

Honest & Quality Corp. v 21214 Northern LLC

2019 NY Slip Op 32275(U)

June 7, 2019

Supreme Court, Queens County

Docket Number: 714380/2018

Judge: Marguerite A. Grays

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS IAS PART 4
Justice

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HONEST & QUALITY CORP.,

Index
No.: 714380/2018

Plaintiff(s),

Motion
Date: March 19, 2019

-against-

21214 NORTHERN LLC, WON CHONG KIM, and
JOHN DOES "1" through "25", said parties being
lienors who have yet to perfect their liens and being
fictitious and unknown to plaintiff,

Motion
Cal. No.: 10

Motion
Seq. No.: 1

Defendant(s).

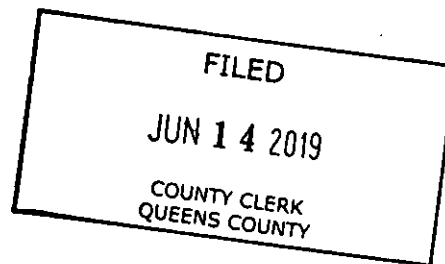
-----X
21214 NORTHERN LLC, WON CHONG KIM

Third-Party Plaintiff(s),

-against-

KINAM HAN and JOHN DOES No. 1 to 100.

Third-Party Defendant(s).



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The following papers numbered EF17- EF27, EF31-EF33, EF36-EF37, EF39 and EF40, read on this motion by plaintiff Honest & Quality Corp., and third-party defendant Kinam Han for an Order pursuant to CPLR §3211(a)(7), dismissing the counterclaim and third-party complaint brought against them, and on this cross-motion by defendant/third-party plaintiffs 21214 Northern LLC and Won Chong Kim for an Order, *inter alia*, permitting them to serve an amended answer, counterclaim, and third-party complaint.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	EF17-EF26
Notice of Cross Motion - Affidavits - Exhibits	EF27
Answering Affidavits - Exhibits	EF32-EF33
Reply Affidavits	EF36-EF37, EF40
Memoranda of Law	EF18, EF31, EF39

Upon the foregoing papers it is ordered that this motion and cross-motion are determined as follows:

I. The Allegations of the Complaint

On or about November 6, 2014, plaintiff Honest & Quality Corp. (contractor) and defendant 21214 Northern LLC (owner) entered into a contract whereby the former agreed to supply labor and materials required for the completion of a construction project at premises known as 212-12 Northern Boulevard, Bayside, New York. Defendant Won Chong Kim guaranteed the defendant owner's obligations under the contract. The plaintiff supplied the labor and materials required by the contract except when the defendant owner prevented its performance. The defendant owner wrongfully terminated the contract and has not paid at least \$1,253,534.54 due under the contract.

On or about September 12, 2018, the plaintiff filed a notice of lien with the Clerk of the County of Queens in the amount of \$1,253,534,54.

II. The Allegations of the Counterclaim and the Third-Party Complaint

Defendant Won Chong Kim is the principal of the defendant owner, and third-party defendant Ki Nam Han is the principal of the plaintiff contractor.

On or about May 6, 2015, the plaintiff contractor and the defendant owner entered into a construction contract whereby the former obligated itself to build a commercial building located at 212-14 Northern Boulevard, Bayside, New York at a price of \$3,870,000. Third-Party defendant Han guaranteed the performance of the plaintiff contractor. The defendant owner has already paid \$3,493,173. The plaintiff breached the contract by, *inter alia*, failing to perform its obligations in a workmanlike manner and failing to supply materials in accordance with contract specifications. On or about March 9, 2018, the defendant owner terminated the contract with the project not substantially completed. The plaintiff thereafter filed an exaggerated mechanic's lien.

III. Discussion and Disposition

A. The Pleadings

The motion by the plaintiff contractor and third-party defendant Han for an Order pursuant to CPLR §3211(a)(7) dismissing the counterclaim and third-party complaint brought against them is granted. The branch of the cross-motion by the defendants/third-party plaintiffs for an Order pursuant to CPLR §3025(b) permitting them to serve an amended

answer, counterclaim and third-party complaint is granted to the extent that they may serve the plaintiff with an amended answer and counterclaim. The third-party plaintiffs, if they are so advised, may seek leave to replead against third-party defendant Kinam Han based upon an adequately drawn amended third-party complaint and a showing of sufficient merit.

The motion was brought upon the ground that the counterclaim and third-party complaint referenced Lien Law §39-c, captioned “Repossession of materials not used,” which has no application to the case at bar. The defendant owner and defendant Kim concede that their pleadings mistakenly cite Lien Law §39-c instead of Lien Law § 39 and Lien Law §39-a which respectively provide that a willfully exaggerated lien is void and that a lienor has liability for filing a willfully exaggerated lien. CPLR §3025(b) provides that leave to amend a pleading “shall be freely given upon such terms as may be just” (*see, Jenal v. Brown*, 80 AD3d 727 [2011]; *Holchender v. We Transport, Inc.*, 292 AD2d 568 [2002]). As a general rule, the amendment of a pleading will be permitted where there is no significant prejudice or surprise to the other party (*see, Edenwald Contr. Co. v. City of New York*, 60 NY2d 957 [1983]; *Holchender v. We Transport, Inc., supra*). There is none in this case.

In regard to the proposed amended third-party-complaint against third-party defendant Kinam Han, a party seeking to amend his pleading has the burden of establishing that the proposed amendment has merit (*see, Manhattan Real Estate Equities Group LLC v. Pine Equity NY, Inc.*, 27 AD3d 323 [2006]).

Lien Law § 39-a, “Liability of lienor where lien has been declared void on account of wilful exaggeration,” provides in relevant part: “Where in any action or proceeding to enforce a mechanic's lien upon a private or public improvement the Court shall have declared said lien to be void on account of wilful exaggeration the person filing such notice of lien shall be liable in damages to the owner or contractor.” (Emphasis added.) In the case at bar, plaintiff Honest & Quality Corp. filed the notice of lien, not its principal, defendant Kinam Han. The third-party plaintiffs did not show on this motion that Kinam Han, in addition to the contractor, may be liable under Lien Law §39-a because he signed the notice of lien as the principal of the contractor. Moreover, while there are various common law remedies available to a property owner where damages result from the wilful exaggeration of a lien (*see, Neptune Estates, LLC v. Big Poll & Son Const., LLC*, 39 Misc 3d 649 [(Sup. Ct.2013)]), and the third-party plaintiffs suggest that Kinam Han may have tort liability for doing so, the tersely drawn proposed amended third-party complaint does not adequately give notice of such theories. The papers submitted in support of the proposed third-party complaint barely address the issue of the principal’s liability. The third-party plaintiffs, if they are so advised, may seek leave to replead based upon an adequately drawn amended third-party complaint and a showing of sufficient merit.

B. Discharge of the Lien

The branch of the cross-motion by the defendants/third party plaintiffs which is for an Order summarily discharging the lien is denied. The branch of the cross-motion by the defendants/third-party plaintiffs which is for an Order awarding them costs, and fees, because of the willful exaggeration of a mechanic's lien is denied.

Lien Law § 19(6) permits an owner of property to apply in the Supreme Court for an Order summarily discharging of record a lien under certain statutorily specified circumstances (*see, In re Lowe*, 4 AD3d 476 [2004]). Lien Law §19(6) “ authorizes summary discharge whenever: first, the character of the labor or the materials furnished as identified upon the face of the notice of lien, and for which a lien is claimed, discloses the absence of a valid lien; or, second, the notice of lien is invalid for failure of the lienor to have complied with the provisions of section 9 of the Lien Law relative to particular contents of the notice; or, third, public records disclose a failure to have complied with section 10 of the Lien Law relative to filing requirements” (*Dember Const. Corp. v. P & R Elec. Corp.*, 76 AD2d 540, 542 [1980]).

Where there is no defect on the face of the notice of lien, the Court cannot summarily discharge the lien pursuant to Lien Law §19 (6). (*Northside Tower Realty, LLC v. Klin Const. Group, Inc.*, 73 AD3d 1072 [2010]; *In re Lowe, supra*; *see Taocon, Inc. v. Urban D.C. Inc.*, 110 AD3d 423, 423 [2013] [“ The Court correctly denied the petition for summary discharge of the lien on the ground that it was untimely filed, because the notice of lien sets forth dates indicating that the lien was filed within the applicable limitations period.”]). Where there is “ no defect upon the face of the notice of lien, any dispute regarding the validity of the lien must await trial thereof by foreclosure ”(*In re Lowe, supra*, 476). In other words, although Lien Law § 39 provides that a willfully exaggerated lien is void, the issue of willful or fraudulent exaggeration must ordinarily be left to the trial of the foreclosure action (*Coppola General Contracting Corp. v. Noble House Const. of NY Inc.*, 224 AD2d 856 [1996]). A motion to discharge a lien summarily pursuant to Lien Law § 19(6) must be denied where issues of fact exist (*see, 72 Pyrgi, Ltd. v Gkam Corp.*, 293 AD2d 387 [2002]).

The defendants argue that the lien should be discharged because “the documents before this Court irrefutably show that Plaintiff willfully overstated its mechanic's lien by intentionally including amounts for work Plaintiff did not perform and materials that Plaintiff did not furnish ***” On the other hand, the plaintiff contractor asserts that the notice of lien properly includes sums for change order work in excess of the contract price. Han swears: “There is no work included in H&Q's Mechanic's Lien that was not performed. Nor is there any prospective work in the Lien as Defendants allege”. The conflicting allegations of the parties have created issues of fact and credibility which must be left for trial.

C. Itemized Statement of the Mechanic's Lien

The branch of the defendants' cross-motion which is for an order compelling the plaintiff to provide the defendants with an itemized statement of the mechanic's lien is denied as moot.

Lien Law § 38, "Itemized statement may be required of lienor," provides in relevant part: "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" (see, *Plain Ave. Storage, LLC v. BRT Mgmt., LLC*, 165 AD3d 1264 [2018]).

The defendants' reply memorandum (p2) states: "On January 18, 2019, Plaintiff served Defendants with what purports to be an itemized statement of Plaintiff's Lien. This resolves a second prong of Defendants' five pronged Cross Motion ***".


D. Mediation and Arbitration

The branch of the cross-motion by the defendants/third-party plaintiffs which is for an order compelling the plaintiff to submit its contractual claims to mediation and arbitration is denied as moot.

The defendants/third-party plaintiffs state in their reply memorandum of law (p 1): "The parties have agreed to submit their reciprocal non-lien claims for breach of contract *** to ADR as required by the Parties' Contract. This resolves one of the five prongs of Defendants' Cross-Motion, provided the Court Orders, or the Parties enter into a stipulation, that requires the parties to submit all their Contract Claims to ADR." There appears to be no impediment to the parties' entering into whatever stipulation is necessary.

Dated:

JUN 07 2019



J.S.C.

FILED
JUN 14 2019
COUNTY CLERK
QUEENS COUNTY