

**40 W. 53rd Assoc. Ltd. Partnership v H. Weiss  
Equip. Corp.**

2011 NY Slip Op 32024(U)

July 18, 2011

Supreme Court, New York County

Docket Number: 117897/09

Judge: Saliann Scarpulla

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

PRESENT: SCARPULLA  
Justice

PART 19

40 WEST 53<sup>RD</sup> ASSOCIATES LTD.  
PARTNERSHIP

INDEX NO.

104998/11

MOTION DATE

MOTION SEQ. NO.

01

MOTION CAL. NO.

- v -  
H. WEISS EQUIPMENT CORP.

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

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*petition is decided in accordance with the accompanying memorandum decision.*

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 7/18/11

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION

SALVANN SCARPULLA  
 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):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 19

----- X  
40 WEST 53<sup>RD</sup> ASSOCIATES LIMITED PARTNERSHIP,

-against-

Petitioner,

Index No.: 117897/09  
Submission Date: 6/29/11

H. WEISS EQUIPMENT CORP.,

**DECISION AND ORDER**

Respondent.

----- X

For Petitioner:  
Rosenberg & Estis, P.C.  
733 Third Avenue  
New York, New York 10017

For Respondent:  
Simon, Eisenberg & Baum, LLP  
24 Union Square East, 5<sup>th</sup> Floor  
New York, New York 10003

Papers considered in review of order to show cause:

- Order to Show Cause.....1
- Petition.....
- Answer.....
- Reply.....

**UNFILED JUDGMENT**

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HON. SALIANN SCARPULLA, J.:

Petitioner and owner 40 West 53<sup>rd</sup> Associates Limited Partnership ("40 West") moves to discharge a Mechanic's Lien placed upon its real property located at 40 West 53<sup>rd</sup> Street, New York, New York, Block 1268, Lot 1001 ("the Property") by respondent and lienor H. Weiss Equipment Corp. ("H. Weiss").

Art Living NY, Inc. ("Tenant") occupied the Property as a tenant and contracted with F.J. Sciame Construction Co., Inc. ("Sciame") to perform construction work on the Property. Sciame subsequently retained H. Weiss to perform additional work in connection with the Property. On January 10, 2011, H. Weiss filed a Mechanic's Lien against the Property alleging that 40 West owes \$222,000.00 for materials manufactured

but not delivered, specifically “manufactured hoods for installation in commercial kitchen.”

In its petition dated April 26, 2011, 40 West asserts that the Mechanic’s Lien is defective and invalid as it fails to comply with the requirements of New York Lien Law §9(6) (“Lien Law §9”), which provides that notice of lien “shall” state the “time when the first and last items of work were performed and materials were furnished.” New York Lien Law §9(6). Specifically, 40 West argues that paragraphs eleven and twelve of the Mechanic’s Lien are insufficient and fail to provide required information regarding the time when the first and last items of work were performed and materials were furnished. In response, H. Weiss asserts that the Mechanic’s Lien is entirely proper and sufficient as the materials were never delivered to 40 West and as such no dates could be provided in the notice of lien.

### **Discussion**

Filing a notice that meets the requirements enumerated in Lien Law §9 creates a valid lien against real property. *See* New York Lien Law §9; *Corina Associates, Inc. v. McManus, Longe, Brockwehl, Inc.*, 39 A.D.2d 613, 614 (3<sup>rd</sup> Dept. 1972); *see Interstate Home Builders, Inc. v. D’Andrea Const., Inc.*, 2001 N.Y. Slip Op. 40515(U) (N.Y. Sup. 2001). A mechanic’s lien which fails to comply with Lien Law §9 may be canceled pursuant to New York Lien Law §19(6) (“Lien Law §19”). *See Retek v. City of New York*, 14 A.D.3d 708 (2<sup>nd</sup> Dept. 2005); *Milbank-Frawley Housing Development Fund Co. v. Marshall Const. Co.*, 335 N.Y.S.2d 598 (N.Y. Sup. 1972). 40 West does not challenge

H. Weiss' right to file the lien. Instead, 40 West argues that the Mechanic's Lien should be discharged because it fails to comply with Lien Law §9(6).

Lien Law §9(6) provides in part that notice of lien "shall" state the "time when the first and last items of work were performed and materials were furnished." New York Lien Law §9(6). A failure to set forth any date regarding when the first or last item of work was performed or materials supplied constitutes a jurisdictional defect and invalidates the notice of lien. *See* 8-92 Warren's *Weed New York Real Property* §92.14[9]. Despite H. Weiss' argument to the contrary this provision is still applicable, even after amendments to the Lien Law were enacted. Lien Law §9(6) exists in part to ensure the timely filing of a lien. *See* 76A N.Y. Jur. 2d *Mechanics' Liens* §66; *see Barrett v. John V. Schaefer, Jr. & Co.*, 162 A.D. 52 (2<sup>nd</sup> Dept. 1914).

Here, the notice of mechanic's lien is fatally flawed because it fails to provide 40 West with any information regarding the time when the first or last item of work was produced and materials furnished and therefore fails to meet the requirements of Lien Law §9(6). Specifically, paragraphs eleven and twelve state respectively that the time when the first and last items of work were performed and materials furnished was "NA." In fact, the body of the notice of mechanic's lien contains no dates whatsoever.

H. Weiss correctly asserts that chapter 507 of the laws of 1916 amended Lien Law §9(4) to include "materials actually manufactured for but not delivered to the real property . . . ." Here, however, 40 West does not suggest that H. Weiss has no right to file a mechanic's lien for materials manufactured but not delivered. Rather it asserts that the notice of mechanic's lien fails to meet notice requirements under §9(6). The changes

made to Lien Law §9 by chapter 507 have not altered the notice requirements of §9(6). Additionally, although H. Weiss asserts that no dates were provided in the notice of lien because materials were produced but not delivered, the notice should have, but did not contain the dates when the items were ordered, manufactured or produced. H. Weiss' Mechanic's Lien does not comply with the notice requirements of Lien Law §9(6), 40 West's petition to discharge the Mechanic's Lien is granted.

In accordance with the foregoing, it is

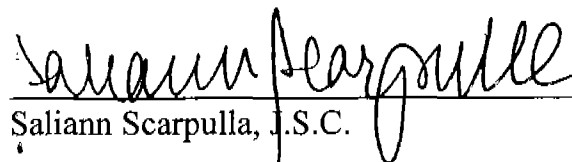
ORDERED and Adjudged that the petitioner 40 West 53<sup>rd</sup> Associates Limited Partnership's petition to discharge the Mechanic's Lien against 40 West 53<sup>rd</sup> Street, New York, New York, Block 1268, Lot 1001 is granted, and the Clerk of the Court is directed to enter judgment discharging the lien of record.

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

Dated: New York, New York

July 18, 2011

ENTER

  
 Saliann Scarpulla, J.S.C.

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