

<b>Kappa Omicron, Inc. v Lot 10 Constr., LLC</b>
2020 NY Slip Op 33794(U)
November 13, 2020
Supreme Court, New York County
Docket Number: 155584/2019
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46

-----X

KAPPA OMICRON, INC.,

Index No. 155584/2019

Plaintiff

- against -

DECISION AND ORDER

LOT10 CONSTRUCTION, LLC, and A & M  
CONSTRUCTION, INC.,

Defendants

-----X

LUCY BILLINGS, J.S.C.:

The court grants plaintiff's motion to consolidate Lot 10 Construction, LLC v. Kappa Omicron, Inc., Index No. 162048/2019, in this court, where Lot10 Construction, LLC, seeks to foreclose on its mechanic's lien against Kappa Omicron, Inc., with this prior action challenging the validity of defendant Lot10 Construction's lien, under this action's Index Number. C.P.L.R. § 602(a). While Lot10 Construction opposes consolidation on the grounds that it would cause jury confusion, Rogin v. Rogin, 90 A.D.3d 507, 508 n. (1st Dep't 2011); Geneva Temps, Inc. v. New World Communities, Inc., 24 A.D.3d 332, 335 (1st Dep't 2005), both actions seek equitable relief that does not entitle the parties to a trial by a jury. C.P.L.R. § 4101(1); Security Pac.

Natl. Bank v. Evans, 148 A.D.3d 465, 466 (1st Dep't 2017);  
Horizon Asset Mgt., LLC v. Duffy, 106 A.D.3d 594, 595 (1st Dep't  
2013). Lot10 Construction's further contention that, absent  
facial invalidity of the mechanic's lien, challenges to the  
lien's validity must await its foreclosure, Rivera v. Department  
of Hous. Preserv. & Dev. of the City of N.Y., 29 N.Y.3d 45, 51  
(2017); Slazer Enters. Owner, LLC v. Gotham Greenwich Constr.  
Co., LLC, 50 A.D.3d 341, 341 (1st Dep't 2008), may be grounds to  
dismiss the action challenging the lien, but is not grounds to  
deny consolidation.

The actions are consolidated under Index Number 155584/2019  
and shall bear the following caption:

SUPREME COURT OF THE STATE OF NEW YORK  
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Plaintiff

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LOT10 CONSTRUCTION, LLC, and A & M  
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LOT10 CONSTRUCTION, LLC,

Plaintiff

- against -

KAPPA OMICRON, INC.,

Defendant

-----x

The pleadings in the two actions shall remain the pleadings in the consolidated action.

The court denies plaintiff Kappa Omicron's motion to the extent that Kappa Omicron seeks to consider its reply to defendant Lot10 Construction's first counterclaim for foreclosure of the lien a timely answer to Lot10 Construction's foreclosure action as a belated attempt to circumvent Kappa Omicron's default in answering that action. Its remedy is to move to vacate that default, supporting the motion in the first instance with an excuse for its default and a meritorious defense to Lot10 Construction's claims. C.P.L.R. § 5015(a); Shmuklyer v. Feintuch Communications, Inc., 158 A.D.3d 469, 470 (1st Dep't 2018); US Bank N.A. v. Richards, 155 A.D.3d 522, 522 (1st Dep't 2017).

Plaintiff Kappa Omicron shall serve this order with notice of entry on all parties in the consolidated actions and on the County Clerk and the General Clerk's Office according to the Protocol on Courthouse and County Clerk Procedures for

Electronically Filed Cases (accessible at the "E-Filing" page of the court's website at [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)). The County Clerk and the General Clerk's Office shall consolidate the files in the two actions and record the consolidation. The parties are to convene for a Status Conference November 18, 2020, at 3:00 p.m., via telephone.

DATED: November 13, 2020



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LUCY BILLINGS, J.S.C.

**LUCY BILLINGS**  
J.S.C.