SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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NEW AGE GENERAL CONTRACTING, INC.,

Plaintiffs,

–against–

1882 THIRD, LLC, MANHATTAN RESTORATION, LLC, AND RLI INSURANCE COMPANY,

Defendants.

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Index No. 150220/16
Motion Seq. Nos. 003

DECISION AND ORDER

CAROL R. EDMEAD, J.S.C.:

In a case involving a mechanic's lien where the lien has already been discharged, plaintiff New Age General Contracting, Inc. (New Age) moves, pursuant to CPLR 3211, to dismiss defendants' counterclaim for an exaggerated lien. Defendants cross-move for sanctions against plaintiff pursuant to 22 NYCRR § 130.1.1 (a).

BACKGROUND

New Age claims that it is owed $53,500 from construction work it did in 2014 for defendants at a property in Manhattan located at 1882 Third Avenue. On March 10, 2015, New Age filed a mechanics lien against the property and, on January 11, 2016, it filed a summons and complaint seeking to foreclose the lien. Defendants, on March 4, 2016, filed an answer with counterclaims. The first counterclaim alleges that New Age breached its subcontract with Manhattan Restoration by performing defective and incomplete work. The second counterclaim alleges that New Age intentionally exaggerated the amount of the lien.

The problem for New Age was that it did not have a license for home improvement in 2014, the year that it performed the subject work. After first seeking the license through discovery, and not receiving one for 2014, defendants lodged an inquiry with the Department of

Consumer Affairs, and learned of this fatal flaw in New Age's lien-foreclosure action. New Age's counsel, without forcing defendants to resort to motion practice, acknowledged that a mechanic's lien is invalid in the absence of proper licensure, executed a stipulation of discontinuance on February 14, 2017. Despite being executed on Valentine's Day, the stipulation did not lead to an amicable resolution of the case, as the tenor of the parties' submissions makes clear.

Here, New Age seeks dismissal of defendants' counterclaim for an exaggerated lien, while defendants seek sanctions against New Age and New Age's counsel for what it characterizes as frivolous conduct in bringing this matter. While New Age released the lien on March 31, 2017, defendants contend that it frivolously tarried before doing so.

I. Defendants Counterclaim for An Exaggerated Lien

Section 39-a of the Lien Law, entitled "Liability of lienor where lien has been declared void on account of wilful exaggeration," provides

> 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.

New Age argues that defendants' counterclaim for an exaggerated lien can no longer be sustained because the lien was cancelled without any determination being made as to whether it was exaggerated. In support, New Age cites to *Wellbilt Equip. Corp. v Fireman* (275 AD2d 162 [1st Dept 2000]), which held that "damages under section 39-a may not be awarded unless the

lien has been declared void for wilful exaggeration after a trial in an action to foreclose the lien" (*id.* at 166).

Here, the lien was foreclosed by stipulation because New Age was not properly licensed. Thus, under *Wellbilt*, defendants cannot recover under section 39-a of the Lien Law for wilful exaggeration. Defendants do not attempt to distinguish *Wellbilt* and do not contest its impact on their counterclaim, and instead focus on their application for sanctions. Accordingly, New Age's application for dismissal of defendants' wilful exaggeration counterclaim must be granted.

II. Defendants' Application For Sanctions

Defendants seek sanctions against New Age and its counsel under 22 NYCRR § 130.1-1 (a), which gives the Court discretion to impose financial sanctions, including attorney's fees, against any party that engages in "frivolous conduct." Such conduct is defined in 22 NYCRR § 130-1.1 (c) as actions taken in litigation that are "completely without merit in law," (22 NYCRR § 130-1.1 [c] [1]) or "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another" (22 NYCRR § 130-1.1 [c] [2]). Additionally, factual assertions that are both material and false are also a proper basis for a finding of frivolity under 22 NYCRR § 130-1.1 (c) (3).

Defendants broadest argument against New Age is that it knew or should have known that it was not properly licensed during the subject work and, thus, could not recover through the Lien Law for any outstanding bills. New Age's counsel, James Fuccio, in his opposition to the cross motion for sanctions, addresses this argument:

> ". . . When I ascertained that, although New Age was licensed at the time of filing the mechanic's lien, as well as the time when the foreclosure action was commenced, it was not licensed at the time when the work was done, I arranged to discontinue the plaintiff's action. I think it is significant to note that Vito Conigliaro who is a principal of New Age General Contracting Inc. was also a principal of an entity called New Age Painting and Decorating, Inc. Both New

> Age Painting and Decorating Inc. and New Age General Contracting, Inc. did work for the defendants and their principal, Shai Shustick. New Age Painting and Decorating, Inc. was licensed as a home improvement contractor at the time that the work in question in this case was done. These circumstances may have given rise to a belief that New Age General Contracting Inc. was likewise licensed properly.

(New Age Opposition, ¶ 9).

Defendants, simply, have not made a showing that New Age and its counsel knowingly brought a meritless action. In these circumstances, sanctions are not appropriate. The court notes that New Age's counsel chided defendants' counsel at length for not ascertaining whether New Age was properly licensed at the time of the work:

> "Any lawyer reasonably acquainted with construction law must be imputed with the knowledge that the failure to hold a license as a home improvement contractor disqualifies a party from collecting on a debt or enforcing a debt through a mechanic's lien. The first step most knowledgeable counsel take when confronted with a mechanic's lien involving a home improvement is to check the public record regarding licensing of the claimant. Nonetheless, the defendant and/or counsel apparently failed to make such an investigation when the action for foreclosure of the mechanics lien was commenced. Counsel for the defendants let almost a year pass between the commencement of the action and the date it got around to examining the public record. In a year there are over two hundred business days where a call or visit to the Office of Consumer Affairs could have been made. It seems apparent that defendant did not take advantage of at least over two hundred opportunities to do its homework. As such, it was not anything that counsel for plaintiff did, but rather defendants' counsel's manifest failure to do a basic investigation that caused the defendants to incur bonding fees, and legal fees."

(*id.*, ¶ 40).

While counsel may have done well to follow his own advice and learn earlier of his client's licensure problem, this is not grounds for sanctions. Defendants also complain about the delay between the stipulation discontinuing New Age's lien-foreclosure action and its cancellation of the lien. New Age's counsel explained its actions in the time intervening between February 14,

2017, when the parties entered into the stipulation of discontinuance, and March 31, 2017, when the lien was cancelled:

> "On February 17, 2017 after receiving the signed stipulations from defendant's counsel, I sent three form releases of mechanics lien (one for the instant matter, one for the claim pending in this court against Theso Corp. and one for a matter pending in NY City Civil Court against Theso) by e-mail to my client for signature. I received the releases back on February 27, 2017. However the releases were not in recordable form because although they were signed they were not notarized. On February 27, 2017 I immediately advised my client to have the documents signed by a notary. I received the discharge of liens forms which had been signed and notarized from my client on March 6, 2017. On the same day I received the signed and notarized forms from my client on March 6, 2017. On the same day I received the signed and notarized forms, I sent them by overnight mail to Disponzio Legal Services to be filed with the New York County Clerk. On March 13, 2017, I received notice from Disponzio that the discharge of liens had been rejected for filing by the clerk as being in the wrong [form]. I was given the proper form from the New York County Clerk by Disponzio. On the same day, I immediately redrafted the Releases of Lien in the proper form and forwarded them by e-mail to my client. Several days later I enquired about the releases. He advised me that he had sent them. Nonetheless, the releases my client sent back were signed notarized releases using the old (wrong) form. In the interim, counsel for the defendant asked for a conference call with the Court. The court directed that liens be filed by March 31, 2017 or my client would be subject to sanctions. All the discharges of lien were filed on about March 31, 2017"

(*id.*, ¶ 10).

This bland, bureaucratic odyssey is not the proper basis for sanctions. Accordingly, defendants cross motion for sanctions is denied. Defendants counsel is reminded that if the court directs a party to take a specific action or face possible sanctions, and that party takes the action in the time allotted by the court, as New Age as done here by cancelling the liens by March 31, 2017, then bringing an application for sanctions anyway is not best practice. The court has already implied that sanctions are not appropriate if the party complies with its directive.

Here, defendants first counterclaim for defective and incomplete work is all that remains in this case. Below, the parties will be directed to appear for a discovery conference to ascertain: (1) whether defendants want to move forward with this counterclaim now that it is clear that they

will have to bear the costs of paying their own counsel; and (2) setting a discovery schedule if defendants decide they want to move forward.

CONCLUSION

Accordingly, it is

ORDERED that plaintiff's motion to dismiss defendants' counterclaim for an exaggerated lien is granted; and it is further

ORDERED that defendants' cross motion for sanctions is denied; and it is further

ORDERED that defendants, within 30 days of the date of this order, are to obtain a new no-fee index No. to proceed with their remaining counterclaim for defective work; and it is further

ORDERED that the parties are to appear, at 10:00 PM, for a discovery conference on Thursday, November 16, at 60 Centre Street, Room 438; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the court.

Dated: October 13, 2017

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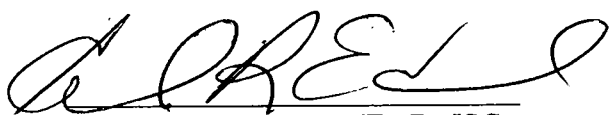

Hon. CAROL R. EDMEAD, JSC

HON. CAROL R. EDMEAD
J.S.C.