

NJE Transp. Co. LLC v River City Constr. Servs.
2020 NY Slip Op 31638(U)
May 27, 2020
Supreme Court, Kings County
Docket Number: 513822/18
Judge: Lara J. Genovesi
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 27th day of May 2020.

P R E S E N T:

HON. LARA J. GENOVESI,
J.S.C.

-----X

NJE TRANSPORTATION CO. LLC,

Index No.: 513822/18

Plaintiff,

DECISION & ORDER

-against-

RIVER CITY CONSTRUCTION SERVICES
and SO DEVELOPMENT ENTERPRISES, LLC,

Defendants.

-----X

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	<u>NYSCEF Doc. No.:</u>
Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed _____	_____ 50-52
Opposing Affidavits (Affirmations) _____	_____ 82-83
Reply Affidavits (Affirmations) _____	_____ 89

Introduction

Upon the foregoing papers, defendant SO Development Enterprises, LLC (SOD) moves, sequence number two, pursuant to CPLR § 3212 and Lien Law § 4, for an order awarding it summary judgment dismissing plaintiff NJE Transportation Co. LLC’s (NJE) first cause of action and vacating NJE’s mechanic’s lien. Plaintiff opposes this application.

Background and Procedural History

SOD owns certain real property located at 2702 West 15th Street, Brooklyn, New York (the property) and at all relevant times was represented by its agent, non-party Global Trade House, Inc. (Global). On July 27, 2016, Global hired defendant River City Construction Services (River City) to serve as the general contractor in connection with a construction and improvement project involving the property. Thereafter, on November 13, 2016, River City hired plaintiff NJE as a subcontractor to perform hauling and soil disposal work on the project. In order to finance the contract and construction costs of the project, SOD took out a mortgage on the property and, between December 2016 and November 2017, River City made five requisitions to SOD's bank for contract payments in the total amount of \$2,907,065.67, which were paid in full. The last requisition was made on October 10, 2017 for \$247,382.68 and was paid in full on November 2, 2017. On November 17, 2017, NJE filed a mechanic's lien against River City and the property in the amount of \$27,618.78. In this regard, NJE claimed it was owed this amount for services rendered under its subcontract with River City.

Beginning in or about October 2017, all work on the project ceased. On January 11, 2018, River City filed a mechanic's lien against the property, alleging that it was owed \$766,290.97 for work performed on the project. On January 24, 2018, Global terminated River City effective February 2, 2018. On February 23, 2018, Global submitted a claim against River City in the amount of \$1,558,957.91 to the architect Walter Marin pursuant to the dispute resolution provisions in the contract between Global

and River City. On March 8, 2018, the architect, as the initial decision maker under the dispute resolution procedures, issued a written determination finding Global's claims to be valid and accurate. In this regard, the architect noted that River City had been paid \$3,286,096 out of an initial contract price of \$5,325,350 but had only completed 25% of the work based upon what was physically observed onsite. On April 6, 2018, Global sent River City a demand for mediation pursuant to the dispute resolution provisions in the contract between the parties. However, on May 23, 2018, River City rejected the mediation demand and refused to participate in mediation. As a result, the mediator declared an impasse.

On April 19, 2018, Global filed a petition in this court seeking to vacate River City's mechanic's lien on the property in the event River City failed to commence a foreclosure action to enforce the lien by May 31, 2018. In an order dated May 31, 2018, Hon. Loren Baily-Schiffman of this court issued an order granting Global's petition to vacate River City's mechanic's lien. On July 5, 2018, NJE commenced the instant action against River City and SOD. The first cause of action in the complaint alleged that, at the time NJE's mechanic's lien was filed against the property, there were amounts due and owing from SOD to River City in excess of the \$27,618.78 lien amount and that NJE was entitled to foreclose on the lien. The remaining two causes of action in the complaint asserted breach of contract and account stated claims against River City. SOD now moves for summary judgment dismissing the first cause of action against it and for an order vacating NJE's mechanic's lien.

Contentions

In support of its motion for summary judgment, SOD initially notes that, under relevant statutory and case law, a subcontractor's rights are derivative of the rights of the general contractor, and the subcontractor's lien may only be satisfied out of funds due and owing from the owner to the general contractor at the time the lien was filed.

However, according to SOD, at the time NJE filed its mechanic's lien on November 17, 2017, no money was owed by SOD to River City. In support of this contention, River City has submitted proof that all of the requisitions submitted by River City were paid in full, and that the final requisition was paid on November 2, 2017, more than two weeks before NJE filed its mechanic's lien against the property. SOD further notes that no additional requisitions have been submitted by River City and all construction work on the project ceased in October 2017. Finally, SOD points to the fact that the mechanic's lien filed against the property by River City was vacated by Justice Baily-Schiffman's May 31, 2018 order.

In further support of its summary judgment motion, SOD argues that the fact that there was a \$165,528.27 retainage fee held at the time of the final requisition does not demonstrate that a balance was still due River City at the time NJE's mechanic's lien was filed. In particular, SOD notes that, under the terms of the contract between the parties, the retainage fee was only payable upon the completion of the project and all punch list items. Here, it is undisputed that River City never completed the work. Thus, SOD maintains that the retainage fee was never due to River City and properly remained in its possession.

In opposition to SOD's motion, NJE maintains that there is an issue of fact regarding whether River City is entitled to the retainage fee inasmuch as there has been no finding that Global properly terminated its contract with River City prior to the competition of the work and River City has filed a mechanic's lien against the property contending that the owner defaulted on its obligations. In further opposition to SOD's motion, NJE maintains that, to the extent that Global/SOD are able to complete the project for less than the original contract price, its mechanic's lien would attach to the difference between the cost of completion and the unpaid contract amount when the lien was filed. According to NJE, further discovery is necessary in order to determine whether the cost of completion would exceed the unpaid contract amount.

Discussion

“Pursuant to statute, a mechanic's lien ‘will only attach to those funds due and owing to the general contractor at the time of its filing, or which may thereafter become due and owing’” (*SMI Building Sys., LLC, v. West 4th St. Dev. Group*, 83 A.D.3d 687, 920 N.Y.S.2d 397 [2 Dept., 2011], quoting *Albert J. Bruce, Ltd. v. Fahey*, 73 A.D.2d 632, 423 N.Y.S.2d 58 [2 Dept., 1979]; see also Lien Law §§ 3, 4[1]). Thus, “the rights of a subcontractor are derivative of the rights of the general contractor and a subcontractor's lien must be satisfied out of funds due and owing from the owner to the general contractor at the time the lien is filed” (*Timothy Coffey Nursery/Landscape, Inc., v. Gatz*, 304 A.D.2d 652, 757 N.Y.S.2d 596 [2 Dept., 2003] [internal quotations omitted]). Consequently, if no funds are due and owing the general contractor from the property

owner at the time a subcontractor files a mechanic's lien against an owner's property, the lien must fail (*see Albert J. Bunce, Ltd. v. Fahey*, 73 A.D.3d 632, *supra*).

Here, SOD has made a prima facie showing that, at the time NJE filed the mechanic's lien, no funds were due and owing River City. In particular, SOD has submitted proof that all five requisitions submitted by River City were paid in full prior to NJE's filing of the mechanic's lien. Further, although the fifth requisition indicates a retainage fund of \$165,528.27, River City was never entitled to these funds. In particular, the payment of the retainage funds was contingent upon River City's completion of the work and it is undisputed that River City was terminated from the project long before completion of the project. Moreover, River City possessed no future right of action with respect to these funds. In this regard, the architect, appointed pursuant to the alternative dispute resolution clause in the contract between River City and Global, determined that SOD/Global had a valid claim of \$1,558,957.91 against River City, an amount far exceeding any outstanding retainage fees (*Pecker Iron Works, Inc., v. The New York Trades Council Association of NYC Health Ctr. Inc.*, 22 A.D.3d 259, 802 N.Y.S.2d 399 [1 Dept., 2005], *lv denied* 6 N.Y.3d 259 [2006]). Further, River City refused to participate in mediation and its mechanic's lien filed against the property has been vacated by an order of this court.

As a final matter, there is no merit to NJE's argument that additional discovery is necessary in order to determine whether Global/SOD will be able to complete the project for less than the original contract price, thereby freeing up funds to which the mechanic's lien may attach. The mere hope that additional discovery will uncover evidence

sufficient to defeat a summary judgment motion is an insufficient basis to deny such a motion when the movant has satisfied its prima facie burden (*Licata v. Cuzzi*, 161 A.D.3d 844, 77 N.Y.S.3d 418 [2 Dept., 2018]; *Merchant v. Greyhound Bus Lines, Inc.*, 45 A.D.3d 745, 846 N.Y.S.2d 315 [2 Dept., 2007]). Moreover, as noted above, although River City has already been paid well over half the contract price, the architect determined that only 25% of work had been completed at the time River City abandoned the job site.

Conclusion

Accordingly, SOD's motion for summary judgment dismissing NJE's first cause of action against it and for an order vacating NJE's mechanic's lien is granted.

This constitutes the decision and order of the court.

E N T E R:



Hon. Lara J. Genovesi
J.S.C.

To:

Richard Zisholtz, Esq.
ZISHOLTZ & ZISHOLTZ, LLP
Attorney for Plaintiff
200 Garden City Plaza
Garden City, NY 11530

Matthew Corey Shwartz, Esq.
Tsyngauz & Associates
Attorney for Defendant
894 6th Avenue, 3rd Floor
New York, NY 10001