

Kamco Supply Corp. v Nastasi & Assoc., Inc.

2019 NY Slip Op 32015(U)

July 1, 2019

Supreme Court, New York County

Docket Number: 651725/2015

Judge: Andrea Masley

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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**

PRESENT: HON. ANDREA MASLEY PART IAS MOTION 48EFM

Justice

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KAMCO SUPPLY CORP., ON BEHALF OF ITSELF AND ALL OTHER PERSONS SIMILARLY SITUATE AS TRUST FUND BENEFICIARIES OF LIEN LAW TRUSTS OF WHICH NASTASI & ASSOCIATES, INC. IS A TRUSTEE,

Plaintiff,

- v -

NASTASI & ASSOCIATES, INC., J.T. MAGEN & COMPANY INC., LIBERTY MUTUAL INSURANCE COMPANY, ANTHONY NASTASI, JOHN DOE ONE THROUGH JOHN DOE TEN

Defendant.

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INDEX NO.	651725/2015
MOTION DATE	
MOTION SEQ. NO.	004 005
DECISION + ORDER ON MOTION	

The following e-filed documents, listed by NYSCEF document number (Motion 004) 124, 125, 126, 127, 128, 129, 130, 131, 133, 135, 173

were read on this motion to/for RENEWAL

The following e-filed documents, listed by NYSCEF document number (Motion 005) 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER

In motion sequence number 004, defendants Nastasi & Associates (N&A) and Anthony J. Nastasi (collectively, Nastasi Defendants) move pursuant to CPLR 2221 (e) to vacate this court's June 8, 2018 order striking the Nastasi Defendants' answers.

In motion sequence number 005, plaintiff Kamco Supply Corp. (Kamco) moves pursuant to CPLR 3212 for summary judgment in its favor and against defendant J.T. Magen & Company, Inc. (JTM). Defendants JTM and Liberty Mutual Insurance Company (Liberty Mutual) (collectively JTM Defendants) cross-move pursuant to CPLR 3212 for summary judgment in their favor.

Motion sequence numbers 004 and 005 are consolidated for disposition.

Background

This court's June 8, 2018 decision and order provides a detailed account of the background, and it is presumed that the parties are familiar with the facts of this case. Thus, the court's recitation here is brief.

In this construction action, Kamco alleges that it provided N&A and JTM, the subcontractor and general contractor, respectively, on a project located at 150 E. 42nd Street, New York, New York, with various building materials, and was never paid \$975,161.32 for those materials (NYSCEF [NYSCEF] Doc. No. 16, amended complaint at ¶¶ 8, 10). On April 29, 2015, Kamco filed a Notice of Mechanic's Lien (Lien) (*id.* at ¶ 12). On May 1, 2015, JTM procured a lien discharge bond from Liberty Mutual in the amount of \$1,072,677.45, which is 110% of the Lien amount in accordance with New York State Lien Law Sections 19(4) and 21(5) (*id.* at ¶ 15). At some time after the Lien was filed, N&A "received credits totaling the sum of \$35,859.44, leaving a balance due on [Kamco's] Lien in the amount of \$939,301.88 (*id.* at ¶ 14). On May 19, 2015, Kamco initiated this action by summons and complaint. On July 9, 2015, Kamco amended its complaint, which amended the amounts owed on the unpaid balance and the amount Kamco seeks for attorneys' fees from the Nastasi Defendants.

Motion Sequence Number 004

On June 8, 2018, this court issued a decision on Kamco's motion for an order compelling the Nastasi Defendants to comply with a previous court order dated October 6, 2015 and to provide Kamco with the requested documents that were never produced (NYSCEF 115). The court found that the Nastasi Defendants failed to preserve

documents despite having knowledge of the pending litigation (*id.*). As a result, Nastasi Defendants' answer was stricken (*id.*).

The Nastasi Defendants now seek an order vacating the June 8, 2018 order, pursuant to CPLR 2221(e), insofar as it ordered the answer of the Nastasi Defendants stricken. Their motion is denied for the reasons stated on the record, which includes the Nastasi Defendants' failure to appear at oral argument (NYSCEF 173, Transcript of Oral Argument at 3:15-4:8).

Motion Sequence Number 005

Kamco now seeks summary judgment against defendant JTM on its first cause of action which seeks to foreclose on the Lien, or, if the lien is held invalid, to recover the sum of \$939,301.88, together with interest from JTM (amended complaint, prayer of relief at ¶ 1 [a]-[f]). The JTM Defendants cross-move for summary judgment in their favor. Both motions are denied as there is an issue of fact which prevents judgment in any parties' favor.

Kamco asserts that the Lien was properly filed on April 29, 2015 in accordance with Section 9 of the New York State Lien Law, and properly served on the same date in accordance with Section 11 of the Lien Law (NYSCEF 142, Mechanic's Lien and Affidavit of Service). However, the JTM Defendants assert that, by law, the Lien can only be enforced to the extent of money owed by the general contractor to the subcontractor, and because JTM had paid N&A in full when the Lien was filed, there are no funds to which the Lien can attach. Specifically, the JTM Defendants claim that JTM

paid N&A \$6,919,664.67¹ of the \$6,813,731.00 owed under its contract with N&A, resulting in an overpayment of \$105,927.67 (see NYSCEF 160, Copies of Checks²; NYSCEF 161, Distribution Report³).

In response, Kamco submits copies of four cashier's checks from N&A to JTM in the amounts of \$500,000 for September, October, November, and December of 2014, totaling \$2,000,000 (NYSCEF 145). Kamco claims that, since N&A paid JTM \$2,000,000 during the project period, the total that JTM paid to N&A should be reduced by that amount, because JTM actually paid N&A \$4,919,664.67 of the \$6,813,731.00 originally owed to N&A, leaving a lien fund of \$1,894,066.33. Kamco asserts that this amount is more than sufficient to pay the \$975,161.32 that it is owed.

In regard to this payment by N&A, JTM maintains that the \$2,000,000 paid by N&A to JTM was repayment for a general business loan JTM granted N&A in 2013, and is separate from the money JTM paid in full to N&A pursuant to their contract; thus, there are no funds for the Lien to attach. JTM also argues that Kamco has failed to establish a valid lien, because Kamco has not provided evidence that they are actually owed money by any of the defendants.

Summary judgment is a drastic remedy that will only be granted where the movant demonstrates that no genuine triable issue of material fact exists (see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; see CPLR 3212). Initially,

¹ In its memorandum of law, Kamco concedes that "JTM paid N&A \$6,919,664.67 for work performed by N&A on the Mt. Sinai project" (NYSCEF 138 at 3).

² JTM provides copies of checks paid to N&A totaling \$7,968,827.57 with no explanation for the extra monies paid.

³ The Distribution Report, presumably created by JTM, indicates a total of \$6,919,664.67 paid to N&A.

"the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the movant has made such a showing, the burden shifts to the opposing party to demonstrate, with admissible evidence, facts sufficient to require a trial, or summary judgment will be granted (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to raise a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d at 562).

Kamco has failed to make a prima facie case that it is owed money for the materials supplied on the project. While Kamco does present evidence of a valid lien, it is the lienholder's burden to also show entitlement to recovery on the lien (*Strober Bros. v Kitano Arms Corp.*, 224 AD2d 351, 353 [1st Dept 1996] [citations omitted]). Kamco has not met this burden.

In regard to the JTM Defendants' cross motion for summary judgment, Kamco has raised issues of fact as whether there is a valid lien, by submitting a copy of the Lien filed with the New York County Clerk, and also as to whether there are funds available for the Lien to attach.

The JTM Defendants are correct in that "a sub-subcontractor or a materialman to a subcontractor[] 'may not enforce its lien for an amount in excess of . . . the amount of money owed by the general contractor to the subcontractor'" (*Peri Formwork Sys. v Lumbermens Mutual Casualty Co.*, 112 AD3d 171, 177 [2d Dept 2013] [citation omitted])

and they have submitted proof that JTM paid N&A the full contract price (NYSCEF 160, 161, and 162).

However, Kamco may attach the Lien to any available assets in the trust fund. Despite the JTM Defendants' unsupported assertion that Kamco cannot use an Article 3-A trust fund to satisfy the Lien, there is nothing in Article 2 or Article 3-A of the New York Lien Law that prevents Kamco from using assets from the statutorily established Article 3-A trust fund to satisfy the Lien (NY Lien Law § 79; *NY Professional Drywall of OC, Inc. v Rivergate Dev., LLC*, 100 AD3d 216, 219 [holding that "a plaintiff may simultaneously maintain an action to foreclose its mechanic's lien and an action under article 3-A." "[A] lienor may pursue both its trust fund remedies under Lien Law article 3-A and its ordinary remedies in enforcing the lien"]).

There is an issue of fact as to whether trust assets remain. Kamco submits copies of four cashier's checks from N&A to JTM in the amounts of \$500,000.00 for September, October, November, and December of 2014, paid during the course of the construction project (NYSCEF 145). While JTM contends that these checks were repayment of a loan that JTM gave N&A, JTM fails to submit any proof of this loan, except the affidavit of Elizabeth Crespo, Controller of JTM, in which she states that JTM provided N&A with a "general business loan, entirely separate from the Project" (NYSCEF 156). There is no submission of loan documents and no detailed description of the purpose of this loan. Without more than Crespo's conclusory statement, this court cannot determine whether the money JTM received for payment on this loan is a trust asset to which the Lien could attach.

Accordingly, it is

ORDERED that defendants Nastasi & Associates and Anthony J. Nastasi's motion to renew is denied; and it is further

ORDERED that this court will conduct an inquest on damages as to defendants Nastasi & Associates and Anthony J. Nastasi in Part 48, Room 242 at 60 Centre Street, on _____; and it is further

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

ORDERED that defendants J.T. Magen & Company, Inc JTM and Liberty Mutual Company's cross-motion for summary judgment is denied; and it is further

ORDERED that the parties shall appear for trial in Part 48, Room 242 at 60 Centre Street, on _____; and it is further

ORDERED that any motions in limine must be served no later than 30 days from the date on by which this court enters this decision and order on NYSCEF; and it is further

ORDERED that the parties shall appear for a pre-trial conference on

8/16/19 at 3:00 a.m. By phone

Motion Seq. No. 004

7.16.19
DATE

HON. ANDREA MASLEY
[Signature]
ANDREA MASLEY, 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"/> SETTLE ORDER	<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE	

Motion Seq. No. 005

7.16.19
DATE

HON. ANDREA MASLEY
[Signature]
ANDREA MASLEY, 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"/> SETTLE ORDER	<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE	