

<b>Zen Restoration, Inc. v Hirsch</b>
2017 NY Slip Op 31737(U)
August 14, 2017
Supreme Court, New York County
Docket Number: 152072/17
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

ZEN RESTORATION, INC.

INDEX NO. 152072/17

- v -

MOT. DATE

JEFFREY HIRSCH et al.

MOT. SEQ. NO. 001

The following papers were read on this motion to/for dismiss and consolidate

Table with 2 columns: Document Type and NYSCEF DOC No(s). Rows include Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits, Notice of Cross-Motion/Answering Affidavits — Exhibits, and Replying Affidavits.

Defendants Jeffrey Hirsch ("J. Hirsch"), Danielle Hirsch ("D. Hirsch") and 94th and Park Corporation ("94th and Park" and collectively "Movants") move to dismiss plaintiff Zen Restoration, Inc's ("Zen") first cause of action to foreclose on its June 1, 2016 Notice of Mechanic's Lien (the "Zen Lien") pursuant to CPLR §§ 3211[a][1] and [7], and Lien Law §§9[2], 11 and 44[5] and to vacate and cancel the Zen Lien and Zen's March 1, 2017 Notice of Pendency pursuant to CPLR § 6514[a].

Defendant AB NY Mechanical Corp ("ABNY") supports consolidation. Zen opposes the motion in its entirety and cross-moves for an order pursuant to Lien Law § 12-a permitting it to amend its Notice of Mechanic's Lien to name 94th and Park as the true owner of the real property located at 1192 Park Avenue, Apt 14C, New York, New York 10128 (the "Unit").

The facts alleged in the complaint are as follows. Zen entered into Contract dated August 13, 2014 with J. Hirsch, whereby it agreed to perform renovation work at the Unit. Documentary evidence submitted in support of the motion establishes that J. Hirsch is not the owner of the Unit, but rather, owns stock in 94th and Park and is the leaseholder of the Unit which is a cooperative apartment unit.

On June 1, 2016, Zen filed the Zen Lien. The Zen Lien is against the Unit and in the amount of \$470,209.23. In the lien, Zen identified the premises as Block 1505 Lot 40. This block and lot description corresponds to the Building, which is comprised of more than seventy cooperative apartment units.

Dated: 8/14/17

HON. LYNN R. KOTLER, J.S.C. (with signature)

- 1. Check one: [ ] CASE DISPOSED [X] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [X] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER
3. Check if appropriate: [ ] SETTLE ORDER [ ] SUBMIT ORDER [ ] DO NOT POST [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

The court will first address the motion to dismiss and, relatedly, the cross-motion to amend. Zen identified the owner of the Unit as J. Hirsch, rather than 94<sup>th</sup> and Park. Zen commenced this action on March 2, 2017 by filing its complaint and Notice of Pendency. In the complaint, Zen asserts three causes of action against J. Hirsch, only: foreclosure of the Zen Lien ("First COA"); [2] breach of contract ("Second COA"); and [3] unjust enrichment ("Third COA").

Relatedly, ABNY entered into a contract with Zen whereby ABNY performed and installed certain HVAC work, labor and materials at the Unit. These facts are alleged in the underlying complaint. On March 21, 2016, ABNY filed a Notice Under Mechanic's Lien Law (the "ABNY Lien"). The ABNY Lien correctly identifies 94<sup>th</sup> and Park as the owner of the Unit. On May 5, 2016, ABNY commenced the ABNY Action which is pending before this court. On or about October 7, 2016, Zen served a Verified Answer to the ABNY Action alleging one counterclaim against ABNY for breach of contract. Zen did not reference the Zen Lien in that answer.

Movants now argue that the Zen Lien is void and the first cause of action should be dismissed because Zen: [1] failed to identify the true owner of the Unit; [2] failed to timely serve 94<sup>th</sup> and Park with notice of the Zen Lien; [3] failed to timely file an affidavit of service of the Zen Lien upon 94<sup>th</sup> and Park; and [4] failed to assert the Zen Lien in its answer in the ABNY Action.

Zen admits that J. Hirsch is not the true owner of the Unit. Zen argues, however, "that the Notice of Mechanic's Lien identification of [J. Hirsch] as the owner is merely a misdescription of the true owner" and the Zen Lien "must not be declared void." Zen urges that Article 2 of the Lien Law should be liberally construed, and that J. Hirsch, as a leaseholder, is an owner under the Lien Law. Further, Zen maintains that the failure to raise the Zen Lien in its answer to the ABNY Action is not a waiver thereof because it did not expressly deny the existence or validity of this lien therein.

## Discussion

Article 2 of the Lien Law expressly provides that the law regarding mechanics' liens "is to be construed liberally to secure the beneficial interests and purposes thereof" and "substantial compliance with its several provisions shall be sufficient for the validity of a lien and to give jurisdiction to the courts to enforce same" (Lien Law § 23). The purpose of the Lien Law is to "provide security for laborers and materialmen and ... provide notice and a degree of certainty to subsequent purchasers" (*Matter of Niagara Venture v. Sicoli & Massaro*, 77 NY2d 175, 181 [1990]). The Notice of Lien must include "[t]he name of the owner of the real property against whose interest therein a lien is claimed, and the interest of the owner as far as known to the lienor" (Lien Law § 9[2]). With regards to the description of an owner, "[t]he failure to state the name of the true owner ... or a misdescription of the true owner, shall not affect the validity of the lien" (Lien Law § 9[7]).

The Lien Law also authorizes amendment provided it does not "prejudice ... an existing lienor, mortgagee or purchaser in good faith" (Lien Law § 12-a [2]). The Court of Appeals summarized the relevant provisions of the Lien Law as follows: "it explicitly provides that it should be construed liberally, states that a misdescription of the true owner shall not invalidate a lien, and allows amendment where a third party would not be prejudiced" (*Rigano v. Vibar Constr., Inc.*, 24 NY3d 415, 419 [2014]).

Lien Law § 44 provides in pertinent part as follows:

In an action in a court of record to enforce a lien against real property or a public improvement, the following are necessary parties defendant:

...

5. Every defendant who is a lienor shall, by answer in the action, set forth his lien, or he will be deemed to have waived the same, unless the lien is admitted in the complaint, and not contested by another defendant. The allegations is (sic)

the answer of a defendant lienor shall be deemed denied by the other lienors in said action without the necessity of serving replies. Two or more lienors having liens notices of which have been filed against the same real property or public improvement, or any part thereof, may join as plaintiffs.

The ABNY Action is an action brought by ABNY to foreclose on its mechanic's lien against the Unit. Paragraph 28 of ABNY's June 7, 2016 Amended Complaint provides in pertinent part:

Upon information and belief, no other liens have been filed or are active against 1192 Park Avenue, except Valley National Bank holds a mortgage dated March 21, 2013 in the amount of \$4,500,000.

Zen does not dispute that it did not assert the Zen Lien in its answer in the ABNY Action dated October 7, 2016. Therefore, pursuant to Lien Law § 44[5], Zen waived its lien and (see *Naber Elec. Corp. v. George A. Fuller Co., Inc.*, 62 AD3d 971 [2d Dept 2009] ["Pursuant to Lien Law § 44(5), a lienor ... which has been added as a defendant must set forth his or her lien in his or her answer, unless the complaint admits and no other defendant contests the existence and validity of the defendant's lien, or the defendant lienor will be deemed to have waived the lien (see Lien Law § 44[5]; see *Naber Elec. Corp. v. George A. Fuller Co., Inc.*, 62 AD3d 971 [2d Dept 2009]). This court is bound to follow *Naber*, and based upon its holding, Movants' motion to vacate and cancel the Zen Lien and dismiss the First COA must be granted.

In light of this holding, the court declines to reach the parties arguments regarding whether identifying J. Hirsch as owner in the Zen Lien is a misidentification or a misdescription, since those arguments are moot. Further, plaintiff's cross-motion to amend is also denied as moot.

The court now turns to the request to consolidate the remainder of this action with the ABNY Action. There is no dispute that both this action and the ABNY Action arise from the same operative set of facts and involve the same parties. Zen argues that the actions should not be consolidated because ABNY is a plaintiff in one and a defendant in the other, and vice versa, and therefore the caption would be confusing. The court rejects this argument. Consolidation is warranted in the interests of judicial economy and because both actions are clearly related. A single amended caption is not necessary, and in order to address Zen's concerns of confusion, both actions shall be listed separately. Accordingly, the motion to consolidate is granted.

## CONCLUSION

In accordance herewith, it is hereby

**ORDERED** that the motion is granted in its entirety and the cross-motion is denied; and it is further

**ORDERED** that plaintiff Zen Restoration, Inc's ("Zen") first cause of action to foreclose on its June 1, 2016 Notice of Mechanic's Lien (the "Zen Lien") is granted and the first cause of action is severed and dismissed; and it is further

**ORDERED** that the Zen Lien and Zen's March 1, 2017 Notice of Pendency is hereby vacated and cancelled; and it is further

**ORDERED** that this action is hereby consolidated with the related action entitled AB NY Mechanical Corp. v. Zen Restoration et al., Index Number 850116/16 (the "ABNY Action") under Index Number 850166/16 and the consolidated action shall bear the following caption:

X-----X

AB NY MECHANICAL CORPORATION,

Index No. 850116/16.  
Action No. 1

Plaintiff,

-against-

ZEN RESTORATION INC., 94<sup>TH</sup> AND PARK CORPORATION,  
VALLEY NATIONAL BANK, HSBC BANK, REPUBLIC BANK  
FOR SAVINGS, DANIELLE HIRSCH and JEFFREY HIRSCH,

Defendants.

X-----X

ZEN RESTORATION, INC.,

Index No. 152072/17  
Action No. 2

Plaintiff,

-against-

JEFFREY HIRSCH, DANIELLE HRISCH, AB NY MECHANICAL  
CORPORATION, 94<sup>TH</sup> AND PARK CORPORATION, VALLEY  
NATIONAL BANK, HSBC BANK USA and REPUBLIC BANK  
FOR SAVINGS,

Defendants.

X-----X

And it is further

**ORDERED** that the pleadings in the actions hereby consolidated shall stand as the pleadings in the consolidated action; and it is further

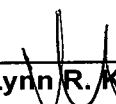
**ORDERED** that Movants are directed to serve a copy of this order with notice of entry on the County Clerk (Room 141 B), who shall consolidate the papers in the actions hereby consolidated and shall mark his records to reflect the consolidation; and it is further

**ORDERED** that movant is directed to serve a copy of this order with notice of entry on the Clerk of the Trial Support Office (Room 151), who is hereby directed to mark the court's records to reflect the consolidation; and it is further

**ORDERED** that counsel are directed to appear for a preliminary conference in Room 278, 80 Centre Street on September 12, 2017 at 9:30am.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 8/14/17  
New York, New York

So Ordered:  
  
Hon. Lynn R. Kotler, J.S.C.