SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT D. KALISH **PART** IAS MOTION 29EFM

Justice

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NISTLER CARPENTRY, INC.,

Plaintiff,

- v -

AMELIA GANGCARZ, MIKE GANGCARZ, CHELSEA WINE STORAGE, CHELSEA WINE VAULT, JAMESTOWN PREMIER CHELSEA MARKET, L.P. and MANHATTAN CHELSEA MARKET LLC,

Defendants.

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INDEX NO. 152897/2018

MOTION DATE 08/15/2018

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 24, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37

were read on this motion to DISCHARGE/CANCEL MECHANICS LIEN.

Upon the foregoing documents and after hearing oral argument, it is ORDERED that the instant motion by Defendants Amelia Gancarz, Mike Carz, Chelsea Wine Storage and Chelsea Wine Vault (collectively, "Defendants") to discharge the mechanics lien for facial deficiency, pursuant to Lien Law § 19 (6), is denied for the reasons stated herein.

BACKGROUND

On February 2, 2018, Plaintiff Nistler Carpentry, Inc. filed a notice of lien with the County Clerk for property situated on "775 9th Avenue, New York, New York 10011; Block 713; Lot 1." (Affirm in Supp., Ex. A [Notice of Lien].) Following demand, pursuant to Lien Law § 59 from Defendants herein, Plaintiff commenced the instant action to foreclose on the lien, alleged to be in the amount of $98,360.40 for unpaid construction labor.

Defendants now move, pursuant to Lien Law § 19 (6) to discharge the lien based upon the following "facial defects": (1) that the alleged work forming the basis of lien was not performed pursuant to a written contract; and (2) that Plaintiff is "not authorized to conduct business in the State of New York nor does the

Plaintiff hold any license to perform construction work in the State of New York." (Affirm in Supp. ¶¶ 8-9, 16-17.)[1]

DISCUSSION

On a motion pursuant to Lien Law § 19 (6), the defendant "is required to demonstrate that the notice of lien filed by plaintiff is in contravention of the requirements imposed by Lien Law § 19 (6)." (*Care Sys., Inc. v Laramee*, 155 AD2d 770, 771 [3d Dept 1989].) As a general rule, "[i]n the absence of a defect upon the face of the notice of lien, any dispute regarding the validity of the lien must await trial of the foreclosure action." (*Pontos Renovation Inc. v Kitano Arms Corp.*, 204 AD2d 87, 87 [1st Dept 1994], quoting *Care Sys., Inc.*, 155 AD2d at 771; *Rivera v Dept. of Hous. Preserv. and Dev. of City of New York*, 130 AD3d 802, 802 [2d Dept 2015], *affd*, 29 NY3d 45 [2017]; *Di-Com Corp. v Active Fire Sprinkler Corp.*, 36 AD2d 20, 21 [1st Dept 1971] ["It is elementary that a lien may be summarily discharged only for defects appearing on its face."].) Further, Lien Law § 23 states: "This article is to be construed liberally to secure the beneficial interests and purposes thereof. A substantial compliance with its several provisions shall be sufficient for the validity of a lien and to give jurisdiction to the courts to enforce the same."

Lien Law § 19 (6) states in relevant part:

> "Where it appears from the face of the notice of lien that the claimant has no valid lien by reason of the character of the labor or materials furnished and for which a lien is claimed, or where for any other reason the notice of lien is invalid by reason of failure to comply with the provisions of section nine of this article, or where it appears from the public records that such notice has not been filed in accordance with the provisions of section ten of this article, the owner or any other party in interest, may apply to the supreme court of this state, or to any justice thereof, or to the county judge of the county in which the notice of lien is filed, for an order summarily discharging of record the alleged lien."

Lien Law § 9 requires that the following information must be provided on a notice of lien:

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[1] To the extent that Defendants attempt to raise additional grounds by submitting an affidavit from Defendant Michael Gancarz with its reply papers, the Court does not consider these newly raised grounds. (*Allstate Ins. Co. v Dawkins*, 52 AD3d 826, 827 [2d Dept 2008] ["The function of reply papers is to address arguments made in opposition to the position taken by the movant, not to permit the movant to introduce new arguments or new grounds for the requested relief."].)

"1. The name and residence of the lienor; and if the lienor is a partnership or a corporation, the business address of such firm, or corporation, the names of partners and principal place of business, and if a foreign corporation, its principal place of business within the state.

1-a. The name and address of the lienor's attorney, if any.

2. The 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.

3. The name of the person by whom the lienor was employed, or to whom he furnished or is to furnish materials; or, if the lienor is a contractor or subcontractor, the person with whom the contract was made.

4. The labor performed or materials furnished and the agreed price or value thereof, or materials actually manufactured for but not delivered to the real property and the agreed price or value thereof.

5. The amount unpaid to the lienor for such labor or materials.

6. The time when the first and last items of work were performed and materials were furnished.

7. The property subject to the lien, with a description thereof sufficient for identification; and if in a city or village, its location by street and number, if known. A failure to state the name of the true owner or contractor, or a misdescription of the true owner, shall not affect the validity of the lien. The notice must be verified by the lienor or his agent, to the effect that the statements therein contained are true to his knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true."

Defendants first argue that "[i]t is well settled that in New York State, written contracts are explicitly required in order to secure lien rights." (Affirm in Supp. ¶ 9.) Defendants cite no authority for this proposition and there is no requirement in Lien Law § 9 that the notice of lien state that the lien relates to

work performed or materials furnished pursuant to a written contract.[2] The only mention of a written contract requirement in relation to Lien Law § 19 (6) is in Lien Law § 10 which states in the relevant part:

> "[E]xcept that in the case of a lien by a real estate broker, the notice of lien may be filed only after the performance of the brokerage services and execution of lease by both lessor and lessee and only if a copy of the alleged written agreement of employment or compensation is annexed to the notice of lien, provided that where the payment pursuant to the written agreement of employment or compensation is to be made in installments, then a notice of lien may be filed within eight months after the final payment is due, but in no event later than a date five years after the first payment was made."

(Lien Law § 10 [emphasis added].) Based on the language of the notice of the lien, it is clear that Plaintiff's lien relates to construction work performed on the premises—neither party claims that the lien relates to work done by Plaintiff as a real estate broker. As such, this Court rejects Defendants' argument that the notice of lien is invalid on its face because the underlying contract was never reduced to a written instrument. (*See also Care Sys., Inc. v Laramee*, 155 AD2d 770, 771 [3d Dept 1989] [refusing to vacate a lien for unwritten change order work notwithstanding written contract's requirement that any modification or alteration had to be in writing].)

Defendants next argue that Plaintiff's notice of lien is invalid on its face because "the Plaintiff is not authorized to conduct business in the State of New York nor does the Plaintiff hold any license to perform construction work in the State of New York." (Affirm in Supp. ¶¶ 15-19.) Defendants fail to put forward any evidence or statement from an individual with knowledge to support their conclusory statements that Plaintiff lacks the appropriate authority and licensing to perform construction work in this State. To this point, it bears noting that Plaintiff states in its complaint that it is "authorized to do business in the State of New York." (Affirm. in Supp., Ex. C [Complaint] ¶ 1.) This Court finds that Defendants have only submitted the conclusory allegation by their attorney that Plaintiff is not properly authorized and licensed to perform the underlying work, and as such, they have failed to establish a prima facie case on this issue. (*See also Di-Com Corp. v Active Fire Sprinkler Corp.*, 36 AD2d 20, 21 [1st Dept 1971] ["If

[2] Subsection 3 of Lien Law § 9 requires that notice state the "the person with whom the contract was made" if the lienor is a contractor or subcontractor—but it does not state that this contract must have been reduced to writing.

plans or surveys are made by a person not licensed to prepare them, they may not be compensable, but that does not affect the instant application [pursuant to Lien Law § 19 (6)]."].)

Moreover, it bears noting that Lien Law § 9—as referenced by Lien Law § 19 (6)—does not expressly require a foreign corporation to state, on the notice of lien, whether it is authorized to do business in this state. Rather, it requires the foreign corporation to state "its principal place of business within the state." (Lien Law § 9.) Here, Plaintiff lists an Illinois address for its principal place of business, and further states that it is a corporation organized pursuant to Illinois law. Courts, however, have found that "that when a foreign corporation lacks a principal place of business within the state, it is not required to give a fictitious address", and that it may file a notice of lien provided that it specify an attorney upon whom service can be made in New York. (*Bros., Inc. v D.C.M. of New York, LLC*, 38 Misc 3d 1235(A) [Sup Ct 2013, Kings County] [Demarest, J]; *In re New Jersey Window Sales, Inc.*, 190 Misc 2d 654, 658 [Sup Ct, NY County 2002] [Lehner, J.]; *Garden State Brickface Co. v Artcourt Realty Corp.*, 40 Misc 2d 712, 715 [Sup Ct 1963].)

Here, the notice of lien lists Plaintiff's current litigation counsel as its attorney and lists an address within this state for said counsel. The Court finds that this complies with Lien Law § 9's address requirement.

CONCLUSION

Accordingly, it is hereby

ORDERED that the instant motion by Defendants Amelia Gancarz, Mike Carz, Chelsea Wine Storage and Chelsea Wine Vault (collectively, "Gangcarz Defendants") to discharge the mechanics lien for facial deficiency, pursuant to Lien Law § 19 (6), is denied.

This constitutes the decision and order of the Court.

8/15/2018
DATE

HON. ROBERT D. KALISH
J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE