

**Hunter Atl., Inc. v Casagrande USA, Inc.**

2010 NY Slip Op 30771(U)

March 31, 2010

Supreme Court, New York County

Docket Number: 117551-2009

Judge: Judith J. Gische

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

PRESENT: GISCHE  
HON. JUDITH J. GISCHE  
Justice

PART 10

HUNTER ATLANTIC INC  
- v -  
CASABRANDS USA INC

INDEX NO. 117557/09  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
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 \_\_\_\_\_

Repeating Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served lessed person. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room

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

**MAR 31 2010**

Dated: \_\_\_\_\_

J. GISCHE  
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  
Hunter Atlantic, Inc.,

Petitioner,

***-against-***

Casagrande USA, Inc.,

Respondent.  
-----X

**DECISION/ ORDER**

Index No.: 117551-2009

Seq. No.: 001

**PRESENT:**

Hon. Judith J. Gische

**J.S.C.**

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

<b>Papers</b>	<b>Numbered</b>
Pet's OSC to vacate mech lien w/VJL affirm, exhs <sup>1</sup> .....	1
Resp opp w/JER affirm, MS and MF affids, exhs .....	2
Pet's reply w/VJL affirm, exhs .....	3

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

**GISCHE J.:**

This is a special proceeding commenced by order to show cause. Petitioner Hunter Atlantic, Inc. ("Hunter Atlantic") seeks an order under Lien Law § 19[6], discharging the mechanic's lien that respondent Casagrande USA, Inc. ("Casagrande") has filed against the real property owned by non-party 281 Broadway Associates ("owner"). Casagrande opposes the motion in all respects and seeks the dismissal of this proceeding.

\_\_\_\_\_  
<sup>1</sup>Rule 12 of the Rules of Court states that exhibits to motions should be tabbed. While the court accepts the motion papers submitted by the petitioner, none of its exhibits are separately tabbed, as they should have been

## Arguments Presented

Hunter Atlantic is in the construction business; it was hired by the owner to provide construction services at 57 Reade Street in New York County (sometimes "property"). Hunter Atlantic hired non-party Ground Water Specialists, Inc. ("Ground Water") as its sub-contractor to perform certain pile work. In turn, Ground Water entered into an equipment rental agreement ("rental agreement") with Casagrande, respondent herein. Ground Water rented an HBR205MP Geothermic Pile Driver ("pile driver") from Casagrande.

It is unrefuted that Casagrande has filed a notice of mechanic's lien against the owner's property because Ground Water stopped paying the monthly rental fee (\$18,000) for the pile driver and it remains unpaid. The mechanic's lien was filed by Casagrande on November 20, 2009 against Block 149 Lot 31, which correctly identifies the real property located at 57 Reade Street. The lien also properly identifies the owner of the property (281 Broadway Associates), lists the value of the pile driver, the total price of the contract for the pile driver and the amount owed, but unpaid for the rental of the equipment (\$265,826.38). The period of time covered by the mechanic's lien is August 4, 2008 through July 20, 2009.

Notwithstanding this detailed information in the notice, Hunter Atlantic argues that the mechanic's lien must be vacated because it appears solely from the face of the notice of lien, that Casagrande's lien is invalid (Lien Law § 19[6]). Hunter Atlantic provides the sworn affidavit of Anthony Scibell, its president ("Scibell"). While admitting the pile driver was delivered to 57 Reade Street for Ground Water's use, he states that the pile driver was removed May 19, 2008. Scibell states he has examined the

underlying invoices which Casagrande contends supports its lien against the property and based upon his review, has concluded the pile driver was actually used by Ground Water at a location in Brooklyn where Ground Water was also working, but completely unrelated to the 57 Reade Street project. In reply to photographs provided by Casagrande showing the pile driver at 57 Reade Street, Scibell states the photographs were taken before the pile driver was removed.

In opposition to petitioner's motion, Casagrande argues that a motion based upon Lien Law § 19[2] cannot attack the underlying merits of the claim, but must solely attack its facial sufficiency. Going to the merits, Casagrande argues that apparently Ground Water was paid for its work (by Hunter Atlantic), but Ground Water did not pay for Casagrande for its equipment rental. Casagrande's president, Michael Steinhardt, provides his sworn affidavit that the pile driver was delivered to 57 Reade Street, used there, even serviced there, and remained through July 2009. Casagrande's office manager also provides her sworn affidavit. The office manager states she had conversations with someone at Hunter Atlantic ("John") who acknowledged petitioner was aware Ground Water was not paying its bills.

### **Discussion**

Where it appears from the face of the notice of lien that the claimant has no valid lien, the owner of the real property or any other party in interest, may seek an order summarily discharging the lien (Lien Law § 19[2]). The statute, however, only allows the summary discharge of an entire mechanic's lien because the notice is facially defective, due to, for example, a mis-description of the labor or materials furnished. Where the notice of lien is facially sufficient, but the objections are based on other

matters, those objections must be determined at trial, not on an application to discharge the lien ( summarily validity of the lien must await trial thereof by foreclosure (Pontos Renovation v. Kitano Arms Corp., 204 A.D.2d 87 [1<sup>st</sup> Dept 1994]).

Petitioner is not attacking the facial sufficiency of the notice of lien. Petitioner's claim is that the equipment was used elsewhere, based upon its review of certain invoices which list a Brooklyn address. There is, therefore, no basis for the court to resolve the lien solely on its facial sufficiency (Retek v. City of New York, 14 A.D.3d 708 [2<sup>nd</sup> Dept 2005]; Pontos Renovation v. Kitano Arms Corp., *supra*). A court has no inherent power to vacate or discharge a notice of lien except as authorized by Lien Law § 19(6) and if there is no defect upon the face of the notice of lien, any dispute regarding the validity of the lien must await trial thereof by foreclosure (*see* Matter of Lowe, 4 A.D.3d 476 [2<sup>nd</sup> Dept 2004]; Dember Constr. Corp. v. P & R Elec. Corp., 76 A.D.2d 540 [2<sup>nd</sup> Dept 2005]; Retek v. City of New York, 14 A.D.3d 708 [2<sup>nd</sup> Dept 2005]). This is not a lien foreclosure action and respondent filed the mechanic's lien less than one year ago.

Other arguments raised by Hunter Atlantic, that it paid Ground Water and Ground Water "should" have paid Casagrande because Ground Water was "adequately compensated," address claims that Hunter Atlantic may have against its subcontractor, but do not support the relief requested against Casagrande, which is vacatur of the lien for facial insufficiency.

Hunter Atlantic's petition and motion pursuant to Lien Law § 19[6] is denied for the reasons set forth herein and this special proceeding is hereby dismissed.

**Conclusion**

In accordance with the foregoing,

*It is hereby,*

**ORDERED ADJUDGE AND DECREED** that petitioner's motion and petition is denied in its entirety and this proceeding is dismissed; and it is further

**ORDERED** that any relief requested not expressly addressed is hereby denied; and it is further

**ORDERED** that this constitutes the decision, order and judgment of the court.

Dated:           New York  
                  March 31, 2010

**ENTER**

  
\_\_\_\_\_  
Hon. Judith J. Gische, JSC

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 4119).