Apple City Bldrs. Corp. v 46-50 Gansevoort St., LLC
2018 NY Slip Op 30583(U)
April 4, 2018
Supreme Court, New York County
Docket Number: 157632/2017
Judge: Anthony Cannataro

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Apple City Builders Corp.,

Plaintiff,

- against -

46-50 Gansevoort Street, LLC, 52-58 Gansevoort Street, LLC, and 60-74 Gansevoort Street, LLC,

Defendants.

Index No.: 157632/2017
Motion Seq.: 001

DECISION & ORDER

Anthony Cannataro, J.:

In an action to enforce a mechanic's lien, defendants 46-50 Gansevoort Street, LLC, 52-58 Gansevoort Street, LLC, and 60-74 Gansevoort Street, LLC (collectively, defendants) seek in this pre-answer motion, pursuant to CPLR R. 3211 (a) (1) and (7), an order dismissing the complaint. Plaintiff Apple City Builders Corp. opposes only that branch seeking dismissal of the cause of action to foreclose on the mechanic's lien.

Briefly, defendants are the current owners of the property located at 46 Gansevoort Street in Manhattan. Before it was sold to defendants in 2015, the property was previously owned by Gansevoort, LLC (Gansevoort). The instant complaint alleges that, between February 19, 2010 and November 3, 2010, plaintiff performed HVAC work on the roof of the property for Gansevoort's commercial tenant at the time, that said work was performed "with knowledge and consent" of Gansevoort, and that the work resulted in "permanent improvements" to the property. When the former owner's commercial tenant failed to pay for plaintiff's work, plaintiff placed a mechanic's lien on the property in the amount of $70,600.00 on February 16, 2011. Plaintiff commenced this action against defendants - the current fee owners of the property - to foreclose on the mechanic's lien. Plaintiff also asserts a cause of action for *quantum meruit*.

On their motion to dismiss, defendants contend that the complaint fails to state a cause of action because the HVAC work was performed solely for and on behalf of the former commercial tenant. Defendants also contend that their predecessor-in-interest, Gansevoort, never "affirmatively" consented to the work. In support of their argument, defendants proffer the affidavit of Mandy (Man Nghi) Ly, who avers that she is the accounts receivable manager for defendants and claims that she was employed by the management company for the property during Gansevoort's ownership. Ly states that if Gansevoort gave its "consent" for plaintiff to perform the HVAC work, such consent was due only to the fact that the lease with the former commercial tenant required the landlord's approval for any alterations. Defendants also contend that dismissal is warranted here because plaintiff's agreement to perform HVAC work was with the commercial tenant, rather than with defendants or Gansevoort.

In opposition, plaintiff argues that, at this early procedural juncture, the complaint has sufficiently stated a cause of action to foreclose on the mechanic's lien. Specifically, plaintiff asserts that the issue of consent under the Lien Law is ordinarily a question of fact not amenable to summary disposition and that the degree of supervision alleged in the complaint constitutes "consent" as defined under Lien Law § 3. In support, plaintiff relies on the affidavit of plaintiff's president, Fernando Gonzalez, who avers that an "on-site representative explained that such supervision was necessary because the building is located in a special landmark district." Plaintiff also contends that the HVAC work resulted in "permanent improvements" to the property, a claim which both Gansevoort and defendants do not dispute. Plaintiff does not appear to oppose that branch of the motion seeking dismissal of its *quantum meruit* claim.

Generally, on a motion to dismiss, the allegations of the complaint are deemed true and given every favorable inference (*Miglino v Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d at 351 [2013]). On a motion to dismiss for failure to state a cause of action, the court determines "only whether the facts as alleged manifest any cognizable

legal theory" (*Elmaliach v Bank of China Ltd.*, 110 AD3d 192, 199 [1st Dept 2013]). On a motion to dismiss based on documentary evidence, the movant has the burden of showing that the relied-upon documentary evidence and undisputed facts "negate or dispose of claims in the complaint or conclusively establish a defense" (*Zanett Lombardier, Ltd. v Maslow*, 29 AD3d 495 [1st Dept 2006]).

Lien Law § 3 provides, in relevant part, that:

> "A contractor, subcontractor, laborer, materialman . . . who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof, or of his agent, contractor or subcontractor, and any trust fund to which benefits and wage supplements are due or payable for the benefit of such laborers, shall have a lien for the principal and interest, of the value, or the agreed price, of such labor, including benefits and wage supplements due or payable for the benefit of any laborer, or materials upon the real property improved or to be improved and upon such improvement, from the time of filing a notice of such lien as prescribed in this chapter."

The primary purpose of the Lien Law is to ensure that those who have directly expended labor and materials to improve real property at the direction of the owner or a general contractor receive payment for the work actually performed (*see generally LeChase Data/Telecom Services, LLC v Goebert*, 6 NY3d 281, 289 [2006]). "It is well established that the purpose of the mechanics' lien statute is to provide an added degree of protection to persons who provide labor or material for construction projects by providing an independently enforceable security interest upon the construction property" (*see Strober Bros., Inc. v Kitano Arms Corp.*, 224 AD2d 351, 352 [1st Dept 1996]). In essence, "[a] mechanic's lien is an incumbrance on realty" (*see Perrin v Stempinski Realty Corp.*, 15 AD2d 48, 49 [1st Dept 1961]).

"Consent" under the Lien Law requires more than mere "acquiescence by the owner to improvements by a lessee in possession at his own expense;" rather, "there must be some affirmative act by the owner" (*see P. Delany & Co. v Duvoli*, 278 NY 328, 331 [1938]). The Appellate Division, First Department has concluded that "consent of the owner . . . required under the lease to avoid forfeiture of the tenant's interest . . . does not constitute a consent within the meaning of section 3 of the Lien Law" (*see Paul Mock, Inc. v 118 E. 25th St. Realty Co.*, 87 AD2d 756, 756 [1st Dept 1982]). However, it is noted that the First Department's exclusion of lease-required "consent" has not been uniformly accepted and the issue is currently pending before the Court of Appeals (*see Ferrara v Peaches Cafe LLC*, 138 AD3d 1391, 1394 [4th Dept 2016], lv to appeal granted, 29 NY3d 917 [September 5, 2017]).

Here, plaintiff's allegations regarding the location of the HVAC work, Gonzalez's averments concerning the extent of the former owner's supervision of plaintiff's work by an "on-site representative," and the undisputed fact that the HVAC equipment became part of the property that ultimately inured to the owner's benefit are sufficient to state a viable claim to foreclose on a mechanic's lien. Giving plaintiff every favorable inference, as this Court must, plaintiff has shown adequate reason to deny the motion for failure to state a cause of action.

Likewise, defendants fail to meet their burden for dismissal based on documentary evidence. The Ly affidavit, which does no more than assert the inaccuracy of plaintiffs' allegations, does not constitute documentary evidence within the meaning of the statute (*see e.g. Art and Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014]). Moreover, since a mechanic's lien constitutes an encumbrance on the property, the mere fact that defendants were not the owners of the property at the time the work was performed or the lien was acquired does not establish entitlement to dismissal (*see Spitz v M. Brooks & Son*, 210 AD 438, 440 [1st Dept 1924]). Lastly, the fact that plaintiff did not enter into a contract with defendants' predecessor-in-interest or

defendants does not invalidate plaintiff's claims since contractual privity is not a necessary element to foreclose on a mechanic's lien (*see In re City of New York*, 292 AD3d 176, 176 [1st Dept 2002]).

Finally, that branch of defendants' motion seeking to dismiss plaintiff's *quantum meruit* claim is granted without opposition. Unlike a mechanic's lien that encumbers the property, a claim for *quantum meruit* lies against the party that sought the work to be performed. That is, "it is not enough that the defendant received a benefit from the activities of the plaintiff; if services were performed at the behest of someone other than the defendant, the plaintiff must look to that person for recovery" (*see Kagan v K-Tel Entertainment, Inc.*, 172 AD2d 375, 376 [1st Dept 1991]). Here, plaintiff's *quantum meruit* claim must be dismissed as it is undisputed that the HVAC work performed was made at the behest of defendants' predecessor-in-interest, Gansevoort. Accordingly, it is

ORDERED that defendants' motion to dismiss is granted to the extent that plaintiff's *quantum meruit* cause of action is dismissed and is otherwise denied; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the parties are directed to appear for a preliminary conference in Part 41 at 111 Centre Street, Rm 490 on May 23, 2018 at 2:15 P.M.

Dated: 4/4/18

ENTER:

Anthony Cannataro, JSC