

<b>Ziya Rest. Inc. v Mulberry Dev. LLC</b>
2016 NY Slip Op 31456(U)
July 27, 2016
Supreme Court, New York County
Docket Number: 155276/2016
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 32

-----X  
ZIYA RESTAURANT INC., and PRANA  
RESTAURANT LLC,

Index No. 155276/2016  
Motion Sequence: 001

Petitioners,

-against-

MULBERRY DEVELOPMENT LLC,

DECISION/ORDER  
ARLENE P. BLUTH, JSC

Respondent.

-----X  
Petitioners bring the instant application, by order to show cause, for an order pursuant to Lien Law § 19 to discharge the mechanic's lien filed against the real property located at 79 Madison Ave., New York, NY on the grounds that it is void and contains a willful exaggeration. Petitioners' application is denied.

Petitioners, tenants at 79 Madison Ave., claim that a mechanic's lien was improperly filed by respondent Mulberry Development LLC (Mulberry) and petitioners fear that the non-party landlord for the property (79 Madison LLC) might use a letter of credit supplied by petitioners to satisfy the lien. Petitioners ask the court to summarily discharge the lien because they claim that Mulberry willfully exaggerated the amount it is due for the construction work Mulberry provided at 79 Madison Ave. Mulberry claims that it is owed \$461,925 for work and materials. Petitioners counter that they, in fact, overpaid Mulberry by \$226,444.55 in connection with Mulberry's construction work at 79 Madison.

Petitioners contend that pursuant to Lien Law § 39 and 39-a, the lien filed by Mulberry is void and that no recovery can be had. Petitioners further claim that they had an independent appraisal done regarding the work performed by Mulberry, which found that Mulberry had been fully paid.

In opposition, Mulberry claims that this petition must be dismissed pursuant to Lien Law § 19 (6). Mulberry argues that an allegation that the mechanic's lien is inaccurate and exaggerated is not a basis to discharge a mechanic's lien pursuant to Lien Law § 19 (6). Mulberry argues that any dispute regarding the validity of a lien, other than a dispute regarding whether a lien is defective on its face, must wait until the trial of a foreclosure action on the lien. Mulberry further claims that petitioners have provided no evidence to show that the lien is defective on its face.

### **Discussion**

Lien Law § 39 provides that:

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. No such lienor shall have a right to file any other or further lien for the same claim. A second or subsequent lien filed in contravention of this section may be vacated upon application to the court on two days' notice.

Lien Law § 39-a provides that:

Where in any action or proceeding to enforce a mechanic's lien upon a private or public improvement the court shall have declared said lien to be void on account of wilful exaggeration the person filing such notice of lien shall be liable in damages to the owner or contractor. The damages which said owner or contractor shall be entitled to recover, shall include the amount of any premium for a bond given to obtain the discharge of the lien or the interest on any money deposited for the purpose of discharging the lien, reasonable attorney's fees for services in securing the

discharge of the lien, and an amount equal to the difference by which the amount claimed to be due or to become due as stated in the notice of lien exceeded the amount actually due or to become due thereon.

“[S]ection 39-a, by its terms, only permits a wilful exaggeration claim to be asserted in an action to enforce a mechanic’s lien, namely a foreclosure action” (*Wellbilt Equip. Corp. v Fierman*, 719 NYS2d 213, 216, 2000 NY Slip Op 08556 [1st Dept 2000] [internal quotations and citations omitted]; *e.g.*, *Aaron v Great Bay Contr., Inc.*, 290 AD2d 326, 326, 736 NYS2d 359 [1st Dept 2002] [“Although Lien Law § 39 provides that a willfully exaggerated lien is void, the issue of willful or fraudulent exaggeration is one that also ordinarily must be determined at the trial of the foreclosure action”]). “Under the plain language of Lien Law §§ 39 and 39-a, willful exaggeration may be established only in any action or proceeding to enforce a mechanic’s lien, rather than, as here, in an action to *discharge* the lien” (*Ahava Med. & Rehabilitation Ctr., LLC v Berkovitch*, 20 Misc3d 1138(A), 867 NYS2d 372 (Table) [Sup Ct, Kings County 2008]).

“[I]n the absence of a defect upon the face of the notice of lien, any dispute regarding the validity of the lien must await trial of the foreclosure action” (*Pontos Renovation Inc. v Kitano Arms Corp.*, 204 AD2d 87, 87, 611 NYS2d 538 [1st Dept 1994] [internal quotations and citation omitted]).

Here, petitioners brought a petition to summarily discharge the lien and to declare it void because Mulberry allegedly overcharged for its work. There is no action to foreclose a mechanic’s lien pending. Pursuant to Lien Law §§ 39 and 39-a, petitioners’ claims about the allegedly exaggerated lien must be considered during the trial of a foreclosure action. Further, the Court cannot summarily discharge the lien pursuant to Lien Law § 19(6) because petitioners have failed to provide any evidence that the lien is void on its face (*see* Lien Law § 19[6]).

As respondent has not moved to dismiss the petition, the court declines to do so *sua sponte*.

Accordingly, it is hereby

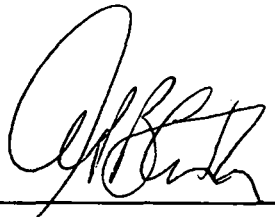
ORDERED that petitioners' application to summarily discharge the Notice of Mechanic's Lien filed by Mulberry Development LLC on or about June 9, 2016 is denied; and it is further

ORDERED that all stays are hereby vacated and respondent need not return or reject any monies received on account of the lien.

Next Conference: October 27, 2016 at 2:30 pm.

This is the Decision and Order of the Court.

**Dated: July 27, 2016**  
**New York, New York**



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**HON. ARLENE P. BLUTH, JSC**

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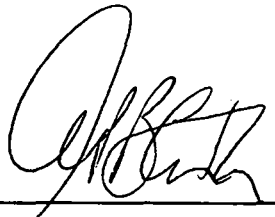
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