

Onekey, LLC v Byron Place Assoc., LLC

2016 NY Slip Op 33163(U)

April 7, 2016

Supreme Court, Westchester County

Docket Number: Index No. 52144/2015

Judge: William J. Giacomo

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.**

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ONEKEY, LLC,

Plaintiff,

-against-

Index No. 52144/2015
DECISION & ORDER

BYRON PLACE ASSOCIATES, LLC FIRST NIAGARA
BANK, N.A., and TITAN CONCRETE CORP.,
Defendants.

-----X
The following papers numbered 1 to 10 were read on defendant Byron Place Associates, LLC's ("Byron Place") motion to dismiss the complaint and plaintiff's motion to consolidate this action with two other related actions. **PAPERS NUMBERED**

Notice of Motion/Affirmation/Exhibits	1-3
Affirmation in Opposition/Exhibits	4-5
Reply Affirmation/Exhibits	6-7
Motion to Consolidate/Affirmation/Exhibits	8-10

Factual and Procedural Background

In April 2011, Byron Place and plaintiff entered into a construction management agreement whereby plaintiff was hired to supervise construction of a property located at 10 Byron Place, Larchmont, New York.

On May 15, 2014, Byron Place terminated the services of plaintiff due to its dissatisfaction with how it was handling the project. On May 18, 2014, the sub contracts executed by plaintiff with the subcontractors on the project were assigned to Byron Place. Thereafter, no subcontractor performed work for plaintiff.

On May 19, 2014, plaintiff filed a mechanics lien against the property in the amount of \$1,208,501.

On January 23, 2015, plaintiff filed a second mechanic's lien against the premises.

On January 31, 2015, plaintiff commenced his action to foreclose on its two mechanic liens. The first cause of action sought to foreclose on the May 2014 lien and the second cause of action sought to foreclose on the January 23, 2015 lien.

On August 6, 2015, plaintiff filed a notice of pendency on the property.

By decision after hearing dated February 16, 2016, in a related action *Byron Place v. Onekey*, Index # 53376, this Court, among other things, dismissed the January 23, 2015 lien finding that it was not timely filed.

There is also a pending action titled *Byron Place v. OneKey LLC*, Index # 61054/2014 seeking to cancel the May 19, 2014 mechanics lien.

Byron Place now moves to dismiss the first cause of action seeking to foreclose on the May 19, 2014 lien on the ground that plaintiff did not comply with the provisions of Lien Law § 17 which provides that a mechanics lien expires in one year after filing unless the lienor commences an action to foreclose the lien and files a notice of pendency of such action with the county clerk . Byron Place notes that plaintiff filed the lien on May 19, 2014 and commenced this action in January 2015, yet did not file the notice of pendency until August 2015. Therefore, Byron argues the May 19,2014 lien expired and the first cause of action seeking to foreclose that lien must be dismissed

Byron Place also argues that the second cause of action seeking to foreclose on the January 23, 2015 lien also must be dismissed however, the Court notes that this lien was dismissed by decision and order dated February 16, 2016.

In opposition, plaintiff acknowledges that the notice of pendency was not filed within one year of the filing of the lien but argues that since the purpose of filing a notice of pendency is to provide third parties notice that there is a claim on title, Byron Place has not been prejudiced by its failure to file the notice of pendency timely. Although not cross moving for such relief, plaintiff also argues that it should be permitted to file a lien extension application *nunc pro tunc*,

Discussion

Lien Law § 17 **Duration of lien**, provides:

No lien specified in this article shall be a lien for a longer period than one year after the notice of lien has been filed, unless within that time an action is commenced to foreclose the lien, and a notice of the pendency of such action, whether in a court of record or in a court not

of record, is filed with the county clerk of the county in which the notice of lien is filed, containing the names of the parties to the action, the object of the action, a brief description of the real property affected thereby, and the time of filing the notice of lien; or unless an extension to such lien, except for a lien on real property improved or to be improved with a single family dwelling, is filed with the county clerk of the county in which the notice of lien is filed within one year from the filing of the original notice of lien, continuing such lien and such lien shall be redocketed as of the date of filing such extension. Such extension shall contain the names of the lienor and the owner of the real property against whose interest therein such lien is claimed, a brief description of the real property affected by such lien, the amount of such lien, and the date of filing the notice of lien. No lien shall be continued by such extension for more than one year from the filing thereof. In the event an action is not commenced to foreclose the lien within such extended period, such lien shall be extinguished unless an order be granted by a court of record or a judge or justice thereof, continuing such lien, and such lien shall be redocketed as of the date of granting such order and a statement made that such lien is continued by virtue of such order. A lien on real property improved or to be improved with a single family dwelling may only be extended by an order of a court of record, or a judge or justice thereof. No lien shall be continued by court order for more than one year from the granting thereof, but a new order and entry may be made in each of two successive years. If a lienor is made a party defendant in an action to enforce another lien, and the plaintiff or such defendant has filed a notice of the pendency of the action within the time prescribed in this section, the lien of such defendant is thereby continued. Such action shall be deemed an action to enforce the lien of such defendant lienor. The failure to file a notice of pendency of action shall not abate the action as to any person liable for the payment of the debt specified in the notice of lien, and the action may be prosecuted to judgment against such person. The provisions of this section in regard to continuing liens shall apply to liens discharged by deposit or by order on the filing of an undertaking. Where a lien is discharged by deposit or by order, a notice of pendency of action shall not be filed.

A lien, the duration of which has been extended by the filing of a notice of the pendency of an action as above provided, shall nevertheless terminate as a lien after such notice has been canceled as provided in section sixty-five hundred fourteen of the civil practice law and rules or has ceased to be effective as constructive notice as provided in section sixty-five hundred thirteen of the civil practice law and rules.


Contrary to plaintiff's arguments, the Lien Law is clear and requires that within one year of filing the lien the lienor must commence a foreclosure action **and** file a notice of pendency otherwise the lien expires. There is no dispute that plaintiff did not file a notice of pendency within one year of filing the lien, therefore the lien has expired (*see Noce v.*

Kaufman, 286 A.D. 531 [1955] [Where mechanic's lien was never extended by order, and, though an action to foreclose the lien was commenced within one year after the lien was filed, no lis pendens was filed within the same time, the lien expired and was lost]; *Meszaros v. Indiveri*, 36 Misc.2d 632 [Sup Ct 1962][Commencement of action by itself is insufficient to continue mechanic's lien beyond the one-year statutory period of this section.]).

Further, plaintiff's motion to consolidate must be denied since all three actions: *Byron v Onekey* - Index No. 61054/14; *Onekey v Byron* - Index No. 52144/15; and *Byron v Onekey II* - Index No. 53367/15, involve the May 19, 2014 lien and the January 23, 2015 lien which have both been dismissed.

Based on the foregoing, Byron Place's motion to dismiss the first and second causes of action is GRANTED and the Westchester County Clerk shall vacate the May 19, 2014 and the January 23, 2015 liens. Plaintiff's motion to consolidate is DENIED.

Dated: White Plains, New York
April 7, 2016



HON. WILLIAM J. GIACOMO, J.S.C.

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