

**270 Greenwich St. Assoc. LLC v Patrol & Guard
Enters., Inc.**

2010 NY Slip Op 31667(U)

June 21, 2010

Supreme Court, New York County

Docket Number: 114163/09

Judge: Emily Jane Goodman

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

PRESENT: GOODMAN
Justice

PART 17

270 GREENWICH ST ASSOCIATES

INDEX NO. 114163/09

MOTION DATE _____

MOTION SEQ. NO. 2

PATROL + GUARD ENTERPRISES 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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided per attached

FILED

JUN 30 2010

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 6/21/10

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 17

270 GREENWICH STREET ASSOCIATES LLC,

Petitioner,

INDEX NO. 114163/09

-against-

MOTION SEQ. NO. 002

PATROL AND GUARD ENTERPRISES, INC.,

Respondent.

Hon. Emily Jane Goodman:

In this mechanic’s lien proceeding, respondent Patrol and Guard Enterprises, Inc. (Patrol) moves, by an order to show cause, to vacate a default order dated November 19, 2009 (the 11/19/09 Order). The 11/19/09 Order granted on default the request of petitioner 270 Greenwich Street Associates LLC’s (270 Greenwich) to discharge a mechanic’s lien filed by Patrol.

BACKGROUND

270 Greenwich owns a piece of real property located at 270 Greenwich Street, New York, New York, Block 142, Lots 1501-1507 (the Property). In November 2005, 270 Greenwich hired a nonparty, HRH Construction, LLC (HRH), as a general contractor in connection with construction of a building (the Project) on the Property. HRH and Patrol entered into a subcontract agreement (the Patrol Subcontract), pursuant to which Patrol agreed to provide security guard services on the Project, which it allegedly did from October 11, 2006 until January 21, 2009 (Page Aff., ¶ 2). Patrol alleges that it is owed \$168,384.83 for its guard services on the Project (*id.*, ¶ 5).

On September 11, 2009, Patrol filed a mechanic’s lien (the Lien) with the Clerk of the County of New York in the sum of \$168,384.83 against the Property. In October 2009, 270

Greenwich brought a petition (the Petition), pursuant to Lien Law § 19 (6), seeking an order discharging the Lien or, in the alternative, directing Patrol to provide an itemized statement of the Lien. On the return date, Patrol did not appear by an attorney, and the court, in the 11/19/09 Order, granted the Petition on default (Ganz Aff., exhibit E). Patrol now moves to vacate the 11/19/09 Order, and to permit it to file a response to the Petition.

DISCUSSION

Pursuant to CPLR 5015 (a) (1), a defendant may move for an order vacating a default order. Such a motion needs to be made within one year after service of a copy of the default order with notice of entry (*see* CPLR 5015 [a] [1]; *see also Lamboy v Peacock Color Offset Corp.*, 285 AD2d 414, 415 [1st Dept 2001]). “[T]he requirements for vacatur under CPLR 5015 (a) (1) [are] a reasonable excuse for the default and a potentially meritorious defense” (*Caba v Rai*, 63 AD3d 578, 579 [1st Dept 2009]).

As to a reasonable excuse for the default, Patrol contends that it attempted, albeit tardily, to retain an attorney to represent it in this proceeding, but that the prospective attorney was not available to appear on the return date to request an adjournment (*see* Page Aff., ¶ 4). Patrol appeared in court on the return date by its controller, Joseph Page, in order to request an adjournment (*id.*). The court in the 11/19/09 Order noted his appearance, but declined to adjourn the return date, because Patrol, a corporation, had to appear by an attorney (*see* 11/19/09 Order). The court also noted that the prospective attorney e-mailed counsel for 270 Greenwich to request an adjournment, but the request was declined (*see id.*; *see also* 12/21/09 Birnbaum Aff., ¶ 2). On December 2, 2009, 270 Greenwich served a Notice of Settlement of Proposed Judgment on Patrol (Ganz Aff., ¶ 7; exhibit E). Patrol made this motion on or about December 22, 2009, or less than

a month later (*see* Order to Show Cause). Accordingly, the court finds that Patrol demonstrated a reasonable excuse for its default.

As to a potentially meritorious defense, Patrol argues that it is entitled to file a mechanic's lien against the Property. 270 Greenwich does not dispute that Patrol performed security guard services on the Project, pursuant to Patrol's subcontract with HRH. Nor does 270 Greenwich appear to contest the amount of the Lien. 270 Greenwich, however, argues that Patrol's security guard services are not lienable.

New York Lien Law (the Lien Law), in relevant part, provides:

A contractor, subcontractor, laborer, materialman ... *who performs labor or furnishes materials for the improvement of real property ...* shall have a lien for the principal and interest, of the value, or the agreed price, of such labor, including benefits and wage supplements due or payable for the benefit of any laborer, or materials upon the real property improved or to be improved and upon such improvement ...

(Lien Law, Article 2, § 3 [emphasis added]). The Lien Law explicitly provides that particular services of an architect, engineer, surveyor, or a real estate broker are considered "improvements" of real property and, therefore, are lienable (*see* Lien Law, Article 1, § 2 [4]). The statute does not explicitly provide so with respect to services of a security guard. However, the Lien Law offers a general definition of "improvement" as, among other things, "any work done upon such property ... for its *permanent improvement*" (*id.* [emphasis added]). Accordingly, the determinative issue is whether security guard services constitute a "permanent improvement" of real property in order to be lienable (*see id.*).

Patrol argues that, pursuant to the New York City Construction Code, 270 Greenwich was obligated to have a watch person at the construction site "during all hours when operations are not

in progress” (see Administrative Code of the City of New York, title 28, chapter 33, section BC 3307, § 3307.5.1). Patrol alleges that if 270 Greenwich had failed to hire a security guard, it would have been subject to a sanction, including a work stop order by the Building Department (see 12/21/09 Birnbaum Aff., exhibit B). However, the fact that 270 Greenwich was obligated, pursuant to the Construction Code, to hire a security guard does not automatically mean that the services of the security guard are considered a “permanent improvement” of the Property within the meaning of the Lien Law (see Lien Law, Article 1, § 2 [4]).

“The words ‘permanent improvement,’ as used in section 2 of the Lien Law, are intended to differentiate *the labor and materials which are consumed in or constitute the [] improvement* as distinguished from the labor or materials which enter into and become a part of the plant of the contractor owned and used by him in the performance of his work” (*Gates & Co. v Stevens Constr. Co.*, 220 NY 38, 49 [1917] [emphasis added]). Additionally, materials or services that do not directly pertain to “the actual work of construction” and that “have neither physical contact nor immediate connection with the structure at any time[, but] are used only to facilitate and make possible the operation of tools, machinery, or men, which in their turn act upon the structure” are not lienable (*Shultz v Quereau Co.*, 210 NY 257, 261 [1914]).

A contractor’s services produce “permanent improvement” in the property where they “result[] in a lasting and continuing beneficial change in the character of the realty” (*Application of Magowan*, 203 NYS2d 35, 38 [Sup Ct, Suffolk County 1960] [Ritchie, J.]; see also *Chase Lincoln First Bank N.A. v New York State Elec. & Gas Corp.*, 182 AD2d 906, 907 [3d Dept 1992] [citing *Magowan* to hold that a contractor’s services of “cutting, trimming, clearing, disposing and chemically treating of trees and vegetation around ... electrical utility lines and poles[] do not

qualify as an 'improvement' within the meaning of Lien Law § 2 (4) ... ”). Accordingly, the security guard services do not leave a lasting imprint on the character of the realty. They do not impact on the realty or structure directly, but, rather, are auxiliary, and one step removed from the actual demolition or construction.

In a letter dated January 12, 2010, Patrol brings to this court's attention a decision rendered in an action encaptioned *In the Matter of the Application of Van Tulco, Inc.*, index No. 39687/87 (Sup Ct, NY County, February 22, 1988 [Dowd, J.]). In *Van Tulco*, the court held that Patrol's services in connection with construction of a public high school athletic field are lienable, because "these services were a necessary part of the work done upon the property for its permanent improvement" (*id.* at 3). This court, however, declines to follow the reasoning in *Van Tulco*. The plain meaning of section 2, subdivision 4 of the Lien Law, and the aforementioned case law, indicate that a contractor's services, even if "necessary" to carry out a construction project, are lienable only if they directly produce a "permanent improvement" in underlying real property (*see* Lien Law, § 2 [4]; *Gates & Co.*, 220 NY at 49; *see also Chase Lincoln First Bank*, 182 AD2d at 907). Patrol's security guard services did not directly permanently improve the Property and, hence, are not lienable. Therefore, Patrol failed to establish a meritorious defense, and its motion is denied.

CONCLUSION

For the foregoing reasons, it is hereby

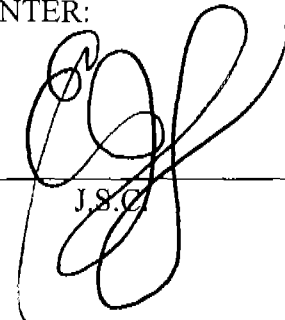
ORDERED that the motion of respondent Patrol and Guard Enterprises, Inc., to vacate a default order is denied.

A separate judgment is signed simultaneously herewith.

This Constitutes the Decision and Order of the Court.

Dated: June 21, 2010

ENTER:



A handwritten signature in black ink, consisting of several loops and flourishes, is written over a horizontal line. Below the signature, the initials "J.S.C." are printed in a small, serif font.