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6.29.10

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

PRESENT: SCHEINKMAN Justice PART 28

LANDMARK VENTURES DNC
- v -
SY CONSTRUCTION

INDEX NO. 601096/10

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for Discharge Lien

	PAPERS NUMBERED
Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ... Petition	1-3
Answering Affidavits — Exhibits	4
Replying Affidavits leases	~~5~~ 5, 6, 7

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum decision

FILED
JUN 29 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/24/10

J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

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LANDMARK VENTURES,

Petitioner,

-against-

SY CONSTRUCTION,

Respondent.

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DECISION AND ORDER

Index No.: 10-601096

HON. MARTIN SCHOENFELD, J.:

Petitioner Landmark Ventures ("Landmark") moves to summarily discharge a mechanic's lien filed by Respondent SY Construction ("SY") on the ground that the lien is invalid because the owner of the property, East Twenty Sixth Associates, did not consent to the work performed by SY. SY opposes the motion arguing that the Owner's conduct and the language of the lease prove consent. The Owner is not a party to this proceeding.

Landmark is a commercial tenant occupying the 16th Floor of 11-13 East 26th Street (the "Premises"). Landmark took the space for a term of five years commencing in June 2009 pursuant to a Lease Agreement (the "Lease") with the Owner. Under Article 3 of the Lease, the tenant is not allowed to make changes in or to the property without the owner's prior written consent. If the owner consents, the tenant may make nonstructural alterations at its own expense. Article 3 also mandates that in the event there is a mechanic's lien filed against the property for work done on behalf of the tenant, the tenant has the obligation to pay the lien or post a bond within 30 days.

Similarly, under the Rider provision of the lease, if the tenant wants to renovate the

property, these same obligations arise. The Rider directs the tenant to submit any plans for "work and installations" to the Owner for its written approval. However, nonstructural alterations less than $25,000 do not require the Owner's written consent.

According to the papers submitted, SY supplied and installed sheetrock, paint, electrical materials, ceiling repairs, and demolition from June 29, 2009 to March 15, 2010 on the property. In his affidavit in opposition to motion, Lior Darel, the President of SY, states that Landmark paid $109,300.72 for SY's work before a dispute developed between the parties in March 2010. Landmark did not pay the remaining $45,826.08 balance of the bill.

On March 26, 2010, SY filed a Notice of Lien for the sum of $45,826.08 against both the Owner and Landmark. After receiving notice of the lien, in a March 29, 2010 letter to Landmark, the Owner's attorney warned Landmark of its obligation under Article 3 of the Lease to "discharge the Lien or file an appropriate bond on or before May 3, 2010", noting that its failure to do so would constitute a material default of the Lease.

On April 29, 2010, Landmark filed this motion with the court by order to show cause, asking that the court discharge the lien. As part of its motion papers, Landmark included a petition from its Managing Director, Ralph Klein. In the Petition, Klein states that SY is not entitled to file a lien against the real property "absent proof of the landlord's permission or consent for the performance of the lienor's alleged work at the premises." Klein states that there is no written agreement between Landmark and SY or SY and the Owner.

Annexed to the Petition, are the Notice of Lien, the March 29, 2010 letter from the Owner's attorney and e-mails between Landmark and SY concerning payment for the work. In the Petition, Klein references an e-mail he received from Darel in which Darel writes, "you can

feel free to keep the entire amount you owe Sy."

In its opposition, SY offers Darel's affidavit asserting that the Lease required Landmark to make the improvements undertaken by SY for the benefit of the Owner. Darel states that according to the Lease, the Owner should either pay Landmark for the work or grant Landmark a credit towards the rent due. Darel offers examples of SY's contact with the Owner that he believes constitutes the Owner's consent for the work SY was doing on the Premises. He also states that the comment in his e-mail waiving payment was not meant to be taken literally.

Under NY Lien Law section 19(6) the property owner or "any other party in interest"may apply for an order summarily discharging an alleged mechanics lien "[w]here 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." Section 9 sets forth the information that must appear on the face of the notice.

Courts read this section to mean that absent a "defect upon the face of the lien," disputes over the validy of the lien must be decided at the trial on the foreclosure action, not on a motion to vacate. Care Systems, Inc. v. Laramee, 155 A.D.2d 770 (3d Dept. 1989). In Northside Tower Realty v. Klin Construction Group, Inc., 73 A.D.3d 1072 (2d Dept. 2010), the Second Department stated that "[a] court has no inherent power to vacate or discharge a notice of lien except as authorized by Lien Law §19(6) . . . [which] provides the grounds for the discharge of a mechanic's lien interposed against a nonpublic improvement." The court held that because the notice of lien was not invalid on its face, it was not subject to summary discharge. Id. Similarly, in Pontos Renovation Inc. v. Kitano Arms Corp., 204 A.D.2d 87 (1st Dept. 1994), in addressing a

motion to summarily discharge a mechanic's lien, the First Department considered whether the owner consented to the contractor's work. The court concluded that whether such consent was given was an issue of fact that could not be "resolved upon defendant's motion to vacate the lien." Id. at 87 (citing Care Systems, Inc. v. Laramee, 155 A.D.2d 770).

Here, as in Pontos, Landmark is challenging the validity of the lien based on lack of the consent by Owner, not on the facial sufficiency of the notice of lien. Thus, this court is constrained to deny Landmark's motion.

The court feels compelled to point out to Landmark that the Lease specifically addresses the resolution of a situation such as this one. According to Article 3, in the event a mechanics lien is filed against the property as a result of work procured by Landmark, the Lease requires that Landmark pay the lien or post a bond within 30 days of the filing of the lien. Landmark did not fulfill these obligations under the lease but instead commenced this proceeding. It appears, therefore, that Landmark does so at the risk of violating its lease.

In addition, the court feels compelled to point out to SY that under Lien Law section 3, a contractor has a valid lien upon the real property "for the improvement of the real property with the consent or at the request of the owner." However, consent as required by this section is not a "mere acquiescence by the owner to improvements by a lessee in possession at his own expense." P. Delaney and Co. v. Duvoli, 278 N.Y. 328, 331 (1938). An affirmative act by the owner is required. Id. In addition, the statute is concerned that the contractor, not the tenant, receive consent from the owner. Paul Mock, Inc. v. 118 East 25th Street Realty Company, 87 A.D.2d 756 (1st Dept. 1982).

After oral argument and review of the parties' submissions, it appears to this court that

the lien may be invalid against this property because there was no proven relationship between the Owner and SY with respect to the work performed for Landmark. SY presented no credible proof of the Owner's consent. The terms of the Lease did not require Landmark to make any renovations and did not state that any such renovations would be made at the Owner's expense. There is no evidence that the Owner procured SY's services. The communications between SY and the Owner as described by Darel in his affidavit do not establish that the Owner actively participated in procuring or directing SY's services.

As discussed above, at this juncture, the court cannot vacate the lien on the ground that there was no consent by the Owner. Nevertheless, it appears that Landmark can move the proceeding along by demanding the immediate commencement of a foreclosure hearing under Lien Law section 59. Further, the court cautions SY that it could face possible adverse consequences if it continues to maintain a suspect lien.

In accordance with the foregoing, it is

ORDERED that petitioner Landmark Ventures' motion pursuant to Lien Law §19(6) to summarily discharge respondent SY Construction's mechanic's lien is denied; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of this Court.

J.S.C.

Dated: New York, New York
June 24, 2010