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

PRESENT: HON. CAROL EDMEAD PART 35

Index Number : 100135/2008
INTERIOR BUILDING
VS.
BROADWAY 1384 LLC
SEQUENCE NUMBER : 005
PARTIAL SUMMARY JUDGMENT

INDEX NO.
MOTION DATE 3/3/09
MOTION SEQ. NO.
MOTION CAL. NO.

n this motion to/for

PAPERS NUMBERED

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

FILED
JUL 07 2009
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by defendant Broadway 1384 LLC pursuant to CPLR §§ 3212(e), 1003 and 6514, and Lien Law §§ 3, 19(5) and 44(5) (a) for partial summary judgment dismissing the third cause of action as against it, which seeks to foreclose on the mechanic's liens filed by plaintiff General Contractor Interior Building Service, Inc. against the building located at 1384 Broadway, New York, New York, (b) for partial summary judgment dismissing the cross claim by defendant subcontractor S & J Entrance and Window Specialists, Inc. ("S&J") to foreclose on S&J's mechanic's liens filed against the Building, and (c) upon granting the foregoing relief, removing the Landlord as party in this action, discharging all seven mechanic's liens filed against the Building, and discharging the Notice of Pendency filed by plaintiff GC in connection, is denied; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 6/26/09

HON. CAROL EDMEAD J.S.C.

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

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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GENERAL CONTRACTOR INTERIOR BUILDING SERVICE, INC.,

Index No. 100135-2008

Plaintiff,

-against-

DECISION/ORDER

BROADWAY 1384 LLC, IN GEAR SWIMWEAR, LLC, a/k/a IN GEAR SWIMWEAR, P&P MECHANICAL INC., DANTON PLUMBING & HEATING CORP., S & J ENTRANCE AND W1NDOW SPECIALISTS, INC., REDLYN ELECTRIC CORP. d/b/a LOUIS SHIFFMAN ELECTRIC, MIDWOOD DOOR & MILWORK INC. and "JOHN DOES 1 THROUGH 10",

Defendants.

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HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action for breach of contract and to foreclose on certain mechanic's liens, defendant Broadway 1384 LLC (the "Landlord") moves pursuant to CPLR §§ 3212(e), 1003 and 6514, and Lien Law §§ 3, 19(5) and 44(5) (a) for partial summary judgment dismissing the third cause of action as against it, which seeks to foreclose on the mechanic's liens filed by plaintiff General Contractor Interior Building Service, Inc. ("plaintiff GC") against the building located at 1384 Broadway, New York, New York (the "Building"), (b) for partial summary judgment dismissing the cross claim by defendant subcontractor S & J Entrance and Window Specialists, Inc. ("S&J") to foreclose on S&J's mechanic's liens filed against the Building, and (c) upon granting the foregoing relief, removing the Landlord as party in this action, discharging all seven mechanic's liens filed against the Building, and discharging the Notice of Pendency filed by plaintiff GC in connection.

Factual Background

The Landlord entered into a lease with In Gear, as tenant, for the entire 9th Floor at the Building. Under the lease, In Gear was to retain a general contractor and architect construct a design showroom and office space, and to supervise all work (the "Tenant Build-Out").

After taking possession of the demised premises, In Gear, using a standard "American Institute of Architect" form, engaged plaintiff GC to construct the Tenant Build-Out (the "GC/In Gear Contract"). Plaintiff GC furnished labor and services on In Gear's credit.

According the Landlord, its involvement in the Tenant Build-Out was limited to (1) approving architectural drawings, (2) executing two "Plan and Work Reports for PC Filing" dated May 8, 2007 and May 9, 2007 (the "Work Reports") and two "Professional and Owner Certifications" dated May 2, 2007 and May 9, 2007 (the "Certifications"), as required by the New York City Department of Buildings ("DOB"), and (3) reimbursing In Gear up to $361,500 for the Build-Out pursuant to Article 78 of the Lease, as a material inducement for In Gear to enter into the lease.

In April, July and August, 2007, the Landlord approved three requests for reimbursement by In Gear, which included partial lien waivers by plaintiff GC. In October 2007, In Gear submitted its fourth and final request for reimbursement, which included a "Waiver of Lien and Release" that In Gear's principal signed, without the plaintiff GC's approval. In Gear also defaulted in its rent payment to the Landlord. The Landlord had no discussions with the GC regarding the Tenant Build-Out until November 2007, when the GC requested that the Landlord pay the balance due for the Tenant Build-Out. The Landlord declined.

Thereafter, seven mechanic's liens were filed, as amended, against the Building by the

plaintiff GC and its subcontractors, five of which are defendants in this action.

Plaintiff GC then commenced this action against In Gear for breach of contract and dishonoring a check payment, and against the defendants to foreclose on plaintiff GC's liens against the Building.[1]

Landlord's Motion

The Landlord argues that the foreclosure of mechanic's liens claims by the plaintiff GC and S&J lack merit. First, there is no basis to impose liability on the owner of a building where, as here, the owner is not a party to or obligated to fund a construction contract between a tenant and general contractor. The mere filing of liens by plaintiff GC and its subcontractor S&J does not create contractual liability for contract funds as to which a lien may properly attach or be foreclosed upon as a matter of law. Second, plaintiff GC and S&J's efforts to make the Landlord the guarantor of In Gear's debts for the Tenant Build-Out violates the Statute of Frauds provision, GOL § 5-701(2), as there is no unequivocal writing by the Landlord to undertake to pay for the debts of In Gear. Third, plaintiff GC may not modify the GC/In Gear Contract to require that the Landlord is obligated to pay the debts of In Gear on the basis of mere oral, self-serving statements, as such statements are barred by the standard form of merger clauses both in the GC/In Gear Contract, and In Gear's lease with the Landlord. Fourth, there is no basis to impose liability on the Landlord on the grounds that the Landlord affirmatively consented to the Tenant Build-Out within the meaning of Lien Law § 3, since (a) In Gear engaged the plaintiff

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[1] Prior to the joinder of issue, In Gear moved to compel arbitration under the GC/In Gear Contract, which resulted in a settlement between plaintiff GC and In Gear, whereby it was agreed that the seven mechanic's liens would be discharged upon a payment by In Gear of $325,000. Although In Gear paid 10% of this sum, the remainder remains unpaid.

GC to perform the Build-Out for In Gear's benefit as a long-term lessor; (b) the lease provides that In Gear is responsible for all construction work at the demised premises; (c) the Landlord did not have possession or control of the demised premises during the time of the construction; (d) the Landlord did not have the right to determine the scope of the work, to direct the general contractor, to stop the project, to approve or reject change orders, or the right to be present when work is performed; (e) all transactions pertaining to the Tenant Build-Out occurred between the plaintiff GC and In Gear, and (f) the Lease provides that any labor or services rendered for the Tenant Build-Out is performed on In Gear's credit, and not on the Landlord's account.

Furthermore, S&J's cross claim to foreclose on its mechanic's liens against the Building also fails, because it is undisputed that any rights the subcontractor has arise out of its agreement with plaintiff GC, not out of any independent relationship with the Landlord. Further, S&J has no greater claim to foreclose on its lien against the Building than the GC has.

Opposition

In opposition, plaintiff GC submits an affidavit from its Executive Vice-President, Robert Fluet ("Fluet"), wherein he states that he was informed that the Landlord was contributing a substantial portion of the costs for the Tenant Build-Out under its lease with In Gear, and that plaintiff GC would receive direct payments from the Landlord at least up to whatever contribution amount the Landlord agreed to make. In sections 40.2 and 78.1 of the lease, the Landlord agreed to finance the Tenant Build-Out in the total sum of $533,221.98 ($361,500.00 by direct money payments from the Landlord and $171,721.98 in rent credits). In addition, the Landlord required In Gear to post a Letter of Credit for approximately $180,000.00 as security for In Gear's obligations under the lease, including In Gear's share of the costs for the work the

plaintiff GC was to perform. Further, section 64.2 of the lease required In Gear to furnish a bond to the Landlord in an amount equal to 120% of the cost of the Tenant Build-Out (less the amount of the Landlord's contribution to plaintiff), to assure payment and completion of the Build-Out.

The Landlord's apparent failure to obtain such payment bond as required by Section 64.2 from In Gear, and allowing In Gear's letter of credit to lapse may render the Landlord liable to plaintiff GC for the full amount of plaintiff's claim. Plaintiff GC intends to seek discovery to ascertain the circumstances involved in the Landlord's failure to obtain the construction payment bond from In Gear and in allowing In Gear's letter of credit to lapse.

Further, the Landlord not only consented to the Tenant Build-Out, but was actively involved in the Tenant Build-Out and in its funding. Consent is not only evidenced by the lease provisions above, but the Landlord's representatives attended pre-construction meetings, were involved in revising and approving the plans for In Gear's Build-Out, attended job meetings on a regular basis and even directed plaintiff GC's personnel to make minor modifications to work in the field which they said were mandated by the Building Code or otherwise requested or required by the Landlord. Plaintiff GC received all of its progress payments directly from the Landlord; at one point when plaintiff GC did not receive a payment, the Landlord's representatives assured Fluet that the Landlord would make a direct payment to plaintiff GC, and pleaded for plaintiff GC to proceed with the work.

S&J's Opposition

There is an issue of fact as to whether the Landlord gave its "consent" to the architectural metal and glass work installed in its building by S&J, as required by and within the purview of Lien Law §3. Further, the language in the lease in which the Landlord purports to disclaim all

liability for labor and materials furnished to Tenant upon credit, and indicating that no mechanic's lien shall attach to the Building violates Lien Law § 34. The payment bond provision of section 64.2 of the lease intended to benefit the laborers and materialmen, and in the event the bond was not posted, the Landlord may be held liable to S&J for the amount that the payment bond would pay. It is also clear that the Landlord benefitted from the Tenant's Build-Out, especially when it committed to paying cash and credits $533,221.98, which is the approximate value of the general construction contract for the work. In Gear could perform no work without the Landlord's prior approval, the Landlord retained the right to not only review In Gear's plans and inspect the work in progress, but to enforce the Landlord's standards in the quality of work, labor and materials employed in the work, In Gear could make no changes in the work without the consent of the Landlord, the Landlord required that In Gear install mechanical systems pursuant to law governing mechanical, electrical and fire safety systems, the Landlord had the right to approve In Gear's choice of engineers and architects, and the Landlord was entitled to reimbursement for costs it incurred in connection with the Tenant Build-Out.

Landlord's Reply

There is no basis to impose liability upon the Landlord beyond the maximum landlord contribution to In Gear, which has been paid in full.

There can be no finding of consent within the meaning of Lien Law §3. It is undisputed that the Landlord did not acquiesce to plaintiff GC extending credit to In Gear. The merger clauses bar any alleged oral representations made, including any representations leading to the plaintiff GC extending credit to In Gear.

Further, the third-party beneficiary argument by plaintiff GC and S&J is unavailing.

Third-party beneficiary status with enforceable rights only exists where the party is an intended beneficiary, and plaintiff GC was not an intended beneficiary of In Gear's option to post a letter of credit in lieu of cash for security regarding rent under Article 54 of the lease. That plaintiff GC was never an intended third party beneficiary of any provision under the Lease is underscored by the fact that it did not know of lease Articles 54 and 64 until the Landlord brought on the present motion. Further, neither Mr. Fluet nor any representative of plaintiff GC ever requested a copy of the Lease before proceeding with the Tenant Build-Out or at any point through completion of the construction project. If plaintiff GC were an intended third party beneficiary of the Lease, at minimum, the Landlord or In Gear would have certainly furnished a complete copy of it before the Tenant Build-Out began, which never occurred. Further, plaintiff GC cannot rely on Lease Articles 54 and 64 to impose liability on the Landlord. Article 54, entitled "Security" by its terms deals primarily with security to the Landlord for payment of rent obligations under the Lease, and for the performance of In Gear's other obligations under the Lease, not for completion of the Tenant Build-Out under the GC/In Gear Contract. Article 64, entitled "Tenant Alterations" requiring the posting of construction bonds, contemplates alterations to the demised premises after the Tenant Build-Out at the inception of the term of Lease, pursuant to Lease Articles 42 and 78. This distinction is made plain by Lease Article 42, entitled "Tenant's Initial Installations" and Lease Article 78, entitled "Work Contribution for Tenant's Initial Installations," which treats the construction project for the initial Tenant Build-Out for the demised premises separately from Tenant Alterations that may occur thereafter from "time to time during the term of this Lease" pursuant to Lease Article 64. Where, as here, there is an inconsistency in the lease between specific provisions governing the initial Tenant Build-

Out for the demised premises, and a general provision regarding bonding requirements for subsequent Tenant Alterations for the balance of the more than ten-year term of the Lease, the specific provision prevails.

The Landlord points out that since S&J has its own subcontract with plaintiff GC for which it has asserted a counterclaim against plaintiff GC and can be made whole, there was no fair or reasonable basis for S&J to assert a claim against the Landlord to foreclose on its mechanic's lien. The lease is solely concerned with the tenancy of In Gear and does not even mention plaintiff GC. Further, plaintiff GC's reliance on the alleged representations of In Gear to establish intended third-party beneficiary status fail because such purely oral statements, run afoul of the parol evidence rule, which prohibits proof of an oral agreement that might vary the terms of the Lease that was intended to embody the entire agreement between the parties. Further, conspicuously absent is documentary proof to support Fluet's affidavit, let alone a signed writing, sufficient to rise to the level of an agreement that is sufficient to vary or contradict the four corners of the Lease.

Moreover, the bonding requirements of the Tenant Alterations provision under Lease Article 64, is exclusively the obligation of In Gear, not the Landlord. If plaintiff GC was in fact a beneficiary of this provision, and assuming it applied to the initial Tenant Build-Out and not subsequent Tenant Alterations, for the sake of argument, it must look to the party who breached this obligation, In Gear, not the Landlord whose obligation it never was in the first place.

Fluet's affidavit, which consists of self-serving, conclusory paragraphs, is devoid of evidentiary detail, and insufficient defeat the instant motion. The Landlord also argues that Fluet's alleged reliance on oral representations from In Gear's representatives to go forward

with the Tenant Build-Out is inconsistent with his self-professed status as a sophisticated businessman, in business for 15 years, who would not reasonably rely on mere oral representations before deciding to proceed with the contractual obligations of a construction project.

The accompanying Reply Affidavit of Manny Syskrot shows that Fluet's argument regarding the Landlord's "involvement" in the Tenant Build-Out, suggesting that there may be some evidence of "consent" within the meaning of Lien Law § 3 is disingenuous. The Landlord had to be involved in the Tenant Build-Out to ensure that it did not adversely impact other tenants, building-wide systems, and common areas, and did not violate the Building Code.

Last, the Landlord has its own claims and grievances against In Gear under the Lease, including outstanding rent arrears of $286,376 through February 2009, and plaintiff GC has already obtained a money judgment for the full amount of its claim under the GC/In Gear Contract. There is no showing regarding any good faith efforts by plaintiff GC at enforcement of the judgment, which makes it whole on its claim against In Gear. Under these circumstances, there is no fair or reasonable basis for plaintiff GC to argue that liability of a guarantor of In Gear's debts under GC/In Gear Contract should be imposed on the Landlord.

And, the amount of rent credits cannot be charged against the Landlord in determining the Landlord's liability; such rent credits were not a credit against construction costs, but was consideration for In Gear agreeing to enter into a long-term lease. Since such credits were already paid to In Gear, the Landlord should not have to be paid out again. Further, the Landlord did not receive the benefits of such credits.

With respect to the opposing papers of S&J, they are supported by nothing more than an

attorney's affirmation, which is insufficient to defeat the present motion.

Analysis

Lien Law § 3 provides as follows:

> A contractor, subcontractor, laborer . . . 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 agent, contractor or subcontractor . . . shall have a lien for the principal and interest, of the value, or the agreed price, of such labor . . . from the time of filing a notice of such lien as prescribed in this chapter.

Although it has been held that the owner of a premises may not be held directly liable to a subcontractor (hired by the owner's general contractor) on a theory of implied or quasi-contract, unless he has in fact assented to such an obligation (*Cotelmo's Sand & Gravel, Inc. V J&J Milano, Inc.*, 96 AD2d 1090 [2d Dept 1983]), Lien Law § 3 grants a contractor and subcontractor the statutory right to file a mechanic's lien against the owner of real property if the work was done "with the consent or at the request of the owner" (*Paul Mock, Inc. v 118 East 2&h Street Realty Co.*, 87 AD2d 756, 448 NYS2d 693 [1st Dept 1982]). Thus, the Landlord's contentions that (1) it did not guaranty, in writing, In Gear's obligations to plaintiff GC under the GC/In Gear Contract, (2) it did not agree, in writing, for the plaintiff GC to perform work on the Landlord's behalf, (3) the lease's merger clause precludes any oral modification to impose an obligation upon the Landlord to pay plaintiff GC, and (4) plaintiff GC is not a third-party beneficiary under the lease provision requiring the Landlord to reimburse In Gear, so as to hold the Landlord liable to plaintiff GC, do not warrant dismissal of the foreclosure action against it (*Interstate Home Builders, Inc. v D'Andrea Const., Inc.*, 2001 WL 1682795, 2001 NY Slip Op 40515(U) [Sup Ct Bronx Co. Aug 14, 2001] [a materialman or subcontractor is not required to be in privity with the property owner in order to foreclose a mechanic's lien]).

The third, and sole cause of action pertaining to the Landlord in this action is based on two mechanic's liens filed against the Building, and the foreclosure of same. Therefore, dismissal and discharge of plaintiff GC's mechanic's liens turns on whether the Landlord establishes, as a matter of law, that Lien Law § 3 has not been satisfied.

The word "consent" as used in section 3 of the Lien Law has a limited application (*Bedford Lake Park Corp. v Twelve Linden Corp.*, 8 AD2d 818, 190 NYS2d 143 [2d Dept 1959]). The "owner must either be an *affirmative factor* in procuring the improvement to be made, or *having possession and control* of the premises assent to the improvement in the expectation that he will reap the benefit of it" (emphasis added) (*Paul Mock, Inc. v 118 East 2&h Street Realty Co.*, 87 AD2d 756, *supra*; *Dash Contracting Corp. v Slater*, 142 Misc 2d 512, 537 NYS2d 736 [Sup Ct New York County 1989]). "There is a marked distinction between the passive acquiescence of an owner in that he knows the improvements are being made, improvements which in many cases he has no right to prevent, and his actual and express consent or requirement that the improvement shall be made" (*Bedford Lake Park Corp. v Twelve Linden Corp.*, 8 AD2d 818, *supra*). It is the latter that constitutes the consent mentioned in the statute (*id., citing Rice v Culver*, 172 NY 60).

The consent by an owner can be found where the owner, by contract with the lessee, has required or specifically consented to the making of certain improvements (*M & B Plumbing & Heating Co., Inc. v Cammarota*, 103 AD2d 879, 477 NYS2d 901 [3d Dept 1984]; *see also In re City of New York*, 292 AD2d 176, 738 NYS2d 202 [1st Dept 2002] [the law requires that the landlord actually participated in procuring the work to be done or that the landlord required the tenant to perform the work for the landlord's benefit; consent found since lease required the

tenant to effect the installations performed by the lien holder and the installations became part of the demised premises and ultimately inured to the owner's benefit; also owner dealt directly with lien holder in connection with the subject work performed upon its premises]). "Of critical significance is the requirement that '[t]he consent contemplated by the statute is not a consent given to the tenant, but a consent given to the materialman'" (*Beaudet v Saleh*, 149 AD2d 772, 539 NYS2d 567 [3d Dept 1989] *citing Paul Mock, Inc. v 118 East 25th St. Realty Co.*, 87 AD2d 756, *supra*, *quoting Sager v Renwick Park & Traffic Assn.*, 172 AD 359, 368, 159 NYS 4).

Here, an issue of fact exists as to whether the Landlord performed "affirmative acts" which can be construed as "consent" required by Lien Law § 3 (*see Beaudet v Saleh*, 149 AD2d 772, 539 NYS2d 567 [3d Dept 1989]).

In *Harner v Schecter* (105 AD2d 932 [3d Dept 1984]), a non-jury trial indicated that the lease was contingent upon procurement of a liquor license, and the tenant hired plaintiff to perform extensive remodeling and repair of the demised premises in order to make it suitable and qualify for the license. On appeal from a judgment finding that the landlord consented to the work, entitling plaintiff to foreclose on the mechanic's lien, the Third Department found that the lease between a landlord and tenant contemplated that improvements would be made to the premises, and expressly provided that resulting benefits would revert to the landlord upon expiration of the lease. Further, the landlord's agent was active in procuring the contractor retained by the tenant, participated in several conferences as to the extent of the renovations, and provided a set of floor plans and was at the work site daily. Therefore, the Court affirmed the judgement.

In *City of New York v New York Iron Works* (292 AD2d 176 [1st Dept 2002]), the First

Department affirmed the denial of a motion to discharge a mechanic's lien. The First Department noted that the lease required the tenant to effect the installations made by the lienholder, and the installations became part of demised premises and ultimately inured to the benefit of the landlord. That the landlord was not in contractual privity with the lienor did not vitiate the lien, because the landlord dealt directly with the lienor in connection with the work performed at the premises.

Here, the lease between the Landlord and In Gear likewise contemplated that major improvements would be made to the demised premises. Indeed, the Lease essentially required In Gear to perform work at the Premises. For example, under Article 42.1

> Tenant agrees, at Tenant's sole cost and expense, to cause the Premises to be improved in accordance with the plans approved by Landlord in writing ("Approved Plans") (which improvement is hereinafter referred to as Tenant's Initial Installations"), which approval shall not be unreasonably withheld or delayed (See Schedule 1 for Tenant's proposed plans, which plans are hereby approved by Landlord.). . . . Tenant's performance of Tenant's Initial Installations shall be performed with due diligence and in a good workmanlike manner so that the same shall be completed . . . not later than ninety (90) days . . . .

According to the plaintiff GC, it received all of its progress payments directly from the Landlord. The Landlord's representatives attended pre-construction meetings, was involved in revising plans for the improvements, attended job meetings on a regular basis, and directed plaintiff's personnel to make minor modifications to work in the field. Therefore, it cannot be said that the Landlord passively acquiesced to the work performed by the plaintiff GC.

Contrary to the Landlord's contention, *Paul Mock, Inc. v 118 East 25th Street Realty Co.* (87 AD2d 756 [1st Dept 1982]) does not militate in favor of the Landlord. In *Paul Mock*, the Court held that the lienor could not foreclose its mechanic's lien against the owner of real

property. The Court found that the submissions established "that the lienor never dealt with the owner with respect to these improvements; all the transactions relating to the improvements occurred between the lienor and the tenant in possession; the credit accorded by the lienor was to the tenant and not to the owner; and the tenant in essence assured the owner that the improvements to be effected were at the tenant's expense." Here, an issue of fact remains as to whether plaintiff GC dealt with the Landlord with respect to the improvements at the premises, and it cannot be said that all of the transactions relating to the improvements occurred between the plaintiff and In Gear; the record indicates that the Landlord made direct payments to the plaintiff GC and that representatives of the Landlord were actively involved in various phases of the construction.

Therefore, since the submissions fail to establish, as a matter of law, that the Landlord did not affirmatively consent to the Tenant Build-Out within the meaning of Lien Law §3, dismissal of the third cause of action on this ground also lacks merit.

Consequently, dismissal of the cross claim by S&J, on the above grounds, lack merit. Where an owner hires a general contractor who, in turn, engages a subcontractor and the subcontractor does not receive full payment, the subcontractor's rights under the Lien Law to recover against the owner are derivative of those of the general contractor and are limited to satisfaction out of the amount established as due from the owner *(Canron Corp. v City of New York*, 214 AD2d 115, 631 NYS2d 642 [1st Dept 1995]). The subcontractor's rights rest upon a theory of subrogation; he thus stands in the general contractor's shoes, and its right to recovery under the Lien Law can be no greater than the general contractors (*Canron Corp. v City of New York, supra*). Therefore, the branch of the Landlord' motion to dismiss S&J's cross claim on the

ground that S&J's rights are derived out of the insufficient claims of the plaintiff GC, is denied.

The remaining derivative forms of relief of likewise denied.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendant Broadway 1384 LLC pursuant to CPLR §§ 3212(e), 1003 and 6514, and Lien Law §§ 3, 19(5) and 44(5) (a) for partial summary judgment dismissing the third cause of action as against it, which seeks to foreclose on the mechanic's liens filed by plaintiff General Contractor Interior Building Service, Inc. against the building located at 1384 Broadway, New York, New York, (b) for partial summary judgment dismissing the cross claim by defendant subcontractor S & J Entrance and Window Specialists, Inc. ("S&J") to foreclose on S&J's mechanic's liens filed against the Building, and (c) upon granting the foregoing relief, removing the Landlord as party in this action, discharging all seven mechanic's liens filed against the Building, and discharging the Notice of Pendency filed by plaintiff GC in connection, is denied; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

Dated: June 26, 2009

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

Duplicate Original

FILED
JUL 07 2009
COUNTY CLERK'S OFFICE
NEW YORK