

**International Exterior Fabricators, LLC v J. Petrocelli  
Contr., Inc.**

2011 NY Slip Op 31545(U)

February 23, 2011

Sup Ct, NY County

Docket Number: 101679/10

Judge: Alexander W. Hunter Jr

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

PRESENT: Hunter  
*Justice*

PART 33

INTERNATIONAL EXTERIOR  
FABRICATIONS, LLC,  
Plaintiff,  
- v -

INDEX NO. 101679/10  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 03  
MOTION CAL. NO. \_\_\_\_\_

J. PETROCELLI CONTRACTING, INC. et al  
Defendants.

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

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

PAPERS NUMBERED

1  
2  
3

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion IS DECIDED IN  
ACCORDANCE WITH THE ATTACHED MEMORANDUM  
DECISION.

**FILED**

APR 11 2011

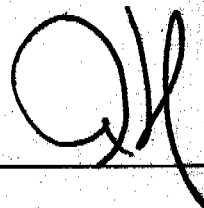
NEW YORK  
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NYS SUPREME COURT  
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MOTION SUPPORT OFFICE

Dated: FEBRUARY 23, 2011



J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE  
 SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

6  
4-11-11

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 33

-----X  
INTERNATIONAL EXTERIOR  
FABRICATIONS, LLC,

Plaintiff,

-against-

Index No. 101679/10

J. PETROCELLI CONTRACTING, INC., 245  
10<sup>TH</sup> AVENUE, LLC, J&A CONCRETE  
CORP. DITMARS CONSTRUCTION CORP.,  
CROSSROADS CONSTRUCTION CORP.,  
FAST RESPONSE, INC., LIF INDUSTRIES,  
INC., DEM INTERIORS, LLC, P.I.  
MECHANICAL CORP., HIGHTOWER  
CONSTRUCTION, INC., MEGA PAINTING &  
DECORATING, INC., GREENWICH  
VILLAGE PLUMBERS' SUPPLY CORP.,  
HANDRAIL DESIGN, INC., CROWNE  
CONSULTING, L.L.C., CITIGROUP GLOBAL  
MARKETS REALTY CORP. and "JOHN DOE  
NO.1" though "JOHN DOE NO. 5,"

DECISION AND ORDER

Defendants.

-----X  
ALEXANDER W. HUNTER, JR., J:

The motion by defendant Citigroup Global Markets Realty Corp ("Citigroup") for summary judgment dismissing plaintiff's fourth cause of action is granted. The cross motion by plaintiff International Exterior Fabricators, LLC for (1) summary judgment establishing that its mechanic's lien is superior to Citigroup's mortgages against the premises; (ii) amending the complaint to conform to the evidence reflecting that the plaintiff's mechanic's lien is superior to the Citigroup mortgages; and (iii) consolidation of the Citigroup action with plaintiff's action is denied in all respects.

Defendant Citigroup seeks the dismissal of plaintiff's fourth cause of action in its complaint, which seeks to enforce plaintiff's alleged mechanic's lien.

Citigroup is the holder of two mortgages encumbering property at 245 10<sup>th</sup> Avenue in New York, New York ("the property") and earlier last year it commenced a mortgage foreclosure action that is currently pending before this Court. The two mortgages secured loans

made by Citigroup to defendant 245 10<sup>th</sup> Avenue LLC ("245"), the property owner, for the construction of condominiums on the property.

In this action, plaintiff, a sub-contractor who allegedly worked on that construction project, brought suit to seek payment from the general contractor, defendant J. Petrocelli Contracting, Inc. ("Petrocelli") and to enforce plaintiff's purported mechanic's lien which it claims it filed against the property.

Only the fourth cause of action asserted by plaintiff is the focus of this proceeding. In the cause of action, plaintiff claims that its mechanic's lien is superior to any interests or liens held by the defendants, including the mortgages held by Citigroup. Specifically, plaintiff claims that Citigroup failed to timely file its building loan agreement in violation of New York Lien Law § 22. Plaintiff alleges that Citigroup entered into "several building loan modifications," did not file them within ten days of their execution, and did not file them "on or before" the date Citigroup's mortgages were recorded.

Summary judgment is appropriate here. Section 22 of the New York Lien Law only requires that a building loan agreement be filed "on or before the date of recording the building loan mortgage made pursuant thereto." The only exception is that any *subsequent* modification to such a building loan agreement must be filed with ten days of its execution.

The filing of Citigroup's building loan agreement was performed in compliance with New York Lien Law § 22. First, there was only *one* building loan agreement between Citigroup and the borrower/owner and the loan agreement was executed on September 6, 2007, the very same day it entered into the related building loan mortgage. Second, this building loan agreement was filed with the New York County Clerk on December 20, 2007, many months *before* the related building loan mortgage was recorded with the New York City Register on February 26, 2008. Third, there were *no* subsequent modifications to that loan agreement. Therefore, the ten-day exception in New York Lien Law § 22 is inapplicable.

Since these facts are not disputed or denied, the building loan agreement was properly and timely filed as a matter of law. Therefore, Citigroup's building loan mortgage is senior to plaintiff's alleged mechanic's lien.

## STATEMENT OF FACTS

In the related action, *Citigroup Global Markets Realty Corp. v. 245 10<sup>th</sup> Avenue, LLC et al.*, No. 600679/10 (Sup. Ct. N.Y. County), Citigroup is seeking to foreclose on two mortgages it holds on the property securing loans made to the owner of the property, defendant 245. Only one of these mortgages is relevant here, that is, Citigroup's building loan mortgage dated September 26, 2007.

In 2006, defendant 245 purchased the property intending to construct condominiums. To finance the construction and marketing of the condominiums, it sought and received numerous loans. Towards that end, defendant 245 hired defendant Petrocelli to serve as the general contractor for the construction of the condominiums, and Petrocelli engaged subcontractors to perform specialized work on the project, including the plaintiff. Plaintiff alleges that it has not received complete payment for the work it claims to have performed on the project.

In September 2007, defendant 245 sought additional funding for this project. Citigroup provided project loan financing for marketing and other costs, and this debt was secured with a mortgage that is not relevant to this action. In addition, Citigroup provided the owner with additional construction funding. As part of that construction loan package, on September 26, 2007, Citigroup was assigned an existing predecessor mortgage on the property, as well as a predecessor building loan agreement. Citigroup also created an additional gap mortgage to secure the additional funding provided with its building construction loan.<sup>1</sup>

The assigned predecessor mortgage and the newly created gap mortgage were then consolidated to create an entirely new mortgage to secure all of the funding provided by Citigroup in its construction loan package (the "Citigroup Building Loan Mortgage"). Citigroup entered into two agreements with defendant 245 to memorialize the terms of the new Citigroup Building Loan Mortgage and the new indebtedness secured by that new lien, namely, the parties executed (i) the Amended and Restated Building Loan Agreement and (ii) the Consolidated,

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<sup>1</sup> The history of the building loan financing is detailed in Defendant Citigroup's complaint in its related mortgage foreclosure action, which is attached as Exhibit 1 to Defendant Citigroup's answer in this action. That Answer is attached as Exhibit B to the accompanying Berry Affirmation.

[\* 5]  
Amended and Restated Building Loan Mortgage and Security Agreement, each dated September 26, 2007. The latter loan agreement (the "Citigroup Building Loan Agreement") is the contract that is at issue here.

Citigroup filed the Citigroup Building Loan Agreement with the New York County Clerk on December 20, 2007. The Citigroup Building Loan Agreement included a written and notarized statement by Defendant 245, confirming the consideration to be paid for the loan and the net sum available to the owner. Two months later, the Citigroup Building Loan Mortgage was recorded on February 26, 2008 at the City Register, file No. 2008000077823, and all required taxes and charges were paid. The filing of the Citigroup Building Loan Agreement and the subsequent recording of the Citigroup building loan mortgage are evidenced by the cover pages for each of these documents.

Plaintiff alleges it satisfactorily and timely performed the work it was hired to do by Petrocelli but has not received full compensation. So, on November 13, 2009, a year and a half after the Citigroup Building Loan Mortgage was recorded, plaintiff filed a Notice of Mechanic's Lien against defendant 245 for \$361,990.99.

On or about February 8, 2010, plaintiff commenced this action to recover monies allegedly owed by Petrocelli and to enforce its mechanic's lien against the defendants.

In its complaint, plaintiff alleges that Citigroup and Defendant 245 "entered into several modified building loan contracts ("the Building Loan Contracts") including subsequent modifications of the Building Loan Contracts." Plaintiff further alleges that Citigroup did not file these so-called "Building Loan Contracts" and their subsequent modifications "with the New York County Clerk within ten days after their execution." In addition, plaintiff contends that these "Building Loan Contracts" were not filed "on or before the date of the filing of the (Citigroup Building Loan Mortgage)." Thus, plaintiff contends that its mechanic's lien has priority over the Citigroup Building Loan Mortgage.

#### **CONCLUSIONS OF LAW**

Citigroup is entitled to summary judgment because it filed the Citigroup Building Loan Agreement before the corresponding Citigroup Building Loan Mortgage was recorded which is all the New York Lien Law§ 22 requires. Summary judgment must be granted if Citigroup establishes its "defense 'sufficiently to warrant a court as a matter of law in directing judgment'

[\* 6]

in [its] favor.” *Zuckerman v. City of N.Y.*, 49 N.Y. 2d 557, 562, 404 N.E. 2d 718, 427 N.Y.S.2d 595 (1980) (quoting N.Y. C.P.L.R. 3212(b)). Once that showing is established, plaintiff will have the burden of showing, in admissible form, that “material questions of fact” exist. *Id.* “[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient.” *Id.*; see also *HSBC Mortgage Servs., Inc. v. Alphonso*, 16 Misc.3d 1131 (A), Slip Copy, 2007 WL 2429711, at \*1 (N.Y. Sup. Ct., Kings County 2007), *aff’d*, 58 A.D.3d 598, 874 N.Y.S.2d 131 (2d Dep’t 2009) (granting summary judgment where priority of mortgages was in dispute).

Here, plaintiff speculates that its alleged mechanic’s lien is somehow superior to the Citigroup Building Loan Mortgage under the New York Lien Law. But that speculation is based on a misunderstanding of the facts concerning the filing of the Citigroup Building Loan Agreement and the recording of the related Citigroup Building Loan Mortgage.

Section 22 of the New York Lien Law governs the priority of liens related to building loans. See N.Y. Lien Law § 22 (2010). The purpose of the statute is to establish a system of public notice that allows contractors to determine the amount of funds available to finance the construction project and thus to pay for their services. See *Howard Savings Bank v. Lefcon P’ship*, 209 A.D.2d 473, 475, 618 N.Y.S.2d 910, 913 (2d Dep’t 1994).<sup>2</sup> Thus, the statute sets forth two conditions that must be satisfied for a mortgage securing a building loan contract to be enforceable. See N.Y. Lien Law § 22 (2010). First, a building loan contract must be in writing and include, among other things, the net sum available to the borrower for the intended improvement. See *id.*<sup>3</sup> Second, the building loan contract must be filed in the County Clerk’s Office before the related mortgage is recorded:

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<sup>2</sup> See also *Realty Improvement Funding Co. v Stillwell Gardens, Inc.*, 91 Misc. 2d 718, 719, 398 N.Y.S.2d 480, 481 (N.Y. Sup. Ct. Westchester County 1977) (describing policy behind enactment of statute); *New York Savings Bank v. Wendell Apartments, Inc.*, 41 Misc. 2d 527, 529, 245 N.Y.S.2d 827, 829 (N.Y. Sup. Ct. Nassau County 1963) (internal citations omitted).

<sup>3</sup> New York Lien Law defines a “building loan contract” as “a contract whereby a ... ‘lender, ‘ in consideration of the express promise of an owner to make an improvement upon real property, agrees to make advances to or for the account of such owner to be secured by a mortgage on such real property.” N. Y. Lien Law § 2, subd. 13 (2010).

[\* 7]

A building loan contract ... must... on or before the date of recording the building loan mortgage made pursuant thereto, to be filed in the office of the clerk of the county in which any part of the land is situated, except that any subsequent modification of any such building loan contract so filed must be filed within ten days after the execution of any such modification. *Id.* (emphasis added).

This provision ensures that the terms of a construction loan are filed publicly (before the recording of the related mortgage) to give contractors full notice of the funds available to pay them, and that any subsequent amendments to those terms are made public in a timely manner. If these requirements are not met, a mechanic's lien is given priority over the mortgage securing the construction loan. *See id; Howard Savings Bank*, 209 A.D.2d at 475, 618 N.Y.S.2d at 913 (holding mortgagee kept priority over liens as it properly filed building loan agreement pursuant to N.Y. Lien Law § 22).

Herein, these requirements have been satisfied. The Citigroup Building Loan Agreement was filed on December 20, 2007. The Citigroup Building Loan Mortgage, which secures the indebtedness governed by that loan agreement, was recorded more than two months later on February 26, 2008. Thus, the "building loan contract" was filed "on or before the date of recording" of the "building loan mortgage made pursuant thereto." N.Y. Lien Law § 22. No more was required by Lien Law § 22 to ensure the priority of the Citigroup Building Loan Mortgage.

In its complaint, however, plaintiff contends that its mechanic's lien is superior because the Citigroup Building Loan Agreement was not filed within ten days of its execution on September 26, 2007. But that ten-day filing requirement has no applicability here. There is no question that the Citigroup Building Loan Mortgage was "made pursuant to" the Citigroup Building Loan Agreement - this mortgage was newly created to secure the additional funding governed by that loan agreement - and it was created on the same day that loan agreement was executed. Thus, Lien Law § 22 only required the Citigroup Building Loan Agreement to be filed before the Citigroup Building Loan Mortgage was recorded which was done here. The ten-day filing requirement would only have applied if there were *subsequent* modifications to the Citigroup Building Loan Agreement, and in this case, there were none.

As a result, Citigroup complied with all aspects of § 22 of the New York Lien Law. Accordingly, Plaintiff's alleged mechanic's lien is junior to the Citigroup Building Loan Mortgage because the Citigroup mortgage was recorded almost two years before plaintiff's

alleged lien. Plaintiff's fourth cause of action against Citigroup requires dismissal as a matter of law.

The subject Project Loan Mortgage was not consolidated with, and is entirely separate from, the subject Building Loan Mortgage at issue. Thus, the Project Loan Mortgage retains priority over plaintiff's lien. Moreover, at the very least, the prior consolidated mortgage of \$15,224,500.83, that was later consolidated to form the new Project Loan Mortgage, retains its priority over plaintiff's mechanic's lien regardless of any potential Lien Law issues.

A motion for leave to amend a complaint should be denied where it is demonstrated that the cause of action is without merit (e.g., *East Asiatic Co. v. Corash*, 34 AD2d 432 [1<sup>st</sup> Dept 1970]). By virtue of all the foregoing, there can be no question that plaintiff's fourth cause of action, claiming priority over Citigroup's first two mortgages, and to which this motion is addressed, should be dismissed. As a result, plaintiff's request for leave to amend is denied.

By the very same token, plaintiff's related request to consolidate its action with Citigroup's related mortgage foreclosure action is denied. Having demonstrated the non-merit of plaintiff's claim of priority, no purpose is served by any such consolidation. Moreover, plaintiff is already a party in Citigroup's mortgage foreclosure action and, as such, cannot be prejudiced.

Defendant Citigroup is directed to serve a copy of this order with notice of entry upon the plaintiff and the other defendants by regular and certified mail (return receipt not required) at their last known addresses and file proof thereof with the clerk's office.

This decision constitutes the decision and order of this court.

Date: New York, New York  
February 23, 2011



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Alexander W. Hunter, Jr.  
J.S.C.

**FILED**

**APR 11 2011**

NEW YORK  
COUNTY CLERK'S OFFICE