| **Rainbow Home Improvement, Inc. v Thor Milford Retail, LLC** |
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| 2019 NY Slip Op 32201(U) |
| July 26, 2019 |
| Supreme Court, New York County |
| Docket Number: 154157/2017 |
| Judge: Arlene P. Bluth |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** HON. ARLENE P. BLUTH **PART** IAS MOTION 32

*Justice*

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RAINBOW HOME IMPROVEMENT, INC.,

Plaintiff,

- v -

THOR MILFORD RETAIL, LLC,CHARISSA DAVIDOVICH DBA SUGAR FACTORY, PARAMOUNT GROUP FUND VIII 700 EIGHTH MORTGAGE, LP, NEW YORK CITY DEPARTMENT OF FINANCE, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU

Defendants.

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**INDEX NO.** 154157/2017

**MOTION DATE**

**MOTION SEQ. NO.** 004

**DECISION AND ORDER**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146

were read on this motion to/for RENEWAL.

The branch of plaintiff's motion to renew the Court's March 19, 2019 decision and order granting defendants partial summary judgment, thereby dismissing plaintiff's mechanic's lien foreclosure claim is denied. The branch of the motion to reargue the March 19, 2019 decision of the Court is granted and upon reargument, the Court adheres to its previous decision and order. The branch of the motion to amend the complaint is denied.

**Background**

Plaintiff, Rainbow Home Improvement, Inc ("RHI") performed certain work necessary to renovate retail space for the opening of a "Sugar Factory" store/restaurant located at 700 Eighth Avenue, New York. The premises is owned by defendant Thor Milford Retail LLC ("Thor") and is subject to a lease made between Thor, as lessor, and Sugar Factory's primary principal, defendant Charissa Davidovici, as lessee. RHI claims it entered into a contract with

Davidovici to renovate the space but Davidovici refused to pay the full amount due upon completion of the work. On February 6, 2017, RHI filed a mechanic's lien against Thor as owner of the property and Charissa Davidovici doing business as Sugar Factory at the Row Hotel. However, plaintiff filed an affidavit of service of the lien with the county clerk as to Thor only; it never filed an affidavit of service of the lien as to Davidovici.

On May 4, 2017, plaintiff brought a claim against Thor and Davidovici for a mechanic's lien foreclosure, breach of contract against Davidovici, and account stated against Davidovici. Davidovici and Thor moved for partial summary judgment to dismiss the lien claim based on RHI's failure to follow the requirements of Lien Law § 11-b. Lien Law § 11-b mandates that an affidavit of service of a lien be filed with the county clerk within thirty-five days of notice of the lien. This Court granted the motion and severed and dismissed the lien law claim because RHI did not file the statutorily mandated affidavit of service as to Davidovici. The Court reasoned that "There was no affidavit of service of the lien filed with the county clerk to show service upon the party with whom the plaintiff claims it contracted [Davidovici]. There was only an affidavit of service filed for the property owner [Thor]. No one claims the owner contracted directly with plaintiff" (NYSCEF Doc. No. 125).

Plaintiff now brings this motion (1) to renew and reargue the decision granting partial summary judgment against plaintiff and (2) to amend its complaint to add a quantum meruit and unjust enrichment claim against Thor.

**Discussion**

**Renewal and Reargument**

CPLR 2221(e) states that a motion for leave to renew:

> 2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and
> 3. shall contain reasonable justification for the failure to present such facts on the prior motion.

Plaintiff claims that the motion for renewal should be granted so that it may submit (1) a full copy of the lease for the property and (2) a new affidavit of service. Plaintiff claims that the whole lease will show that Thor consented to the work done on the premises and therefore, RHI was authorized to file a lien against Thor. However, Thor's consent for any work done on the premises is irrelevant because plaintiff does not claim it contracted with Thor. Plaintiff claims it contracted with Davidovici. Furthermore, submitting the lease still does not change the fact that plaintiff failed to file an affidavit of service as to Davidovici, the party with whom it claims it contracted.

RHI also seeks to renew the motion so it can submit a new affidavit of service of the Notice of Lien upon Davidovici. However, this proposed affidavit of service is dated April 11, 2019, and was obviously created after this Court's March 19, 2019 decision dismissing the Lien Law claims. Furthermore, the Lien Law mandates that the affidavit of service be filed with the county clerk within 35 days after the notice of lien has been filed. Submitting a new affidavit of service dated well after the statutorily mandated time to do so does not rewrite history. The fact remains that plaintiff failed to file the affidavit of service within 35 days of filing the lien.

"A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or

misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision" (*William P. Pahl Equipment Corp. v Kassis*, 182 AD3d 22, 27, 588 NYS2d 8 [1st Dept 1992]).

Plaintiff presents several reasons why the motion for summary judgment should be reargued. First, plaintiff claims that Davidovici does not have standing to bring the prior motion and challenge the lien. However, as previously decided, Davidovici has standing by virtue of the fact that plaintiff named her in the Notice of Lien and also as a party in this action.

Next, plaintiff argues that a material issue of fact exists because it has not been established whether plaintiff directly contracted with Davidovici individually or with her company, the Sugar Factory. The crux of the argument is: if plaintiff did in fact contract with Sugar Factory and not Davidovici, then that eliminates the requirement of filing an affidavit of service of the lien as to Davidovici. However, the point is not relevant because plaintiff never filed an affidavit of service as to Sugar Factory either.

Plaintiff claims that Lien Law § 23 excuses plaintiff's non-compliance with Lien Law § 11-b. It argues that Lien Law § 23 permits substantial compliance with the requirements of the Lien Law and therefore, non-compliance with § 11-b can be excused. That is not the law. "The Appellate Division has consistently held that Lien Law § 23 does not permit a court to excuse non-compliance with Lien Law § 11-b" (*see* 146 *W. 45th St. Corp. v McNally*, 188 AD2d 410, 591 NYS2d 402 [1st Dept 1992]). "The language of Lien Law § 11, however, is clear and unambiguous, and mandates vacatur of mechanic's liens in the absence of strict compliance by the lienor with the provisions thereof" (*id.*). The analysis regarding this point has not changed since the last time the motion was argued. Strict compliance with the Lien Law is required and § 23 does not exempt plaintiff from abiding by the statutory requirement of filing an affidavit of service.

Next, plaintiff claims that the motion to reargue should be granted because this Court erred in dismissing the lien because it should have instead been dismissed through a special proceeding pursuant to Lien Law § 19(6). This is the first time this argument is being made and consequently, the Court cannot consider it as part of a motion to reargue. Even if the Court did consider the argument, it is without merit. Lien Law § 19(6) allows a party challenging a lien based on facial deficiencies to bring a special proceeding without having to wait for the lienor to file a foreclosure action first ("[T]he 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 § 19(6)] [emphasis added]). The statute does not *require* the aggrieved party to seek relief through a special proceeding. There is no indication in the statute that an aggrieved party cannot challenge a lien by putting forth a defense to a lienor's foreclosure action in lieu of bringing a special proceeding. Therefore, the argument is without merit.

Lastly, plaintiff claims that the Court erred in granting the summary judgment motion because the issue of the lack of an affidavit of service for anyone other than the owner was not raised by either of the movants and therefore was improperly before the Court. Plaintiff is incorrect; this exact issue was before the Court in the last motion. The argument was briefed and argued before the Court and a decision was rendered on the exact issue.

The motion to renew the Court's March 2019 decision and order granting partial summary judgment is denied. The motion to reargue that decision and order is granted and the Court adheres to its prior decision.

**Amend the Complaint**

"Leave to amend a pleading should be freely given as a matter of discretion in the absence of prejudice or surprise, although to conserve judicial resources, examination of the underlying merit of the proposed amendment is mandated. Therefore a motion for leave to amend a pleading must be supported by an affidavit of merits and evidentiary proof that could be considered upon a motion for summary judgment" (*Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352, 354-55, 797 NYS2d 434 [1st Dept 2005] [internal quotations and citations omitted]).

Plaintiff moves to amend her complaint to add claims against Thor for quantum meruit and unjust enrichment.[1] In the proposed quantum meruit claim, plaintiff alleges that if RHI and Davidovici did not have a contract, RHI performed services with Thor's consent with the reasonable expectation of being paid.

To assert a claim for quantum meruit, "plaintiff must allege (1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services" (*Soumayah v Minnelli*, 41 AD3d 390, 391, 839 NYS2d 79 [1st Dept 2007]). Plaintiff fails to allege facts in the proposed amended complaint that would establish that Thor as lessor accepted RHI's services and created an expectation that it would pay RHI for those services. Simply stating "Defendants knew that Plaintiff was expending large sums of money in materials and labor to improve the premises and accepted the material and labor provided by plaintiff" (NYSCEF Doc. No. 130) is not enough to show that plaintiff expected that Thor, the landlord, was a guarantor of payment for the work Thor allowed the tenant to do.

[1] It should be noted that plaintiff does not actually use the term "quantum meruit" anywhere in her proposed amended complaint. However, the term is used in plaintiff's motion papers to amend the complaint.

The proposed unjust enrichment claim states that Thor and Davidovici have been unjustly enriched at plaintiff's expense and should not be able to reap the benefits of the improvements without compensation. To assert a claim for unjust enrichment, plaintiff must show "that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182, 944 NE2d 1104 [2011] [internal quotations and citations omitted]). "Further, although privity is not required for an unjust enrichment claim, a claim will not be supported unless there is a connection or relationship between the parties that could have caused reliance or inducement on the plaintiff's part" (*Georgia Malone & Co. v Ralph Rieder*, 86 AD3d 406, 408, 926 NYS2d 494 [1st Dept 2011] [internal quotations and citations omitted]). In the proposed amended complaint, plaintiff does not allege any facts which would indicate that Thor induced plaintiff into believing that it would pay plaintiff for the services it rendered to Davidovici. Thor is simply the lessor of the property and its connection remains with Sugar Factory and Davidovici as lessees, and not with any third-party contractors hired to do work on the property. Therefore, the branch of the motion to amend the complaint to add claims for unjust enrichment and quantum meruit against Thor is denied.

**Summary**

Almost all the claims and issues plaintiff brings up in its motion to renew and reargue have already been thoroughly litigated, and the only claim that has not been litigated (the claim relating to §19[6]) is without merit. The main issue in this case is that the statutorily mandated requirements of the Lien Law were not met by plaintiff. That issue has already been decided pursuant to the last decision. Plaintiff's motion to renew and reargue did not present any

arguments that would cast doubt upon the reasoning of the Court's previous decision. Additionally, plaintiff fails to allege sufficient facts in her proposed amended complaint for a cause of action for quantum meruit and unjust enrichment against Thor. It certainly is not the law that every landlord who allows a tenant to perform work on the leasehold becomes a guarantor of payment to the contractor.

Accordingly, it is hereby

ORDERED that the branch of the motion to renew is denied, as no new facts or law have been shown; and it is further

ORDERED that the branch of the motion to reargue is granted, and upon reargument, the Court adheres to its decision and order dated March 19, 2019; and it is further

ORDERED that the branch of the motion to amend the complaint is denied.

The parties are directed to appear for a conference on September 24, 2019 at 2:15 p.m.

7/25/19
DATE

ARLENE P. BLUTH, J.S.C.
HON. ARLENE P. BLUTH

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| CHECK ONE: | | CASE DISPOSED | | | X | NON-FINAL DISPOSITION | |
| | | GRANTED | | DENIED | X | GRANTED IN PART | OTHER |
| APPLICATION: | | SETTLE ORDER | | | | SUBMIT ORDER | |
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