Melcon Gen. Contr., LLC v ELUL 1080 Leggett LLC
2019 NY Slip Op 32211(U)
February 8, 2019
Supreme Court, Bronx County
Docket Number: 26920/2016E
Judge: Ruben Franco
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX - IAS PART 26

MELCON GENERAL CONTRACTORS, L.L.C.

Plaintiff,

-against-

ELUL 1080 LEGGETT LLC and JOHN DOES "1" Through "25" said parties being lienors who have yet to perfect their liens and being fictitious and unknown to Plaintiff.

Defendants

Index No. 26920/2016E

MEMORANDUM DECISION/ORDER

Rubén Franco, J.:

This action is to foreclose on a mechanic's lien. Plaintiff moves to amend the Complaint to, in essence, add amounts owed for additional work performed, and to have the Amended Complaint deemed served via electronic case filing. Defendant cross-moves, as is pertinent here, to compel plaintiff to provide an itemized statement of plaintiff's Notice of Mechanic's Lien (Lien), pursuant to Lien Law § 38.

The facts, as set forth in the Complaint, are that on June 18, 2015, plaintiff and non-party Sunrise Cooperative Inc. (Sunrise) entered into an agreement whereby plaintiff was to perform construction and improvement work for the project known as 1080 Leggett Avenue Fit-Out ("project"). Defendant owns the subject premises and consented to the work performed by plaintiff. As of August 19, 2016, there was a balance of $966,216.56 owed to plaintiff from Sunrise for work performed, which plaintiff has demanded. On October 4, 2016, plaintiff filed a Lien for the sum owed. Plaintiff's attorney submits an affirmation in which he states that on March 28, 2017, an Amended Lien was filed in the sum of $1,337,047.19 (Amended Lien). Sunrise filed for bankruptcy, and defendant alleges that plaintiff performed work after Sunrise filed for bankruptcy for which plaintiff is seeking the amount of $370,830.63.

Plaintiff asserts that defendant will not be prejudiced by the amendment inasmuch as the amendment is only seeks to update the Complaint to reflect the current circumstances, of which

defendant is aware. Moreover, plaintiff argues that failing to allow the amendment would prejudice it by preventing plaintiff from litigating the full claim against defendant.

Defendant does not dispute that the work was done, however, its opposition to plaintiff's motion rests on the following arguments: (1) plaintiff failed to provide sufficient evidence to support the amount of its lien; (2) plaintiff's lien includes work that was allegedly performed after Sunrise filed for bankruptcy and was not approved; (3) plaintiff's lien is barred by the Lien Law; and, successive liens can only be used to cure an irregularity, which does not include increasing the sum of a lien.

Plaintiff asserts that it has already provided evidence supporting the amounts contained in the Amended Lien, and denies that work was performed after obtaining knowledge that Sunrise had filed for bankruptcy.

CPLR 3025 (b) provides:

> A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.

Generally, leave to amend or supplement pleadings "shall be freely given," unless the amendment sought is palpably improper or insufficient as a matter of law, or unless prejudice and surprise directly result from the delay in seeking the amendment (*Fahey v County of Ontario*, 44 NY2d 934, 935 [1978]; *McCaskey, Davies & Assocs. v New York City Health & Hosps. Corp*., 59 NY2d 755, 757 [1983]). The Court in *360 W. 11th LLC v ACG Credit Co. II, LLC* (90 AD3d 552, 553 [1st Dept 2011]) stated that "a court must examine the merit of the proposed amendment in order to conserve judicial resources" (*citing Zaid Theatre Corp. v Sona Realty Co*., 18 AD3d 352, 354-355 [(1st Dept) 2005])." A proposed amendment which is devoid of merit should not be permitted (*see Miller v Cohen*, 93 AD3d 424, 425 [1st Dept 2012]; *Lucido v Mancuso*, 49 AD3d 220, 226 [2nd Dept 2008]).

Lien Law § 38 provides:

> A lienor who has filed a notice of lien shall, on demand in writing, deliver to the owner or contractor making such demand a statement in writing which shall set forth the items of labor and/or material and the value thereof which make up the amount for which he claims a lien, and which shall also set forth the terms of the contract under which such items were furnished. The statement shall be verified by the lienor or his agent.... If the lienor shall fail to comply with such a demand within five days after the same shall have been made by the owner or contractor, or if the lienor delivers an insufficient statement, the person aggrieved may petition the supreme court ... for an order directing the lienor within a time specified in the order to deliver to the petitioner the statement required by this section. Two days' notice in writing of such application shall be served upon the lienor. Such service shall be made in the manner provided by law for the personal service of a summons. The court or a justice or judge thereof shall hear the parties and upon being satisfied that the lienor has failed, neglected or refused to comply with the requirements of this section shall have an appropriate order directing such compliance. In case the lienor fails to comply with the order so made within the time specified, then upon five days' notice to the lienor, served in the manner provided by law for the personal service of a summons, the court or a justice or judge thereof may make an order canceling the lien.

In *Matter of Solow v Bethlehem Steel Corp.* (60 AD2d 826 [1st Dept 1978]), the Court explained: "Section 38 of the Lien Law does not establish an absolute right to a detailed statement from a lienor as to all the items of labor and/or material and the value thereof for which he claims a lien but does require a statement from a lienor as to items in dispute" (*citing Matter of 819 Sixth Ave. Corp. v T. & A. Assoc.*, 24 AD2d 446 [1st Dept 1965])." Thus, the lack of specificity is not necessarily a basis to deny plaintiff's request to amend its Complaint, however, it is sufficient to grant defendant's cross motion to compel production of the specifics.

In order for a Notice of Lien to be valid, it must substantially comply with the requirements of Lien Law § 9. With respect to amending a lien, Lien Law § 12-a provides:

> 1. Within sixty days after the original filing, a lienor may amend his lien upon twenty days notice to existing lienors, mortgagees and the owner, provided that no action or proceeding to enforce or cancel the mechanics' lien has been brought in the interim, where the purpose of the amendment is to reduce the amount of the lien, except the question of wilful exaggeration shall survive such amendment.
> 2. In a proper case, the court may, upon five days' notice to existing lienors, mortgagees and owner, make an order amending a notice of lien upon a public or private improvement, nunc pro tunc. However, no amendment shall be granted to the prejudice of an existing lienor, mortgagee or purchaser in good faith, as the case may be.

Thus, pursuant to Lien Law § 12-a, if the lienor establishes the validity of a lien by showing substantial compliance with Lien Law § 9, the notice may be amended *nunc pro tunc*, unless the amendment would prejudice existing mortgagees, purchasers or other lienors.

In *Matter of Perrin v Stempinski Realty Corp.*, (15 A.D.2d 48, 49-50 [1st Dept 1961]), the court refused to permit the amendment, however, the Court noted that an increase in the amount of the lien could be permissible in the "proper case" where there is some proof submitted to justify the court in allowing the amendment.

The court finds that defendant has failed to show that plaintiff's proposed amendment to its Complaint is palpably improper, insufficient as a matter of law, or devoid of merit. Notably, defendant concedes that plaintiff completed the additional work on the project,

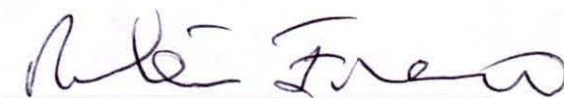
Accordingly, plaintiff's motion to amend the Complaint as set forth in its motion, is granted. The Amended Complaint is deemed served via electronic case filing.

Defendant's cross motion to compel plaintiff to provide an itemized statement of plaintiff's Amended Lien, pursuant to Lien Law § 38, is granted to the extent that plaintiff shall supply to defendant such items and information not already provided, within five days of receipt of a copy of this Order with Notice of Entry.

Plaintiff shall serve a copy of this Order upon defendant with Notice of Entry, within 20 days hereof.

The foregoing constitutes the Decision and Order of the court.

Dated: February 8, 2019



Rubén Franco, J.S.C.

HON. RUBÉN FRANCO