

<b>DJHI Dev. LLC v Martin Interiors Contr., Inc.</b>
2009 NY Slip Op 32769(U)
November 19, 2009
Supreme Court, New York County
Docket Number: 113622/09
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: RAKOWER  
Justice

PART 5

DJHI DEVELOPMENT, LLC

INDEX NO. 113622/09

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

- v -

MOTION SEQ. NO. 01

MARTIN INTERIORS CONTRACTING, INC.

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

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

1  
2  
3

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

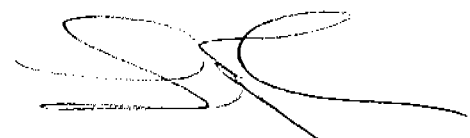
**FILED**

NOV 27 2009

NEW YORK  
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.**

Dated: 11/19/09



**HON. EILEEN A. RAKOWER**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 5

-----X  
DJHI DEVELOPMENT LLC,

Petitioner

of

MARTIN INTERIORS CONTRACTING, INC.,

Respondent.

-----X  
EILEEN A. RAKOWER, J.S.C.

Index No.  
113622/09  
**ORDER AND  
DECISION**  
Mot. Seq.: 001

**FILED**

NOV 27 2009

NEW YORK COUNTY CLERK  
CLERK OF THE SUPREME COURT

Petitioner, DJHI Development LLC (“DJHI”) brings this petition, by order to show cause, for an order: (1) summarily discharging the Notice Under Mechanic’s Lien Law, dated May 29, 2009 and July 20, 2009, pursuant to Lien Laws §19(6), §4, and §39-a; and (2) pursuant to Lien Law §39-a, awarding damages in favor of petitioner as against respondent in an amount equal to the difference by which the amount claimed to be as stated in the notice of the mechanic’s lien exceeded the amount actually due or to become due, along with an award of reasonable attorney’s fees. Respondent, Martin Interiors Contracting, Inc. (“Martin”) opposes the petition.

Martin, the contractor entered into an “AIA” construction agreement for renovation of an existing townhouse with DJHI, the owner of the townhouse located at 133 West 4<sup>th</sup> Street in the County and State of New York on or about December 28, 2005. The contract called for Martin was to be paid a total of \$1,392,000.00. DJHI held back \$102,240, representing a portion of the payment amount, because Martin allegedly failed to “substantially complete” the project timely. Thereafter, on May 29, 2009, Martin filed a mechanics lien in the amount of \$462,000. On July 20, 2009, Martin filed another mechanic’s lien in the amount of \$104,606.47.

DJHI, in support of its motion, submits: its petition; the contract; a document titled “Application and Certificate for Payment;” a “Block and Lot Search;” and the affidavit of John Gordon, Architect with the firm Truisi Suk Design Group (“Truisi”).

DJHI seeks to have the two mechanics liens summarily dismissed and brings several causes of action seeking reimbursement of money allegedly owed to it by Martin. DJHI asserts that Martin did not substantially complete the project; that it failed to complete the work; and that Martin performed its work negligently, carelessly and recklessly. DJHI points to §3.3 of the contract, which states, in relevant part:

The Contractor shall achieve Substantial Completion of the entire Work not later than 274 from the date of commencement, or as follows:

...

Substantial Completion of the Work shall be achieved in 9 months.

...

Contractor will be penalized a fee of \$5,000/Month if substantial completion not achieved in 9 months.

DJHI claims that Martin failed to complete its work until thirty-seven months after the start date, twenty eight months late. The amount that was subtracted from Martin's payment totaled \$102,240.00. DJHI points to the fact that Martin signed the Application and Certificate for Payment, dated November 23, 2007. The certificate states that the "Original Contract Sum" was \$1,392,000.00 and that the "Total Earned Less Retainage" was \$1,289,760.00. Martin also signed a "Partial Release. DJHI also submits the affidavit of its architect, Mr. Gordon, in support of its claims.

Martin, in opposition, submits: its answer; several Change Order forms; a copy of the "Condominium Unit Deed;" a Work Permit from the Department of Buildings and; several correspondences between the parties. Martin claims that DJHI owes it the remainder of the payment on the contract, \$102,240.00, plus \$464,366.47 in change orders, necessitating the filing of the subject mechanic liens. Martin asserts that in signing the Partial Release it did not forego its right to file a lien for monies due pursuant to Change Orders which, Martin claims, were authorised by DJHI and the Architect. Further, Martin claims that any delays in substantially completing the project were caused by DJHI, and not by it.

By way of reply, DJHI argues that the mechanic's liens should be dismissed because they are untimely<sup>1</sup> and reasserts its arguments that the liens are defective

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<sup>1</sup>DJHI raises this issue for the first time in its reply. As such, the court will not consider that argument.

pursuant to multiple lien laws.

Lien Law §19(6) states, in relevant part:

Where it appears from the face of the notice of lien that the claimant has no valid lien by reason of the character of the labor or materials furnished and for which a lien is claimed, *or where for any other reason the notice of lien is invalid by reason of failure to comply with the provisions of section nine of this article*, or where it appears from the public records that such notice has not been filed in accordance with the provisions of section ten of this article, the owner or any other party in interest, may apply to the supreme court of this state, or to any justice thereof, or to the county judge of the county in which the notice of lien is filed, for an order summarily discharging of record the alleged lien. (emphasis added).

Lien Law §9 states:

The notice of lien shall state:

1. The name and residence of the lienor; and if the lienor is a partnership or a corporation, the business address of such firm, or corporation, the names of partners and principal place of business, and if a foreign corporation, its principal place of business within the state.  
  
1-a. The name and address of the lienor's attorney, if any.
2. The name of the owner of the real property against whose interest therein a lien is claimed, and the interest of the owner as far as known to the lienor.
3. The name of the person by whom the lienor was employed, or to whom he furnished or is to furnish materials; or, if the lienor is a contractor or subcontractor, the person with whom the contract was made.

4. The labor performed or materials furnished and the agreed price or value thereof, or materials actually manufactured for but not delivered to the real property and the agreed price or value thereof.
5. The amount unpaid to the lienor for such labor or materials.
6. The time when the first and last items of work were performed and materials were furnished.
7. The property subject to the lien, with a description thereof sufficient for identification; and if in a city or village, its location by street and number, if known. A failure to state the name of the true owner or contractor, or a misdescription of the true owner, shall not affect the validity of the lien. The notice must be verified by the lienor or his agent, to the effect that the statements therein contained are true to his knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Lien Law §4 states, in relevant part:

*If labor is performed for, or materials furnished to, a contractor or subcontractor for an improvement, the lien shall not be for a sum greater than the sum earned and unpaid on the contract at the time of filing the notice of lien, and any sum subsequently earned thereon. In no case shall the owner be liable to pay by reason of all liens created pursuant to this article a sum greater than the value or agreed price of the labor and materials remaining unpaid, at the time of filing notices of such liens, except as hereinafter provided. (emphasis added).*

Lien Law §39 states:

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 to be void and no recovery shall be had thereon.* No such lienor shall have a right to file any other or further lien for the same claim. A second or subsequent lien filed in contravention of this section may be vacated upon application to the court on two days' notice. (emphasis added).

Lien Law §39-a states:

Where in any action or proceeding to enforce a mechanic's lien upon a private or public improvement the court shall have declared said lien to be void on account of wilful exaggeration the person filing such notice of lien shall be liable in damages to the owner or contractor. The damages which said owner or contractor shall be entitled to recover, shall include the amount of any premium for a bond given to obtain the discharge of the lien or the interest on any money deposited for the purpose of discharging the lien, reasonable attorney's fees for services in securing the discharge of the lien, and an amount equal to the difference by which the amount claimed to be due or to become due as stated in the notice of lien exceeded the amount actually due or to become due thereon.

“It is elementary that a lien may be summarily discharged only for defects appearing on its face.” (*Di-Com Corp. V. Active Fire Sprinkler Corp.*, 36 AD2d 20[1st Dept. 1971]). Courts strictly construe Lien Law §19(6) in assessing whether a notice of lien is defective on its face. The Court in *Charles Hyman v. Olsen Indus.*, 227 AD2d 270[1st Dept. 1996] found:

Plaintiffs' liens were properly discharged for failure to identify the labor supplied or materials provided to defendants (Lien Law §9[4]) Because Supreme Court's finding was based upon a failure of proof, we need not reach the parties' competing contentions that the liens were wilfully

exaggerated . . .

Here, the liens filed by Martin are invalid for failure to comply with §9[4],[5] and [6] of the Lien Law. Both liens omit the following: “The labor performed or materials furnished and the agreed price or value thereof . . . and the time when the first and last items of work were performed and materials were furnished.” Martin does not dispute DJHI’s assertion that the mechanic’s liens are deficient. Rather, it merely states that “there can be no summary discharge of a Lien if there are disputed issues of fact.” Martin cites to *In re Miller*, 133 NYS2d 421[Sup. Ct. Suffolk County 1954], in support of its argument. The Court in *Miller* found that:

In the instant case issues of fact have been raised by the conflicting affidavits. It may well be that upon trial of these issues the owner will prevail and the lien will be held invalid; however, this court on a summary application for discharge of the lien is bound by the provisions of the Lien Law.

*Miller* is inapplicable to the instant action. The court there reviewed the notice of lien and found that the items of materials and labor were sufficiently itemized in the notice of lien so as to not be in violation of Lien Law §19(6). Here, there is no view of the mechanic’s liens that would lead to the conclusion that the notice of lien contains the information required by Lien Laws §19(6) and §9.

Wherefore it is hereby

ORDERED that the petition is granted to the extent that the Notices of Mechanic's Lien filed by Martin Interiors Contracting, Inc on May 29, 2009 and July 20, 2009, against certain real properties situated in the City of New York, County of New York described as (1) 133 West 4<sup>th</sup> Street Block 552 Lot 1401, are hereby vacated and cancelled of record; and it is further

ORDERED that the Clerk is hereby directed to vacate and cancel the Notices of Mechanic's Lien described herein, and to enter upon the lien docket, or other record of liens, opposite the endorsement of said Lien, a statement that it has been vacated and cancelled of record.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: November 19, 2009

  
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EILEEN A. RAKOWER, J.S.C.

**FILED**

NOV 27 2009

CLERK

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