

York Hunter Constr. Servs., Inc. v El-Ad Skyview, Inc.
2010 NY Slip Op 30321(U)
February 1, 2010
Supreme Court, New York County
Docket Number: 120872/03
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE

PART 10

Index Number : 120872/2003

YORK HUNTER CONSTRUCTION

vs
EL-AD SKYVIEW

Sequence Number : 005

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 005

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

Upon the foregoing papers, it is ordered that this motion

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

FILED

FEB 03 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/1/10

JJ
HON. JUDITH J. GISCHE J.S.C.

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: IAS PART 10**

-----X
YORK HUNTER CONSTRUCTION SERVICES,
INC.,

Plaintiff,

-against-

EL-AD SKYVIEW, INC., H.G. SKYVIEW, INC.,
TITLE ASSOCIATES AGENCY, INC., EL-AD
SKYVIEW, INC., H.G. SKYVIEW, INC.,
TITLE ASSOCIATES AGENCY, INC., GPS
GLOBAL PARKING SOLUTIONS LLC, CARA
GOLDENBERG CASTALDO, ANDREW P.
CASTALDO, DAVID TUTERA, RYAN JURICA,
JOHN HOUSTON, trustee, FRANCISCO
DUQUE, IOANNIS DANALIS, MICHAEL
FERRENTINO, ROBERT B. LEVINE, KAREN
KULVIN, GAIL M. LANDER, MICHAEL TING,
JENNY W. LEE, SHANE HENTY SUTTON,
JOHN L. FIELD, EDWARD DIRNFELD, WILLIAM
LEVIS, GEORGIA LEVIS, TAMARA SHARON
STEELE, PANKAJ SAMTANI, CLAUDE
VU I L L I E M E C H A M B A D A L , P H I L I P P E
C H A M B A D A L , G A O W M I C H E L L E
S U W A N N U K U L , S A K A R I N S U W A N N U K U L ,
ADAM M. LEVINE, CHRISTINE JANSING,
RALPH JAMES SILVA, Jr., WINGHUNG
ALISTER LO, ARUN K. NEMALI, GAYATRI
NEMALI, WILLIAM M. ROBERTS, ALISON MARI
ROBERTS, WALTER KEITH VANCE, JANET
LYNN VANCE, THOMAS R. ELLIS, CHRISTIAN
L. MUNDIGO, BRADEN K. RHETTS, TEVYA
FINGER, NORMAN Y. SCHOENBERG, JAMES
MINUTELLO, WILLIAM PORTNOY, LLC,
WILLIAM M. PORTNOY, JACK O'KELLEY III,
MARC RICHARDS, LISA RICHARDS, SHERON
KORPUS, AMY JILL BRASLAW, KELLIS
ROGERS, STEPHEN J. KANTOR, DAVID M.
LINDSEY, CINDY J. O'HAGAN, CHRISTOPHER
ROBERTSON, EDWIN SCULHAFFER, BOMBAY
SUN EQUITIES, LLC, ERIC LUFTIG, DAVID A.

Decision/Order

Index No.: 120872/03

Seq. No. : 005

Present:

Hon. Judith J. Gische

J.S.C.

FILED
FEB 03 2010
NEW YORK
COUNTY CLERK'S OFFICE

KANE, PARAG PANDE, RITU PANDE, JULIAN ADDISON, ALEXANDRA WHELAN, JOSEPH S. SACHS, STEVEN BROWN, NYU SCHOOL OF LAW FOUNDATION, MICHAEL J. ASHWORTH, JEREMY PALMER, RAQUEL PALMER, GLENN N. LEDESMA, and JOHN AND JANE DOES 1 THROUGH 100, the names John and Jane Doe being fictitious, representing owners and holders of liens against the subject premises, the true names of defendants being currently unknown,

Defendants.

-----x

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Pltf's n/m (SJ) w/SC affirm, exhs (sep back)	1,2
Def Skyview opp w/SJG affirm, MN affid (sep back) exhs	3,4
Pltf's reply w/SC affirm	5

Upon the foregoing papers, the decision and order of the court is as follows:

Glsche J.;

This is a lien foreclosure action by York Hunter Construction Services, Inc. ("York Hunter") against the owner of the project, El-Ad Skyview, Inc. and H.G. Skyview, Inc. (collectively "Skyview" and sometimes "owner") and other named defendants, including individual condominium owners. Presently before the court is York Hunter's motion for "dismissal" of Skyview's first and second counterclaims which are for willful exaggeration of York Hunter's lien, and Skyview's third counterclaim which is for the recovery of change order fees.

Although York Hunter did not, in its notice provision, designate whether this is a motion to dismiss under CPLR § 3211 [a][7] or a motion for summary judgment,

[* 4]

dismissing the counterclaims under CPLR § 3212, it is clear from the body of this motion that York Hunter seeks partial summary judgment, dismissing Skyview's counterclaims. This motion was made within 120 days of the note of issue being filed (CPLR § 3212; Brill v. City of New York, 2 NY3d 648 [2004]). Since this motion is timely, it will be decided on the merits. The court's decision and order is as follows:

Arguments

York Hunter was the construction services manager for a construction project at 151 West 17th Street in New York County ("project"). The project was to build twin condominiums. Skyview is the owner of the property under construction. York Hunter and Skyview had three contracts. One was for York Hunter to provide pre-construction services to the owner. Another was to excavate and pour the foundation for the buildings. The third, called a "last look agreement," gave York Hunter the right to review the lowest bid by a general contractor to complete the project, so York Hunter could decide whether it wanted to match that bid and complete the project itself.

York Hunter entered into a subcontract with non-party John Civetta & Sons, Inc. ("Civetta") to do the necessary concrete work for the foundation. Under subcontract, Civetta was to be paid for \$1,499,000. York Hunter was eventually terminated from the project by Skyview in June 2001, before the foundation was completed and after York Hunter made requisitions for payment. The requisitions were for work York Hunter did, as well as for work that Civetta did.

Skyview terminated York Hunter because York Hunter received and retained money that York Hunter should have paid to Civetta. York Hunter acknowledges that it received \$440,000 from Skyview in connection with its second requisition for payment

and that it "delayed in making a payment to Civetta on Requisition No. 2" because of a "financial shortfall in the spring of 2001 . . ." The foundation work was subsequently completed by Civetta under the supervision of another company ("KBF") that had been hired by Skyview to act as the general contractor on the project even before York Hunter was terminated.

York Hunter has sued to foreclose its mechanic's lien in the amount of \$1,234,516 which it filed against the property owned by Skyview. The lien amount represents sums York Hunter claims remain due and unpaid under the pre-construction agreement (\$139,656) and the foundation contract (\$1,092,000). York Hunter admits that there is minor discrepancy between the amount claimed it is owed (\$1,231,656) and the amount of the lien (\$1,234, 516). It attributes this discrepancy to a computational error.

Skyview has counterclaimed for willful exaggeration of the lien (1st and 2nd counterclaim) arguing that York Hunter has a colorable claim for, at most, \$542,656. Skyview has also asserted a claims for change orders, or money that the owner contends it was charged by KBF for additional work, etc., necessitated for KBF to assume the responsibilities of York Hunter after York Hunter was terminated from the job.

York Hunter seeks summary judgment dismissing those claims on the basis that its mechanic's lien was not willfully exaggerated when York Hunter filed it, even if subsequent events may have impacted the amount it is now entitled to collect. Additionally, York Hunter argues that Skyview cannot prove the amount of its change orders because that information was demanded during discovery but was never

produced.

Skyview opposes York Hunter's motion on several grounds. First, Skyview argues that York Hunter has not met its burden on this motion, which is to prove the lien was not willfully exaggerated when it was filed. Skyview also argues that the counterclaims cannot be decided until the lien amount is decided, and finally, that it did incur charges for change orders which it should have a chance to prove at trial.

Both sides extensively discuss a decision by Judge Gammerman in another action involving York Hunter and Civetta (John Civetta & Sons v. York Hunter Construction Services, Inc., Supreme Court, N.Y. Co., Index No. 104140/92) ("Civetta action"). In that action Judge Gammerman granted Civetta's motion for summary judgment and directed entry of a money judgment against York Hunter in the principal amount of \$469,000. Judge Gammerman wrote the following in his decision and order dated March 30, 2003:

"It is clear from the documents submitted that defendant [York Hunter] billed the Owners [Skyview] \$739,000 for plaintiff's [Civetta's] work. It is also clear that the full value of plaintiff's [Civetta's] work was \$1,499,000 and that the value of plaintiff's [Civetta's] work remaining after defendant's [York Hunter's] termination was \$760,000. Therefore the payment of \$760,000 by the Owners [Skyview] directly to plaintiff [Civetta] corresponds with the value of the work performed by plaintiff [Civetta] directly for the Owners [Skyview]. Defendant [York Hunter] merely asserts that it is a third party beneficiary of the agreement between plaintiff [Civetta] and the Owners [Skyview], and that plaintiff [Civetta] may have agreed, for some reason, to accept the amount owed by Owners to satisfy defendant's [York Hunter's] debt as well. Such an assertion, devoid of any evidentiary support, is insufficient to defeat a motion for summary judgment."

Skyview relies upon Judge Gammerman's decision to support its argument that the \$760,000 payment was for completion of the work under the Civetta subcontract with York Hunter and thus a credit under York Hunter's contract with Skyview. Skyview argues further that York Hunter willfully overstated its lien because it sought recovery from Skyview of money that the owner had already paid directly to Civetta in June 2001.

York Hunter argues that it filed its lien in May 2001, before the owner allegedly made this payment to Civetta and while Civetta may have prevailed in the Civetta action, Judge Gammerman's decision does not collaterally estop York Hunter from arguing in this action that the payment Skyview made was not to reimburse Civetta for work performed under York Hunter's foundation contract. York Hunter contends it will reduce its lien if Skyview can prove the \$760,000 was for work under the foundation contract, as opposed to work done for KBF. York Hunter argues further that this court has already considered, but rejected, Skyview's argument that the \$760,000 payment is a credit under York Hunter's contract with Skyview. This is a reference to this court's prior orders denying Skyview's motion for partial summary judgment (August 30, 2007) and motion to reargue (June 10, 2008). In the court's decision on the reargument, the court refused to consider Skyview's arguments about the \$760,000 being a credit to York Hunter, because those arguments were raised for the first time in the reargument motion.

Although there is no disagreement that KBF's contract allowed the construction manager to charge 6-10% of any change orders, including the added cost for managing additional work, York Hunter argues that Skyview has never produced any documents showing it was actually charged for any change orders by KBF and, in fact, the

* 8] .
documents produced by the owner suggest there were no change orders.

Applicable Law

On a motion for summary judgment, it is the movant's burden to set forth evidentiary facts to prove its prima facie case that would entitle it to judgment in its favor, without the need for a trial (Zuckerman v. City of New York, 49 N.Y.2d 557, 562 [1980]). Only if the moving party meets this initial burden does it then shift to the opponent who then must demonstrate, by admissible evidence, the existence of a factual issue requiring a trial, and therefore, the denial of defendant's motion (Alvarez v. Prospect Hosp., 68 NY2d 320, 324 [1986]; Zuckerman v. City of New York, 49 NY2d 557 [1980]).

Discussion

Although the court would not entertain Skyview's arguments about the \$760,000 payment to Civetta in connection with Skyview's motion to reargue it was because those arguments were raised for the first time in the motion to reargue; they were not raised in the original motion for summary judgment (see prior orders dated 8/30/07, 6/10/08). Therefore, the court did not reach the merits of Skyview's arguments, that the \$760,000 payment was a credit to York Hunter because it was for work done by Civetta under York Hunter's foundation contract. That defense, however, is now properly raised in opposition to York Hunter's motion to dismiss Skyview's counterclaims for an exaggerated lien. Any argument by York Hunter, that the issue of whether Skyview's payment to Civetta was for work performed under York Hunter's foundation contract - or for other work - is contradicted by Judge Gammerman's decision. Judge Gammerman

decided that the owner's \$760,000 payment to Civetta was for the value of Civetta's work remaining after York Hunter's termination. That decision, on the merits in connection with Civetta's motion for summary judgment, is the functional equivalent of a decision after trial and decisive of York Hunter's present arguments. York Hunter had a full and fair opportunity to litigate those issues and is, therefore, collaterally estopped from arguing that the payment may have been made for some other reason (Gramatan Home Investors Corp. v. Lopez, 46 NY2d 481 [1979]). Furthermore, York Hunter received a credit for the money that the owner paid, otherwise the money judgment against York Hunter would have been higher.

The issue of whether a lien is exaggerated is usually resolved only after the lien amount is established either by a dispositive motion or at trial (Strongback Corp. v N.E.D. Cambridge Avenue Dev. Corp., 25 AD3d 392 [1st Dept. 2006]; Goodman d/b/a Keystone v. Del-Sa-Foods, Inc., 15 NY2d 191 [1965]). This is because the allegedly aggrieved party asserting a Lien Law § 39 claim has to prove that the exaggeration is tantamount to a fabrication, not just an honest difference of opinion, or mere inaccuracy (E-J Elec Installation Co. v. Miller v. Raved, Inc., 51 AD2d 264 [1st Dept. 1976] *app dism* 39 NY2d 898 [1976]). Since the underlying claims in the lien foreclosure action remain to be decided, York Hunter's motion for summary judgment dismissing the counterclaims for willful exaggeration is premature and must be denied (Aaron v. Great Bay Contracting, Inc., 290 AD2d 326 [1st Dept 2002]).

Another argument by York Hunter about why its lien is not exaggerated is that it filed its lien before Judge Gammerman made his decision. This argument fails because plaintiff included the value of work performed by Civetta in its lien, even though York

Hunter did not pay Civetta any portion of the second requisition.

York Hunter contends that because Skyview has not produced documents pinpointing the exact percentage it was charged for change orders (i.e. 6% or 10%) that it cannot prove it had change orders. There is, however, documentation that Skyview was charged change orders by KBF and there is also a sworn affidavit as to those facts. It remains to be decided by the trial of fact what the charges to Skyview were for and what percentage was applied. Since York Hunter did not meet its burden on this motion for summary judgment, that there are no triable factual disputes, its motion to dismiss Skyview's counterclaim for change order expenses is denied as well.

Conclusion

York Hunter's motion for summary judgment dismissing the 1st, 2nd and 3rd counterclaim is denied. Since the note of issue has been filed, this case is ready to be tried. The plaintiff shall serve a copy of this decision and order on the Clerk in the trial support office so the case can be scheduled for trial.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
February 1, 2010

So Ordered:

Hon. Judith J. Gscheide, JSC
FILED
FEB 03 2010
NEW YORK
COUNTY CLERK'S OFFICE