Marjam Supply Co., Inc. v John J. Griffin Roofing, Inc.

2009 NY Slip Op 32188(U)

September 16, 2009

Supreme Court, Nassau County

Docket Number: 008163/2009

Judge: Ira B. Warshawsky

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SCAN

SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 9

MARJAM SUPPLY CO., INC., on behalf of themselves and all others similarly situated,

Plaintiff,

INDEX NO.: 008163/2009
MOTION DATE: 07/30/2009
MOTION SEQUENCE: 001 and 002

-against-

JOHN J. GRIFFIN ROOFING, INC., JOHN J. GRIFFIN, INC., JOHN J. GRIFFIN a/k/a JOHN JAMES GRIFFIN a/k/a JOHN GRIFFIN and MARY GRIFFIN,

Defendants.

The following papers read on this motion:

Notice of Motion, Affirmation, Affidavit & Exhibits Annexed	1
Notice of Cross Motion, Affirmation, Affidavit & Exhibits Annexed	2
Affirmation in Opposition to Defendants' Cross Motion of Elias C. Schwartz, Affidavit in Opposition of Seeta Lochan & Exhibits Annexed	3
Summons and Verified Complaint (Complaint in 3 parts)	4
Verified Answer and Counterclaim	5

Motion by plaintiff for a default judgment is denied. Motion by defendants to extend their time to answer is granted. Motion by defendants for a judgment declaring plaintiff's mechanic's liens to be willfully exaggerated is denied.

This is an action to recover for building materials supplied to a home improvement contractor. Plaintiff Marjam Supply Co. is engaged in the business of selling building materials

to contractors. Defendant John J. Griffin Roofing, Inc. is a roofing contractor. Defendant John J. Griffin is the owner of the company. Defendant Mary Griffin is the estranged wife of John J. Griffin.

On March 21, 2000, Griffin, on behalf of the corporation, submitted an application to plaintiff for a $25,000 line of credit. In the application, Griffin personally guaranteed the indebtedness of the company. Griffin also agreed to pay finance charges of 2% per month and attorney's fees in the event that litigation was commenced to collect payment.[1] On March 1, 2006, Griffin signed a similar credit application and guarantee, but the new application did not contain a maximum credit line.[2] On December 19, 2007, plaintiff and Griffin Roofing entered into an agreement reducing the late charges to 1% per month on invoices which had been due over 60 days.[3] This agreement was also personally guaranteed by Griffin.

Although the parties appear to have done business since the time of the first credit application, the present action is to collect payment for building materials which Griffin Roofing purchased between June 4 and November 4, 2008. Griffin used these materials in connection with home improvement projects for 103 different customers. Plaintiff alleges that although Griffin was paid for the work which it performed, it has not remitted payment for the materials to plaintiff. Between November 19 and December 18, 2008, plaintiff filed notices of mechanic's liens against the properties benefitted by the home improvement projects.[4]

This action was commenced on April 28, 2009. The first 103 causes of action are based on 103 individual construction projects for which plaintiff provided materials to defendant. The 104th cause of action is based upon the total amount of materials which plaintiff supplied to defendant and is thus cumulative of the first 103 causes of action. Plaintiff alleges that the total value of the materials is $497,557.44. The 105th cause of action is for $27,812.29 in finance charges which accrued at the rate of 1% per month. The 106th cause of action is for attorney fees.

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[1]Plaintiff's ex. F.

[2]Plaintiff's ex. G.

[3]Plaintiff's ex. H.

[4]Defendants' ex. E.

The 107th cause of action is against defendant John Griffin on his guarantee. The 108th cause of action is against defendant Mary Griffin, alleging that, as part of a divorce settlement, she received $500,000 of the proceeds of the construction projects in violation of § 77 of the Lien Law.

As required by § 77, the action is brought in the form of a class action to enforce a trust, on behalf of all persons who have supplied goods or services to Griffin's construction projects (See *Aspro Contracting, Inc. v Fleet Bank*, 1 NY3d 324 [2004]). Nevertheless, plaintiff released the majority of its mechanic's liens on June 2, 2009, after the action was commenced.[5]

Plaintiff moves for a default judgment against defendants John Griffin and the corporation on the 104th through 107th causes of action pursuant to CPLR § 3215. Plaintiff moves for a default judgment against defendant Mary Griffin on the 108th cause of action. Plaintiff requests an order severing the first 103 causes of action.

Defendants cross-move for an extension of time to file their answer pursuant to CPLR § 2004. In their proposed answer, defendants assert the defense of payment and counterclaim for judgment in the amount of the mechanic's liens and attorney's fees pursuant to Lien Law § 39-a. Defendants also assert counterclaims for libel and punitive damages based upon plaintiff's filing of the mechanic's liens. Additionally, defendants request a judgment declaring the mechanic's liens to be wilfully exaggerated and void.

CPLR § 2004 provides that "the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed." In view of the policy favoring resolution of cases on their merits, defendant's time to answer should be extended where the delay in answering was brief and nondeliberate, there is a potentially meritorious defense, and plaintiff does not make any showing of prejudice (*Nikita v* Parfomak, 43 AD3d 892 [2d Dept 2007]).

Plaintiff served defendants John J. Griffin and John J. Griffin Roofing, Inc. with the

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[5]Plaintiff's reply ex. G and H.

summons and complaint on April 30, 2009.[6] Defendant Mary Griffin was served on May 11, 2009. Defendants served a notice of appearance on June 8, 2009. Although plaintiff granted defendants an extension to June 22, defendants' counsel mistakenly believed that their time to answer was extended to July 6, 2009. The court notes that plaintiff's motion for a default judgment was made on July 2, 2009, only ten days after defendants' time to answer had expired. Since defendants' answer was served with their cross-motion on July 20, 2009, the court concludes that the delay was brief and nondeliberate.

In support of their payment defense, defendants submit copies of checks dated between July 18 and October 25, 2008, totaling $338,240.77.[7] In reply, plaintiff has submitted "payment sheets," which accompanied the checks, indicating that Griffin had instructed plaintiff to apply the payments, not to the transactions upon which plaintiff sues, but to prior orders which were delivered in 2007 and early 2008.[8] Plaintiff also submits a letter signed by John Griffin, dated November 11, 2008, agreeing to pay "the existing balance of $522,778.36 or any balance that may be outstanding in full at the time my pending lawsuit is settled with Allied Building Supply."[9] Plaintiff asserts that the payment sheets and the November 11 letter rebut defendants' claim to have paid for the material which is the subject of the present action.

While the payment sheets, for the most part, refer to prior orders, the sheets do include orders falling within the time frame of the deliveries for which plaintiff sues. Since the relationship of the Allied Building Supply case to the instant matter has not been explained, it is not clear that Griffin's November 11 letter refers to the claims asserted in the present action. Thus, the court concludes that defendants have established a colorable defense of payment for at least some of plaintiff's causes of action. Defendants' motion to extend the time to serve their answer is granted. Plaintiff's motion for a default judgment is denied.

While defendants have been granted leave to serve an answer, the court will consider

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[6]Plaintiff's ex. B.

[7]Defendants' ex. F.

[8]Plaintiff's reply ex. F.

[9]Plaintiff's reply ex. E.

whether defendants may also assert their counterclaims. "A contractor, subcontractor, [or] ... materialman ...who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof, ...shall have a lien for the principal and interest of the value, or the agreed price, of such labor...or materials upon the real property improved...from the time of filing a notice of lien..." (Lien Law § 3). The term "materialman" means any person who furnishes material either to an owner, contractor, or subcontractor for, or in the prosecution, or an improvement of real property not belonging to the state (Lien Law § 2 [8][12]).

Lien Law § 39 provides "In any action or proceeding to enforce a mechanic's lien upon a private or public improvement or in which the validity of the lien is an issue, if the court shall find that a lienor has wilfully exaggerated the amount for which he claims a lien as stated in his notice of lien, his lien shall be declared void and no recovery shall be had thereon." If the court declares a mechanic's lien void on account of wilful exaggeration in an action to enforce a mechanic's lien, the person filing such notice of lien shall be liable in damages to the owner or contractor (Lien Law § 39-a). The damages recoverable in such an action are the premium for a bond given to discharge the lien, reasonable attorney's fees, and the difference between the amount claimed in the notice of lien and the amount actually due (Id). Where a contractor or materialman has filed an exaggerated mechanic's lien, an action pursuant to Lien Law § 39-a is the exclusive remedy (*E-J Electric Installation Co. v Miller & Raved, Inc.*, 51 AD2d 264, 266 [1st Dept 1976]).

Where a contractor commences an action for breach of contract and to foreclose a mechanic's lien, the owner may counterclaim to declare the lien void for wilful exaggeration and to recover damages for the amount exaggerated (*Strongback Corp. v N.E.D. Cambridge Ave. Dev. Corp.*, 25 AD3d 392 [1st Dept 2006]). However, where a contractor sues only for work, labor, and services, the validity of the lien is not in issue, and the court may not entertain an owner's claim for wilful exaggeration (*Pyramid Champlain Co. v R. P. Brosseau & Co.*, 267 AD2d 539 [3d Dept 1999]). In the present case, plaintiff has released most of its mechanic's liens and does not seek to foreclose those liens which are still outstanding. Thus, defendants may not assert a counterclaim for wilful exaggeration. Moreover, according to defendants, the total

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amount of the mechanic's liens is $326,794.51. Since defendants allege that their total payments exceed this figure, the mechanic's liens do not appear to be exaggerated.

Accordingly, defendants' motion for an order declaring the mechanics's liens exaggerated and void is denied. Defendants' answer is deemed timely served as of the date of the filing of their motion for an extension. However, defendants' first counterclaim for wilful exaggeration of the mechanic's liens is stricken. Because an action pursuant to Lien Law § 39-a is the exclusive remedy, and the court has found defendants' claim with respect to the mechanic's liens to be without merit, defendant's counterclaims for libel and punitive damages are similarly stricken.

This shall constitute the decision and order of the court.

Dated: September 16, 2009

J.S.C.

ENTERED

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