

<b>Heavy Constr. Co., Inc. v Metro Constr. Equities Inc.</b>
2013 NY Slip Op 30285(U)
February 7, 2013
Supreme Court, Queens County
Docket Number: 25257/2012
Judge: Allan B. Weiss
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, ALLAN B. WEISS IAS PART 2  
Justice

HEAVY CONSTRUCTION CO., INC.,

Petitioner,

-against-

METRO CONSTRUCTION EQUITIES INC., and  
FRANK DEMARTINO,

Respondents.

Index No: 25257/12

Motion Date: 2/4/13

Motion Seq. No.: 1

The following papers numbered 1 to 19 read on this application by Petitioner cancelling, invalidating and discharging six Notices of Lien filed by Respondents in connection with six Public Improvement Contracts pursuant to Lien Law §§ 5, 12 & 21 ; awarding petitioner monetary damages for willful exaggeration of the liens pursuant to Lien Law §§ 39 & 39-a; and pursuant to Article 63 of the CPLR granting a permanent injunction enjoining the respondents from filing any mechanic's liens affecting any contract of the petitioner without prior approval of the Court.

PAPERS  
NUMBERED

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Upon the foregoing papers it is ordered that this application is determined as follows.

The petitioner entered into six separate public improvement contracts bearing numbers HWS2009R, SECBRPQ01, HWP2011Q, HWCURB07, HWS2012K and HWP2012Q with the Department of Design and Construction, City of New York (NYC DDC). The respondents filed Notices of Mechanic's Lien for Public Improvement as against monies due or to become due under each of these contracts alleging that\$500,000.00 is presently due and owing to respondents under each contract for furnishing various construction equipment in the performance of each contract.

The petitioner brought the instant proceeding pursuant to Lien Law §12 and §21(7) to summarily vacate, cancel and discharge the six Notices of Mechanic's Liens filed by the respondents.

Lien Law §5 provides in pertinent part that, upon filing a notice of lien, a person furnishing materials to a contractor, his subcontractor or legal representative under contracts for public improvements, shall have a lien for the value or agreed price of such materials furnished upon the moneys allocated to improvements under a particular contract to the extent of the amount due or to become due on such contract.

The petitioner has established that the six notices of claim are facially defective since the respondents have no lienable claims under Lien Law §5 as against any of the six public improvement contracts by submitting the affidavit of its president, Stenis Lomonaco, supported by documentary evidence. Lomanaco asserts that the respondents and petitioners never had any agreement to nor did the respondents furnish construction equipment, or any other any materials, to be used in conjunction with any of the public improvement contracts against which respondents filed the six notices of lien. Petitioner contends that as a result of prior litigation between the respondents and several non-parties, the respondent filed false and exaggerated notices of lien to harass and injure the petitioner.

In opposition to this branch of the petition the respondent DeMartino, appearing pro se, submitted his affidavit asserting that the petitioner wrongfully possesses hundreds of thousands of dollars worth of construction and office equipment belonging to the respondents as a result of a landlord tenant litigation with SNC Properties, LLC (SNC Properties), an entity respondent claims is the alter ego of the petitioner. Respondent claims that he observed petitioner using the construction equipment belonging to respondents in the performance of the work under the six public improvement contracts for which respondents have received no compensation.

Even if the court were to accept DeMartino's unsubstantiated claims that the petitioner used construction equipment owned by the respondents, it is apparent that the respondents did not furnish any materials to be used in the performance of the six public improvement contracts within the meaning of the Lien Law §5. Moreover, it is undisputed that the petitioner was not a party to the landlord tenant action and respondents have submitted no evidence to support the claim that SNC Properties is an alter ego of the petitioner. Whether the respondents have any legally cognizable claim as against SNC Properties, or any other

entity not a party to this proceeding, arising out of the landlord tenant litigation, such a claim is not a lienable claim under Lien Law §5.

Petitioner further asserts that the notices of lien must be summarily discharged pursuant to Lien Law §21(7) on the grounds that the liens are defective on their face because (a) they were filed more than 30 days after the completion and acceptance by the public corporation of the work under the applicable contract in violation of Lien Law §12; (b) the notices of lien inadequately describe the equipment allegedly furnished; (c) the respondents failed to serve petitioner with the Notices of lien in accordance with Lien Law §11-c (d) the respondents have willfully exaggerated the amount claimed they are due and (e) that the lienor/respondent Metro Construction Equities, Inc., has failed to appear in this proceeding and, in any event, it lacks standing to assert any lien inasmuch as it is inactive and has been dissolved by proclamation.

Pursuant to Lien Law § 12, public improvement liens must be filed no later than 30 days after the entire public improvement is completed and accepted by the public owner. In addition, Section 12 requires that the notice of claim state the name and residence of the lienor, the contractor for whom materials were furnished, the amount claimed to be due and the date when due, a description of the materials furnished and identify the contract under which the claim arose.

Lien Law § 21(7) provides in pertinent part that the court, upon application of a contractor may summarily discharge a notice of lien 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 materials furnished, or where the notice of lien is invalid in that it fails to comply with the provisions of Lien Law §12, or where it appears from the public records that such notice has not been filed in accordance with Lien Law §12.

In support of its petition, petitioner submitted documentary evidence demonstrating that the notices of lien filed as against contracts numbered HWS2009R, SECBRPQ01 and HWCURB07 are invalid on their face (see Lien Law §12) since they were filed more than 30 days after completion and acceptance of the work by the public corporation. The notice of lien as to the contract numbered SECBRPQ01 was filed on October 15, 2012 and the work was completed and accepted on September 26, 2011. The notice of lien referable to contract number HWS2009R was filed on October 16, 2012 whereas the completion and acceptance of the work thereunder was March 25, 2011. The notice of lien with respect to contract

number HWCURB07 was filed on October 16, 2012, and the work was completed and accepted on July 16, 2012.

The notice of lien referable to contract number HWP2011Q is also a nullity since it does not comply with Lien Law §11-c. Lien Law §11-c provides in pertinent part that the lienor shall, within five days before or simultaneously with filing, serve a copy of the notice of lien by certified mail on the contractor, subcontractor, assignee or legal representative for whom he furnished materials, and that proof of such service shall be filed with the notice of lien which is filed. The failure to file proof of such service shall render the notice of lien a nullity.

The petitioner submitted the notice of lien referable to contract number HWP2011Q dated July 17, 2012, and stamped as having been received by NYC DDC General Counsel on July 17, 2012. However, there was no affidavit of service attached.

In opposition, the respondents submitted an affidavit of service as Exhibit 10 which they claim is proof of service of the notice of lien referable to contract number HWP2011Q. This affidavit of service is insufficient to establish compliance with Lien Law §11-c by demonstrating that the notice of lien as to contract number HWP2011Q was served upon the petitioner or that it was attached to the notice of lien that was filed. The affidavit of service, dated August 17, 2012, does not state which of the six notices of claim was allegedly served on July 28, 2012. In addition, this affidavit of service bears a stamp "Received NYC DDC General Counsel August 17, 2012" while the notice of lien to which it is allegedly applicable i.e. contract number HWP2011Q, was stamped as received on July 17, 2012. Thus, the notice of lien referable to contract number HWP2011Q does not comply with Lien Law §11-c is a nullity.

With respect to the petitioner's claim for money damages pursuant to Lien Law §§ 39 and 39-a it is denied. Lien Law §§ 39 and 39-a both begin with the phrase "[i]n any action or proceeding to enforce a mechanic's lien ...." As respondent correctly states, the statutes provide that a claim to void a lien because of wilful exaggeration may be maintained only where the lienor commences an action to enforce the lien (Matter of Tully Constr. Co. v United Minerals, Inc., 221 AD2d 697, 698 [1995]; Matter of Upstate Bldrs. Supply Corp. [Maple Knoll Apts.], 37 AD2d 901, 902 [1971]). Here, the lienors have not commenced an action to enforce the lien. Therefore, petitioner may not assert a cause of action based on Lien Law § 39 or 39-a in this proceeding.

The branch of the petition seeking a permanent injunction enjoining the respondents from filing any lien affecting any contract of the petitioner without prior approval of the court is denied.

Accordingly it is

**ORDERED AND ADJUDGED** that the petition is granted only to the extent that the Notices of Lien filed as against the public improvement contracts bearing Contract Numbers HWS2009R, SECBRPQ01, HWP2011Q, HWCURB07, HWS2012K and HWP2012Q are discharged pursuant to Lien Law §21(7), and it is further

**ORDERED AND ADJUDGED** that the remainder of the petition is denied and dismissed.

Dated: February 7, 2013  
D# 48

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J.S.C.