

Delete Constr. Inc. v Rose Group 583 Park Ave. LLC
2014 NY Slip Op 33657(U)
October 2, 2014
Supreme Court, New York County
Docket Number: 111965/2010
Judge: Doris Ling-Cohan
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. DORIS LING-COHAN

EA
10/2/14
E

PRESENT: _____
Justice

PART 31

Index Number : 111965/2010
DELETE CONSTRUCTION INC.
vs.
ROSE GROUP 583 PARK AVENUE
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for Summary judgment
Notice of Motion/Order to Show Cause — Affidavits — Exhibits (none) | No(s). 1, 2
Answering Affidavits — Exhibits _____ | No(s). 3
Replying Affidavits reply memo | No(s). 4

Upon the foregoing papers, it is ordered that this motion is for summary judgment
is denied, in accordance with the
attached memorandum decision.

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

FILED
OCT 02 2014
NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED
OCT 02 2014
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

Dated: 10/2/14

J.S.C.

HON. DORIS LING-COHAN

- 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 : IAS PART 36

-----X
Delete Construction Inc.,

Plaintiff,

Index Number:

-against-

111965/2010

The Rose Group 583 Park Avenue LLC, Third Church of Christ (Scientist) of New York City and John Does 1-10 being and intended to be those persons or entities with an interest in the real property,

Motion Seq.:

002

FILED
OCT 02 2014
NEW YORK
COUNTY CLERK'S OFFICE

Defendants.

-----X

Doris Ling-Cohan, J.:

Defendants The Rose Group 583 Park Avenue LLC (Rose Group) and Third Church of Christ (Scientist) of New York City (the Church) move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint. For the reasons set forth below, the motion is denied.

Parties' Allegations and Procedural Background

Plaintiff, Delete Construction Inc. (Delete) is a company that performs carpentry, masonry, electrical and other construction work (complaint, ¶ 3). The Church is the owner of a building (the Building), located at 583 Park Avenue, New York, New York (*id.*, ¶ 6; admitted, defendants' answer; Rose EBT at 16). Rose Group is a company that is in the hospitality industry and it is the lessee under a 20-year triple net lease with the

Church, under which the Rose Group has control of the Building, except for those times when the Church has services, as specified in the lease (*id.* at 22-23, 26). The Building is a four-story building with an auditorium, which holds approximately 1,500 people (*id.* at 14-15, 21).

In 2006, shortly after executing the net lease with the Church, Rose Group hired Joseph Gardella (Gardella) to act as construction manager to oversee the day-to-day operations for extensive renovation work in the Building (the Project), to enable Rose Group to rent out the auditorium for various events (*id.* at 23-26). In addition to overseeing daily operations, Gardella also recommended hiring various subcontractors on the Project and Delete was hired by the Rose Group to perform demolition work, including removal of the pews (the Work) (*id.* at 26, 29-30). The agreement between Delete and the Rose Group was an oral agreement to perform the Work, as necessary (*id.* at 33; McKoy EBT at 46).

Plaintiff contends that it performed the Work as directed by Gardella and that its contract included a 12% mark-up on both labor and materials (*id.* at 46, 48, 53, 106-107, 110). It states that invoices for labor were prepared based upon information gathered by its employee, Lincoln Cadle (Lincoln), which were reviewed by Gardella, and then signed by McKoy, one of plaintiff's principals, and then submitted to Gardella for

payment (*id.* at 54-56, 58-60, 68, 93, 111, 135-136). It further states that, after a period of delays, Rose Group eventually stopped paying the invoices and that the amounts set forth in the notice of lien (the Notice), the unpaid balance (the agreed price of labor and material, \$1,340,034.26, and \$330,000), are accurate (*id.* at 55-56, 70-71).

Plaintiff also states that the basis for the amounts set forth in the invoices and the Notice was based upon the number of workers and their hours (*id.* at 95-98, 108-109, 111). It asserts that it has no additional documentation, since the records were destroyed in a fire in its accountant's office (*id.* at 98, 126).

Defendants contend that the plaintiff willfully exaggerated the amount of the lien and, consequently, that the lien should be cancelled. They assert that the Work was "shoddy" and that, instead of taking a year to perform the Work, Delete took a year and a half (Rose EBT at 51, 67, 74, 85). They state that due to Delete's poor masonry work in the elevator shaft, that work had to be redone (*id.* at 79). They also state that, as a result of this, Gardella left the Project and they then began receiving invoices from Delete, which had completed the Work on the Project (*id.* at 87, 93-94).

Defendants note that Gardella now has a business relationship with McKoy (McKoy EBT at 91-92) and that Delete has produced only a limited amount of records. They assert that the

Notice was defective, since it states that plaintiff did roofing work and plaintiff acknowledges that it did not do roofing work (*id.* at 69). Accordingly, they seek summary judgment dismissing plaintiff's complaint.

Lien Law

Lien Law § 3 provides, in pertinent part, as follows:

"A contractor [or] subcontractor . . . who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof, or his agent . . . shall have a lien for the principal and interest, of the value, or of the agreed price, of such labor, . . . or materials upon the real property improved."

Lien Law § 39 provides, in pertinent part, as follows:

"In any action or proceeding to enforce a mechanic's lien . . . , if the court shall find that a lienor has wilfully [sic] exaggerated the amount for which he claims a lien . . . , his lien shall be declared to be void and no recovery shall be had thereon."

The purpose of the Lien Law is "the protection of that class of people who perform services or supply the material for the improvement of realty [and the Lien Law] should be liberally construed to secure [this purpose]" (*Matter of Claudio Perfetto, Inc. v Waste Mgt. of N.Y.*, 274 AD2d 389, 390 [2d Dept 2000]). "The fact that a lien may contain improper charges does not, in and of itself, establish that a plaintiff willfully exaggerated a lien" (*Minelli Constr. Co. v Arben Corp.*, 1 AD3d 580, 581 [2d Dept 2003]; see also *Park Place Carpentry & Bldrs., Inc. v*

DiVito, 74 AD3d 928, 929 [2d Dept 2010]). Put another way, “[i]naccuracy in [the] amount of [a] lien, if no exaggeration is intended, does not void a mechanic’s lien; willfulness also must be shown” (*Goodman v Del-Sa-Co Foods*, 15 NY2d 191, 194 [1965] [internal citation omitted]; see also *Capogna v Guella*, 41 AD3d 522, 523 [2d Dept 2007]; *Strongback Corp v N.E.D. Cambridge Ave. Dev. Corp.*, 25 AD3d 392, 393-394 [1st Dept 2006]). Moreover, “the issue of willful or fraudulent exaggeration is one that also ordinarily must be determined at the trial of the foreclosure action” (*Aaron v Great Bay Contr.*, 290 AD2d 326, 326 [1st Dept 2002]; see also *On the Level Enters., Inc. v 49 E. Houston LLC*, 104 AD3d 500, 500 [1st Dept 2013]).

Summary Judgment

A party seeking summary judgment must make a prima facie case showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails to make this showing, the motion must be denied (*id.*). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary

judgment if there is any doubt as to the existence of a material issue of fact (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]; *Dauman Displays v Masturzo*, 168 AD2d 204, 205 [1st Dept 1990], *lv dismissed* 77 NY2d 939 [1991]). "Where different conclusions can reasonably be drawn from the evidence, the motion should be denied" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 555 [1992]). However, where a party submits affidavits that "'clearly contradict [his or her] deposition testimony ... [this submission] can only be considered to have been tailored to avoid the consequences of [such] earlier testimony" and is deemed to be a feigned issue and, consequently, is insufficient to defeat summary judgment (*Fernandez v VLA Realty, LLC*, 45 AD3d 391, 391 [1st Dept 2007]; *see also Washington v New York City Bd. of Educ.*, 95 AD3d 739, 740 [1st Dept 2012]; *Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318, 320 [1st Dept 2000]).

In a case involving a claimed breach of contract, "[t]he question of whether there has been substantial performance-or a breach-is to be determined, whenever there is any doubt, by the trier of fact" (*F. Garofalo Elec. Co., Inc. v New York University*, 300 AD2d 186, 189 [1st Dept 2002]).

Discussion

Initially, since defendants are seeking summary judgment, the court must view the evidence in favor of the plaintiff, as the nonmoving party (*Branham*, 8 NY3d at 932). Defendants assert

that the affidavit testimony submitted on plaintiff's behalf contradicts the plaintiff's deposition testimony and should therefore be disregarded as feigned (*Washington*, 95 AD3d at 740). However, in his affidavit, McKoy states that Delete performed the Work as directed by Gardella, that the 12% markup applied to both labor and materials was part of the parties' agreement, that the invoices were prepared based upon Lincoln's information and were submitted to, and approved by Gardella and that any additional records were unavailable due to a fire at Delete's accountant's office (plaintiff affidavit ¶¶ 4-5, 10-12, 16; Gardella affidavit ¶¶ 3-8, 10-11, 13, 15-20, 22). In his deposition, McKoy testified to the same effect as to all of these points (McKoy EBT at 26, 29-30, 46, 48, 53, 56-58, 93, 98, 106-107, 110, 126, 135-136). Defendants have not shown that the statements in McKoy's or Gardella's affidavits "clearly contradict" the deposition testimony on the material facts and, accordingly, the court cannot consider this testimony feigned (*Fernandez*, 45 AD3d at 391; *Phillips*, 268 AD2d at 320).

Additionally, the claim that Delete has failed to provide records is controverted by McKoy's testimony that it has provided all of the records it has and that any other records were destroyed in a fire in its accountant's office (McKoy EBT at 126, 135-136). Defendants have not shown that the failure to produce records was willful or contumacious.

Defendants also assert that "the contractor, as plaintiff, bears the burden of establishing its entitlement to payment and must furnish proof to support its case" (*Strongback*, 25 AD3d at 393). However, in that case, plaintiff "submitted only the affidavit of counsel [which] merely incorporat[ed] allegations contained in the pleadings" (*id.*), whereas in this action, plaintiff has submitted both affidavits and deposition testimony, as noted above.

While defendants point to errors in the Notice with regard to roofing, "[t]he fact that a lien may contain improper charges does not, in and of itself, establish that a plaintiff willfully exaggerated a lien" (*Minelli Constr. Co.*, 1 AD3d at 581; see also *Park Place Carpentry & Bldrs.*, 74 AD3d at 929). More importantly, "the issue of willful or fraudulent exaggeration is one that is ordinarily determined at the trial of the foreclosure action, and not on summary disposition" (*On the Level Enters.*, 104 AD3d at 500; *Aaron*, 290 AD2d at 326). This is so because the issue of willful exaggeration "necessarily involves proof as to the credibility of the lienor" (*On the Level Enters.*, 104 AD3d at 500). Finally, while defendants assert that Delete's work was "shoddy" and took a year and a half, rather than the expected one year, "[t]he question of whether there has been substantial performance-or a breach-is to be determined, whenever there is any doubt, by the trier of fact" (*F. Garofalo Elec. Co.*, 300 AD2d

at 189). Consequently, defendants' motion for summary judgment must be denied.

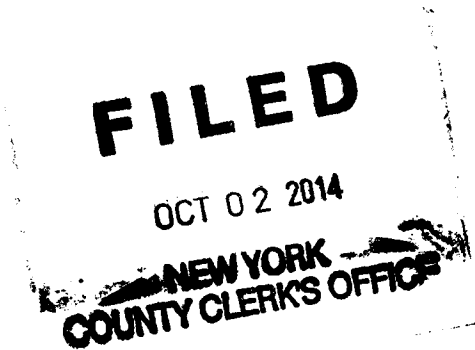
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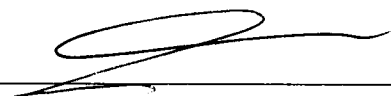
It is, therefore,

ORDERED that the motion of defendants The Rose Group 583 Park Avenue LLC and Third Church of Christ (Scientist) of New York City for summary judgment dismissing plaintiff's complaint is denied; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon defendants, with notice of entry.

Dated: October 2, 2014




Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\delete construction. rose group.wpd