

C&L Concrete Corp. v Mich-Kat Enters. Ltd.
2011 NY Slip Op 32962(U)
November 4, 2011
Sup Ct, Nassau County
Docket Number: 601660/09
Judge: Denise L. Sher
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

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

C&L CONCRETE CORP.,

TRIAL/IAS PART 32
NASSAU COUNTY

Plaintiff,

- against -

Index No.: 601660/09
Motion Seq. No.: 04
Motion Date: 08/22/11

MICH-KAT ENTERPRISES LTD. d/b/a KAM
CONSTRUCTION SERVICES, IMC REALTY CORP.
and "JOHN DOE 1" through "JOHN DOE 10," said parties
being lienors who have yet to perfect their liens and being
fictitious and unknown to Plaintiff,

Defendants.

The following papers have been read on this motion:

	Papers Numbered
<u>Notice of Motion, Affidavits and Exhibits</u>	1
<u>Affirmation in Opposition and Exhibits</u>	2
<u>Reply Affidavit and Exhibit</u>	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Non-party movant, Walgreen Eastern Co., Inc. ("Walgreens"), moves, pursuant to CPLR § 1012(a)(2), for an order permitting it to intervene in this action, directing that it be added as a party defendant, amending all papers, pleadings and proceedings in this action accordingly and allowing it to respond to the Verified Complaint herein within twenty (20) days after the entry of an order granting this instant motion on the grounds that the interest of non-party movant Walgreens is or may be inadequately represented and it may be bound by the default judgment entered herein. Plaintiff opposes the motion.

In support of the instant motion, non-party movant Walgreens submits that it is- and has been since November, 2005 - the sole and exclusive "triple-net" tenant of the real property located at 600-606 Long Beach Boulevard, Long Beach, New York 11561 (the "property"), pursuant to a forty-year Ground Lease by and between defendant I.M.C. Realty Corp. ("IMC") and Walgreens. Said property was the subject of the underlying mechanic's lien action. Defendant Mich-Kat Enterprises Ltd. d/b/a KAM Construction Services ("Mich-Kat") was the general contractor for the construction of non-party movant Walgreens' new store premises at the property, pursuant to a Construction Agreement, by and between non-party movant Walgreens and defendant Mich-Kat dated August 9, 2006. The instant mechanic's lien action was brought by plaintiff, a subcontractor of defendant Mich-Kat, to, amongst other things, foreclose a mechanic's lien, dated as of January 20, 2009, in the amount of \$49,465.75. Non-party movant Walgreens argues that, at the time plaintiff filed said mechanic's lien, non-party movant Walgreens had already completed making payments in full to the general contractor, defendant Mich-Kat pursuant to the Construction Agreement, thus making the mechanic's lien invalid. Non-party movant Walgreens had completed all payments due and owing to defendant Mich-Kat in October, 2008.

Non-party movant Walgreens further contends that Section 5(a) of its lease with defendant IMC "provides: 'All of [Walgreens'] Construction [as defined therein] shall be done by [Walgreens], at [Walgreens'] sole cost and expense, in accordance with [Walgreens'] plans and specifications....Title and ownership to the Building and Site Improvements [as defined therein] shall be vested in [Walgreens].'" Non-party movant Walgreens adds that, "[a]ccordingly, in or about August, 2006, Walgreens, as the 'Owner,' and KAM Construction, as the 'General Contractor,' entered into the Construction Agreement, pursuant to which Walgreens' new store premises were constructed at the Property."

Non-party movant Walgreens further argues that its rights and interests in and to the subject property were not/are not adequately represented by any of the parties in the instant action. Although non-party movant Walgreens paid defendant Mich-Kat in full pursuant to the Construction Agreement, defendant Mich-Kat did not inform the Court, or plaintiff, of such fact. Therefore, non-party movant Walgreens submits that, if it is not permitted to intervene in this action, it will be bound by this Court's January 19, 2011 Order, which, among other things, directed that "the premises located at 600-606 Long Beach Boulevard, Long Beach, New York be sold, as provided by law" and ordered a default judgment and that such sale will cause non-party movant Walgreens to lose its rights and interests in said property under their lease agreement.

In opposition to the motion, plaintiff argues that "Walgreens' motion to intervene is both untimely and moot. Further, Walgreens is not entitled to intervene as a matter of right due to the fact that Walgreens' interest in the subject property and instant litigation will be adequately protected by the lease agreement between Walgreens and defendant IMC Realty Corp. ("IMC") and Walgreens, as well as the fact that Walgreens' interest in the subject property will in no way be adversely affected by the default judgment obtained as against IMC."

Plaintiff submits that CPLR § 1012(a) requires that a motion to intervene be "timely" made. Plaintiff contends that non-party movant Walgreens was aware of the instant proceedings as early as April 7, 2011 and that, on or about May 4, 2011, when defendant IMC moved by Order to Show Cause to vacate the default judgment in this matter, non-party movant Walgreens "did not attempt to interject itself into the proceedings at this point, but rather sat on the sidelines while IMC's motion to vacate was argued and denied." Plaintiff adds that non-party movant Walgreens also abstained from any attempt to interject itself in the instant action from June 30, 2011, the date of the Court's decision denying the motion to vacate, to August 8, 2011.

Plaintiff states, “[o]n August 8, 2011, after having plaintiff and this Court incur additional unnecessary expense in opposing IMC’s motion and recommencing execution proceedings, Walgreens finally decided now- after all other attempts have failed - would be a good time to continue to drag this matter further and file an application to intervene, forcing plaintiff and this Court to expend even more of its resources to enforce and collect approximately \$60,000.00 default judgment.” Plaintiff contends that non-party movant Walgreens should not be permitted to intervene at this late juncture due to the length of its awareness of the instant action and failure to take any course of action until well after the Court’s decision to deny vacatur of the default judgment.

Plaintiff further argues that non-party movant Walgreens’ motion should be denied as moot. Plaintiff submits that, as of the date of filing of the instant motion, defendant IMC had not filed a Notice of Appeal nor made a Motion to Re-argue and, since more than thirty days passed since service of the Notice of Entry, those remedies are no longer available to defendant IMC. Plaintiff states, “C&L has a valid and subsisting judgment as against, *inter alia*, IMC which can no longer be appealed or reargued. To allow Walgreens to intervene at this point would have no practical effect on the unappealable judgment which has already been entered as against the named defendant (and record property owner) - IMC and is nothing more than an attempt to circumvent the Judgment obtained by plaintiff, to which all rights to vacate same have been extinguished...Even if Walgreens were permitted to intervene, it can do nothing to undo or change the determinations and judgment that have already been entered against the current defendants; they have no standing to do so.”

Plaintiff additionally submits that non-party movant Walgreens is not entitled to intervention as a matter of right as non-party movant Walgreens’ interest in the subject property will not be adversely affected. Plaintiff states that, “there is no dispute that (1) IMC was the record owner of the subject property at the time the lien was filed, (2) IMC was the record owner of the subject property at the commencement of the instant action, and (3) IMC is

currently the record owner of the subject property....Simply put, Walgreens is a tenant of the subject property and should the subject property be sold pursuant to the Court's January 19, 2011 Decision and Order, Walgreens would simply pay rent to the entity that purchases the property."

Plaintiff further submits that "not only does C&L have a judgment that the subject premises be sold, C&L also has a monetary judgment as against IMC....As such, in addition to a Sheriff's sale of the subject property, C&L has numerous remedies at law for the collection of the debt owed by IMC to C&L which may include, but not be limited to, execution on other properties owned by IMC and/or execution on the bank accounts and/or assets of IMC."

In reply to plaintiff's opposition, non-party movant Walgreens argues that it has demonstrated that it is a necessary party to the instant action and should therefore be permitted to intervene and respond to the Verified Complaint based upon the facts that "Walgreens is - and has been since November, 2005 - the sole and exclusive 'triple-net' tenant of the property located at 600-606 Long Beach Boulevard, Long Beach, New York 11561 (the 'Property') pursuant to a 40-year Ground Lease, by and between I.M.C. Realty Corp. and Walgreens (the 'Lease'), dated as of November 21, 2005....Defendant Mich-Kat Enterprises Ltd. d/b/a KAM Construction Services ('KAM Construction') was the general contractor for the construction of Walgreens' new store premises at the Property, pursuant to a Construction Agreement, by and between Walgreens and KAM Construction, dated August 9, 2006 (the 'Construction Agreement')....Walgreens completed all payments due to KAM Construction under the Construction Agreement in October, 2008. Thus, at the time C&L filed a mechanic's lien (the 'Lien') on or about January 20, 2009, no payments were due by Walgreens to KAM Construction, and therefore there was no basis for the filing of the Lien."

With respect to plaintiff's argument that the instant motion is untimely, non-party movant Walgreens states that "such argument is disingenuous, in that C&L fails to disclose to this Court that, upon learning of the pendency of this action from I.M.C. Realty Corp,

Walgreens' *actual* landlord..., Walgreens, through counsel, promptly contacted C&L's counsel and attempted to amicably resolve this action. To that effort, on April 21, 2001, Walgreens provided C&L with copies of Walgreens' payment records, evidencing payment in full to the general contractor KAM Construction."

Non-party movant Walgreens adds that the mere fact that the instant motion was made after the entry of a default judgment does not render said motion untimely and that courts have held that intervention will be granted to enable the intervenor to move to vacate a default judgment taken against the original defendant.

With respect to plaintiff's argument that Walgreens is in no way bound by the default judgment obtained against defendant IMC, non-party movant Walgreens asserts that said argument is "simply baseless" as Section 5(a) of its lease provides, "[t]enant shall indemnify and hold Landlord harmless from and against any and all mechanics liens. Such indemnification shall include, but not be limited to Landlord's reasonable attorney's fees and disbursements." Non-party movant Walgreens submits that it "will be 'bound by the judgment' in the event the default judgment is deemed to be enforceable as against the Landlord. In that event, Walgreens - *despite having paid the general contractor KAM Construction in full* - will be obligated to pay (or reimburse) the Landlord the full amount of the default judgment, plus interest, as well as the attorney's fees and disbursements incurred by the Landlord."

With respect to plaintiff's argument that Walgreens' interest in the subject property will not be adversely affected, non-party movant Walgreens states that this argument is baseless since the motion was made pursuant to CPLR § 1012(a)(2) not CPLR § 1012(a)(3) and thus the requisite showing under that section is not required for the motion.

CPLR § 1012(a)(2) states that "[u]pon timely motion, any person shall be permitted to intervene in any action:...2. When the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment;" The Court finds that non-party movant Walgreens has demonstrated, in the arguments set forth in its instant motion,

both that its representation by the parties was inadequate and that it is bound by the judgment. First, non-party movant Walgreens' representation by defendant IMC was inadequate given the fact that IMC defaulted in the instant action. Additionally, in its motion to vacate the default judgment (which was denied by this Court), while defendant IMC did present the indemnification argument with respect to non-party movant Walgreens, it failed to place on the record that, in October, 2008, non-party movant Walgreens had completed all payments due to defendant Mich-Kat under the Construction Agreement between the two parties. Thus, on or about January 20, 2009, when plaintiff filed the mechanic's lien, no payments were due by Walgreens to defendant Mich-Kat and, therefore, there was no basis for the filing of said mechanic's lien. Consequently, when the Court rendered its January 19, 2011 Decision and Order stating that "plaintiff has a valid and subsisting lien upon the interest of defendant IMC, in the premises located at 600-606 Long Beach Boulevard, Long Beach, New York, in the total amount of \$49,465.75, with interest thereon from January 20, 2009," said statement was inaccurate. With respect to mechanics' liens, New York State Lien Law § 4(1) states,

"[s]uch lien shall extend to the owner's right, title or interest in the real property and improvements, existing at the time of filing the notice of lien, or thereafter acquired, except as hereinafter in this article provided. If an owner assigns his interest in such real property by a general assignment for the benefit of creditors, within thirty days prior to such filing, the lien shall extend to the interest thus assigned. If any part of the real property subjected to such lien be removed by the owner or by any other person, at any time before the discharge thereof, such removal shall not affect the rights of the lienor, either in respect to the remaining real property, or the part so removed. *If labor is performed for, or materials furnished to, a contractor or subcontractor for an improvement, the lien shall not be for a sum greater than the sum earned and unpaid on the contract at the time of filing the notice of lien, and any sum subsequently earned thereon.* In no case shall the owner be liable to pay by reason of all liens created pursuant to this article a sum greater than the value or agreed price of the labor and materials remaining unpaid, at the time of filing notices of such liens, except as hereinafter provided. (emphasis added)."

Non-party movant Walgreens has demonstrated that it has paid in full the general

contractor, defendant Mich-Kat, prior to plaintiff filing the subject mechanic's lien. *See* Non-party movant Walgreens' Affidavit in Support Exhibit 1. Since a subcontractor-lienor may not acquire a lien exceeding the amount that is due and owing from the owner to the contractor, it necessarily follows that where the general contractor is fully paid in good faith prior to the filing of the lien the subcontractor-lienor may not enforce his or her lien against the owner of the property. *See Snyder v. Monroe Eckstein Brewing Co.*, 107 A.D. 328, 95 N.Y.S. 144 (2d Dept. 1905). The rights of subcontractor-lienors are derivative of those of the general contractor and are restricted to satisfaction out of the amount established to be due and owing from the owner to the general contractor. *See Timothy Coffey Nursery/Landscape, Inc. v. Gatz*, 304 A.D.2d 652, 757 N.Y.S.2d 596 (2d Dept. 2003). Thus, if there is nothing owing to the contractor, then there is nothing to which the subcontractor's lien can attach, and the lienor may not look to the owner of the premises for payment. *See Van Clief v. Van Vechten*, 130 N.Y. 571 (1892); *Wynkoop v. People*, 1 A.D.2d 620, 153 N.Y.S.2d 836 (2d Dept. 1956).

The Court further notes that defendant Mich-Kat also defaulted. Therefore the fact that defendant Mich-Kat had been paid in full by non-party movant Walgreens was never presented to the Court. Accordingly, neither defendant IMC nor defendant Mich-Kat provided adequate representation of non-party movant Walgreens' interest as each failed to provide vital information to the Court with respect to the mechanic's lien that was filed in the instant action.

Non-party movant Walgreens has also proven that it is bound by the default judgment ordered by this Court due to the fact that Section 5(a) of its lease provides, "[t]enant shall indemnify and hold Landlord harmless from and against any and all mechanics liens. Such indemnification shall include, but not be limited to Landlord's reasonable attorney's fees and disbursements." Therefore, non-party movant Walgreens will be bound by the judgment in the

contractor KAM Construction in full - will be obligated to pay (or reimburse) the Landlord the full amount of the default judgment, plus interest, as well as the attorney's fees and disbursements incurred by the Landlord."

The Court finds that non-party movant Walgreens' motion to intervene was in fact timely, as said motion can be made even after a default judgment has been entered, and that non-party movant Walgreens has demonstrated that it is a necessary party to the instant action.

Accordingly, non-party movant Walgreens' motion, pursuant to CPLR § 1012(a)(2), for an order permitting it to intervene in this action, directing that it be added as a party defendant, amending all papers, pleadings and proceedings in this action accordingly and allowing it to respond to the Verified Complaint herein within twenty (20) days after the entry of this Order is hereby **GRANTED**. It is further

ORDERED that the Court's January 19, 2011 Order that "plaintiff is entitled to enforce and foreclose said lien against said premises" and "that the premises located at 600-606 Long Beach Boulevard, Long Beach, New York be sold, as provided by law, and that out of the proceeds of such sale, plaintiff be paid the amount of its lien and interest, and that plaintiff has a judgment against defendant IMC for any deficiencies which may then remain" is hereby **stayed** pending a resolution of the matter between plaintiff and the newly added party, defendant Walgreens Eastern Co., Inc.

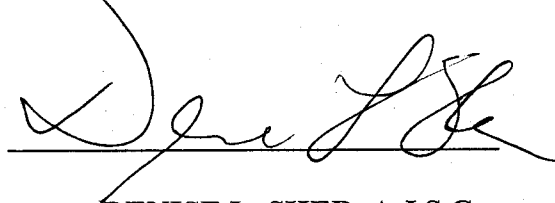
The default judgment as ordered in the Court's January 19, 2011 Decision and Order against defendant Mich-Kat for the relief demanded in the Second, Third and Fourth Causes of Action in plaintiff's Verified Complaint remains a valid Order. It is further

ORDERED that plaintiff and the newly added party, defendant Walgreens Eastern Co., Inc., shall appear for a Subsequent Preliminary Conference on December 19, 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 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.

ENTER:

A handwritten signature in black ink, appearing to read "Denise L. Sher", is written over a horizontal line.

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

ENTERED

NOV 07 2011

NASSAU COUNTY
COUNTY CLERK'S OFFICE

Dated: Mineola, New York
November 4, 2011