

Adria Infrastructure, LLC v Henick-Lane, Inc.

2019 NY Slip Op 30429(U)

January 2, 2019

Supreme Court, Richmond County

Docket Number: 100930/2015

Judge: Kim Dollard

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This opinion is uncorrected and not selected for official publication.

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

-----X DCM 4
ADRIA INFRASTRUCTURE, LLC Present:
HON. KIM DOLLARD

Plaintiff,

-against- DECISION AND ORDER

HENICK-LANE, INC., JACOB'S FACILITIES, INC., Index No. 100930/2015
DORMITORY AUTHORITY STATE OF NEW YORK, Motion No. 006, 007, 008, 009,
LEVEST ELECTRICAL CORP., TRAVELERS 010, 011, 012, 013
CASUALTY AND SURETY OF AMERICA AND JOHN
DOES 1-10,

Defendants.

-----X
The following papers numbered 1-23 were fully submitted on the 18th day of September,
2018.

	Papers Numbered
Notice of Motion (006) seeking leave to file an Amended Verified Answer and Affirmative Defenses to the Amended Complaint with Counterclaims and Third-Party Claims, with the Affirmation of Gary J. Repke, Esq. and Exhibits Annexed (dated May 22, 2018) -----	1
Defendant's Memorandum of Law in Support (dated May 22, 2018) -----	2

Notice of Motion (007) seeking assessment of sanctions against plaintiff,
 plaintiff's principal and counsel, and payment of bond premiums, with
 Affirmation of Carol A. Sigmond, Esq. and Exhibits Annexed
 (dated May 23, 2018) ----- 3

Defendant's Memorandum of Law in Support
 (dated May 23, 2018) ----- 4

Notice of Motion (008) seeking leave to amend its notice of leave, *nunc pro tunc*,
 to reduce the amount of the lien and leave to file a Second Amended Verified
 Complaint, with the Affirmation of Christopher Cobb, Esq. and Exhibits
 Annexed
 (dated May 25, 2018) ----- 5

Plaintiff's Memorandum of Law in Support
 (dated May 25, 2018) ----- 6

Notice of Cross-Motion (009) to dismiss the Third and Fourth Causes of Action
 in the Amended Complaint with the Affirmation of Gary J. Repke, Esq. and
 Exhibits Annexed
 (dated June 29, 2018) ----- 7

Defendant's Memorandum of Law in Opposition (008) and Support (009)
 (dated June 29, 2018) ----- 8

Affirmation of Christopher Cobb, Esq. in Opposition (006) and Exhibits
 Attached
 (dated June 29, 2018) ----- 9

Reply Affirmation of Gary J. Repke, Esq. (006) and Exhibits Attached
 (dated July 11, 2018) ----- 10

Reply Affirmation of Gary J. Repke, Esq. (007) and Exhibits Attached
 (dated July 11, 2018) ----- 11

Affirmation of Christopher Cobb, Esq. in Support (008) and Opposition (009) and Exhibits Attached
(dated July 11, 2018) ----- 12

Notice of Motion (010) to Cancel, Release and Discharge Mechanic's Lien and Surety Bond with the Affirmation of Gary J. Repke, Esq. and Exhibits Annexed
(dated August 2, 2018) ----- 13

Notice of Motion (011) to Void Release of Lien, Amend Mechanic's Lien, Assess Sanctions and Sever Counterclaim with the Affirmation of Carol A. Sigmund, Esq. and Exhibits Annexed
(dated August 24, 2018) ----- 14

Notice of Motion (012) to Quash Subpoena with the Affirmation of Carol A. Sigmund, Esq. and Exhibits Annexed
(dated August 24, 2018) ----- 15

Notion of Motion (013) to dismiss the Amended Complaint as against Defendant Dormitory Authority State of New York with the Affirmation of Scott Glotzer, Esq. and Exhibits Annexed
(dated September 4, 2018) ----- 16

Affirmation of Christopher Cobb, Esq. in Opposition (010) and Exhibits Attached
(dated September 13, 2018) ----- 17

Affirmation of Christopher Cobb, Esq. in Opposition (011) and Exhibits Attached
(dated September 13, 2018) ----- 18

Affirmation of Christopher Cobb, Esq. in Opposition (012) and Exhibits Attached
(dated September 13, 2018) ----- 19

Reply Affirmation of Gary J. Repke, Esq. (010)
(dated September 20, 2018) ----- 20

Reply Affirmation of Carol A. Sigmond, Esq. (011)
(dated September 20, 2018) ----- 21

Reply Affirmation of Carol A. Sigmond, Esq. (012)
(dated September 20, 2018) ----- 22

Affirmation of Gary J. Repke, Esq. (013)
(dated September 20, 2018) ----- 23

The court marked motions 006 through 013 fully submitted on October 5, 2018. The court rules as follows: The motions to amend the pleadings to add plaintiff’s principal to claims for willful exaggeration and to remove the causes of action for foreclosure of the 2013 lien and release of the release of said lien are granted. The motions to amend the pleadings to add a cause of action for breach of the settlement agreement and to dismiss the causes of actions for quantum meruit, unjust enrichment, foreclosure of the 2014 lien and remaining causes of action as against the Dormitory Authority of the State of New York are denied. The motion to compel the release of certain information relating to defendant’s claimed damages is granted. The motion to quash plaintiff’s subpoena of defendant’s counsel is granted. All motions for sanctions are denied.

PROCEDURAL HISTORY

This action was commenced with the filing of a summons and complaint on July 23, 2015. By Decision and Order dated December 1, 2016, this court decided Motion Sequence No. 002, 003, 004 and 005¹ as follows:

- Motion Sequence 002: Henick moved to consolidate the instant action with another action filed by Levest Electrical Corp. The motion was denied.
- Motion Sequence 003: Henick moved to compel responses and other discovery and for sanctions against Adria for failing to abide by prior orders. The motion was denied as academic.

¹ Motion Sequence 001, to extend time to complete service, was withdrawn.

- Motion Sequence 004: DASNY moved for partial summary judgment dismissing the Third, Fourth and Fifth Causes of Action as asserted against it. The motion was granted.
- Motion Sequence 005: Adria cross-moved to amend its notice of lien, *nunc pro tunc*, and to reduce the amount of said lien. The motion was granted.

Thereafter, Motions Sequence No. 006, 007, 008, 009, 010, 011, 012, 013 were filed. Said motions were orally argued before the court and fully submitted on October 5, 2018. The motions, all of which are being adjudicated by this Decision and Order, are as follows:

- Motion Sequence 006: Henick seeks leave to file an Amended Verified Answer and Affirmative Defenses to the Amended Complaint with Counter-Claims and Third-Party Claims. The amendment contemplates, *inter alia*, the naming of Adria owner Damjan Stanivukovic (“Stanivukovic”) as a defendant in his personal capacity and the assertion against him of two claims for willful exaggeration of two mechanic’s liens.
- Motion Sequence 007: Henick moves for an order assessing sanctions in the total amount of \$10,000 against Adria, Stanivukovic and their present counsel, Christopher Cobb. The motion also seeks an award of \$65,845 plus 9% statutory interest and reasonable attorney fees for the bond premiums paid by Henick.
- Motion Sequence 008: Plaintiff seeks leave to file a Second Amended Verified Complaint which no longer has any cause of action to foreclose on the 2013 Lien or the 2015 Lien², and seeks an order to compel production of documents and information responsive to prior demands and interrogatories as well as information regarding computer systems.

² As originally filed, Motion Sequence 008 sought leave to decrease the amount of the 2015 Lien. However, in a subsequent affirmation, plaintiff’s counsel requested to modify the motion.

- Motion Sequence 009: Henick moves to dismiss the Third and Fourth Causes of Action asserted in the Amended Complaint.
- Motion Sequence 010: Henick moves to cancel, release and discharge the notice under mechanic's lien law for account of public improvement, signed by Plaintiff, on or about December 12, 2013, and served on or about December 24, 2013, in the sum of \$742,651.12; to cancel, release and discharge the surety bond, dated January 21, 2014, in the sum of \$816,916.23 and award Henick its costs and expenses for paid premiums on the surety bond in the amount of \$65,845, together with 9% statutory interest.
- Motion Sequence 011: Henick moves to void the Release of Lien on Public improvement, dated July 2, 2018, filed by Adria; amending the amount of Adria's Notice Under Mechanic's Lien Law for Account of Public Improvement, dated March 31, 2015, from \$4,180,706.72 to \$0.
- Motion Sequence 012: Henick moves to quash the subpoena, dated August 10, 2018, which seeks deposition testimony and production of documents and further moves for sanctions against Adria and Counsel, Christopher Cobb.
- Motion Sequence 013: DASNY moves to dismiss the remainder of Adria's complaint as to DASNY.

FACTS

The instant contract dispute has its genesis in the construction of the Richmond County Courthouse. Defendant DASNY was the project owner with regards to the construction of the aforesaid courthouse project. On September 17, 2009, Defendant Henick entered into a contract with DASNY to provide certain Heating, Ventilation and Air-Conditioning related work on the public improvement project formally known as the New Courthouse and Memorial Green Construction at Staten Island Courthouse. On or about September 2, 2009, Defendant Travelers Casualty and Surety Company of America ("Travelers") issued a labor and material payment bond, with Henick as principal, to DASNY as the project owner. On or about February 1, 2010,

Henick, acting as a general contractor, subcontracted with plaintiff³ to provide supplies and labor relating to the installation of pipe fittings, hangers, valves, etc. The total "Amount of Contract" was listed as \$3,550,000. The execution of the subcontract, work commenced thereunder, but ultimately the parties encountered multiple disputes relating to delays, added costs, and non-payments.

On August 9, 2012, plaintiff caused a notice of mechanic's lien for account of public improvement in the amount of \$585,689.78 to be filed with the appropriate agencies. On September 10, 2012, lien discharge bond issued by Liberty Mutual Insurance Company ("Liberty") was filed with the appropriate agencies, discharging the lien. A second notice of mechanic's lien in the amount of \$299,997.94 was filed by plaintiff and again discharged by the filing of a lien discharge bond from Liberty on December 4, 2012. In connection with the disputes that gave rise to the liens, Plaintiff commenced an action in this court, index number 150506/2012, naming Henick, Travelers and Liberty as defendants. Henick asserted counterclaims in that action. Additionally, plaintiff filed a second action against Henick in this court, index number 85011/2012, with Henick filing a cross-petition therein.

On or about May 29, 2013, Adria and Henick entered into a settlement agreement resolving, *inter alia*, the disputes raised in both 2012 Supreme Court actions. The settlement agreement acknowledged that, to that date, Adria had been paid \$2,949,538.59 for its work on the project. The parties also agreed that \$450,000 was still due to Adria under the contract, with \$300,000 to be paid at the time of settlement and the remaining \$150,000 to be paid in progress payments. For its part, Adria was obligated to completed certain agreed upon work as well as executed partial releases relating to the money that was being paid to it by Henick. A formula was agreed upon by Adria and Henick in the event DASNY or related municipal entities claimed credits or other monies due. Both Adria and Henick reserved the right to seeks additional compensation / payment from DASNY. On May 29, 2013, both stipulations were filed discontinuing both 2012 court actions with prejudice.

³ It appears that plaintiff is an affiliate of the company that was formally retained in the contract at issue. At some point, the contracting entity assigned its rights under the subcontract to plaintiff.

Adria and Henick agree that the timeframes for completion of the HVAC work, as well as the overall project, were extended significantly. Adria alleges that these delays and other issues of alleged mismanagement by Henick and others caused them to incur and realize significant additional costs and entitlements to increased payments under the subcontract. On December 24, 2013, plaintiff filed⁴ a Notice of Mechanic's Lien against the project in the amount of \$742,651.12 (the "2013 Lien"). On or about January 21, 2014, Henick bonded off the 2013 Lien. Plaintiff subsequently filed an extension of 2013 lien in December of 2014. On March 31, 2015, plaintiff filed a second Notice of Mechanic's Lien against the project in the amount of \$4,180,706.72 (the "2015 Lien"). Henick has alleged that annual bond premiums for the 2013 lien exceed \$13,000. During the time since the 2013 settlement, there has been continued interaction relating to additional payments, change orders, etc. involving DASNY, Henick and Adria. Such interaction, at times, has purportedly included attorneys for the litigants and has involved issues relating to payment, etc.

Since the filing of this action in 2015, the amount of the 2015 Lien has been reduced. Discovery, including examinations before trial ("EBT") of the principals of Adria and Henick, have taken place. Adria and Henick have both sought to amend their respective claims, both including new causes of actions or parties and reducing and / or eliminating claims.

⁴ The lien was signed December 12, 2013 and served on December 24, 2013.

DISCUSSION

Plaintiff's motion for leave to file a Second Amended Complaint which removes all causes of action for lien foreclosure and adds a cause of action for breach of the settlement agreement is granted as to the 2013 Lien and denied as to the 2015 Lien and settlement agreement (Motion Sequence 008). Henick's motion seeking to void the release of the 2015 Lien and the motion to reduce the amount of the 2015 Lien are granted (Motion Sequence 011). Henick's motion to cancel, release and discharge the 2013 Lien and cancel, release and discharge the surety bond, dated January 21, 2014, is granted (Motion Sequence 010).

The core disputes, in this case, revolve around the subcontract between defendant Henick, as the general contractor, and Adria, as the subcontractor. Adria contends that they were not properly compensated under the contract despite largely performing as required, with any delays hampering performance attributable to Henick or DASNY. Henick disputes plaintiff's characterization, claims that plaintiff left significant portions of work unperformed and that Henick was required to pay significant monies to have the subcontracted work completed. As a part of these disagreements overpayment, plaintiff caused to be filed notices of liens on account of public improvement against Henick per Lien Law §12.

At this stage in the proceedings, a party may amend its pleadings by stipulation of the parties or by leave of the court. CPLR §3025(b). Such leave shall be freely given, provided there is no delay, surprise or prejudice to the opposing part(ies). (*Id.*; *McCaskey, Davies & Associates, Inc. v. New York City Health & Hospitals Corp.*, 59 N.Y.2d 755, 757 [1983].)

In the amended complaint, the fifth cause of action seeks to foreclose on the 2013 Lien, and the sixth cause of action seeks to foreclose on the 2015 Lien. In defendant's answer and affirmative defenses to amended complaint with counter-claims, Henick asserts causes of actions for willful exaggeration of the 2013 Lien and 2015 lien. Plaintiff now seeks leave to file a second amended complaint which removes the causes of action to foreclose the liens, moving forward on contract and quasi-contract claims. Henick moves to cancel, release and discharge the 2013 Lien and cancel, release and discharge the surety bond, dated January 21, 2014. However, although Henick has ardently attacked the liens at issue, it opposes the release of the 2015 Lien out of concerns that it would impact their counterclaims for willful exaggeration.

Similarly, Henick requests that the cause of action for foreclosure of the 2013 Lien remain as a necessary predicate for counterclaims against plaintiff.

In an action to enforce a mechanic's lien in which the validity of the lien is at issue, if the court finds that the lienor has willfully exaggerated the amount due in the notice of lien, the court shall void the lien. Lien Law §39. Upon a finding of willful exaggeration, an aggrieved contractor or owner is entitled to damages for the cost of the bond for the overstated amount as well as reasonable attorney's fees. Lien Law §39-a. The uncommon issue before the court is to determine whether Henick's claims for willful exaggeration of the 2013 and 2015 Liens survive if those liens are released before trial.

The predicate for any damages for willful exaggeration of a mechanic's lien is that a court "shall have declared said lien to be void on account of wilful exaggeration." (Lien Law §39-a, *Wellbilt Equip. Corp. v. Fireman*, 275 ad2d 162, 166 [1st Dept, 2000].) As a cause of action founded in a statute that is to be strictly construed, termination of the lien prior to trial removes the ability of a defendant to continue pursuit of a willful exaggeration cause of action. (see *Wellbilt Equip. Corp.*, 275 AD2d at 166). In *Wellbilt*, the parties stipulated to discharge the lien, which then served to foreclose the ability of the defendant therein to assert a claim for willful exaggeration. *Id.* As it mattered not the circumstances as to how or why the lien was discharged, the only manner in which the defendant could have preserved its cause of action for willful exaggeration would have been to refrain from seeking dismissal or discharge of the subject liens prior to trial. *Id.*

Defendant is in the odd position of advocating that the liens it challenges, or the causes of actions for foreclosure, be maintained in place in order to preserve its own causes of action. While this position is awkward and the facts of this case are distinguishable from *Wellbilt*, defendant is not acting inconsistently with the Lien Law and court precedent. Denial of plaintiff's request to remove the causes of action to foreclose the 2013 and 2015 Liens results in no prejudice to plaintiff. However, defendant is asserting potential rights to significant monetary penalties in relation to the cost of the alleged willful exaggeration, which would potentially be imperiled by plaintiff's request. Therefore, plaintiff's motion to seek leave to amend the

complaint to remove the foreclosure of the 2013 and 2015 Lien must be denied. Henick's motion to void the release of the 2015 Lien and reduce the amount of the lien to \$0 is granted.

As to the 2013 Lien, Henick seeks to discharge the 2013 Lien and related surety bond. The parties agree that, to a certain extent, that the 2013 Lien is not currently properly in force, such that its discharge and the discharge of the related surety bond are proper. While the parties disagree as to the culpability for costs relating thereto, the motion for discharge of the lien and surety bond should be granted.

Plaintiff also seeks leave to add a cause of action for breach of the 2013 settlement agreement between Adria and Henick, to which Henick objects. As plaintiff and defendants were the parties to the settlement agreement in 2013, its existence and the relative obligations therein certainly were well known to both parties at the time this action was commenced in 2015. Plaintiff appears to assert that interactions between Henick and DASNY, among other activities, violated terms of the settlement agreement. Plaintiff further alleges that it only became aware of these violations through the discovery process, creating this late request to amend. However, as discussed below, plaintiff is asserting claims for unjust enrichment and quantum meruit that also relate to payments Henick allegedly received from DASNY.

Plaintiff has failed to provide adequate information as to why the claims sought to be asserted now were not asserted earlier. Furthermore, defendant properly asserts that allowing the addition of this new cause of action would potentially require new rounds of discovery, adding undue delay to a case that is near trial. Therefore, that portion of the motion that seeks to add a new cause of action for breach of the 2013 settlement must be denied.

Defendant Henick's motion seeking leave to file an amended verified answer and affirmative defenses to the amended complaint with counter-claims and third-party claims is granted (Motion Sequence 006).

Henick seeks leave to add the principal of plaintiff Adria, Stanivukovic, individually in relation to its causes of action for willful exaggeration of the 2013 and 2015 Liens. Henick justifies this request by arguing that Stanivukovic personally signed the liens at issue in this case and, therefore, is personally involved with the tortious conduct alleged to have

occurred. In opposing this motion plaintiff, improperly, relies heavily on the presumption that the willful exaggeration causes of actions will not survive. Additionally, plaintiff asserts that Stanivukovic was not personally involved in the allegedly tortious conduct.

As noted above, a party may amend its pleadings by leave of the court provided there is no delay, surprise or prejudice. CPLR §3025(b); *McCaskey, Davies & Associates, Inc. v. New York City Health & Hospitals Corp.*, 59 N.Y.2d 755, 757 [1983].) A principal or director of a corporation can be personally accountable for willful exaggeration of a mechanic's lien if he or she personally is involved in the conduct at issue. (*see Greenway Plaza Office Park-1, LLC v Metro Constr. Servs.*, 4 AD3d 328, 329-330 [2nd Dept 2004].) Defendant has alleged that Stanivukovic was personally involved in the exaggeration of the lien amounts, noting that he signed the documents at issue. While his actual conduct may or may not have risen to the level of willful exaggeration, plaintiff presented nothing to reflect that, as a matter of law, Stanivukovic cannot be liable for willful exaggeration of the subject liens. *Greenway Plaza Office Park-1, LLC v Metro Constr. Servs.*, 4 AD3d at 329. Furthermore, Stanivukovic appears to be significantly involved in plaintiff company, having signed documents at issue and having participated in discovery, such that his being formally named as a party creates no significant surprise or undue delay. Therefore, Henick's motion for leave to file an amended pleading is granted.

Henick's motion to dismiss the third and fourth causes of action in the amended complaint is denied (Motion Sequence 009).

Defendant moves to dismiss plaintiff's third and fourth causes of action pursuant to CPLR §3211(a)(7). Plaintiff's third cause of action is for unjust enrichment as against Henick, while the fourth cause of action is for quantum meruit also as against Henick⁵. Defendant argues that the causes of action for quasi-contract cannot stand as they merely duplicate the causes of action for breach of the written contract between Henick and Adria (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]). As the relationship

⁵ The proposed second amended complaint contains identical causes of actions as the first amended complaint in this regard.

between plaintiff and defendant is defined by the subcontract, Henick argues that the quasi-contract claims are impermissible duplications of the contract claims. (*Id.*)

In response, plaintiff argues that the claims for quantum meruit and unjust enrichment are for money and charges that are outside of the express wording of the subcontract. While the base relationship between the parties is driven by the subcontract, plaintiff has plead that items relating to change orders and payments by DASNY should result in payments to plaintiff. Similarly, plaintiff is alleging that they performed work outside the scope of the written contract, at the direction of Henick. On this motion to dismiss, the issue is not whether plaintiff ultimately proves these claims, but whether the pleading merely state a valid cause of action. (*see Sokol v Leader*, 74 AD3d 1180, 1180-1181 [2nd Dept 2010].) The allegations on their face are not, as a matter of law, duplicative of the breach of contract claims and therefore, defendant's motion to dismiss must be denied.

Defendant DASNY's motion to dismiss remaining claims as against it is denied (Motion Sequence 013).

DASNY moved to dismiss the remaining cause of action as against it, which is to foreclose of the 2015 Lien, pursuant to CPLR §3211. DASNY makes this motion based upon the fact that plaintiff released the subject lien on July 2, 2018, thereby eliminating the remaining reason for DASNY's involvement in this case. However, as discussed above, the court is granting Henick's motion to void the release. As the lien will remain as of record at this time, DASNY's motion to dismiss must be denied.

Plaintiff's motion to compel further discovery is granted in part (Motion Sequence (008)). Henick's motion to quash plaintiff's subpoena is granted. (Motion Sequence 012).

Plaintiff moves to compel production of documents and information responsive to prior demands and interrogatories as well as information relating to computer systems. Defendant Henick objects asserting that plaintiff failed to make good faith attempts to resolve the discovery dispute and, regardless, Henick has already produced all non-privileged materials.

In moving to compel discovery, the movant shall include an affirmation of good faith, attesting that the affiant has attempted to resolve the discovery issue. (*see NY CLS Unif*

Rules, Civil Cts § 202.7; CPLR §3124). Despite defendant's characterizations to the contrary, plaintiff's counsel did provide Henick's counsel with certain correspondence seeking additional information, satisfying the need to attempt a party-to-party resolution.

Plaintiff's request relates to Henick's allegations that certain work was either not completed by Adria or completed improperly, causing Henick to expend monies to have said work completed properly. During discovery, Henick did provide a summary list of items which it alleges Adria failed to complete correctly, necessitating completion by another, presumably non-party, contractor. Furthermore, Henick has asserted that it turned over all non-privileged information contained in the project file.

Rights to discovery are to be liberally construed, with all items that are material and necessary to the claims, defenses or counter-claims subject to disclosure. (CPLR §3101(a); *Forman v. Henkin*, 30 NY3d 656, 661 [2018].) During the examination before trial ("EBT") of a former employee of Henick who had been the project manager for this job, testimony was given that certain accounting information relating to Adria and the subcontract was contained in two databases maintained outside of the project file. Such information is material to Henick's claims that it needed to expend funds to complete work that plaintiff was required to complete under the subcontract. Although much of the information contained in the computer programs may duplicate information previously disclosed, Henick failed to provide justification for not turning over any information in said programs as it relates to Adria and the work at issue. In particular, to the extent that the information exists in any of the hard or computer files in Henick's possession, defendant must produce all documentation relating to the alleged missing or improperly performed work, companies hired to undertake such work, scopes of work, invoices and any other information relating to said deficiencies and remediation.

Separately, plaintiff issued a subpoena dated August 10, 2018, upon defendant's counsel. As part of the ongoing issues between Adria, Henick, and DASNY, requests were made by Adria for Requests for Equitable Adjustments ("REAs"). REAs appear to be a mechanism by which a party seeks additional compensation from DASNY. It is not in dispute that the REAs at issue in this subpoena were submitted to DASNY through Henick and their attorneys.

Adria's counsel and Henick's counsel have been in disagreement regarding the merits of certain aspects of Adria's request. However, such disagreement has not been hidden, with Henick's counsel clearly stating its position on its feelings regarding Adria's requests. While plaintiff is free to dispute Henick's position, such dispute does not remove Henick's right to attorney-client privilege. In this instance, plaintiff has provided no basis to conclude that an EBT of counsel or production of firm documents is either warranted in relation to the dispute or, more importantly, not protected by attorney-client privilege. Therefore, defendant's motion to quash the subpoena is granted.

Defendant Henick's motions for sanctions, premiums, legal fees and interest are denied (Motion Sequences Nos. 007, 010, 011 and 012).

Independently and in conjunction with certain of the motions discussed above, defendant has moved for sanctions and an award of premiums relative to the cause of action to foreclose the 2013 Lien. Motion Sequence No. 007 accuses Plaintiff Adria, its principal Stanivukovic and its counsel, Christopher Cobb, of conducting frivolous conduct in civil litigation (*see* NY CLS Standards & Admin Pol §130-1.1). Specifically, defendant alleges that, in pursuing a cause of action relating to an expired lien, the action is frivolous. Defendant seeks the imposition of a \$10,000 sanction as well as the costs of bond premiums of \$65,845, with interest and attorney's fees. While the plaintiff now requests to remove the cause of action, defendant has not shown that the cause of action is frivolous as defined in the court rules. It must be noted that this action was commenced in 2015, defendant only made their request of plaintiff's counsel in May of 2018.

As to the request for bond premiums, the court notes that half of the premiums sought were paid prior to the commencement of the instant litigation. Moreover, plaintiff argues that, as the 2013 Lien was arguably unenforceable, the payment of bond premiums by Henick was unnecessary. More importantly, monies paid for the bond premiums are more appropriately categorized as potential damages in relations to defendant's counter-claims. For all the above reasons, the motion for sanctions and premiums must be denied. The request for bond premiums within Motion Sequence No. 010 is similarly denied as it is ultimately a request for damages to be determined at trial.

Defendant's request for sanctions as against plaintiffs for discharging the 2015 Lien are also denied. As defendant's have noted to the court, there is a paucity of case law regarding the impact of counter-claims for willful exaggeration where the underlying liens do not survive trial under facts similar to those presented. Therefore, plaintiff's actions in discharging the lien cannot be considered deserving of sanctions.

Finally, defendant moves for sanctions based upon plaintiff's request for documents and testimony from defendant's counsel. While the court is granting the motion to quash, the court does not find that the actions of plaintiff's counsel are frivolous. The ongoing nature of interactions between Adria, Henick and DASNY has merged litigation with business law, such that the attorneys involved, rightfully, are undertaking tasks beyond strict court oriented work. While the subpoena is quashed, the court does not find the mere issuance of it, under the circumstance, to warrant sanction. Therefore, all requests for sanctions are denied, with requests for damages related to payments on bond premiums reserved for trial.

Accordingly, it is hereby:

ORDERED, that motion sequence 006 seeking leave to file an amended verified answer and affirmative defenses to the amended complaint with counter-claims and third-party claims to add causes of action as against Damjan Stanivukovic is granted; it is further

ORDERED, that motion sequence 007 seeking sanctions against plaintiff, plaintiff's principal Damjan Stanivukovic and plaintiff's counsel is denied; it is further

ORDERED, that motion sequence 008 is granted to the extent that plaintiff is granted leave to file a second amended complaint that removes the cause of action to foreclose on the mechanic's lien dated on or about December 12, 2013 and to compel defendant Henick to produce all documentation relating to all work that Henick alleges plaintiff either didn't perform or performed improperly, including companies hired to undertake such work, scopes of work, invoices and any other information relating to said deficiencies and remediation; but is denied to the extent that it seeks to remove the cause of action to foreclose on the mechanic's lien dated March 31, 2015 and to the extent that it request to add a cause of action for breach of the 2013 settlement agreement; it is further

ORDERED, that motion sequence 009 seeking to dismiss plaintiff's causes of action for unjust enrichment and quantum meruit (presently enumerated as causes of action numbers three and four, respectively) is denied; it is further

ORDERED, that motion sequence 010 is granted to the extent that it seeks to cancel, release and discharge the notice of mechanic's lien dated on or about December 12, 2013 and filed on or about December 24, 2013, cancelling, releasing and discharging the surety bond, dated January 21, 2014, made by Henick as principal and Liberty Mutual Insurance as surety; but is denied to the extent that it seeks costs and expense for paid premiums on the surety bond and interest related thereto; it is further


ORDERED, that motion sequence 011 is granted to the extent that it seeks to void the release of lien on public improvement dated July 2, 2018, filed by Adria and that it seeks to amend the amount of plaintiff's notice under mechanic's lien law for account of public improvement, dated March 31, 2015 from \$4,180,706.72 to \$0 and holding that defendant Henick's claim for willful exaggeration survives; but is denied to the extent that it seeks sanctions against plaintiff, its principal and its counsel; it is further

ORDERED, that motion sequence 012 is granted to the extent that it seeks to quash the subpoena, dated August 10, 2018, issued upon Henick's counsel, Cohen Seglias Pallas Greenhall & Furman; but is denied to the extent that it seeks sanctions against plaintiff and plaintiff's counsel; it is further

ORDERED, that motion sequence 013 seeking to dismiss the remaining causes of action as against defendant DASNY is denied.

ENTER,

Dated: January 2 , 2019



J.S.C.

Hon. Kim Dollard
Acting Supreme Court Justice