

**Independent Equip. Corp. v Cherry Val. Assoc.,
LLC**

2010 NY Slip Op 30958(U)

April 6, 2010

Supreme Court, Nassau County

Docket Number: 009169/07

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

INDEPENDENT EQUIPMENT CORP.,

Plaintiff,

TRIAL/IAS, PART 2
NASSAU COUNTY

INDEX No. 009169/07

MOTION DATE: March 5, 2010
Motion Sequence # 003, 004

-against-

CHERRY VALLEY ASSOCIATES, LLC,
MODERN CONCRETE CORP., THE
HARTFORD FIRE INSURANCE COMPANY,
COASTAL PIPELINE PRODUCTS CORP., and
"JOHN DOE NO. 1" through "JOHN DOE NO. 5",

Defendants.

The following papers read on this motion:

- Notice of Motion..... XX
- Affirmation/Affidavit in Opposition..... XXXX
- Reply Affirmation XX
- Memorandum of Law.....XXXX

Motion by defendants Cherry Valley Associates, LLC ("Cherry Valley") and Hartford Fire Insurance Co. ("Hartford") for summary judgment is **denied**, and motion by plaintiff Independent Equipment Corp. ("Independent") for partial summary judgment is **denied** for the reasons set forth herein.

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Independent and defendant Coastal Pipeline Products (“Coastal”) seek to enforce their respective mechanics’ liens filed against Cherry Valley’s parcel known as 420 Hempstead Turnpike, Hempstead, N.Y. (the premises). Hartford was the surety.

Defendant Modern Concrete Corp. (“Modern”) was hired by Cherry Valley to demolish existing structures at the premises. It is asserted that Modern leased equipment from Independent to perform the job; and that Coastal provided pre-cast concrete structures to Modern to be used in preparing the property for a supermarket on the premises. Independent contends it is owed in excess of \$92,000 from Modern. Coastal contends that it is owed in excess of \$24,000 from Modern. Both Independent and Coastal have based their liens on monies allegedly due Modern by Cherry Valley.

Cherry Valley and Hartford contend Independent and Coastal do not have a “lien fund” to which their liens can attach since, at the time the respective liens were filed, they allege Cherry Valley did not owe any money to Modern Concrete. Cherry Valley also contends that Independent’s invoices indicate that its lien is based on items furnished to Modern Concrete for improvements to other properties rather than just the Hempstead Turnpike premises, and Independent never gave Modern Concrete written consent to move the equipment from its original location to the Cherry Valley premises. Further, Cherry Valley contends that Independent asserts a lien for parts and repairs to its equipment used by Modern Concrete but not supplied to Cherry Valley’s property. As to this last issue, Cherry Valley contends Independent’s claim is “exaggerated.”

As to the lack of a “lienable fund”, i.e., money owed to Modern Concrete by Cherry Valley, Cherry Valley states it paid all monies owed to it to Modern Concrete. It offers the affidavit of Marc Kemp; who is a member of B. K. West Hempstead, LLC, which is a member of Cherry Valley. Cherry Valley states it never had a contractual relationship with either Independent or Coastal. Cherry Valley claims that its contract with Modern Concrete commenced on March 20, 2006 and that Modern Concrete abandoned the subject premises on January 25, 2007. Kemp avers that Cherry Valley had to hire other contractors to finish Modern Concrete’s tasks; and Modern Concrete owes it, Cherry Valley, money. Further, Cherry Valley states it discharged Independent’s lien.

The court will address the timeliness of Independent’s motion. Pursuant to this court’s certification order, all motions for summary judgment must be filed within 30 days of the filing of the Note of Issue (see Exhibit A annexed to Cherry Valley’s February 18, 2010

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affirmation in opposition). The Note of Issue herein was filed on December 23, 2009. Cherry Valley has offered a Web Civil supreme-Motion detail indicating Independent's motion was filed on January 26, 2010.

The "good cause" requirement of CPLR 3212 specifies that a summary judgment motion be made no later than 120 days after the filing of the note of issue, except with leave of the court on "good cause" shown. This requires a showing of good cause for the delay in making the motion, i.e., a satisfactory explanation for the untimeliness, rather than simply permitting meritorious, non-prejudicial filings (*Brill v City of New York*, 2 NY3d 648; *Polhamnus v Foulke*, 20 AD3d 888).

A court may set a date, after which no summary judgment motion may be made, that is less than 120 days, provided the date is at least thirty (30) days after the note of issue is filed (*Rossi v Arnot Ogden Med. Ctr.*, 252 AD2d 778). Here, the parties were given thirty (30) days to file their motions after the note of issue was filed. The "good cause" requirement applies to this shorter period set by the court.

Although Independent's motion was filed four days late, the court will consider the merits of the motion because a timely summary judgment motion was filed by Cherry Valley. Thus, the court will have to review the entire record in any event.

In order to maintain and enforce a mechanic's lien a plaintiff is required to demonstrate that the defendant consented to the work performed on its property by some affirmative act or course of conduct establishing confirmation (*Modern Era Construction, Inc. v Shore Plaza, LLC*, 51 AD3d 990). Here, it is not disputed that Cherry Valley contracted with Modern for work on the subject premises.

A subcontractor, in seeking to establish a mechanic's lien, has the burden of establishing that there was money due and owing to the general contractor from the owner based on a primary contract (*GCDM Ironworks, Inc. v CJF Construction Corp.*, 292 AD2d 495).

If anything is due the contractor pursuant to the terms of the contract, when the lien is filed, the lien attaches to that extent (*Van Clief v Van Vechten*, 130 NY 571). Thus, if Cherry Valley owes Modern money, then Independent's and Coastal's respective liens are viable.

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Rental value of equipment, machinery and tools to a contractor is a lienable item (*P.J. Carlin Construction Co. v A to Z Equipment Corp.*, 31 AD2d 546).

A material person or subcontractor is not required to be in contractual privity with a property owner in order to file and foreclose on a mechanic's lien (*Spectrum Painting Contractors, Inc. v Kreisler Borg Florman General Construction Co., Inc.*, 64 AD3d 565). Clearly, Independent and Coastal need not have been in contact with Cherry Valley to file their respective liens.

In construction law, procedures for termination of contractors must be strictly followed (see *General Supply and Construction Co. v Goelet*, 241 NY 28) including allowing a contractor the contractual cure period (*MCK Building Assoc., Inc. v St. Lawrence University*, 301 AD2d 726, *lv dismissed* 99 NY2d 651).

To terminate Modern Concrete from the job site, Cherry Valley was obligated to follow the contractual procedure (*MCK Building Associates, Inc. v St. Lawrence University, supra; Gulf Ins. Co. v Fidelity Deposit Co. of Maryland*, 16 Misc3d 1116[A], 2007 WL 2162885).

Here, Independent, Coastal and Modern raised issues of fact as to whether Cherry Valley failed to terminate its contract with Modern in compliance with the contractual termination procedures. These procedures include giving Modern Concrete notice to cure as to any defects and providing a certification from the architect in accordance with the terms of the contract.

Modern alleges that Cherry Valley owes it in excess of \$361,767 for labor, materials, equipment and work at the Cherry Valley Project. Modern has offered the affidavit of Quirino Rotundo, who is the manager of Modern. Rotundo contends that Modern was terminated because it was owed monies for "extra work"; and that Modern did not receive the seven (7) day cure notice or the termination certificate by an architect. Independent contends that the lien waiver applies only to amounts which Cherry Valley had paid Modern, not the monies allegedly due for "extra work," which Modern claims were never paid.

Modern argues that the lien waivers would not extinguish its lien in the amount of \$361,767 allegedly due from Cherry Valley for extra work for which Modern was never paid. Modern argues that the lien waivers are effective only as to amounts paid.

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Thus, a material issue of fact exists as to whether sums were due and owing to Modern at the time Independent and Coastal filed their notice of lien (*see Perma Pave Contracting Corp. v Paerdegat Boat and Racquet Club, Inc.*, 156 AD2d 550).

Genuine issues of material fact, as to whether Cherry Valley approved extra work performed by Modern and whether Cherry Valley waived a contractual requirement that extra work be approved in writing, preclude summary judgment (*see Spectrum Painting Contractors, Inc. v Kreiser Borg Florman General Construction Co., Inc. supra*).

A notice of a mechanic's lien is fatally defective, where it purports to include material furnished under "independent operations," i.e. the improvement of distinct and widely separated pieces of real property, (*Twin County Transit Mix, Inc. v Ingula Builders Corp.*, 27 AD2d 939).

Independent appears to have provided equipment to Modern under a long term lease with the initial location noted at the start of the lease. The equipment appears to have been moved by Modern from job site to job site without a paper trail noting Independent's written permission to move the equipment to the next location.

The original invoice for the equipment does not show the Cherry Valley Project as its location, and the equipment contract states that written permission is necessary to move the equipment to another project. However, the Bohm affidavit suggests that the "normal" procedure, or course of performance, was to rent the unit of equipment from Independent and not seek written permission to move the location of the equipment.

Independent and Modern list rentals and repairs used on the Cherry Valley premises. Bohm states that the reason the invoices for equipment moved to the Cherry Valley project still reflect the original project location is that once the equipment was first invoiced to a project other than the Cherry Valley Project, the invoice format—including the project—Cherry Valley location—was not changed when the equipment was moved.

Machinery parts installed in equipment used at a construction site are not "lienable" materials under Lien Law § 2(12) because they do not go into the improvement and are returnable to the contractor for use in other work (*Harsco Corp. v Gripin Construction Corp.*, 301 AD2d 90 [2d Dept 2002]). The use of parts results merely in a depreciation of the subcontractor's equipment; the parts did not go into or constitute a part of the improvement

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where the material and labor are performed on machinery used by a sub-contractor and not performed or furnished to or consumed in work for the contract with the owner (Application of Warren Bros. Roads Co., 27 Misc2d 323).

Liens for repairs and parts furnished to a motor vehicle, i.e., a garageman's lien, are the only liens for repairs and parts that are acknowledged by the courts (*see generally* First Nat. Bank of Atlanta v Strother Ford Inc., 188 Ga.App. 749, 374 SE2d 203).

Thus, any parts supplied by Independent are not "lienable."

The Lien Law provision with regard to excessive lien claims is intended to punish willful exaggeration, rather than honest differences, and to protect an owner or contractor against fictitious, groundless and fraudulent liens (Lien Law § 39; E-J Elec. Installation Co. v Miller and Raved, Inc., 51 AD2d 264, *app. dismissed*, 39 NY2d 898). Here, Independent sought parts and repairs as lienable items. There is nothing to indicate that such a lien request was "willful exaggeration."

The fact that Independent has requested repairs or parts changes affects the amount of Independent's lien. The lien cannot be considered, from an objective point of view, "exaggerated." Independent incorrectly used its contract with Modern to include parts/repairs in its lien calculation. The bulk of Independent's lien request is for equipment rental.

The credibility of witnesses, the reconciliation of conflicting statements, a determination of which should be accepted and which rejected, the truthfulness and accuracy of the testimony, whether contradictory or not, are issues for the trier of the facts (Lelekakis v Kamamis, 41 AD3d 662; Pedone v B & B Equipment Co., Inc., 239 AD2d 397).

Thus, the trier of fact must evaluate each conflicting factual scenario set forth herein.

The standards for summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is, therefore, entitled to judgment as a matter of law (Alvarez v Prospect Hosp., 68 NY2d 320). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (Miller v Journal News, 211 AD2d 626). Thus, the burden on the moving party for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to

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demonstrate the absence of any material issue of fact (Ayotte v Gervasio, 81 NY2d 1062).

Here, Cherry Valley has not met its prima facie burden as to the respective liens of Independent and Coastal.

Accordingly, both motions are **denied**.

Counsel are reminded of the Pre Trial conference scheduled for May 13, 2010, to be held in Chambers of the undersigned.

Dated 6 April 10

Stephen A. Bercari
J.S.C.

ENTERED
APR 14 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE