

DJHI Dev. LLC v Martin Interiors Contr., Inc.
2010 NY Slip Op 30409(U)
March 1, 2010
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: _____

PART 15

Index Number : 113622/2009
DJHI DEVELOPMENT LLC
 vs.
MARTIN INTERIORS
 SEQUENCE NUMBER : 002
 REARGUMENT/RECONSIDERATION

INDEX NO. 113622/09
 MOTION DATE _____
 MOTION SEQ. NO. 002
 MOTION CAL. NO. _____

his motion to/for _____

PAPERS NUMBERED

1
2
3

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.

MAR 02 2010
 COUNTY CLERK

Dated: 3/1/10


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 15

-----X
DJHI DEVELOPMENT LLC,

Petitioner

of

Index No.
113622/09
**ORDER AND
DECISION**
Mot. Seq.: 002

MARTIN INTERIORS CONTRACTING, INC.,

Respondent.

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

Petitioner, DJHI Development LLC (“DJHI”) previously brought an Order to Show Cause, seeking 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”) opposed the petition. By Order of the this Court dated November 19, 2009, the petition was granted to the extent that the Notices of Mechanic’s Liens filed by Martin on May 29, 2009 and July 20, 2009 were vacated and cancelled. Martin now moves to renew or reargue the petition. DJHI opposes.

By way of background, Martin entered into an American Institute of Architects (“AIA”) construction agreement for renovation of an existing townhouse with DJHI, the owner of the townhouse located at 133 West 4th Street in the County and State of New York on or about December 28, 2005. The contract called for Martin 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.

CPLR §2221(d) provides that a motion for leave to reargue “shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion....” CPLR §2221(e) states that a motion to renew shall be “based on new facts not in the prior record.” There are no new facts presented here. Thus, leave to renew is denied. However, leave to reargue is granted as the Court relied on printouts of the Notice of Mechanic’s Lien provided by DJHI, rather than the original notices, when it granted DJHI’s motion. Martin annexes the original Notices of Lien to its motion papers here. It is well settled that actions should be decided on their merits whenever possible. (*Carter v. Baldwin Transp. Corp.*, 215 AD2d 256[1st Dept. 1995]).

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.

DJHI asserts that even if the court considers the original notices now provided by Martin, it should adhere to its decision because the Liens are defective. DJHI claims that there is a miscalculation in the amount owed on the July 20, 2009 Notice of Lien, and “the respondent was required to provide a description of labor performed and materials furnished . . . [and] respondent is required to state the time of the first and last date of service, items worked on and materials furnished.”

DJHI refers to item #6 on the July 20, 2009 Lien, which is for the "total amount unpaid." Martin lists \$104,606.47 as a separate amount for labor performed and for material furnished. Martin lists \$104,606.47 as the total amount unpaid, whereas DJHI asserts that the total should be \$209,212.94. With respect to the July 20, 2009 Lien, it is clear that Martin intended that \$104,606.47 be the "total amount unpaid" on the contract and the total amount for which the lien was filed. There is no merit to DJHI's remaining allegations, as Martin has sufficiently described the labor performed, and/or materials furnished, and has inserted the applicable dates.

Neither may the Liens be dismissed pursuant to Lien Law §39, which states that a Lien willfully exaggerated is void. "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]). "Although Lien Law §39 provides that a willfully exaggerated lien is void, the issue of willful or fraudulent exaggeration is one that also ordinarily must be determined at the trial of the foreclosure action." (*Aaron v. Great Bay Contracting, Inc.*, 290 AD2d 326[1st Dept. 2002]).

Wherefore it is hereby

ORDERED that leave to reargue is granted; and it is further

ORDERED that upon reargument, DJHI's motion to vacate and cancel 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 4th Street Block 552 Lot 1401, is denied; and it is further

ORDERED that this Court's Order dated November 19, 2009 is hereby vacated.

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

DATED: March 1, 2010



EILEEN A. RAKOWER, J.S.C.

FILED
MAR 02 2010
NEW YORK
COUNTY CLERK'S OFFICE