

**257-263 W. 34th St., LLC v E&W Wholesale Elec.,
Inc.**

2021 NY Slip Op 31112(U)

April 7, 2021

Supreme Court, New York County

Docket Number: 156482/2020

Judge: Carol R. Edmead

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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. CAROL R. EDMEAD PART IAS MOTION 35EFM

Justice

-----X

257-263 W. 34TH STREET, LLC

Plaintiff,

- v -

E&W WHOLESALE ELECTRICAL, INC.,

Defendant.

-----X

INDEX NO. 156482/2020

MOTION DATE 12/01/2020

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26

were read on this motion to/for DISMISS

Upon the foregoing documents, it is

ORDERED that the application of Respondent E&W Wholesale Electrical, Inc. by Order to Show Cause for an order vacating this Court's default order entered October 8, 2020 that discharged the mechanic's lien filed by Respondent, and cancelling any bond issued by an insurance company to discharge the lien (Motion Seq. 002) is granted, and it is further

ORDERED that the Decision and Order of this Court dated October 8, 2020 is vacated in its entirety; and it is further

ORDERED that this proceeding is dismissed with prejudice; and it is further

ORDERED that counsel for Respondent shall serve a copy of this Order with notice of entry on all parties within twenty (20) days.

MEMORANDUM DECISION

In this Lien Law special proceeding, Respondent E&W Wholesale Electrical, Inc. moves by Order to Show Cause for an order vacating this Court's default order entered October 8, 2020 that discharged the mechanic's lien filed by Respondent, and cancelling any bond issued by an insurance company to discharge the lien (Motion Seq. 002). Respondent also moves for an order pursuant to CPLR § 3211(a)(2) dismissing this action for lack of subject matter jurisdiction and improper special proceeding. Petitioner 257-263 West 34th Street, LLC opposes the motion in its entirety.

BACKGROUND FACTS

In 2018, Respondent, an electrical wholesale company that provides supplies and services to construction projects, provided supplies to Reteg Electrical Inc. ("Reteg"), a subcontractor working on a construction site owned by Petitioner located at 263 West 34th Street (the subject premises). Reteg was hired by NY Developers & Management, LLC ("NDM"), the general contractor hired by Petitioner (NYSCEF doc No. 1, ¶ 4). Respondent contends that while it tendered the final delivery of all materials to the construction project, it was not fully paid and is owed an outstanding balance of \$101,949.78 (NYSCEF doc No. 21 at 1).

On June 24, 2020, Respondent filed a Notice of Mechanic's Lien against the subject premises (NYSCEF doc No. 3).

On August 17, 2020, Petitioner filed a Verified Petition and Order to Show Cause seeking to discharge the lien, arguing that it had paid both its general contractor and subcontractors in full and that therefore no lien fund exists (NYSCEF doc No. 6). As Respondent failed to appear or oppose, this Court entered an order on default discharging the lien and cancelling the bond on October 8, 2020 (NYSCEF doc No. 9).

On December 1, 2020, Respondent filed the instant motion by Order to Show Cause (NSYCEF doc No. 22). Respondent argues that the Court's default order should be vacated pursuant to CPLR § 5015 as Respondent has a reasonable excuse for its default and a meritorious defense to this proceeding. Respondent argues it was not properly served with the underlying petition and only became aware of this matter after Petitioner served a Notice of Entry of the October 8, 2020 decision. Respondent also argues that upon vacating the default order, this Court must dismiss this proceeding given that Petitioner has raised a substantive challenge to the underlying facts of the lien, and therefore this dispute must be adjudicated in a proper plenary action and cannot be summarily discharged.

In opposition, Petitioner argues that Respondent was properly served as the Order to Show Cause and petition were served upon Respondent through the New York Secretary of State by a licensed process server on September 4, 2020 (NYSCEF doc No. 18). Petitioner also argues that summarily dismissal of the lien was proper as no money was owed to Respondent and the lien is therefore invalid and subject to vacatur and dismissal pursuant to Lien Law § 19(6).

DISCUSSION

It is well settled that on a motion to vacate a default judgment entered based upon a failure to appear or timely serve an answer, the movant must demonstrate both a reasonable excuse for the delay and the existence of a meritorious defense (*Young v Richards*, 26 AD3d 249, 250 [1st Dept. 2006]; *Simon & Schuster, Inc. v Howe Plastics & Chemicals Co., Inc.*, 105 AD2d 604, 605 [1st Dept. 1984]).

Regarding a reasonable excuse for its failure to appear, Respondent contends that although Petitioner asserts it served the petition and Order to Show Cause on the New York Secretary of State on September 4, 2020, Respondent never received the same from the Secretary

of State and was not made aware of this proceeding until November 16, 2020, over a month after this Court issued the default judgment (NYSCEF doc No. 21 at 7).

Petitioner argues this does not constitute a reasonable excuse for default as Respondent was properly served via the Secretary of State pursuant to New York Business Corporation Law § 306 (NSYCEF doc No. 25 at 4). However, Petitioner overlooks the fact that it failed to properly comply with any of the service and notice requirements set forth in this Court's initialization of Petitioner's Order to Show Cause on September 1, 2020. Petitioner was obligated to serve the petition via overnight mail upon Respondent's counsel and was further "required to forward the skype invitation to all parties" for the Skype hearing that this Court scheduled for September 30 (NYSCEF doc No. 6). However, Petitioner did not serve via overnight mail, did not serve counsel for Respondent, and did not forward the skype information relative to the hearing to Respondent or its counsel (NYSCEF doc No. 21 at 7). Therefore, Respondent has demonstrated a reasonable excuse for its failure to appear earlier in this proceeding.

The Court also finds that Respondent has demonstrated a meritorious defense and has established that this proceeding must be dismissed. Pursuant to Lien Law § 19(6), a trial court has authority to summarily vacate and discharge a lien that is invalid on its face. However, the Court of Appeals has made it clear that when a lien is facially valid, but the underlying facts are in dispute, the matter must be "decided after a trial, and not in a summary proceeding" (*Rivera v Department of Hous. Preserv. & Dev. of the City of N.Y.*, 29 NY3d 45, 53 (2017) ["Summary discharge addresses only the facial validity of the notice of lien and leaves disputes regarding the claimed expenses in the underlying liens to be resolved at a foreclosure hearing or trial"]). CPLR § 103 also mandates that all claims must be brought by commencing a plenary action and not as

a special proceeding when the claims are not based in specific statutory authority, which here would be Lien Law § 19(6) (*Hunter Atl., Inc. v. Casagrande USA, Inc.*, 243 NYLJ 73 [Sup. Ct. NY Cty. 2010] [dismissing a special proceeding brought by a property owner to discharge a lien based on a non-facial challenge to the lien]).

Petitioner's opposition to this motion contends that the lien was "erroneously and incorrectly recorded" as Respondent has been paid in full for its services (NYSCEF doc No. 25 at 6). This, however, is a substantive challenge to the underlying facts of the lien, and only reinforces Respondent's position that the lien here is not subject to summary discharge. Petitioner claims it is "beyond dispute" that Respondent was paid in full, but clearly Respondent disputes this statement and must be afforded the right to litigate this issue and obtain discovery on this matter. Respondent is thus correct that Petitioner should have commenced a plenary action rather than a special proceeding via Order to Show Cause and a verified petition.

Accordingly, as the Court has determined that Respondent has demonstrated a reasonable excuse for its failure to appear and a meritorious defense to this proceeding, the Court finds that its Decision and Order dated October 8, 2020 must be vacated, and further, this action must be dismissed for improper special proceeding.

CONCLUSION

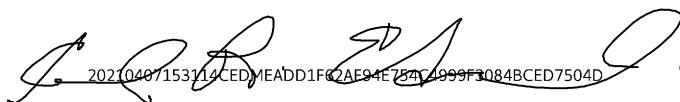
Based on the foregoing, it is hereby

ORDERED that the application of Respondent E&W Wholesale Electrical, Inc. by Order to Show Cause for an order vacating this Court's default order entered October 8, 2020 that discharged the mechanic's lien filed by Respondent, and cancelling any bond issued by an insurance company to discharge the lien (Motion Seq. 002) is granted, and it is further

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4/7/2021
DATE

CAROL R. EDMED, J.S.C.

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