

<b>CPN Mech., Inc. v Madison Park Owner LLC</b>
2011 NY Slip Op 30124(U)
January 11, 2011
Sup Ct, NY County
Docket Number: 601276/10
Judge: Emily Jane Goodman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Goodman  
Justice

PART 17

CPR Mechanical

INDEX NO. 601276/10

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 01

MOTION CAL. NO. \_\_\_\_\_

- v -

Madison Park Owner

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for Sum. Judgment

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 denied

at Fall

**FILED**

JAN 20 2011

NEW YORK  
COUNTY CLERK'S OFFICE

*EGJ*

Dated: 1/11/11

check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
check if appropriate:  DO NOT POST  REFERENCE

**EMILY JANE GOODMAN**

REASON(S) FOR THE FOLLOWING REASON(S):

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

-----X  
CPN MECHANICAL, INC., EVA MECHANICAL,  
INC., EVA SALES, INC., APN AIR CONDITIONING,  
INC., AP HEATING & A/C, INC. and YVONNE  
SALES, INC.,

Plaintiffs,

Index No.  
601276/10

-against-

MADISON PARK OWNER LLC, G BUILDERS IV  
LLC, LEADER ELECTRIC CO., INC., BP AIR  
CONDITIONING CORP., and MOTTOLA-RINI  
ENGINEERS, P.C., and JOHN DOE #1 through JOHN  
DOE #25 inclusive, the last names being fictitious and  
unknown to plaintiffs such persons intended to be  
tenants, occupants, persons, corporations, or other  
entities, if any, having or claiming an interest in or lien  
upon the premises described in the complaint,

Defendants.

-----X  
EMILY JANE GOODMAN, J.S.C.:

By order to show cause, defendant Madison Park Owner LLC (Madison Park) moves, pursuant to CPLR 3212, for an order (a) granting summary judgment in its favor, dismissing the first, eighth, ninth and tenth causes of action as against it,<sup>1</sup> and (b) awarding it partial summary judgment on its first counterclaim against plaintiff CPN Mechanical, Inc. (CPN), pursuant to New York Lien Law §§ 39 and 39-a, declaring CPN's April 1, 2010 Notice of Mechanic's Lien (the Lien) void, and setting the matter down for an inquest and assessment of damages.

Madison Park is the owner of the real property located at 15 East 26<sup>th</sup> Street, New York, New York (the Property), at which a construction project consisted of the renovation of the 20-story building (the Project). The causes of action at issue in the current motion are: the first, in

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<sup>1</sup> The remaining causes of action are not brought as against Madison Park.

**FILED**

**JAN 20 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

3] which plaintiffs seek to foreclose on a mechanic's lien related to their work at the Project; the eighth, alleging breach of contract; the ninth, sounding in unjust enrichment; the tenth, for quantum meruit; and the first counterclaim, in which Madison Park seeks damages for CPN's allegedly willful exaggeration of the Lien.

CPN alleges that, from November 2006 through July 2008, defendant G Builders IV LLC (G Builders), the construction manager for the Project, acting on behalf of Madison Park, entered into a series of agreements with CPN, pursuant to which CPN agreed to provide heating, ventilating and air-conditioning (HVAC) construction work for the Project. CPN explains that the other five plaintiffs (the Related Entities) are CPN's wholly owned subsidiaries. CPN states that G Builders also entered into multiple agreements, on behalf of Madison Park, with the Related Entities, by which each of the Related Entities agreed to provide HVAC-related labor, material and equipment for the Project.

According to CPN, both G Builders and Madison Park expected CPN, and not the Related Entities, to provide all of the HVAC-related work for the Project, with payment being made either to CPN or to the Related Entities. CPN states that G Builders and Madison Park knew that the Related Entities were created for the Project in January of 2007. It explains that G Builders had separate agreements with the Related Entities because Madison Park and/or G Builders requested that it be done that way, in order to avoid providing payment and performance bonds for the Project, the cost of which would have been borne by Madison Park. CPN states, upon information and belief, that Madison Park's lender for the Project required such bonds for major subcontracts over \$1,000,000, and that Madison Park was able to avoid this cost by splitting the HVAC work among multiple entities. CPN points out that all of the change orders on the Project were issued to CPN and not to the Related Entities. According to CPN, this

indicates that all of the parties knew that CPN was performing the actual HVAC work on the Project. Otherwise, CPN argues, a change order could not be issued to CPN changing the terms of an agreement to which it was not a party.

CPN states that the total value of the labor and materials that it provided to the Project was approximately \$8,114,951.07, comprised of the combined value of: (a) the direct agreements between CPN and G Builders (\$1,421,124); (b) the agreements between G Builders and the Related Entities (totaling \$4,667,000); and (c) the unpaid change orders (\$2,026,827.07) to CPN on the Project. CPN asserts that, notwithstanding what entity was in privity of contract with G Builders, all of the HVAC-related labor and materials on the Project were provided by CPN, through its direct subcontractors and material suppliers. CPN states that it and the Related Entities were paid a total of \$6,233,477.66, leaving a balance of \$1,881,473.41 for the unpaid fair and reasonable value of labor and material actually provided by CPN to the Project. CPN states that, as a result of the nonpayment of the remaining balance, it filed the Lien with the Office of the New York County Clerk, in the amount of \$1,576,758.56, on April 1, 2010. CPN explains that the Lien was filed only under its name because it, and not the Related Entities, actually provided the \$8,114,991.07 in labor, material and equipment for the Project.

In accordance with Lien Law § 38, CPN submitted a May 25, 2010 verified itemized statement (the Itemized Statement), signed by its president, Constantine Nikolis (Nikolis). Referring to CPN's sworn representations in the Itemized Statement, Madison Park contends that the Lien improperly includes: (a) sums for work performed directly for the buyers of the individual apartments in the Property; (b) monies for labor and material furnished pursuant to purchase orders (P.O.'s) entered into between G Builders and the Related Entities, for which CPN does not have the right to a lien; (c) monies due as part of an alleged contract balance under

two P.O.'s entered into between CPN and G Builders, although CPN did not complete the work under those P.O.'s as of the date of its termination; (d) monies due as part of an alleged contract balance under P.O.'s between G Builders and the Related Entities, although they also did not complete the work under their respective P.O.'s as of the date of their termination; and (e) sums for proposals CPN submitted to G Builders, for which no P.O.'s were issued, and for which CPN provides no evidence that the work had been approved by G Builders or even performed.

According to Madison Park, CPN has filed a willfully and deliberately exaggerated mechanic's lien against Madison Park, such that, pursuant to Lien Law § 39, the first cause of action, for foreclosure of the Lien, must be dismissed. Madison Park states that, pursuant to Lien Law § 39-a, it is entitled to recover an amount equal to the difference by which the amount claimed to be due in the Lien exceeds the amount actually due, reasonable attorneys' fees in securing the discharge of the Lien, and other statutory costs.

Madison Park maintains that the dollar amount by which CPN exaggerated the Lien is unclear at this time. Madison Park contends that, at a minimum, the Lien was exaggerated by the \$932,111.50 allegedly due to the Related Entities, because CPN has no right to a lien on behalf of contractors with which it is not in privity of contract, even if they are CPN's wholly owned subsidiaries. Madison Park maintains that it is also unclear by how much CPN inflated the Lien for its own alleged contract balance or for work it was not authorized to perform or did not perform. Madison Park asserts that this court should enter an order finding CPN liable to Madison Park in damages under Lien Law § 39-a and setting this matter down for an inquest and assessment of damages to determine the exact differential.

According to Madison Park, effective November 4, 2008, G Builders terminated CPN and the Related Entities. As of that date, according to Madison Park, none of the plaintiffs had

completed the contract work under their respective P.O.'s. Madison Park asserts that G Builders later retained another contractor to complete all of the plaintiffs' remaining work. Thus, Madison Park asserts that the Lien, filed more than 16 months after all of the plaintiffs were terminated in November 2008, was untimely. Madison Park contends that CPN brought the Lien in its name alone in an attempt to circumvent the eight-month statutory limitations period in Lien Law § 10 that had already expired for the Related Entities. Pursuant to Lien Law § 10 (1), the notice of lien may be filed "during the progress of the work and the furnishing of the materials, or, within eight months after the completion of the contract, or the final performance of the work, or the final furnishing of the materials, dating from the last item of work performed or materials furnished." A failure to file the notice within the statutory period is fatal to the lien, according to Madison Park.

Madison Park states that, while the complaint alleges that the Lien was filed within eight months of the last date that CPN performed work, it is silent as to the last date on which any of the Related Entities worked at the Project. Madison Park maintains that this is because they were terminated by G Builders on November 4, 2008, and they did not file a mechanic's lien within eight months of their last date of work.

Madison Park argues that the balance of plaintiffs' claims against it must also be dismissed. Madison Park maintains that it is undisputed that G Builders entered into the P.O.'s with CPN and with the Related Entities. Madison Park asserts that it was not a party to any of those agreements, nor did it obligate itself to make any payments to plaintiffs, except as directed by G Builders. Madison Park states that, as directed by G Builders, it paid CPN and each of the Related Entities directly for the work performed under their respective P.O.'s. Madison Park states that it was never advised that the Related Entities did not perform the labor or furnish the

materials, as CPN now contends was provided and performed by CPN. Madison Park states that the only contract it entered into was its March 2007 agreement with G Builders (the MP-GB Agreement).<sup>2</sup> Therefore, Madison Park contends, plaintiffs' claims against it for breach of contract, unjust enrichment and quantum meruit must also be dismissed.

Plaintiffs argue that the motion should be denied because: (a) Madison Park relies on several disputed factual allegations that prevent the granting of summary judgment; (b) the Lien was timely because CPN was never terminated, and, it completed its work on the Project; (c) there are no defects on the face the Lien, which is the only ground for dismissal under the Lien Law; (d) CPN has the right to a lien for the unpaid value of all HVAC-related labor and material on the Project, regardless of what the various contractual arrangements portray, because CPN provided all such labor and material; (e) the 9<sup>th</sup> and 10<sup>th</sup> causes of action do not require privity of contract; and (f) willful exaggeration of a mechanics' lien cannot, as a matter of law, be decided on a motion for summary judgment.

The question of whether CPN is entitled, in its name alone, to a lien for the amounts allegedly due to the Related Entities is significant. While the complaint alleges that CPN performed work on the Project within eight months of filing the Lien, it makes no such allegation regarding the work of the Related Entities. Thus, if there were not an issue of fact regarding which entity actually did the work under the various HVAC-related subcontracts, the eight-month statute of limitations in Lien Law § 10 (1) would have expired for the Related Entities by the time of the April 1, 2010 filing and the lien would be improper. In the absence of

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<sup>2</sup>Madison Park notes that G Builders has been indicted by the New York County District Attorney for its involvement in a scheme with its subcontractors to defraud property owners, including Madison Park, of millions of dollars. According to Madison Park, this case is thus tainted by the fraud of G Builder and its subcontractors.

CPN's allegations that it actually did all of the work, it would not be able to file a lien for the work of other parties, even its wholly owned subsidiaries. *See A. Servidone, Inc. v Bridge Tech.*, 280 AD2d 827 (3d Dept 2001) (where Bridge Technologies, LLC did not perform work, which was performed by the party to the subcontract Bridge Technologies, Inc., after its dissolution, by its parent Bridge Technologies, Ltd., the mechanics lien filed by Bridge Technologies, LLC was discharged).

CPN provides evidence in support of the timeliness of the Lien as to its work. Although Madison Park submits a November 4, 2008 letter terminating plaintiffs from the Project, Nikolis contends in his affidavit, and multiple e-mails among the parties suggest, that CPN performed work or furnished materials to the Project until the HVAC work was completed, on or about September 10, 2009, and therefore within eight months of filing the Lien.

Although Madison Park maintains that *A. Servidone, Inc. (id)* supports discharge of the lien here, in that case the entity that filed the lien did not perform any work. Contrarily here, CPN alleges that regardless of the designation of the Related Entities as parties to some of the agreements, which was allegedly created to avoid payment on performance bonds, CPN was entitled to file the lien because it performed all the work. CPN notes that privity of contract is not a necessary element under §3 of the Lien Law, which only requires the performance of labor or furnishing materials for the improvement of real property "with the consent or at the request of the owner thereof, or his agent, contractor or subcontractor" (*see also Hartman v Travis*, 81 AD2d 692 (3d Dept 1981)). Although Madison Park denies that it ever consented to CPN performing all of the work, the Nikolis affidavit paints a different picture. He claims that Madison Park always knew that CPN was to perform all of the work, even though some contracts were with the Related Entities and not CPN, because it would avoid the cost of

providing payment and performance bonds, required by Madison Park's lender, for work over one million dollars, by splitting the contracts in amounts of less than one million dollars. Nikolis also discusses certain circumstances which led him to believe that this scheme was, as his attorney states, "concocted by Madison Park with the assistance of GB." Although Madison Park explains away those circumstances, at this stage in the action, where absolutely no discovery has taken place, Madison Park has not met its burden on summary judgment. Accordingly, at this time, CPN is permitted to seek a lien for amounts allegedly due not only to itself, but also to the Related Entities under their subcontracts and P.O.'s.<sup>3</sup>

Plaintiffs state that the eighth cause of action, for breach of contract, was included against Madison Park because, upon information and belief, G Builders was a construction manager to Madison Park and, as such, it may be found that Madison Park is in privity of contract with the trade subcontractors, including plaintiffs. Plaintiffs assert that, if after discovery it is found that this is not the case, then they will withdraw the cause of action for breach of contract against Madison Park.

The eighth cause of action, sounding in breach of contract, is dismissed as against Madison Park. It is undisputed that there were no contracts between Madison Park and any of the plaintiffs for the work performed. Furthermore, there is no language in the MP-GB Agreement making G Builders an agent of Madison Park. The first page of the MP-GB Agreement states that Madison Park's agent is Walter & Samuels. It further provides, at § 6.1.3, that "[s]ubcontracts will be between the Construction Manager [G Builders] and its Subcontractors. The form of Subcontract shall provide ... that Subcontractors shall have no

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<sup>3</sup>However, the Court grants leave for Madison Park to renew its motion for summary judgment under CPLR 3212, after Plaintiff files a note of issue.

contractual rights or remedies against the Owner.” It is well settled that “a subcontractor may not assert a contractual claim against an owner with whom it is not in privity.” *Eastern States Elec. Contrs. v Crow Constr. Co.*, 153 AD2d 522, 523 (1<sup>st</sup> Dept 1989).

Madison Park argues that it cannot be held liable in quasi contract, under the ninth cause of action for unjust enrichment or the tenth cause of action for quantum meruit, absent its express consent to be bound for G Builders’ debts. Madison Park states that, because there was no such consent, the quasi-contract claims against it must be dismissed.

CPN argues that the ninth and tenth causes of action should not be dismissed because privity of contract is not required for causes of action sounding in unjust enrichment and quantum meruit. CPN asserts that it is undisputed that CPN and/or the Related Entities performed work at the Project with G Builders’ and Madison Park’s consent, that Madison Park was enriched by this work, and that Madison Park paid CPN and the Related Entities directly for some of the work provided. According to CPN, by accepting the labor and materials provided by CPN, and failing to pay for some of those labor and materials, Madison Park is liable to plaintiffs under claims of quantum meruit and unjust enrichment. It further asserts that it would be against good conscience to allow Madison Park to be unjustly enriched in such a manner.

The ninth and tenth causes of action, sounding in quasi contract, survive the instant motion. “[I]t is a firmly established principle that a property owner who contracts with a general contractor does not become liable to a subcontractor on a quasi contract theory unless it expressly consents to pay for subcontractor’s performance.” *Perma Pave Contr. Corp. v Paerdegat Boat & Racquet Club*, 156 AD2d 550, 551 (2d Dept 1989). “The owner’s mere consent to and acceptance of improvements placed on his property by the subcontractor, without more, does not render it liable to the subcontractor.” *Id.* In the instant case, however, all of the

payments to the plaintiffs for their work on the Project came not from G Builders, but from Madison Park's agent, Walter & Samuels. Each of the checks submitted to the court was from the account of Walter & Samuels and was written out to two payees, G Builder and one or another of the plaintiffs. Thus, because there is evidence that Madison Park consented to pay, and did pay, for plaintiffs' performance, the ninth and tenth causes of action are not dismissed.

Regarding Madison Park's allegation that CPN willfully exaggerated the Lien, CPN denies that there was exaggeration and notes that it submitted, with the Itemized Statement, several hundred pages of proof, including invoices, change orders, etc., substantiating its \$8,114,951.07 in labor and materials provided to the Project. CPN states that, even if the court accepts Madison Park's arguments that the Lien includes unspecified monies due on P.O.'s or unsigned change orders, or for work provided to individual owners of residential apartments, the Lien was for \$304,714.85 less than the entire amount due and owing to CPN on the Project. CPN further contends that a determination of willful exaggeration cannot be made on a motion for summary judgment but must be decided at the trial of a foreclosure action, with damages under Lien Law § 39-a to be awarded after such a trial.

As to certain unsigned change orders, there is a question of fact whether they are properly included in the liened amount. Even when there is a contractual provision stating that there can be no oral modifications to the contract, "[u]nder New York law, oral directions to perform extra work, or the general course of conduct between the parties, may modify or eliminate contract provisions requiring written authorization or notice of claims." *Penava Mech. Corp. v Afgo Mech. Servs., Inc.*, 71 AD3d 493, 494 (1<sup>st</sup> Dept 2010), quoting *Barsotti's, Inc. v. Consolidated Edison Co. of N.Y.*, 254 AD2d 211, 212 (1<sup>st</sup> Dept 1998).

A lien notice that willfully exaggerates the amount of the lien is void pursuant to New

York Lien Law § 39, and such a determination can be made on a summary judgment motion if there is no issue of fact as to the willfulness of the exaggeration. *Strongback Corp. v N.E.D. Cambridge Ave. Dev. Corp.*, 25 AD3d 392 (1<sup>st</sup> Dept 2006). Summary judgment is not available, however, if there is an issue of fact as to whether the amount sought in a lien has been exaggerated, or whether any such exaggeration was willful. “The fact that a lien may contain improper charges does not, in and of itself, establish that a plaintiff willfully exaggerated a lien.” *Minelli Constr. Co. v Arben Corp.*, 1 AD3d 580, 581 (2d Dept 2003).

“Lien Law § 39-a, which is penal in nature, is a purely statutory offense, providing for drastic consequences in the event the statute is violated. As a result, there can be no liability under this provision by implication of fact or law. Furthermore, the statute must be strictly construed in favor of the person upon who the penalty is sought to be imposed.” *Wellbilt Equip. Corp. v Fireman*, 275 AD2d 162, 169 (1<sup>st</sup> Dept 2000), citing *Joe Smith, Inc. v Otis-Charles Corp.*, 279 App Div 1, 4 (4<sup>th</sup> Dept 1951), *aff’d* 304 NY 684 (1952). The court does not find, as a matter of law, that the Lien has been willfully exaggerated, and therefore, that part of the motion that seeks partial summary judgment on the first counterclaim is denied.

The court notes that the Itemized Statement clearly indicates the amount CPN alleges was paid, and remains due, for each of the P.O.’s entered into between the Related Entities and G Builders. The Itemized Statement does not indicate, however, which parts of the P.O.’s and change orders and other items were allegedly paid, and remain due, as to the agreements between CPN and G Builders. There are issues with certain of those documents, and if CPN alleges that the lien amount includes sums due under those documents, CPN will have to prove its entitlement thereto.

Accordingly, it is

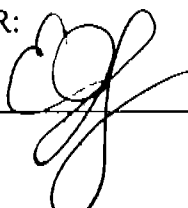
ORDERED that the motion for summary judgment is granted in part, to the extent that the eighth cause of action of the complaint is dismissed, and the motion is otherwise denied; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 422 on February 24, 2011 at 10AM

This constitutes the Decision and Order of the Court.

Dated: January 11, 2011

ENTER:



A handwritten signature in black ink, appearing to read 'EJG', is written over a horizontal line.

J.S.C.

**EMILY JANE GOODMAN**

**FILED**

**JAN 20 2011**

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