

"K"- Detailing, Inc. v N & C Ironworks, Inc.
2018 NY Slip Op 30500(U)
March 26, 2018
Supreme Court, New York County
Docket Number: 155985/2017
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32

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"K"- DETAILING, INC.,

Plaintiff,

-against-

N & C IRONWORKS, INC., H&H BUILDERS, INC.,
9TH AVENUE DELAWARE OWNER LLC, NICK
SORRENTINO, KENNETH HART and JOHN and JANE
DOES 1-10 and other similarly situated,

Defendants.
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Index No. 155985/2017
Motion Seq: 001

DECISION & ORDER
ARLENE P. BLUTH, JSC

The motion to dismiss the first, second, third, fourth and seventh causes of action against defendants H&H Builders, Inc. ("H&H"), 9th Avenue Delaware Owner LLC ("Owner") and Kenneth Hart ("Hart") (collectively, the "Moving Defendants") is granted in part and denied in part.

Background

This action arises out of a mechanic's lien filed by plaintiff on July 8, 2016 for \$62,755. In 2015, H&H and defendant N&C Ironworks, Inc. ("N&C") entered into agreements with general contractors hired by the Owner to supply materials for a construction job at the Owner's property. N&C then entered into an agreement with plaintiff for structural steel detailing at the premises.

Plaintiff claims that N&C failed to pay plaintiff and that it is owed \$62,755. On June 28, 2016, plaintiff prepared a lien and served it on defendants H&H, the Owner, and N&C. Ten days

later, on July 8, 2016, plaintiff filed a notice of mechanic's lien with the New York County Clerk's Office.

The Moving Defendants seek vacatur and discharge of the lien (the second cause of action) on the ground that plaintiff failed to comply with Lien Law § 11. The Moving Defendants argue that plaintiff served notice of the lien too early— plaintiff is only allowed to serve notice of the lien five days before or thirty days after filing it with the clerk's office. The Moving Defendants also seek dismissal of plaintiff's breach of contract, accounts stated and quantum meruit causes of action on the ground that there is a valid contract upon which plaintiff can recover.

In opposition, plaintiff claims that courts have held that serving a notice more than 5 days before the lien is filed does not warrant dismissal. Plaintiff insists that there is no prejudice to the Moving Defendants.

Discussion

Lien Law § 11 provides that "Within five days before or thirty days after filing the notice of lien, the lienor shall serve a copy of such notice upon the owner . . ." Here, it is undisputed that plaintiff served notice of the lien 10 days prior to filing it. The question for this Court is whether the failure to comply with this rule requires dismissal of the cause of action to foreclose a mechanic's lien.

A review of the legislative history of Lien Law § 11 reveals that the language "five days before" was added in 1996 (*see* New York Bill Jacket, 1996 A.B. 9118, Ch. 147). According to a letter from New York State Senator Hannon (a sponsor of the legislation that added the 'five days' language), the "bill provides lien holders with greater flexibility for serving a notice of lien,

while simultaneously ensuring that persons receive reasonable notice of the lien” (*id.*). Senator Hannon observed that “some lien holders ultimately serve a notice of lien on the day of or immediately before filing” (*id.*), which rendered the lien invalid under the previous statutory scheme.

A memorandum in support of the legislation argues “Whether notice is received 30 days after or, as the bill would allow, 5 days before, the purpose of notice is still served. In fact, it may even be argued that the prior-to-filing notice is better notice” (*id.* [emphasis in original]).

The legislative history makes clear that the Lien Law was amended in 1996 to allow service of the lien prior to filing the lien because it was a reasonable practice designed to foster prompt notice. The Court finds that serving notice of the lien ten days prior to filing does not merit a dismissal based on this legislative history because the purpose of amending the Lien Law was to ensure that owners get timely notice of a lien.

Case law also compels this Court to deny the Moving Defendants’ motion to dismiss based on improper service of the lien. In *Interstate Home Builders, Inc. v D’Andrea Constr. Inc.*, (2001 WL 1682795, 2001 NY Slip Op 40515(U) [Sup Ct, Bronx County 2001]), the Supreme Court found, after a non-jury trial, that serving a notice of a lien six days prior to its filing was permissible because “Such allowance will not prejudice the Defendants.” The First Department affirmed a judgment based on this decision without opinion (*see Interstate Home Builders, Inc. v D’Andrea Constr. Inc.*, 306 AD2d 117, 760 NYS2d 69 [1st Dept 2003]).

Moreover, a decision from New York County Supreme Court, relying on *Interstate Home Builders*, held “that where the notice is served too early or and [sic] there is an absence of prejudice suffered as a result of premature service, the prematurely served mechanic’s lien is yet

valid" (*William Somerville, Inc. v The A.J. Group, Inc.*, 2005 WL 8149555, 2005 NY Slip Op 30583(U) [Sup Ct, NY County 2005] [finding that serving notice of a mechanic's lien 13 days prior to filing the lien was not a material defect]).

The Moving Defendants disagree with the findings in the cases cited above and insist that the Lien Law does not allow for serving the notice of a lien so early. However, this Court is unable to ignore the First Department precedent cited by plaintiff and the Moving Defendants have not shown that they suffered prejudiced from the early notice. The Court also observes that the central case cited by the Moving Defendants, *Wesco Distribution, Inc. v Teclan Data Corp.* (267 AD2d 173, 700 NYS2d 815 [1st Dept 1999]), is inapposite because it was decided under the prior version of Lien Law § 11—the version that did not permit *any* service before the lien was filed.

Remaining Branches of the Motion

The Moving Defendants also move to dismiss the first, third, and fourth causes of action. The Moving Defendants claim that plaintiff "fails to state any viable cause of action in the Complaint against the Moving Defendants for breach of contract, accounts stated, or *quantum meruit*, mandating the granting of the instant motion to dismiss" (NYSCEF Doc. No. 11 at 8).

As an initial matter, the Court observes that the first and third causes of action do not seek relief against the Moving Defendants (*see* NYSCEF Doc. No. 1 [complaint]). Instead, these claims seek relief from only N&C. Therefore, these branches of the Moving Defendant's motion are denied because the Court cannot grant this requested relief.

With respect to the fourth cause of action, that claim is severed and dismissed against the Moving Defendants because plaintiff did not address it in opposition. A search of plaintiff's opposition reveals that "quantum meruit" appears only once (NYSCEF Doc. No. 24 ["Fourth cause is for quantum meruit, in case the foregoing contract is not enforceable, for any reason"])). Plaintiff does not offer any substantive arguments addressing the Moving Defendants' claim that the existence of a valid contract requires the Court to dismiss this cause of action. And this Court declines to identify and analyze legal issues not raised by plaintiff in opposition.

At oral argument plaintiff agreed to withdraw the seventh cause of action (damages relating to piercing the corporate veil) as against defendant Kenneth Hart (the owner of H&H).

Summary

Clearly, the legislature amended Lien Law § 11 in 1996 to allow for the service of a mechanic's lien prior to filing the lien. However, the bill jacket cited above does not provide any insight into the justification for the particular length of time permitted in the legislation. In other words, there is no discussion about why service of the lien five days prior to filing is permissible but longer periods, such as ten or twenty days before, are not appropriate. The focus of the legislation was to allow "a brief period so as to still be reasonably contemporary with the filing" (New York Bill Jacket, 1996 A.B. 9118, Ch. 147 [letter from Assemblyman Vitaliano, a sponsor of the bill]).

The Court is unable to find that serving notice of the lien 10 days early (or five days earlier than provided for in the statute) frustrates the goal of service that is reasonably contemporary with filing of the lien. And the fact is that courts looking at this issue have

permitted service of lien earlier than five days prior to its filing and the Moving Defendants have not demonstrated that they suffered any prejudice from the early notice.

Accordingly, it is hereby

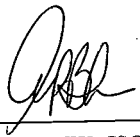
ORDERED that the motion to dismiss by defendants H&H Builders, Inc., 9th Avenue Delaware Owner LLC, and Kenneth Hart is granted to the extent that the fourth and seventh causes of action are severed and dismissed and denied as to the remaining branches of the motion; and it is further

ORDERED that the Moving Defendants are directed to answer pursuant to the CPLR.

This is the Decision and Order of the Court.

The parties are directed to appear for the already-scheduled compliance conference on July 17, 2018 at 2:15 p.m.

Dated: March 21, 2018
New York, New York



ARLENE P. BLUTH, JSC.

**ARLENE P. BLUTH
J.S.C.**