

**Arbor Realty Funding, LLC v East 51st St.
Dev. Co., LLC**

2009 NY Slip Op 30212(U)

February 2, 2009

Supreme Court, New York County

Docket Number: 602186/2008

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD

PART 35

Index Number : 602186/2008 *Justice*

ARBOR REALTY

vs

EAST 51ST STREET

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 01/15/09

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered _____ motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

The motion and cross motions herein are decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that plaintiff's motion for default judgments against defendants East 51St Street Development Company, LLC, 968 Kingsmen LLC, James Kennelly, Arbor Realty, Sr, Inc., JBS Construction anagement, In House Construction Services, Empire Transit Mix,M Inc., Urban Arborists, Inc., Metal Lathers and Reinforcing Ironworkers Local 46 Funds, Cement and Concrete Workers Pension Fund, Annuity Fund and Training Fund, Cement and Concrete Workers District Council Welfare Fund, Cement Masons Local 780 Fringe Benefit Funds, Barker Steel Co., Inc., Tayrank Ltd., Industrial Components of Westchester, Inc. f/k/a ICW, Kass Industrial Supply Corp, Doka USA Ltd, Nets R Us Ltd., Mottola Rini Engineers PC,, District Council for NYC and Vicinity of the Brotherhood of Carpenters and Joiners of America, New York Timber, LLC, R&R Scaffolding Ltd., Corporate Electric Group, Inc., Domani Consulting, Inc., Exterior Wall & Building Corp., Samuel Feldman Lumber Co., Inc., MG Engineering PC, MGJ Information Technologies, Barker Steel LLC f/k/a Barker Steel Co. Inc., New York City Environmental Control Board, City of New York Department of Finance, and State of New York Office of Attorney General is granted and the complaint is severed as to said defendants; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff and against said defendants; and it is further

Dated: _____

FILED
FEB 2 2009
J.S.C. [Signature]
COUNTY CLERKS OFFICE

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):

ORDERED that that branch of TMJ Plumbing and Heating Corp.'s cross motion which seeks partial summary judgment on its first counterclaim against plaintiff and its cross claim against the other defendants is denied; and it is further

ORDERED that that branch of R & J Construction Co.'s motion which seeks an order that the summons and verified complaint be amended by denoting John Doe #1 as defendant R & J Construction is granted, and the pleadings, papers and proceedings of the plaintiff and the other parties to this action are deemed amended by denoting John Doe #1 as defendant R & J Construction Corp.; and it is further

ORDERED that the branch of R & J Construction Co.'s cross motion that seeks partial summary judgment on its first counterclaim against plaintiff and cross claim against the other defendants is denied; and it is further

ORDERED that the cross motion of ThyssenKrupp Safway, Inc. is denied; and it is further

ORDERED that, pursuant to Real Property Actions and Proceedings § 1321, the issue of the amount due to plaintiff on the notes and mortgages set forth in the complaint, the issue of whether the properties burdened by those notes and mortgages can be sold in parcels, and the issue of whether those notes and mortgages can be satisfied without the sale of the property located at 303 East 51st Street in Manhattan are referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issues; and it is further

ORDERED that these motions, except for those that are granted or denied herein, are held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403, or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Judicial Support Office (Room 311) to arrange a date for the reference to a Special Referee; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this Order with notice of entry within twenty days of entry on counsel for all parties.

Dated 2/2/09

ENTER: [Signature], J.S.C.

HON. CAROL EDMEAD

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check If appropriate: DO NOT POST REFERENC

FILED
FEB - 2 2009
NEW YORK
COUNTY CLERK'S OFFICE

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 35

_____x
 ARBOR REALTY FUNDING, LLC,

Plaintiff,

Index No. 602186/2008

-against-

DECISION/ORDER

EAST 51st STREET DEVELOPMENT
 COMPANY, LLC, et al.

Defendants.

_____x
 EDMEAD, J.S.C.

MEMORANDUM DECISION

This action arises out of the aborted construction of a 42-story mixed-use residential building on real property known as Block 1344, Lots 103, 104, and 105, also known as 303 East 51st Street in Manhattan, (East 51st Street Property). Construction on the building was halted in March 2008, after a crane collapsed at the site, and two workmen were killed. Plaintiff Arbor Realty Funding, LLC (Arbor) seeks to foreclose mortgages (Mortgages) that it holds on the East 51st Street Property and on certain other properties. Defendant mortgagors, East 51st Street Development Company, LLC (Development), 968 Kingsmen LLC (Kingsmen), and James Kennelly, have not appeared. Cross movants, as well as defendants Joy Contractors, Inc. s/h/a Joy Contracting, Inc. (Joy), Linear Contracting, Inc. (Linear), and Garrett Gourlay Architect, PLLC (Gourlay), performed work on, or relating to, the construction of the building and have filed mechanic's liens related to that work.

Arbor moves, pursuant to CPLR 3212 (a), for summary judgment on the complaint against defendants Reliance Construction Ltd. d/b/a RCG Group, Inc. (RCG), TMJ Plumbing & Heating Corp. (TMJ), Joy Contractors, Inc, s/h/a Joy Contracting, Inc., ThyssenKrupp Safway Inc. (ThyssenKrupp), Gourlay, and Linear, and for summary judgment striking those defendants' affirmative defenses and dismissing their counterclaims. Arbor also moves, pursuant to CPLR 3215, for default judgments against Development, Kingsmen and Kennelly, as well as against defendants Arbor Realty, Sr, Inc., JBS Construction Management, In House Construction Services, Empire Transit Mix, Inc., Urban Arborists, Inc., Metal Lathers and Reinforcing Ironworkers Local 46 Fund,

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 COUNTY CLERK'S OFFICE

Cement and Concrete Workers Pension Fund, Annuity Fund and Training Fund, Cement and Concrete Workers District Council Welfare Fund, Cement Masons Local 780 Fringe Benefit Funds, Barker Steel Co., Inc., Tayrank Ltd., Industrial Components of Westchester, Inc. f/k/a ICW, Kass Industrial Supply Corp, Doka USA Ltd, Nets R Us Ltd., Mottola Rini Engineers PC,, District Council for NYC and Vicinity of the Brotherhood of Carpenters and Joiners of America, New York Timber, LLC, R&R Scaffolding Ltd., Corporate Electric Group, Inc., Domani Consulting, Inc., Exterior Wall & Building Corp., Samuel Feldman Lumber Co., Inc., MG Engineering PC, MGJ Information Technologies, Barker Steel LLC f/k/a Barker Steel Co. Inc., New York City Environmental Control Board, City of New York Department of Finance, and State of New York Office of Attorney General. Finally, plaintiff moves for an order amending the caption to delete the references therein to "John Doe" Nos. 1-25 and the descriptive language thereafter, and, pursuant to Real Property Actions and Procedure Law § 1321, for an order appointing a referee to compute the amount due to plaintiff on the notes and mortgages set forth in the complaint.

TMJ cross-moves for partial summary judgment on its first counterclaim against plaintiff and its cross claim against the other defendants, adjudging that TMG's lien on the East 51st Street Property is prior to plaintiff's interest or lien on that property, and on its second counterclaim and first cross claim against Kingsmen and Kennelly, that plaintiff not be permitted to sell the 51st Street Property until plaintiff has exhausted its remedies against real property located at 972-976 Second Avenue in Manhattan, and that all proceeds from a sale of the 51st Street Property should go first to pay TMJ and the other defendant mechanics lienors.

R&J Construction Co. (R&J) moves, pursuant to Lien Law, §§ 13, 22, and 62, and CPLR 1012 and 1013, for an order that the summons and verified complaint be amended by denoting John Doe #1 as defendant R&J, and pursuant to CPLR 3212 (a), for partial summary judgment on its first counterclaim against plaintiff and cross claim against the other defendants, seeking, on its behalf, the same relief that TMJ seeks.

ThyssenKrupp cross-moves for partial summary judgment on its first counterclaim and cross

claim, seeking, on its behalf, the same relief that TMJ and R&J seek. In addition, ThyssenKrupp seeks an order compelling plaintiff to respond to certain discovery demands.

TMJ, R&J, and ThyssenKrupp all argue that their mechanic's liens on the 51st Street Property are prior to the Mortgages, because Arbor modified the Mortgages but failed to file the modifications with the County Clerk prior to the filing of the mechanic's liens. In addition, ThyssenKrupp argues that plaintiff has failed to submit evidence either that any advances on the Mortgages were made prior to the filing of the mechanic's liens, or that the Mortgages contain the covenant that is required by Lien Law § 13 (3).

The Mortgages are in the principal balance of \$70,373,657.00, plus accrued and unpaid interest and other charges due under the Mortgages. The Mortgages encumber the premises located at 303, 305, 307, and 309 51st Street and 968, 972, 974, and 976 Second Avenue. Guy R. Milone, Jr., the senior vice president of plaintiff, describes the various loan documents that are pertinent to this action as follows. His description is undisputed by any of the defendants. On May 8, 2007, Arbor and Development entered into three loan agreements whereby Arbor extended an acquisition loan to Development in the amount of \$39,489,532.20, a building loan in the amount of \$3,704,275.00, and a project loan in the amount of \$2,444,428.80. The building loan was intended to fund the excavation of the East 51st Street Property site and the construction of the foundation for the building that was to be erected thereat. On the same day, Development executed and delivered to Arbor three separate notes in the aggregate principal amount of 45,637,957.00. These notes were secured by three mortgages, to wit, an Original Acquisition Loan Mortgage, a Building Loan Mortgage, and an Original Project Loan Mortgage, all of which were recorded in the Office of the City Register of New York County (City Register), between May 24 and May 30, 2007. In addition, on May 14, 2007, the building loan contract was filed in the Office of the County Clerk of New York County, pursuant to Lien Law § 22. On or about May 21, 2007, Arbor lent Development an additional \$20,735,700.00, for the purpose of purchasing real and personal property located at 972-976 Second Avenue in Manhattan (the Second Ave. Property). Development executed and delivered

to Arbor a note in the same amount, as well as a Second Acquisition Loan Mortgage. That mortgage, which burdens both the East 51st Property and the Second Ave. Property, was recorded with the City Register on or about June 13, 2007. On or about July 24, 2007, Development and Kingsmen jointly executed and delivered to Arbor a Consolidated, Amended, and Restated Project Loan Note in the amount of \$6,444,428.80. This note consolidated the terms of the original project note in the principal sum of \$2,444,428.80 and a certain Gap Note, dated July 24, 2007, made by Development and Kingsmen to Arbor in the principal sum of \$4 million. On the same date, Development and Kingsmen executed and delivered to Arbor a Project Loan Mortgage Consolidation and Modification Agreement, which consolidated the prior Original Project Loan Mortgage in the sum of \$2,444,428.80 and the July 24, 2007 Gap Mortgage in the amount of \$4 million. That mortgage was recorded with the City Register on or about July 31, 2007. The complaint alleges, and no party disputes, that, also on July 24, 2007, Plaintiff, Development, and Kingsmen executed amendments to the initial acquisition loan agreement, building loan agreement, and project loan agreement. Pursuant to these amendments, Kingsmen joined Development as a co-borrower on the three referenced loans and became a party to the related notes and mortgages. TMJ, R&J, and ThyssenKrupp contend that this amendment to the building loan agreement was a modification that, pursuant to Lien Law § 22, had to be filed with the County Clerk, but was not so filed.

The mechanic's liens that are at issue here were all filed between March 20, 2008 and June 26, 2008.

The Lien Law was enacted to protect those who provide labor or materials to the improvement of real property, "with the consent or at the request of the owner thereof" (Lien Law § 3), by granting them an interest in such property, in addition to their common-law right to sue for breach of contract or in quantum meruit if they are not paid for such labor or materials. *Schaghticoke Powder Co. v Greenwich & Johnsonville Ry. Co.*, 183 NY 306 (1905). Lien Law § 13 (1) provides that, with exceptions that are not relevant here,

[a] lien for materials furnished or labor performed in the improvement of real property shall have priority over a ... mortgage, ... or other claim against such

property not recorded, docketed or filed at the time of the filing of notice of such lien ... [and] over advances made upon any mortgage or other encumbrance thereon after such filing

Lien Law § 13 (2) provides, in relevant part, that

[w]hen a building loan mortgage is delivered and recorded a [mechanic's] lien shall have priority over advances made on the building loan mortgage after the filing of the notice of lien; but such building loan mortgage, whenever recorded, to the extent of advances made before the filing of such notice of lien, shall have priority over the lien, provided it or the building loan contract contains the covenant required by subdivision three hereof, and provided the building loan contract is filed as required by section twenty-two of this chapter.

The covenant required by Lien Law § 13 (3) commits the mortgager to "receive the advances secured [by the building loan mortgage] as a trust fund to be applied first for the purpose of paying the cost of improvement" Lien Law § 22 provides that a building loan contract must be filed, on or before the date of recording a mortgage made pursuant thereto,

in the office of the clerk of the county in which any part of the land is situated, except that any subsequent modification of any such building loan contract so filed must be filed within ten days after the execution of any such modification.

Here, the initial building loan contract was filed with the clerk of New York County on May 14, 2007, more than a week before the mortgage based upon it was recorded with the City Register. *See Milone, Further Aff., Exh. A, at cover sheet.* The contract contains the covenant required by Lien Law § 13 (3). *See id.* at 101-102. Mr. Milone states in his further affidavit that all the monies that were to be advanced under the contract were, in fact, advanced in accordance with the terms of the contract. There is no evidence to the contrary. It is undisputed that no modifications of the building loan contract were filed within 10 days of being made, or for that matter, at any time. Accordingly, the only remaining question is whether any modifications that were made to that contract were required to be filed, pursuant to Lien Law § 22.

In *Nanuet National Bank v Eckerson Terrace* (47 NY2d 243, 245 [1979]), the court held that, under Lien law § 22, "a lender that knowingly files a building loan contract that materially misrepresents the net sum available to the borrower for the improvement suffers a subordination of its mortgage to subsequently arising mechanic's liens." Analogously, the Lien Law § 22 requirement,

that modifications of building loan contracts be filed, applies only to "material" modifications.

A modification of a building loan agreement is "'material' if it: (1) alters the rights and liabilities otherwise existing between the parties to the agreement or (2) enlarges, restricts, or impairs the rights of any third party beneficiary."

Howard Sav. Bank v Lefcon Partnership, 209 AD2d 473, 475 (2d Dept 1994) citing *HNC Realty Co. v Bay View Towers Apts.*, 64 AD2 417, 426 (2d Dept 1978).

The July 24, 2007 modification of the initial building loan agreement merely added an additional borrower. It neither altered the rights or liabilities existing under the initial agreement between Arbor and Development, nor in any way changed the rights of any third-party beneficiary of that agreement. Accordingly, it was not a "material" modification, and Arbor's failure to file it did not affect the priority of the associated mortgage over the subsequently noticed mechanic's liens.

The court also note that Lien Law § 2 (14) defines "[b]uilding loan mortgage" to include "an agreement wherein and whereby a building loan mortgage is consolidated with existing mortgages so as to constitute one lien upon the mortgaged property." The evidence, here, shows that no such consolidation occurred. Arbor is, therefore, entitled to foreclose on the mortgages that it holds.

That said, the Legislature's intention "to protect those who have directly expended labor and materials to improve real property at the direction of the owner or a general contractor" (*West-Fair Elec. Contrs. v Aetna Cas. & Sur. Co.*, 87 NY2d 148, 157 [1995]), as provided for in the Lien Law, counsels that, if plaintiff's mortgages can be satisfied without the sale of the East 51st Property, that is, the property as to which the cross movants' mechanic's liens were noticed, then that property should be used to satisfy those liens.

It only remains to be said that ThyssenKrupp has shown no evidence to warrant discovery, pursuant to CPLR 3212 (f). See *Bailey v New York City Tr. Auth.*, 270 AD2d 156 (1st Dept 2000).

Accordingly it is hereby

ORDERED that plaintiff's motion for default judgments against defendants East 51St Street Development Company, LLC, 968 Kingsmen LLC, James Kennelly, Arbor Realty, Sr, Inc., JBS

Construction anagement, In House Construction Services, Empire Transit Mix,M Inc., Urban Arborists, Inc., Metal Lathers and Reinforcing Ironworkers Local 46 Funds, Cement and Concrete Workers Pension Fund, Annuity Fund and Training Fund, Cement and Concrete Workers District Council Welfare Fund, Cement Masons Local 780 Fringe Benefit Funds, Barker Steel Co., Inc., Tayrank Ltd., Industrial Components of Westchester, Inc. f/k/a ICW, Kass Industrial Supply Corp, Doka USA Ltd, Nets R Us Ltd., Mottola Rini Engineers PC,, District Council for NYC and Vicinity of the Brotherhood of Carpenters and Joiners of America, New York Timber, LLC, R&R Scaffolding Ltd., Corporate Electric Group, Inc., Domani Consulting, Inc., Exterior Wall & Building Corp., Samuel Feldman Lumber Co., Inc., MG Engineering PC, MGJ Information Technologies, Barker Steel LLC f/k/a Barker Steel Co. Inc., New York City Environmental Control Board, City of New York Department of Finance, and State of New York Office of Attorney General is granted and the complaint is severed as to said defendants; and it is further

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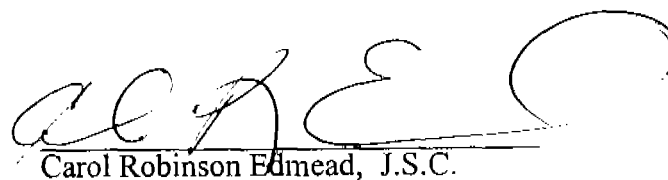
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ORDERED that counsel for plaintiff shall serve a copy of this Order with notice of entry within twenty days of entry on counsel for all parties.

Dated: February 2, 2009

ENTER:



Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

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