

Danya Cebus Constr., LLC v Bella Mgt. Group, Inc.

2020 NY Slip Op 32195(U)

July 6, 2020

Supreme Court, Kings County

Docket Number: 527013/2019

Judge: Debra Silber

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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.

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

X

DANYA CEBUS CONSTRUCTION, LLC,

Petitioner,

DECISION/ORDER

-against-

Index No. 527013/2019
Motion Seq. No. 1, 2
Date Submitted: 6/18/20

BELLA MANAGEMENT GROUP, INC.,

Respondent.

X

Recitation, as required by CPLR 2219(a), of the papers considered in the review of petitioner's petition for an itemized statement and respondent's motion to dismiss or stay the petition

Papers	NYSCEF Doc.
Order to Show Cause, Petition, Affirmation and Exhibits	<u>1-6</u>
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>8-22</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>23-24</u>
Reply Affirmation.....	<u>26</u>

Upon the foregoing cited papers, the Decision/Order is as follows:

This is a special proceeding arising out of a mechanic's lien. The lien was filed on March 15, 2019 by respondent (a subcontractor) against the property owner¹ and petitioner, the contractor. Petitioner served a "Demand for Itemized Statement of Lien Pursuant to Lien Law § 38" on July 5, 2019. An action to foreclose on the lien was commenced on September 26, 2019 under Ind. 521186/19. Petitioner Danya Cebus Construction, LLC ("DCC") filed this special proceeding (mot. seq. 1) a few months later, for an order pursuant to Lien Law § 38, directing respondent Bella Management Group ("BMG") to provide a Verified Itemized Statement of its Mechanic's Lien, specifically, "(i) the items of labor and/or materials and the value thereof that make up the amount for which Respondent claimed a

¹ 120-150 Union Avenue, Brooklyn, NY. Block: 2238 Lot: 49. The property is owned by 120 Union Asset LLC.

lien in the amount of \$338,000,00, and (ii) the terms of the contract under which the items were furnished.”

BMG’s action to foreclose on the lien, (hereinafter “foreclosure action”), also asserts several other claims, including breach of contract, unjust enrichment, quantum meruit, and account stated. In the complaint, BMG seeks to foreclose on the mechanic’s lien, as well as be awarded damages for the other causes of action.

New York Lien Law § 38 provides, in pertinent 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 materials 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.” Under Lien Law §38, such a demand requires a response, verified as provided in the statute, within 5 days. BMG did not respond within this timeframe, and DCC subsequently brought this Petition, by Order to Show Cause dated December 29, 2019, for an order compelling compliance.

BMG did not oppose the petition, and instead, on January 14, 2020, respondent BMG filed a pre-answer motion (mot. seq. 2) to dismiss the petition under CPLR 3211(a)(4), [prior action pending] arguing that BMG’s pending foreclosure action against DCC warrants the dismissal of DCC’s subsequent petition for an itemized statement. BMG urges the court to exercise its discretion and dismiss the petition. Specifically, BMG claims that the three requirements to activate this rule [CPLR 3211(a)(4)]: substantial identity of parties; sufficient similarity of actions; and substantially the same relief sought, are met, citing *Montalvo v Air Dock Sys.*, 37 AD3d 567, 567 [2d Dept 2007]; *Liebert v TIAA-CREF*, 34 AD3d 756, 757 [2d Dept 2006]; *White Light Prods. v On The Scene Prods.*, 231 AD2d 90, 93-94 [1st Dept 1997].

In the alternative, BMG seeks an order staying the petition for 30 days “or other such period of time as this court deems reasonable,” to enable BMG to bring a motion for consolidation pursuant to CPLR 602(a) before the Justice assigned to the foreclosure action. BMG argues that permitting this special proceeding to go forward could lead to parallel litigation with divergent results, causing BMG prejudice in the foreclosure action. BMG urges the court to stay DCC’s petition in order to avoid such prejudice. Further, BMG cites the principles of *res judicata* and collateral estoppel (issue preclusion), contending that DCC should have filed a motion in the foreclosure action instead of a separate petition. BMG also points to policy considerations inherent in the Lien Law and cites several decisions by the Appellate Divisions of the First and Second Department to illustrate the argument.

DCC opposes BMG’s motion to dismiss and argues that the summary nature inherent in petitions under Lien Law § 38 implies that they are meant to be resolved swiftly, pointing to the five-day response time outlined in the law as support for this interpretation. By contrast, the foreclosure action implicates eight different parties and multiple claims and counterclaims amongst them. DCC thus contends that granting BMG’s request to stay the petition so it can move to consolidate it with the foreclosure action would divest this special proceeding of its intended summary nature.

CPLR § 3211(a)(4)

CPLR 3211(a)(4) states that “a party may move to dismiss one or more causes of action asserted against him on the ground that there is another action pending between the same parties for the same cause of action in a court of any state or the United States.” The purpose of CPLR 3211(a)(4) is to spare defendants the time and expense of multiple

lawsuits over the same matter. Courts are accorded broad discretion under this rule in determining whether to dismiss the action (*Whitney v Whitney*, 57 NY2d 731, 731 [1982]).

For a motion to dismiss to be properly granted under 3211(a)(4), three conditions must be met: the parties of both actions must be substantially identical, the factual basis of both actions must be substantially the same, and the relief sought in both actions must be substantially the same (*PK Restaurant, LLC v Lifshutz*, 138 AD3d 434, 436 [1st Dept 2016]; *Bofinger v Bofinger*, 107 Misc 2d 573, 575 [Sup Ct Suffolk Co 1981]).

In general, the parties are sufficiently identical when at least one plaintiff and one defendant is common to each action (*Jaber v Elayyan*, 168 AD3d 693, 694-695 [2d Dept 2019]). In the present action, the substantial identity of the parties in both actions is met, since both the petitioner DCC and respondent BMG are parties to the foreclosure action. The fact that additional parties are also joined in the foreclosure action does not change the fact that these parties are parties in both actions (see *White Light Prods, Inc. v On the Scene Productions, Inc.* 231 AD2d 90, 94).

Although the parties to both actions are “sufficiently identical” within the meaning of CPLR §3211(a)(4), BMG’s motion to dismiss DCC’s petition must be denied, because neither the factual basis of the two matters nor the relief sought are sufficiently similar. While both claims arise out of the “same subject matter or the same series of alleged wrongs” (*Cherico, Cherico & Assoc. v Midollo*, 67 AD3d 622, 622 [2d Dept 2009], quoting *Kent Development Co., Inc. v Liccione*, 37 NY2d 899, 901 [1975]; *Jadron v 10 Leonard St., LLC*, 124 AD3d 842, 843 [2d Dept 2015]), petitioner here has a right to the information requested in its Demand in order to defend the foreclosure action. In conclusion, while there is some factual overlap in the two matters, the actionable wrongs do not align. The actionable wrong in the instant petition is BMG’s failure to comply with DCC’s Demand for

an Itemized List. In the foreclosure action, the actionable wrong is the failure to pay a sum allegedly owed to BMG.

Further, the relief sought by DCC's petition and the relief sought by BMG's foreclosure action are not substantially the same. DCC's petition seeks an order requiring respondent to provide a Verified Itemization of [BMG's] Mechanic's Lien (see *Spector v Zuckermann*, 287 AD2d 704, 706 [2d Dept 2001]). As this is a special proceeding, once the petition is granted or denied, the matter is finished. For these reasons, BMG's motion to dismiss must be denied.

CPLR § 2201

CPLR § 2201 allows the court to grant a stay of proceedings "upon such terms as may be just." Parties may invoke CPLR § 2201 based on another pending action. As with motions to dismiss under CPLR § 3211(a)(4), the court has broad discretion when making this determination. However, a stay "should not be granted . . . unless the other action presents complete identity of parties, causes of action, and relief sought" (*Lessard Architectural Group, Inc., P.C. v X & Y Dev. Group, LLC*, 88 AD3d 768 [2d Dept 2011]). In making its determination, the court may consider factors such as judicial economy, procedural orderliness and comity (*Theatre Confections, Inc. v Andrea Theatres, Inc.*, 126 AD2d 969, 970 [4th Dept 1987]). In the present case, both parties are sufficiently identical, but their causes of action and relief sought are not. Thus, this special proceeding should not be stayed for the same reason it cannot be dismissed under CPLR 3211(a)(4). Further, BMG's argument that allowing consolidation of the two proceedings would avoid any prejudice to it which would inevitably result from determining DCC's petition completely lacks merit.

BMG's remaining arguments invoke the doctrines of *res judicata* and collateral estoppel and Lien Law policy. BMG's argument that *res judicata* and collateral estoppel are applicable is inaccurate. *Res judicata* applies only to cases arising out of the same series of alleged wrongs. While the foreclosure action and DCC's petition are both related to the same mechanic's lien, they do not arise out of the same series of alleged wrongs, have different claims and request different relief.

BMG's final argument is that the Lien Law favors resolving all controversies together which arise out of liens which are filed against the same property is not strong enough to justify defeating the summary nature of DCC's petition. Granting this petition will not affect the other parties in the foreclosure action. BMG has thus not met its burden of proof for a stay. In an analogous case also involving a petition for itemization of a mechanic's lien and an action to foreclose the lien, the court came to a similar conclusion. It denied the respondent's motion to consolidate the petition with a pending foreclosure action against the petitioner because "[t]he summary nature of a special proceeding should not be consolidated with a plenary action" (Borough Const. Group, LLC v. Red Hook 160 LLC, No. 500308/19, 2019 WL 1102899 [Sup Ct Kings Co 2019], citing *Anastasi & Assoc. v Masaryk Towers Corp.*, 52 AD3d 241 [1st Dept 2008]).

Accordingly, it is **ORDERED** that the petition is granted. Respondent shall provide petitioner with a response to its Demand (E-File Doc 3) by e-filing, within ten days from the date of this order, "a verified statement in writing setting forth the items of labor and/or materials and the value thereof which make up the amount for which BMG claims a mechanic's lien, represented by a Notice Under Mechanic's Lien Law filed on or about March 15, 2019 in the Office of the Kings County Clerk, in the amount of \$338,000.00 against the property located at 150 Union Avenue, Brooklyn, New York; Block: 2238, Lot:

49. The said verified statement in writing shall also set forth the terms of the Contract under which the items were furnished.”

Respondent’s motion to dismiss is denied in its entirety.

This constitutes the decision and order of the court.

Dated: July 6, 2020

ENTER :



Hon. Debra Silber, J.S.C.