

Matter of Paik Constr., Inc. v Dienst
2013 NY Slip Op 30600(U)
March 27, 2013
Supreme Court, New York County
Docket Number: 100319/13
Judge: Joan B. Lobis
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOBIS
Justice

PART 6

PAIK CONSTRUCTION, INC.

INDEX NO. 1003/9/13

- v -

MOTION DATE 3/19/13

MOTION SEQ. NO. 1

JILL C. DIENSTZ ET AL.

MOTION CAL. NO. _____

The following papers, numbered 1 to 19 were read on this motion to for compel.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1-5

Answering Affidavits — Exhibits _____

x-mot: 6-15

Replying Affidavits _____

16-18, x-mot 19

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

THIS MOTION IS DEEMED TO BE GRANTED WITH THE ACCOMPANYING UNFILED JUDGMENT DECISION. This judgment has not been entered by the County Clerk. ~~Order~~ notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 3/27/13

JOAN B. LOBIS J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

-----X

In the Application of the Demand of
PAIK CONSTRUCTION, INC.,

Petitioner,

Index No. 100319/13

For an Order directing Production of a Verified
Statement of the Lien Law Trust Books and Records
Pursuant to a Lien Law § 76 Demand Served Upon

Decision, Order, and Judgment

JILL C. DIENST and DANIEL W. DIENST,

Respondents.

-----X

JOAN B. LOBIS, J.S.C.:

Paik Construction, Inc., ("Contractor") brings this petition pursuant to Section 76 of the Lien Law, by order to show cause, for a verified statement of entries made in a trust account. Respondents Jill and Daniel Dienst ("Owners") must maintain a trust account by virtue of ownership of a property located at 397 West 12th Street, Unit 4, New York, New York ("Property"). Paik is a construction company that was hired by the Owners to do certain renovations to the Property. Respondents have cross-moved to dismiss the petition. For the reasons stated below, the relief requested in the order to show cause and petition is granted, and the cross-motion is denied.

According to the documents annexed to Respondents' papers, a standard form AIA agreement was entered into between the Contractor and the Owners on April 19, 2011, for renovations of the fifth and sixth floors of the Property. The agreement includes a clause requiring mediation of any dispute arising out of the contract. The relationship between the parties has broken down. The Contractor asserts that it is owed in excess of \$425,000.00; while the Owners claim that the Contractor breached the contract. A mediation is currently scheduled before the American

Arbitration Association.

Under the Lien Law, an owner of real property is required to hold all monies received in connection with work done on the property from various sources, which include building loans, mortgages, home improvement loans, and insurance proceeds, in trust. The law imposes similar duties on contractors and sub-contractors. The purpose of the trust is to ensure that funds obtained for construction projects are available to assure payments for work on those projects. Lien Law § 71; Aspro Mech. Contr. v. Fleet Bank, N.A., 1 N.Y.3d 324 (2004). As provided in Section 76, the Contractor is entitled to examine the books and records of the trust or to get a verified statement setting forth the entries contained in the books and records upon demand. On December 28, 2012, the Contractor sent a demand by certified mail for a verified statement to the Owners. A copy of the receipt of certified mailing is attached to Petitioner's reply and opposition to Respondents' cross-motion. When no response to the demand was forthcoming, the Contractor commenced this special proceeding by order to show cause and petition. In lieu of answering the petition, Respondents cross-moved pursuant to Rule 3211(a)(8) of the Civil Practice Law and Rules, asserting that the Court lacks personal jurisdiction, and pursuant to Rule 3211(a)(2) of the Civil Practice Law and Rules, asserting that the Court lacks subject matter jurisdiction because of the failure to mediate. They seek to vacate the demand as another basis to dismiss the petition. All of Respondents' bases to dismiss lack merit.

The order to show cause, signed on February 14, 2013, required personal service by February 18, 2013. The return date was March 5, 2013. Respondent Daniel W. Dienst admits to

receiving copies of the order to show cause, petition, and exhibits from his doorman on February 17, 2013, and copies by mail on February 20, 2013. Respondents argue that service was not completed until the filing of the affidavit of service. As of February 26, 2013, the date of the cross-motion, no affidavit of service had been filed. They argue that since there was no filed affidavit, service was not complete and that the Court lacks personal jurisdiction over Respondents. That is not a correct statement of the law. Personal service was accomplished by the delivery to a person of suitable age and discretion and by mailing. The failure to timely file an affidavit of service is not jurisdictional. See Conde v. Zaganjor, 66 A.D.3d 947 (2d Dep't 2009); Helfand v. Cohen, 110 A.D.2d 751 (2d Dep't 1985). As long as service of process is made as required, personal jurisdiction is obtained. The requirement of filing an affidavit to complete service is a procedural mechanism for triggering responsive pleadings. The cases cited by Respondents all show defects in the mode of service. These defects are not present here.

The requirement to mediate contained in the parties' agreement has no impact on the Contractor's rights under Section 76 of the Lien Law. The mediation clause applies to disputes under the contract. While it is conceivable that information about the trust account may be relevant to the dispute between the parties, the right to that information is independent of the contract. It is not an issue that is subject to the mediation clause.

Finally, the Contractor's attorney attached proof of service of the demand by certified mail. This satisfies the notice requirement in the statute. Respondents' vacating the premises because of damage from Hurricane Sandy is unfortunate. But it does not provide a legal basis to

[* 5]
void this proceeding. Petitioner has established that it complied with its requirement to demand relief prior to commencing a lawsuit.

The petition is granted. The Court directs Respondents to comply with the demand for a verified statement within ten (10) days of service of a copy of this order with notice of entry. It appears that Respondents have put forward all of their substantive arguments in defense of this petition and did not request additional time to answer the petition. If they have any additional non-frivolous defenses to the petition, they may move by order to show cause for leave to answer the petition prior to the expiration of the ten-day period provided to comply with the Section 76 demand.

This constitutes the decision and order of this Court.

Dated: *Mar. 27*, 2013

ENTER:



JOAN E. LOBIS, J.S.C.