

**JKT Constr. Inc. v Rose Tree Mgt. &
Dev. Co.**

2009 NY Slip Op 31019(U)

April 29, 2009

Supreme Court, New York County

Docket Number: 113704/08

Judge: Walter B. Tolub

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

PRESENT: WALTER R. TOLUB
Justice

PART 15

JKT Constructors Inc.

INDEX NO. 113704/08

- v -

Rose Tree Management

MOTION DATE _____

MOTION SEQ. NO. 001

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

IN ACCORDANCE WITH THE COURT'S PREVIOUS DECISION

FILED
MAY 01 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4/29/09

WALTER R. TOLUB 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 CITY OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----x
JKT CONSTRUCTION INC., d/b/a CORCON,

Plaintiff,

Index No.: 113704/08

-against-

DECISION

ROSE TREE MANAGEMENT & DEVELOPMENT CO.,
ROSETREE 104 LLC, TITAN CAPITAL ID, LLC,
SIGNATURE BANK, BOARD OF MANAGERS OF
THE 104 WEST 123rd STREET CONDOMINIUM,
THE CITY OF NEW YORK, THE STATE OF NEW
YORK AND "JOHN DOE NO. 1" THROUGH "JOHN
DOE NO. 100" INCLUSIVE, the name of the
last 100 defendants being unknown
fictitious, the true names of said
defendants being unknown to plaintiff,
it being intended to designate fee
owners, tenants or occupants of the
liened premises and/or persons or parties
having or claiming an interest in or a
lien upon the lienee premises, if the
aforesaid individual are living, and if
any or all of said individuals
be dead their heirs at law, next of kin
distribute, executors, administrators,
trustees, committees, devisees, legatees,
and assignees, lienors, creditors, and
successors in interest of them and
generally all persons having or
claiming under, by through or against
the said defendants named as a class, of
any right, title, or interest in or lien
upon the premises described in the
complaint herein,

Defendants.

-----x
TOLUB, J.

Defendant Titan Capital ID, LLC (Titan) moves, pursuant to
CPLR §3212(a)(1), to terminate and cancel the mechanic's lien

filed by plaintiff, alleging that the lien violates the provisions of Lien Law §9 and Real Property Law (RPL) §339-1. Titan further moves to dismiss the second cause of action, the mechanic's lien foreclosure claim, as defective as a matter of law, and because the mechanic's lien has expired by operation of law. This is the only one asserted against Titan.

Facts

On or about January 3, 2003, plaintiff, as contractor, contracted with defendant Rose Tree Management & Development Co. (Rose Tree Management), as owner of the property, to furnish certain labor, services, equipment and materials to the subject property, for the agreed upon sum of \$635,600.00. The property was subject to a mortgage made between defendant Rosetree 104 LLC (Rosetree 104), as mortgagor, to Titan, as mortgagee.

On July 11, 2006, a declaration was filed and recorded in the Office of the City Register of the City of New York in connection with the property, by which the entire property, formerly known as Lot 38, was subdivided into four separate single residential condominium units with four appurtenant storage units. Each was given its own lot designation.

Between July, 2006, and August, 2006, three of the four units, with the appurtenant storage units, were sold to individual owners, the last such deed being recorded on August 8, 2006. Rosetree 104 retained ownership in the remaining unsold

unit and appurtenant storage unit.

Plaintiff filed the subject mechanic's lien on October 19, 2006, in the amount of \$70,899.72, for work it claimed was performed under the above-referenced contract. The lien indicated the owner as "Rosetree 104 LLC," with a fee simple ownership interest in the property. The lien also designated the property as "Block 1907, Lot 1301-1308, 38." (Defendant's Ex. J). By order of the Hon. Martin Schoenfeld, the lien was extended for one year on October 12, 2007.

On or about October 10, 2008, plaintiff filed the instant action, which included a Notice of Pendency. On November 12, 2008, copies of the Notice of Pendency were affixed to the doors of both Rosetree 104 and Rose Tree Management's business addresses, and additional copies were mailed on or about November 14, 2008. (Defendant's Ex. N and O). Titan was served by leaving a copy of the pleadings with Titan's managing agent on November 12, 2008. (Defendant's Ex. P). Both the Board of Managers of the 104 West 123rd Street Condominium (the Board) and Signature Bank were served by leaving a copy of the pleadings with persons authorized to accept service on November 7, 2008.

Titan claims that the lien is defective because the owner is misidentified and the property is incorrectly described. Titan further argues that the foreclosure claim must be dismissed, even if the underlying lien is not deemed defective, because the owner

[* 5]
was not served within 30 days of filing the Notice of Pendency as required by CPLR §6512.

Discussion

CPLR §3211 (a), provides that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(1) a defense is founded upon documentary evidence; ..."

On a motion to dismiss pursuant to CPLR §3211, the pleadings should be liberally construed, the facts alleged by the plaintiff should be accepted as true, and all inferences should be drawn in the plaintiff's favor (*Leon v Martinez*, 84 NY2d 83 [1994]). The court must determine whether the alleged facts "fit within any cognizable legal theory." (*Id.* at 88). Further, "[a]llegations consisting of bare legal conclusions ... are not presumed to be true [or] accorded every favorable inference." (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 (2000)).

On a pre-answer motion to dismiss pursuant to CPLR §3211(a) (1), dismissal is proper only when the documentary evidence submitted establishes a defense to the asserted claims as a matter of law. (*Bonnie & Co. Fashions, Inc. v Bankers Trust Co.*, 262 AD2d 188 [1st Dept 1999]). If any question of fact exists with respect to the meaning and intent of the contract in question, based on the documentary evidence supplied to the

motion court, a dismissal pursuant to CPLR §3211(a)(1) is precluded. (*Khayyam v Doyle*, 231 AD2d 475 [1st Dept 1996]).

"The requirements of Lien Law §9(2) that the notice of lien state the name of the owner of the real property must be construed liberally to secure the beneficial interests and purposes of the Lien Law; substantial compliance ... [is] sufficient for the validity of a lien [internal quotation marks omitted]."

(*PM Contracting Company, Inc. v 32 AA Associates LLC*, 4 AD3d 198, 199 [1st Dept 2004]).

"While a failure to state the true owner or contractor or a misdescription of the true owner will not affect the validity of a notice of lien (Lien Law § 9 [7]), a misidentification of the true owner is a jurisdictional defect which cannot be cured by an amendment nunc pro tunc."

(*Tri-State Sol-Aire Corp. v Lakeville Pace Mechanical, Inc.*, 221 AD2d 519, 521-522 [2d Dept 1995] [notice of lien named as owner an entity that possessed no ownership interest in the property, and was therefore fatally defective]).

The crucial distinction, for determining the propriety of the notice of lien lies in difference between the misdescription and the misidentification of the owner. With misdescription, the actual owner is identified but is inaccurately named, such as calling Acme, Inc., Acme LLC. Such misdescription is not fatal to the validity of the notice of lien, and is capable of correction. Conversely, with misidentification, the actual owner is not indicated at all, such as naming Acme, Inc. as the owner when the owner, in fact, is Beta LLC. Such misidentification is fatal to the validity of the notice of lien.

In the instant matter, plaintiff identifies Rosetree 104 as the owner, and Rosetree 104 is, in fact, the owner of the one unsold unit. The owner of the property was not, as claimed by Titan, misidentified but was merely incompletely identified by failing to name the other owners. (See *Matter of Tri Quality Mechanical Corp. v Chappastream Corp.*, 138 AD2d 610 [2d Dept 1988] ["failure to state the true owner ... will not affect the validity of a notice of lien."]). As a such, the notice of lien is valid as against Rosetree 104. (*Matter of Country Village Heights Condominium*, 79 Misc 2d 1088 [Sup Ct, Rockland County 1975]).

Additionally,

"[u]nder Real Property Law § 339-1 (1), [a] postdeclaration lien is also invalid as against the building's common elements because it was filed without the unanimous consent of the unit owners."

(*Northeast Restoration Corp. v K&J Construction Co., L.P.*, 304 AD2d 306, 307 [1st Dept 2003]).

Therefore, based on the foregoing, Titan's argument regarding the invalidity of the notice of lien based on the name of the owner appearing on said notice is correct only with respect to the three unnamed unit owners and the common areas.

Titan's next argument concerns the claimed invalidity of the notice of lien based on the address of the property that appears in said notice.

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In the instant matter, plaintiff identifies Rosetree 104 as the owner, and Rosetree 104 is, in fact, the owner of the one unsold unit. The owner of the property was not, as claimed by Titan, misidentified but was merely incompletely identified by failing to name the other owners. (See *Matter of Tri Quality Mechanical Corp. v Chappastream Corp.*, 138 AD2d 610 [2d Dept 1988] ["failure to state the true owner ... will not affect the validity of a notice of lien."]). As a such, the notice of lien is valid as against Rosetree 104. (*Matter of Country Village Heights Condominium*, 79 Misc 2d 1088 [Sup Ct, Rockland County 1975]).

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"[H]istorically, the property description requirement of

Lien Law § 9(7) could be satisfied by a description that was sufficient to identify the premises, [but] a more stringent rule applies to liens on the unique legal identity created by the Condominium Act [internal quotation marks and citations omitted]."

(*Matter of Westgate Towers Associates v ABM Air Conditioning and Refrigeration, Inc.*, 187 AD2d 600, 600 [2d Dept 1992]).

In *Matter of 49 East 21 LLC v C.H. Schmitt & Co., Inc.* 46 AD3d 391 [1st Dept 2007], the court held invalid a lien that named the subject property as a whole without identifying the individual condominium units. (See also *Northeast Restoration Corp. v K&J Construction Co., L.P.*, 304 AD2d 306, *supra*). However, in the instant case, plaintiff has identified the individual condominium units (Lot 1301-1308) as well as the superseded single lot number. In this respect, plaintiff has sufficiently identified the property in question so as to satisfy the requirements of Lien Law § 9(7).

Defendant relies heavily on *Matter of the Application of Diamond Architecturals, Inc. v EFCO Corp.* 179 AD2d 420 [1st Dept 1992], in which the court held a notice of lien invalid, wherein the name of the owner appearing on the notice was the condominium developer who retained ownership in the unsold units, but the names of the other unit owners were missing. However, in that case the lienor failed to indicate the correct block and lot description as well. As a consequence, the *Diamond Architecturals* court stated that "inasmuch as the notice at issue

contains more than one defect, it cannot be said that there has been substantial compliance warranting [an] amendment." (*Id.* at 421). This is distinguishable from the case at bar in which the block and lot description does indicate the individual condominium units.

As a consequence of the foregoing, the court concludes that the notice of lien is valid only as against the individual unit and appurtenant storage unit owned by Rosetree 104. However, the question remains as to whether the second cause of action for foreclosure on the lien must be dismissed for inadequate service.

"CPLR 6514 (a) provides for mandatory cancellation of a notice of pendency if service of a summons has not been completed within the time period set forth in CPLR 6512, which is 30 days after filing the notice of pendency. In multi-defendant cases, service is sufficient for purposes of CPLR 6514 (a) if it is timely made on any one defendant with an ownership interest in the subject property."

(*Deans v Sorid*, 56 AD3d 417, 418 [2d Dept 2008]).

In order to satisfy the requirements of CPLR 6512, at least one owner of the property must have been served within 30 days of October 10, 2008, the date when the notice of pendency was filed. There is no dispute that both the Board and Signature Bank were served within this 30 day time period, but service on the named owner, Rosetree 104, as well Titan, was not effectuated until after the 30 days had elapsed.

"[S]ince the defendants who were served in the action in accordance with CPLR 6512 had no ownership interest in the premises, the service upon them does not preclude

cancellation of the notice of pendency."

(*Rabinowitz v Lakefield Building Corp.*, 231 AD2d 703, 704 [2d Dept 1996]).

In its opposition, plaintiff argues that service on the Board should satisfy the requirements of CPLR §6514. There is no case or statutory law on this point, therefore the court is disinclined to establish such a precedent. As a consequence, since no named owner was served within the 30 day time period, the mechanic's lien is deemed expired by operation of law.

Therefore, the court grants Titan's motion with respect to dismissing the second cause of action for foreclosure on the mechanic's lien.

Accordingly, it is hereby

ORDERED that Titan Capital ID, LLC's motion is granted to the extent of finding that the notice of lien is invalid as against the common areas of the condominium and as against all the condominium unit owners except for Rosetree 104 LLC; and it is further

ORDERED that the notice of pendency filed by plaintiff on or about October 10, 2008, is cancelled; and it is further

ORDERED that plaintiff's second cause of action seeking foreclosure of the mechanic's lien is dismissed; and it is further

ORDERED that the complaint is dismissed as against Titan

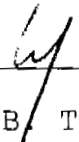
Capital ID, LLC, with costs and disbursements to said defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Counsel for the parties are directed to appear for a conference on June 12, 2009 at 11:00AM in room 335 at 60 Centre Street.

Dated: 4/29/09

ENTER:



Walter B. Tolub, J.S.C.

FILED

MAY 01 2009

COUNTY CLERK'S OFFICE
NEW YORK