

**Matter of Atria Bldrs., LLC v Red Hook Constr.
Group-II, LLC**

2019 NY Slip Op 32739(U)

September 13, 2019

Supreme Court, New York County

Docket Number: 157748/2019

Judge: Eileen A. Rakower

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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In the Matter of the Application of

Atria Builders, LLC,

Petitioner,

Index No:
157748/2019

- against -

**Decision and
Order**

Mot. Seq.: 1

Red Hook Construction Group-II, LLC,

Respondent.

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HON. EILEEN A. RAKOWER, J.S.C.

Petitioner Atria Builders (“Petitioner”) moves by Order to Show Cause pursuant to Lien Law 59 for an Order vacating the Notice of Lien (“the Lien”) filed by Respondent Red Hook Construction Group-II, LLC (“Respondent”), on January 17, 2018, pertaining to real property known as 461 West 34th Street, Block 00732, Lot 0001, in the County of New York, City and State of New York. The Lien named 34-10 Development, LLC as Owner, Respondent as the party by whom lienor was employed and Petitioner as contractor. The Lien was filed in the amount of \$2,128,920.14. The Lien was extended by the filing of an Extension of Mechanic’s Lien on January 7, 2019.

On January 23, 2019, Petitioner served a demand upon Respondent to commence an action to enforce the Lien within 30 days pursuant to Lien Law 59. Respondent did not commence an action to enforce the Lien within that time period.

Respondent has filed a Cross Petition seeking an order amending *nunc pro tunc* the Lien and giving Respondent additional time to commence an action to foreclose on such amended Lien. Respondent asserts that since the filing of the Lien, it has been in acting in good faith to negotiate a settlement with Petitioner of the amounts owed and to resolve some of the claims. Respondent seeks to have the amount of the Lien reduced from \$2,128,920.14 to \$816,656.66.

Respondent, in opposition, states that “the sole reason they (sic) failed to comply with the Notice was the simple fact of employee error.” Respondent submits the affidavit of its Vice President Jeff Gaeta (“Gaeta”). Gaeta states that Respondent failed to comply with the Notice to Commence because a former employee accepted service of it and did not advise management of the same. Gaeta states that “[w]ithout this payment [the payment owed by Petition], we will be irreparably harmed, and as stated, my business is a small business, and we have substantial difficulty in handling such a large sum to go unpaid.”

Respondent requests that the Court deny Petitioner’s motion and allow the attached Verified Complaint to Foreclose to be filed within 5 days of the Order. Petitioner, in reply, argues that Respondent has failed to establish a valid excuse for its failure to timely commence a foreclosure action.

The parties appeared for oral argument and were heard on the record on September 12, 2019.

Legal Standard

Section 59 of the Lien Law provides:

A mechanic’s lien notice of which has been filed on real property or a bond given to discharge the same may be vacated and cancelled or a deposit made to discharge a lien pursuant to section twenty may be returned, by an order of a court of record. Before such order shall be granted, a notice shall be served upon the lienor, either personally or by leaving it as his last known place of residence, with a person of suitable age, with directions to deliver it to the lienor. Such notice shall require the lienor to commence an action to enforce the lien, within a time specified in the notice, not less than thirty days from the time of service, or show cause at a special term of a court of record, or at a county court, in a county in which the property is situated, at a time and place specified therein, why the notice of lien filed or the bond given should not be vacated and cancelled, or the deposit returned, as the case may be. Proof of such service and that the lienor has not

commenced the action to foreclose such lien, as directed in the notice shall be made by affidavit, at the time of applying for such order.

“The Court has the discretion and duty to consider the equities of the case before it, and has the power to excuse the lienor for not commencing the action in the time specified in the notice.” *Matter of Radovsky*, 6 Misc. 3d 1018(A) (N.Y. Misc. 2004) at *3.

Discussion

The Court declines to exercise its discretion to excuse Respondent from not timely commencing its action to foreclose on the Lien. Respondent took no action during the first year of the Lien. Upon Respondent’s extension of the Lien beyond that one year period, Petitioner demanded Respondent to proceed with an action to foreclose within 30 days pursuant to Section 59 of the Lien Law. While the demand stimulated negotiations, it did not relieve Respondent of its obligation to move forward. In fact, without any further payment by Petitioner, the parties were able to resolve many issues and Respondent determined that the Lien amount should be reduced substantially. Respondent is not without recourse. The statute of limitations to proceed with regard to monies owed on a contract is six years and Respondent is well within its time to bring such a claim. However, the cloud of a mechanic’s lien without compliance with a demand to commence an action pursuant to Lien Law 59 should be lifted.

Wherefore it is hereby

ORDERED and ADJUDGED that the Order to Show Cause is granted and the Notice of Lien filed by Respondent Red Hook Construction Group-II, LLC, on January 17, 2018, pertaining to real property known as 461 West 34th Street, Block 00732, Lot 0001, in the County of New York, City and State of New York, naming 34-10 Development, LLC as Owner, Red Hook Construction Group-II, LLC as the party by whom lienor was employed and Atria Builders, LLC as contractor is DISCHARGED; and it is further

ORDERED that, upon service of this order with notice of entry, the Clerk of the County of New York is directed to vacate and cancel the notice of such lien; and it is further

ORDERED that the cross motion is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: September 13, 2019



Eileen A. Rakower, J.S.C.