

<b>Matter of Madison 96 Assoc., LLC (Marson Contr. Co., Inc.)</b>
2009 NY Slip Op 31848(U)
August 10, 2009
Supreme Court, New York County
Docket Number: 116388/08
Judge: Walter B. Tolub
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **WALTER B. TOLUB**  
*Justice*

PART \_\_\_\_\_

Index Number: 116388/2008  
**MADISON 96 ASSOCIATES, LLC**  
VS.  
**MARSON CONTRACTING CO. INC.,**  
SEQUENCE NUMBER: # 001  
VACATE & CANCEL MECHANIC'S LIEN

INDEX NO. 116388-08  
MOTION DATE \_\_\_\_\_  
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 \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION**

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 8/10/09

WALTER B. TOLUB s.c.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based thereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 941B).

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In the Matter of the Application of

MADISON 96 ASSOCIATES, LLC, to vacate  
MARSON CONTRACTING CO., INC.'s Notice  
of Mechanic's Lien or show cause why its  
Notice of Lien Should not be vacated or  
cancelled of record under the Provisions  
of Lien Law §§ 9(7) and 39.

Index No.: 116388/08  
SEQ: 001

DECISION

-----X  
WALTER B. TOLUB, J.:

**BACKGROUND**

Petitioner Madison 96 Associates, LLC (Madison 96) moves, pursuant to Lien Law §§ 9 (7) and 39, to vacate and cancel the mechanic's lien filed by Marson Contracting Co., Inc. (Marson).

Marson performed construction management services on the subject premises between October 6, 2004, and January 24, 2007. On May 22, 2007, Marson filed a mechanic's lien against Madison 96, the alleged owner of the property, and said lien was extended by filing a lien extension on or about May 16, 2008.

The subject building, currently a condominium, is identified as Block 1602, Lot 16. On February 2, 2006, individual lot numbers were assigned to each condominium unit. The tenth and eleventh floors of the building, the property subject to the instant lien, are described as the penthouse unit, and were

assigned Lot 1111 as part of the condominium conversion.

On October 24, 2006, the penthouse unit was conveyed by Madison 96 to S&H Associates (S&H), a general partnership, for the sum of \$10. Stuart Boesky (Boesky), a member of Madison 96 and a partner in S&H, executed the conveyance. It is noted that all of the units in the building were conveyed to several different buyers for the same sum on the same day.

The subject lien identifies the owners of the premises, in paragraph (2) of the notice of lien, as Madison 96, and Madison 96 is further identified as the entity that hired Marson to perform the construction management services for the property. Paragraph (7) of the notice of lien states:

"The property subject to the lien (solely against the 10<sup>th</sup> and 11<sup>th</sup> floors of the Property that remain in the title of the aforementioned Owner) is situated in the County of New York, State of New York, and is identified on the New York County Tax Maps in Block 1602, Lot 16. Said Property being commonly known as the 10<sup>th</sup> and 11<sup>th</sup> floors of 21 East 96<sup>th</sup> Street, New York, New York. Said Property also being known as 1380-1388 Madison Avenue, New York, New York.

This lien is not filed against the common elements of the Property and only the aforementioned unit owned by the owner, i.e., Madison 96 Associates, LLC. This lien is not filed against any and all condominium units that have heretofore deeded out by Madison 96 to unit owners. This lien should only be recorded against the real property ownership interests of the Debtors as set forth in paragraph (2) hereof. This lien is not a blanket lien against the condominium property [emphasis in the original.]"

The notice of lien indicates that the total unpaid amount due and owing for services rendered is \$601,639.00.

Madison 96 alleges that the lien is defective because both

the owner and the description of the property are inaccurate. Madison 96 further argues that Marson has willfully exaggerated the amount due and owing, maintaining that the parties entered into an oral agreement to settle the dispute for \$425,000.00, and that Madison 96 has already paid \$300,000 of that sum, as evidenced by a cancelled check appearing in the moving papers, so that the amount still due is only \$125,000.00.

#### DISCUSSION

Madison 96's argument that the lien should be vacated and cancelled, pursuant to Lien Law § 39, because Marson willfully exaggerated the amount owed, is improperly propounded in this action. The issue of a lienor's willful exaggeration of the amount due is only properly to be determined at a foreclosure proceeding to enforce the lien, not at a proceeding to vacate and cancel a lien for being invalid. *Atlas Refrigeration-Air Conditioning, Inc. v Lo Pinto*, 33 AD3d 639 (2d Dept 2006); *Executive Towers at Lido, LLC v Metro Construction Services, Inc.*, 303 AD2d 545 (2d Dept 2003); *Wellbilt Equipment Corp. v Fireman*, 275 AD2d 162 (1<sup>st</sup> Dept 2000).

However, the court does find some merit in Madison 96's arguments based on Lien Law § 9.

"[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 [1<sup>st</sup> 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 (1<sup>st</sup> Dept 2003). However, in the instant case, Marson has identified the individual condominium unit (10<sup>th</sup> and 11<sup>th</sup> floors) with sufficient clarity so as to satisfy the requirements of Lien Law § 9 (7). This is especially true since Marson specifically stated that no other unit or common area was subject to the notice of lien.

Therefore, the court finds that the property in question was sufficiently described to fulfil that requirement of Lien Law § 9 (7). However, the court also finds that the name of the owner of the property was incorrectly stated.

"The requirement 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 (1<sup>st</sup> 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 the 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. See generally *id.*

Marson argues that the transfer from Madison 96 to S&H was, in reality, a sham transaction, and that because Boesky is a member/partner of both entities, the distinction should be considered a misdescription capable of amendment. The court disagrees.

In *PM Contracting Company, Inc. v 32 AA Associates LLC* (4 AD3d 198, *supra*), a case involving a similar situation with respect to the name of the owner on a notice of lien, the Appellate Court disregarded a conveyance that it characterized as

not being one at arm's length. In that case, the former corporate owner transferred its entire interest in the property to a new corporation, of which the former corporate owner was the sole shareholder. Under those circumstances, the Court held that the misnomer did not prejudice any party, and further held the lien to be valid. That is not the situation in the case at bar.

When the subject property was converted to condominium residences, each of the units was conveyed for the same dollar consideration to multiple individual purchasers. The conversion and title transfers were all properly recorded, and tax transfer forms were filed. All of the transfers occurred more than half a year before Marson completed its work or filed its notice of lien, and, as of that point in time, Madison 96 no longer held any title to, or interest in, the subject property.

"Where, as here, the notice of mechanic's lien totally misidentifies the true owner of the real property as of the date it was filed, the defect is jurisdictional and the notice is void. The jurisdictional defect is not obviated merely because the misidentification of the true owner of the propert[ies] was the result of an [apparent] failure to make a thorough search of the County Clerk's records [internal quotation marks and citation omitted]."

*Long Industries Construction Corp. v Appelaniz*, 298 AD2d 309, 309 (1<sup>st</sup> Dept 2002).

