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

PRESENT : DONNA M. MILLS PART 58
Justice

In the Matter of the Application of
1564 SECOND REALTY LLC,

INDEX NO. 114555/11

Petitioner,

MOTION DATE

For An Order Vacating and Discharging a Mechanic's Lien Filed By

MOTION SEQ. NO. 001

L.D. BANKS & ASSOCIATES INC.,
Respondent-Lienor

MOTION CAL NO.

The following papers, numbered 1 to _____ were read on this motion to Vacate Mechanics Lien.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits	1
Answering Affidavits– Exhibits	2
Replying Affidavits	3

CROSS-MOTION: _____ YES _____ NO

Upon the foregoing papers, it is ordered that this motion to vacate the Mechanic's Lien is decided as follows:

This is a proceeding pursuant to § 19 of the Lien Law seeking to vacate Respondent-Lienor L.C. Banks, Inc. (hereinafter "Banks"), mechanic's lien filed, on August 1, 2011 and refiled on October 20, 2011. Petitioner, 1564 Second Realty LLC, (hereinafter "Realty") owns the real property known as 1524 Second Avenue, New York, New York (hereinafter "Property"). On August 1, 2011 Banks filed a mechanic's lien with the New York County Clerk against the Property for the sum of $326,276.41.

The exclusive basis of the Petition and the Order to Show Cause seeking a summary discharge of the instant mechanic's lien is Petitioner's claim that the lien is facially defective pursuant to Lien Law Art. 2 section 19, in that Realty does not and cannot owe any monies to Banks under the Agreement. The subject agreement required Realty to pay Banks, acting as broker, funds paid by tenant, Eastside Lewis Poultry, Inc. (hereinafter "Eastside").

In opposition to the motion, Matthew T. Worner, Esq., prefaces his opposition by informing the Court that on January 23, 2012, Banks assigned all of its rights and interests in the instant mechanic's lien filed against the Property, to Maverick Construction Services LLC, (hereinafter "Maverick").

Realty correctly points out that pursuant to the Contract annexed to the lien in question, it provides in relevant part, "Neither this agreement nor Tenant's obligations, nor any payments due to Broker, may be assigned without Tenant's prior written consent..." Here, Maverick provides no evidence that the Tenant Eastside, consented to any assignment of the Lien. Realtor however, argues that the assignment to Maverick is therefore void ab initio.

Though Realty correctly contend that the Agreement contains an anti-assignment provision, as the Agreement only contained a covenant not to assign, and did not provide that any assignment would be void or invalid, the assignment was not void, but only gives rise to a claim for damages against [Banks] for violation of the covenant not to assign (see Macklowe v. 42nd St. Dev. Corp., 170 A.D.2d 388, 389 [1st Dept 1991]). Therefore, contrary to Realty's contention, Maverick does have standing to defend this action.

Turning to the substance of the parties' contentions, the Lien indicates that the labor performed by Respodnent is that it:

> Preformed [sic] Real Estate Brokerage services pursuant to a written brokerage agreement (the "Brokerage Agreement"), attached hereto as Exhibit A, by introducing the Tenant to the Landlord and negotiating the terms to a lease satisfactory to both the Tenant and the Landlord and such lease being executed and exchanged between the Landlord and the Tenant.

The Agreement is silent as to why any commission would be paid. Instead, it provides for the completion of two conditions precedent that must be satisfied prior to Respondent being entitled to any money. It provides that upon satisfaction of the two conditions precedent, Respondent would be entitled to certain monies described as a "Commission" from Eastside in the amount of $316,000.00. By the express terms of the Agreement, Realty is only a party for the purpose set forth in paragraph 6(a) thereof (to wit: delivering certain money to the broker upon payment by tenant).

Realty thus claims that since its only obligation under the Agreement is to deliver certain checks only after Eastside delivers those checks to it, and because it is only a party to the Agreement with respect to that sole obligation, Respondent may not lien its property.

A real estate broker may only lien a property when it has performed an improvement defined by the Lien Law on Petitioner's property. Lien Law § 2 (4) defines "improvement" as, inter alia: the performance of real estate brokerage services in obtaining a lessee for a term of more than three years of all or any part of real property to be used for other than residential purposes pursuant to a written contract of brokerage employment or compensation." (see Robert Plan Corp. v Greiner-Maltz Co., Inc., 229 AD2d 122 [2nd Dept 1997]).

To constitute an "improvement", the services provided must be the procuring of a lessee pursuant to a written agreement. The parties to such an agreement could only be the owner and a broker. Had the Legislature intended the term "improvement" to include services provided to a lessee in acquiring a lease as well as those provided to an owner/lessor, it would have used the work "lease" rather than "lessee" (see Robert Plan Corp. supra at 124).

Here, the Agreement is between the lessee (Eastside) and the broker (Banks), mandating that any services provided by the broker were to the lessee and not the lessor. Additionally, under the Agreement, no services were provided to Realty. Instead, the Agreement is between Eastside and Banks and is on Eastside's letterhead, The Agreement specifically limits Realty's obligations and Realty has no obligation under the agreement other than to deliver a check to Banks if and when it received it from Eastside.

Accordingly, the definition of "improvement" under Lien Law § 2 (4) does not encompass the services allegedly performed by Banks. Since the services were not "for the improvement of real property", Banks does not have a valid lien. Consequently, Realty is entitled to an order summarily discharging the lien (see, Lien Law § 19 [6]).

Accordingly it is

ORDERED that the mechanic's lien filed by L.D. Banks & Associates, Inc., in the office of the Clerk of New York County is discharged and canceled; and it is further

ORDERED that the New York County Clerk mark the Lien Docket to reflect that the above referenced mechanic's lien is discharged and canceled.

Dated: 3/6/12

J.S.C.

DONNA M. MILLS, J.S.C.

Check one: ✓ FINAL DISPOSITION

___ NON-FINAL DISPOSITION