

Matter of McGowan Bldrs. Inc.
2019 NY Slip Op 30079(U)
January 9, 2019
Supreme Court, New York County
Docket Number: 151458/2018
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2

Justice

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INDEX NO. 151458/2018

IN THE MATTER OF THE APPLICATION OF MCGOWAN BUILDERS INC., PETITIONER, FOR AN ORDER DISCHARGING AND CANCELLING A MECHANIC'S LIEN FILED BY C.C.C. RENOVATION INC., RESPONDENT, FOR, INTER ALIA, FAILURE TO TIMELY FILE SAID LIEN PURSUANT TO LIEN LAW § 10 AND FOR WILLFULLY EXAGGERATING THE LIEN PURSUANT TO LIEN LAW § 39.

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 12, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34

were read on this motion to/for DISCHARGE MECHANIC'S LIEN/CONSOLIDATE.

Upon the foregoing documents, it is ordered that the applications are decided as follows.

This special proceeding was commenced by petitioner McGowan Builders, Inc. to summarily discharge a mechanic's lien filed by respondent C.C.C. Renovation Inc. encumbering the premises located at 515 West 29th Street, New York, New York. Respondent opposes the petition and cross-moves to consolidate the captioned special proceeding with an action it commenced in this Court styled *C.C.C. Renovation Inc. v McGowan Builders, Inc.*, et al, under New York County Index Number 150249/18. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the petition and cross motion are denied.

FACTUAL AND PROCEDURAL BACKGROUND:

Petitioner, as general contractor, entered into a construction contract with 515 West 29th Street Owner, LLC (Owner), owner of the property located at 515 West 29th Street, New York, New York (the premises), in connection with a construction project (the project) to be performed at the premises. Doc. 1, at pars. 2, 3. Petitioner hired respondent, a masonry contractor, to perform work in connection with the project. Doc. 1, at par. 4. According to petitioner, respondent last worked on, or provided materials for, the project on February 6, 2017. Doc. 1, at par. 5.

On November 13, 2017, respondent filed a notice of mechanic's lien in the New York County Clerk's office encumbering the premises. Doc. 1, at par. 6; Doc. 2. The amount claimed in the lien was \$229,149.82. Doc. 1, at par. 7; Doc. 2. On December 13, 2017, petitioner served respondent with a demand for an itemized statement pursuant to Lien Law § 38. Doc. 1, at par. 8; Doc. 3. On or about January 5, 2018, respondent's attorney provided an itemized statement of labor and material in which it represented that the lien amount was actually \$235,973.38, which amount exceeded that set forth in the lien. Doc. 1, at par. 9; Doc. 4.

On January 11, 2018, respondent commenced an action in Supreme Court, New York County styled *C.C.C. Renovation, Inc. v McGowan Builders, Inc., 515 West 29th Street Owner, LLC and Liberty Mutual Insurance Company* under New York County Index Number 150249/18 (the breach of contract action). Doc. 17. In the breach of contract action, respondent claimed, inter alia, that Liberty Mutual Insurance Company (Liberty) was a surety which, at petitioner's request, issued a bond on December 15, 2017 which discharged the mechanic's lien filed by respondent on November 13, 2017. Doc. 17, at pars. 4, 16. In its verified complaint, respondent asserted that the defendants in the breach of contract action failed to pay it \$229,149.82 for services it performed at the premises and that, as a result, it stopped performing work at the premises on

March 16, 2017. Doc. 17, at pars. 8, 9. In the breach of contract action, respondent asserted causes of action for, inter alia, breach of contract, unjust enrichment, and for an accounting. Doc. 17.

On February 15, 2018, petitioner filed a petition and order to show cause commencing the captioned special proceeding seeking to summarily discharge the lien on the grounds that: 1) it was not filed within the time required by Lien Law § 10; and 2) respondent willfully exaggerated the amount of the lien in violation of Lien Law § 39. Docs. 1, 8-10. Specifically, petitioner argues that, since respondent did not file its mechanic's lien until November 13, 2017, the said lien was untimely pursuant to Lien Law § 10 since it was filed more than 8 months after respondent last furnished materials or worked on the project. Additionally, petitioner claims that respondent willfully exaggerated the amount of the lien as \$229,149.82, since it would have been owed a maximum of \$149,149.81 in the event it performed all of its work pursuant to its contract. Petitioner's order to show cause was signed by this Court (Feinman, J) on February 16, 2018 and petitioner filed an amended verified petition on May 2, 2018. Doc. 35.

Respondent opposes the petition and cross-moves, pursuant to CPLR 602, to consolidate the captioned proceeding with the breach of contract action. Docs. 15-16, 23-24. In opposing the motion, respondent argues that the lien was timely filed pursuant to Lien Law § 10 since the affidavit of Victor Sarmiento, Vice President of respondent, reflects it stopped performing work at the site on March 16, 2017. Docs. 23-24. Sarmiento further claims that the lien was not willfully exaggerated since respondent's payment application: 1) does not reflect the work performed by respondent through March 16, 2017; and 2) indicates that it was only for work performed through November 30, 2016. In support of the cross motion, respondent asserts that the captioned proceeding should be consolidated with the breach of contract action since they both

“relate to the same project and [l]ien” (Doc. 16, at par. 9) and both “arise out of the same project and circumstances, and involve common questions of law and fact.” Doc. 16, at par. 17.

In opposition to the cross motion, although petitioner states that the captioned proceeding and breach of contract action “involve[] the same parties and mechanic’s lien”, it nevertheless maintains that consolidation would be prejudicial since it would confuse the issues and delay the resolution of its request to vacate the lien. Doc. 33, at pars. 12-14.

LEGAL CONCLUSIONS:

Petitioner’s Motion to Summarily Discharge the Lien

A. Timeliness

That branch of petitioner’s application seeking to summarily discharge the lien on the ground that it is untimely, is denied. Lien Law § 10 (1) requires that a mechanic’s lien be filed within 8 months after the lienor completes its work or last furnishes materials on a project. Although petitioner claims that respondent last performed work on the project on February 6, 2017, Sarmiento submits an affidavit attesting to the fact that respondent last worked on the project on March 16, 2017, within 8 months before the lien was filed. Thus, the lien was timely on its face and this Court cannot summarily discharge it on this ground. *See Matter of 856 River Ave. Rest. Corp. v Style & Care, Inc.*, 117 AD3d 530 (1st Dept 2014).

B. Willful Exaggeration

“A claim under Lien Law § 39-a is subject to summary disposition where the evidence concerning whether or not the lienor willfully exaggerated the lien is conclusive. Such a burden necessarily involves proof as to the credibility of the lienor. Accordingly, the issue of willful or

fraudulent exaggeration is one that is ordinarily determined at the trial of the foreclosure action, and not on summary disposition” (citations omitted). *On the Level Enters., Inc. v 49 E. Houston LLC*, 104 AD3d 500 (1st Dept 2013). Given the discrepancy between the parties regarding the amount of the lien, this Court finds that there is no basis on which to render a summary disposition of this issue.

Respondent’s Cross Motion to Consolidate

As noted above, respondent seeks to consolidate the captioned special proceeding with the breach of contract action.

Motions to consolidate pursuant to CPLR 602(b) are made as a means to further judicial economy. *See Braun v Fraydun Realty Co.*, 158 AD2d 430, 431 (1st Dept 1990). Specifically, consolidation avoids “two-track” litigation by having the parties’ claims heard in one action when those claims are interrelated. *Id.* Absent a showing of prejudice, courts may therefore grant consolidation when the separate actions “involve the same parties, and essentially the same questions of law and fact.” *43d St. Deli v. Paramount Leasehold, L.P.*, 89 AD3d 573, 573–74 (1st Dept 2011). The party opposing a motion to consolidate must show that granting the motion will cause it prejudice. *See Vigo S. S. Corp. v Marship Corp. of Monrovia*, 26 NY2d 157, 161 (1970). The decision whether to consolidate is one to be made in the Court’s discretion. (*See Murphy v 317-319 Second Realty LLC*, 95 AD3d 443, 445 [1st Dept 2012].)

Although some issues in the special proceeding and breach of contract action overlap, the crux of this special proceeding by petitioner is to summarily discharge the lien, whereas the breach of contract action was commenced by respondent to recover for pecuniary damages. Further, the owner and Liberty are parties in the breach of contract action but have no relation to the special

proceeding. Thus, this Court finds that consolidation is not warranted under the circumstances since it could cause prejudice resulting from juror confusion.

Therefore, in light of the foregoing, it is hereby:-

ORDERED that the application by petitioner McGowan Builders, Inc. to summarily discharge the mechanic's lien filed by respondent C.C.C. Renovation Inc. on November 13, 2017 is denied; and it is further

ORDERED that the cross motion for consolidation by respondent C.C.C. Renovation Inc. is denied; and it is further

ORDERED that this constitutes the decision and order of the court.

1/9/2019
DATE


KATHRYN E. FREED, 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	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	