

**S. DiGiacomo & Son, Inc. v Callen**

2016 NY Slip Op 30882(U)

May 12, 2016

Supreme Court, New York County

Docket Number: 155737/15

Judge: Barbara Jaffe

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 12**

-----X  
**S. DIGIACOMO & SON, INC.,**

**Plaintiff,**

**-against-**

**ROBINSON CALLEN, REINSTEIN ROSS LLC d/b/a  
REINSTEIN ROSS GOLDSMITHS, ADMIRAL AIR  
CONDITIONING CORP., and JOHN DOES No. 1 to  
100,**

**Defendants.**  
-----X

**BARBARA JAFFE, JSC:**

**For plaintiff:**

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**For Reinstein Ross:**

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By notice of motion, defendant Reinstein Ross LLC d/b/a Reinstein Ross Goldsmiths moves pursuant to CPLR 3211(a)(1) and (a)(7) for a pre-answer order dismissing plaintiff's claims seeking foreclosure of a mechanic's lien against it and for an account stated. Plaintiff opposes.

**I. BACKGROUND**

On or about January 23, 2014, plaintiff, a general contractor, and Reinstein, the tenant of retail space located in Manhattan, entered into a contract for an interior build-out at the premises. The work commenced on or about January 27. (NYSCEF 7). Pursuant to the contract, the scope of the work included, among other things, installation of "new associated high efficiency heat pumps" and the replacement of "baseboard [heating] units with runtal wall panels." (NYSCEF

[\* 2]  
10).

Work continued at the site until approximately early July 2014, when communications between the parties broke down and the work stopped. By letter dated July 14, 2014, Reinstein notified plaintiff that it was terminating their contract, explaining in part, as follows:

You are in substantial breach of the Contract Documents for failure to substantially complete the work within the seventy (70) days provided in the Contract Documents, and it has now been more than one hundred eighty (180) days since commencement. Your substantial breach of the Contract Documents has been certified by the Architect for the project. A copy of the Architect's certification is attached. All efforts to reach you over the past two (2) weeks regarding the project have been ignored.

(NYSCEF 8).

Reinstein thereafter retained an engineer to inspect the premises, and by memorandum dated January 25, 2015, the engineer found; as pertinent here, that plaintiff had neither installed the specified condenser units serving the HVAC system nor the baseboard heating radiators.

(NYSCEF 11).

On March 9, 2015, plaintiff filed a mechanic's lien on the property for \$100,621.76.

(NYSCEF 9). Following Reinstein's request pursuant to Lien Law § 78, on May 18, 2015, plaintiff provided it with an itemized statement consisting of the parties' contract, plaintiff's bid for the project, and an application and certification for payment dated July 14, 2014, from plaintiff to Reinstein. (July AFP). The July AFP comprises 28 items and 19 change orders reflecting the labor and materials provided to date for the job, and certifies that the work is 100 percent complete. Plaintiff signed the certification; the project architect did not. (NYSCEF 7).

On or about June 8, 2015, plaintiff commenced this action, asserting claims of a breach of contract, an account stated, and *quantum meruit*, and seeking foreclosure on the March 2015 lien.

[\* 3]  
(NYSCEF 1). In lieu of serving an answer, this motion ensues.

## II. DISCUSSION

### A. Contentions

In support of dismissal, Reinstein contends that the change orders were unsigned, unilateral, and not part of the parties' contract, and thus insufficient to support a mechanic's lien. It alleges that of the sum claimed in the lien, \$27,500 reflects HVAC-related expenses for a system that plaintiff admits was never installed, and \$54,369.66 are attributed to 19 change orders that neither it nor its architect ever approved, and thus do not constitute valid modifications of their contract. Accordingly, it contends that the lien was wilfully exaggerated and is therefore void. Reinstein also alleges that plaintiff fails to state a claim for an account stated, presumably on the same grounds as it seeks dismissal of the lien. (NYSCEF 6).

Reinstein offers the affidavit of its architect, who advances the following specific objections to the July AFP: (1) he neither saw nor approved it; (2) as he never approved it, he never approved the change orders referenced therein; (3) although he rejected several of the change orders, including two as duplicative, and discussed them with plaintiff, they nonetheless appear in the lien; (4) plaintiff indicated that it would get back to him regarding issues with the change orders but never did; and (5) "little of what was billed [therein] was actually performed or supplied," and he would have rejected much of it as the work was not completed. (NYSCEF 5).

In his affidavit, Reinstein's principal attests that plaintiff became unresponsive sometime after July 14, 2014, and that at the end of July, after weeks of silence, Reinstein terminated plaintiff's contract for cause. He advances the following pertinent objections to plaintiff's itemized statement: (1) plaintiff never installed the heating system it agreed to install, including

[\* 4]

heat pumps and radiators, and now the system is more expensive to retrofit; (2) two items were included in the original bid, and later reappeared in two change orders, resulting in them being triple-billed; (3) plaintiff billed for delivery and installation of a microwave that was neither delivered nor installed; (4) certain door hardware was returned by Reinstein as incompatible but appears in the July AFP; (5) several of the change orders were not received until after the lien was filed; and (6) the lighting change order appears in the July AFP although it was rejected as incorrect, as confirmed by the architect. He asserts that as the July AFP was never approved by the architect, any claim based on it is premature, and that, in general, the lien is grossly exaggerated. (NYSCEF 13).

In opposition, plaintiff's principal disputes Reinstein's account and contends that the question of wilful exaggeration may not be determined on affidavits alone. He contends that he filed the lien only after receiving no payment from Reinstein, and contrary to Reinstein's account, delays were occasioned by Reinstein's redesigns and the late receipt of items from the owner, and plaintiff stopped performing redesign work as change orders were due and owing since February 11, 2014. Moreover, he contends that plaintiff was always open to communication, and that when Reinstein allegedly defaulted, its architect had not addressed the post-February 2014 change orders. He also alleges that the July AFP was sent on July 7, that plaintiff had reduced the change orders contained therein, which reflects no duplicative billings and were substantiated by subcontractors' bills, but that Reinstein addressed neither the July AFP nor the change orders. He maintains that Reinstein's own default in payment preceded its purported termination of the agreement. (*Id.*).

Plaintiff also contends that the majority of work reflected in the July AFP constituted

redesigns dictated by Reinstein's architect. He specifically addresses 18 items and 13 change orders therein, explaining, as pertinent here:

7) Door details were worked out by [plaintiff] and the architect on site. Specified door sizes didn't work. [Plaintiff] returned specified butts and lock sets after the architect failed to process change orders. Doors that were installed were approved by the architect.

....

10/11) Wood doors [and hardware]: The layout in the area where the majority of the doors were was not completed until May due to extensive mechanical re-design by the engineer and the architect. Doors could not be confirmed. [Plaintiff] would have replaced doors and hardware but change orders were not being processed and [the July AFP] was not addressed.

....

22) Appliances: Microwave was in specifications, however cabinets were not ordered by the architect until the job was complete. A \$550 credit is acceptable.

....

24) [HVAC] . . . . [None of the equipment fit because the system was designed poorly]. The AC units on the roof will be replaced once change orders are addressed and [the July AFP] is addressed. The entire HVAC system cost \$29,000[,] replacement of two roof top units is \$8,000 . . . . [Plaintiff] waited 4 weeks for a HVAC ductwork design. This project was over and still no engineer design. The existing equipment that was to be reused was beyond its life cycle.

....

27) Fee: Fee is for complete work . . . All the items left incomplete are a result of designs that did not work with existing conditions especially existing piping that was not accounted for, redesigns that were not done in a timely fashion and a failure to process long [overdue] change orders.

....

C04) [Plaintiff] did not charge for any extra fixture (there were 4). Backup was sent. Fixtures that were approved were installed. Many fixtures in building . . . wouldn't fit.

....

C05) Magnetic lock system had to be installed on the exterior because consideration was never given during design. Custom mounts had to be made. Access system worked 100% when project was finished. [Plaintiff] was never advised that the

[\* 6]  
system was not functioning. Change order was never disputed. Change order was never paid. One electric strike was specified [in the contract], nothing else – no controller, no buttons, no remote controls. Design was incomplete, drawings incomplete, nothing on electric drawing.

*(Id.)*.

As to the remaining items, plaintiff explains that the work performed and/or materials supplied were either directed by Reinstein's architect per redesign, were not specifically designed by the architect, were not disputed at the time by Reinstein, or were the result of improvised work given complications due to incomplete or faulty design/redesign. He maintains that any disputed items should be explored in discovery. *(Id.)*.

In reply, Reinstein contends that plaintiff fails to address the HVAC system, the magnetic lock system, door hardware, and appliances, all with which it takes issue, and also fails to address the 19 unsigned change orders. It argues that plaintiff's assertion that it ignored the change orders constitutes a concession that Reinstein did not sign them, and in any event, a lien based on disputed change orders is void. (NYSCEF 19).

Reinstein also argues that plaintiff in effect concedes that at least \$8,000 of the cost of the HVAC system is exaggerated and that it would only install the system upon Reinstein's payment, claiming it an improper use of a mechanic's lien. As to the remaining items, it alleges that the triple-billing of the magnetic lock system and other discrepancies were not addressed, that \$3,750 for hardware was billed but never installed, and that plaintiff concedes that the \$550 it charged for a microwave is exaggerated, as it offered a credit for that amount. *(Id.)*.

B. Analysis

1. Governing standard

Pursuant to CPLR 3211(c), the court may, on its own initiative, convert a motion to dismiss to one for summary judgment provided that it give adequate notice to the parties. However, in cases where the parties “deliberately chart a summary judgment course by laying bare their proof . . . submitting extensive extrinsic documentary evidence and evidentiary affidavits,” no notice is required. (*51 St. Nicholas Realty Corp. v City of New York*, 218 AD2d 343, 347-348 [1<sup>st</sup> Dept 1996], quoting *O’Dette v Guzzardi*, 204 AD2d 291 [2d Dept 1994]).

As the parties have laid out their proof and do not otherwise object, I treat Reinstein’s motion as one for summary judgment. (CPLR 3211(c)).

To prevail on a motion for summary judgment dismissing a cause of action, the defendant “bears the initial burden of coming forward with evidence that, absent contrary evidence creating an issue of fact, establishes as a matter of law that plaintiff cannot sustain this cause of action.” (*Correa v Saifuddin*, 95 AD3d 407, 408 [1<sup>st</sup> Dept 2012]). If the defendant meets this burden, the plaintiff must offer evidence in admissible form to demonstrate the existence of factual issues that require a trial, as “mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient.” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

2. Foreclosure of mechanic’s lien

In any action or proceeding to enforce a mechanic’s lien upon a private or public improvement or in which the validity of the lien is an issue, if the court shall find that a lienor has wilfully exaggerated the amount for which he claims a lien as stated in his notice of lien, his lien shall be declared to be void and no recovery shall be had thereon. . . .

(Lien Law § 39). “Inaccuracy in amount of lien, if no exaggeration is intended, does not void a

mechanic's lien; wilfulness also must be shown." (*Goodman v Del-Sa-Co Foods, Inc.*, 15 NY2d 191, 195 [1965], quoting *Yonkers Bldrs. Supply Co. v Luciano & Son, Inc.*, 269 NY 171 [1935]; *J. Sackaris & Sons, Inc. v Terra Firma Constr. Mgt. & Genl. Contracting, LLC*, 14 AD3d 538 [2d Dept 2005], *lv denied* 4 NY3d 878; *Fidelity New York, FSB v Kensington-Johnson Corp.*, 234 AD2d 263, 263 [2d Dept 1996]).

It is the burden of the opponent of the lien to demonstrate that the lien was intentionally and deliberately exaggerated (*George A. Fuller Co. v Kensington-Johnson Corp.*, 234 AD2d 265, 267 [2d Dept 1996]), and the issue is one that ordinarily must be determined at trial (*NY Professional Drywall of OC, Inc. v Rivergate Dev., LLC*, 137 AD3d 1509 [3d Dept 2016]; *Aaron v Great Bay Contr., Inc.*, 290 AD2d 326, 326 [1<sup>st</sup> Dept 2002]). Thus, the voiding of a lien "is subject to summary disposition where the evidence concerning whether or not the lienor wilfully exaggerated the lien is conclusive"; such a burden "necessarily involves proof as to the credibility of the lienor," and therefore the issue of wilful or fraudulent exaggeration is ordinarily determined at trial and not on summary judgment. (*On the Level Enter., Inc. v 49 E. Houston LLC*, 104 AD3d 500 [1<sup>st</sup> Dept 2013]).

"A notice of lien may include amounts due from written contracts and change orders for extras depending on whether the owner of the property sought to be liened has given his consent for the extra work." (*Matter of Forman v Pala Constr. Co.*, 124 AD2d 453 [3d Dept 1986]). A mechanic's lien may also include amounts due for unsigned change or work orders, even where the parties' agreement requires any change to be in writing, as when an owner receives and accepts the benefits of extra work "orally directed by himself and his agents, that owner is equitably bound to pay the reasonable value thereof, notwithstanding the provisions of his

[\*9]  
contract that any extra work must be supported by a written authorization signed by the owner.”  
(*Care Sys. v Laramee*, 155 AD2d 770 [3d Dept 1989]; see also *DiSario v Rynston*, AD3d ,  
2016 WL 1355814 [2d Dept 2016] [lienor may seek amounts due from both written contracts and  
from change orders for extras depending on whether owner consented to extra work]).

While plaintiff may have inserted in the lien improper charges and double-billed certain  
items, Reinstein offers no evidence that it wilfully and intentionally exaggerated the lien. Rather,  
the parties dispute the scope of the work performed by plaintiff and the procurement of  
materials/supplies billed to Reinstein. (See *NY Prof. Drywall of OC, Inc. v Rivergate Dev., LLC*,  
137 AD3d 1509 [3d Dept 2016] [summary dismissal of mechanic’s lien denied as there existed  
genuine dispute regarding work done by plaintiff, including whether change orders were  
approved]; *Weaver v Acampora*, 277 AD2d 727 [3d Dept 1996] [if actual cost of change order  
was less than that claimed by plaintiff, value of changes was subject of conflicting testimony, and  
defendants failed to prove discrepancy resulted from intentional or deliberate overstatement,  
rather than disagreement as to value]).

Moreover, Reinstein’s denial of the enforceability or validity of the unsigned change  
orders is not relevant to the issue of wilful exaggeration. (See *Care Sys.*, 155 AD2d at 771  
[denying motion to discharge mechanic’s lien summarily for wilful exaggeration as defendant  
relied only on provision in contract requiring written consent for extra work]). And, given the  
parties’ differing accounts about the work performed, materials provided, and extent to which  
Reinstein approved the orders, there are factual issues as to whether the unsigned orders are  
chargeable against Reinstein, through a course of conduct or otherwise. (See *Care Sys.*, 155  
AD2d at 771 [dispute about validity of lien must be determined at trial, including whether

defendant requested or consented to performance of extra work, notwithstanding contract requirement of written consent for extra work]; see generally *Peter Scalamandre & Sons, Inc. v FC 80 Dekalb Assocs., LLC*, 129 AD3d 807, 809 [2d Dept 2015] [contract provisions requiring written authorization for changes waived when parties' conduct evidences "indisputable mutual departure from the written agreement and the changes were clearly requested by (the owner) and executed by (the contractor)"] [alterations in original]; see also *Deerkoski v E. 49<sup>th</sup> St. Dev. II, LLC*, 120 AD3d 1387, 1389 [2d Dept 2014] [conduct of parties dispensed with requirement that plaintiff must submit written change orders as condition precedent to payment for work performed]).

Reinstein has thus failed to meet its burden of establishing that plaintiff wilfully and intentionally exaggerated the lien. (See e.g. *On the Level Enter., Inc.*, 104 AD3d at 500 [even where lienor was unable to support many charges on lien's itemized list, determination as to whether plaintiff's exaggeration of lien was due to principal's wilfulness rather than ignorance reserved for trial]; *CPN Mech., Inc. v Madison Park Owner LLC*, 94 AD3d 626 [1<sup>st</sup> Dept 2012] [summary judgment denied on defendant's claim for wilful exaggeration of lien as factual issues precluded determination as to validity and amount of lien]; *E. Hills Metro, Inc. v J. M. Dennis Constr. Corp.*, 277 AD2d 348 [2d Dept 2000] [fact that lien may contain improper charges, in itself, does not establish that plaintiff wilfully exaggerated lien]).

### 3. Account stated claim

Reinstein advances no specific arguments supporting dismissal of plaintiff's account stated claim.


III. CONCLUSION

Accordingly, it is hereby

**ORDERED**, that defendant Reinstein Ross LLC d/b/a Reinstein Ross Goldsmiths's motion for an order dismissing plaintiff's claims seeking foreclosure of a mechanic's lien and for an account stated is denied; and it is further

**ORDERED**, that defendant Reinstein Ross, LLC d/b/a Reinstein Ross is directed to file and serve an answer within 20 days of the date of this order.

ENTER:

  
\_\_\_\_\_  
Barbara Jaffe, JSC  
**BARBARA JAFFE**  
**J.S.C.**

**DATED:** May 12, 2016  
New York, New York