

Dorkin v APV-RE Dev. 2003-1 Corp.

2011 NY Slip Op 31398(U)

May 13, 2011

Supreme Court, Nassau County

Docket Number: 23422/10

Judge: Denise L. Sher

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

MARTIN DORKIN d/b/a
M. DORKIN LICENSED ELECTRICAL CONTRACTOR,

TRIAL/IAS PART 32
NASSAU COUNTY

Plaintiff,

Index No.: 23422/10
Motion Seq. Nos.: 01, 02
Motion Dates: 03/01/11
02/21/11

- against -

APV-RE DEVELOPMENT 2003-1 CORP.,
37 ATLANTIC ASSOCIATES, LLC.,
DAWN M. ZICCARDI and ITZAK HERSHKO, Individually
and d/b/a CHARLES GIBSON STEAKHOUSE and
ATLANTIC NATIONAL REALTY,

Defendants.

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion (Seq. No. 01), Affidavits and Exhibits and	
Memorandum of Law	1
Affirmation in Opposition and Exhibits	2
Reply Affirmation	3
Notice of Motion (Seq. No. 02), Affidavit, Affirmation and Exhibits and	
Memorandum of Law	4
Affirmations in Opposition and Exhibits	5
Reply Affirmation	6

Defendants, Dawn M. Ziccardi ("Ziccardi") and Itzak Hershko ("Hershko"), move (Seq. No. 01), pursuant to CPLR §3211(a)(7), for an order dismissing plaintiff's complaint.

Defendants APV-RE Development 2003-1, Corp. (“APV-RE”) and 37 Atlantic Associates, LLC (“Atlantic Associates”) move (Seq. No. 02) for the following relief: an order canceling the two mechanics liens filed by plaintiff against the property relevant to the within action; an order pursuant to CPLR § 6514, vacating and canceling the Notice of Pendency filed against the subject property, and for an order pursuant to CPLR § 3211(a)(1) and (7), as well as CPLR § 3212, dismissing the within action.

The underlying action was commenced by plaintiff as a result of an alleged breach by defendants Ziccardi and Hershko of two agreements wherein plaintiff agreed to perform certain labor and services at a building situated at the corner of Atlantic Avenue and Stauderman Avenue in Lynbrook, New York. *See* Defendants Ziccardi and Hershko’s Affidavits in Support Exhibit A, Verified Complaint at ¶¶12,15. *See also* Defendants APV-RE and Atlantic Associates’ George Papadogiannis Affidavit in Support at ¶2. Said property is comprised of at least two commercial units in addition to an onsite parking lot and bears an address of 44 Stauderman Avenue a/k/a 43 Atlantic Avenue, Lynbrook, New York.. *See* Defendants APV-RE and Atlantic Associates’ George Papadogiannis Affidavit in Support at ¶ 5; Defendants Ziccardi and Hershko’s Affidavits in Support, Ziccardi Affidavit at ¶1.¹

On or about September 20, 2009, the first of the two agreements was entered into by and between plaintiff and defendants Ziccardi and Hershko, whereby plaintiff agreed to provide

¹ At all times relevant herein, the subject property was owned by defendants APV-RE and Atlantic Associates until August 24, 2010, when said defendants sold the subject property to defendant Atlantic National Realty, LLC. *See* Defendants APV-RE and Atlantic Associates’ George Papadogiannis Affidavit in Support at ¶3. *See also* Defendants APV-RE and Atlantic Associates’ Affidavit in Support Exhibit C. In connection thereto, defendants APV-RE and Atlantic Associates, agreed to defend and indemnify defendant Atlantic National Realty, LLC against any actions to foreclose upon the subject mechanics’ liens. *See* Defendants APV-RE and Atlantic Associates’ Thomas S. Tripodianos Affirmation in Support at Footnote 3.

“certain labor, services, and materials for a work of improvement at a business location known as Alpha Dogs * * * for an agreed contract price of \$14,000.” See Defendants Ziccardi and Hershko’s Affidavits in Support Exhibit A, Verified Complaint ¶12. Thereafter, on or about October 25, 2009, plaintiff entered into a second agreement with defendant Ziccardi, who was allegedly acting on behalf of both herself, as well as defendant Charles Gibson Steakhouse, and whereby plaintiff agreed to “furnish certain labor, services, and materials for work of improvement on the portion of the Building parcel located at 44 Stauderman Avenue, for an agreed contract price of \$22,050.00.” See Defendants Ziccardi and Hershko’s Affidavits in Support Exhibit A, Verified Complaint at ¶¶15,19.

Plaintiff alleges that, notwithstanding his performance of the terms of the agreements, there remains an outstanding balance of \$9,500.00 due an owing on the first agreement and an outstanding balance of \$22,050.00 in relation to the second agreement. See Defendants Ziccardi and Hershko’s Affidavits in Support Exhibit A, Verified Complaint at ¶19. As a result thereof, on June 3, 2010 and June 7, 2010, respectively, plaintiff filed separate Notices of Mechanics’ Liens with the Nassau County Clerk. See Defendants APV-RE and Atlantic Associates’ George Affidavit and Affirmation in Support Exhibits D and F.

Thereafter, on or about December 23, 2010, plaintiff commenced the underlying action which contains four causes of action, the First of which sounds in Breach of Contract, the Second of which sounds in *Quantum Meruit*, the Third of which seeks to foreclose on the above noted mechanics’ liens and the Fourth of which sounds in Unjust Enrichment. See Defendants Ziccardi and Hershko’s Affidavits in Support Exhibit A, Verified Complaint at ¶¶8-24, 25-33, 34-36, 40-48. Simultaneously therewith, plaintiff filed a Notice of Pendency against the subject

property. *See* Defendants Ziccardi and Hershko's Affidavits in Support Exhibit A. The instant applications respectively interposed by the moving parties herein thereafter ensued and are determined as set forth hereinafter.

The Court initially addresses the application interposed by defendants Ziccardi and Hershko (Motion Seq. No. 01). In support thereof, counsel argues that said defendants were merely members of the limited liability companies with whom plaintiff dealt and, in accordance with Limited Liability Company Law § 609, said defendants are not personally responsible for the debts incurred thereby. *See* Defendants' Ziccardi and Hershko's Memorandum of Law at Point II. *See also* Defendants' Ziccardi and Hershko's Reply Affirmation at ¶2. Counsel provides the affidavit of defendant Ziccardi, who avers, *inter alia*, that she was not the tenant doing business as Charles Gibson Steakhouse and rather "the tenant at the premises [was] * * * Pure 44 LLC." *See* Defendants' Ziccardi and Hershko's Ziccardi Affidavit in Support at ¶2; Defendants' Ziccardi and Hershko's Affidavits in Support Exhibit B. Counsel further provides the affidavit of defendant Hershko, who similarly states that the actual tenant at the premises was "Pure 44 LLC." *See* Defendants' Ziccardi and Hershko's Hershko Affidavit in Support at ¶2.

The application is opposed by plaintiff, who asserts that he was hired by both defendants Ziccardi and Hershko as a licensed electrical contractor, and, as proof thereof, has provided copies of two checks, which were remitted as partial payment for the work performed. *See* Plaintiff's Affidavit in Opposition at ¶¶2,3,7. *See also* Plaintiff's Affidavit in Opposition Exhibits 1 and 2.

On an application interposed pursuant to CPLR § 3211(a)(7), the complaint is to be liberally construed and the plaintiff afforded every favorable inference which may be drawn

therefrom. *See Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994). The facts as alleged are to be accepted as true, although bare legal conclusions, in addition to factual assertions which are squarely contradicted by the record, are not entitled to any such consideration. *See Doria v. Masucci*, 230 A.D.2d 764, 646 N.Y.S.2d 363 (2d Dept. 1996); *Mayer v. Sanders*, 264 A.D.2d 827, 695 N.Y.S.2d 593 (2d Dept. 1999). In entertaining such an application, the function of the motion court is only to determine whether the facts as alleged fall within a cognizable legal theory. *See id.* “In assessing a motion to dismiss under 3211(a)(7) . . . a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint.” *Leon v. Martinez, supra* at 88.

Within the particular context of defendants Ziccardi and Hershko’s application *sub judice*, “[a] member of a limited liability company may not be held personally liable on contracts entered into by his or her company, provided he or she did not purport to bind himself individually under the contract.” *Panasuk v. Viola Park Realty, LLC*, 41 A.D.3d 804, 839 N.Y.S.2d 520 (2d Dept. 2007). In the instant matter, plaintiff alleges that, at the behest of defendants Ziccardi and Hershko, he did electrical work on the premises occupied by the businesses Alpha Dogs, as well as Charles Gibson Steakhouse. However, there is no evidence herein that the individual defendants Ziccardi and Hershko either leased the property at which the work was performed or that they contracted with plaintiff therefor. *See id.* Rather, a review of the leases relevant to the subject property indicates that with respect to the business known as Alpha Dogs, the tenant thereon was Alpha Dogs LLC, and as to Charles Gibson Steakhouse, the tenant listed on said lease is Pure 44 LLC. The Court notes that plaintiff has not provided any written contract memorializing the purported agreements or any other evidence demonstrating that defendants Ziccardi and Hershko acted in their individual capacities. Further,

the copies of checks offered in opposition to instant application demonstrate that while defendants Ziccardi and Hershko's signatures appear thereon, the accounts from which the funds were drawn belonged to limited liability companies.

Therefore, based upon the foregoing, the motion (Seq. No. 01) interposed by defendants Ziccardi and Hershko, made pursuant to CPLR § 3211(a)(7) and which seeks an order dismissing plaintiff's complaint with respect to said defendants, is hereby **GRANTED**.

The Court now addresses the application interposed by defendants APV-RE and Atlantic Associates. In support thereof, counsel for defendants APV-RE and Atlantic Associates asserts that the Notices of Liens filed by plaintiff are jurisdictionally defective pursuant to Lien Law § 9(2). Specifically, counsel contends that plaintiff has failed to identify Alpha Dogs, LLC and Pure 44, LLC as the proper owners of the leasehold interests on the various lien notices, warranting both the cancellation thereof and dismissal of the within action to foreclose thereon. Counsel further contends that plaintiff never acquired a valid lien as he neither obtained the consent of the property owners to undertake the work performed, nor entered into any contracts therewith. Counsel stresses that the owner of the subject premises "was not an affirmative factor in procuring the improvements while in possession or control of the premises," and given the failure of plaintiff to allege same in the complaint, in addition to the provisions of Lien Law § 3, the lien notices must be cancelled and the within action dismissed. Counsel finally posits that the terms of leases relevant herein expressly require the tenants to remove any improvements which they have undertaken at the subject property and as such the owners thereof would not receive any benefit from which their consent as to the improvements could be inferred.

Plaintiff opposes defendants APV-RE and Atlantic Associates' instant application.

“It is well established that the purpose of the mechanics’ lien statute is to provide an added degree of protection to persons who provide labor or material for construction projects by providing an independently enforceable security interest upon the construction property.” *Stober Bros. Inc. v. Kitano Arms Corp.*, 224 A.D.2d 351, 638 N.Y.S.2d 90 (1st Dept. 1996). The statute is remedial in nature and must be liberally construed so as to give effect to the purposes for which it was promulgated. *See id.*; *Tri-City Electric Co., Inc. v. People*, 96 A.D.2d 146, 468 N.Y.S.2d 283 (4th Dept. 1983) *affd* 63 N.Y.2d 969, 483 N.Y.S.2d 990 (1984). Lien Law § 23 provides the following: “This article is to be construed liberally to secure the beneficial interests and purposes thereof. A substantial compliance with its several provisions shall be sufficient for the validity of a lien and to give jurisdiction to the courts to enforce same.” However, notwithstanding the direction that the statute be liberally construed, the courts should not interpret same so as to enlarge the ambit and intendment thereof. *See Tri-City Electric Co., Inc. v. People, supra.*

In the instant matter, as noted above, counsel for defendants APV-RE and Atlantic Associates contends that the Notices of Liens are jurisdictionally defective as a result of plaintiff’s failure to include thereon the owners of the leaseholds. Lien Law § 9, provides that the a notice of lien shall contain “[t]he name of the owner of the real property against whose interest therein a lien is claimed, and the interest of the owner as far as known to the lienor.” *See* Lien Law §9(2). Here, contrary to counsel’s assertions, the Notices of Lien at issue quite clearly contain the names of the entities which owned the subject premises when the plaintiff’s services were purportedly provided.

Additionally, with respect to the defendants APV-RE and Atlantic Associates’ purported

lack of consent *vis a vis* the work provided by plaintiff, this Court, as is permitted on an application made under CPLR §3211(a)(7), has reviewed and considered the affidavit submitted by plaintiff.² See *Leon v. Martinez*, *supra* at 88; *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 389 N.Y.S.2d 314 (1976). As recited therein, plaintiff avers that while working at the job site, he had several conversations with Mr. Michael Kromar, President of defendant APV-RE, and that Mr. Kromar was cognizant of an approved the work being done at the subject premises. See Plaintiff's Affidavit in Opposition at ¶¶5,6,7,9. More specifically, plaintiff states that "Mr. Kromar and I had discussions regarding the work being performed * * * and the material supplied to the building" and that "at no time did [he] ever say anything or indicate to me that he did not want me to proceed with the work I was doing." See Plaintiff's Affidavit in Opposition at ¶¶ at 5,6.

Thus, liberally construing plaintiff's allegations, accepting them as true and drawing every favorable inference therefrom, defendants APV-RE and Atlantic Associates' instant motion (Seq. No. 02), for an order canceling the two mechanics liens, vacating and canceling the Notice of Pendency and dismissing the within action is hereby **DENIED** in its entirety. All applications not specifically addressed are denied.

It is further ordered that the parties shall appear for a Preliminary Conference on June 27, 2011, at 9:30 a.m., at the Preliminary Conference Desk in the lower level of 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this Order

² The Court notes that the while plaintiff's Affidavit is improperly labeled an "Affirmation", the form thereof comports with the requirements of an Affidavit and accordingly was considered as such.

shall be served on all parties and on the DCM Case Coordinator. There will be no adjournments, except by formal application pursuant to 22 NYCRR § 125.

This constitutes the Decision and Order of this Court.

ENTERED
MAY 19 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE

ENTER:



DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
May 13, 2011

ENTERED
MAY 19 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE