

MJM Constr. Servs., LLC v Weise

2011 NY Slip Op 30971(U)

April 15, 2011

Supreme Court, Albany County

Docket Number: 9337-09

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

MJM CONSTRUCTION SERVICES, LLC,

Petitioner,

DECISION and ORDER
RJI NO.: 01-09-098497
INDEX NO.: 9337-09

-against-

MARTIN WEISE and 415 WEST 150 LLC,

Respondents.

Supreme Court - Albany County All Purpose Term, February 14, 2011
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

In 2007, Respondents retained Petitioner as a subcontractor for their mixed commercial / residential development project. Respondent Weise acted as the project’s developer and construction manager for Respondent 415 West 150 LLC, which owned the real estate. In August 2009, claiming non-payment of monies owed, Petitioner filed a mechanic’s lien on the property.

Thereafter, Petitioner commenced this proceeding, pursuant to Lien Law §76(5), to compel Respondents’ to serve a Lien Law §76(1)(b) and (4) verified statement (hereinafter “Lien Law Statement”). By Order, dated December 10, 2009 (hereinafter “Order”), this Court granted

the petition and ordered Respondents to “serve upon Petitioner’s attorney... a verified statement in compliance with N.Y. Lien Law §76(4).”

Claiming Respondents failed to comply with the Order, Petitioner now moves to hold Respondents in contempt, for an order “returning Petitioner’s trust funds”, imprisoning Respondent Weise and for their attorney’s fees, costs and disbursements. Respondents oppose the motion and cross move to dismiss, for change of venue or to consolidate this proceeding with a foreclosure action pending in Supreme Court, New York County. Because Petitioner demonstrated Respondents’ repeated failure to comply with the Order, its motion for contempt is granted. Respondents’ various cross motions, however, are unsupported and denied.

As is applicable here, Lien Law §76(4) entitles a trust beneficiary to “a statement, subscribed by the trustee or an officer thereof and verified on his own knowledge, setting forth the entries with respect to the trust contained in the books and records kept by the trustee pursuant to [Lien Law] §75 and the names and addresses of the person or persons who...consented to the making of the payments shown.” (*see Bette & Cring, LLC. v. Brandle Meadows, LLC.*, __ AD3d __ [3d Dept 2011]; *Conforti & Eisele v. Salzstein & Co.*, 56 AD2d 292, 294 [1977]). Correspondingly, “[p]ursuant to Lien Law §75(3), the trustee’s [i.e. Respondents’] books or records shall contain entries regarding trust assets receivable, trust accounts payable, trust funds received, trust payments made with trust assets, and transfers in repayment of or to secure advances made pursuant to a ‘Notice of Lending,’ together with specific information underlying each trust transaction.” (*Bette & Cring, LLC. v. Brandle Meadows, LLC.*, *supra* [emphasis added]).

Here, not one of the three Lien Law Statements Respondents served on Petitioner

complied with Lien Law §76.

Respondents' first purported Lien Law Statement, dated December 24, 2009, consisted of a cover letter enclosing a packet of unexplained documents. It enclosed copies of: eight "Acknowledgment of Partial Payment and Lien Waiver[s]", seven checks, one fax cover page and two mortgages. Clearly, such submission does not comply with any of the Lien Law §§76(1, 4) or 75(3) requirements.

Similarly non-compliant was Respondents' second alleged Lien Law Statement, dated January 20, 2010. It consisted of an unverified letter and a four page unsigned and unverified spreadsheet. (Lien Law §76[4]). The letter, in general, discussed assets receivable, but provided no explanation for the "conditions upon which certain trust assets would become receivable [i.e. 'forthcoming']." (Bette & Cring, LLC. v. Brandle Meadows, LLC., supra; Lien Law §75[3][A][1-3]). Moreover, the spreadsheet's mere listing of vendors (without address) and payments made "fail[ed] to clearly set forth the particulars regarding the contracts for such work (see Lien Law § 75 [3] [D] [5])." (Bette & Cring, LLC. v. Brandle Meadows, LLC., supra). Nor did it identify the person, with address, who consented to each payment. (Lien Law §76[4]).

Then, after Petitioner made this motion and in opposition hereto, Respondents served a third defective Lien Law Statement, dated January 4, 2011. Although this statement was verified, it again failed to provide the name, and address, of the individual who consented to each payment out of the trust fund. (Lien Law §76[4]). Nor did it distinguish between accounts payable and paid or identify whether "any such payment was made pursuant to a contract... the date when such contract was made, whether it was oral or in writing, and the agreed price named therein." (Lien Law §75[3][D]). Moreover, "respondent[s] failed to supply any information

regarding transfers pursuant to a ‘Notice of Lending’ (Lien Law § 75 [3] [E]).” (Bette & Cring, LLC. v. Brandle Meadows, supra).

In accord with the foregoing, Petitioner duly demonstrated that Respondents did not serve a Lien Law Statement that complied with Lien Law §76. With such failure, Petitioner demonstrated Respondents’ contempt of this Court’s Order.

“To warrant a [civil contempt] finding, it must be established that there was a lawful court order in effect that clearly expressed an unequivocal mandate, that the person who allegedly violated the order had actual knowledge of it’s terms and that his or her actions or failure to act defeated, impaired, impeded, or prejudiced a right of the moving party.” (Hamilton v. Murphy, 79 AD3d 1210, 1212–13 [3d Dept. 2010], quoting Beneke v. Town of Santa Clara, 61 AD3d 1089, 1090 [3d Dept. 2009]; Judiciary Law §753; East Coast Wholesalers, Inc. v. John J. Moran Co., Inc., 42 AD2d 605 [2 Dept. 1973]; Bel-Aqua Pool Supply, Inc. v. Ocean Blue Pools, Inc., 215 NYS2d 637 [Sup Ct, Nassau County 1961]).

Here, it is undisputed that, Respondents had knowledge of this Court’s lawful Order, as they have attempted to comply with its terms three times. Similarly undisputed is the clarity and unequivocal mandate of this Court’s Order. It simply requires Respondents to “serve upon Petitioner’s attorney...a verified statement in compliance with N.Y. Lien Law §76(4).” Moreover, Respondents’ defective Lien Law Statements impaired Petitioner’s uncontested right to a verified statement that complied with Lien Law §76.

Accordingly, Petitioner’s motion for contempt of this Court’s Order is granted.

On this record, however, Petitioner has not established the actual damages Respondents’ contempt caused. Petitioner submits no probative evidence establishing its damages and its Lien

Law §79-a violation claim amounts to nothing more than unsupported conclusory speculation. Moreover, the contempt Respondents committed, failure to provide a Lien Law §76 statement, does not rise to a level requiring imprisonment. As such, pursuant to Judiciary Law §773, Respondents are hereby fined: two hundred and fifty dollars along with the costs and expenses, including attorney's fees, Petitioner incurred due to Respondents' contempt. (Hamilton v. Murphy, Lembo v. Mayendia-Valdes, supra; Lembo v. Mayendia-Valdes, 293 AD2d 789 [3d Dept. 2002]).

Respondents may purge their contempt if they fully comply with this Court's Order within thirty (30) days of the date this Decision and Order is served upon them. (East Coast Wholesalers, Inc. v. John J. Moran, Co., supra). In the event Respondents fail to purge their contempt, Petitioner shall submit to this court, on notice, evidentiary proof demonstrating the costs and expenses (including attorney's fees) it incurred due to Respondents' contempt. The Respondents will then have ten (10) days, from the date they are served with such submission, to submit opposition papers thereto. Upon such papers, this Court will determine Petitioner's fine.

Turning to Respondents' cross-motion to dismiss, as set forth above and contrary to Respondents' contentions, Petitioner duly demonstrated Respondents failure to comply with this Court's Order. As Respondents' motion to dismiss is premised upon their allegation that they complied with this Court's Order, their motion to dismiss is denied.

Respondents' motions to change venue and for consolidation are similarly unavailing. Respondents failed to comply with CPLR §511(a and b)'s "improper county" procedure, requiring denial of their motion on that theory. (Callanan Industries, Inc. v. Sovereign Const. Co., Ltd., 44 AD2d 292 [3d Dept. 1974]; Thomas v. Guttikonda, 68 AD3d 853 [2d Dept. 2009]).

Similarly, Respondents' motion to change venue on either discretionary ground (CPLR §510[2 and 3]) is denied because they failed to make this motion "within a reasonable time after commencement of th[is proceeding]." (CPLR §511[a]). Lastly, because the pendency of a related foreclosure action does "not alter respondent's obligation to provide a verified statement fully compliant with the Lien Law" (Bette & Cring, LLC. v. Brandle Meadows, supra) there is no basis upon which to consolidate this proceeding with the foreclosure proceeding in Supreme Court, New York County.

To the extent not specifically addressed above, the parties' remaining contentions have been examined and found to be lacking in merit.

Accordingly, Petitioner's motion for contempt is granted, in accord with the foregoing; and Respondents' cross-motion is denied in its entirety.

This Decision and Order is being returned to the attorneys for the Petitioner. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: April 15, 2011
Albany, New York


JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated October 14, 2010; Affirmation of Nathan R. Sabourin, dated October 14, 2010, with attached Exhibits A-E.
2. Notice of Cross-Motion, dated February 3, 2011; Affidavit of Martin Weise, dated February 3, 2011, with attached Exhibits A-B.
3. Affirmation of Jeremy M. Smith, dated February 11, 2011, with attached Exhibits A-D; Affirmation of Kate T. Loughney, dated February 11, 2011, with attached Exhibit A.