

**C.C.C . Renovations, Inc. v Victoria Towers Dev.
Corp.**

2015 NY Slip Op 32877(U)

April 9, 2015

Supreme Court, Queens County

Docket Number: 700169/2012

Judge: Marguerite A. Grays

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Memorandum

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A GRAYS IA Part 4
Justice

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C.C.C . Renovations, Inc.,

Plaintiff(s)

-against-

Victoria Towers Development Corp.,
Wu Towers, LLC,
Blue Diamond Group, LLC,
Mega International Commercial Bank Co., Ltd.,
Bank of China, New York Branch,
Cemcolift Inc.,
Maloof Architectural Metals, Inc.,
Mold Terminator's Inc. d/b/a Up-Rite Plus,
Platinum Energy Group,
All Catastrophe Construction Team, Inc.,
PCM Consulting Corp.,
Latin American Container Service, Inc.,
Rockledge Scaffold Corp.,
SMG Industries LLC
New York City Environmental Control Board,
and "John Doe #1" through "John Doe #100,"

Defendant(s).

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Hon. Marguerite A. Grays

Plaintiff commenced this action on January 30, 2012, alleging seven causes of action in the complaint. The first four causes of action were based upon breach of subcontracts between it, as subcontractor, and defendant Blue Diamond Group, LLC (Blue Diamond), as

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contractor, and sought to recover a money judgment against defendant Blue Diamond for labor, equipment and materials provided by plaintiff pursuant to the subcontracts with respect to the real property known as Victoria Towers, a condominium with residential and commercial units, located at 133-38 Sanford Avenue, Flushing, New York. The fifth, sixth and seventh causes of action were for foreclosure of mechanic's liens which plaintiff had filed with respect to the real property. Defendants Victoria Towers Development Corp. (Victoria Towers) and Wu Towers, LLC (Wu Towers) served a joint answer, asserting affirmative defenses and interposing four counterclaims based upon their claims that the work performed, and materials supplied, by plaintiff were shoddy, unworkmanlike and substandard, and the liens filed by plaintiff are wilfully overstated. Defendants Victoria Towers and Wu Towers, in their counterclaims, seek declaratory and monetary relief, including attorneys' fees, and to discharge plaintiff's mechanic's liens as void.

Defendant Victoria Towers obtained surety bonds from Westchester Fire Insurance Co. (Westchester Fire) to discharge plaintiff's mechanic's liens, which bonds were approved and filed in the Queens County Clerk's office (*see* Index Nos. 22277/2012, 22279/2012, 15335/2013).

Plaintiff previously moved for partial summary judgment on its first, second, third and fourth causes of action against defendant Blue Diamond. By order dated March 28, 2013, the motion was granted. On July 29, 2013, the Clerk signed and entered judgment in favor of plaintiff against defendant Blue Diamond in the amount of \$80,743.39 on the first cause

of action, \$649,763.58 on the second cause of action, \$129,102.90 on the third cause of action, and 88,856.98 on the fourth cause of action, totaling \$948,466.85.

Plaintiff thereafter moved for leave to serve and file a proposed supplemental summons and supplemental amended complaint, adding Westchester Fire as a party defendant, setting forth facts and occurrences relative to the obtaining and filing of the bonds to discharge plaintiff's mechanic's liens, and adding claims against defendant Westchester Fire to recover on the discharged bonds and to adjudicate deficiency liability against defendants Victoria Towers and Wu Towers. By order dated May 28, 2014, the motion was granted without opposition. Defendant Westchester Fire, now appearing by the same counsel as represents defendants Victoria Towers and Wu Towers, served an answer dated June 25, 2014¹ to the supplemental amended complaint.

Plaintiff moves (1) pursuant to CPLR 3212 for summary judgment against defendants Victoria Towers Development Corp. (Victoria Towers) and Westchester Fire Insurance Co. (Westchester Fire) on the fifth, sixth and seventh causes of action of the amended complaint and to direct defendant Westchester Fire to pay it the full amount due under the bonds discharging mechanic's liens numbered K0864570A and K08645711, as amended, and filed in the Office of the Queens County Clerk on October 26, 2012 and August 12, 2013 toward the satisfaction of the judgment entered on July 29, 2013 against defendant Blue Diamond,

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Although another answer dated June 27, 2014 was served and filed on behalf of defendant Westchester Fire on June 27, 2014, such answer is a nullity insofar as it was served by counsel who, at the time, had yet to obtain or file an executed consent to change attorney (CPLR 321[b]).

(2) to dismiss the first, second, and third affirmative defenses and the first, second, third and fourth counterclaims asserted by defendants Victoria Towers and Wu Towers, and the third affirmative defense asserted by defendant Westchester Fire, (3) to dismiss the complaint insofar as asserted against defendants Bank of China, New York Branch (Bank of China), Mega International Commercial Bank Co., Ltd. (Mega International) and Wu Towers on the ground they are not necessary parties to the action, (4) to dismiss the action with respect to any claims held by defendants Latin American Container Service, Inc. (Latin America), SMG Industries LLC (SMG), All Catastrophe Construction Team (All Catastrophe), and Mole Terminator's Inc., d/b/a Up Rite Plus, s/h/a Mold Terminator's Inc. d/b/a Up-Rite Plus (Mole) on the ground the claims of such defendants have been satisfied, and (5) to dismiss the action with respect to any claims held by defendants Maloof Architectural Metals, Inc. (Maloof), Platinum Energy Group (Platinum), All Catastrophe Construction Team, Inc. (All Catastrophe), PCM Consulting Corp. (PCM Consulting), Rockledge Scaffold Corp. (Rockledge), and New York City Environmental Control Board on the ground those defendants are in default in appearing or answering the complaint.

The court notes that the March 28, 2013 order, in granting summary judgment with respect to the first, second, third and fourth causes of action, did not expressly sever the fifth, sixth and seventh causes of action from the breach of contract causes of action. In addition, the supplemental amended complaint has been served and filed. Thus, the fifth, sixth and seventh causes of action asserted in the supplemental amended complaint are severed, and

plaintiff is directed to obtain a new index number in relation to the severed claims within 30 days of the date of service of a copy of the order to be settled hereon with notice of entry.

In support of the motion, plaintiff offers, among other things, a copy of the pleadings including the joint answer dated June 5, 2012 of defendants Victoria Towers and Wu Towers, the June 25, 2014 answer of defendant Westchester Fire, the affirmation of plaintiff's counsel, copies of plaintiff's contracts with Blue Diamond and requests for payment, plaintiff's mechanic's liens, the discharge bonds, an affidavit of Myint J. Kyaw a/k/a Jeffrey Wu, a principal of defendants Victoria Towers and Wu Towers, a notice of discharge, and an affidavit² of Robinson Agudelo, plaintiff's president. Defendants Victoria Towers, Wu Towers and Westchester Fire oppose the motion. The remaining defendants have not appeared in relation to the motion.

With respect to the branch of the motion by plaintiff to dismiss the claims asserted against defendants Wu Towers, Bank of China and Mega International, defendant Wu Towers was named as a party defendant as an owner of the property and defendants Bank of

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The working copy of the affidavit of Mr. Agudelo presented to the court lacks a signed jurat, although the copy of his affidavit filed electronically contains a signed one. Under the court rules, a "working copy" means a hard copy that is "an exact copy of a document that has been electronically filed" in accordance with 22 NYCRR 202.5-b (22 NYCRR 202.5-b[a][2][vii]). CPLR 2001 permits a court, "[a]t any stage of an action," to disregard a party's mistake, omission, defect, or irregularity if a substantial right of a party is not prejudiced by the mistake. Here, no substantial right of the defendants Victoria Towers and Westchester Fire are prejudiced by plaintiff's failure to provide the court with an exact copy of Mr. Agudelo's affidavit which had been e-filed with the court. The court therefore will disregard, for the purpose of this motion only, the irregularity and consider the working copy of Mr. Agudelo's affidavit presented to the court in relation to the motion (CPLR 2001).

China and Mega International were named as party defendants as holders of mortgages against the property. An owner of real property, however, ceases to be a necessary party to an action to foreclose a mechanic's lien where the lien no longer attaches to real property due to the filing of a bond under the Lien Law (*see e.g. Norden Elec. v Ideal Elec. Supply Corp.*, 154 AD2d 580, 581 [2d Dept 1989]; *Melniker v Grae*, 82 AD2d 798, 799 [2d Dept 1981]; *Bryant Equip. Corp. v. A-1 Moore Contr. Corp.*, 51 AD2d 792, 793 [2d Dept 1976]).³ Likewise, a holder of a mortgage is not a necessary party with respect to a claim to foreclose a mechanic's lien when a bond has replaced the real property as the security to be attached and attacked (*see Bryant Equipment Corp. v. A-1 Moore Contracting Corp.*, 51 AD2d 792). The subject property was released from plaintiff's mechanic's liens by virtue of the filing of the discharge bonds issued by defendant Westchester Fire. That branch of the motion by plaintiff to dismiss the causes of action asserted against defendants Wu Towers, Bank of China and Mega International is granted.

With respect to the branch of the motion by plaintiff for summary judgment against defendants Victoria Towers and Westchester Fire, plaintiff acknowledges that those defendants have not filed an answer to the supplemental amended complaint "separate" from the June 25, 2014 answer filed by defendant Westchester Fire in relation to the supplemental amended complaint. Plaintiff, in its motion papers, nevertheless treats the June 5, 2012

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Defendant Victoria Towers remains a necessary party defendant insofar as it is the principal on all of the filed bonds (*see Lien Law §37[7]*).

answer of defendants Victoria Towers and Wu Towers to the original complaint as the operative answer for defendants Victoria Towers and Wu Towers vis-a-vis the supplemental amended complaint. Defendants Victoria Towers, Wu Towers and Westchester Fire do not object to such treatment, or make any claim that the June 5, 2012 answer of defendants Victoria Towers and Wu Towers is no longer in effect or that summary judgment against Victoria Towers is premature due to the nonservice of an amended answer by that defendant. The additional claims in the supplemental amended complaint, to recover against the discharge bonds, furthermore, are directed only against defendant Westchester Fire. Hence, the supplemental amended complaint may be considered as not superseding the original complaint, but rather as “in addition to it” (*Pimsler v Angert*, 1 AD2d 783 [2d Dept 1956]; see *Mendrzycki v Cricchio*, 58 AD3d 171 [2d Dept 2008]). Defendant Westchester Fire, in its June 25, 2014 answer, incorporates as a third affirmative defense, those defenses asserted by Victoria Towers and Wu Towers in their June 5, 2012 answer. Such incorporation indicates an acceptance on the part of defendant Westchester Fire that the answer of defendants Victoria Towers and Wu Towers to the original complaint remains effective with respect to defendants Victoria Towers and Wu Towers. Under such circumstances, the court shall consider the June 5, 2012 answer of defendants Victoria Towers and Wu Towers as their answer to the supplemental amended complaint, and deem issue to have been joined with respect to defendants Victoria Towers and Westchester Fire (CPLR 3212[a]).

Surety bonds to discharge mechanic's liens are conditioned for the payment of any judgment which may be rendered against the property for the enforcement of the liens (*see* Lien Law § 19[4]). However, for a plaintiff to be entitled to recover on a filed discharge bond, it must first judicially establish the validity its mechanic's lien and entitlement to the amount asserted in the lien, notwithstanding the release of the subject property from the lien (*see G. Rama Const. Enter., Inc. v 80-82 Guernsey Street Assocs., LLC*, 43 AD3d 863 [2d Dept 2007]; *Martirano Constr. Corp. v Briar Contr. Corp.*, 104 AD2d 1028, 1031 [2d Dept 1984]; *see also Ruckle & Guarino, Inc. v Hangan*, 49 AD3d 267 [1st Dept 2008]). A plaintiff must also make a prima facie showing that the party against whom the foreclosure of the mechanic's lien is sought has an ownership interest in the property, the plaintiff began the action within one year after the filing of the lien, the owner consented to the work performed, and the plaintiff did not receive full payment for its labor, materials or equipment.

In this case, plaintiff has established prima facie that defendants Victoria Towers and Wu Towers have an ownership interest in property known as 133-38 Sanford Avenue, Flushing, New York, defendant Victoria Towers hired defendant Blue Diamond to perform restoration work at the premises, Blue Diamond subcontracted the roofing (including additional roofing), pipe scaffolding, electric scaffolding and sidewalk bridging work to plaintiff, plaintiff performed the labor and provided the material and equipment for such work with the consent of defendant owners, plaintiff was not fully paid, plaintiff filed notices of lien which comply with the requirements of Lien Law § 9, plaintiff filed its notices of lien

in a timely manner pursuant to the requirements of Lien Law § 10, and plaintiff asserted its causes of action to foreclose on the liens in a timely manner.

The burden shifts to defendants Victoria Towers and Westchester Fire to produce evidence showing there is a triable issue of fact or to demonstrate the existence of a defense warranting the denial of summary judgment (*see Haselnuss v Delta Testing Laboratories, Inc.*, 249 AD2d 509 [2d Dept 1998]). Defendants Victoria Towers and Westchester Fire have failed to carry this burden.

Contrary to the argument by defendants Victoria Towers and Westchester Fire, plaintiff is entitled to enforce its liens despite the absence of contractual privity between plaintiff and defendant owners. “[A] material person or subcontractor is not required to be in contractual privity with the property owner in order to file and foreclose on a mechanic’s lien (*see Lien Law § 3; Spectrum Painting Contrs., Inc. v Kreisler Borg Florman Gen. Constr. Co., Inc.*, 64 AD3d 565, 576 [2d Dept 2009]). A subcontractor can foreclose on a mechanic’s lien if the owner owes money to the general contractor under the primary contract regardless of the existence of contractual privity between the subcontractor and the owner (*see Matell Contracting Co., Inc. v Fleetwood Park Development, LLC*, 111 AD3d 681 [2d Dept 2013]; *Rainbow Elec. Co. v Bloom*, 132 AD2d 539 [2d Dept 1987]). Section 3 of the Lien Law provides, in relevant part, that a contractor or subcontractor, “who performs labor or furnishes materials for the improvement of real property with the consent ... of the owner thereof,” shall have a lien on the property for the price or value of the labor or

materials. “ ‘Where the circumstances are such that an owner may be said to have consented so far as the contractor is concerned, the owner is deemed also to have consented to the furnishing of labor and materials to the contractor with the latter’s consent’ (*Rure Assocs. v DiNardi Const. Corp.*, 917 F2d 1332, 1336 [2d Cir 1990])” (*GCDM Ironworks, Inc. v GJF Const. Corp.*, 292 AD2d 495 [2d Dept 2002]). In the instant case, it is undisputed that plaintiff performed work and supplied material and equipment at the subject property pursuant to subcontracts received from Blue Diamond, which received a primary contract from the owners.

Defendants Victoria Towers and Westchester Fire claim plaintiff’s mechanic’s liens were overstated insofar as liens nos. 740/2011 and 41/2012 relate to the same work, are for the same amount and are covered by the same bond. Lien Law § 10(1) permits the filing of a notice of lien “at any time during the progress of the work and the furnishing of materials, or, within eight months after the completion of the contract, or the final performance of the work, or the final furnishing of the materials, dating from the last item of work performed or materials furnished.” Furthermore, the Lien Law is permissive and allows the filing of successive liens for the same work to cure an irregularity in an earlier lien, as long as the successive lien is filed within the period prescribed in section 10 (*see Madison Lexington Venture v Crimmins Contr. Co.*, 159 AD2d 256, 257 [1st Dept 1990], *lv dismissed* 78 NY2d 905 [1991]). Here, lien no. 740/2011 was filed on November 7, 2011 by plaintiff against lots 1101 through lot 1201, naming defendant Victoria Towers as the owner and defendant

Blue Diamond as the person employing plaintiff at the property. Plaintiff subsequently determined that defendant Wu Towers had retained an ownership interest in the commercial space at the property, which was comprised of lots 1101 and 1102. Because work covered by lien no. 740/2011 was still ongoing, plaintiff filed an additional lien (lien no. 41/2012), against lots 1101 and 1102 on January 27, 2012, which named defendant Wu Towers as an additional owner of such lots, and in all other respects was identical to lien no. 740/2011. The filing of lien no. 41/2012 was filed during the progress of the work and the furnishing of materials and equipment under Lien Law § 10, and defendants Victoria Towers and Westchester Fire have failed to show that the lien no. 41/2012 was defective. Lien no. 41/2012 therefore is a proper successive lien which was filed to cure the irregularity in lien no. 740/2011 regarding the identity of the owner lots 1101 and 1102 (*see Danica Plumbing & Heating, LLC v 3536 Cambridge Ave., LLC*, 62 AD3d 426 [1st Dept 2009]). Defendants Victoria Towers and Westchester Fire therefore have failed to demonstrate liens nos. 740/2011 and 41/2012 were overstated.

Defendants Victoria Towers and Westchester Fire also have failed to raise any question of fact as to whether at the time plaintiff filed its liens, Blue Diamond owed plaintiff the amounts of \$64,500.00, \$519,185.00 (plus all amounts accruing thereon at the rate of \$11,300.00 per month from July 4, 2011), \$103,500.00, and \$71,000.00 (plus all amounts thereon accruing at the rate of \$2725.00 from on or about July 5, 2011) under the various subcontracts and whether defendant owners owed Blue Diamond the amount of

\$7,348,082.41. At the time of the filing of plaintiff's liens, a lien fund existed as to which the lien could attach. "[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 AD2d 652, 653-654 [2d Dept 2003] [internal quotation marks omitted]).

The settlement reached between defendant owners and Blue Diamond after the filing of plaintiff's mechanic's liens and payments made by defendant owners to Blue Diamond after the filing of such liens do not defeat the liens (*see Certified Indus. v International Bus. Machs. Corp.*, 69 AD2d 806 [2d Dept 1979]; *Drane Lbr. Co. v T.G.K. Constr. Co.*, 39 AD2d 567 [2d Dept 1972]). At the time plaintiff filed its liens, defendant owners owed money to the general contractor, and they were obligated to satisfy plaintiff's liens out of that fund (*see Timothy Coffey Nursery/Landscape v Gatz*, 304 AD2d 652). That payments were made to defendant Blue Diamond after the filing of plaintiff's mechanic's liens are not a valid defense to the foreclosure of the liens.

Defendants Victoria Towers and Westchester Fire have failed to come forward with any evidence showing the existence of a triable issue of fact with respect to any other defense. The counterclaims of defendant Victoria Towers and Wu Towers also fail. Defendant Victoria Towers and Wu Towers have presented no evidence to show the work performed and materials and equipment supplied by plaintiff was shoddy, unworkmanlike

or substandard. Again, defendant Victoria Towers and Wu Towers have failed to show that the mechanic's liens are overstated. In addition, defendant Victoria Towers and Wu Towers have failed to show a basis to declare the liens filed by plaintiff as void or their entitlement to an award of attorneys' fees, or need for declaratory relief setting forth the rights and obligations of the parties relative to the subject property.

Plaintiff is thus entitled to summary judgment in its favor against defendants Victoria Towers and Westchester Fire on the fifth, sixth and seventh causes of action of the amended complaint. That branch of the motion by plaintiff for summary judgment against defendants Victoria Towers and Westchester Fire on the fifth, sixth and seventh causes of action of the amended complaint, and dismissing the counterclaims and affirmative defenses of defendant Victoria Towers and Wu Towers and the third affirmative defense asserted by defendant Westchester Fire is granted.

With respect to that branch of the motion by plaintiff to dismiss the claims asserted against defendants Maloof, Platinum, All Catastrophe, PCM Consulting, Rockledge, Latin American, SMG, Mole and New York City Environmental Control Board, plaintiff alleged in the amended complaint that defendants Maloof, Platinum, All Catastrophe, PCM Consulting, Rockledge, Latin American, SMG and Mole filed notices of lien against the subject property and defendant New York City Environmental Control Board is the holder of judgments which are subject to and subordinate to plaintiff's mechanic's liens.

With respect to that branch of the motion to dismiss the causes of action insofar as asserted against defendant Mole, plaintiff asserts that defendant Mole's mechanic's lien has been discharged and released. That branch of the motion by plaintiff to dismiss the causes of action asserted against defendant Mole in the amended complaint is granted. Plaintiff admits that it has failed to cause defendant Mole to be served with process. Under such circumstances, the court has not obtained personal jurisdiction over defendant Mole.


With respect to that branch of the motion by plaintiff to dismiss the causes of action asserted against defendants Maloof, Platinum, All Catastrophe, PCM Consulting, Rockledge, Latin American, SMG and New York City Environmental Control Board, no valid cause of action to enforce a lien against the subject property remains, and those defendants have not filed any claims to the discharge bonds and therefore are not necessary party defendants (*see* Lien Law § 37[5]). Defendant Latin American executed a stipulation of discontinuance with respect to its cross claim asserted against defendants Victoria Towers, Wu Towers and Blue Diamond, and defendant SMG executed a satisfaction, and a discharge and release of its mechanic's lien, and discontinued its cross claim asserted against defendants Victoria Towers and Blue Diamond. Furthermore, defendant All Catastrophe was granted summary judgment by order dated May 7, 2014, entered on May 15, 2014, in connection with the action it commenced (*All Catastrophe Construction Team, Inc. v Blue Diamond Group* [Supreme Court, Queens County, Index No. 10278/2012]) commenced to enforce All Catastrophe's mechanic's lien against a filed discharge bond. The mechanic's lien at issue in the *All*

Catastrophe Construction Team action (Index No. 10278/2012) is the same one as alleged to have been filed by defendant All Catastrophe herein. Under such circumstances, that branch of the motion by plaintiff to dismiss the causes of action asserted against defendants Maloof, Platinum, All Catastrophe, PCM Consulting, Rockledge, Latin American, SMG, and New York City Environmental Control Board is granted to the extent of granting plaintiff leave to discontinue the causes of action asserted against defendants Maloof, Platinum, All Catastrophe, PCM Consulting, Rockledge, Latin American, SMG and New York City Environmental Control Board, without costs to any party (*see GMAC Mtge., LLC v Bisceglie*, 109 AD3d 874, 876 [2d Dept 2013] ["A motion for leave to discontinue an action without prejudice should be granted unless there are reasons which would justify its denial"]).

Settle Order.

Dated:

APR 09 2015



J.S.C.

FILED

MAY 12 2015

COUNTY CLERK
QUEENS COUNTY