

**Northe Group, Inc. v Spread NYC, LLC**

2010 NY Slip Op 33330(U)

November 22, 2010

Supreme Court, New York County

Docket Number: 600068/10

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON  
Justice

PART 55

Merthe Group Inc.

- v -

Speed NYC LLC

INDEX NO. 600068/10  
MOTION DATE 10/25/10  
MOTION SEQ. NO. 02  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 8 were read on this motion to/for counsel fees

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
<u>1-3</u>
<u>4-6</u>
<u>7-8</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the memorandum decision and order filed under motion sequence 03.

**FILED**

NOV 26 2010

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 11/22/10

JANE S. SOLOMON  
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: PART 55

-----X  
NORTHE GROUP, INC.,

Plaintiff,

-against-

SPREAD NYC, LLC, WAH KOK REALTY CORP.,  
and JOHN DOES 1 through JOHN DOE 10,

Defendants.  
-----X

Index №.: 600068/10

DECISION and ORDER

**FILED**

NOV 26 2010

NEW YORK  
COUNTY CLERK'S OFFICE

JANE S. SOLOMON, J.S.C.:

In an action to foreclose a mechanic's lien, plaintiff moves, pursuant to CPLR 2221 (d), to reargue this court's decision dated June 28, 2010 (the June 2010 Order). The June 2010 Order granted defendant Spread NYC, LLC's (Spread) motion for partial summary judgment discharging plaintiff's \$31,600 lien, finding that plaintiff wilfully exaggerated the entire amount of the lien.

Separately, Spread moves, pursuant to Lien Law § 39-a, for attorneys fees in the amount of \$44,938.03, for services in securing the discharge of the lien. Northe cross-moves, pursuant to CPLR 5519 (c), for a stay pending appeal of the June 2010 Order.

The motion to reargue, Motion Sequence 003, and the motion for attorneys fees, Motion Sequence 002, are consolidated for disposition.

002,003

### Background

By an agreement dated December 3, 2008, Spread, the tenant of defendant Wah Kok Realty Corp. in a building located at 209 Mulberry Street in lower Manhattan, engaged Northe to act as a construction manager for a project to renovate the Mulberry Street building for the purpose of opening a restaurant. The agreement provided that Spread was to pay Northe \$12,000 per month to act as construction manager for the renovation project. The agreement also envisioned that staffing of the construction work, as well as other expenses, "would be billed at cost" (Construction Manager Agreement, paragraph 4). Finally, the agreement provided that Northe would "market test all trades," and that this process "would be handled open book" (*id.*, paragraph 4).

According to the affidavit of Spread's principal, Nicolas Dutko, submitted in support of its motion for summary judgment discharging the lien, the parties, in March 2009, agreed to a lesser fixed monthly fee, which Spread always paid on time (Dutko Affidavit, paragraph 10). Simultaneous with the monthly fee, Northe was billing Spread for the work of its subcontractors. A payment history submitted with the underlying motion showed that by May 2009, Spread had paid Northe \$174,171.85 in subcontracting fees.

Around this time, Spread began to suspect that it was not

being charged at cost for the subcontractor's work, as envisioned by the agreement (Dutko Affidavit, paragraph 13-14). As a result, Spread contacted M&A Projects Inc. (M&A), the masonry subcontractor, and learned that while Spread had paid Northe \$107,031.85 for M&A's work, M&A had only billed Northe, and been paid, in the amount of \$44,550. In other words, Northe had taken a markup of \$63,381.85 for M&A's work (*id.*, paragraph 15). Spread contacted the other subcontractors and found that Northe had charged proportionately similar markups for their work (*id.*, paragraph 17-18). On May 15, 2009, Spread terminated Northe's services.

After its termination, Northe submitted a final invoice in the amount of \$31,600, for consulting fees for March, April, and May 2009. This is the amount Northe would have been due under the contract for its services as construction manager had, as Dutko alleges, the contract not been renegotiated in March 2009. On October 13, 2009, Northe filed a notice of mechanic's lien in the amount of its final invoice, which Spread had refused to pay. On January 12, 2010, Northe instituted the present action to foreclose the lien. On February 24, 2010, Spread brought an Order to Show Cause for summary judgment discharging the lien, pursuant Lien Law section 39, and for damages, pursuant to Lien Law section 39 (a).

In support of its application, Spread argued that the lien

was void since Northe wilfully exaggerated the amount of the lien. In support, Spread submitted, among other things, the contract, a payment history, and Dutko's affidavit.

In opposition, Northe submitted an affidavit from Albert Zihenni, Northe's principal, in which Zihenni swore that the unforeseen poor condition of the building required Northe to do "an inordinate amount" of structural repairs, as a general contractor, which were not covered by the agreement (Zihenni Affidavit, 6-15). Spread also submits pictures, which show, according to Zihenni, the condition of the building prior to these repairs, as well as "some of the work performed by Northe" (*id.*, paragraph 13). Zihenni claimed that since Northe performed the structural work as a general contractor, it was not subject to the agreement between the parties, and "it is irrelevant how much it paid its subcontractors for any of the work on the premises" (*id.*, paragraph 20).

As to alleged reduction in fee, Zihenni acknowledged that he verbally agreed to reduce the monthly amount, but stated that the parties never agreed to the terms of the reduction, and a proposed written amendment was never executed (*id.* at 3). Northe contended that Zihenni's affidavit refuted Spread's claims of wilful exaggeration.

In reply, Spread submitted the affidavit of Bogdan Malinowki, president of M&A, who confirmed the allegations in

[\* 6]

Dutko's affidavit regarding markups on M&A's work (Malinowski Affidavit, paragraph 8-10). Malinowski also stated that M&A had been on the job from December 2008, and that Northe served exclusively as a construction manager on the project, and that Northe is a one-man operation which lacks the capacity to act as a general contractor (Malinowski Affidavit, paragraph 2, 6). Moreover, Malinowski swore that Zihenni's claim that the building was in such poor condition that it required Northe to perform an inordinate amount of structural repairs is "entirely untrue" (id., paragraph 14). As to the picture which Zihenni alleged depicted "some of the work performed by Northe," Malinowski stated that the picture depicts M&A employees (id., paragraph 13).

In granting Spread partial summary judgment discharging Northe's lien, the court found that Spread was entitled to such relief under Lien Law section 39, as Northe wilfully exaggerated the amount it claims in its notice of lien. The court reasoned that:

The persuasive submissions of Dutko and Malinowski completely undercut those of Zihenni and establish that, as to M&A alone and without regard to claims of overbilling for other subcontractor's work, the lien is wilfully exaggerated: The balance due if anything for the services described in the statement are cancelled by the larger counterclaim for refunds of inflated charges which Spread paid.

Accordingly, while issues of credibility

usually are reserved for trial, this motion can be granted on the submissions. Because the credible amount of alleged overcharges substantially exceeds the amount claimed by Northe, the motion is granted to the extent of voiding the lien entirely under section 39 of the Lien Law on the ground that the lienor, Northe, has wilfully exaggerated the amount it claims in its notice of lien.

(June 2010 Order, at 10).

The court left open the question of damages pursuant to Lien Law section 39 (a).

#### Discussion

##### A. **Reargument**

A motion to reargue is properly based on "matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion," not including "any matters of fact not offered on the prior motion" (CPLR 2221 [d] [2]).

Northe argues that the court erred in three ways: (1) by finding that plaintiff wilfully exaggerated the lien when there was no showing that the alleged overcharges were either intentional or improper; (2) by misapprehending the law because a determination of wilful exaggeration cannot be resolved on affidavits and instead must be resolved at trial; (3) by improperly considering the Malinowski affidavit which was submitted along with Spread's reply.

First, as to the claim that the court erred by finding that plaintiff wilfully exaggerated the lien, plaintiff contends that

Lien Law 39-a must be strictly construed in favor the party against whom the penalty is sought. While this principle is accurate, it is inapposite here because this rule stems from the penal nature of Lien Law section 39-a, and does not apply to Lien Law section 39, the provision under which the court voided the mechanic's lien (see *Wellbilt Equip. Corp. v Fireman*, 275 AD2d 162, 169 [1st Dept 2000]).

Factually, Northe argues that the billing records demonstrate that the parties treated the pre-construction contract as distinct from the repair work, that the lien stems from charges under the contract and has nothing to do with alleged overcharges arising from structural repair work, and that there is no evidence that Northe was not allowed to markup the contract.

Defendant argues that Northe points to no evidence which would tend to show that the parties had a separate agreement for structural repair work.

As to Northe's claim that such an agreement is suggested by separation in the billing records of structural repair costs and Northe's payments as a construction manager, this separation is entirely consistent with the terms of the contract which has been submitted to the court. That is, the agreement between the parties foresaw a monthly fee for Northe and at-cost billing for the work of subcontractors. The fact that Spread made separate

payments to Northe for Northe's own services and those of the subcontractors does not demonstrate that there was a separate agreement for structural repair work.

Northe's second factual contention, that the lien stems from the contract and has nothing to do with overcharges for structural repair work, falls with the first. Since any division between the construction-manager contract and the structural repair work is false, the overcharges were done under the contract, and Spread did not owe Northe anything under the contract when Northe filed its notice of lien. Since Northe's overcharges were intentional, so was its exaggeration of the lien. Finally, plaintiff fails to show that the court misapprehended the terms of the contract, which foresaw pass-through billing for work done by subcontractors.

Second, as to the claim that the court misapprehended the law by determining wilful exaggeration without a trial, plaintiff cites *Wellbilt Equip. Corp* for the proposition that the issue of wilful exaggeration "can only be determined at the trial of the foreclosure action," a statement which does not appear in that case. While it is true that the issue of wilful exaggeration "is one that ordinarily must be determined at the trial of the foreclosure action" (*Aaron v Great Bay Contract., Inc.*, 290 AD2d 326 [1st Dept 2002]), courts may sometimes decide the issue of wilful exaggeration upon a pre-trial motion for summary judgment

(see e.g., *Strongback Corp. v N.E.D. Cambridge Ave. Dev. Corp.*, 25 AD3d 392 [1st Dept 2006]). Northe tries to distinguish *Strongback Corp.* by arguing that the lienor in that case admitted that the value of its lien was almost twice the value of the work invoices supporting the lien. This is a mischaracterization of *Strongback Corp.*, as the First Department found that plaintiff's invoices reflected a disparity between the value of the lien and the value of its work, not that plaintiff admitted the disparity (*id.* at 394).

Third, as to the claim that the court should not have considered the Malinowski affidavit since it introduced new evidence and arguments that were improperly submitted for the first time in reply, the rule against the submission of new evidence on reply is not inflexible, and a court, in the exercise of its discretion, may consider evidence offered for the first time in reply where the offering party is responding to an issue brought up in the opposition to the motion (*Matter of Kennelly v Mobius Realty Holdings LLC* (33 AD3d 380, 381-2 [1st Dept 2006]); *Matapos Tech. Ltd. v Compania Andina de Comercio Ltda*, 68 AD3d 672 [1st Dept 2010]).

Here, the Malinowski affidavit was offered in response to Northe's claim that it did work as a general contractor which was outside of the scope of Northe's agreement with Spread; the affidavit was not offered to remedy defects in Spread's moving

papers. As such, it was properly considered, and the court adheres to its June 2010 Order.

#### B. Attorneys Fees

Lien Law section 39-a provides that a party who has been forced to defend against a lien which was wilfully exaggerated is entitled, among other damages, to "reasonable attorney's fees for services in securing the discharge of the lien."

A calculation of reasonable attorney's fees "should consider the time spent, the difficulties involved in the matters in which the services were rendered, the nature of the services, the amount involved, the professional standing of the counsel, and the results obtained" (*Matter of Karp [Cooper]*, 145 AD2d 208, 215 [1st Dept 1989] [internal quotation marks and citation omitted]). The claimant bears the burden of showing the reasonableness of the fee (*Klein v Robert's Am. Gourmet Food, Inc.*, (28 AD3d 63, 75 [2d Dept 2006])). Reasonable attorney's fees assessed pursuant to Lien Law 39-a, as all penalties under this provision, "must be construed in favor of the person upon who the penalty is sought to be imposed" (*Wellbilt Equip. Corp. v Fireman*, 275 AD2d 162, 169 [1st Dept 2000]).

In support of its motion for \$44,938.03 in attorneys fees, Spread submits invoices from four attorney, two partners, an associate, and a contract attorney. The partners billed a total of 35.11 hours on the case at a rate of \$450 per hour. The

associate billed 56.42 hours on the case at a rate of \$295 per hour, while the contract attorney billed 38.54 hours at a rate of \$295 per hour. While the attorney's affirmation attests to the relative experience of each of the attorneys who worked on the case, it does not aver that any of them had any experience with respect to the Lien Law.

In opposition, Northe argues (1) that reasonable attorney's fees cannot be calculated, as the June 2010 Order did not establish the percentage of the lien which Northe wilfully exaggerated, and (2) that the fees sought are unreasonable. As to the unreasonableness of the fees, Northe argues that the motion for summary judgment discharging the lien was relatively simple, and that Spread's counsel billed for duplicative work, including 4.5 hours, or \$1,825.50, to analyze the notice of lien.

In reply, Spread argues that Northe's opposition is untimely under CPLR 2214, as it was not served within seven days of the original return date. This timeliness argument is unpersuasive, as Northe received an adjournment of the motion date, and its papers were timely submitted with relation to the new date. Spread also argues in reply that Northe is to blame for the substantial legal costs, since it submitted a misleading affidavit from Northe's principal, Zihenni, in opposition to the motion, and Spread's attorneys were forced to spend time discrediting it. Finally, Spread argues that it has not charged

Northe for any of the work its attorneys did to institute an action against plaintiff and its principal in New York County for breach of contract and fraud.<sup>1</sup>

Preliminarily, the court rejects Northe's first argument, as the June 2010 Order found that the entire amount of the lien was wilfully exaggerated because "the credible amount of alleged overcharges substantially exceeds the amount claimed by Northe" (June 2010 Order, at 2). Whether Spread's attorney's fees are reasonable is a more difficult question.

It is clear that Spread's attorneys obtained a favorable result in discharging the lien. However, Spread submits no evidence as to the amount of a "customary fee" charged for obtaining the discharge of mechanic's lien (*Matter of Karp*, 145 AD2d at 215, quoting *Matter of Freeman*, 34 NY2d 1, 9 [1974]). Nor does Spread submit any work product which would corroborate the invoices (see *Brookman & Brookman P.C. v Joseph Fleischer Natural Coiffures, Inc.*, 13 AD3d 196, 197). Moreover, Spread fails to show that the discharge of this lien was particularly difficult, or that any of the attorneys who worked on it had any expertise with mechanic's liens.

In short, while Spread's affirmation shows that, in order to discharge the lien, its attorneys billed almost fifteen thousand

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<sup>1</sup>This action is entitled *Spread NYC, LLC v North Group, Inc*, Index No. 602410/09.

dollars more than the amount of the lien, it does not prove that doing so was reasonable. In these circumstances, the court finds that it cannot determine reasonable attorneys fees on the papers and refers the issue to a special referee.

Northe urges the court to issue a discretionary stay of the proceeding pursuant to CPLR 5519 (c), as plaintiff's appeal has presumptive merit. Northe's cross motion is denied, as the court is not persuaded of the presumptive merit of Northe's appeal, as is evident from the discussion above of the June 2010 Order.

#### Conclusion

Based on the foregoing, it is

ORDERED that the motion of plaintiff for leave to reargue the motion for partial summary judgment is granted; and it is further

ORDERED that, upon reargument, the Court adheres to its Decision and Order, dated June 28, 2010, granting defendant Spread NYC, LLC partial summary judgment discharging plaintiff's mechanic's lien in its entirety; and it is further

ORDERED that the issue of reasonable attorneys fees which defendant Spread NYC, LLC spent discharging the mechanic's lien which plaintiff filed is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid

issue; and it is further

ORDERED that Motion Sequence 002 is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for Spread NYC, LLC shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed information Sheet,<sup>2</sup> upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

ORDERED that plaintiff's cross motion for a stay of the action is denied.

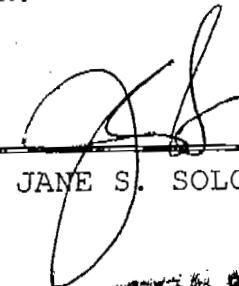
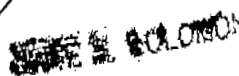
Dated: November 22, 2010

ENTER:

**FILED**

NOV 26 2010

NEW YORK  
CLERK'S OFFICE

  
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Hon. JANE S. SOLOMON, J.S.C.  


<sup>2</sup> Copies are available in Rm 119M at 60 Centre Street and on the Court's website at [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh) under the "References" section of the "Courthouse Procedures" link.