Maverick Constr. Servs LLC v 868 Broadway Corp.
2016 NY Slip Op 30040(U)
January 6, 2016
Supreme Court, New York County
Docket Number: 653379/2011
Judge: Robert D. Kalish
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
COUNTY OF NEW YORK: IAS PART 29

----------X

Maverick Construction Services LLC

Plaintiff,

Index No. 653379/2011

-against-

868 Broadway Corp., Douglas Dey, Washington International Insurance Company, and John Doe 1 through 10

Defendants.

----------X

868 Broadway Corp. and Douglas Dey

Third-Party Plaintiff,

Index No. 590065/2012

-against-

Walter Sedovic, individually and doing business as Walter Sedovic Architects

Third-Party Defendants.

----------X

KALISH, J.:

Upon the forgoing papers, the Plaintiff's motion for additional security (motion sequence 004) and the Defendants' motion for summary judgment canceling the lien (motion sequence 006) are both denied as follows:

Relevant Background, Underlying Dispute and Deposition Testimonies

Without reiterating the entirety of the pleadings, the underlying action arises from an alleged breach of contract. Specifically, the Plaintiff alleges that the Defendant Douglas Dey executed an agreement on behalf of himself and the Defendant 868 Broadway Corp. with the Third-Party Defendant

Walter Sedovic Architects ("WSA"), whereby WSA agreed to provide certain architectural services for renovations and improvements to the premises described as 868 Broadway, designated as Block 846, Lots 1401-1402, flk/a Lot 55, on the Tax Map of the Borough of Manhattan, New York, New York (the Premises"). Plaintiff further alleges that said contract was subsequently modified from a monthly stipend to an hourly billing structure, and that the total agreed upon price and value for the services provided under said contract was $325,437.10 of which $122,621.83 has not been paid.

On or about July 7, 2011, WSA filed a Notice of Mechanic's lien (the "Lien") with the Office of the Clerk of the County of New York, stemming from the alleged nonpayment for services.

On or about December 1, 2011, WSA assigned their rights, title, and interest in their claim against the Defendants as well as the Lien to the Plaintiff.

On August 27, 2013, in response to a Lien Law §38 Demand made by the Defendants, the Plaintiff served an Itemized Statement of Lien pursuant to Lien Law §38 (the "Itemized Statement").

On or about January 24, 2014, the Defendant 868 Corp. filed a mechanic's lien discharge bond as surety, in the amount of $134,884.0 pursuant to Lien Law Section 19 (4) (the "Bond"). The Bond was issued by the Defendant Washington International Insurance Company ("WIIC"). Said Bond is for a sum equal to 110% of the amount claimed in the underlying Lien as required pursuant to Lien Law §19(4).

Plaintiff claims that the Defendants, Mr. Dey, 868 Corp. and WIIC are liable to the Plaintiff for the amount of the Lien, that Plaintiff is entitled to enforce the Lien herein and that the Plaintiff is entitled to judgment against Mr. Dey, 868 Corp. and WIIC in the amount of $122,621.83, together with interest, costs, disbursements, and attorney's fees.

Parties' arguments on the instant motions

The Plaintiff now moves this Court pursuant to Lien Law §19(4) and CPLR §2508 for an order requiring either or both of the Defendants to give further security in addition to the Bond. The Plaintiff argues in sum and substance that the invoices that WSA sent to the Defendants for work completed on the Premises indicated that payment was due upon receipt and that said invoices included a service charge of 1.5% per month upon any unpaid balance over 30 days old.[1] Plaintiff argues that to date, the total service charge accrued since the Lien was docketed is $91,250.80. Plaintiff argues that as of the date of the instant motion, the Defendants are liable for both the underlying $122,621.83 and the additional $91,250.80 service charge, for a total of $213,872.63. As such, the Plaintiff argues that the Court should order the Defendants to increase the Bond from $134,884.00 to $235,259.89 representing 110% of the $213,872.63 amount that the Defendants owe to the Plaintiff as of the date of the instant motion.

The Plaintiff further argues in sum and substance that the Defendants' bad faith conduct has prolonged the completion of discovery in the underlying action, which in turn has resulted in the accrual of the additional service charges as per the terms of the invoices.

In opposition to the Plaintiff's motion and in support of their own motion for summary judgment dismissing the Lien, the Defendants argue in sum and substance that the Lien is defective and should be summarily cancelled and vacated pursuant to Lien Law §19. Specifically, the Defendants argue that the Lien, as "itemized" by WSA and the Plaintiff consists almost entirely of generic charges for construction administration work, which do not qualify as "architectural work". The Defendants argue that said charges are not a valid basis for a mechanics lien filed by an architect, unless the work specifically

---

[1] The Court notes that at oral argument and in its moving papers, the Plaintiff refers to the 1.5% monthly charge as "interest". However, said charge is identified on the invoices as a "service charge".

includes supervision, management and control of the construction project. The Defendants further argue that the Lien fails to describe the labor and services performed as required by the Lien Law, and that the Plaintiff has failed to adequately describe the services performed, despite having had numerous opportunities to do so. The Defendants argue that the Plaintiff relies upon the generic term "construction administration" to describe the work for which the Lien was filed without specifying what that work includes or involves. Finally, the Defendants argue that the Lien was filed four years ago in the amount of $122,621.18 and that four years of interest on said amount is 36% (9% per annum), or approximately $43,000.00. Therefore, Defendants argue that even if the Plaintiff is ultimately awarded the entire amount sought with interest, the most that could be due would be approximately $170,000.00. The Defendants argue that under said circumstances, the current value of the Bond ($134,884.01) is appropriate.

In reply and in opposition to the Defendants' motion for summary judgment, the Plaintiff reiterates its argument that the Court should order the Defendants to give further security in addition to the Bond. The Plaintiff further argues that there are significant issues of fact that warrant denying the Defendants' motion for summary judgment. Specifically, the Plaintiff argues that the Lien is subject to a liberal construction, and that the validity of the specific charges in the Lien are issues for trial. The Plaintiff further argues that if the Defendants dispute the charges in the itemized statement, this is also an issue of fact to be determined at trial. The Plaintiff further argues that the charges included in the itemized statement are a valid basis for the Lien.

The Plaintiff further argues that the Defendants' motion for summary judgment is premature as discovery remains incomplete. Specifically, the depositions of the Defendants' principals and of WSA, Mr. Dey and Mr. Sedovic, respectively, have not yet been completed. Finally, the Plaintiff argues that there are issues of fact as to whether all or part of the work at issue is subject to the Lien Law.

In reply to the Plaintiff's opposition to the Defendants motion for summary judgment, the Defendants reiterate their argument that the Lien is invalid as it includes charges that are not covered under the Lien Law for mechanics liens filed by architects.

On December 8, 2015, the Parties appeared before this Court for oral argument on the instant motions and reiterated the arguments presented in their submitted papers.

The Court will first address the Defendants' motion for summary judgement dismissing the lien and then address the Plaintiff's motion for additional security.

Analysis

Summary Judgment Standard

It is well established that "[t]he proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law" (Ryan v Trustees of Columbia Univ. in the City of N.Y., Inc., 96 AD3d 551, 553 (NY App Div 1st Dept 2012) [internal quotation marks and citation omitted]). "Thus, the movant bears the burden to dispel any question of fact that would preclude summary judgment" (id.). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (Giuffrida v Citibank Corp., 100 NY2d 72, 81 [2003]). "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party" (Vega v Restani Constr. Corp., 18 NY3d 499, 503 (2012) (internal quotation marks and citation omitted)). If there is any doubt as to the existence of a triable

issue of fact, summary judgment must be denied (Rotuba Extruders v Ceppos, 46 NY2d 223, 231 (1978); Grossman v Amalgamated Hous. Corp., 298 AD2d 224, 226 (NY App Div 1st Dept 2002)).

The Defendants motion for summary judgment dismissing the lien is hereby denied as the Defendants have failed to establish prima facie that the Lien is invalid on its face.

"A Court has no power to vacate or discharge a notice of lien except as authorized by Lien Law § 19 (6). Lien Law § 19 enumerates the grounds for the discharge of a mechanic's lien interposed against a nonpublic improvement" (Rivera v Department of Hous. Preserv. & Dev. of City of New York, 130 AD3d 802 (NY App. Div. 2d Dept 2015) citing Lane Constr. Co., Inc. v. Chayat, 117 AD3d 992 (NY App Div 2nd Dept 2014); Matter of Luckyland (N.Y.), LLC v Core Cont. Constr., LLC, 83 AD3d 1073 (NY App Div 2nd Dept 2011); Matter of Gold Dev. & Mgt., LLC v. P.J. Contr. Corp., 74 AD3d 1340 (NY App Div 2nd Dept 2010); Matter of Northside Tower Realty, LLC v. Klin Constr. Group, Inc., 73 AD3d 1072 (NY App Div 2nd Dept 2010)). Further, Lien Law §23 specifically states that the Lien Law "is to be construed liberally to secure the beneficial interests and purposes thereof. A substantial compliance with its several provisions shall be sufficient for the validity of a lien and to give jurisdiction to the courts to enforce the same."

Lien Law § 19(6) reads as follows:

> Discharge of lien for private improvement
> A lien other than a lien for labor performed or materials furnished for a public improvement specified in this article, may be discharged as follows:
>
> (6) Where it appears from the face of the notice of lien that the claimant has no valid lien by reason of the character of the labor or materials furnished and for which a lien is claimed, or where for any other reason the notice of lien is invalid by reason of failure to comply with the provisions of section nine of this article, or where it appears from the public records that such notice has not been filed in accordance with the provisions of section ten of this article, the owner or any other party in interest, may apply to the supreme court of this state, or to any justice thereof, or to the county judge of the county in which the notice of lien is filed, for an order summarily discharging of record the alleged lien. A copy of the papers upon which application will be made together with a notice setting forth the court or the justice thereof or the judge to whom the application will be made at a time and place therein mentioned must be served upon the lienor not less than five days before such time. If the lienor can not be found, such service

may be made as the court, justice or judge may direct. The application must be made upon a verified petition accompanied by other written proof showing a proper case therefor, and upon the approval of the application by the court, justice or judge, an order shall be made discharging the alleged lien of record.

Lien Law § 9 gives the requirements for the contents of a notice of Lien as follows:

Contents of notice of lien

The notice of lien shall state:

1. The name and residence of the lienor; and if the lienor is a partnership or a corporation, the business address of such firm, or corporation, the names of partners and principal place of business, and if a foreign corporation, its principal place of business within the state.

1-a. The name and address of the lienor's attorney, if any.

2. The name of the owner of the real property against whose interest therein a lien is claimed, and the interest of the owner as far as known to the lienor.

3. The name of the person by whom the lienor was employed, or to whom he furnished or is to furnish materials; or, if the lienor is a contractor or subcontractor, the person with whom the contract was made.

4. The labor performed or materials furnished and the agreed price or value thereof, or materials actually manufactured for but not delivered to the real property and the agreed price or value thereof.

5. The amount unpaid to the lienor for such labor or materials.

6. The time when the first and last items of work were performed and materials were furnished.

7. The property subject to the lien, with a description thereof sufficient for identification; and if in a city or village, its location by street and number, if known. A failure to state the name of the true owner or contractor, or a misdescription of the true owner, shall not affect the validity of the lien. The notice must be verified by the lienor or his agent, to the effect that the statements therein contained are true to his knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Where a notice of lien is not invalid on its face, any disputes regarding the validity of the lien will be determined at trial (See Matter of Rigano v Vibar Constr., Inc., 131 AD3d 1252, (NY App Div 2nd Dept 2015); Rivera v Department of Hous. Preserv. & Dev. of City of New York, supra)).

The Court finds that the Lien filed in the underlying action meets all of the requirements of Lien Law §9, and as such is not invalid upon its face. Further, there is no dispute that the Defendants made a a demand for an itemized statement from the Plaintiff and/or that the Plaintiffs provided the Defendants with said itemized statement in accordance with the requirements of Lien Law §38. The Defendants argue in sum and substance that the itemized charges as included in the itemized statement are not lienable as "architectural services". However, as the Lien is valid on its face, the validity of the specific charges under the Lien are to be determined at trial (See Matter of Rigano v Vibar Constr., Inc., 131 AD3d 1252 (NY App Div 2d Dept 2015) citing Care Systems, Inc. v. Laramee, 155 A.D.2d 770 (NY App Div 3d Dept 1989); Matter of Northside Tower Realty, LLC v. Klin Constr. Group, Inc., 73 AD3d 1072 (NY App Div 2nd Dept 2010); Exec. Towers at Lido, LLC v. Metro Constr. Servs., 303 AD2d 545 (NY App Div 2nd Dept 2003); Aaron v. Great Bay Contr., Inc., 290 A.D.2d 326 (N.Y. App. Div. 1st Dept 2002)).

Accordingly, the Defendants' motion for summary judgment dismissing the Lien is hereby denied.

The Plaintiff's motion for further security in addition to the Bond is hereby denied

A lien foreclosure action is equitable in nature (See Salerno Painting & Coating Corp. v. National Neurolabs, Inc., 43 AD3d 1140 (NY App Div 2nd Dept 2007) citing Brescia Const. Co. v. Walart Const. Co., 264 NY 260 (NY 1934)). As such this Court has broad powers to mold its decisions according to the necessities of the underlying action as equity and justice require (See NY Const, art VI, § 7 (a); Dickerson v Thompson, 88 A.D.3d 121, 123 (N.Y. App. Div. 3d Dept 2011) citing Kaminsky v. Kahn, 23 AD2d 231 (NY App Div 1st Dept 1965); Maresca v. Cuomo, 64 N.Y.2d 242 (N.Y. 1984) appeal dismissed 474 US 802 (1985); Buteau v. Biggar, 65 AD2d 652 (NY App Div 3d Dept 1978); State v. Barone, 74 NY2d 332 (NY 1989)).

Upon review of the Parties' submitted papers and having heard oral argument on the Plaintiff's motion, this Court finds that there is an insufficient basis to increase the security beyond the $134,884.00 Bond. It is clear from the Parties' submitted papers and the Parties' arguments presented at oral argument that there is a significant dispute as to which of the specific itemized charges are lienable and which are not. As such, even assuming arguendo that the Plaintiff is awarded a judgment in the underlying action, said judgment may be significantly less than the value of the current Bond. Further, any determination as to the "service fees" (if any) for which the Defendant may be liable, is entirely dependant upon the specific charges that the jury determines are lienable in the underlying action. Further, should the Plaintiffs be awarded a judgment in the underlying lien foreclosure action, any award of interest will be at the discretion of the trial Court (Salerno Painting & Coating Corp. v. National Neurolabs, Inc., 43 AD3d 1140 (NY App Div 2nd Dept 2007)). Finally, given the pretrial history of the underlying action, this Court does not find that the delays in bringing the underlying action to trial lie entirely with the Defendants.

Accordingly, the Plaintiff's motion pursuant to Lien Law §19(4) and CPLR §2508 for additional security in addition to the $134,884.00 Bond is hereby denied.

Conclusion

Accordingly and for the reasons so stated, it is hereby

ORDERED that the Defendants' motion for summary judgment dismissing the Lien is hereby denied. It is further

ORDERED that the Plaintiff's motion pursuant to Lien Law §19(4) and CPLR §2508 for additional security in addition to the $134,884.00 Bond is hereby denied.

The foregoing constitutes the ORDER and DECISION of the Court.

Dated: January 6, 2016

ENTER:

, JSC
HON. ROBERT D. KALISH
J.S.C.