

**433 East 74th St., LLC v EBCOR Constr.
Co., Inc.**

2009 NY Slip Op 30382(U)

February 11, 2009

Supreme Court, New York County

Docket Number: 116029/08

Judge: Judith J. Gische

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

HON. JUDITH J. GISCHE

PRESENT: _____

PART 10

Justice

433 East 74th Street 7th

INDEX NO.

11603-9/08

MOTION DATE

- v -

MOTION SEQ. NO.

021

Evon Construction Co.

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

FILED
FEB 23 2009
COUNTY CLERK'S OFFICE
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

*and PK scheduled for
3/26/09 at 9:30 am in Part 10
@ 60 Centre Street, Room 232*

Dated: Feb 11, 2009

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: IAS PART 10**

-----X
433 East 74th Street, LLC,

Plaintiff (s),

-against-

EBCOR Construction Co., Inc.,

Defendant (s).
-----X

DECISION/ ORDER
Index No.: 116029/08
Seq. No.: 001

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers

- 433's OSC (vacate lien) w/JG affid, RKM affirm, exh 1
- Def ECC opp w/BNB affirm, EB affid, exh 2
- Summons w/ Notice (sep back) 3
- RJI (sep back) 4
- Affid of Service (2) (sep backs) 5

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NEW YORK

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action to vacate a mechanic's lien. Before the court is plaintiff, 433 East 74th Street, LLC's motion ("owner") to immediately have the lien vacated or discharged. Defendant EBCOR Construction Co., Inc. ("lienor") opposes the motion.

Arguments

Plaintiff is the owner and sponsor of the condominium located at 433 East 74th Street in New York County (the "property"). Defendant is a construction company that has filed a mechanic's lien against plaintiff's property (Block 1469 Lot 14). According to the lienor, it rendered labor, professional services and/or materials to the owner which

the owner plaintiff accepted but did not pay for. The lien which is dated June 25, 2008 is in the amount of \$728,031.39 ("lien").

Plaintiff has commenced this action and brought the instant motion to vacate the lien forthwith on the basis that the lien: 1) is defective because the notice of lien does not comply with the requirements of Lien Law § 9; 2) prevents the owner from selling its condominium units; and 3) amount stated has been wilfully overstated or exaggerated by the defendant.

This motion is supported by the affidavit of Josh Guberman ("Guberman"), a principal of the property owner. It is undisputed that defendant has a place of business in Pennsylvania where it was served with legal process. Guberman, however, contends that the lienor also has an office within New York State and that it was required to disclose this fact, along with other identifying information, on the lien it filed ainst the property. The property owner alleges that this defect alone is fatal, rendering the lien void and that the court must vacate it immediately to prevent further harm to the property owner. Conspicuously absent, however, from Guberman's affidavit is any discussion of how much he thinks the lien really is, or a statement that he does not owe any money at all to the lienor. Although a motion to vacate an exaggerated lien is properly brought under Lien Law § 39, this motion is brought under Lien Law §§ 59, 19 and CPLR § 304.

In opposition to the property owner's motion, defendant raises a number of arguments and defenses principally through the affidavit of its President, Ernest Bertuzzi ("Bertuzzi"). Bertuzzi states that EBCOR is a foreign corporation and its only office is in Milford, Pennsylvania. EBCOR does not maintain within the State of New

[*4]

York, but it is duly authorized by the Department of State to do business in New York, and EBCOR has designated the Secretary of State as its agent for service of process. EBCOR does not, however, argue improper service or anything of that nature.

The lienor argues further that the property owner failed to comply with the requirements of Lien Law § 59 which requires that the property owner seeking vacatur of a lien either serve a 30 day notice demanding that the lienor commence a lien foreclosure action, or that the property owner first file a bond discharging the lien before bringing a motion to vacate or discharge it.

Finally, defendant notes that the property owner has not explained how the notice fails to properly describe the work done or amount owed or why it believes the lien is exaggerated.

Discussion and Court's Decision

The property owner's motion is deficient and procedurally defective. It must be denied for the following reasons:

First, the owner has not moved under the appropriate section of the Lien Law pertaining to exaggerated liens (Lien Law § 39). Even were the court to look beyond that procedural defect, the property owner has not met its burden of making a prima facie showing that the lien is exaggerated and that the exaggeration was intentional and, therefore, willful. Pratt General Contractors v. Trappey, 177 AD2d 566 (2nd Dept 1991). Further, the issue of whether a lien is exaggerated is usually resolved only after there is a dispositive motion [Strongback Corp. v N.E.D. Cambridge Avenue Dev. Corp., 25 AD3d 392 (1st Dept. 2006) (motion for summary judgment)] or trial [Goodman d/b/a Keystone v. Del-Sa-Foods, Inc., 15 NY2d 191 (1965)]. This is because the allegedly

aggrieved party asserting a Lien Law § 39 claim has to show that the exaggeration is tantamount to a fabrication, not just an honest difference of opinion, or mere inaccuracy. E-J Elec Installation Co. v. Miller v. Raved, Inc., 51 AD2d 264 (1st dept. 1976) *app disp* 39 NY2d 898 (1976).

The lienor has established that although it is registered (and therefore authorized) to do business in the State of New York, it does not have an office within the state. The property owner cites no legal authority that would require defendant to have an office in New York in order to file a lien. In fact, Lien Law § 9 (1) only requires that an office in New York be disclosed, and not that the lienor make believe it has an office within the State. Garden State Brick face Co. v. Art Court Realty Corp., 40 Misc2d 712 (1963). Moreover, there is ample case law suggesting that non-compliance with these requirements is not, as the property insists, fatal to the lien. See: In re Dorsey, 240 AD 1005 (2nd Dept 1933); Acme v. McGratty, 155 NYS2d 135 (Sup Ct N.Y. Co. 1955). The court finds that the lienor has substantially complied with the requirements of Lien Law § 9, as they pertain to foreign corporations. The true owner has been named, the property described, and an amount (albeit disputed) listed.

Although the property owner claims it is being prejudiced by the lien because prospective buyers are being scared off, the purpose of a lien is to ensure that those who have expended labor or provided materials at the direction of the owner are paid for their work. Canron Corp. v. City of New York, 89 N.Y.2d 147 (1996). It is also notice to subsequent purchasers of the property that a contractor has an interest in the improved real property. Carl A. Morse, Inc. v. Rentar Indus. Development Corp., 85 Misc.2d 304 *aff'd* 56 A.D.2d 30 *aff'd* Carl A. Morse, Inc. v. Rentar Indus. Development

Corp., 43 N.Y.2d 952 (1978) *app dism* 439 U.S. 804 (1978). Thus, the kind of "prejudice" the property owner complains about simply shows the lien has its intended effect.

Other arguments raised by the property owner attacking the adequacy of the Notice of Lien, do not command a different result; they do not require the vacatur or discharge of the lien. The motion to vacate or discharge the lien is denied in its entirety for the reasons stated.

Issue has not yet been joined and the time to do so had not expired at the time this motion was submitted. Nonetheless, the court hereby schedules the **preliminary conference for MARCH 26, 2009 at 9:30 a.m. in Part 10 at 60 Centre Street Room 232.**

Any relief sought that has not been addressed in the foregoing decision is hereby denied. This constitutes the decision and order of the court.

Dated: New York, New York
February 11, 2009

So Ordered:



Hon. Judith J. Gische, J.S.C.

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