

G Bldrs. V, LLC v Quality Waste Servs. Corp.

2019 NY Slip Op 33500(U)

November 26, 2019

Supreme Court, Kings County

Docket Number: 513827/2019

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

x

G BUILDERS V, LLC,

Petitioner,

**DECISION / ORDER
JUDGMENT**

-against-

**Index No. 513827/2019
Motion Seq. No. 1
Date Submitted:11/21/19
Cal No. 21**

QUALITY WASTE SERVICES CORP.,

Respondent.

x

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this petition to vacate a mechanic's lien.

Papers	NYSCEF Doc.
Order to Show Cause, Petition, Affidavit and Exhibits Annexed..	<u>1-10</u>
Affirmation and Affirmation in Opposition.....	<u>12-13</u>
Reply Affirmation.....	<u>15</u>

**Upon the foregoing cited papers, the Decision/Order on this application is
as follows:**

This is a petition to vacate a mechanic's lien filed on May 1, 2019 affecting property known as 81-91 North 6th Street, Brooklyn (Block 2326, Lots 37, 38, 39, 41, 42) in the sum of \$28,195.15 against property owner Williamsburg Portfolio II, LLC by respondent Quality Waste Services Corp., petitioner G Builders V LLC being the general contractor who hired respondent, and for the costs and disbursements of this proceeding.

The petitioner contends it served a 30 day demand notice, pursuant to Lien Law § 59, that respondent commence an action to enforce the lien, and that 30 days have since elapsed and no notice of pendency has been filed and no action to foreclose the

lien has been commenced. Thus, petitioner contends the mechanic's lien should be vacated.

Respondent counters that it has a separate pending action for breach of contract, quantum meruit, account stated and unjust enrichment against petitioner for \$450,554.75 in connection with demolition and other work at the subject location and at other locations. Respondent claims that its retained counsel, who was apparently inexperienced in this area, failed to file mechanic's liens in connection with those claims and that the subject lien was filed by respondent's principal, without the assistance of counsel.

Respondent argues that the 30 day period triggered by a notice under Lien Law § 59 to commence an action to enforce the lien is not a statute of limitations and that the court has discretion, in the interests of justice, to extend the time period to institute a foreclosure action. Respondent argues that it should not be punished for its prior attorney's failures and that the payment dispute is based upon petitioner's allegedly meritless deductions from the amount owed, apparently because of a claim by one of respondent's workers who was injured at another job site. Further, since petitioner is not the owner of the premises, respondent contends petitioner lacks standing to seek removal of the lien, and that costs and disbursements are not available under the statute.

Petitioner disputes that a failure of counsel is a basis to extent the period to commence a proceeding to foreclose a mechanic's lien under Lien Law § 59, and that the cases upon which respondent relies are distinguishable, as they involve situations where an attempt was made to timely commence an action to enforce the lien. Further,

petitioner notes that respondent does not deny receipt of the 30 day notice and took no action. In addition, petitioner maintains that disposition of this proceeding will have no impact on the separate action by respondent against petitioner. Finally, petitioner maintains it has standing insofar as it is contractually bound to resolve all issues arising out of its contract with the property owner.

Conclusions of Law

In a proceeding under Lien Law § 59 to vacate a mechanic's lien, the lienor must commence an action within the time specified in the notice or show sufficient cause why it has not done so (*Matter of Selwyn Realty Corp.*, 184 App Div. 355 [1 Dept 1918], *affd* 224 NY 559). "While Lien Law § 59 affords Supreme Court the discretion to consider the equities of the situation, respondent failed to properly furnish the court with evidence sufficient to warrant a denial of petitioner's application to vacate the liens as was their burden" (*Kushaqua Estates Inc. v Bonded Concrete Inc.*, 215 AD2d 993, 994 [3d Dept 1995] [internal citations omitted]). Here, respondent has not denied proper service of the notice and offers no real explanation as to why the notice was not acted upon (see *M3GH Properties LLC v Debut Concrete & Gen. Const., Inc.*, 18 Misc 3d 1108[A], 2007 NY Slip Op. 52473[U] [Sup Ct Suffolk County 2007]; *In re Cancellation of a Mech.'s Lien on Real Prop. at 81 Brookline Ave., Albany, New York 12203*, 3 Misc. 3d 1105(A); 2004 NY Slip Op. 50426[U] [Sup Ct Albany County 2004]; *cf. In Jackson v. Haven*, 87 App Div 236 [1st Dept 1903] ["the lienor had served one of the defendants, but had failed to serve the owner, in consequence of the inability of the process server to find him. This court held that failure to make the service was sufficiently excused,

and affirmed an order denying a motion to cancel the lien"). Further, while respondent may lose the lien on the property, the action against the general contractor, which whom it has a dispute, will remain (see *M3GH Properties LLC, supra; In re Cancellation of a Mech.'s Lien on Real Prop. at 81 Brookline Ave., Albany, New York 12203*, 3 Misc. 3d 1105(A); 2004 NY Slip Op. 50426[U]).

Further, contrary to respondent's contention, it has long been held that a general contractor may serve a notice pursuant to Lien Law § 59 and has standing to bring a petition to vacate the lien (see *In re Cancellation of a Mech.'s Lien on Real Prop. at 81 Brookline Ave., Albany, New York 12203*, 3 Misc. 3d 1105(A); 2004 NY Slip Op. 50426[U]; *In re Weeks*, 73 Misc 242, 243 [Sup Ct, Queens County 1911]).

Accordingly, it is

ORDERED and **ADJUDGED** that the petition is granted. The mechanic's lien filed by respondent Quality Waste Services Corp. on May 1, 2019 against the property known as 81-91 North 6th Street (Block 2326, Lots 37, 38, 39, 41, 42), in the sum of \$28,195.15, against Williamsburg Portfolio II, LLC as owner, with petitioner G Builders V LLC as the employer, is hereby vacated, and the Clerk of Kings County is directed to vacate and cancel such lien of record accordingly.

This constitutes the decision, order and judgment of the court.

Dated: November 26, 2019

ENTER :



Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court