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

PRESENT: HON. PAUL G. FEINMAN PART 12

Justice

Metropolitan Enterprises, etc.

-v-

Tres Construction, LLC, et al

INDEX NO. 650493/10 E

MOTION DATE 9/14/2011

MOTION SEQ. NO. 001

The papers considered on this motion (☐ and cross motion) are enumerated in the attached decision/order.

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ORDERED that this motion (☑ and cross motion) are decided in accordance with the annexed decision and order.

Dated: 1/4/2012

J.S.C.

1. Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is ☐ GRANTED ☑ DENIED ☐ GRANTED IN PART ☐ OTHER

Cross Motion is granted in part.

3. Check if appropriate: ☐ SETTLE ORDER/JUDGMENT ☐ SUBMIT ORDER/JUDGMENT
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT
☐ REFERENCE
☑ PC/CC 2/2/2012 at 2:15

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

----------X

METROPOLITAN ENTERPRISES NY a/k/a METROPOLITAN ENTERPRISES, INC.,
Plaintiff,

-against-

TRES CONSTRUCTION LLC, THE CITY OF NEW YORK, IRENE KALERGIOS, GEORGE KALERGIOS, and, JOHN DOES 1-10 and others similarly situated.
Defendants.

----------X

Index Number 650493/2010E
Mot. Seq. No. 001

DECISION AND ORDER

For the Plaintiff:
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For the Defendant:
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Papers considered in review of this e-filed motion and cross motion:	**E-FilingDocument Numbers**
Notice of motion, Martinez affidavit and annexed exhibits A - C	5
Kutil affirmation in support of motion and annexed exhibits A - C	5-1
Notice of cross motion, Paschalidis affirm. in opposition and in support of cross motion, Kalergios affidavit and annexed exhibits A - H	3
Order directing transfer to non-commercial part	16
Interim decision and order restoring motion to Motion Support	18
Paschalidis reply affirm. in opposition to cross motion	19
Kutil reply affirmation in support of motion and in opposition to cross motion and annexed exhibit A	20 - 20-1

PAUL G. FEINMAN, J.:

Plaintiff, Metropolitan Enterprises NY a/k/a Metropolitan Enterprises, Inc ("Metro") moves for partial summary judgment, pursuant to CPLR 3212, and/or summary judgment as against defendant Tres Construction LLC ("Tres"). Defendant, Tres, opposes and cross-moves, pursuant to New York Lien Law § 21 (7), to vacate Metro's mechanic's liens. Metro opposes the cross motion. The individual defendants, Irene Kalergios and George Kalergios, are represented by the same attorneys as Tres, and have adopted all positions taken by Tres, while the remaining

defendant, the City of New York, has not appeared in connection with the instant motion and cross motion. For the reasons provided below, Metro's motion is denied and Tres's cross motion is granted in part, and denied in part.

Background

This action involves a dispute between Metro and Tres arising out of an agreement whereby Metro would furnish, erect and dismantle scaffolding at a construction site. There is some confusion in the record as to where this construction site was located. Metro's initial proposal, dated March 18, 2008, and executed by George Kalergios on behalf of Tres on March 31, 2008, refers to the project as "MOMA" (Doc. 5, ex. A, Agreement). In other places, such as a document submitted by Metro and described in the affidavit of Kenneth Martinez, Metro's president, as a "copy of the summary of invoices," the project is listed as "Metropolitan Museum of Art" (Doc. 5, ex. B, Customer open balance sheet). "MOMA" or "MoMA"is a common abbreviation for the Museum of Modern Art, a museum located in midtown Manhattan and known for its collection of modernist and contemporary art. This is a separate and distinct institution from the Metropolitan Museum of Art, often known colloquially as the "The Met," and located on the Upper East Side of Manhattan.

Martinez also avers that the "contract provided that Metropolitan would erect and dismantle scaffolding at the Metropolitan Museum of Art" (Doc. 5, Martinez affid. at ¶ 2). To add further confusion, the invoices submitted by Metro refer to the project as "Metropolitan Museum of Art" but also includes descriptions of the work performed as "[p]ipe scaffolding at MOMA ...," "...installation of sidewalk shed at MOMA in Area #1," "...installation of the side shed bridge at MOMA in Area #2," and "...installation of sidewalk shed at MOMA in Area #2"

(Doc. 5, ex. C, Invoices #9202, 9204, 9205 and 9207, each dated Dec. 15, 2009).

Martinez claims that on or about December 15, 2009, invoices totaling $59,193.26 were sent to Tres (Doc. 5, Martinez affid. at ¶ 4). He further avers that Metro "has been trying to get paid for these open invoices from Tres [and] Metro[]'s payment collection staff were told by representatives from the City[,] who owns the Museum (a Laura Cabibbo from the Museum, tel. 212....) that the work was accepted and that payment would be forthcoming" (*id.* at ¶ 5).

Tres submits the affidavit of George Kalergios, a member of Tres and also individually named as a defendant in this action, in which he alleges that Metro breached the parties' contract by "failing to perform in accordance with [its] terms, failing to furnish the manpower required in the performance of plaintiff's obligations and for charging Tres for costs and expenses that were not appropriate or authorized by the contract and by causing Tres to incur extra and additional costs to complete plaintiff's obligations" (Doc. 3, Kalergios affid. at ¶ 4). Kalergios then provides several examples of Metro's alleged failures to perform pursuant to the terms of the contract, which Kalergios claims were brought to Metro's attention but Metro failed to take the appropriate corrective steps. He alleges that Metro "abandoned the work prior to completion ... forcing Tres to incur additional expenses to complete the work [and Metro] refused to comply with Tres' requests that [Metro] comply with the agreement or credit Tres for Tres' additional expenses incurred as a result of plaintiff's aforementioned breaches" (*id.* at ¶¶ 9-10). Kalergios also contends Tres completed its work at the Metropolitan Museum of Art on November 19, 2008, that all work was completed at the Museum on October 5, 2009, and that Metro was "paid for all work performed and [Tres] do not owe any additional monies to [Metro]" (*id.* at ¶ 11).

On June 3, 2009, Metro filed a "Notice Under Mechanic's Lien Law for Account of

Public Improvements" for labor and materials furnished between March 18, 2008, and March 16, 2009, in the amount of $16,103.39, pursuant to a contract made between Metro, Tres, and New York City Department of Design and Construction for the erection and dismantling of pipe scaffold at the Metropolitan Museum of Art (Doc. 3, ex. D, June 3 Notice of lien). Although the notice initially says that Metro is a New York corporation in the introductory paragraph, in paragraph (1), it states that Metro is a Massachusetts corporation with a principal place of business in Brooklyn, New York (*id.*).

Subsequently, on April 29, 2010, Metro filed another "Notice Under Mechanic's Lien Law for Account of Public Improvement" for additional monies allegedly owed under the same contract as the June 3 mechanic's lien (Doc. 3, ex. F, Apr. 29 Notice of lien). The notice states that the price and value of the material provided and labor performed that is due under the contract, but not paid, is $59,193.26, but that $16,103.39 was liened on June 3, 2009, making the balance liened by this notice $43,089.87. Unlike the June 3 notice, this notice does not specify the dates that materials and labor were provided, but it does state "[u]pon information and belief, thirty days have not elapsed since the completion and acceptance of the construction of said public improvement" (*id.* at ¶ 5).

Metro commenced the instant action on June 1, 2010, by filing the summons and verified complaint. The verified complaint asserts the following three causes of action: (1) breach of contract, as against Tres; (2) foreclosure of liens, as against the City of New York and John or Jane Doe No. 1 through 5; and (3) diversion of trust funds as against Irene and George Kalergios and John or Jane Doe No. 6 through 10 (Doc. 5-1, ex. A, Ver. compl. at ¶¶ 15 - 29).

The papers submitted in connection with the instant motion and cross motion include

Tres's verified answer and counterclaim, dated August 12, 2010 (Doc. 5-1, ex. B, Ver. answer). Tres admitted that a contract was entered into between Tres and Metro, although alleged that "the contract consisted of two separate agreements covering two distinct phases and areas of the work" (*id.* at ¶ 7). The verified answer asserts the following three affirmative defenses, with the last two also being designated as counterclaims: (1) plaintiff was not authorized by its Board of Directors and shareholders to institute this action; (2) breach of contract, causing Tres to incur damages in the aggregate amount of $31,739.15; and (3) willful and intentional filing of two mechanic's liens in excess of any rightful and appropriate claim, causing Tres to incur damages in the sum of $10,000.00 (*id.*). Metro's reply, dated August 25, 2010, includes general denials of all allegations except it admitted that Metro had entered into a contract with Tres (Doc. 5-1, ex. C, Reply). The reply set forth two affirmative defenses to the counterclaims as follows: (1) Tres fails to state a claim for which relief can be granted; and (2) Tres waived and/or are otherwise estopped from raising any complaints that they may have regarding plaintiff's compliance with any asserted contract terms or conditions.

According to the Supreme Court Records Online Library (SCROLL), a request for judicial intervention was not filed with the County Clerk's Office until February 14, 2011. SCROLL further indicates that a preliminary conference has not been held in this action, and no note of issue has been filed. Also on February 14, 2011, Metro filed its notice of motion for summary judgment and accompanying documents in hard-copy form at the Motion Support Office of this court. These papers were not electronically filed on the NYSCEF system until March 7, 2011, although Tres's cross motion and supporting papers had been uploaded to this case's NYSCEF site on February 28, 2011. Thus, Tres's notice of cross motion, "affirmation in

opposition and cross-motion," and affidavit of George Kalergios with annexed exhibits, all e-filed together as document number 3, are not filed under motion sequence number 001 on the NYSCEF system, presumably because these documents were e-filed before the notice of motion was uploaded to the NYSCEF system. The court will nonetheless deem the materials e-filed as document 3 as part of the record to be considered in connection with motion sequence number 001.

Upon filing of the request for judicial intervention, the instant motion was initially assigned to the Commercial Division. However, by order dated May 2, 2011, the motion was randomly reassigned to this part. Thereafter, this court issued an interim decision and order, so-ordering a stipulation executed by the parties, which restored motion sequence number 001 to the Motion Submission Calendar (Doc. 18). Additional papers were then filed by both parties, and oral argument was held before the court on August 10, 2011. The transcript of oral argument was e-filed November 30, 2011 (Doc. 22).

Analysis

1. Summary judgment standards

A movant seeking summary judgment in its favor has the initial burden to make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form to eliminate any material issues of fact from the case (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once the movant has made such a showing, the burden shifts to the opposing party who, to defeat the motion, must demonstrate the existence of a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). However, if the movant fails to meet its initial burden, then the motion will be denied regardless of the

sufficiency of the opposing papers (*Winegrad*, 64 NY2d at 853).

Under CPLR 3212 (b), the motion must "be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions." The affidavit must be "by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit" (CPLR 3212 [b]). The bare affirmation of a party's attorney who demonstrates no personal knowledge is "without evidentiary value and thus unavailing" (*Zuckerman*, 49 NY2d at 563). However, the "affidavit or affirmation of an attorney, even if he [or she] has no personal knowledge of the facts, may, of course, serve as the vehicle for the submission of acceptable attachments which do provide 'evidentiary proof in admissible form,'e.g., documents, transcripts" (*id.*). In any case, the evidence is to be viewed in the light most favorable to the party opposing the motion (*see Brown v Muniz*, 61 AD3d 526, 531 [1st Dept 2009]).

2. Metro's motion for summary judgment against Tres

Metro moves for partial summary judgment only against Tres on its first cause of action, sounding in breach of contract.

To establish a prima facie cause of action for breach of contract, Metro must prove the following elements: (1) formation of an enforceable agreement between plaintiff and defendant; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage (2 PJI 2d 4:1 [2009]). Here, there is no dispute that an enforceable agreement exists between Metro and Tres. As to the second and third elements, Metro submits an affidavit of Kenneth Martinez in which he states that Metro "supplied scaffolding for other companies to perform their work at the

site [and Metro] was not paid for the work it had performed" (Doc. 5, Martinez affid. at ¶ 6). However, other than the fact that Martinez says he is the president of Metro, there is no other indication that the facts described in his affidavit are based upon his personal knowledge (*see Suppiah v Kalish*, 76 AD3d 829, 832, 833 [1st Dept 2010]; CPLR 3212 [b]). His assertion that "[f]rom December 15, 2009, [Metro] has been trying to get paid for these open invoices from Tres [and Metro's] payment collection staff were told by representatives from the City[,] who owns the Museum ... that the work was accepted and that payment would be forthcoming," is hearsay evidence, and, as such, is insufficient to support Metro's burden of establishing a prima facie showing of entitlement to summary judgment (*see Ying Ji v Rockrose Development, Corp.*, 34 AD3d 253, 254 [1st Dept 2006]).

Metro also relies on the invoices submitted as exhibit "C" to Martinez's affidavit, which include descriptions of the work performed, the rate at which such work was being billed, and the sales tax being charged (Doc. 5, ex. C, Invoices; Doc. 20, Kutil reply affirm. at ¶ 2). Although the invoices are each dated December 15, 2009, the work described therein took place between June 5, 2008, to November 7, 2008, more than a year prior to when the invoices were created. As such, the invoices do not fall within the business records exception to the hearsay rule as they were not "made in the regular course of any business ... at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter" (CPLR 4518). Furthermore, although on each invoice the "project" is listed as "Metropolitan Museum of Art," several of the invoices describe work performed at "MOMA" (Doc. 5, ex. C, Invoices). Thus, even if a proper foundation had been laid for admit the hearsay documents under the business record exception, the contents of the invoices raise issues of fact as to whether the work described therein was

actually performed pursuant to the contract between Metro and Tres. The other document submitted by Metro, a "Customer Open Balance" showing the six invoices from December 15, 2009, and the amount due, is merely a restatement of the hearsay contents of the invoices. Furthermore, nothing in the Martinez affidavit or elsewhere in the record provides the required foundation that this document was prepared in the ordinary course of business or otherwise satisfies the requirements necessary to admit hearsay documents under the business record exception.

The arguments advanced in Metro's attorney's affirmations, to the extent relevant to the issues of Metro's performance and Tres's alleged breach, are "without evidentiary value and thus unavailing" (*Zuckerman*, 49 NY2d at 563). Having failed to offer proof in admissible form establishing each of the elements of a breach of contract claim, Metro does not meet its initial burden of proving its prima facie entitlement to summary judgment. As such, the court need not address the sufficiency of Tres's evidence submitted in opposition. Accordingly, Metro's motion for partial summary judgment as against Tres is denied in its entirety.

3. Tres's motion to vacate Metro's mechanic's liens

Lien Law § 21 provides several ways that a lien against the amount due or to become due to a contractor from the state or a public corporation for the construction of a public improvement may be discharged, including section 7, which allows discharge of a lien, in relevant part, "[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, or where the notice of lien is invalid by reason of failure to comply with the provisions of section twelve of this article" (Lien Law § 21 [7]). Under Lien Law § 12, notice of a lien on account of

public improvements may be filed "[a]t any time before the construction or demolition of a public improvement is completed and accepted by the state or by the public corporation, and within thirty days after such completion and acceptance ...." Work is "completed" when the entire project has been completed, not completion of the lienor's work (*see* 8-92 Warren's Weed, New York Real Property § 92.37 [2011]). "Acceptance" occurs when the public corporation formally recognizes that the work has been completed (*id.*). Under Lien Law § 12-a (1), within 60 days after the original filing, a lienor may amend its lien upon 20 days notice to existing lienors, mortgagees and the owner, "... provided that no action or proceeding to enforce or cancel the mechanic's lien has been brought in the interim, where the purpose of the amendment is to reduce the amount of the lien, except the question of wilful exaggeration shall survive such amendment."

A public improvement lien may also be discharged by the contractor or subcontractor, either before or after the beginning of an action, by executing a bond or undertaking in an amount equal to 110% of such lien, "conditioned for the payment of any judgement which may be recovered in an action to enforce the lien..." (Lien Law § 21 [5]). "The execution of any such bond or undertaking by any fidelity or surety company authorized by the laws of this state to transact business, shall be sufficient; and where a certificate of qualification has been issued by the superintendent of insurance ... no justification or notice thereof shall be necessary" (Lien Law § 21 [5] [a]). The bond or undertaking "shall be filed with ... the public corporation with which the notice of lien is filed and a copy shall be served upon the adverse party. The undertaking is effective when so served and filed" (*id.*).

Here, Tres argues that it completed all work on the project at issue on November 19,

2008, and that the improvements to the Metropolitan Museum of Art were completed and accepted by the New York City Department of Design and Construction on October 5, 2009 (Doc. 3, Paschalidis affirm. at ¶ 34). As proof of this contention, Tres relies on the statement made by Kalergios in his affidavit, which he says is based upon his review of Tres's payroll records (Doc. 3, Kalergios affid. at ¶ 12). Attached as exhibit "H" to Tres's attorney's affirmation, are the purported "payroll records," consisting of only two pages (Doc. 3, ex. H, Payroll records). The first page is a "certification of payroll," certified by Kenneth Martinez before a notary on December 4, 2008, for work at the Metropolitan Museum for the week ending November 23, 2009. According to the hours shown on this document, two laborers each worked two hours on Thursday, November 20. The next page is an "employees daily sign-in log" for Tres, dated November 19, 2008. On this document, the project name is left blank, but the start and end dates have been filled in as May 29, 2008, to November 20, 2008. Although there is a place for a "contractor/representative" to certify the correctness of the information provided in the document, this particular document is not certified. As proof that all work was completed and accepted by the New York City Department of Design and Construction on October 5, 2009, Tres submits an affidavit of Marilyn Maher, the risk manager of E.W. Howell Co., LLC, the general contractor/construction manager for the NYC Department of Design and Construction, contract no. FVO22IFS, for the improvement of the Metropolitan Museum of Art (Doc. 3, ex. E, Maher affid. at ¶¶ 1-2). Based on her personal knowledge of the books and records of E.W. Howell, Maher avers that Tres was a scaffolding subcontractor on the project, and that "E.W. Howell received final payment by wire transfer on October 5, 2009, following the final completion and acceptance of the Project by the City of New York" (*id.* at ¶¶ 3-4).

Relying on this evidence, Tres argues that the lien filed on April 19, 2010, was not filed within the required time because it was filed more than 30 days after the completion and acceptance of the work (Doc. 3, Paschalidis affirm. at ¶ 35). Tres further contends that the April 19 lien was duplicative in all respects other than the amount of a lien filed by plaintiff on June 3, 2009. Thus, it argues that even if the June 3 lien was timely, the April 19 amendment was beyond the time provided by Lien Law § 12-a (1).

Tres also claims that the liens should be discharged based on the contents of the exhibits that are attached to Tres's attorney's affirmation in support of its cross motion, showing "that each of [Metro's] liens were validly bonded in the appropriate amount" under Lien Law § 21 (5). Tres attaches as exhibit "H" "a bond to discharge public improvement lien," bond number S-906-3977, listing Washington International Insurance Company as the surety for a bond in the amount of $17,713.72. This document appears to be acknowledged by a representative of Tres and the surety on April 22, 2010, and includes a certificate of solvency for Washington International and an affidavit of service, dated April 26, 2010, from George Kalergios, stating that he served Metro by mail with a copy of the public improvement discharge bond and affidavit (Doc. 3, ex. H). Tres also encloses another "bond to discharge public improvement lien," bond number S-906-3982, dated May 6, 2010, also listing Washington International as the surety for a bond in the amount of $47,398.85 (*id.*). Annexed to this bond are documents related to Washington International's solvency, but there does not appear to be an affidavit of service similar to one Tres attached to the April 26 bond.

In opposition to Tres's cross motion, Metro argues that the certified payroll paper submitted by Tres to show that work was completed on October 5, 2009, fails to indicate whether

the City had accepted the work on that date (Doc. 21, Kutil reply affirm. at ¶ 13). It further contends that Tres does not supply "any payment application of final payment or other evidence that it had completed the work and that the work was accepted by the owner[,] and[,] most importantly, when" (*id.* at ¶ 14). As to the affidavit Tres submitted from Marilyn Maher of E.W. Howell, Metro claims that the affidavit provides no recitation that Maher "had or has any personal knowledge of the date of the completion of the work, or acceptance by the City ... [,] there are no documents attached to movant's papers that support[] Ms. Maher's statement [a]nd nowhere does she or anyone else state th[e] date that the work was completed and accepted" (*id.* at ¶ 17 [*emphasis in original*]). Finally, Metro argues that because Tres's evidence is insufficient to warrant dismissal of the liens, "[d]iscovery should be permitted to ascertain exactly when, if at all, the work on the project was completed and accepted triggering the lien law filing limitation [but in] the interim, [Metro] asks for judgment on its contract cause of action" (*id.* at ¶¶ 18-19). Metro's attorney's affirmation does not address Tres's contention that the court should discharge the two liens based on the evidence submitted by Tres showing that each of the liens were bonded.

The June 3, 2009, lien for the sum of $16,103.39 was not untimely under Lien Law § 12 because Maher's affidavit does not clearly demonstrate that the *entire project* at the Metropolitan Museum of Art had been completed and accepted by the City of New York 30 days prior to June 3, 2009. Because the June 3 lien was a lien on account of public improvements, the time in which Metro had to file the lien is not determined by when Tres's work was completed and accepted (*see* 8-92 Warren's Weed, New York Real Property § 92.37 [2011]). However, the second lien, dated April 29, 2010, is untimely under Lien Law § 12. Maher's affidavit, based on

her personal knowledge of the books and records of E.W. Howell, the project's construction manager, states that "E.W. Howell received final payment by wire transfer on October 5, 2009, following the final completion and acceptance of the Project by the City of New York" (Doc. 3, ex. E, Maher affid. at ¶¶ 4-5). Although the precise date of acceptance and completion is not specified in Maher's affidavit, it can be inferred that this occurred at some point on or before October 5, 2009. Thus, to be timely, the lien would have needed to be filed on or around November 5, 2009. In addition, the April 29 lien was not filed within 60 days of the original June 3, 2009 lien for the purpose of reducing the amount of the lien, as required to qualify as an amendment under Lien Law § 12-a (1). Furthermore, Metro does not ask the court to make an order amending the June 3 notice of lien nunc pro tunc (*see* Lien Law § 12-a [2]). Had Metro made such a request, the court would not find this to be "a proper case" for amendment, as Metro has provided no explanation for not filing the second lien until April 29, 2010. The statements made by Metro's attorney's affirmation about the sufficiency of the Maher affidavit are insufficient to raise a triable issue of fact as to the date the project was completed and accepted by the City of New York.

Although it appears that Tres obtained bonds to secure the amount equal to 110% of the two liens, it does not demonstrate that such bond was filed with the public corporation with which the notice of lien was filed (*see* Lien Law § 21 [5] [a]). The affidavit of service attached to the bond related to the June 3 lien only indicates that notice of the bond was mailed to Metro, but a bond is not effective to discharge a lien until it has been filed with the public corporation (Lien Law § 21 [5] [a]). Therefore, Tres does not establish compliance with the requirements for discharging the liens as set forth in Section 21 (5) (a). Although, based on the copy of the notice

under mechanic's lien law for account of public improvements submitted by Tres, it appears the lien is defective in that it is not verified by the lienor or its agent, because this point was not raised by Tres and Metro has not had an opportunity to respond, it would be improper for the court to grant Tres's cross motion for this reason.

In summary, Tres has shown that the April 29 lien was defective in that it was not filed in accordance with the provisions of section 12 of the Lien Law. As such, Tres, as a "party in interest," and upon the papers submitted in connection with its cross motion, is entitled to an order discharging the alleged lien dated April 29, 2010, because Metro fails to raise an issue of fact as to the date of the project's completion and acceptance (Lien Law § 21 [7]). However, Tres has not submitted sufficient proof to warrant discharge of the lien dated June 3, 2009, because it offers no proof that notice and a copy of the bond allegedly obtained on the lien was filed with the appropriate public corporation, a prerequisite for the bond to be effective for purposes of discharging the lien (Lien Law § 21 [5] [a]). Accordingly, Tres's cross motion is granted to the extent that the April 29, 2010 lien is discharged and otherwise denied.

Accordingly, it is

ORDERED that the motion of plaintiff, Metropolitan Enterprises NY a/k/a Metropolitan Enterprises, Inc., for partial summary judgment as against defendant, Tres Construction LLC, is denied; and it is further

ORDERED that the cross motion of Tres Construction LLC seeking to vacate two liens for account of public improvements filed by plaintiff is granted only to the extent that the "Notice Under Mechanic's Lien Law for Account of Public Improvements," filed by plaintiff's agent on April 29, 2010, is hereby vacated and cancelled of record and the cross motion is otherwise

denied; and it is further

ORDERED that, upon service of this order with notice of entry, the Clerk of the County of New York is directed to vacate and cancel the notice of such mechanic's lien for account of public improvements, and enter upon the lien docket, or other record of liens, opposite the endorsement of said lien, a statement that it has been vacated and cancelled of record; and it is further

ORDERED that the Part 12 Clerk shall matter is set down for a preliminary conference in Part 12, at 60 Centre Street, Room 212, New York, NY 10007 on February 2, 2012 at 2:15 p.m.

This constitutes the decision and order of the court.

Dated: January 4, 2012
New York, New York

J.S.C.

(2012 Pt 12 D&O_650493_2010_001_daz[sj_xmot_lien])