

Trugreen Contr. Corp. v Biltmore Gen. Contrs., Inc.
2020 NY Slip Op 33122(U)
September 23, 2020
Supreme Court, New York County
Docket Number: 653268/2018
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM
Justice
INDEX NO. 653268/2018
TRUGREEN CONTRACTING CORP. MOTION DATE 02/20/2020, 08/17/2020
Plaintiff, MOTION SEQ. NO. 001 002
- v -
BILTMORE GENERAL CONTRACTORS, INC., DECISION + ORDER ON MOTION
Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30 were read on this motion to/for DISCHARGE/CANCEL MECHANICS LIEN.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40 were read on this motion to/for DISCHARGE/CANCEL MECHANICS LIEN.

Upon the foregoing documents, (i) Biltmore General Contractors, Inc.'s (Biltmore) motion (Mtn. Seq. 002) to discharge the First Lien and the Second Lien (hereinafter defined) is granted solely to the extent that the First Lien is discharged but otherwise denied and (ii) Biltmore's motion (Mtn. Seq. 001) to discharge the First Lien is denied as moot.

The Relevant Facts and Circumstances

Reference is made to a Subcontract (the Subcontract; NYSCEF Doc. No. 17), dated November 29, 2016, by and between Biltmore as general contractor and Trugreen Contracting Corp. (Trugreen) as subcontractor, whereby Trugreen agreed to perform the duties of a trade consultant concerning masonry work for a project at 234 West 109th Street, New York, New York with the New York City School Construction Authority (the Project) (NYSCEF Doc. No.

32, ¶¶ 3-4). On or about March 23, 2018 and prior to completion of the Project, Trugreen vacated the work site and refused to complete outstanding tasks (*id.*, ¶ 5).

On April 4, 2018, Trugreen filed a mechanic's lien for public improvements against the President/CEO & Comptroller of NYC School Construction Authority and Biltmore in the amount of \$766,456 for "Supplied and Installed Masonry Materials, Etc." (the **First Lien**; NYSCEF Doc. No. 34). On June 28, 2018, Trugreen commenced this action for (i) foreclosure of the First Lien, (ii) breach of contract, (iii) quantum meruit, and (iv) an account stated. Trugreen did not file a notice of pendency in connection with the First Lien or an extension of the First Lien.

On January 22, 2019, Biltmore issued a demand for an itemized statement regarding the First Lien (NYSCEF Doc. No. 9). On January 27, 2019, Trugreen responded to Biltmore's demand advising that the labor and materials consisted of those items set forth in the Subcontract and indicated that they would produce supporting documents (NYSCEF Doc. No. 10).

Pursuant to a So-Ordered Stipulation, dated October 2, 2019, Trugreen was to "produce an itemized statement [within] 30 days or mechanics lien [would] be discharged" (NYSCEF Doc. No. 13). On October 30, 2019, Trugreen produced invoices, handwritten notes, and cheques concerning the labor and materials furnished for the Project (NYSCEF Doc. No. 22). Biltmore subsequently filed a motion to discharge the First Lien for failure to produce an itemized statement and for willful exaggeration (Mtn. Seq. 001).

On April 3, 2020, Trugreen filed a second mechanic's lien for public improvements, again, in the amount of \$766,456 for "Supplied and Installed Masonry Materials, Etc." (the **Second Lien**; NYSCEF Doc. No. 35) which led Biltmore to file a motion to discharge the First Lien and the Second Lien (Mtn. Seq. 002).

Discussion

A. Mtn. Seq. 002 (Biltmore's Motion to Discharge the First Lien and Second Lien)

Biltmore argues that the First Lien and the Second Lien should be discharged because Trugreen failed to: (i) timely extend the First Lien, and (ii) timely file a notice of pendency in connection with both the First Lien and the Second Lien. In its opposition papers, Trugreen concedes that the First Lien has expired, but asserts that the Second Lien is a valid public improvement lien that was filed within the applicable statutory period under Lien Law § 12.

Pursuant to Lien Law § 10(1), a notice of lien may be filed during progress of the work, or within eight months after contract completion or final performance of the work. Lien Law § 12 provides that a public improvement lien may be filed with the head of the department or bureau having charge of such construction, at any time before construction of the public improvement is complete and within thirty days after such completion and acceptance. A party may also cure an irregularity in an earlier lien by filing a successive lien for the same work, as long as the successive lien is filed within the period set forth in § 10 or § 12 (*see Matter of 361 Broadway Assoc. Holdings, LLC v Blonder Bldrs. Inc.*, 178 AD3d 494, 494 [1st Dept 2019]; *Berger Mfg. Co. v New York*, 206 NY 24, 32 [1912]).

Lien Law § 17 provides that a lien shall not last longer than one year after the notice of lien has been filed, unless an action is commenced to foreclose the lien and a notice of pendency is filed within that one-year period:

No lien specified in this article shall be a lien for a longer period than one year after the notice of lien has been filed, unless within that time an action is commenced to foreclose the lien, and a notice of the pendency of such action, whether in a court of record or in a court not of record, is filed with the county clerk of the county in which the notice of lien is filed, containing the names of the parties to the action, the object of the action, a brief description of the real property affected thereby, and the time of filing the notice of lien; or unless an extension to such lien, except for a lien on real property improved or to be improved with a single family dwelling, is filed with the county clerk of the county in which the notice of lien is filed within one year from the filing of the original notice of lien, continuing such lien and such lien shall be redocketed as of the date of filing such extension ...

(NY CLS Lien § 17 [emphasis added]; see *Madison Lexington Venture v Thomas Crimmins Contr. Co.*, 159 AD2d 256, 257-258 [1st Dept 1990] [holding commencement of a foreclosure action alone is insufficient to continue a lien without filing a notice of pendency], citing *Noce v Kaufman*, 2 NY2d 347, 351 [1957] [mechanic's lien lapsed because plaintiff failed to file a notice of pendency within one year from the filing of the lien]).

Here, Trugreen filed its First Lien on April 4, 2018 and timely commenced this action to foreclose on the First Lien two months later, on June 28, 2018. However, Trugreen did not file a notice of pendency within one year after the First Lien was filed. As a result, Trugreen's failure to file a notice of pendency within one year after the First Lien was filed, as required by Lien Law § 17, resulted in a lapse of the First Lien (see *Noce, supra*). Accordingly, the branch of Biltmore's motion to discharge the First Lien is granted.

The Second Lien was filed on April 3, 2020 and the record indicates that the Second Lien was timely filed as a successive lien to the First Lien because construction on the Project appears to be ongoing. In an affidavit, dated August 13, 2020, Mr. Geiser, owner of Biltmore, attested that Biltmore was unable to move forward on the Project due to the Second Lien (NYSCEF Doc. No. 32, ¶ 11). Furthermore, a notice of lien, whether for a customary mechanic's lien or public improvement lien may be filed at any time before construction is complete (Lien Law §§ 10, 12). In addition, while Trugreen has not filed a notice of pendency or an amended complaint in connection with the Second Lien, the Second Lien is valid for one year – *i.e.*, until April 3, 2021 – unless a notice of pendency and an amended complaint is filed in connection with the Second Lien (Lien Law § 17; *see Danica Plumbing & Heating, LLC v 3536 Cambridge Ave., LLC*, 62 AD3d 426, 427 [1st Dept 2009] [second lien was a valid successive lien because it was not shown to be defective, it was filed within the eight-month period applicable under Lien Law § 10, and plaintiff also filed an amended complaint referring only to the second lien and served and filed a notice of pendency referring to the second lien]). Accordingly, the branch of Biltmore's motion to discharge the Second Lien is denied.

B. Mtn. Seq. 001 (Biltmore's Motion to Discharge the First Lien)

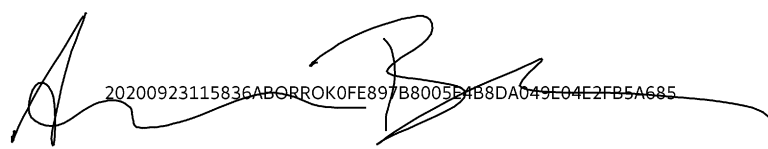
For the reasons set forth above, Biltmore's earlier filed motion to discharge the First Lien under Lien Law § 38 is denied as moot. However, for the avoidance of doubt, to the extent that Biltmore argues that the First Lien should be discharged for willful exaggeration, this court may not make a finding of willful exaggeration unless there is a motion for summary judgment or a trial, and neither is before the court on the instant motion (*see NDL Assoc., Inc. v Villanova Hgts., Inc.*, 99 AD3d 450, 450 [1st Dept 2012] [reversing trial court because it improperly held a

hearing on whether mechanic's lien willfully exaggerated prior to the close of discovery]; *LMF-RS Contr., Inc. v Kaljic*, 2013 NY Slip Op 32352[U], *5 [Sup Ct, NY County 2013], *aff'd* 126 AD3d 436 [1st Dept 2015] [finding of willful exaggeration awaits trial of foreclosure action or a motion for summary judgment, after discovery is complete and the foreclosure action is ripe for determination]).

Accordingly, it is

ORDERED that Biltmore's motion (Mtn. Seq. 002) to discharge the First Lien and the Second Lien is granted solely to the extent that the First Lien is discharged but otherwise denied; and it is further

ORDERED that Biltmore's motion (Mtn. Seq. 001) to discharge the First Lien is denied as moot.



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9/23/2020
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> GRANTED IN PART
	<input type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE