

Sheng Sheng Constr., Inc. v Har's Constr., Inc.

2013 NY Slip Op 31214(U)

May 30, 2013

Sup Ct, Queens County

Docket Number: 29227/10

Judge: Bernice Daun Siegal

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Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY
Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 19
Justice

-----X
Sheng Sheng Construction, Inc.,

Plaintiff,

-against-

Har’s Construction, Inc., and H.L.C. 139, LLC,

Defendants.
-----X

Index No.: 29227/10
Motion Date: 4/15/13
Motion Cal. No.: 103
Motion Seq. No.: 2

The following papers numbered 1 to 12 read on this motion for an order pursuant to common law and New York Lien Law §39, discharging the mechanic’s lien filed by Plaintiff Sheng Sheng Construction, Inc., on or about August 24, 2010; (b) pursuant to CPLR §3212 dismissing the complaint against the defendant H.L.C. 139 LLC; (c) awarding defendant HLC 139 with reasonable attorney’s fees, costs, fees and disbursements.

	PAPERS NUMBERED
Notice of Motion - Affidavits-Exhibits.....	1 - 4
Affirmation in Opposition.....	5 - 9
Reply Affirmation.....	10 - 12

Upon the foregoing papers, it is hereby ordered that the motion is resolved as follows:

Defendant, H.L.C. 139, LLC (“HLC”) moves for an order pursuant to New York Lien Law §39 discharging the mechanic’s lien filed by plaintiff, Sheng Sheng Construction, Inc. (“Sheng Construction”) on or about August 24, 2010 and for an order pursuant to CPLR §3212 dismissing the complaint as against HLC and for an award of reasonable attorney’s fees, costs, fees and disbursements.

Facts

Plaintiff brought the within action seeking a judgment foreclosing the Mechanic's Lien and seeking damages due to HLC's breach of contract in the amount of \$936,149. HLC is the owner of real property located at 139-28 34th Avenue, Flushing New York 11354.

On November 26, 2007, defendant Har's Construction, Inc ("Har") was hired by HLC to construct a six story condominium for a contract price of \$3,400,000. On the same day, HLC obtained a loan from First American International Bank ("First American") in the amount of \$4,500,000 with \$1,100,000 going towards the land purchase.

HLC contends that it paid Har, the general contractor, in full, for its work on or before August 24, 2010.

Sheng Construction, the subcontractor, asserts that it performed work on the subject property from February 9, 2009 through July 23, 2010 and that the amount left unpaid for its labor is \$891,149 with an additional \$45,000 for material furnished for the subject property.

HLC's motion is granted solely to the extent of dismissing plaintiff's second cause of action as against HLC only, as more fully set forth below.

Mechanic's Lien

"[T]he rights of a subcontractor are derivative of the rights of the general contractor and a subcontractor's lien must be satisfied out of funds 'due and owing from the owner to the general contractor' at the time the lien is filed." (*Timothy Coffey Nursery/Landscape v Gatz*, 304 A.D.2d 652, 653-654 [2nd Dept 2003].) HLC contends that a subcontractor bears the burden of demonstrating that there is money due and owing to the general contractor from the owner based on the primary contract." (Id. at 654.) Pak Lew ("Lew"), Manager of HLC, stated in his affidavit that

HLC had paid Har, in full, for its work on or before August 24, 2010, the date the Plaintiff subcontractor Sheng Construction filed and served the Mechanic's Lien.

However, HLC has misapplied the relevant case law. On a summary judgment motion dismissing the cause of action to foreclose a lien on the ground that no fund exists to which a lien can attach, the prima facie burden is upon the movant. (*SMI Bldg. Systems, LLC v. West 4th Street Development Group, LLC*, 83 A.D.3d 687 [2nd Dept 2011][Defendant's assertions that it owed no money to the General Contractor at the time the subcontractor filed the lien not sufficient for a prima facie showing].) Similar to *West 4th Street Development Group, LLC*, in the within action, the movant is HLC, the owner. The court notes that although in both *West 4th Street Development Group, LLC* and *Gatz* the burden is on the movant, the holdings are distinguishable. In *Gatz*, the plaintiff moved for summary judgment and therefore the court determined the burden was upon the plaintiff to establish that there is money due and owing. In *West 4th Street Development Group*, as is the case herein, the defendant moved for summary judgment and therefore the burden was upon the defendant to submit evidence, such as checks or similar financial documents, establishing proof of defendant's payment in full to the general contractor. Here, HLC fails to submit proof of payments made to Har. Instead, HLC merely submits a Waiver and Release of Lien; however, the Waiver fails to state that all funds have been paid. Accordingly, HLC has failed to make out its prima facie entitlement to summary judgment.

HLC also claims that the Mechanic's Lien is void because the plaintiff wilfully exaggerated the amount of the lien in violation of Lien Law §39. The burden is upon HLC to show that the amounts set forth were "intentionally and deliberately exaggerated." (*Park Place Carpentry & Builders, Inc. v. DiVito*, 74 A.D.3d 928 [2nd Dept 2010]; *Garrison v. All Phase Structure Corp.*, 33

A.D.3d 661 [2nd Dept 2006].) In addition, Lien Law §39 must be strictly construed in favor of the party against whom the penalty is sought to be imposed. (*East Hills Metro, Inc. v. J.M. Dennis Const. Corp.*, 277 A.D.2d 348 [2nd Dept 2000].) Here, the record presents triable issues of fact with respect to whether Sheng Construction is guilty of fraud, and whether Sheng Construction wilfully exaggerated the lien so as to render it void as HLC has failed to establish what amount, if any, it has paid to the general contractor. Ordinarily, after a finding that the lien is valid on its face, a determination of wilful and fraudulent exaggeration of said lien should await trial. (*Northside Tower Realty, LLC v. Klin Construction Group, Inc.*, 73 AD3d 1072 [2nd Dept. 2010]; *Coppola Gen. Contr. Corp. v. Noble House Constr. of NY, supra*)

Privity of Contract

HLC contends that the Second Cause of action should be dismissed because there is no contract between HLC and Sheng Construction. Lew states in his affidavit that there was never a contract between HLC and Sheng Construction. Lew also asserts that HLC never breached the general contract between HLC and Har. “Liability for breach of contract does not lie absent proof of a contractual relationship or privity between the parties.” (*Hamlet at Willow Creek Development Co., LLC v. Northeast Land Development Corp.*, 64 A.D.3d 85, 104 [2nd Dept 2009].) “As a general rule, a subcontractor is in privity with the general contractor on a construction project, but is not in privity with the owner even if the owner has benefitted from the contractor's work.” (*CDJ Builders Corp. v. Hudson Group Const. Corp.*, 67 A.D.3d 720, 722 [2nd Dept 2009].) Here, it is undisputed that there is no written contract between the plaintiff, Sheng Construction and defendant HLC. Accordingly, HLC’s motion for summary judgment seeking to dismiss the second cause of action is granted as against HLC.

Conclusion

For the reasons set forth above, HLC's motion is granted solely to the extent of dismissing plaintiff's second cause of action as against HLC only.

Dated: May 30, 2013

Bernice D. Siegal, J. S. C.