

**Red Hook Constr. Group-II LLC v 130 Seventh Ave.
S. Prop. LLC**

2020 NY Slip Op 33625(U)

October 28, 2020

Supreme Court, New York County

Docket Number: 654266/2020

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 14

Justice

-----X

RED HOOK CONSTRUCTION GROUP-II LLC,

Plaintiff,

- v -

130 SEVENTH AVENUE SOUTH PROPERTY LLC,T2G
LLC

Defendant.

-----X

INDEX NO. 654266/2020

MOTION DATE 10/27/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15

were read on this motion to/for DISMISS.

The motion by 130 Seventh Avenue South Property LLC (“130 Seventh”) to dismiss the fourth cause of action and to impose sanctions is granted in part and denied in part.

Background

This action arises out of construction work performed at a property owned by 130 Seventh. Plaintiff claims that it entered into a contract to do excavation, foundation and superstructure concrete work at the property in January 2017. It claims that it billed \$1,676,632.77 for its work at the property and that there is a balance remaining of \$168,313.28. Plaintiff claims that it subsequently filed a mechanic’s lien on the property on November 20, 2017.

130 Seventh moves to dismiss the fourth cause of action—foreclosure of the mechanic’s lien—on the ground that plaintiff does not have a valid lien. It points out that plaintiff’s ex parte application to extend the validity of the lien was denied and that plaintiff failed to re-submit its

application. 130 Seventh concludes that the lien expired by operation of law and is unenforceable.

It adds that plaintiff's submission of a verified pleading concerning the lien foreclosure claim is sanctionable conduct because plaintiff knew the lien had lapsed and it still pled a cause of action that was no longer viable.

In opposition, plaintiff alleges that it was simply a good faith mistake that it allowed the lien to expire and it was unaware of the procedural posture of the previous proceeding (under Index No. 160470/2019) in which plaintiff's request to extend the lien was denied. Counsel for plaintiff emphasizes that he was not the attorney who filed for the extension of the lien.

Plaintiff also argues that the instant motion is moot because plaintiff wants to file an amended complaint that does not include the fourth cause of action. It insists that 130 Seventh made the instant motion before it was served with the verified complaint and that plaintiff did not have adequate time to respond to 130 Seventh's request that plaintiff withdraw the fourth cause of action before this motion was made.

In reply, 130 Seventh disputes plaintiff's contention that it was a good faith mistake to include a cause of action to foreclose a lien that had expired. It points out that it sent an email to plaintiff's counsel on September 24, 2020 demanding that this cause of action be withdrawn by October 1, 2020 but this request was ignored.

Discussion

There is no dispute that the fourth cause of action lacks merit and should be dismissed. The lien previously expired and plaintiff should not have included it in its pleading. Plaintiff's request to file an amended complaint does not render the instant motion moot; plaintiff did not

cross-move for such relief nor did it attach a proposed amended pleading. The mere suggestion that plaintiff might do something in the future is not a basis to deny a motion as moot.

“The court rule set forth in 22 NYCRR 130–1.1, which is intended to limit frivolous and harassing behavior, authorizes a court, in its discretion, to award a party in a civil action reasonable attorney's fees resulting from frivolous conduct. Conduct is frivolous if, inter alia, it is completely without merit in law or undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party” (*Hutter v Citibank, N.A.*, 142 AD3d 1049, 1049-50, 38 NYS3d 35 [2d Dept 2016] [internal citations and quotations omitted]).

The Court denies the branch of the motion seeking sanctions. Certainly, counsel for 130 Seventh gave plaintiff a chance to withdraw this cause of action, but it gave counsel for plaintiff just a week to make that determination. This case was commenced on September 4, 2020 and the email from counsel for defendant was sent on September 24, 2020 with a deadline of October 1, 2020 to withdraw the subject claim (NYSCEF Doc. No. 8). This motion was made on October 9, 2020. The Court declines to find that sanctions should be levied where a cause of action was not withdrawn within two weeks in a case just over a month old.

Simply put, the timeline does not evidence an intent to harass or injure. Rather, the opposition from plaintiff suggests that there was confusion about the essential facts that underly this case. But sloppiness from attorneys or inadequate information from a client is not a basis for

sanctions based on frivolous conduct. Mistakes happen and plaintiff should not have included a cause of action that clearly was no longer viable. But not every oversight is a basis for sanctions.

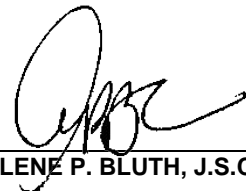
The Court observes that plaintiff admits that it made a mistake and no longer wants to pursue that cause of action; this is not a case where a party seeks to delay a case by insisting a claim that is wholly without merit should remain. The Court also observes that the money is still claimed due and the substance of the claim remains.

Accordingly, it is hereby

ORDERED that the motion by defendant 130 Seventh Avenue South Property LLC is granted to the extent that it sought dismissal of the fourth cause of action and denied to the extent it sought sanctions.

Remote Conference: February 19, 2021.

10/28/2020
DATE


ARLENE P. BLUTH, J.S.C.

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