named the subject property as a whole without

identifying the individual condominium units and purported to place liens on the building's common areas without the consent of all individual condo unit purchasers, thus warranting its vacatur" (*49 East 21 LLC* at 391–92). Pursuant to Real Property Law § 339-l(1) and NY Lien Law §§ 4, 19(6), this was a fatal error and does not allow for amendment of the lien given that the lien did not name the units that petitioner still owned and it improperly named the common areas without the unanimous consent of the unit owners. Thus, the lien was void *ab initio*. Accordingly the petition to discharge the lien must be granted. The cross-motion to amend is denied. It is

ADJUDGED and ORDERED that the petition is granted and the October 2, 2007 mechanic's lien against 406 West 45th Street, New York, NY 10036, Block 1054, Lot 37 is discharged and it is further:

ORDERED that the cross-motion to amend the mechanic's lien is denied.

This is the decision, order and judgment of this court

ENTER:

Dated: July 21, 2008
New York, New York

J.S.C.