

**Katselnik & Katselnik Group, Inc. v 313-315 W. 125th St., LLC**

2013 NY Slip Op 32932(U)

November 15, 2013

Sup Ct, New York County

Docket Number: 157251/2012

Judge: Carol R. Edmead

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

Index Number : 157251/2012
KATSELNİK & KATSELNİK GROUP
vs
313-315 WEST 125TH STREET
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO.
MOTION DATE 10/15/13
MOTION SEQ. NO.

The following papers, numbered 1 to , were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).
Answering Affidavits — Exhibits No(s).
Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is

Based on the accompanying Memorandum Decision, it is hereby

ORDERED that plaintiff's motion for summary judgment against defendants 313-315 West 125th Street, LLC, 118 Third Avenue LLC, Solil Management, LLC and Lighthouse Properties, LLC under its first through fourth causes of action for breach of contract and to foreclose on a mechanic's lien, and for an award of attorneys' fees is denied; and it is further

ORDERED that said defendants' the request to void plaintiff's Notice of Lien pertaining to the 125th Street Contract pursuant to Lien Law §39 is denied; and it is further

ORDERED that the parties shall appear for a Preliminary Conference on January 7, 2014, 2:15 p.m.; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 11/15/2013

HON. CAROL EDMEAD, J.S.C.

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

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 35

-----X  
KATSELNİK & KATSELNİK GROUP, INC. d/b/a  
K&K GROUP, INC.,

Index No.: 157251/2012

Plaintiff,

-against-

**DECISION AND ORDER**  
Motion Seq. 002

313-315 WEST 125<sup>th</sup> Street, LLC, 118 THIRD AVENUE  
LLC, SOLIL MANAGEMENT, LLC, LIGHTHOUSE  
PROPERTIES, LLC and JOHN DOE/ABC COMPANY  
NOS. 1 THROUGH 10,

Defendants.

-----X  
CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

Plaintiff, Katselnik & Katselnik Group, Inc. d/b/a K&K Group, Inc. (“plaintiff”) moves for summary judgment against defendants 313-315 West 125<sup>th</sup> Street, LLC (“313”), 118 Third Avenue LLC (“118”), Solil Management, LLC (“Solil”) and Lighthouse Properties, LLC (“Lighthouse”) (collectively, the “Solil Defendants”) for its first through fourth causes of action for breach of contract and to foreclose on a mechanic’s lien.

*Factual Background*

According to the Complaint, 313 owns the premises located at 313-315 West 125<sup>th</sup> Street, a/k/a 313-325 West 125<sup>th</sup> Street, New York, New York (the “125<sup>th</sup> Street Premises”) and 118 owns the premises located at 150 East 14<sup>th</sup> Street, a/k/a 118-120 Third Avenue, New York, New York (the “14<sup>th</sup> Street Premises”). Lighthouse is allegedly affiliated with 313, 118, or Solil, and has “some type of ownership interest” in the 14<sup>th</sup> Street Premises.

In April 2010, plaintiff entered into an agreement with Solil to furnish labor and materials

(the “125<sup>th</sup> Street Contract”) in connection with construction work at the 125<sup>th</sup> Street Premises (the “125<sup>th</sup> Street Project”). In August 2010, plaintiff entered into an agreement with Solil to provide labor and materials (the “14<sup>th</sup> Street Contract”) in connection with construction work at the 14<sup>th</sup> Street Premises (the “14<sup>th</sup> Street Project”). Plaintiff claims that it performed all of the labor and services required under both Contracts, and that Solil failed to fully pay the sums due thereunder. As a result, plaintiff sues Solil for breach of the two Contracts (first and second causes of action), and seeks to foreclose on mechanic’s liens plaintiff filed against both Premises (third and fourth causes of action).

In support of summary judgment, plaintiff submits both Contracts, to which Solil is a signatory, accountings of the monies due under each Project, copies of the mechanic’s liens plaintiff filed and Notices of Pendency pertaining to the foreclosure causes of action, and attests that Solil failed to pay the outstanding contract balances due and owing. Plaintiff argues that a pending action against 313 does not provide a legal basis for the Solil Defendants’ failure to pay the balances owed.<sup>1</sup> Plaintiff further argues that the Solil Defendants failed to submit a timely and valid objection to plaintiff’s statements of account, failed to respond to plaintiff’s outstanding discovery requests served upon them in this action, and have not disclosed any information to support their refusal to pay plaintiff the balance due. Thus, it is argued, as a result of Solil’s breach of the Contracts, plaintiff is entitled to \$288,661.90 plus interest on the sum of \$190,516.74 at the statutory rate (9% per annum) from February 6, 2012, which is the date when

---

<sup>1</sup> Plaintiff contends that a personal injury action was filed in the Bronx County Court against 313, and 313 commenced an action against plaintiff (and plaintiff’s insurer) for defense and indemnification of the personal injury claims. Greater New York Mutual Insurance agreed to defend one or more of the Solil Defendants, none of which has incurred any liability for damages to date.

plaintiff allegedly last furnished labor and/or equipment on the 125th Street Project, as well as interest on the sum of \$98,145.16 at the statutory rate from February 8, 2012, which is the date when plaintiff allegedly last furnished any improvements on the 14th Street Project.

In support of its motion for attorneys' fees, plaintiff argues that the Solil Defendants have engaged in "outrageous and extortionist conduct" by refusing to pay monies owed to plaintiff without justification.

In opposition, the Solil Defendants argue that plaintiff failed to submit an affidavit from someone with personal knowledge to support its motion, failed to properly authenticate the documentary evidence presented, and presented incomplete documentation.

It is argued that the 125<sup>th</sup> Street Contract plaintiff submitted is missing its signature page and, does not include the correct General Conditions of the Contract for Construction, which appears to be for a different construction project in Kearny, New Jersey. The Solil Defendants submit what it contends is the true and complete contract for the 125<sup>th</sup> Street Project. And, plaintiff failed to submit all releases and waivers of liens from the subcontractors that worked at the 125<sup>th</sup> Street Premises. Plaintiff's subcontractor (plumber) Joseph L. Balkan, Inc. (the "plumber") allegedly filed a Notice of Mechanic's Lien on April 20, 2012 for work he performed at the 125<sup>th</sup> Street Premises, and then commenced an action against 313 and plaintiff in 2013. Plaintiff owes Balkan more than \$12,000, which is a material breach of §9.10 of the 125<sup>th</sup> Street Contract, and has not submitted a final waiver of lien for Balkan. And, the Solil Defendants assert, during the period of construction of the 125<sup>th</sup> Street Project, plaintiff submitted 12 Change Orders (for various sums), which were unsigned and unauthorized, and thus, plaintiff's application for final payment was never approved by the Architect ("Just Architecture"). Thus,

the total amount sought under the 125<sup>th</sup> Street Contract is wilfully exaggerated. Given that the amounts stated in the Notice of Lien is exaggerated, the Court should deny summary judgment or void the Notice of Lien pursuant to Lien Law §39.

The 14<sup>th</sup> Street Contract plaintiff submitted also is not a true and complete copy, as it fails to include the General Conditions of the Contract for Construction. Further, according to the status report by the architect, certain work remains incomplete, which has precluded defendants from obtaining a certificate of occupancy for the subject building. And, plaintiff submitted a final waiver of lien for this Project, which to date, has not been closed out.

Further, plaintiff failed to show that 313 is the record fee owner of the 125<sup>th</sup> Street Premises, and that 118 Third Avenue LLC and Lighthouse are the record fee owners of the 14<sup>th</sup> Street Premises. Nor did plaintiff prove that Solil consented to plaintiff's work within the meaning of Lien Law §3. And, plaintiff did not properly serve Lighthouse, one of the alleged owners of the 14<sup>th</sup> Street Premises, with the Notice of Mechanic's Lien for the 14<sup>th</sup> Street Premises at Lighthouse's corporate address and place of business at pursuant to Lien Law §11 and/or §11-b. Thus, the mechanic's lien as to the 14<sup>th</sup> Street Premises should be discharged.

Finally, argues the Solil Defendants, there is no legal basis for the attorneys' fees sought by plaintiff.

In reply, plaintiff submits a fully executed copy of the 125<sup>th</sup> Street Contract, and points out that defendant's submission of the Contract did not include the proposals referenced in Section 4.2 of the Contract which govern plaintiff's required scope of work at the 125<sup>th</sup> Street Premises. Plaintiff states that the scope of work did not include the filing of permits, obtaining sign-offs and arranging for filings with the NYC Department of Buildings to "close out" the job.

And, the Solil Defendants did not point to any provision of the 125<sup>th</sup> Street Contract with which plaintiff failed to comply. Further, the Solil Defendants' objections to the Change Orders at this point cannot defeat summary judgment. And, counsel for defendants lack any personal knowledge of what transpired during the 125<sup>th</sup> Street Project. Therefore, the Solil Defendants failed to raise an issue of fact concerning plaintiff's satisfactory completion of its scope of work.

Further, plaintiff argues that the Solil Defendants do not contest any portion of the amounts outstanding for the 14<sup>th</sup> Street Project, and points to no provision of the 14<sup>th</sup> Street Contract with which plaintiff failed to comply. And, because the Solil Defendants materially breached such Contract by failing to pay the outstanding amounts due, plaintiff is not contractually obligated to assist them with completing any work toward the certificate of occupancy.

And, even assuming Lighthouse was improperly served, such factor is immaterial to plaintiff's breach of contract claim against Solil relating to the 14<sup>th</sup> Street Project.

#### *Discussion*

As the proponent of the motion for summary judgment, plaintiff must establish its cause of action sufficiently to warrant the court directing judgment in its favor as a matter of law in (CPLR §3212 [b]; *VisionChina Media Inc. v Shareholder Representative Services, LLC*, 109 AD3d 49, 967 NYS2d 338 [1<sup>st</sup> Dept 2013]; *Ryan v Trustees of Columbia University in City of New York, Inc.*, 96 AD3d 551, 947 NYS2d 85 [1<sup>st</sup> Dept 2012]). This standard requires that the plaintiff make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*People ex rel. Cuomo v Greenberg*, 95 AD3d 474, 946 NYS2d 1 [1<sup>st</sup> Dept 2012];

*Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1<sup>st</sup> Dept 2012], citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923, 501 NE2d 572 [1986] and *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, the motion must be supported “by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions” (CPLR § 3212 [b]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any material issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (*Wing Wong Realty Corp. v. Flintlock Const. Services, LLC*, 95 AD3d 709, 945 NYS2d 62 [1<sup>st</sup> Dept 2012] citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 501 NE2d 572 [1986]; *Ostrov v Rozbruch*, 91 AD3d 147, 936 NYS2d 31 [1<sup>st</sup> Dept 2012]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman* at 562; *IDX Capital, LLC v Phoenix Partners Group*, 83 AD3d 569, 922 NYS2d 304 [1<sup>st</sup> Dept 2011]).

#### *Breach of Contract*

To establish a breach of contract claim, plaintiff is required to show the existence of a valid contract, performance by the plaintiff, breach of the contract by defendant and resulting damages (*see Flomenbaum v New York Univ.*, 71 AD3d 80, 890 NYS2d 493 [1st Dept 2009]; *Clearmont Prop., LLC v Eisner*, 58 AD3d 1052 [3d Dept 2009]; *Volt Delta Resources LLC v Soleo Communications Inc.*, 11 Misc 3d 1071, 816 NYS2d 702 [Supreme Court, New York

County 2006], *citing Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]);

Here, plaintiff submitted the 125<sup>th</sup> Street Contract, which on its face, is between Solil and plaintiff for the 125<sup>th</sup> Street Project, in which Solil agreed “to pay the Contractor” (plaintiff) \$1,115,000. Although the complete contracts for the 125<sup>th</sup> and 14<sup>th</sup> Street Projects were not initially submitted, Solil admits, in opposition and through its own submission of the relevant contract, that Solil engaged plaintiff to provide certain labor and construction services at the 125<sup>th</sup> Street Premises (See ¶3, Affidavit of Joseph Grabowski, Director of Commercial Management for Solil). Similarly, apart from pointing out that the 14<sup>th</sup> Street Contract plaintiff submitted does not include the General Conditions, Solil admits that it engaged plaintiff to perform certain labor and construction services at the 14<sup>th</sup> Street Premises in exchange for \$515,000 (*id.*). And, it is uncontested that plaintiff performed work pursuant to the 14<sup>th</sup> Street Contract. It is noted that facts “appearing in the movant's papers which the opposing party does not controvert, may be deemed to be admitted” (*Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1<sup>st</sup> Dept 2012] *citing Kuehne & Nagel v Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 330 NE2d 624 [1975]). Thus, to the degree Solil does not dispute that it hired plaintiff to perform the work in question at both Projects for the amounts plaintiff asserts, plaintiff sufficiently established the existence of the agreements upon which its breach of contract claims are based. Plaintiff, as the movant, also established that it provided the labor and services as required, and that Solil failed to pay plaintiff the full amounts due under both Contracts. And, the affirmation of an attorney, even if he has no personal knowledge of the facts, may serve as the vehicle for the submission of acceptable attachments which do provide “evidentiary proof in admissible form,” *e.g.*, documents (*Furlender v Sichenzia Ross Friedman Ferenca LLP*, 79

AD3d 470, 912 NYS2d 204 [1<sup>st</sup> Dept 2010]). Therefore, plaintiff established its entitlement to summary judgment on its first and second causes of action against Solil for breach of both Contracts.

However, in opposition, the Solil Defendants sufficiently raised issues of fact as to their liability for breach of the Contracts. As to the 125<sup>th</sup> Street Contract, the numerous Change Orders from September 2011 through November 2011 which plaintiff invoiced were *not* executed so as to demonstrate their approval or acceptance by either party, notwithstanding the requirement under Article 7 of said Contract that a “Change Order shall be based upon agreement among the Owner, Contractor and Architect.” Although the Solil Defendants do not dispute that plaintiff’s work at the 125<sup>th</sup> Street Premises was satisfactory, and notwithstanding the meeting minutes submitted in reply, it cannot be said, as a matter of law, that the parties agreed to the work plaintiff performed under such Change Orders, upon which plaintiff’s breach of contract is also based. And, the Solil Defendants sufficiently raise an issue as to whether plaintiff breached the 125<sup>th</sup> Street Contract by failing to fully pay the plumber in accordance with Section 9.10 of said Contract.<sup>2</sup> Therefore, summary judgment in favor of plaintiff and against Solil for breach of the 125<sup>th</sup> Street Contract is unwarranted.

As to the 14<sup>th</sup> Street Contract, the Solil Defendants raised an issue of fact as to whether plaintiff sufficiently performed under said Contract. According to the submissions, and notwithstanding plaintiff’s submissions in reply, it is unclear whether there are pending, open electrical and alteration applications which preclude Solil from obtaining a certificate of

---

<sup>2</sup> Section 9.10 of the 125<sup>th</sup> Street Contract provides that “Neither final payment nor any remaining retained percentage shall become due until the Contractor submits to the Architect . . . data establishing payment or satisfaction of obligations, such as . . . releases and waivers of liens . . . arising out of the Contract.”

occupancy for the 14<sup>th</sup> Street Premises. It is also unclear whether the work indicated by the architect was not required to be performed by the plaintiff under the 14<sup>th</sup> Street Contract. Therefore, summary judgment in favor of plaintiff and against Solil for breach of the 14<sup>th</sup> Street Contract is unwarranted.

*Foreclosure on Mechanic's Liens Claims*

As stated by plaintiff, to “establish the right to enforce a mechanic's lien, the contractor . . . must make a prima facie case that the lien is valid, and that it is entitled to the amount asserted in the lien” (*Ruckle and Guarino, Inc. v Hangan*, 49 AD3d 267, 852 NYS2d 122 [1<sup>st</sup> Dept 2008]). Plaintiff must show that the party against whom the foreclosure of the mechanic's lien is sought has an ownership interest in the subject properties, that it commenced the action within one year of filing of the liens, and that such party consented to the work performed and failed to fully pay plaintiff for such work (*see Nouveau Elevator Industries, Inc. v Tracey Towers Housing Co.*, 95 AD3d 616, 944 NYS2d 119 [1<sup>st</sup> Dept 2012]; *American Const. Inc. v Radu Physical Culture, LLC*, 93 AD3d 580, 940 NYS2d 633 [1<sup>st</sup> Dept 2012]).

Here, plaintiff has established, based on the documents and pleadings, that it furnished all labor and materials from June 5, 2010 through February 6, 2012 as to the 125<sup>th</sup> Street Project, and from August 28, 2010 through February 8, 2012 as to the 14<sup>th</sup> Street Project pursuant to the subject Contracts, and such properties were owned by 313, and 118 and Lighthouse, respectively, that within eight months thereafter, it timely filed its mechanic's liens on July 27, 2012 as to both Projects, and that plaintiff was not fully paid for the work performed on both Projects as indicated on the invoices sent to Solil (*see Nouveau Elevator Industries, Inc. v Tracey Towers Housing Co.*, 95 AD3d 616, 944 NYS2d 119 [1<sup>st</sup> Dept 2012]) (“Plaintiff also established its

entitlement to foreclosure of the mechanic's liens as against Tracey Towers Co., Tracey Towers Associates, and Leon D. DeMatteis Construction Corp., *each of which is alleged by the verified complaint to have an ownership interest in the subject properties*") (emphasis added)).

In opposition, the Solil Defendants sufficiently raised issues of fact as to the propriety of the mechanic's liens foreclosure claims. As noted above, issues of fact as to the amounts sought in the mechanic's lien for the 125<sup>th</sup> Street Project and whether the Solil Defendants consented to the work under the Change Orders at issue, preclude summary judgment on this claim.

However, while plaintiff is not entitled to summary judgment on its mechanic's lien against the 125<sup>th</sup> Street Premises, the Solil Defendants' request that the mechanic's lien pertaining to the 125<sup>th</sup> Street Project be deemed void under Lien Law § 39-a on the ground that plaintiff wilfully exaggerated the amount stated therein is also unwarranted. A "claim under Lien Law § 39-a is subject to summary disposition where the evidence concerning whether or not the lienor wilfully exaggerated the lien is conclusive" (*On the Level Enterprises, Inc. v 49 East Houston LLC*, 104 AD3d 500, 964 NYS2d 85 [1<sup>st</sup> Dept 2013], *citing Northe Group, Inc. v Spread NYC, LLC*, 88 AD3d 557, 931 NYS2d 231 [1<sup>st</sup> Dept 2011]). "Such a burden necessarily involves proof as to the credibility of the lienor" and as such, "the issue of wilful or fraudulent exaggeration is one that is ordinarily determined at the trial of the foreclosure action, and not on summary disposition (*On the Level Enterprises, Inc., supra citing Rosenbaum v Atlas & Design Contrs., Inc.*, 66 AD3d 576, 887 NYS2d 93 [1<sup>st</sup> Dept 2009]) and *Aaron v Great Bay Contr.*, 290 AD2d 326, 736 NYS2d 359 [1<sup>st</sup> Dept 2002]).

Here, the Solil Defendants failed to establish, as a matter of law, through the affidavits of the parties or other documentation, that the plaintiff wilfully exaggerated the amounts sought

under the 125<sup>th</sup> Street Contract (*On the Level Enterprises, Inc., supra* (finding that a determination as to whether the exaggeration of the lien was wilful should be left to the factfinder where “the record is devoid of affidavits from either of McGrath's two principals, absent which, the motion court could not summarily conclude they bore no ill will when they calculated the lien and that any errors were the result of ignorance or honest mistake)). Therefore, the request to void plaintiff's Notice of Lien pertaining to the 125<sup>th</sup> Street Contract pursuant to Lien Law §39 is denied.

And, as to the mechanic's lien pertaining to the 14<sup>th</sup> Street Contract, the record indicates that the Notice of mechanic's lien was improperly sent to Lighthouse at an address in Lynchburg, Virginia, where Lighthouse does not maintain a corporate address or place of business. “Pursuant to Lien Law § 11, a party is required to serve a notice of lien on a corporation by one of three specified methods. Strict compliance with the statutory requirements is mandated and the court does not have discretion to excuse noncompliance” (*Lona & Sons, Inc. v Raposo*, 36 Misc 3d 1203(A), 957 NYS2d 264 (Table) [Supreme Court, Queens County 2012] *citing HMB Acquisition Corp. v F & K Supply*, 209 AD2d 412 [2d Dept 1994] and *Sanco Mech., Inc. v DKS Gen. Contrs. & Constr. Mgrs., Inc.*, 34 AD3d 271 [1st Dept 2006]). Although the amended verified complaint acknowledges Lighthouse's office address on Fifth Avenue, New York, New York, the Notice of the mechanic's lien was not served upon Lighthouse at its Fifth Avenue address. Instead, said Notice was served upon Lighthouse at an address in Virginia, and then in Massachusetts. Therefore, summary judgment against the Solil Defendants on the mechanic's lien filed against the 14<sup>th</sup> Street Premises is unwarranted.

### *Attorneys' Fees Claim*

Finally, plaintiff's request for attorneys' fees is denied. Under the general rule, attorneys' fees "are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule" (*Gotham Partners, L.P. v High River Ltd. Partnership*, 76 AD3d 203, 906 NYS2d 205 [1<sup>st</sup> Dept 2010]; *Braithwaite v 409 Edgecombe Ave. HDFC*, 294 AD2d 233, 234 [1st Dept 2002]). While exceptions have been made where the counsel has acted in "bad faith," (*Park South Assoc. v Essebag*, 113 Misc 2d 1026, 451 NYS2d 345 [N.Y. City Civ. Ct.1982]) and attorneys' fees may be granted based on "frivolous" conduct as that term is defined in subdivision (c) of 22 NYCRR 130-1.1,<sup>3</sup> plaintiff failed to establish its entitlement to attorneys' fees based on any conduct of the Solil Defendants.

### *Conclusion*

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion for summary judgment against defendants 313-315 West 125<sup>th</sup> Street, LLC, 118 Third Avenue LLC, Solil Management, LLC and Lighthouse Properties, LLC under its first through fourth causes of action for breach of contract and to

---

<sup>3</sup> Conduct is frivolous under 22 NYCRR 130-1.1(c), if "(1) it is completely without merit in law and cannot be supported\*582 by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false." (*Cadlerock Joint Venture, L.P. v. Sol Greenberg & Sons Intern., Inc.*, 94 AD3d 580, 942 NYS2d 497 [1<sup>st</sup> Dept 2012]).

to the 125<sup>th</sup> Street Contract pursuant to Lien Law §39 is denied; and it is further

ORDERED that the parties shall appear for a Preliminary Conference on January 7, 2014, 2:15 p.m.; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: November 15, 2013



Hon. Carol Robinson Edmead, J.S.C.

**HON. CAROL EDMEAD**