

Wheaton v M Studiolo LLC

2020 NY Slip Op 32728(U)

August 12, 2020

Supreme Court, New York County

Docket Number: 160126/2019

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

-----X

RENA WHEATON,

Petitioner,

- v -

M STUDIOLO LLC,

Respondent.

-----X

INDEX NO. 160126/2019

MOTION DATE 02/20/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 7, 8, 9, 10, 11, 12 were read on this motion to/for DISCHARGE/CANCEL MECHANICS LIEN

ORDER

Upon the foregoing documents, it is

ORDERED that the petition is granted, and the mechanic's lien is vacated; and it is further

ORDERED that the Notice of Mechanic's Lien filed by M Studiolo, LLC in the sum of \$24,092.26 on October 2, 2019 against certain real property situated in the City of New York, County of New York described as Sherman Square Realty Corp., New York, New York, being situated in Block 1162, Lot 29 on the New York County Tax Assessment Map; 201 West 70th Street Apt 22G New York, New York 10023, with Rena Miwako Wheaton and Kimio Wheaton as lienees, is hereby vacated and cancelled of record; and it is further

ORDERED that the Clerk of the County of New York is hereby directed to vacate and cancel the Notice of Mechanic's Lien, and to enter upon the lien docket, or other record of liens, opposite the endorsement of such Lien, a statement that it has been vacated and cancelled of record.

DECISION

Petitioner Rena Wheaton resides at 201 West 70th Street, Apartment 22G, New York, New York (the apartment).

Respondent M Studiolo LLC is a business organized and based in New York.

On April 13, 2017, the parties signed an Interior Design Agreement pursuant to which respondent was to provide certain services related to the renovation of the apartment's bathroom and kitchen (Exhibit to Petition, NYSCEF Doc. No. 3).

The agreement provided, in relevant part:

"Site Visits - shall make site visits to include space review and take measurements, architect walk-through, daily project management and scheduling.

. . . .

"Provide client architectural plans, layout and as required completed BOD (Board of Directors) package.

. . . .

"Project Management - Create and oversee project plan to include acquiring all products for the Project, manage contractor and sub-

contractors, coordinating deliveries and installations, etc.”

(id. ¶ 1.1).

The agreement named DeWalt Construction as the general contractor and stated that petitioner was to make certain payments directly to DeWalt (id. ¶ 3.2).

Significantly, the agreement stated:

“4.4 M Studiolo LLC may use subcontractors (including without limitation plumbers, electricians, painters, tile installers, floor sanders) for the Project, and agrees to use only licensed subcontractors including Home Improvement Contractors licensed by DCA and plumbers and electricians licensed by the New York City Department of Buildings (DOB). M Studiolo LLC shall be responsible for paying any Project subcontractors or supply vendors arranged by M Studiolo LLC, except for DeWalt Construction and any other contractor or subcontractor that is paid directly by Client as set forth in the Estimate or any Change Order”

(id. ¶ 4.4).

As for the cost of the project, the parties agreed:

“The total cost of the Project is capped and shall not exceed the total Estimates set forth in Exhibit A of \$91,241.98, excluding the cost of (i) new bath and kitchen plumbing riser lines, (ii) the reasonable cost of preparing the building Board of Directors (BOD) package and (iii) required building fees” (id. ¶ 3.8).

It is not disputed that petitioner paid respondent \$106,481.76 for its work; the approximately \$15,000 over the cap presumably was for riser lines, the BOD package, and building fees.

On October 1, 2019, respondent filed a mechanic's lien under Lien Law § 19 (6) for an additional \$24,092.26 (NYSCEF Doc. No. 4). The lien states that \$24,092.26 of respondent's total bill, which allegedly was \$131,157.66, remained outstanding (id. ¶¶ 5-6). The lien claims that petitioner was liable for the following: "Project Management, flooring, sink, backsplash, cabinetry, countertop, refrigerator, freestanding gas oven, microwave, dishwasher, faucet, paint, washer/dryer, closet doors, hardware, lighting, window treatments, interior entry doors, mirrors, closet shelving, medicine cabinets, base mouldings and wall coverings" (id. ¶ 5).

On October 18, 2019, petitioner commenced this proceeding, which seeks a court order discharging the lien under Lien Law § 19 (6).

The petition, verified personally by petitioner, raises two challenges.

First, petitioner alleges that respondent lacks the authority to file a lien because neither the company nor its principal obtained a home improvement contractor license, which is mandatory under New York City Administrative Code (Administrative Code) § 20-387 (id. ¶¶ 8-10). In that regard, she asserts that pursuant to the agreement, respondent performed home improvement services, and she paid the costs of such services. She also points to the face of the lien that describes the "material and labor furnished"

as: "project management, flooring, sink, backsplash, cabinetry, countertop, refrigerator, freestanding gas oven, microwave, dishwasher, faucet, pain, washer/dryer, closet doors, hardware, lighting, window treatments, interior entry doors, mirrors, closet shelving, medicine cabinets, base moulding and wall coverings."

Second, petitioner contends that respondent cannot seek the additional \$24,092.26, as it exceeds the \$91,241.98 cap, and that petitioner has already paid respondent "more than 30% above the actual cost, and more than the cap" (NYSCEF Doc. No. 1 ¶ 6).

In opposition, respondent, solely by affirmation of its attorney, who lacks personal knowledge, contends that it is an interior design company and that, therefore, the home improvement requirement is inapplicable. Counsel states that respondent is not a contractor within the meaning of Administrative Code § 20-386 (5) and that its work is not considered home improvement work under Administrative Code § 20-386 (2). Counsel points out that the contract in question is an "Interior Design Agreement" and that none of respondent's prescribed duties include home improvement work (NYSCEF Doc. No. 3). According to counsel, because the agreement specifies the names of the contractors who ultimately performed the work, respondent itself was not responsible for home improvement. It contends that its work as project manager did not require a license. As for the amount of the lien itself, respondent contends that "at the very least, there

exists a question of fact as to Respondent's claim" because the \$91,241.98 cap did not apply to "the costs for kitchen and plumbing riser lines, reasonable costs for preparing building Board of Director packages and building fees" (NYSCEF Doc. No. 9 [Affirmation in Opp] ¶ 10).

Analysis

A court has no inherent power to vacate or discharge a mechanic's lien except as authorized under Lien Law § 19 (6) (Matter of Luckyland (N.Y.), LLC v Core Cont. Constr., LLC, 83 AD3d 1073, 1074 [2d Dept 2011]). As is pertinent here, the law authorizes discharge where "for any . . . reason the notice of lien is invalid by reason of failure to comply with the provisions of section nine of this article" (Lien Law § 19 [6]).

As the case at bar under Lien Law § 19 (6) constitutes a special proceeding,

"CPLR 409(b) requires the court to make a summary determination of a special proceeding to the extent that the pleadings and papers raise no triable issues of fact and the same test and standards used when disposing of a motion for summary judgment in an action apply in resolving that question".

Lefkowitz v McMillen, 57 AD2d 979 (3d Dept. 1977).

Respondent filed its claim under Lien Law § 3. Under this provision,

"A contractor, subcontractor, laborer, materialman, . . . who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof, or of his agent,

contractor or subcontractor . . . shall have a lien for the principal and interest, of the value, or the agreed price, of such labor . . . upon the real property improved or to be improved and upon such improvement, from the time of filing a notice of such lien as prescribed in this chapter".

"The Home Improvement Business provisions of the Administrative Code of the City of New York were enacted to safeguard and protect consumers against fraudulent practices and inferior work by home contractors" (B & F Bldg. Corp. v Liebig, 76 NY2d 689, 692 [1990]; see Administrative Code § 20-385). Accordingly, courts construe the license requirement strictly in order to protect the purchasers (see Matter of Metrobuild Assoc., Inc. v Nahoum, 51 AD3d 555, 556 [1st Dept 2008] [dismissing claims for breach of contract and quantum meruit], lv denied 11 NY3d 704 [2008]). If the contract in question is one for home improvement services, therefore, the service provider must have a home improvement license or the contract is unenforceable against the homeowner (see Kamco Supply Corp. v JMT Bros. Realty, LLC, 98 AD3d 891 [1st Dept 2012] [referencing Administrative Code §§ 20-386, 20-387]). Under Lien Law § 19 (6), a party may petition the court to discharge a lien on this basis. The petitioner prevails if she or he "establish[es] prima facie that at the time the lien was filed, it owed no payment to the general contractor" (Kamco Supply Corp., 98 AD3d at 891 [in context of a motion for summary judgment dismissing a lien]). If the lienor lacks the necessary license,

there is no enforceable contract against the party seeking discharge and the court should grant the application (see id.).

In the case at hand, the parties dispute whether respondent is a home improvement contractor and whether the interior design agreement is really a home improvement contract. A home improvement contractor is anyone "who owns, operates, maintains, conducts, controls or transacts any home improvement or solicits any contract thereunder" (Administrative Code § 20-386 [5]). A home improvement contract is an oral or written agreement for these services between a contractor and a tenant, including a cooperative apartment owner (see Administrative Code § 20-386 [4]), as long as the work "is to be performed in, to or upon the residence or dwelling unit . . . for the performance of a home improvement and includes all labor, services and materials to be furnished and performed thereunder" (Administrative Code § 20-386 [6]).

After due deliberation, the court concludes that petitioner has satisfied her prima facie burden of showing that, given the extent of its involvement in the home improvement project, respondent was required to obtain a home improvement license, and alternatively, that she owes no payment to respondent.

According to the agreement, respondent promised to make daily site visits in order to provide project management and scheduling,

to “manage contractor¹ and subcontractors”, to acquire all products for the project, and to coordinate deliveries and installations. (Doc. No. 3 ¶¶ 1.1). It also explicitly provides that respondent had the authority to select and hire all subcontractors and had the responsibility to pay any such subcontractors (id. ¶ 4.4). Such services constitute more than the mere supervision of “the implementation of [its] own designs for aesthetic purposes” (cf. Franklin v Sobel, 38 AD3d 229, 230 [1st Dept 2007] (holding that plaintiff interior designer was not barred from recovery of his fee, where such designer “supervised the implementation of his own designs for aesthetic purposes, and never performed or supervised any services that required the expertise of a licensed professional”).

Here, respondent’s opposition is insufficient to shift the burden of proof of proof back to petitioner, as the conclusory statements in respondent’s attorney’s affirmation are unsupported by any evidence and, by itself, have no probative value (see Matter of Caruso, 132 Misc2d 513, 515 [Sup Ct, Saratoga County 1986]; see also Ramos v New York City Housing Authority, 264 AD2d 568 [1st Dept. 1959]). In his affirmation, respondent’s counsel refers to Exhibit A to the agreement, that he states specifies “home

¹Petitioner challenges the characterization of DeWalt Construction as general contractor based on the petition’s contention that respondent is the de facto general contractor. The court need not address this issue.

improvement contractors (Donald Burns Heating & Air Conditioning, Dewalt Construction, All City electrical, Mari Pain and Wallpaper and Wynne Plumbing)". The agreement states that DeWalt Construction is the general contractor, whom petitioner was responsible for paying directly (id. ¶¶ 3.2 and 4.4). Though Exhibit A, respondent's Bathroom and Kitchen Renovation Estimates, lists Dewalt Construction and various other contractors, such Estimates beg the question whether respondent hired and paid same, as it was authorized to do under the agreement. In fact, the grand total of such Estimates, \$91,241.98, which is also the cap under the agreement undisputedly paid by petitioner to respondent, supports petitioner's position that respondent paid such contractors. Moreover, under the agreement, respondent's own design fee of \$15,830.67 was due upon its submission to petitioner of waivers of liens from the general contractor and all subcontractors and vendors (id., ¶ 3.4).

Even if this were not the case, the court would grant the petition because petitioner has established that no money is due, to which respondent has raised no issue of fact.

Petitioner has established a prima facie case on this issue by submitting the contract, which shows a cap of \$91,241.98 with limited exclusions, and submitting the lien, by which respondent admits that petitioner paid \$106,481.76, over \$15,000 above the cap. Respondent's answer merely denies the allegations in the

petition, presents no sworn statement as to its version of the facts, and raises generic and conclusory affirmative defenses that for the most part are inapplicable to the instant dispute. As stated, respondent's attorney's affirmation has no probative value. Further, counsel's statement - that, "at the very least, there exists a question of fact as to Respondent's claim for the funds due in the mechanic's lien" because the \$91,241.98 cap "exclude[d] from the cap the costs for kitchen and plumbing riser lines, reasonable costs for preparing building Board of Director packages and building fees" (NYSCEF Doc. No. 9 ¶ 10) - also fails. The principal of respondent, who has control of the account, comes forward with no affidavit or record evidence that substantiates such conclusory assertion, such as an itemized accounting for the \$15,000 that petitioner concededly paid respondent over the cap. Moreover, the notice of lien, at paragraph 5, contradicts respondent counsel's assertions that payment is outstanding for riser lines, Board of Directors packages or building fees, as such notice does not list such items as part of the \$24,092.26 claim (NYSCEF Doc. No. 4).

Petitioner has come forward with her verified petition, based on her personal knowledge, which serves as an affidavit of facts. Her sworn statement, coupled with the agreement entitles her to vacatur of the lien, as because respondent performed home improvement services, was required to have a home improvement

license. As respondent fails to come forward with admissible evidence that he performed services only related to the aesthetics and design of the project, it has raised no issue of fact. The court need not and does not consider evidence that petitioner submits for the first time in her reply. See Ritt by Ritt v Lenox Hill Hosp., 182 AD2d 560, 562 (1st Dept. 1992).

8/12/2020

DATE

Debra A. James
DEBRA A. JAMES, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE