

**Matter of Windermere Holdings, LLC v Murray Eng'g,  
P.C.**

2011 NY Slip Op 32595(U)

September 27, 2011

Supreme Court, New York County

Docket Number: 104351/11

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN

*Justice*

PART 7

In the Matter of the Application of  
WINDERMERE HOLDINGS, LLC,

Petitioner,

Index No.: 104351/11

Motion Seq.: 001, ~~002~~

For an Order Discharging the Mechanic's  
Lien filed by

MURRAY ENGINEERING, P.C.,

Respondent.

Premises: 400-406 West 57<sup>th</sup> Street  
New York, New York  
Block: 1066; Lot 32

**FILED**

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The following papers were read on petitioner's motion to vacate a mechanic's lien and respondent's motion to dismiss petitioner's motion and Interplead a non-party.

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

PAPERS NUMBERED

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Cross-Motion:  Yes  No

Motion sequence numbers 001 and 002 are hereby consolidated for disposition.

In motion sequence number 001, petitioner moves to vacate the mechanic's lien filed by respondent against the building known as the Windermere, located at 400-406 West 57<sup>th</sup> Street, New York, New York, on the ground that the mechanic's lien is null and void, having misidentified petitioner as being the owner of the building.

In motion sequence number 002, respondent moves: (1) pursuant to CPLR 401, 1001 and 1006, for leave to interplead as additional petitioner, nonparty Windermere Properties, LLC, as the actual party-in-interest and a necessary party to respondent's motion to amend the

mechanic's lien; (2) to dismiss petitioner's motion, pursuant to CPLR 404, on the ground that petitioner lacks standing to maintain the action; (3) for leave to amend nunc pro tunc the mechanic's lien, pursuant to New York Lien Law (Lien Law) § 12-a, to list Windermere Properties, LLC as the owner of the subject premises and to allow respondent to serve the amended notice of mechanic's lien upon all required parties; (4) to find, pursuant to Lien Law Article 3A, that (a) any funds in the hands of petitioner are trust assets, (b) that petitioner is the trustee of said trust assets, and (c) that respondent is a proper beneficiary of said trust; and (5) to award respondent its attorney's fees incurred in making the instant motion.

### **BACKGROUND**

Respondent, a subcontractor, alleges that it has not been paid the sum of \$102,883.51 for services rendered by respondent at the subject building. Petitioner asserts that the mechanic's lien filed by respondent is defective, in that it incorrectly names petitioner as the owner of the building (Petition, Ex. A). Petitioner asserts that the owner of the building is Windermere Properties, LLC (Petition, Ex. B) and, as such, the mechanic's lien must be declared null and void and vacated.

According to the mechanic's lien, the last work performed on the property by respondent was on April 22, 2010, and the lien was filed on May 10, 2010.

In opposition to petitioner's motion, and in support of its own motion, respondent asserts that it subcontracted with petitioner, that Lien Law requires that it identify the entity with whom it contracted as well as the entity that owns the property, and that it only learned the name of the true owner of the property when petitioner filed its motion. According to respondent, section 9 (7) of the Lien Law states that a failure to name the true owner, or a misdescription of the true owner, does not affect the validity of the mechanic's lien. Therefore, respondent states, petitioner's motion should be denied, since the mechanic's lien simply misdescribed the owner. Further, respondent avers that Windermere Properties, LLC is owned and operated by the

same principal as petitioner, and has the same address and telephone number as petitioner.

Respondent also points to its proposal for the work, prepared by respondent, which indicates petitioner as the owner of the property, according to respondent's understanding. Respondent asserts that, when Mark Tress (Tress), the manager for both respondent and Windermere Properties, LLC, signed that proposal, thereby transforming it into the subcontract for the work to be performed at the premises, he implicitly acknowledged that petitioner was the owner of the premises (Respondent's Motion, Ex. 5). In addition, according to the Landmarks Preservation Commission application form, again signed by Tress, petitioner is listed as the owner of the property (Respondent's Motion, Ex. 8).

Moreover, respondent alleges that petitioner lacks standing to maintain this action because it is a foreign limited liability company, formed in Delaware, that has not registered to do business in New York. In support of this contention, respondent has included an e-mail that it sent to the owner of Windermere Holdings LLC, indicating that that limited liability company only operates in upstate New York and transacts no business in New York City (Respondent's Motion, Ex. 20). Since there can only be one *limited liability company* registered with that unique name, respondent maintains that petitioner is not authorized to do business in New York and, consequently, cannot maintain the present action.

In addition, respondent states that the portion of its motion seeking to amend the mechanic's lien must be granted before any relief in this action may be awarded, since Windermere Properties, LLC is the true owner and a necessary party, and any action taken by the court without it would adversely affect that party's interests.

Respondent also states that its application to amend the mechanic's lien should be granted because such amendment would not adversely prejudice the rights of any other lienor, mortgagor or good faith purchaser, because there are no other open mechanic's liens filed on the property, no mortgages filed on the property, and no indication that anyone has purchased

the property since the lien was filed (Respondent's Motion, Exs. 3, 7 and 4).

In opposition to respondent's motion, and in reply to respondent's opposition to petitioner's motion, petitioner, on behalf of Windermere Properties, LLC,<sup>1</sup> concedes that Windermere Properties, LLC is a necessary party, that it has no objection that it be interpleaded nunc pro tunc, and that Windermere Properties thereby adopts all of petitioner's claims as its own. Petitioner also contends that, once Windermere Properties, LLC is added as a party to this action nunc pro tunc, it resolves respondent's argument that petitioner lacks standing, since Windermere Properties, LLC is authorized to do business in New York.

Further, respondent points out that a foreign entity that is not authorized to do business in New York is still permitted, under New York law, to defend itself in an action in a New York court. It is petitioner's position that, by naming petitioner as both the owner and the contractor in the mechanic's lien, respondent has placed petitioner in a defensive position.

Petitioner contends that respondent's admitted failure to determine the true owner of the property does not excuse its failure to correctly name the owner on the mechanic's lien. Additionally, petitioner states that Tress did not have a fiduciary relationship with respondent and, therefore, that respondent cannot base its belief on the ownership of the building on what Tress signed. Moreover, Tress provided an affidavit in which he states that those documents were all prepared by respondent in order to advance the project as expeditiously as possible, that he did not notice that he signed those documents on behalf of petitioner rather than on behalf of Windermere Properties, LLC until it was pointed out to him by the attorneys for this litigation, and that, at no time did he intend to mislead respondent (Tress Aff). The Court notes that respondent has failed to provide any affidavit contradicting the averments of Tress in his affidavit.

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<sup>1</sup> Petitioner's attorney affirms that he represents both Petitioner and Windermere Properties, LLC.

Petitioner contends that naming it rather than Windermere Properties, LLC as the owner of the premises is a misidentification rather than a misdescription, which is fatal to the enforceability of the mechanic's lien.

Lastly, petitioner maintains that respondent is not entitled to attorney's fees because the action is not frivolous.<sup>2</sup>

### DISCUSSION

That portion of respondent's motion seeking to interplead Windermere Properties, LLC nunc pro tunc is granted upon the concession of petitioner and Windermere Properties, LLC.

The main issue in contention is whether respondent misidentified or misdescribed the true owner of the property on the mechanic's lien.

"The requirement of Lien Law § 9 (2) that the notice of lien state the name of the owner of the real property must be construed liberally to secure the beneficial interests and purposes of the Lien Law; substantial compliance ... [is] sufficient for the validity of a lien" (*PM Contracting Company, Inc. v 32 AA Associates LLC*, 4 AD3d 198, 199 [1st Dept 2004] [internal quotation marks and citation omitted]). "While a failure to state the true owner or contractor or a misdescription of the true owner will not affect the validity of a notice of lien (Lien Law § 9 [7]), a misidentification of the true owner is a jurisdictional defect which cannot be cured by an amendment nunc pro tunc" (*Tri-State Sol-Aire Corp. v Lakeville Pace Mechanical, Inc.*, 221 AD2d 519, 521-522 [2d Dept 1995] [interior quotation marks omitted] [notice of lien named as owner an entity that possessed no ownership interest in the property, and was, therefore, fatally defective]).

The crucial distinction, for determining the propriety of the notice of lien, lies in the

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<sup>2</sup> It is noted that both sides have written scathing letters to the Court; however, since the Court only addresses motions filed and served pursuant to the CPLR, the letters are simply acknowledged but remain unaddressed.

difference between the misdescription and the misidentification of the owner. With misdescription, the actual owner is identified, but is inaccurately named, such as calling Acme, Inc., Acme LLC. Such misdescription is not fatal to the validity of the notice of lien, and is capable of correction. Conversely, with misidentification, the actual owner is not indicated at all, such as naming Acme, Inc. as the owner when the owner, in fact, is Beta LLC. Such misidentification is fatal to the validity of the notice of lien (*see generally id.*).

In the case at bar, although the names are similar, respondent and Windermere Properties LLC are two totally distinct and separate entities and, had respondent performed a simple title search before filing the mechanic's lien, rather than in response to the instant lawsuit, it would have known the identity of the true owner. Therefore, the court concludes that the name of the owner appearing on the mechanic's lien is a misidentification, not a mere misdescription.

"Where, as here, the notice of mechanic's lien totally misidentifies the true owner of the real property as of the date it was filed, the defect is jurisdictional and the notice is void. The jurisdictional defect is not obviated merely because the misidentification of the true owner of the propert[ies] was the result of an [apparent] failure to make a thorough search of the County Clerk's records" (*Long Indus. Constr. Corp. v Appelaniz*, 298 AD2d 309, 309 [1st Dept 2002] [internal quotation marks and citation omitted]).

As a consequence of the foregoing, the court concludes that the mechanic's lien is null and void, and is hereby vacated.

This determination renders the remainder of respondent's motion moot.

### **CONCLUSION**

Based on the foregoing, it is hereby

ORDERED that the portion of respondent's motion (motion sequence number 002) seeking to interplead Windermere Properties LLC as an additional necessary party is granted nunc pro tunc; and it is further,

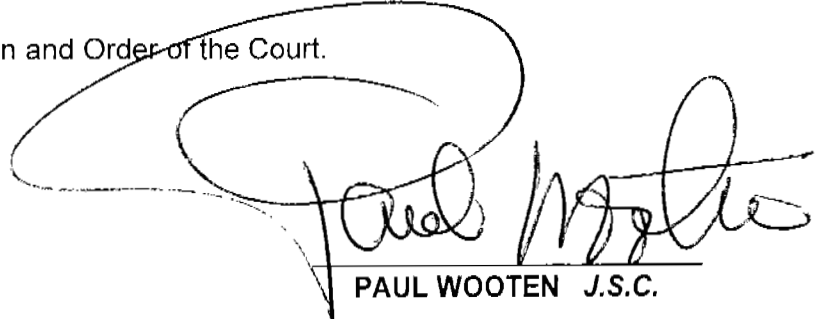
ORDERED that the remainder of respondent's motion is denied as moot; and it is further,

ORDERED that petitioner's motion to vacate and cancel the Notice of Mechanic's Lien filed by Murray Engineering, P.C. (motion sequence number 001) is granted and the mechanic's lien is hereby vacated; and it is further,

ORDERED that petitioner is to serve a copy of this order on the County Clerk who is directed to vacate the mechanic's lien accordingly.

This constitutes the Decision and Order of the Court.

Dated: 9-27-11

  
PAUL WOOTEN J.S.C.

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

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