Saratoga Assoc. Landscape Architects v Lauter Dev. Group
2009 NY Slip Op 31657(U)
July 25, 2009
Supreme Court, Albany County
Docket Number: 2322/09
Judge: Joseph C. Teresi
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

SARATOGA ASSOCIATES LANDSCAPE ARCHITECTS, ARCHITECTS, ENGINEERS AND PLANNERS, P.C.,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 2322-09
RJI NO. 01-09-097106

THE LAUTER DEVELOPMENT GROUP, SANFORD ZIMMERMAN and ABODE BLUE CHIP, L.L.C.,

Defendants.

Supreme Court Albany County All Purpose Term, July 6, 2009
Assigned to Justice Joseph C. Teresi

APPEARANCES:
Wardlaw Associates, P.C.
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Attorney for Plaintiff
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Attorneys for Defendant Abode Blue Chip, LLC
One Commerce Palza
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TERESI, J.:

Plaintiff commenced this action, in part, to foreclose the mechanics' lien it filed against defendant Abode Blue Chip, LLC's (hereinafter "Abode") property, located in Guilderland, New York (hereinafter "the property"), for professional services rendered. Abode answered, setting forth specific denials, affirmative defenses, counterclaims and a cross claim. Discovery commenced and is ongoing. Abode now moves for summary judgment dismissing plaintiff's

complaint, a declaration that the mechanics lien plaintiff filed is void, along with damages pursuant to Lien Law §39-a. Plaintiff opposes the motion. Because Abode demonstrated its entitlement to judgment as a matter of law dismissing the complaint against it and vacating plaintiff's lien, that portion of its motion is granted. However, because Abode failed to demonstrate its entitlement to damages pursuant to Lien Law §39-a, that portion of its motion is denied.

"Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue." (Napierski v. Finn, 229 AD2d 869, 870 [3d Dept. 1996]). "To succeed on a motion for summary judgment, the movant is required to establish its entitlement to judgment as a matter of law by demonstrating that there are no questions of fact, shifting the burden to the nonmovant to raise a question of fact requiring a trial." (Lynch v. Liberty Mut. Fire Ins. Co., 58 AD3d 939, 940 [3d Dept. 2009]; Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]). In opposing a motion for summary judgment, one must produce "evidentiary proof in admissible form. . . mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." (Zuckerman v. City of New York, 49 NY2d 557, 562 [1980]). Moreover, all evidence must be viewed in the light most favorable to the opponent of the motion. (Amidon v. Yankee Trails, Inc., 17 A.D.3d 835 [3d Dept. 2005]).

Lien Law §3 provides that a "contractor... who performs labor... 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... of such labor... upon the real property." It applies, as is relevant here, to an architect who creates plans in the process of developing real property. (Bralus Corp. v. Berger, 307 NY 626 [1954]). Additionally, "[t]he

consent required by this section is not mere acquiescence and benefit, but some affirmative act or course of conduct establishing confirmation." (Harner v. Schecter, 105 AD2d 932 [3d Dept. 1984]; Tri North Builders Inc. v. Di Donna, 217 AD2d 886 [3d Dept. 1995]; Care Systems Inc. v. Laramee, 155 AD2d 770 [3d Dept. 1989]); J.K. Tobin Const. Co., Inc. v. David J. Hardy Const. Co., Inc., __AD3d __, 2009 WL 1981430 [4th Dept. 2009]).

Here, Abode demonstrated its entitlement to judgment as a matter of law. Abode submits the affidavit of its authorized agent, who was engaged in the development of the property for Abode through BBL Development Corp. (hereinafter "BBL"). Abode, by its developer BBL, contracted with C.T. Male Associates, PC (hereinafter "C.T. Male") to create plans and specifications for developing the property at a cost of more than $180,000.00, to date. Using the C.T. Male plans, Abode obtained Final Site Plan Approval from the Town of Guilderland to develop the property with twenty four town homes and eighty eight condominium units, all age restricted. Abode did not use plaintiff's services in obtaining their project's approval. Abode's authorized agent unequivocally states that at no time did "Abode, BBL [or] any representative of either entity ever consent to the work performed by [plaintiff]".

Abode also submits the affidavit of defendants Sanford Zimmerman, individually, and as a principal of the Lauter Development Group (hereinafter collectively referred to as "Lauter"). Lauter alleges that after Abode obtained Final Site Plan Approval, it engaged in negotiations with Abode to purchase the property. Although Abode's project was approved, Lauter's potential purchase was premised upon modifying the configuration of the approved development. Lauter contracted with plaintiff to obtain, in part, "preliminary plans" for development of the property as modified from Abode's approved plans. For such purpose, Lauter requested that Abode forward

their approved plans to plaintiff, which Abode did. Lauter, although contracting with plaintiff for its professional services in developing the property, never entered into a contract with Abode to purchase the property. Lauter unequivocally states that it never represented to plaintiff that it "was acting in concert with or on behalf of Abode or BBL or any representatives of either entity."

It is undisputed on this record that the plans drawn by plaintiff constitute work done for purposes of "improvement" of the property, in accord with Lien Law §3. However, Abode demonstrated that it, as the property owner, did not "consent" to plaintiff's services. The sworn allegations of both Abode and Lauter, and the supporting documents attached, all demonstrate that no "consent" was given, as a matter of law. Abode's showing shifts the burden to plaintiff to demonstrate the existence of a material issue of fact.

In opposition, plaintiff submits the affidavit of Robert Bristol, its president, chairman and CEO, who claims familiarity with the circumstances at issue herein due to his positions with plaintiff. At no point does Mr. Bristol allege his personal knowledge or involvement in the events at issue. The Bristol affidavit alleges numerous oral representations made by Zimmerman, without setting forth any exceptions applicable to these hearsay, and/or double hearsay, statements attributed to Zimmerman. As such, Mr. Bristol's allegations about what Zimmerman said are inadmissible on this motion, and fail to raise a triable issue of fact. (Kaufman v. Quickway, Inc., __AD3d__, 2009 WL 1955864 [3d Dept. 2009]). Moreover, plaintiff sets forth no "words or conduct" communicated by Abode, which demonstrate that Zimmerman was Abode's agent. (Edinburg Volunteer Fire Co., Inc. v. Danko Emergency Equipment Co., 55 AD3d 1108 [3d Dept. 2008]). Thus, the statements allegedly made by Zimmerman, even if admissible, cannot be attributed to or bind Abode. (Id.) As such, plaintiff's

characterization of Zimmerman's statements cannot create an issue of fact. Nor does plaintiff demonstrate, with admissible or inadmissible evidence, that Abode "consented" to plaintiff's work. The only "consent" plaintiff alleges Abode gave was for the release of its approved plans. However, Abode's consent to release their Final Site Plan to plaintiff does not constitute Abode's "consent" to plaintiff's development work for it. Rather, it merely demonstrates Abode's attempt to market their fully approved development to a potential purchaser, nothing more. As plaintiff set forth no "affirmative act", or issue of fact relative thereto, of Abode's "consent" to plaintiff's work, summary judgment is appropriate. (See Tri-North Builders, Inc., supra).

Alternatively, plaintiff claims Abode's motion is premature, requiring denial, because discovery is in its "infancy" and information to oppose this motion is "strictly within [defendants'] knowledge". (See CPLR §3212[f]). Contrary to plaintiff's contentions, however, Abode's "consent" is not within defendant's sole and exclusive knowledge. Rather, Abode's consent, if given at all, would necessarily have been communicated to plaintiff when the events at issue in this action unfolded. Plaintiff's insistence on the necessity of further discovery to obtain undisclosed documents, speaks volumes for what Abode did not receive during the course of the events at issue. Namely, Abode's consent. Because plaintiff did not make an "evidentiary showing suggesting that completion of discovery will yield material and relevant evidence", its opposition on this ground is unavailing. (Zinter Handling, Inc. v. Britton, 46 AD3d 998, 1001[3d Dept. 2007]).

Turning to Abode's motion for summary judgment of its Lien Law §39-a claim, Abode failed to demonstrate its entitlement to judgment as a matter of law on this counterclaim. "It is well settled that Lien Law §39 and §39-a must be read in tandem, and damages may not be

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awarded under section 39-a unless the lien has been discharged for willful exaggeration". (Pyramid Champlain Co. v. R.P. Brosseau & Co., 267 AD2d 539 [3d Dept. 1999][emphasis added]). As set forth above, plaintiff's lien is being discharged due to plaintiff's failure to obtain Abode's "consent" to its work. The lien is not being discharged due to its "willful exaggeration". While an inference of wilful exaggeration may be made from the context of Abode's non-consent, such inference is not enough to support this motion. Because Lien Law §39-a "is penal in nature... [it] must be strictly construed in favor of the person upon whom the penalty is sought to be imposed." (Id.) Strictly construing the reason for discharge in this action, i.e. non-consent, it is clearly not a "wilful exaggeration" discharge, upon which Abode would have been entitled to damages.

Accordingly, Abode's motion for summary judgment is granted in part. Plaintiff's complaint against Abode is dismissed, plaintiff's mechanic's lien, filed January 20, 2009, is hereby canceled null and void, and Abode's summary judgment motion for damages in accord with Lien Law §39-a is denied.

This Decision and Order is being returned to the attorneys for the defendant Abode. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: July 25, 2009
Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated June 19, 2009; Affidavit of Sanford Zimmerman, dated June 15, 2009 with attached Exhibit "A"; Affidavit of Peter Cornell, dated June 18, 2009, with attached Exhibits "A" - "E"; Affidavit of Neil Levine, dated June 18, 2009, with attached Exhibits "A" - "I";
2. Affidavit of Robert Bristol, dated June 29, 2009, Affirmation of Donna Wardlaw, dated June 29, 2009 with attached Exhibits "A" - "L".
3. Affidavit of Sanford Zimmerman, dated July 6, 2009; Affidavit of Peter Cornell, dated July 6, 2009, with attached Exhibit "A"; Affidavit of Neil Levine, dated July 6, 2009.