

<b>Matter of Carnegie Hill N. LLC (Diontech Consulting, Inc.)</b>
2009 NY Slip Op 32110(U)
September 9, 2009
Supreme Court, New York County
Docket Number: 103829/09
Judge: Emily Jane Goodman
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2002

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

PRESENT: EMILY JANE GOODMAN  
Justice

PART 17

Carnegie Hill North

INDEX NO. 103829/09

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

Diontech Consulting Inc,

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*is decided per*

*attached*

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

**FILED**  
SEP 16 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 9/9/09

EMILY JANE GOODMAN

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 17

-----X  
In the Matter of the Application of

CARNEGIE HILL NORTH LLC,

Petitioner,

for an Order vacating and discharging  
of record a Certain Mechanic's Lien  
filed by

DIONTECH CONSULTING, INC.,

Respondent,

against premises known and described as  
1677-1681 Lexington Avenue, New York,  
New York, said premises being situated  
in Block 1633, Lot 20, as shown on the  
Land and Tax Map of the County of New  
York, and against Moe Yaghoubi, as  
Owner, and Upper Manhattan Development  
Corp., as Contractor.

Index No. 103829/09

**FILED**  
SEP 16 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

-----X  
**EMILY JANE GOODMAN, J.S.C.:**

Motion sequence numbers 001 and 002 are consolidated for  
disposition.

In motion sequence number 001, petitioner Carnegie Hill  
North LLC (Carnegie Hill) seeks, by order to show cause, an order  
vacating and cancelling a mechanic's lien on property known and  
described as 1677-1681 Lexington Avenue, New York, New York (the  
premises).

In motion sequence number 002, respondent Diontech  
Consulting, Inc. (Diontech) moves, pursuant to Lien Law § 12-a  
(2), for leave to amend, nunc pro tunc, the notice of mechanic's  
lien filed against the premises by Diontech on July 16, 2008.

On or about June 4, 2007, Diontech, as subcontractor, entered into a written subcontract with Upper Manhattan Development Corp. (Upper Manhattan), as contractor, to provide excavation, carpentry and concrete work in connection with construction at the premises.

Diontech contends that between June 5, 2007 and May 16, 2008 it furnished materials and performed work at the premises pursuant to that contract, but that it was not fully paid. On July 16, 2008, Diontech filed a mechanic's lien against the premises for \$123,514.82, that it contends is due and owing under the subcontract. The notice of mechanic's lien lists Moe Yaghoubi as the owner of the premises.

The petition alleges that Carnegie Hill is the owner of the premises, and that the deed reflecting Carnegie Hill's purchase of the property from Lex Properties, Inc. (both of which maintain the same address in New Rochelle, New York) was recorded in the Office of the City Register of the City of New York, on May 31, 2007.<sup>1</sup> The petition further contends that Diontech should have been aware of the proper identity of the owner, because the subcontract signed by Diontech identifies Carnegie Hill as the

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<sup>1</sup> The court notes that the Recording and Endorsement Cover Page submitted by petitioner as an exhibit to the petition states that the deed of sale was recorded or filed with the Office of the City Register on June 4, 2007; however, that slight difference in dates does not appear to have any bearing on the dispute regarding the validity of the mechanic's lien.

property owner.

Citing *Long Indus. Constr. Corp. v Appelaniz* (298 AD2d 309 [1<sup>st</sup> Dept 2002]), *Matter of Kleet Lumber Co. (DMC Management, Inc. )* (197 AD2d 576 [2d Dept 1993]), and *Matter of Tri Quality Mech. Corp. v Chappastream Corp.* (138 AD2d 610 [2d Dept 1988]), petitioner contends that, pursuant to Lien Law § 9 (2) the mechanic's lien must be vacated and terminated, because the lien misidentifies the owner of the premises, and, therefore, is jurisdictionally defective and cannot be cured by an amendment.

Diontech, however, counters that the owner is merely misdescribed, not misidentified, and that Diontech should be permitted to amend the notice of lien nunc pro tunc. Dennis Mihalatos, president and an owner of Diontech, submits an affidavit in opposition to the petition and in support of Diontech's motion, stating that Moe Yaghoubi and Abby Yaghoubi are principal owners of the contractor, Upper Manhattan, and that during the course of the project, Moe Yaghoubi told him that he was the owner of the premises.

Yaghoubi denies that he had a conversation with Mihalatos in which he said he was the owner of the premises, and argues that the subcontract between Diontech and Upper Manhattan identifies Carnegie Hill as the owner of the premises, and Carnegie Hill's deed as owner of the property was filed more than a year before the mechanic's lien was filed.

As Mihalatos notes, however, the subcontract between Diontech and Upper Manhattan, while defining Carnegie Hill as "owner" states that the company owns a 99-year ground lease for the property, not the property itself.

Mihalatos submits a document from the New York State Department of State, Division of Corporations, which identifies Abby Yaghoubi as Chairman or Chief Executive Officer of Upper Manhattan and Mahamud Yaghoubi as Principal Executive Officer. According to Mihalatos, Moe Yaghoubi signed the subcontract on behalf of Upper Manhattan.<sup>2</sup> Mihalatos also submits a document from the Division of Corporations which indicates that the address to which the Department of State will mail process for Carnegie Hill North LLC, if accepted on behalf of the entity is: Jaghoubi Bros. (*sic*), 50 Webster Avenue, Suite 1J, New Rochelle, NY 10801. The court notes that the Recording and Endorsement submitted by petitioner in connection with the sale of the premises from Lex Properties to Carnegie Hill lists 50 Webster Avenue, New Rochelle, N.Y. as the address for both seller and buyer.

Diontech argues that it should be permitted to amend the Notice of Lien, pursuant to Lien Law § 9 (7), which states: "[a]

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<sup>2</sup> The court notes that the signatures of the persons signing for both the contractor and subcontractor are indecipherable; however, Yaghoubi does not deny that he is a signatory to the contract.

the company listed as the owner, had transferred title to 32 Sixth Avenue while the plaintiff was performing improvements on the space in question, even though plaintiff neglected to perform an updated title search, which would have revealed the identity of the owner (*id.* at 200). According to the court, the transfer of title merely created an additional layer of ownership because 32 AA was the sole member of 32 Sixth Avenue and maintained total control over all aspects of the business operated by the latter corporation (*id.* at 199). Further, the court based its determination on the fact that the transfer was not at arms length, as no transfer taxes was paid, and therefore, presumably, no consideration for the transfer, and because both entities shared the same address and agent for service of process (*id.* at 199-200).

As the lower court in *PM Contr. Co.* observes, mechanic's liens have been found to misidentify the owner and the liens were vacated where the lien named a corporation rather than a partnership as owner, although the same persons were principals in each entity (*Tri-State Sol-Aire Corp. v Lakeville Pace Mech., Inc.*, 221 AD2d 519 [2d Dept 1995]), the lien named a corporation as owner, though at the time of filing the property was owned by an individual (*Matter of Kleet Lumber Co. [MC Mngt., Inc.]*, 197 AD2d 576, *supra*), the lien named as owner a shareholder and officer of the corporation that was actually the owner. *Church*

*E. Gates & Co. v Empire City Racing Assn.*, 225 NY 142 (1919).

In contrast, the court permitted an amendment to the notice of lien where the notice was filed against a corporation that signed a contract as owner for the purchased materials and that paid real property taxes for several years, where the true owners were three individuals who owned the named corporation but were doing business as a different corporation which actually owned the property. *Matter of Carboline Co. v Gold*, 94 AD2d 921 (3d Dept 1983). Similarly, where a notice named an agent of the contractor as owner and the agent had the same address as the corporate contractor, the court permitted an amendment. *Peachy v First 97-101 Reade St. Assoc.* (180 AD2d 474 [1st Dept 1992]).

The main purpose of the notice of lien is to provide notice to the property owner, purchasers and other lien holders. *Matter of Fibernet Telecom Group, Inc. v East Coast Optical Servs.*, 195 Misc 2d 461, 463 (Sup Ct, NY County); see also *Waring v Burke Steel Co.*, 69 NYS2d 399, 400 (Sup Ct, Monroe County 1947). In accordance with the dictates of Lien Law § 23 that the law governing mechanics' liens "is to be is to be construed liberally to secure the beneficial interests and purposes thereof." Lien Law § 23. Here, the notice of lien was evidently sent to Moe Yaghoubi at the premises, but there is no assertion that Carnegie Hill did not receive actual notice of the lien nor is there any evidence that other lien holders have been prejudiced by the

apparent error in identifying the owner.

As noted in *PM Contr. Co. v 32 AA Assoc. LLC, supra*, the failure to perform a title search, which would result in the identification of the true owner, is not necessarily fatal. Here there is more than an information and belief allegation of a misleading oral statement about the true owner of the property (see *Matter of Tri Quality Mech. Corp. v Chappastream Corp., supra* [court refused to allow amendment of the lien even though the petitioner claimed that the individual, who was both the senior vice-president of the entity named in the lien notice and allegedly the president of the true owner, misidentified the owner]). Contrary to Carnegie Hill's contention, the subcontract does not identify it as the owner, as the document actually defines Carnegie Hill as the owner of a ground lease for the property, suggesting that it in fact, was not the owner of the property. Further, Moe Yaghoubi is a principal owner of Upper Manhattan and a member of Carnegie Hill. Moreover, a factor found of crucial importance in *PM Contr. Co. v 32 AA Assoc. LLC, supra*, was the failure to pay consideration or a transfer tax on the transfer of real property. Based on the documents submitted to the court, no transfer tax or consideration was paid on the transfer from Lex Properties, Inc. to Carnegie Hill, further clouding the issue of control among the Yaghoubi businesses.

Given the conflicting sworn statements of Mihalatos and

Yaghoubi, the court is not in a position to determine whether Yaghoubi, in fact, told Mihalatos that he was the owner of the premises and therefore refers that issue to a Special Referee. Further, an issue is raised regarding whether Moe Yaghoubi, who states that he is a member of Carnegie Hill, maintains control over the business operated by the LLC. Upper Manhattan, Carnegie Hill and Lex Properties appear to be interrelated and Yaghoubi appears to be deeply involved in both Carnegie Hill and Upper Manhattan. Not only is he a member of Carnegie Hill, but he is the Principle Executive Officer of Upper Manhattan (Abby Yaghoubi is the Chairman or Chief Executive Officer) and the Jaghoubi Brothers (presumably Moe and Abby Yaghoubi) are designated to accept service for Carnegie Hill. Accordingly, the issue of the relationship between Moe Yaghoubi and Carnegie Hill and whether Moe Yaghoubi controls Carnegie Hill, in whole or in part, is referred to the Special Referee.

Accordingly, it is hereby

ORDERED that the issue of whether Moe Yaghoubi told Dennis Mihalatos that he was the owner of the premises is referred to a Special Referee to hear and report; and it is further

ORDERED that the issue of the relationship between Moe Yaghoubi and Carnegie Hill and whether Moe Yaghoubi controls Carnegie Hill, in whole or in part, is referred to a Special Referee to hear and report; and it is further

ORDERED that these motions are held in abeyance pending receipt of the report of the Special Referee and a motion to confirm and/or reject said report.

This Constitutes the Interim Decision and Order of the Court.

Dated: September 9, 2009

ENTER:

  
\_\_\_\_\_  
J. S. C.  
**EMILY JANE GOODMAN**

**FILED**  
SEP 16 2009  
COUNTY CLERK'S OFFICE  
NEW YORK