

**Antamex (US) Inc. v 123 Washinton LLC**

2011 NY Slip Op 33793(U)

March 16, 2011

Sup Ct, NY County

Docket Number: 600871/2010

Judge: Bernard J. Fried

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

PRESENT: BERNARD J. FRIED PART 60

E-FILE

**HON. BERNARD J. FRIED** Justice

-----X

ANTAMEX (US) INC.,  
Plaintiff,

Index No. #600871/2010

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

-against-

MOTION SEQ. NO. #001

123 WASHINGTON LLC, ET. AL.,

MOTION CAL. NO. \_\_\_\_\_

Defendants.  
-----X

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

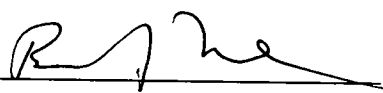
	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**This motion is decided in accordance  
with the attached memorandum decision.**

Dated: 3/16/2011



J.S.C. **HON. BERNARD J. FRIED**

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):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 60

----- X  
ANTAMEX (US) INC.,

Plaintiff,

Index No.  
600871/2010

- against -

123 WASHINGTON LLC, THE MOINIAN GROUP,  
TERRA DRILLING COMPANY, a/b/a EARTH  
RETENTION SYSTEMS, INC., KENMAR  
ASSOCIATES, INC., P.B. CAPITAL CORP-  
ORATION and "JOHN DOES ONE" through  
and including "JOHN DOES TEN,"

Defendants.

----- X

**APPEARANCES:**

For Plaintiff:

Morrison Cohen LLP  
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(Mary E. Flynn,  
David S. Goldstein)

For Defendants:

123 Washington LLC  
and the Moinian Group  
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(Bruce H. Lederman)  
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(Michael A. Lynn)

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(Richard Y. Im)

**FRIED, J.:**

In motion sequence 001, defendant 123 Washington LLC (123 Washington), a nominee of the Moinian Group (jointly, the owner), moves to dismiss the complaint, pursuant to CLPR 3211 and Lien Law § 19. In motion sequence 002, defendant P.B. Capital Corp. (PB Capital) moves to dismiss the first cause of action, pursuant to CPLR 3211.

This action arises from a contract dated January 27, 2007 (the contract), involving construction of a mixed-use hotel and residence project at 123 Washington Street in Manhattan (the premises). In addition to the owner, the parties to the contract include the construction manager, Tishman Construction Corporation of New York (Tishman), which is not a party to this action, and plaintiff Antamex (US) Inc. (Antamex). The contract requires Antamex to provide and install a 201,300 square foot curtain wall at the premises for \$20.2 million.

PB Capital, which holds a mortgage lien on the premises, has filed a separate motion to dismiss the complaint as against it, but has not made any detailed submission. PB Capital has joined in the owner's arguments. Only the first cause of action contains allegations against PB Capital.

Although movants do not specify which subdivision of CPLR 3211 (a) they rely upon for this motion, the only applicable provisions are a defense founded upon documentary evidence (CPLR 3211 (a) (1), and failure to state a cause of action (CPLR 3211 (a) (7).

Movants also rely on Lien Law § 19 (6), which provides, as pertinent:

[w]here it appears from the face of the notice of lien that the claimant has no valid lien by reason of the character of the labor or materials furnished and for which a lien is claimed ... the owner or any other party in interest, may apply to the supreme court of this state ... for an order summarily discharging of record the alleged lien ... The application must be made upon a verified petition accompanied by other written proof showing a proper case therefor, and upon the approval of the application by the court, justice or judge, an order shall be made discharging the alleged lien of record.

Plainly, the requirements of Lien Law § 19 (6) have not been met here because there is no verified petition. No other subdivision of section 19 applies. In any event, movants are seeking to dismiss the complaint, not discharge the lien, which, it is represented, has been discharged by bonding.

The owner also seeks relief pursuant to Lien Law §§ 39 and 39-a, awarding it sums equal to the amounts stated in the notices of lien for the “loss of efficiency” and “storage costs” claims, respectively, totaling \$3,246,778. This demand for relief is premature because there has been no judicial declaration that the lien is void on the grounds of willful exaggeration, and the owner has not demonstrated its entitlement to such a declaration.

The complaint contains five causes of action. The first cause of action, naming all defendants, seeks foreclosure of two mechanic’s liens filed by Antamex on the premises. One lien is denoted in the complaint as the “storage lien,” and the other as the “scope changes lien.” The second cause of action, sounding in breach of contract, seeks damages

from the owner for out-of-sequence work, scope of work changes, and storage costs. The third cause of action alleges breach of the implied covenant of good faith and fair dealing. The fourth and fifth causes of action sound, respectively, in quantum meruit and unjust enrichment.

Both motions are granted to the extent of dismissing the third, fourth and fifth causes of action, and otherwise denied. Applying the standards of a CPLR 3211 (a) (7) motion, where the factual allegations of the complaint are deemed true, and the pleader is afforded the benefit of all reasonable favorable inferences (*see Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]), there can be no genuine dispute that the first two causes of action, based, respectively, on the Lien Law and the contract are sufficiently pleaded.

Movants argue that the damages for out-of-sequence work are not contractually recoverable and therefore are not lienable, pursuant to its construction of the terms of the contract. Antamex disputes the owner's construction of the contract, and argues that the terms of the rider specifically allow such claims and should be given precedence over the more general terms in the body of the contract. The owner also argues that the storage costs are not lienable because the curtain wall is not being stored on the premises.

Lien Law § 23 provides that the Lien law should "be construed liberally to secure the beneficial interests and purposes thereof." Lien Law § 2 (4) which defines "improvement" for the purposes of the Lien Law, provides as pertinent: "[t]he term "improvement," when used in this chapter, includes ... the value of materials actually manufactured for but not delivered to the real property." This latter provision casts substantial doubt on the owner's contention that the storage costs are not lienable because the curtain wall is not being stored

on the premises.

Moreover, a notice of lien should not be invalidated “because the description on the lien in question included more property than was directly benefited by the improvement” (*East Coast Mines & Materials Corp. v Golf Course Props. Co.*, 228 AD2d 545, 546 [2d Dept 1996]).

For a CPLR 3211 (a) (1) motion based on documentary evidence to be granted, the documentary evidence must resolve all factual issues as a matter of law and definitively dispose of the plaintiff's claim (*see Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000]). Movants have not met this standard on this motion.

Even if the owner had established as a matter of law that the two categories of damages are not lienable, that would not entitle it to dismissal of the first cause of action because Antamex would still then be entitled to file a mechanic's lien for work performed and materials furnished for the curtain wall.

The issue of lienability of the claims for storage costs or damages resulting from out-of-sequence work should be presented in the context of a CPLR 3212 motion rather than a CPLR 3211 (a) motion, because a CPLR 3211 motion “must be denied if, upon any reasonable view of the facts alleged in the complaint, the plaintiff would be entitled to recovery” (*Alsol Enterprises, Ltd. v Premier Lincoln-Mercury, Inc.*, 11 AD3d 493, 494 [2d Dept 2004]).

The issues of whether the lien is wilfully exaggerated, or whether storage costs for off-premises storage, and contractual claims relating to out-of-sequence work are properly

lienable cannot be determined on this motion addressed to the sufficiency of the complaint.

Antamex's third cause of action alleging breach of the implied covenant of good faith and fair dealing is dismissed as duplicative of the contract cause of action (*see Jacobs Private Property, LLC v 450 Park LLC*, 22 AD3d 347, 347-48 [1st Dept 2005]), as are the fourth and fifth causes of action sounding, respectively, in quantum meruit and unjust enrichment (*see Sivin-Tobin Associates, LLC v Akin Gump Strauss Hauer & Feld LLP*, 68 AD3d 616, 618 [1<sup>st</sup> Dept 2009]).

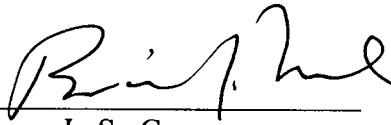
Accordingly, it is

ORDERED that the motion of defendant 123 Washington LLC and The Moinian Group (sequence 001), joined in by defendant P.B. Capital Group (Sequence 002), to dismiss the complaint pursuant to CPLR 3211 (a), and Lien Law § 39, is granted, to the extent of dismissing the third, fourth and fifth causes of action, and is otherwise denied; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 20 business days of service with notice of entry.

Dated: 3/16/2011

E N T E R:

  
\_\_\_\_\_  
J. S. C.  
**HON. BERNARD J. FRIED**