

Titanium Constr. Servs., Inc. v Nicholas Indus. & Constr. Servs., Inc.
2017 NY Slip Op 30659(U)
April 5, 2017
Supreme Court, Kings County
Docket Number: 504961/16
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9**

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TITANIUM CONSTRUCTION SERVICES, INC.

Plaintiff,

-against-

**NICHOLAS INDUSTRIES & CONSTRUCTION
SERVICES, INC. and CONGRESS STREET
DEVELOPMENT, LLC,**

Defendants.

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**NICHOLAS INDUSTRIES & CONSTRUCTION
SERVICES, INC.**

Third Party Plaintiff,

-against-

DARWIN NATIONAL ASSURANCE COMPANY,

Third Party Defendant.

-----X

HON. DEBRA SILBER, J.S.C.:

**Recitation, as required by CPLR §2219(a), of the papers considered in the review
of defendant Nicholas Industries & Construction Services, Inc.'s motion to
reargue.**

Papers	Numbered
Notice of Motion, Affirmation and Affidavits Annexed	<u>1-11</u>
Affirmation in Opposition.....	<u>12,13</u>
Reply	<u> </u>

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Defendant Nicholas Industries and Construction Services, Inc. ("Nicholas") moves for leave to reargue the court's decision of September 28, 2016¹ (Mot. Seq. #1) which granted plaintiff's motion for summary judgment in its action to cancel and discharge Nicholas' mechanics lien and to dismiss its counterclaim, and upon reargument, to instead sever movant's counterclaim for "foreclosure of the mechanic's lien." Plaintiff opposes the motion, as does third party defendant Darwin National Assurance Company (now known as Allied World Specialty Insurance Company).

The court grants reargument, and upon reargument, adheres to its original decision.

Plaintiff commenced this action on April 1, 2016, seeking to cancel and discharge a mechanic's lien filed by defendant Nicholas on December 19, 2014. Defendant Nicholas answered the complaint and interposed a counterclaim to foreclose on its lien, dated May 9, 2016. The sole counterclaim was denoted by Nicholas as a "Counterclaim to Foreclose of the Mechanic's Lien." Plaintiff replied to the counterclaim. Subsequently, Nicholas brought a third-party summons and complaint against third party defendant Darwin National Assurance Company, the company that bonded the lien.

By Notice of Motion dated June 14, 2016, plaintiff moved for summary judgment on all causes of action in its complaint and for an order dismissing Nicholas' counterclaim.

¹Plaintiff was directed to settle an order on notice, which was signed on October 20, 2016 and entered on November 1, 2016.

The court granted plaintiff's motion on September 28, 2016. The order granted plaintiff's motion in its entirety, including the request for an order dismissing Nicholas' counterclaim to foreclose the mechanic's lien. The decision notes that no action was taken to foreclose the lien in a timely manner. Plaintiff was directed to settle an order on notice and directed that the third party action was severed. That was all that needed to be said. However, it is also now stated that the counterclaim was not only untimely, if it is ever possible to foreclose on a mechanic's lien by way of counterclaim, but it also lacked the specificity required by Lien Law § 17. It doesn't identify the mechanic's lien or the real property. It was not timely followed by the filing of a notice of pendency. It was not extended for another year, as defendant erroneously claims, and it was not filed against a single family home as defendant also erroneously claims.

Nicholas' sole contention in the instant motion is that plaintiff never moved for summary judgment as to defendant Nicholas' counterclaim. This is simply false. Nicholas had one counterclaim, "To Foreclose of the Mechanic's Lien." While the movant's sole counterclaim does make reference to a "breach of contract," that is the dispute that resulted in the lien, and there is no separate counterclaim for "breach of contract." Plaintiff's motion specifically asked for summary judgment and an order dismissing the sole counterclaim which sought, albeit untimely, to foreclose the mechanic's lien. Plaintiff's memorandum in support of its summary judgment motion specifically argued that plaintiff was entitled to judgment, as a matter of law, vacating, cancelling and discharging the mechanic's lien, canceling the bond and discharging the surety, and that furthermore, defendant's sole counterclaim to foreclose upon the mechanic's lien failed as a matter of law.

It is further noted that the court did not misapprehend any law or fact. CPLR §

2221. While plaintiff clearly moved to dismiss movant's sole counterclaim, movant's opposition to the plaintiff's summary judgment motion failed to oppose that request for relief. Now, Nicholas claims the court erred in granting it. That is simply not the case.

This constitutes the decision and order of the court.

Dated: Brooklyn, New York
April 5, 2017



Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court