

**Matter of 553-559 Lenox Ave. Assoc. LLC v Fidelity
& Deposit Co. of Md. (Bond No. CGB 893536)**

2009 NY Slip Op 32664(U)

November 10, 2009

Supreme Court, New York County

Docket Number: 111305/08

Judge: Marilyn Shafer

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

PRESENT: MARILYN SHAFER
Justice

PART 8

553-559 Seneca Ave. Assoc.

INDEX NO. 111305/08

MOTION DATE _____

- v -

A.G.A.P.E. Construction Corp

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ 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 *and so*

Upon the foregoing papers, it is ordered that this motion *decided*

pursuant to attached item

FILED
NOV 16 2009
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 11/10/09

MARILYN SHAFER
[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 8

-----x
In the Matter of the Application of
553-559 LENOX AVENUE ASSOCIATES LLC,

Petitioner,

Index No.: 111305/08

-against-

DECISION

For an Order Cancelling the
Undertaking of

FIDELITY AND DEPOSIT COMPANY OF
MARYLAND (Bond No. CGB 893536),

A.G.A.P.E. CONSTRUCTION GROUP, INC.,

Respondent,

As Lienor, Against Certain Premises
in the City, County and State of New
York, and for Discharge of the
Sureties thereon.

-----x
MARILYN SHAFER, J.:

BACKGROUND

Motion sequence numbers 001 and 002 are consolidated for
disposition.

In motion sequence number 001, petitioner 553-559 Lenox
Avenue Associates LLC (Lenox) moves, pursuant to Lien Law §§ 17
and 20, to cancel the undertaking, dated August 13, 2008, made by
Lenox, as principal, and Fidelity and Deposit Company of Maryland
(Fidelity), as surety, in the sum of \$451,000. This motion was
granted by the court, on default, on August 21, 2009.

FILED
NOV 16 2009
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* 3]

In motion sequence number 002, respondent A.G.A.P.E. Construction Group, Inc. (AGAPE) moves, pursuant to CPLR 2004, 2005, and 5015, to vacate the default judgment entered against it by this court on August 21, 2009.

On June 19, 2008, AGAPE filed a notice of mechanic's lien in the Office of the Clerk for New York County, in the sum of \$410,000, against the property situated in the City and County of New York at 553, 555, 557 and 559 Lenox Avenue, New York, New York, Block 2007, Lots 29, 30, 31 and 32.

On August 18, 2008, Lenox filed an undertaking, dated August 13, 2008, made and executed by Lenox, as principal, and Fidelity, as surety, in the sum of \$451,000 for the discharge of the lien. On or about July 13, 2009, Lenox filed an order to show cause to cancel the bond on the grounds that AGAPE had not commenced an action thereon, or sought an extension of time to maintain the lien, within one year, as mandated by the Lien Law. The court signed the order to show cause, and the motion was made returnable July 30, 2009.

Prior to Lenox filing its order to show cause to cancel the bond, AGAPE commenced a action for breach of contract against Lenox in the Supreme Court, Bronx County, on June 19, 2009.

On July 30, 2009, the judge was out ill, and the clerk informed the parties that the motion would be adjourned to a later date. The clerk stated that the court would notify the

* 4]
parties as to the adjourned date.

AGAPE alleges that, although its opposition papers were served, the court file did not have a copy, and the clerk advised counsel not to worry, because of the adjournment. AGAPE further alleges that it never received notification of the adjourned date, and that it later received a copy of the August 21, 2009, default judgment against it.

Lenox maintains that it never received opposition papers to its motion until August 4, 2009, when an unsigned copy of AGAPE's counsel's affirmation in opposition to Lenox' motion to cancel the bond was received by mail. Lenox further asserts that it was notified of the adjourned hearing date by means of Court Alert, and assumes that AGAPE could have received such notice in a similar manner, or by looking at the New York Law Journal, E-Law, eCourts, OCA, or by calling or writing to the court.

DISCUSSION

CPLR 5015 (a) provides that a default judgment may be vacated upon a showing of excusable default and a meritorious defense. *Matter of Christian E. v Kendra E.*, 2009 WL 3199826, 2009 NY App Div Lexis 6990 (1st Dept 2009). In the instant matter, AGAPE has no meritorious defense to the cancellation of the bond.

Lien Law § 20 provides that a lien may be discharged by depositing a sum of money, as an undertaking or a bond, equal to

the amount claimed in the notice of lien, which was done in this case. The bond provided by Lenox substitutes the lien on the realty with a lien on the money. *Matter of Carl R. Cacioppo Electrical Contractors, Inc.*, 259 AD2d 698 (2d Dept 1999); *LaPointe v J.T.T. Contractors, Inc.*, 153 AD2d 880 (2d Dept 1989).

Lien Law § 17 states:

"No lien ... shall be a lien for a longer period than one year after the notice of lien has been filed, unless within that time an action is commenced to foreclose the lien, and a notice of pendency of such action ... **is filed with the county clerk of the county in which the notice of lien is filed** ... or unless an extension to such lien ... is filed ... within one year from the filing of the original notice of lien, continuing such lien [emphasis added]."

It is undisputed that AGAPE did not seek an extension to its lien, nor did it commence an action in New York County, the county in which the lien was filed, within the one-year period mandated by the Lien Law. Hence, the lien automatically expired by operation of the Lien Law, allowing Lenox to cancel its bond.

As a consequence of the foregoing, AGAPE's motion to vacate the default judgment against it is denied. This decision does not constitute a substantial injustice to AGAPE, since it may still proceed against Lenox on its contract claim in the lawsuit it has filed in Bronx County. *240-35 Associates v Major Builders Corp.*, 234 AD2d 234 (1st Dept 1996).

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that respondent's motion to vacate the default judgment entered against it is denied; and it is further

ORDERED that the default judgment entered against respondent in favor of petitioner, cancelling petitioner's bond, dated August 21, 2009, is confirmed.

Dated: 4/10/09

ENTER:

Marilyn Shafer, J.S.C.
(Signature)

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NOV 16 2009
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