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

PRESENT: HON. CAROL EDMEAD PART 35

Justice

Index Number : 101456/2009

SUPERIOR MAINTENANCE GROUP

VS.

CA CONSTRUCTION, INC.,

SEQUENCE NUMBER : # 001

MECHANIC LIEN

INDEX NO. 101456-09

MOTION DATE 3/2/09

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

were read on this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED
MAY 12 2009
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the Petition for an Order discharging the Notice of Lien is denied; and it is further

ORDERED that the application by CA Construction, Inc. for leave to amend its Notice of Lien *nunc pro tunc* pursuant to Lien Law § 12-a to include the proper state of incorporation is granted, and CA Construction, Inc. shall so amend its Notice of Lien within 20 days of service of this order with notice of entry; and it is further

ORDERED that petitioner serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: 5/8/09

HON. CAROL EDMEAD J.S.C.

Check one: FINAL DISPOSITION ✓ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

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In the Matter of the Application of
SUPERIOR MAINTENANCE GROUP,

Petitioner,

for an Order Summarily Discharging A Notice of Lien in the Amount of $638,426.00 and dated November 24, 2008 by CA CONSTRUCTION, INC. as Lienor,

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Index No. 101456-2009

HON. CAROL EDMEAD, J.S.C.

MEMORANDUM DECISION

Superior Maintenance Group ("petitioner") seeks an order pursuant to Lien Law § 19(6) summarily discharging the Notice of Lien dated November 24, 2008 and filed in the Office of the New York County Clerk on December 2, 2008 by CA Construction, Inc. in the amount of $638,426.00 against the premises known as 25 Broadway, New York, New York, Block 13, Lot 27 (the "premises") owned by 25 Broadway Office Properties, Inc. (the "Owner").

Petition

Petitioner was the general contractor of a renovation project at the premises and hired the Lienor to provide certain materials and labor in connection with the premises. After delivery of materials and labor, for which it was not fully paid, Lienor filed a Notice Under Mechanic's Lien Law on December 2, 2008 for $638,426.00 against the premises (the "Notice of Lien"). Petitioner is a party in interest in the Notice of Lien, in that petitioner is identified in the Notice of Lien as the party by whom Lienor was employed and the party to whom Lienor furnished materials and performed labor.

Petitioner argues that the Notice of Lien should be discharged because it is defective on

its face and fails to comply with the Lien Law.

The Notice of Lien violates Lien Law § 9 (1), which provides that when a lienor is a foreign corporation, the notice of lien shall state the lienor's: "principal place of business within the state." The Notice of Lien states that Lienor is a corporation duly organized and existing by virtue of the laws of the State of Connecticut. However, the Notice of Lien does not state a principal place of business for Lienor within the State of New York.

The Notice of Lien also fails to comply with Lien Law § 9 (1-a) in that it fails to state the name and address of the attorney for the Lienor, even though the Lienor has been represented by an attorney, William Wilson, II, Esq., throughout the course of Lienor's dealings with petitioner.

Even if Lienor were to claim that it does not have a principal place of business within New York and that it is not represented by an attorney, the Lien nevertheless should be summarily discharged because a foreign corporation must set forth either a principal place of business within New York in accordance with Lien Law § 9 (1) or the name and address of an attorney with a New York address in accordance with Lien Law § 9 (1-a) in order for the Notice of Lien to be valid. Here, the Notice of Lien filed by Lienor does not comply with either of these requirements.

The Notice of Lien also fails to comply with Lien Law § 9 in that it states that Lienor is a corporation duly organized and existing under and by virtue of the laws of Connecticut. However, upon information and belief, a search of the records of the Secretary of State of the State of Connecticut failed to reveal any record of Lienor having ever been incorporated there. Thus, the Lienor lacks the power and authority to file the Notice of Lien. Since, upon information and belief, Lienor has not been incorporated in the State of its alleged incorporation,

Lienor has not qualified and cannot qualify to transact business within the State of New York, in violation of Lien Law § 9.

The Notice of Lien also fails to comply with Lien Law § 9 (4) in that it does not separately state the agreed price or value of the labor performed and the materials furnished.

The Notice of Lien likewise fails to comply with Lien Law § 9 (5) in that it does not separately state the amount unpaid to the Lienor for the labor performed and the materials furnished.

Thus, the Notice of Lien is invalid. Where there are several defects in a notice of lien, the defects cannot be corrected by amendment and the Notice of Lien must be discharged pursuant to Lien Law § 19 (6) even if any of the defects, standing alone, could be corrected by amendment.

Opposition

Lienor argues that petitioner alleges only minor and irrelevant technical issues with the Notice of Lien that, either standing alone or collectively, do not render it invalid. The Notice of Lien adequately states, among other things, (1) the name and residence of the lienor; (2) the name of the owner of the real property against whose interest a lien was claimed and the interest of the owner as far as known to the lienor; (3) the name of the person with whom the contract was made; (4) the labor performed and material furnished and the agreed price thereof; (5) the amount unpaid to the lienor for such labor and materials; (6) the time when the first and last items of work were performed and materials were furnished; and (7) the property subject to the lien, with a description thereof sufficient for identification, and its location by street and number. Since the Notice of Lien substantially complies with Lien Law § 9, the petition must be denied.

Due to petitioner's failure to pay the amounts due, Lienor did not use an attorney to file

the subject lien. Instead, Lienor elected to use Speedy Lien, Inc., a well known and well respected Mechanic's Lien service provider, and Speedy Lien's standard Notice of Mechanic's Lien form. This form is used successfully by countless entities in New York. The Notice of Lien was duly verified and substantially complied with the requirements of Lien Law § 9 (except for the inadvertent mistake identifying Connecticut rather than Nevada as the state within which Lienor is incorporated). Petitioner received adequate notice of the lien and has not been prejudiced in any way by the minor technical issues about which it complains.

As shown in the Entity Details for Lienor from Nevada's Secretary of State website, Lienor is a corporation organized and duly existing under the laws of the State of Nevada. Lienor did not represent itself to petitioner as a Connecticut corporation. The statement on Lienor's Notice of Lien indicating it was a Connecticut corporation was an isolated, inadvertent and harmless mistake, and caselaw relied upon by petitioner in this regard is inapplicable. At most, the wrong state of incorporation is a technical error that can be amended under Lien Law § 12-a, if necessary. And, petitioner has not been prejudiced or harmed in any way by this mistake.

In addition, Lien Law §9 (1) does not require a foreign corporation to state a principal place of business within New York if it does not have one. Lienor's principal place of business is 100 Mill Plain Road in Danbury, Connecticut. Lienor does not have any place of business located in the state of New York. As shown by the Lienor's Certificate of Authority from the New York State Department of Taxation and Finance, Lienor also has been authorized to do business in the State of New York. Thus, Lienor did not state a principal place of business in New York in its Notice of Lien because it does not have one. The Notice of Lien correctly stated Lienor's principal place of business in Danbury, Connecticut which is sufficient compliance with

Lien Law § 9. Lienor adequately identified itself to all interested parties and the public. Petitioner had sufficient notice of where Lienor can be reached and had no problem serving the petition on Lienor. Petitioner also has not been prejudiced in any way without the inclusion of a New York address in the Notice of Mechanic's Lien.

Further, Lien Law § 9 (1-a) does not require a Notice of Lien to set forth the name and address of an attorney in New York if an attorney was not used by the Lienor to process and serve the mechanic's lien. This is clear by the provision of "if any" included at the end of Lien Law § 9 (1-a) and the liberal construction with which it must be read. The inclusion of "if any" at the end of Lien Law § 9 (1-a) can hardly be construed as requiring the listing of an attorney in New York in the Notice Lien if one is not being used. Petitioner also admits that it knew of the attorney Lienor had used prior to the Notice of Lien and could have contacted same if necessary. Petitioner has not been prejudiced in any way by the omission of an attorney with a New York address in the Notice of Lien and should not be allowed to hide behind its unfounded interpretation of a technical and inapplicable provision.

Lien Law § 9 (4) does not require the cost for material and labor to be stated separately, and petitioner cites no authority to support its contention otherwise. The Lienor described the general nature of the material and labor supplied such that it adequately apprised the petitioner and owner of the material and labor for which the lien is claimed and stated the total sum for the combination of all material and labor furnished, all of which constitutes sufficient compliance with Lien Law§ 9 (4).

Likewise, Lien Law § 9 (5) does not require the amount unpaid for material and labor to be stated separately, so long as there is adequate information from which it can be understood

that there is an ascertainable amount remaining due and owing. Petitioner cites no authority to support its contention otherwise. The Lienor adequately described the amount remaining due and owing.

What is required under Lien Law §§ 9 (4) and 9 (5), is some description (something more than simply "labor and materials were provided") sufficient to apprise the owner and all interested parties of the nature of the material and labor for which the lien was claimed.

Petitioner's contention that the Notice of Lien cannot be corrected by amendment and must be discharged because several defects exist is a ruse. The only "defect" in the Notice of Lien is the inadvertent mistake naming Connecticut rather than Nevada as Lienor's state of incorporation. However, Lienor also moves to amend its Notice of Lien *nunc pro tunc* pursuant to Lien Law § 12-a to correct the state within which Lienor is incorporated and for any other technical corrections if the Court deems necessary. None of the said corrections would prejudice any interested party.

Reply

Lienor argues that petitioner failed to overcome the deficiencies which invalidate the Notice of Lien. Lienor is not a corporation existing under the laws of Connecticut. In an attempt to salvage a Notice of Lien filed by a non-existent entity, the Lienor alleges that it in reality is a Nevada corporation which mistakenly and inadvertently alleged in the Notice of Lien that it was a Connecticut corporation. However, the contents of the Notice of Lien and documentary evidence refute the assertion of inadvertent mistake. The evidence indicates that the entity known as "CA Construction, Inc." which had a verbal agreement with petitioner, which performed the services alleged in the Notice of Lien, and which filed the Notice of Lien, is a

different entity than the "C.A. Construction, Inc." incorporated in Nevada. The state of the Lienor's incorporation, Connecticut, is prominently set forth in the first paragraph of the Notice of Lien and could not have been missed by anyone giving even a cursory review to the Notice of Lien. The Verification of the Notice of Lien by C.A.'s President states under oath that he: "... has read the foregoing notice of lien and knows the contents thereof, and that the same is true to deponent's own knowledge..." The Verification further states on the line immediately above the signature line that: "CA is a Domestic corporation, and deponent is familiar with the facts and circumstances herein." The statement that the Lienor is a "Domestic corporation" rather than a Nevada corporation, on the line immediately above the signature line also could not have been missed prior to signing the Notice of Lien. This establishes that CA's "President" knew at the time he signed the Notice of Lien that the Notice of Lien was being filed on behalf of a Connecticut entity, not on behalf of a Nevada corporation. Thus, the claim of inadvertent mistake defies all standards of credibility.

If the "CA" entity which filed the Notice of Lien is a Nevada corporation, the Notice of Lien is defective both in stating that CA is a Connecticut corporation and in stating in the Verification that CA is a domestic corporation. The Verification is defective in stating that the Lienor is a domestic corporation, in listing both New York and Connecticut as the state where it was signed and in listing both "Watertown" and "County of Nassau" as the location where it was signed.

However, it appears that the entity which performed the work alleged in the Notice of Lien and filed the Notice of Lien is a different entity than the Nevada corporation which obtained a Certificate of Authority to do business in New York.

All of the references to the Lienor in the Notice of Lien are to "CA Construction, Inc.," an entity whose name has no periods after the letters "C" and "A." There are no references in the Notice of Lien to "C.A. Construction, Inc.," the Nevada entity referred to by the Lienor whose name has periods after the letters C and A and whose incorporation is under Nevada law.

During the course of petitioner's dealings with the Lienor, petitioner's attorneys received numerous communications from the same Connecticut law firm which represents the Lienor in this proceeding, all of which referred to "CA Construction" with no periods after "C" and "A."

The Certificate of Authority refers to "C.A. Construction, Inc." with periods after the letters C and A and sets forth a different Connecticut address than the address for "CA Construction, Inc." which is set forth in the Notice of Lien.

Contrary to the assertion that the Lienor did not represent itself to petitioner as a Connecticut corporation, such a representation was made in the Notice of Lien. Furthermore, all communications from the Lienor set forth a Connecticut address; the Lienor was represented by a Connecticut attorney; never communicated to petitioner that it was incorporated in Nevada or had any connection with Nevada; and there is no claim that there were ever any such communications by "CA." Thus, the Lienor failed to establish that the Nevada corporation is the same entity as the entity which performed the work alleged in the Notice of Lien and which filed the Notice of Lien. Rather, it appears that the work was performed and the Notice of Lien was filed by an unincorporated entity based in Connecticut.

Any claim that the statement in the Notice of Lien that CA is a Connecticut corporation is a harmless and non-prejudicial mistake must be rejected since petitioner has incurred various fees and expenses as a result of the alleged mistake. The Notice of Petition, Petition and

accompanying papers commencing this proceeding could not be served upon the New York Secretary of State or the Connecticut Secretary of State since neither the New York Secretary of State's records nor the Connecticut Secretary of State's records had any listing for a Connecticut corporation known as "CA Construction, Inc.," the entity identified as the Lienor in the Notice of Lien. Petitioner had to incur the expense of having a process server serve the papers in Connecticut. When an internet search of the records of the Connecticut Secretary of State failed to reveal any record of a corporation known as "CA Construction, Inc." incorporated in Connecticut, a professional corporate search firm was hired to conduct a search of Connecticut records to confirm that there was no such corporation incorporated in Connecticut. Petitioner incurred the expense of this search as well. Petitioner also incurred legal fees in connection with researching the issues raised by the filing of the Notice of Lien which stated that the Lienor is a corporation duly organized and existing under the laws of Connecticut when in fact the Lienor was neither organized nor exists under the laws of Connecticut. In addition, the legal fees incurred by petitioner in connection with this proceeding include fees incurred as a result of the statement in the Notice of Lien that the Lienor is a Connecticut corporation which would not have been incurred had the Notice of Lien not been defective in this respect. Thus, petitioner has been prejudiced. The various arguments set forth by the Lienor to avoid the consequences of the other defects in the Notice of Lien must likewise be rejected.

The Lienor failed to set forth the name and address of its attorney as required by Lien Law § 9 (1-a). Documentary evidence establishes that the Lienor has been represented in matters relating to the project for which the Notice of Lien was filed by William Wilson, II, Esq. of Halloran & Sage LLP, the same law firm which is now representing Lienor in this proceeding.

While the Lienor alleges that it did not use an attorney to file the Notice of Lien the Lienor never represents that Halloran & Sage, LLP did not represent the Lienor at the time the Notice of Lien was prepared and filed. Since Halloran & Sage, LLP has continuously represented the Lienor in connection with issues concerning the project for which the Notice of Lien was filed since at least April 2008, the Notice of Lien is defective for failure to set forth the name and address of the Lienor's attorney.

Petitioner has likewise been prejudiced by the Lienor's failure to separately state the amount allegedly unpaid for labor performed and for materials furnished. Petitioner contends that it will seek a discharge of the Notice of Lien in the recently commenced action to foreclose the Lien upon the ground of willful exaggeration. The reasons why there are unpaid invoices are that the Lienor failed to provide any documentation for the unpaid invoices; the last two invoices totaling approximately $88,500 were for the same type of work as for prior invoices, but charged more than double the amount charged on prior invoices for identical work; and petitioner was required to provide a credit of $50,000 to the owner of the premises for work performed improperly by the Lienor for which petitioner is entitled to a credit from the Lienor. When the invoices totaling approximately $88,500 are reduced to their proper amount of approximately $44,250 and the credit of $50,000 is taken into account, the true amount in dispute is approximately $25,500.

Here, the several defects set forth in the Petition and discussed above establish that the Lienor did not substantially comply with the Lien Law and that the defects cannot be cured by amendment.

Analysis

A valid lien is created by filing a notice which substantially complies with the provisions of Lien Law § 9 (*Fibernet Telecom Group, Inc. v East Coast Optical Services, a Mass. Partnership*, 195 Misc 2d 461, 760 NYS2d 621 [Sup Ct New York County 2002] *citing Matter of Corina Assocs., Inc. v McManus, Longe Brockwehl, Inc.*, 39 AD2d 613, 614 [3d Dept 1972]; *Matter of Artcourt Realty Corp. v Garden State Brickface Co.*, 39 Misc 2d 796, 798 [Sup Ct New York County 1963] [A substantial compliance with its several provisions shall be sufficient for the validity of a lien"]). The main purpose of Lien Law § 9 is to provide adequate notice of the lien which is essential to the security of owners, purchasers and lien creditors (*Fibernet Telecom Group, Inc. v East Coast Optical Services, a Mass. Partnership*, 195 Misc 2d 461, *supra* ["Because a lienor cannot be physically located at a post office box, an owner, purchaser or lien creditor seeking to verify the lien's validity, or to serve process to vacate the lien, would not be able to do so"] *citing Waters v Goldberg*, 124 AD 511 [2d Dept 1908]). "A technical construction, if applied to the Lien Law, would conflict with the legislature's express declaration that it 'be construed liberally to secure the beneficial interests and purposes thereof'" (*Matter of Menqel Co., Inc. v Kensington Village, Inc.*, 281 AD 530, 532 [4th Dept 1953]; *Naclerio Contracting Co. v Rialto Realty Corp.*, 28 Misc 2d 957, 215 NYS2d 430 [Sup Ct New York County 1961]). Thus, the statute is to be construed liberally and the question of the validity of the notice turns upon substantial compliance with its provisions (*Waters v Goldberg*, *supra* at 12; *Schwartz v Lewis*, 138 AD 566, 567 [2d Dept 1910] citing Lien Law § 23).

However, pursuant to Lien Law § 19 (6), the failure of a notice of lien to comply with the provisions of Lien Law § 9 renders the lien subject to summary discharge (*Fibernet Telecom*

Group, Inc. v East Coast Optical Services, a Mass. Partnership, 195 Misc 2d 461 [the failure to comply with a material requirement of Lien Law voids the lien]). Lien Law § 19 (6) states:

> Where 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 lien may be summarily discharged only for defects appearing on its face (*HamiltonAir Co., Inc. v Gould*, 17 Misc 3d 222, 844 NYS2d 640 [N.Y. City Civ. Ct ,2007]; *Di-Comm Corp. v Active Fire Sprinkler Corp.*, 36 AD2d 20, 21 [1st Dept 1971]). And, minor mistakes that do not prejudice any substantial right of any interested property can be disregarded and/or amended (*Lvcee Francais de New York v Calaona*, 26 Misc 2d 374, 379-380 [Sup Ct New York County 1960]).

As to Lien Law § 9, petitioner challenges the Lienor's compliance with subdivisions 1, 1-a, 4 and 5 thereof. Thus, the Court considers each subdivision in turn.

Section 9 (1) states that the Lien shall state: "The name and residence of the lienor; and . . . and if a foreign corporation, its principal place of business within the state." Here, the face of the lien provides the residence as Lienor's principal place of business located at "100 Mill Plain Road in Danbury, Connecticut." Lienor did not state a principal place of business in New York in its Notice of Lien because it does not have one. The Notice of Lien correctly stated Lienor's principal place of business in Danbury, Connecticut which is sufficient compliance with Lien Law § 9.

In *John Roshirt, Inc. v Rosenstock* (138 Misc 515 [Sup Ct, Albany County 1930]), in an action to foreclose on a lien, the foreign corporation stated that its principal office was in Cleveland, Ohio. However, since the proof showed that the corporation did have a place of business in New York, it was held that the lien was invalid for failure to comply with the foregoing statutory requirement. In *J.C. Constr. Mgt. Corp. v Hunt Co.* (266 AD2d 512, 513 [2d Dept 1999]), the Court ruled that where a foreign corporation had several places of business in the State, "its failure to recite the address of at least one of those locations on its notice of lien violates the Lien Law § 9 [1] and invalidates the lien." "If the foreign corporation, filing the notice as lienor, is not actually 'doing business 'within the State ... the statement of its out-of-state principal office has been held sufficient; the statute is not construed to require the statement of an address that does not exist" (*Matter of Artcourt Realty Corp. v Garden State Brickface Co.*, 39 Misc 2d at 798). The test is not whether a certificate of doing business was filed but whether in fact the foreign corporation was doing business within the State of New York and, therefore, had a 'principal place of business within the state' (*Application of Edmund J. Rappoli Co.*, 5 AD2d 758, 169 NYS2d 376 [4th Dept 1957]; *Garden State Brickface Co. v. Artcourt Realty Corp.*,40 Misc.2d 712, 243 NYS2d 733 [Sup Ct New York County 1963] [Lien Law § 9 (1) requires that such foreign corporation state its actual principal place of business within the State at the time of the execution and filing of its notice of lien. It does not require of a foreign corporation lienor the statement of a fictitious address or of an address that does not actually exist. This is so whether such lienor has or has not previously filed a certificate of 'doing business'"]).

Here, there is no indication in the record that the Lienor's principal place of business was located within New York state. Thus, the recital of the principal place outside the state is a

sufficient compliance with the provisions of the Lien Law (*see Butts v Valerio Const. Co.*, 236 AD 299, 259 NYS 93 [3d Dept 1932]). It cannot be said that the Notice of Lien, on its face, failed to comply with Lien Law § 9 by failing to set forth the Lienor's principal place of business within the State of New York (*Matter of Rappoli Co.*, 5 AD2d 758 [4th Dept 1957] [discharge of lien denied where record indicated that the respondent was not doing business in New York, stating that "to hold that it nevertheless had a principal place of business at the office of the Corporation Trust Company, which was the address in its certificate [of doing business], "would be an attempt to breathe truth into a fiction." In the event the testimony is heard upon a trial on the merits of the lien indicates that the respondent was doing business in New York State, upon proper motion the lien could then be dismissed and the matter continued as a common-law contract action]).

Lien Law § 9 (1-a) states that the Notice of Lien shall state "The name and address of the lienor's attorney, *if any*." (Emphasis added). Although the record indicates that William Wilson II, Esq. was the attorney for Lienor during the subject the construction project, there is no indication that William Wilson II, Esq. filed the Notice of Lien on behalf of the Lienor. In fact, the Notice of Lien was executed by the Lienor's President, and the Lienor claims that it did not have an attorney file the Notice of Lien, and thus, did not have an attorney to list on the Notice of Lien. Therefore, since the statute requires that the Lienor identify its attorney "if any," it cannot be said that the failure to do so where the Lienor has no attorney, is a fatal defect warranting discharge of the Notice of Lien.

Petitioner's reliance on *In Matter of New Window Sales (Precision Specialist Metal & Glass)*, 190 Misc 2d 654 [Sup Court New York County 2002]), for the proposition that the

Lienor must list the attorney's name and address since it has no principal place of business in New York State, is misplaced. The Court in *In Matter of New Window Sales* stated that "there is no reason to require that a corporation engaging in such activities in New York so as to be deemed 'doing business' here, but without a true New York place of business, set forth a New York address in the notice of lien, *with the proviso that it name therein an attorney upon whom service may be made in New York with respect to the lien.* If such an attorney is named, no prejudice ensues to the lienee by reason of a lack of a New York address of the lienor on the notice of lien." (Emphasis added). However, the Court does not interpret *In Matter of New Window Sales* to hold that a foreign corporation without a true New York place of business *must* list the name and address of an attorney where it does not have one. To hold otherwise would require the Lienor to hire a New York attorney to file its Notice of Lien, if it did not maintain a principal place of business in New York, which is not required by statute. If the Legislature intended that a foreign corporation without a New York principal place of business state the name and address of an attorney, it could have so required.

Therefore, it cannot be said that the Notice of Lien, on its face, violated Lien Law § 9 by failing to set forth both a principal place of business in New York and the name and address of an attorney in New York, under the circumstances.

Lien Law § 9 (4) provides that the Notice of Lien state "The labor performed or materials furnished and the agreed price or value thereof, or materials actually manufactured for but not delivered to the real property and the agreed price or value thereof." Here, the Notice of Lien states that the agreed price and value of the labor performed and value of the material furnished is $2,124,426.00.

Contrary to petitioner's contention, Lien Law § 9 (4) does not require the cost for material and labor to be stated separately in the Notice of Mechanic's Lien. A total sum for the combination of all material and labor furnished constitutes sufficient compliance (*Matter of Murdock v Kleist*, 250 AD 127,128 [2d Dept 1937]["Claimant's failure to state in his notice of lien any alleged agreed price or value of the architectural plans and specifications as materials furnished, apart from the labor performed in their preparation and supervision, was not violative of subdivision 4 where the notice as filed was in substantial compliance with the requirements of the statute]; *New York County Nat. Bank v Wood*, 169 AD 817, 153 NYS 860 [1st Dept 1915], *affd* 222 NY 662 [notice which states the kinds of material which went into the building and their agreed price or value in the aggregate, was sufficient, without giving the separate amount and value of each kind of material]). The notice states the kind of materials which went into the building and their agreed price and value, which is "all that is required" under Lien Law §9 (4) (*see id*).

In any event, where a Notice of Lien does not set forth the "labor performed or materials furnished and the agreed price or value thereof" in accordance with Lien Law § 9 (4), but stated "the total amount of the agreed price and value that was unpaid," since there were no other defects with the notice of lien, the defective notice of lien "was amendable pursuant to Lien Law § 12-a" (*EFCO Corp. v Helena Assoc. LLC*, 45 AD3d 399 [1st Dept 2007]). Contrary to petitioner's contention, *Brescia Constr. Co. Inc. v Walart Constr. Co. Inc.* (249 AD 151 [1st Dept 1936] *affd* 273 NY 648 [1937]) does not warrant a different result. In *Brescia*, the lien notice stated:

8. The agreed price and value of said labor is $8,178.39.
9. The agreed price and value of said materials is $3,312.26 which includes a balance of $1,400 on the original contract and $1,912.26 of which is for extra materials.
10. The amount unpaid the lienor for such labor and materials including the extra work as aforesaid is the sum of $11,490.65.

The court found that the based on the proof, "the agreed price and value of the labor and materials was $18,788.20, that there was paid to the lienor $7,297.55, *leaving an unpaid balance of $11,490.65*" (emphasis added). Since the notice of lien did not state the value of the labor performed and materials furnished, but merely has stated the amount unpaid as the whole value of the services performed and materials furnished, it failed to meet the requirement that the notice shall state the whole value of the labor and materials, as well as the amount remaining unpaid; "one requirement [was] as imperative as the other." Here, the Notice of Lien expressly states "The agreed price and value of the Labor performed and value of the material furnished is $2,124,426.00 . . . Total agreed price and value $2,124,426.00."

Lien Law § 9 (5) provides that the Notice of Lien state "5. The amount unpaid to the lienor for such labor or materials." *EFCO Corp. v Helena Assocs., LLC* (45 AD3d 399 [1st Dept 2007]), cited by petitioner, does not support the contention that Lien Law § 9 (4) and (5) require that the Notice of Lien separately state the agreed price or value of the labor performed and the materials furnished, or the amount unpaid to the Lienor for the labor performed and the materials furnished, respectively. In *EFCO*, the notice of lien stated "the total amount of the agreed price and value that was unpaid" and did not state "'*[t]he labor performed or materials furnished* and the agreed price or value thereof,' as required by Lien Law § 9 (4)." Here, the Notice of Lien states that labor performed or materials furnished and the agreed price as "Masonry Material, Caulking, Scaffolding, Etc." and the "agreed price and value of labor furnished is

$2,124,426.00."

In any event, while, as the Lienor argues, the court in *EFCO* determined that a notice of lien which did not set forth separate amounts for labor performed and materials furnished was defective, the defendants fail to acknowledge that the court also stated that amendment to correct this error was proper, as there was substantial compliance with the Lien Law because there were no other defects.

Petitioner's claim that the Lienor is a Nevada corporation is an insufficient basis to discharge the Notice of Lien. The Notice of Lien stated that "CA Construction, Inc." is a: "Corporation duly organized and existing under and by virtue of the laws of the State of Connecticut whose business address is at 100 Mill Plain Road, Danbury, CT 06811."

Petitioner's reliance on *Matter of New Window Sales (Precision Specialist Metal & Glass)* 189 Misc 2d 528, 735 NYS2d 724 *recalled,* 190 Misc 2d 654, 741 NYS2d 387 [Sup Ct New York County 2002]), is misplaced. In *Matter of New Window Sales (Precision Specialist Metal & Glass*), the court summarily discharged a notice of lien filed where the lienor was a foreign corporation which dissolved in 1990 for failure to pay taxes, and had never qualified to do business in New York, even though it did a significant volume of business in New York. An application to discharge the notice of lien was granted. The court held: "However, having been nonexistent in its state of organization for a decade and having never sought permission to do business in this State, I find that it lacked the power and authority to file the lien and may not take advantage of the de facto corporation doctrine." In a subsequent opinion on reargument, the court recalled the earlier opinion and denied the application to discharge the notice of lien because, prior to the decision granting the application, the lienor had been reinstated as a New

Jersey corporation. The court held that the notice of lien should not be discharged since the lienor had been reinstated in New Jersey and had qualified to do business in New York.

Here, it is uncontested that the Lienor was never incorporated in Connecticut, and it is claimed that the Lienor is a Nevada Corporation. However, on its face, the Notice of Lien did state the Lienor's address. That the address was incorrect does not render the Lienor a "dissolved" corporation. And, unlike the corporation in *Matter of New Window Sales,* the record indicates that the Lienor was qualified to do business in New York.

In any event, the issue as to whether the Lienor is in fact incorporated should await trial of the foreclosure action. It is fundamental that a mechanic's lien may be summarily discharged only for defects appearing on its face and in the absence of a defect upon the face of the notice of lien, any dispute regarding the validity of the lien must await trial of the foreclosure action *(Care Systems, Inc. v Laramee*, 155 AD2d 770, 547 NYS2d 471 [3d Dept 1989]; *see also, HamiltonAir Co., Inc. v Gould*, 17 Misc 3d 222, 844 NYS2d 640 [NYCity Civ Ct 2007] *citing Di-Com Corp. v Active Fire Sprinkler Corp.*, 36 AD2d 20, 21, 318 NYS2d 249 [1st Dept 1971]). Since the Notice of Lien is a facially valid lien and there is no defect upon the face of the notice of lien, any dispute regarding the validity of the lien must await trial thereof by foreclosure (*see id.*); *see also, In re Miller*, 133 NYS2d 421 [Sup Ct New York County 1954][On summary application to vacate mechanic's lien under statute providing that lien may be discharged where it appears from the face of the notice of lien that claimant has no valid lien by reason of certain defects thereon, where affidavits submitted by the parties involved question whether notice of lien had been timely filed, such objections raised issues of fact for disposition upon trial rather than upon motion to vacate the lien]).

Cross-Motion to Amend

Amendments to duly filed mechanic's liens are governed by Lien Law § 12-a. Lien Law § 12-a (2) provides that a lienor may apply to the Court for an Order amending a Notice of Mechanic's Lien *nunc pro tunc* provided that no existing lienor, mortgagee or purchaser in good faith would be prejudiced by such amendment. Lien Law § 12-a. "The statute was enacted to remedy those instances where liens were defeated for technical deficiencies" *(SGS Assocs., LLC v. R.A. German Const., Corp.,* 15 Misc 3d 1135, 841 NYS2d 824 [Sup. Ct. Kings County 2007] *citing Application of Upstate Builders Supply Corp.*, 63 Misc 2d 35 [Sup. Ct. Onondaga County 1970; *Application of Suffolk Academy of Medicine*, 151 Misc 2d 976, 977-978 [Sup. Ct. Suffolk County 1991]).

Contrary to the Lienor's contention, this is not an instance where an amendment is unwarranted (*cf. Empire Pile Driving Corp. v Hylan Sanitary Serv.*, 32 AD2d 563 [2d Dept 1969] [While it might be the case that any of the defects standing alone could be amended under section 12-a of the Lien Law where there is not one but several defects, it cannot be said that under these circumstances there has been substantial compliance with the Lien Law; there was a violation of subsections (4), (5), (6), and (7) and permission to amend the Notice of Lien *nunc pro tunc* must be denied]).

As discussed above Lienor does not have a place of business in New York and substantially complied with Lien Law § 9 (1) by listing its residence, it did not use an attorney to process and serve the lien, and thus, did not violate 9 (a-1), and the Lien Law does not require amounts for labor and materials, agreed upon and unpaid, to be stated separately in the Notice of Lien. Furthermore, any overstatement of the lien as filed does not necessarily render the lien

invalid and incapable of amendment (*Application of Upstate Builders Supply Corp.*, 37 AD2d 901, 325 NYS2d 509 [4th Dept 1971]). And, that petitioner incurred legal fees in connection with this proceeding, including fees incurred as a result of the statement in the Notice of Lien that the Lienor is a Connecticut corporation, does not establish prejudice to an "existing lienor, mortgagee or purchaser in good faith." Therefore, there being substantial compliance with the Lien Law, the Lienor is permitted to correct the location of its principal place of business.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the Petition for an Order discharging the Notice of Lien is denied; and it is further

ORDERED that the application by CA Construction, Inc. for leave to amend its Notice of Lien *nunc pro tunc* pursuant to Lien Law § 12-a to include the proper state of incorporation is granted, and CA Construction, Inc. shall so amend its Notice of Lien within 20 days of service of this order with notice of entry; and it is further

ORDERED that petitioner serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: May 8, 2009

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

FILED

MAY 12 2009

COUNTY CLERK'S OFFICE
NEW YORK