

Casella Constr. Corp. v 322 E. 93rd St., LLC
2018 NY Slip Op 32568(U)
October 9, 2018
Supreme Court, New York County
Docket Number: 155098/17
Judge: Doris Ling-Cohan
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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 36

-----X
CASELLA CONSTRUCTION CORP.,

Plaintiff,

-against-

Index No.: 155098/17

322 EAST 93RD STREET, LLC,

Motion Sequence No.: 003

Defendant.

-----X
322 EAST 93RD STREET, LLC,

Counterclaimant,

-against-

324 E. 93 LLC,

Additional Counterclaim Defendant.
-----X

324 E. 93 LLC,

Fourth-Party Plaintiff,

-against-

DAVID SHEPHERD and ASHLEY SHEPHERD,

Fourth-Party Defendants.
-----X

DORIS LING-COHAN, J.:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100

were read on this motion to/for

SUMMARY JUDGMENT(AFTER JOINDER)

In this mechanic's lien foreclosure action, plaintiff seeks an order granting summary judgment in its favor against defendant property owner. Defendant opposes the motion.

The main action in this case concerns work which was performed by plaintiff Casella Construction Corp. (Casella), a construction company, after a six-alarm fire damaged a building then located at 324 East 93rd Street ("324" or "the fire damaged building"). Defendant 322 East 93rd Street, LLC (322 LLC) owns the building and property next door to the fire damaged building ("322" or "the 322 building"), and, until the fire damaged building at 324 was demolished by Casella, the buildings at 322 and 324 shared an adjoining exterior "party" wall.

On a motion for summary judgment, the movant must, through admissible evidence, make a prima facie showing of entitlement to judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and it must be clear that no material or triable issues of fact are presented (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Once the movant has demonstrated entitlement, the burden shifts to the opposing party to produce evidence sufficient to raise an issue of fact warranting a trial "or [to] tender an acceptable excuse for [the] failure to do so" (*Zuckerman*, 49 NY2d at 560).

To meet its burden on this motion, plaintiff must show that the party against whom the foreclosure of the mechanic's lien is sought has an ownership interest in the subject property, consented to the work performed, and failed to fully pay plaintiff for such work (*see Nouveau El. Indus., Inc. v Tracey Towers Hous. Co.*, 95 AD3d 616, 617 [1st Dept 2012]; *American Constr. Inc. v Radu Physical Culture, LLC*, 93 AD3d 580, 580 [1st Dept 2012]). Here, the ownership of 322 is undisputed.

Concerning the element of consent, "the owner must either be an affirmative factor in procuring the improvement to be made, or having possession and control of the premises assent

to the improvement in the expectation that he will reap the benefit of it” (see *Paul Mock, Inc. v 118 East 25th St. Realty Co.*, 87 AD2d 756, 756 [1st Dept 1982] [citation omitted]; *Interior Bldg. Servs., Inc. v Broadway 1384 LLC*, 73 AD3d 529, 529 [1st Dept 2010] [work performed for tenant and not owner’s benefit]). A contractor must also “establish . . . that it is entitled to the amount asserted in the lien” (*Ruckle & Guarino, Inc. v Hangan*, 49 AD3d 267, 267 [1st Dept 2008]).

Here, Casella demonstrated that it performed work stabilizing the party wall, and that the wall remained stabilized after a year. To demonstrate consent, Casella submits forms filed with the New York City Department of Buildings (DOB), for certain specific work at the 322 building, that are signed on behalf of 322 LLC. Greg Casella, vice president of Casella, avers that the value of the work performed is \$200,903.40 and, in support he submits an itemized bill for the alleged work.

In opposition, 322 LLC’s member, Bess Fern, submits an affidavit in which she states that, on or about November 1, 2016, she was approached by a representative of Casella requesting access to the premises at 322 for the installation of a sidewalk bridge, due to the fire damage at 324. Fern avers that she completed a permit because Casella needed to file it with DOB to do the work. Fern states that on or about November 29, 2016, she received another email from Casella requesting that she complete DOB permit application forms. When she inquired as to what the application was for, Casella responded that “we have to file these forms for both 322 and 326 East 93rd Street for the installation of wall ties for stabilization due to the demo of building 324” (Fern Aff, Exhibit B).

Fern contends that the stabilization work was done for the benefit of 324, and that 324’s demolition could not be completed without that work. Fern notes that the New York City

building code requires that such work be performed by the party demolishing a building, and asserts that, by contracting with Casella to perform the work, 324 LLC was merely complying with the code. Fern states that, as the mandatory work at 324 required access to 322, as well as the filing of a permit with DOB, she consented to Casella's access and signed the permit, for the limited purpose of allowing Casella to complete its work for the fire damaged building.

Fern submits an email from Casella, dated January 24, 2017, asking Fern to complete a "PW3" form and stating that Casella was preparing to obtain a DOB sign-off of the installation of wall ties for stabilization of 322. The PW3 form contains an estimate of \$35,000 for wall ties. Fern responded that she could not sign off on something that allocated Casella's cost as her responsibility. Fern states that, thereafter, on May 23, 2017, plaintiff filed a mechanic's lien notice with the New York County Clerk in the amount of \$200,903.40. Fern avers that the lien falsely states that Casella was employed by 322 LLC and that the work was done for the benefit of 322 LLC, when neither is true, and the work was done for the benefit of 324 E. 93 LLC ("324 LLC") in demolishing the fire damaged building. Fern also avers that the lien states that improvements were made to 322, but that Casella's work devalued 322, as the wall is less stable now and the steel tie backs are temporary and will require removal and work to repair the resultant holes. Fern contends that Casella damaged 322 LLC's building, by removing and not reinstalling a downspout, causing water damage.

In adjudicating a summary judgment motion, courts must scrutinize the motion papers and evidence in a light most favorable to the party opposing the motion and afford that party the benefit of every reasonable favorable inference (*see Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]). There is no dispute here that Casella contracted with 324 LLC, not 322 LLC. Greg Casella avers that DOB issued an emergency demolition order for the fire damaged building at

324. Fern's affidavit and the email correspondence she submits, however, raises factual issues as to 322 LLC's consent to Casella's work.

The New York City Building Code (Administrative Code of City of NY tit 28, ch 7 § 3309.8) provides, concerning "Adjoining walls" that:

"When any construction or demolition operation exposes or breaches an adjoining wall, including load bearing and nonload-bearing walls *as well as party walls* . . . *the person causing the . . . demolition operation shall, at his or her own expense, perform the following:*

1. *Maintain the structural integrity of such walls and adjoining structure, and have a registered design professional investigate the stability and condition of the wall and adjoining structure, and take all necessary steps to protect such wall and structure [and]*

5. *During demolition operations, all nonload-bearing chimney breasts, projections and any other debris exposed on party walls shall be examined and monitored by the person causing the demolition. . . . All openings shall be bricked up flush on the exterior side of the party wall. All masonry that is in poor condition shall be pointed and patched"*

([emphasis added] [Building Code § 3309.8]). Fern's affidavit indicates that 322 LLC granted access to Casella, and that Fern signed DOB documentation, but that she did so based upon Casella's representation that the work was being performed for, and to benefit 324 LLC. Casella does not adequately address its emails with Fern, one of which indicates that Casella was performing work for 324, and the DOB permit applications that Casella submits may not be viewed in isolation from Building Code § 3309.8. Under such circumstances, 322 LLC's conduct in permitting access and signing the DOB documents may not, as a matter of law, be deemed consent to Casella's performance of work for 322 LLC.

There is also a factual issue as to whether any money remains due to Casella for the work it claims it performed. In his moving affidavit, Greg Casella, owner of Casella Construction

Corp., states that, “[t]o date Casella . . . has not been paid any monies *by the owner of 322 . . . or anyone on her behalf*” (Martin Affirmation, Exhibit 4, [Casella Affidavit] § 28 [emphasis added]). Casella does not address, however, whether or not 324 LLC has already paid Casella, on its *own* behalf, for the work performed at 322, in accordance with 324 LLC’s contract with Casella. Thus, the issue of whether Casella has already been paid by 324 LLC for the work it allegedly completed to the building at 322, is a factual issue for trial.

Another unresolved fact issue relates to the sworn cost estimate of \$35,000, for work involving tie backs, submitted by Casella to DOB, and which Casella sent to 322 LLC to approve, by email, on January 24, 2017. Casella claims to have performed a lot of work in addition to the tie backs, required by DOB, but does not adequately demonstrate that it received consent from 322 LLC to do the additional work. In addition, the invoice documentation that Casella submits includes billing for work performed during October 2016,¹ but Fern did not sign DOB documents until over a month later, on November 30, 2016 and December 1, 2016. This presents a further fact question as to whether 322 LLC consented to Casella’s alleged work.

Additionally, summary judgment is not warranted at this juncture as discovery remains outstanding, which was demanded by defendant 322 LLC and has yet to be supplied by plaintiff Casella. Casella’s complaints, about excessive discovery on a simple lien foreclosure, ignore that, in a typical lien foreclosure, the contractor is not also performing demolition, by contract with a neighbor, on a building with a party wall. Casella also does cite to any case law which bars against discovery in lien foreclosure cases.²

¹ The NYC Building Work Permit Data form that Casella submits lists the job start date as December 22, 2016.

² By Preliminary Conference Order dated 10/9/18, a discovery schedule for the expeditious completion of discovery has been issued by this Court.

In light of the fact issues here concerning consent and the value of the alleged work performed by Casella, and Casella's failure to respond to discovery demands, summary judgment is denied. As such, it is unnecessary to reach the issue of whether or not Casella's work benefitted 322 LLC, or whether the affidavit of Josh Gregg, P.E., submitted by 322 LLC, is adequate to defeat summary judgment.

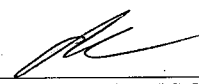
It is noted that, while plaintiff seeks its attorneys' fees from defendant 322 LLC, no basis for attorneys' fees has been supplied. It is well settled that attorneys' fees are not warranted, absent a party agreement, "statute" or "court rule" (*Gotham Partners, L.P. v High Riv. Ltd. Partnership*, 76 AD3d 203, 204 [1st Dept 2010]), or a party's frivolous conduct as defined in subdivision (c) of 22 NYCRR 130-1.1, which have not been demonstrated here.

Based on the above, it is

ORDERED that plaintiff's motion for summary judgment against defendant is denied; and it is further

ORDERED that within 30 days of entry of this order, defendant shall serve a copy upon all parties with notice of entry.

Dated: October 9, 2018


Hon. Doris Ling-Cohan, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE