

**Depth Capital LLC v White Hill Restoration Inc.**

2011 NY Slip Op 32764(U)

October 21, 2011

Sup Ct, NY County

Docket Number: 108203-11

Judge: Judith J. Gische

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**SUPREME COURT OF THE STATE OF NEW YORK**  
**HON. JUDITH J. GISCHE NEW YORK COUNTY**

Index Number : 108203/2011

DEPTH CAPITAL LLC

vs

WHITE HILL RESTORATION INC.

Sequence Number : 001

MECHANIC'S LIEN

PART 10

INDEX NO. 108203/11

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, It is ordered that this motion is


**motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.**

**FILED**

OCT 25 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 10/21/11

  
\_\_\_\_\_  
**HON. JUDITH J. GISCHE**, J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 10**

**FILED**

OCT 25 2011

-----x  
DEPTH CAPITAL LLC, DEPTH CAPITAL II LLC,  
NY 45, LLC, MIDTOWN UNITED LLC AND  
CASSA 28 LLC,

Petitioners,

**-against-**

WHITE HILL RESTORATION INC.

Respondent.

NEW YORK  
~~DECISION/ORDER~~ OFFICE  
Index No.: 108203-11  
Seq. No.: 001

**PRESENT:**  
Hon. Judith J. Gische  
**J.S.C.**

-----x  
Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this  
(these) motion(s):

<b>Papers</b>	<b>Numbered</b>
Ver Pet w/RJM affirm, w/ SC, KCC, RJ, RLH affids, exhs, .....	1

-----x  
*Gische, J.*

*Upon the foregoing papers, the decision and order of the court is as follows:*

The petitioners, Depth Capital LLC, Depth Capital II LLC, NY 45, LLC, Midtown United LLC and Cassa 28 LLC ("Petitioners") seek to discharge a mechanic's lien filed by respondent White Hill Restoration ("Respondent"), which included amongst others the individual properties of Respondents. Service has been properly effectuated and neither Respondent nor its counsel have interposed any opposition.

Respondent filed the Notice of Mechanic's Lien in the sum of \$81,656.25 against non-party Waterscape Resort LLC's ("Waterscape") property, a 45-story mixed use hotel and condominium apartment building located at 70 West 45<sup>th</sup> Street, New York County, on November 5, 2005. The lien was specified against the property situated in the City of New York, County of New York, Block 1260, Lots 68, 1101-1156.

Petitioners claim that the filing of the lien was made after the filing of the Declaration of Condominium, which changed the old lot numbers, Block 1260, lots 68,69 and 169, to new lot numbers, Block 1260, Lots 1101-1156. Furthermore, Petitioners claim the filing of the lien was made after the transfer of the condominium units identified as Block 1260, Lots 1120, 1121, 1131, 1143 and 1156, from Waterscape to Petitioners and the filing of the deeds. Petitioners claim that not one of the them consented to subject their condominium units to the Lien. Therefore, they argue that the lien improperly included seven condominium units that are not the subject of the Lien. Petitioners maintain that the owners of the individual units did not request that Respondent do any work for them. Petitioners further claim that after advising the Respondent that the Mechanic's Lien was improper, Respondent failed to modify or remove its lien as to these seven units. Petitioners argue that the failure to remove its Mechanic's Liens interferes with their individual property rights.

Petitioners now move pursuant to Lien Law §19(6) to discharge the alleged Notice of Lien as being defective for failure to comply with the provisions of Lien Law §9, and in violation of RPL §339-L.

Where condominiums are involved, the lien cannot include the common elements of the units after the recording of the Declaration of Condominium without the express consent of the units' owners. RPL §339-L. The lien must be limited to those particular units that are the subject of the lien. Northeast Restoration Corp. v. K & J Const. Co., L.P., 304 A.D.2d 306, 307 (1st Dept. 2003).

When the owner of a building is the subject of a lien, the lien cannot include those individual units that were sold after the filing of the Declaration of Condominium by the

owner and the owner has not retained any interest in those individual units. Advanced Alarm Technology, Inc. v. Pavilion Associates, 145 AD.2d 582, 536 (2d Dept. 1988); see also In the Matter of Atlas Tile and Marble Works, Inc., 191 A.D.2d 247 (1st Dept. 1993).

When a lien does include the common elements or units that the owner has no interest in, the lien is then a "blanket lien," because it includes those portions of the condominium and individual units that are not the subject of the lien. Such a lien is invalid *ab initio* requiring its discharge. Bridge View Tower, LLC v. Roco G.C. Corp., 69 A.D.3d 711 (2d Dept. 2010) (invalidating lien as a "blanket lien" because it provided a general description of property after owner filed condominium declaration); In the Matter of Atlas Tile and Marble Works, Inc., 191 A.D.2d 247 (1st Dept. 1993) (invalidating lien because it was filed after the declaration of condominium and included the former superseding lot number for the entire lot); In the Matter of M.M.E. Power Enterprises, Inc., 205 A.D.2d 631 (2d Dep't, 1994) (invalidating liens because they did not exclude the condominium common areas, were not confined to the enumerated sublots, nor had unanimous consent from individual owners); Advanced Alarm Technology, Inc., supra.; and Application of Country Village Heights Condominium (Group I), supra, (additional reason to invalidate lien was because it failed to be limited to those units of the condominium in which the original sponsor and developer still retained an interest).

Respondent included the old lot number, Lot 68, in its liens. The use of the old lot number after the filing of the Declaration of Condominium was inaccurate. It improperly placed a Lien on the common areas of the condominiums in contravention of the Condominium Act, RPL §339-L. The lien is also invalid because it is a "blanket lien" and must be discharged. In the Matter of Atlas Tile and Marble Works, Inc., 191 A.D.2d at 247.

Consequently, the motion is granted and the Notice of Mechanic's Lien filed November 5, 2010 in the Office of the Clerk in the County of New York by White Hill Restoration in the sum of \$81,656.25 is hereby discharged in full.

In accordance with the foregoing,

*It is hereby*

**ORDERED** that the petition for the discharge of the Notice of Mechanic's Lien (\$81,656.25) filed by respondent White Hill Restoration against Block 1260, Lots 68, 1101-1156. in New York County (70 West 45<sup>th</sup> Street) is hereby **GRANTED** and that lien is hereby vacated and discharged; and it is further

**ORDERED** that any relief not expressly addressed herein is hereby denied; and it is further

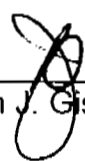
**ORDERED** that this constitutes the decision and order of the court.

Dated: New York, New York

So Ordered:

October 21, 2011

**FILED**

  
\_\_\_\_\_  
Hon. Judith J. Gische, J.S.C.

**OCT 25 2011**

**NEW YORK  
COUNTY CLERK'S OFFICE**