Matter of Concrete Structures, Inc. v Men of Steel Rebar Fabricators, LLC
2012 NY Slip Op 33903(U)
November 29, 2012
Supreme Court, Nassau County
Docket Number: 601617-12
Judge: Timothy S. Driscoll

SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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In the Matter of

CONCRETE STRUCTURES, INC.,

Petitioner,

-against-

for an Order discharging the mechanic's lien filed by

MEN OF STEEL REBAR FABRICATORS, LLC,

pursuant to Sections 9 and 19 of the New York State Lien Law and Section 1312(a) of the New York State Business Corporation Law,

Respondent.

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TRIAL/IAS PART: 16
NASSAU COUNTY

Index No: 601617-12
Motion Seq. No: 1
Submission Date: 10/4/12

Papers Read on this Motion:

Order to Show Cause, Verified Petition, Affirmation in Support, Affidavit in Support and Exhibits.....x
Memorandum of Law in Support.....x
Affirmation in Opposition.....x
Affidavit in Opposition and Exhibits.....x
Memorandum of Law in Opposition.....x
Reply Affirmation and Exhibit.....x
Reply Memorandum of Law in Further Support.....x

This matter is before the court on the motion filed by Petitioner Concrete Structures, Inc. ("Petitioner") on August 17, 2012 and submitted October 4, 2012. For the reasons set forth below, the Court denies the motion.

BACKGROUND

A. Relief Sought

Petitioner moves for an Order discharging and dismissing the mechanic's lien ("Mechanic's Lien") filed in the office of the Nassau County Clerk on July 12, 2012 by Respondent Men of Steel Rebar Fabricators, LLC ("Respondent") in the amount of $137,150.43.

Respondent opposes the motion.

B. The Parties' History

The Verified Petition ("Petition") alleges as follows:

Petitioner is a New York corporation with its place of business in Ronkonkoma, New York. Respondent is a foreign corporation with its place of business in Edgewater Park, New Jersey.

Petitioner and Respondent entered into an agreement ("Contract") pursuant to which Respondent would supply certain fabricated rebar in connection with the project known as 130 West Hempstead Avenue, West Hempstead, New York 11552 ("Project" or "Premises"). Petitioner performed all of its obligations under the Contract. Respondent was unable, and failed, to deliver timely the material required under the Contract. Due to that failure, Petitioner was required to terminate Respondent and retain the services of another supplier. On or about July 12, 2012, Respondent caused to be filed the Mechanic's Lien with the Nassau County Clerk in the sum of $137,150.43 in connection with the Premises.

The Petition contains the following two (2) causes of action:

First Cause of Action

New York Business Corporation Law ("BCL") § 1312(a) provides as follows:

> A foreign corporation doing business in this state without authority shall not maintain any action or special proceeding in this state unless and until such corporation has been authorized to do business in this state and it has paid to the state all fees and taxes imposed under the tax law or any related statute, as defined in section eighteen hundred of such law, as well as penalties and interest charges related thereto, accrued against the corporation. This prohibition shall apply to any successor in interest of such foreign corporation.

Upon information and belief, Respondent has performed construction services and or supplied construction materials in connection with the projects known as 1) the Apartments at Rockville Centre, Rockville Centre, New York 11570, 2) the BJ's located at 8719 Avenue D, Brooklyn, New York 11236, 3) the Frederick Douglas Academy located at 2581 7th Avenue,

New York, New York 10039, and 4) Boricua College [1] located at 890 Washington Avenue, Bronx, New York 10451.

Upon information and belief, Respondent is a foreign corporation doing business in the State of New York ("New York") without proper authority. Accordingly, Respondent lacks the ability, pursuant to BCL § 1312(a), to commence an action to foreclose on its Mechanic's Lien or otherwise enforce its purported lien rights. Thus, the Mechanic's Lien filed by Respondent serves no legitimate purpose other than to encumber the Premises and should be discharged, pursuant to New York State Lien Law ("Lien Law") § 19 and BCL § 1312(a).

Second Cause of Action

Lien Law § 19 sets forth, in part, that "[a] lien other than a lien for labor performed or materials furnished for a public improvement specified in this article, may be discharged...[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 for any other reason the notice of lien is invalid by reason of failure to comply with the provisions of section nine of this article."

Lien Law § 9 provides that a "notice of [mechanic's] lien shall state: [*inter alia*] [t]he labor performed or materials furnished and the agreed price or value thereof, or materials actually manufactured for but not delivered to the real property and the agreed price of value thereof."

The Mechanic's Lien filed by Respondent sets forth that "[t]he agreed price and value of the labor performed and value of the material furnished is $137,150.43," which is the amount of Respondent's Mechanic Lien. In actuality, the agreed upon price and value of the Contract, assuming that Respondent delivered all of the required materials, was $479,750.00. The failure to set forth the correct agreed upon price of the Contract is a fatal defect on the face of the Mechanic's Lien. In addition, the Mechanic's Lien fails to set forth an address or place of business within New York in which Respondent does business or is located. The failure to set forth such information is a fatal defect on the face of the Mechanic's Lien.

In light of the foregoing, the Mechanic's Lien should be discharged, pursuant to Lien Law §§ 9 and 19.

[1] The Petition refers to "Baricua Collage" but the Court gleans that Petitioner intended to refer to Boricua College.

In support of Petitioner's motion, Americo Magalhaes ("Magalhaes"), the President of Petitioner corporation, affirms that, assuming that Respondent delivered all of the required materials under the Contract (Ex. H to Magalhaes Aff. in Supp.), Respondent was to be paid $479,750.00. This amount is contrary to the amount set forth in the Mechanic's Lien (*id.* at Ex. A) which states that the agreed price and value of the labor performed and value of the material furnished is $137,150.43. In addition, the Mechanic's Lien incorrectly states that the agreed fee for professional services is $137,150.43. Magalhaes affirms that Respondent did not provide any professional services; they were only to provide materials. Magalhaes affirms, further, that the statement on the Mechanic's Lien that the total agreed price and value is $137,150.43 is incorrect.

Magalhaes affirms, further, that due to Respondent's inability to deliver the required materials promptly and properly, Respondent was terminated from the Project prior to delivery of all of the materials. Respondent, however, was paid for the materials it did provide and Petitioner contends that it, in fact, paid Respondent more than it was owed. Petitioner paid Respondent over $242,000.00, as reflected by the documentation provided (Ex. I to Magalhaes Aff. in Supp.). Magalhaes affirms that Petitioner determined that Respondent was actually overpaid and, therefore, the Mechanic's Lien is not only facially defective, it is substantively invalid. Magalhaes also affirms that, as a result of the allegedly improper Mechanic's Lien, Petitioner was compelled to deposit a sum equal to the Mechanic's Lien plus interest with the County Clerk, to discharge the Mechanic's Lien from the Premises. Thus, Petitioner has funds in the sum of $137,150.43 (*see* Ex. I to Magalhaes Aff. in Supp.) tied up unnecessarily as a result of the improperly filed Mechanic's Lien.

In opposition, Robert Vogelbacher ("Vogelbacher"), the President of Respondent, affirms that Respondent, in an effort to be competitive in the bidding process for the Project, offered a total fixed Contract price of $479,750.00 for an estimated 464 tons of fabricated rebar needed to be supplied to the Premises. The parties understood that, should more steel rebar be needed, Respondent would fabricate and supply that rebar at no additional cost. If the Project required less rebar, however, Petitioner would still pay Respondent the agreed lump sum Contract price. Vogelbacher affirms that nothing in the Contract prevented Petitioner from picking up the rebar on its own or arranging for a third party transporter but, based on Vogelbacher's experience, Respondent's shipping services saves its customers that additional expense.

Vogelbacher affirms that, pursuant to the Contract, extra charges applied for certain items, including but not limited to rescheduled delivery with less than 24 hours notice and an unlading time in excess of 2 hours. In addition, the Contract provides that a price adjustment increase of 3.5% would apply for any material shipped after January 1, 2012, and an additional 4.5% 90 days thereafter. The parties understood that the reason for the increase in price after January 1, 2012 was that Respondent, having offered a lump sum price to Petitioner, needed to secure and store the necessary quantity of steel from its suppliers.

In addition to providing Petitioner with a favorable lump sum price, Respondent included "shop drawings" (Vogelbacher Aff. in Opp. at ¶ 9) in the Contract price, which were to be drafted by Respondent's in-house drafting/detailing department. Shop drawings are detailed plans drafted by a specialist known as a "Detailer" (*id.* at ¶ 10) using a Computer Aided Design ("CAD") program and machine. The Detailer reviews the structural engineering plans for the project site and determines the quantity, type and shape of the rebar pieces needed to provide adequate structural strength. The use of these detailing services is more efficient than cutting and bending the rebar pieces as the project proceeds. Moreover, although the detailed drawings add an additional up-front cost to a project, they typically save the developer money on the additional labor that would result from delays in fabricating steel rebar piece by piece on the job site. Based on his 10 years of experience, Vogelbacher estimates that the shop drawings for the Project were worth approximately $20,000 retail, had they not been included in the lump sum Contract price. By including the shop drawings in the Contract price, Respondent provided additional savings to Petitioner.

Vogelbacher affirms that on or about July 29, 2011, Respondent began fabricating and delivering steel rebar in quantities and specifications as requested by Petitioner pursuant to the Contract. Petitioner paid Respondent the sum of $242,970.20 for rebar delivered to the Project beginning on August 2, 2011 through October 19, 2011, as reflected by the Account Receivables Payment provided (Ex. B to Vogelbacher Aff. in Opp.).

Subsequent to October 19, 2011, Respondent received orders from Petitioner for fabricated rebar. Respondent shipped orders on October 31, November 9, November 21, December 9 and December 12 of 2011 ("Unpaid Invoices") (Exs. C 1-5 to Vogelbacher Aff. in Opp.). The aggregate total of the Unpaid Invoices is $137,150.43 as reflected by the documentation provided (*id.* at Ex. D). Pursuant to the Contract, all invoices were to be paid within thirty (30) days of delivery. When Vogelbacher inquired regarding the delay in payment,

he was advised that the Project was "slowing down" and that construction would be suspended as of January 2012 (Vogelbacher Aff. in Opp. at ¶ 29). Vogelbacher's attempts to collect on the Unpaid Invoices were unsuccessful.

Respondent delivered final detailed shop drawings to Petitioner on December 9, 2011. Vogelbacher subsequently learned that Petitioner began purchasing steel rebar from an alternate supplier at wholesale prices. Vogelbacher submits that those purchases constituted a material breach of the Contract and disputes Magalhaes' claim that Respondent was terminated due to its inability to deliver the required materials promptly and properly. Vogelbacher affirms that Respondent not only met its delivery schedule under the Contract, but also fabricated and supplied steel rebar in rush orders and provides relevant documentation regarding Respondent's communication with Nick Lambo ("Lambo"), Petitioner's Chief Estimator (Exs. I, J and K to Vogelbacher Aff. in Opp.). In light of the Unpaid Invoices, Respondent filed the Mechanic's Lien which accurately reflects the agreed price and value of the labor performed and value of material furnished.

Vogelbacher also disputes Petitioner's claim that Respondent may not enforce its lien rights pursuant to CPLR § 1312(a). Vogelbacher affirms that Respondent 1) does not maintain an office in New York; 2) does not maintain bank accounts in New York; 3) does not receive mail in New York; 4) does not have a telephone number in New York; 5) has salespeople who solicit business in New York and numerous other states, including Pennsylvania, Delaware and Maryland; and 6) performs all of its steel rebar fabrication at its shop in New Jersey.

C. The Parties' Positions

Petitioner submits that 1) the Court should discharge the Mechanic's Lien on the grounds that Respondent is a foreign corporation doing business in New York without proper authority; 2) the Court should discharge the Mechanic's Lien on the grounds that Respondent failed to set forth the actual agreed upon price and value of the labor performed and value of the material furnished, and failed to set forth its New York business address; 3) in light of the fact that Respondent was overpaid for the materials they provided, the Mechanic's Lien is invalid.

Respondent opposes Petitioner's motion, submitting that 1) BCL § 1312(a) is not a bar to this action in light of the fact that Respondent was not doing business in New York, within the meaning of that statute, as Respondent's business activities in New York were not so systematic and regular as to manifest continuity of activity within the state; 2) should the Court conclude that BCL § 1312(a) is applicable to Respondent, the Court should stay this action until

authorization is obtained as Petitioner should not be permitted to use BCL § 1312(a) as a vehicle to avoid its contractual obligations; and 3) the Court should not discharge the Mechanic's Lien in light of the fact that Respondent accurately stated the value of the materials contracted for.

In reply, Petitioner submits, *inter alia*, that Respondent has not overcome evidence establishing that it is doing business in New York within the meaning of BCL § 1312(a). Petitioner asserts that Respondent's website and other documents reflect that Respondent is doing business in New York, and Respondent has admitted that it solicits customers and makes deliveries in New York. Thus, Respondent is not entitled to maintain an action in New York to foreclose its Mechanic's Lien and the Court should discharge the Mechanic's Lien.

RULING OF THE COURT

A. Discharge of Mechanic's Lien

Lien Law § 19, titled "Discharge of lien for private improvement," provides as follows at subdivision 6:

> (6) Where 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 for any other reason the notice of lien is invalid by reason of failure to comply with the provisions of section nine of this article, or where it appears from the public records that such notice has not been filed in accordance with the provisions of section ten of this article, the owner or any other party in interest, may apply to the supreme court of this state, or to any justice thereof, or to the county judge of the county in which the notice of lien is filed, for an order summarily discharging of record the alleged lien. A copy of the papers upon which application will be made together with a notice setting forth the court or the justice thereof or the judge to whom the application will be made at a time and place therein mentioned must be served upon the lienor not less than five days before such time. If the lienor can not be found, such service may be made as the court, justice or judge may direct. 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.

A court has no inherent power to vacate or discharge a notice of lien except as authorized by Lien Law § 19(6). *Matter of Gold Dev. & Mgt., LLC v. P.J. Contr. Corp.*, 74 A.D.3d 1340, 1341 (2d Dept. 2010), quoting *Matter of Northside Tower Realty, LLC v. Klin Constr. Group*, Inc., 73 A.D.3d 1072 (2d Dept. 2010). In *Matter of Gold Dev. & Mgt, LLC*, the Second Department reversed the trial court's order granting the petition to vacate the mechanic's lien to the extent of reducing the mechanic's lien from $120,250 to $8,430.60. 74 A.D.3d at 1341. In reversing the trial court's order, the Second Department held that, as the mechanic's lien in issue

was not invalid on its face, it was not subject to summary discharge pursuant to Lien Law § 19(6) and any dispute regarding the validity of the lien must await trial thereof by foreclosure. *Id.*, quoting *Matter of Northside*, *supra*, at 1072-1073.

In *40 West 53rd Associates Limited Partnership v. H. Weiss Equipment Corp.*, 2011 N.Y. Misc. LEXIS 3615 (N.Y. Sup. Ct. 2011), petitioner asserted that the mechanic's lien at issue was defective and invalid because it failed to comply with the requirements of the Lien Law that notice of the lien shall state the time when the first and last items of work were performed and materials were furnished. *Id.* at * 1-2. The court in *40 West* granted petitioner's application because the notice of mechanic's lien failed to provide petitioner with any information regarding the time when the first or last item of work was produced and materials furnished and, therefore, failed to meet the requirements of Lien Law § 9(6). *Id.* at * 3.

B. BCL § 1312(a)

BCL § 1312(a) constitutes a bar to the maintenance of an action by a foreign corporation in New York if that corporation is found to be "doing business" in New York without having obtained the requisite authorization to do so. *Highfill, Inc. v. Bruce and Iris, Inc.*, 50 A.D.3d 742, 743 (2d Dept. 2008), quoting *Airline Exch. v. Bag*, 266 A.D.2d 414, 415 (2d Dept. 1999). The question of whether a foreign corporation is "doing business" in New York must be approached on a case-by-case basis with inquiry made into the type of business being conducted. *Id., quoting Alicanto, S.A. v. Woolverton*, 129 A.D.2d 601, 602 (2d Dept. 1987). To find that a foreign corporation is "doing business" in New York within the meaning of BCL § 1312(a), the corporation must be engaged in a regular and continuous course of conduct in the State. *Id.*, quoting *Commodity Ocean Transp. Corp. of N.Y. v. Royce*, 221 A.D.2d 406, 407 (2d Dept. 1995). A defendant relying on BCL § 1312(a) as a statutory barrier to a plaintiff's lawsuit bears the burden of proving that the plaintiff-corporation's business activities in New York were not just casual or occasional, but so systematic and regular as to manifest continuity of activity in the jurisdiction. *Id.*, citing *S & T Bank v. Spectrum Cabinet Sales*, 247 A.D.2d 373 (2d Dept. 1998), quoting *Peter Matthews, Ltd. v. Robert Mabey, Inc.*, 117 A.D.2d 943, 944 (3d Dept. 1986). Absent sufficient evidence to establish that a plaintiff is doing business in New York, the presumption is that the plaintiff is doing business in its state of incorporation, and not in New York. *Id.* at 743-744, quoting *Cadle Co. v. Hoffman*, 237 A.D.2d 555 (2d Dept. 1997).

C. Application of these Principles to the Instant Action

The Court denies Petitioner's Order to Show Cause. Preliminarily, the Court concludes that BCL § 1312(a) is not a bar to Respondent's filing of the Mechanic's Lien. In light of Respondent's affirmations, *inter alia*, that Respondent does not maintain an office in New York, does not maintain bank accounts in New York, does not receive mail in New York and does not have a telephone number in New York, the Court concludes that Respondent was not doing business in New York within the meaning of BCL § 1312(a).

The Court denies Petitioner's application based on the Court's conclusion that the Mechanic's Lien is not invalid on its face and is not subject to summary discharge. The Notice Under Mechanic's Lien Law (Ex. A to Olsen Aff. in Supp.) provides adequate information regarding the time when the first and last items of work were performed and materials were furnished and, accordingly, any dispute regarding the validity of the Mechanic's Lien must await trial.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear before the Court for a Preliminary Conference on January 8, 2013 at 9:30 a.m.

ENTER

DATED: Mineola, NY
November 29, 2012

HON. TIMOTHY S. DRISCOLL
J.S.C.