

Matter of American Constr. Mgt, Inc. v Allure Metal Works, Inc.

2016 NY Slip Op 32321(U)

November 23, 2016

Supreme Court, New York County

Docket Number: 655049/2016

Judge: Eileen A. Rakower

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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In the Matter of the Application of

AMERICAN CONSTRUCTION MANAGEMENT, INC.,

Petitioner,

Index No.
655049/2016

For an Order Summarily Discharging of Record a Notice
Of Lien filed by

**DECISION and
ORDER**

ALLURE METAL WORKS, INC.,

Mot. Seq. 004

Lienor.

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HON. EILEEN A. RAKOWER, J.S.C.

Petitioner, American Construction Management, Inc. (“Petitioner” or “ACM”) brings a Notice of Petition to Discharge the Mechanic’s Lien filed by Allure Metal Works, Inc. (“Lienor” or “Allure”), upon the ground that the Lienor failed to comply with the provisions of Section 11-b of the Lien Law.

As set forth in the Petition, on January 26, 2014, ACM entered into a contract with FMFS of 125, LLC, to perform renovations on premises located at 2314 Frederick Douglas Boulevard, New York, New York, Block 1951, Lot 22 in the County of New York (“Premises”). FMFS was a tenant in the building located at the Premises. ACM entered into a subcontract with Reliance Mechanical Services (“Reliance”) for certain work in connection with the premises. Petitioner states, upon information and belief, Reliance entered into a sub-contract with Allure, the Lienor, for Allure to perform certain work and provide certain materials for the project.

On July 17, 2015, Allure filed a notice of mechanic’s lien in the sum of \$17,542 (“the Lien”) against the Premises naming Commonwealth Local

Development Corp (“CLDC”), as owner. The affidavit of service Allure filed in connection with said lien states that service was upon CLDC and Reliance.

New York Lien Law § 11-b, “Copy of notice of lien to a contractor or a subcontractor,” provides:

Within five days before or thirty days after filing a notice of lien in accordance with section ten of this chapter or the filing of an amendment of notice of lien in accordance with section twelve-a of this chapter the lienor shall serve a copy of such notice or amendment by certified mail on the contractor, subcontractor, assignee or legal representative for whom he was employed or to whom he furnished materials or if the lienor is a contractor or subcontractor to the person, firm or corporation with whom the contract was made. A lienor having a direct contractual relationship with a subcontractor or a sub-subcontractor but not with a contractor shall also serve a copy of such notice or amendment by certified mail to the contractor. Failure to file proof of such a service with the county clerk within thirty-five days after the notice of lien is filed shall terminate the notice as a lien. Any lienor, or a person acting on behalf of a lienor, who fails to serve a copy of the notice of lien as required by this section shall be liable for reasonable attorney's fees, costs and expenses, as determined by the court, incurred in obtaining such copy.

Lien Law § 11-b (emphasis added).

Lien Law § 2(9) defines a “contractor” as “a person who enters into a contract with the owner of real property for the improvement thereof, or with the state or a public corporation for a public improvement.” Lien Law § 2(3) defines an “owner” to include tenants under leases.

In the Petition, Petitioner states that since Allure had a contractual relationship with Reliance, a subcontractor, and not with ACM, the “contractor,” Allure was required to serve a copy of the Lien by certified mail on ACM and that Allure failed to do so. Petitioner states that Allure’s affidavit of service states that service was only made on the owner and Reliance, and that Allure failed to file an affidavit of service attesting to service on ACM within 35 days of the filing of the notice of lien as required by Section 11-b of the Lien Law. Accordingly, Petitioner claims the

notice of Lien is no longer effective and is invalid and ACEM is entitled to an order vacating the notice of Lien of record.

Petitioner further states that by letter dated September 16, 2016, ACM's counsel wrote to Allure and notified Allure that it failed to properly serve ACM as required by the statute and demanded that Allure withdraw the lien. By letter dated September 19, 2016, Allure responded and requested a copy of ACM's contract, which ACM provided to Allure's counsel. Allure thereafter refused to withdraw the Lien. Petitioner seeks an order awarding it attorneys' fees in connection with this application pursuant to the provisions of Section 11-b, "particularly in light of Allure's unjustified refusal to withdraw its lien."

Allure has filed an Answer to the Petition to Discharge Mechanic's Lien. In the Answer, Allure states, the Lien was filed on July 23, 2015, and the one-year period therefore expired on July 23, 2016 as proscribed under Lien Law 17. Allure states, "Upon information and belief, no action to foreclose the lien in question has been commenced and no notice of pendency of such an action has been commenced" and "no extension of lien has been filed." Allure states, "Accordingly, pursuant to Lien Law 17, the lien in question expired on July 23, 2016. As a result, it was impossible for Lienor to comply with the requests of Petitioner as Petitioner's first request to remove the lien was made on September 16, 2016, by which time the lien had already expired."

In its reply, Petitioner states that "Allure's contentions are factually incorrect" and "Allure did extend its lien for an additional year in July, 2016." Petitioner annexes a copy of said extension. As such, Allure's lien remains on record. Petitioner further states, "Allure further fails in any way to contest or even address its failure to properly serve its mechanic's lien on the Petitioners [sic] as [sic] for the project at issue as required by Lien Law sec. 17-b. In fact, Allure's answer expresses no interest in continuing, pursuing or maintaining the lien."

Here, Allure does not dispute that it failed to serve a copy of the Lien upon Petitioner by certified mail and to file an affidavit of service attesting to service on Petitioner within 35 days of the filing of the notice of lien as required by § 11-b of the Lien Law. Accordingly, the Lien is no longer effective and Petitioner is entitled to an order vacating the notice of lien of record.

Wherefore, it is hereby

ORDERED that the notice of mechanic's lien filed by Allure Metal Works, Inc., against the premises located at 2314 Frederick Douglas Boulevard, New York, New York, Block 1951, Lot 22 in the County of New York, naming Commonwealth Local Development Corp. as owner, is vacated; and it is further

ORDERED that Petitioner is entitled to reasonable attorneys' fees in connection with this application pursuant to the provisions of Section 11-b; and it is further

ORDERED that the amount of reasonable attorneys' fees and costs is referred to a Special Referee to hear and report with recommendations; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Reference Part (Room 119A) to arrange for a date for the reference to a Special Referee and the Clerk shall notify all parties, including defendant, of the date of the hearing.

This constitutes the Decision and Order of the Court. All other requested relief is denied.

Dated: November 23, 2016



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HON. EILEEN A. RAKOWER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE