

Matell Contr. Co., Inc. v Fleetwood Food Corp.

2014 NY Slip Op 33467(U)

May 16, 2014

Supreme Court, Westchester County

Docket Number: 60191-2013

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT : STATE OF NEW YORK
IAS PART WESTCHESTER COUNTY
PRESENT: HON. JOAN B. LEFKOWITZ, J.S.C.

-----X
MATELL CONTRACTING CO., INC.,

Plaintiff,

-against-

FLEETWOOD FOOD CORP., FLEETWOOD PARK
DEVELOPMENT, LLC, MARIO SILVA ELECTRICAL
INC., AND VALLEY PLUMBING SERVICES, INC.,
d/b/a MR. ROOTER PLUMBING,

Defendants.

-----X
FLEETWOOD PARK DEVELOPMENT, LLC,

Third-Party Plaintiff,

-against-

SALVATORE GIZZO,

Third-Party Defendant.

-----X

To commence the statutory time period for
appeals as of right (CPLR 5513[a]), you are
advised to serve a copy of this order, with
notice of entry, upon all parties.

DECISION & ORDER

Index No: 60191-2013

Motion and Cross-Motion
Return Date:
March 14, 2014
Motion Seq. #2 & #3

The following papers numbered 1 through 66 were read on (1) the **E-filed** motion by defendant, FLEETWOOD PARK DEVELOPMENT, LLC, (FLEETWOOD PARK) for an order (a) granting summary judgment dismissing the complaint and discharging the notice of mechanic's lien and notice of pendency filed against the property of FLEETWOOD PARK; (b) granting summary judgment dismissing the cross-claim against it asserted by the defendant, MARIO SILVA ELECTRICAL (SILVA ELECTRICAL), and discharging the mechanic's lien filed by SILVA against the property of FLEETWOOD PARK; (c) granting summary judgment on FLEETWOOD PARK's counterclaim against the plaintiff alleging plaintiff willfully exaggerated the mechanic's lien in violation of Lien Law §39 and §39-a; and (2) the **E-filed** cross-motion by the plaintiff for an order granting summary judgment on its claim against FLEETWOOD PARK and determining that its notice of lien, dated May 25, 2011, is a valid lien against the property of FLEETWOOD PARK.

Notice of Motion, Affirmation, Affidavit (Exhibits A-R).....1-21
Affirmation in Support (Exhibits A-N).....22-36
Memorandum of Law.....37
Affirmation in Opposition (SILVA).....38

Affidavit in Opposition (Exhibit A) (SILVA).....39-40
 Notice of Cross-Motion, Affidavit, Memorandum of Law (Exhibits A-V).....41-65
 Memorandum of Law (FLEETWOOD PARK).....66

Upon reading the foregoing papers it is

ORDERED the branch of the motion which seeks an order granting summary judgment dismissing the complaint and discharging the notice of lien and notice of pendency is granted and the complaint is dismissed, and the notice of lien filed by the plaintiff against the property of the defendant FLEETWOOD PARK DEVELOPMENT, LLC, in the sum of \$1,800,000.00 in the Office of the Westchester County Clerk on May 25, 2011, is discharged of record, and the notice of pendency, filed by the plaintiff against the property of the defendant FLEETWOOD PARK DEVELOPMENT, LLC, in the Office of the Westchester County Clerk on December 9, 2011, is discharged of record, and the Clerk is directed to mark his records accordingly; and it is further

ORDERED the branch of the motion which seeks an order granting summary judgment dismissing the cross-claim by the defendant, MARIO SILVA ELECTRICAL INC, against the defendant, FLEETWOOD PARK DEVELOPMENT, LLC, and discharging the notice of mechanic's lien, is granted, and the cross-claim asserted by the defendant, MARIO SILVA ELECTRICAL INC., against the defendant, FLEETWOOD PARK DEVELOPMENT, LLC, is dismissed, and the notice of lien filed by the defendant, MARIO SILVA ELECTRICAL INC., against the property of the defendant, FLEETWOOD PARK DEVELOPMENT, LLC, in the sum of \$142,382.00 in the Office of the Westchester County Clerk on March 6, 2011, is discharged of record, and the Clerk is directed to mark his records accordingly and it is further

ORDERED the branch of the motion which seeks an order granting summary judgment on the counterclaims of the defendant, FLEETWOOD PARK DEVELOPMENT, LLC, alleging the plaintiff willfully exaggerated the lien is denied, and the counterclaims are dismissed; and it is further

ORDERED the cross-motion is denied.

Plaintiff sues to foreclose a mechanic's lien. The defendant, FLEETWOOD FOOD CORP. (FOOD CORP), leased premises from the owner, the defendant, FLEETWOOD PARK DEVELOPMENT. FOOD CORP, which intended to operate a supermarket in the premises, hired the plaintiff as its general contractor. Plaintiff claims FOOD CORP failed to pay under their contract. Plaintiff then filed a notice of mechanic's lien against the property owned by FLEETWOOD PARK, and thereafter commenced this action to foreclose the lien.

Following the completion of discovery FLEETWOOD PARK moves for an order dismissing the complaint against it, and discharging the notice of mechanic's lien and the notice of pendency filed against its property upon the grounds that it did not consent, within the meaning of Lien Law §3, to the work performed by plaintiff and upon the grounds that the notice of lien is willfully exaggerated.

Consent

Lien Law §3 provides, “[a] contractor . . . who performs labor or furnishes materials for the improvement of real property with the consent . . . of the owner thereof . . . shall have a lien . . . for the value or the agreed price of such labor . . . or material.”

“A contractor who performs work for, or provides equipment to, a tenant may impose a mechanic’s lien against the premises where the owner of the premises affirmatively gave consent for the work or equipment *directly to the contractor*; but not where the owner has merely approved or acquiesced in the undertaking of such work or provision of such equipment” (*Drapaniotis v 36-08 33rd Street Corp.*, 48 AD3d 736, 736 [2d Dept 2008] [emphasis added]).

Here, the defendant, FLEETWOOD PARK, established its entitlement to judgment as a matter of law by demonstrating that it did not give its consent directly to the plaintiff for the work plaintiff performed for FLEETWOOD PARK’s tenant, FOOD CORP (*Drapaniotis, supra; Vardon v Suga Development, LLC*, 36 AD3d 897 [2d Dept 2007]; *Elliot-Williams Co., Inc.*, 28 AD3d 706 [2d Dept 2006]; *GCDM Ironworks, Inc., v GJF Construction Corp.*, 282 AD2d 495 [2d Dept 495]).

In opposition, plaintiff failed to raise a triable issue of fact. Its claim that FLEETWOOD PARK’s consent may be inferred from its participation in the filing of permit applications with the municipality, from its granting of a rent abatement to its tenant, FOOD CORP, and from the consent for the renovations it gave to its tenant, FOOD CORP, is without merit since none of the circumstances cited by plaintiff demonstrate that FLEETWOOD PARK gave its consent directly to the plaintiff for the work plaintiff performed for FOOD CORP.

Exaggerated Lien - Lien Law §39 and §39-a

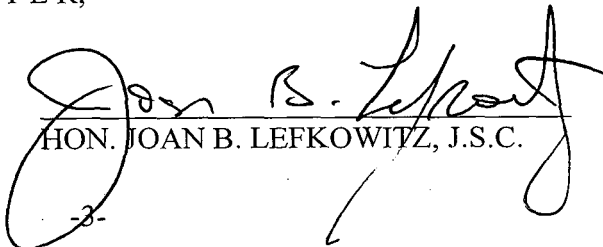
Since the mechanic’s lien has been discharged on grounds other than willful exaggeration FLEETWOOD PARK has no cause of action for discharge and damages under Lien Law §39 and §39-a (*Atlas Refrigeration-Air Conditioning, Inc., v Lo Pinto*, 33 AD3d 639 [2d Dep 2006]; *Guzman v Estate of Fluker*, 226 AD2d 676 [2d Dept 1996]).

Cross-Claim of MARIO SILVA ELECTRICAL

FLEETWOOD PARK demonstrated as a matter of law that it did not consent, within the meaning of Lien Law §3, to the work performed by the defendant, SILVA ELECTRICAL, for FOOD CORP. In opposition, SILVA failed to raise a triable issue of fact.

ENTER,

Dated: White Plains, New York
May 16, 2014


HON. JOAN B. LEFKOWITZ, J.S.C.

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