

**Matter of Mayrich Constr. Co. v Oliver L.L.C.**

2010 NY Slip Op 34119(U)

March 15, 2010

Supreme Court, New York County

Docket Number: 116517/09

Judge: O. Peter Sherwood

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 61**

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**In the Matter of the Petition of  
MAYRICH CONSTRUCTION COMPANY,**

**DECISION, ORDER  
AND JUDGMENT**

**Petitioner,**

**Index No. 116517/09**

**for an Order to Compel Compliance with  
Lien Law § 76**

**-against-**

**OLIVER L.L.C., c/o ALEXICO GROUP, LLC,**

**Respondent.**

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**O. PETER SHERWOOD, J.:**

In this special proceeding petitioner, Mayrich Construction Company (“Mayrich”), is seeking an order pursuant to Lien Law § 76(5) directing respondent, Oliver L.L.C. (“Oliver”), to serve upon Mayrich, within 10 days of the date of said order, a verified statement drawn in accordance with the provisions of Lien Law § 76. For the reasons that follow, the petition is granted and Oliver shall serve a verified statement pursuant to the provisions of Lien Law § 76 in accordance with this decision and order.

***BACKGROUND***

Oliver is the owner of contiguous parcels of real property in Manhattan formerly known as 953, 957, 959 and 961 First Avenue (the “property”). Oliver’s purchase of the property was financed by Bank of America and secured by two mortgages recorded against the property. The first mortgage, in the amount of \$19,111,079.06, was recorded on November 9, 2007. The second mortgage, in the amount of \$2,300,000, was recorded on May 9, 2008.

The following is undisputed: Mayrich entered into a “subcontract” with Oliver<sup>1</sup> as part of a project to build a mixed use residential and retail tower on the property to be known as “The Oliver” (“the project”); Oliver owes Mayrich \$2,321,552 for work performed on the project to date; and,

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<sup>1</sup> No copy of the “subcontract” between Mayrich and Oliver has been provided.

Mayrich commenced its “improvement” to the property, as defined in Lien Law § 2(4), prior to the recording of the Bank of America mortgages.

On October 5, 2009, Mayrich, claiming to be a trust fund beneficiary under Article 3-A of the Lien Law, served a verified statement upon Oliver demanding that Oliver furnish a verified statement pursuant to Lien Law § 76 “setting forth the entries as required to be kept in your books and records by Lien Law § 75 ... with respect to the trust contained in such books and records” (see Petition, Exhibit “A”). On October 29, 2009 Oliver furnished a verified response denying Mayrich’s demand and stating that “Oliver has not received funds and has no rights of action for the payment of funds constituting assets of a trust of which an owner is a trustee as set forth in Article 3-A of the Lien Law” (*id.*, Exhibit “B”).

#### ***DISCUSSION***

The issue presented by the papers before the court is whether the funds provided to Oliver by Bank of America constitute trust assets under Article 3-A of the Lien Law, in which case Mayrich is entitled to the relief it requests.

Lien Law § 70(1) provides in pertinent part that “[t]he funds described in this section received by an owner for or in connection with an improvement of real property in this state ... shall constitute assets of a trust ... .” Lien Law § 70(5)(c) provides that “[t]he assets of a trust of which the owner is trustee are the funds received by him and his rights of action for payment thereof ... under a mortgage recorded subsequent to the commencement of the improvement and before the expiration of four months after the expiration of the improvement.”

In support of its petition Mayrich contends that under Section 70 of the Lien Law the loans made by Bank of America to Oliver, which were secured by the mortgages recorded after Mayrich commenced its improvement, are trust assets and, accordingly, Oliver is required to account to Mayrich with respect to the loan proceeds pursuant to Lien Law § 76.<sup>2</sup> Mayrich adds that Section 1.17 of the mortgages provides that the funds received from Bank of America are trust funds under Article 3-A of the Lien Law.

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<sup>2</sup> The statute provides, *inter alia*, that the beneficiary of an Article 3-A trust shall be entitled to examine and copy the books and records of the trustee with respect to the trust.

In opposition, Oliver argues that under Lien Law § 70(1) the assets of an owner trust include only “funds ... received by an owner for or in connection with improvement of real property” and that the loan proceeds at issue are not trust funds because they were not received by Oliver for or in connection with the improvement of the property, but rather to purchase the property. Oliver alternatively argues that a finding that the proceeds of the Bank of America loans were assets of an owner trust would lead to an “absurd” result because the use of loan proceeds for their intended purpose would be deemed to be a diversion of trust funds.

Oliver’s primary argument has some merit. Oliver relies, in part, on *Canron Corp. v City of New York* (89 NY2d 147 [1996]) for the proposition that the provisions of Article 3-A of the Lien Law “were intended to insure that funds obtained for financing of an improvement of real property ... will in fact be used to pay the costs of that improvement” (*id.*, at 153-154). It appears that the funds obtained by Oliver from Bank of America were used to purchase the property, not to pay for the costs of improving it. Nevertheless, the relief requested by Mayrich shall be granted.

Section 1.17 of the mortgages, entitled “Trust Fund; Lien Laws,” provides in pertinent part as follows:

Mortgagor will receive the advances secured hereby and will hold the right to receive such advances as a trust fund to be applied first for the purpose of paying the ‘cost of improvement,’ as such quoted term is defined in the New York Lien Law, and will apply the same first to the payment of such costs before using any part of the total of the same for any other purpose ... .

(see Mayrich’s Exhibits “E” and “F”, Section 1.17). By entering into such accord, Oliver has clearly agreed that the funds advanced to it by Bank of America would constitute a trust fund to the extent required for the payment of improvements under the Lien Law (*cf. Spruck v McRoberts*, 139 NY 193, 197 [1893]). Furthermore, the mortgage provision comports with the primary purpose of Article 3-A, which is to ensure that a contractor who has directly expended labor and materials to improve real property at the direction of the owner receives payment for the work actually performed (see *Aspro Mechanical Contracting, Inc. v Fleet Bank*, 1 NY3d 324, 328 [2004], rearg den 2 NY3d 760 [2004]). Finally, Oliver’s alternative hypothetical argument has no bearing on the express terms of the mortgages.

In view of the above, the court concludes that Mayrich is entitled to the relief sought herein.

Accordingly, it is

**ADJUDGED** that the petition is granted; and it is further

**ORDERED** that Oliver L.L.C. is directed to serve upon Mayrich Construction Company, within 10 days of service of a copy of this judgment with notice of entry, a verified statement drawn in accordance with the provisions of Lien Law § 76.

This constitutes the decision, order and judgment of the Court.

DATED: 3/15/10

ENTER,

*O.P. Sherwood*

**O. PETER SHERWOOD**

J.S.C.

*Neuman Haskman*  
CLERK

**FILED**

MAR 30 2010

NEW YORK  
COUNTY CLERK'S OFFICE