

Herc Rentals, Inc. v Elevation Holdings, LLC

2021 NY Slip Op 31376(U)

April 16, 2021

Supreme Court, Kings County

Docket Number: 514210/2019

Judge: Carl J. Landicino

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 16th day of April, 2021.

PRESENT:

CARL J. LANDICINO, J.S.C.

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HERC RENTALS, INC.,

Plaintiff,

-against-

Index No.: 514210/2019

DECISION AND ORDER

Motions Sequence #1 and 3

ELEVATION HOLDINGS, LLC, BROOKLAND CAPITAL, LLC, BOAZ GILAD, WESTCHESTER FIRE INSURANCE COMPANY, XYZ CORPORATION 1 -10 and/or JOHN DOES, 1 -10 (Mortgage and Lien Holders),

Defendants.

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Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion:

	<u>Papers Numbered (NYSCEF)</u>
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	10-17, 19, 26-35
Opposing Affidavits (Affirmations).....	37-40
Reply Affidavits (Affirmations)	
Memorandum of Law	18, 36

After a review of the papers and oral argument the Court finds as follows:

The Plaintiff Herc Rentals, Inc. (hereinafter the "Plaintiff") has initiated this action through an amended complaint as against Elevation Holdings, LLC, Brookland Capital, LLC, Boaz Gilad, XYZ Corporation 1-10 and/or John Does 1-10 (Mortgage and Lien Holders) and Westchester Fire Insurance Company (hereinafter referred to individually or collectively as the "Defendants").¹ The Plaintiff seeks damages for breach of contract and other related causes of action in relation to

¹ While the initial complaint included 4 Ave BU as a defendant, the amended complaint does not. Accordingly, 4 Ave BU will be considered a non-party for the remainder of this decision.

work it allegedly performed at 554 Fourth Avenue, Brooklyn, New York, (hereinafter the “Premises” or “Property”). In the complaint, the Plaintiff alleges that it filed a Mechanic’s Lien in the amount of \$80,697.83 with the King’s County’s Clerk’s Office on or about November 9, 2018 (the “Mechanic’s Lien”). As part of the Amended Complaint, the Plaintiff contends that on or about December 10, 2018 Defendant Westchester Fire Insurance Company (hereinafter “Defendant Westchester”) issued and filed a discharge of lien bond, in the amount of \$88,767.61. The Plaintiff argues that as a result, Defendant Westchester has guaranteed that it will satisfy the Plaintiff’s lien claim in the event that Plaintiff is successful in establishing that its lien is valid.

Defendant Westchester now moves (motion sequence #1) by Order to Show Cause for an Order, 1) vacating the Plaintiff’s November 9, 2018 Notice Under Mechanic’s Lien Law filed against the Premises, pursuant to New York Lien Law §19(6), 2) Dismissing the Plaintiff’s First Amended Complaint against Defendant Westchester (the 10th Cause of Action or Count), or in the alternative, 3) granting a temporary stay of Defendant Westchester’s service of an Answer to the Complaint. Defendant Westchester, as surety, contends that Pursuant to Lien Law §19(4), in order to discharge the Lien against the Property, it issued a bond conditioned for the payment of any judgment which may be rendered in an action to enforce the lien.

Defendant Westchester contends that on or about October 2, 2017 (letter dated October 2, 2017), the State of New York, Office of Attorney General, accepted non-party 4 Ave BU, LLC’s Condominium Declaration and conversion of the Property to a Condominium. Westchester also contends that upon the filing of the Condominium Declaration forty three (43) separate residential units were established and listed as Apartment Building Block 1046 Lot 37 and Block 1046 Lots 1001 through 1043 for the individual units, by Declaration Recorded on September 24, 2018. The Mechanic’s Lien dated November 9, 2018 was filed on November 23, 2018 (see Defendant

Westchester's Motion, Exhibit 2) only reflecting and concerning Block 1046, Lot 37. On or about April 8, 2019, non-party 550 4th Ave. Investor, LLC apparently purchased all forty three condominium units from non-party 4 AVE BU, LLC.² Defendant Westchester contends that the Notice of Mechanic's Lien was filed after the Property was converted to condominiums and after the condominium declaration was filed. As a result, Defendant Westchester contends that the Lien constitutes a blanket lien that must be vacated and the cause of action as against Defendant Westchester should accordingly be dismissed, in that the Property description in the Mechanic's Lien is fatal to the lien's validity.

The Plaintiff opposes the motion and moves (motion sequence #3) for separate relief. The Plaintiff contends that the Lien at issue accurately sets forth a description of the Property as well as the name of the owner, and that at the time the Lien was filed, non-party 4 Ave BU, LLC owned all of the units located at the Premises. The Plaintiff further contends that the Lien is clear in that it adequately describes the Premises in accordance with Lien Law 9 (7). What is more, the Plaintiff argues that even if the Lien is viewed as a "blanket lien", as argued by Defendant Westchester, there is no requirement that the court determine it invalid and release the bond. The Plaintiff also cross moves (motion sequence #3) for an Order pursuant to CPLR § 3215, granting Plaintiff's default judgments against defendants, Elevation Holdings, LLC and Brookland Capital, LLC. No opposition to that motion has been filed.

Plaintiff's Motion (Motion Sequence #3)

As an initial matter the Court grants the Plaintiff's motion (motion sequence #3) for a default judgment as against Defendants Elevation Holdings, LLC and Brookland Capital, LLC.

² Although the parties do not dispute the date of the recording of the deed and date of transfer, the recording document in the moving papers is not complete. (See Defendant West's Motion, Exhibit "5").

CPLR 3215 provides that “[w]hen a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him.” In support of their application, the Plaintiff relies on affidavits of service of the supplemental summons and Amended Complaint upon the Defendants Elevation Holdings, LLC and Brookland Capital, LLC pursuant to Limited Liability Law 303 (upon the New York Secretary of State) on September 10, 2019. (See Plaintiff’s Motion, Exhibits “B” and “C”). Plaintiff shall settle an Order providing for inquest at the time of trial, on notice to all parties by certified mail, together with a copy of this Decision and Order, with Notice of Entry, within 60 days of entry.

Defendant Westchester’s Motion (Motion Sequence #1)

Turning to the merits of the application by Defendant Westchester to vacate the Plaintiff’s Mechanic’s Lien, pursuant to New York Lien Law §19(6), the Court finds that the lien was invalid and the bond should be released. A Court may discharge a mechanic's lien if it does not substantially comply with the provisions of the Lien Law. *See C & D Rodriguez Gen. Contracting, Inc. v. Gatell*, 295 AD2d 550, 744 N.Y.S.2d 889, 890 [2d Dept 2002]. In the instant proceeding, the Plaintiff filed a mechanic's lien against the property in the amount of \$80,697.83 for labor and materials purportedly last furnished on September 26, 2018. The lien was dated November 9, 2018 and filed with the King’s County’s Clerk’s Office on November 23, 2018. A review of the Mechanic's Lien shows that while it provides a detailed metes and bounds description of the property, in its Schedule “A” it states “SAID premises being known as and by street number 138 15th Street, Brooklyn, N.Y., Block: 1046, Lot: 37,” “Address 554 Fourth Avenue, Brooklyn, 11215.” At the time the Mechanic's Lien was filed, the New York Attorney General had already

approved the Condominium Declaration and the Declaration was filed reflecting the new single unit tax block and lots, as stated.

It is clear that "Real Property Law § 339-l(1) prohibits the creation of a lien against the common elements of a condominium, subsequent to the recording of a condominium declaration, without the unanimous consent of the unit owners." *Matter of M.M.E. Power Enterprises, Inc.*, 205 AD2d 631, 632, 613 N.Y.S.2d 266, 267 [2d Dept 1994]; *Ne. Restoration Corp. v. K & J Const. Co., L.P.*, 304 A.D.2d 306, 307, 757 N.Y.S.2d 542, 543 [1st Dept 2003]. Moreover "[t]he description of the property in the notice of lien created a blanket lien which is not valid as against the individual units, including the unsold units retained by the petitioner, or the common elements of the condominium." *Bridge View Tower, LLC v. Roco G.C. Corp.*, 69 AD3d 711, 712, 892 N.Y.S.2d 520, 521 [2d Dept 2010], quoting *Westage Towers Assocs. v. ABM Air Conditioning & Refrigeration, Inc.*, 187 AD2d 600, 600, 590 N.Y.S.2d 118, 118 [2d Dept 1992] (emphasis added); see also *Depth Capital LLC v. White Hill Restoration Inc.*, No. 108203-11, 2011 WL 5130815 [Sup Ct, New York County, 2011]. Although the Court in *A.C. Green Elec. Contractors, Inc. v. Fu*, 240 A.D.2d 243, 245, 658 N.Y.S.2d 602 [1st Dept 1997], held that the lien would continue based upon, "... allegations including work that was done before and after the individual unit owner purchased their units and that the new owners were alter egos of the Petitioner" (See *Matter of Myrtle Owner LLC (Ro-Sal Plumbing and Heating Inc.)* 32 Misc.3d 1221(A0, 934 N.Y.S.2d 35 [Sup Ct, Kings County, 2011]), there are no such allegations here. The work was performed prior to the transfer of the property to the purported current owner, non-party 550 4th Avenue Investor, LLC. and there is no allegation that the non-party 4 Avenue BU, LLC was related to the current owner. Although the current owner may have purchased all 43 units, thereby recognizing that the lien was of record, and included the building in its entirety, the lien is still a

blanket lien and the new owner did not consent to a lien against the common elements. A post declaration lien which fails reflect the separate lot numbers assigned to the units, “fails to properly describe the specific units that plaintiff sought to encumber.” *Northeast Restoration Corp. v. K&J. Constr. Co., L.P.*, 304 AD3d 306, 307, 757 N.Y.S.2d 542, 543 [1st Dept 2003]; see also *Application of Atlas Tile & Marble Works, Inc. & Atamco Inc.*, 191 A.D.2d 247, 248, 595 N.Y.S.2d 10, 11 [1st Dept 1993]. Moreover, the bond was apparently issued so as to allow for the unencumbered purchase of the property and the bonding of the lien is of no moment. “Nor does it avail plaintiff that the former owner bonded an invalid lien.” *Northeast Restoration Corp. v. K&J. Constr. Co., L.P.*, 304 AD3d 306, 307, 757 N.Y.S.2d 542, 543 [1st Dept 2003].

Accordingly, the Mechanic's Lien filed by the Plaintiff is invalid, the bond shall be released and the Tenth Cause of Action as against Defendant Westchester seeking to foreclosure upon the Mechanic's Lien is hereby dismissed. Permitting the Plaintiff to amend the lien would be improper because this relief was requested in opposition papers and not by motion, 2) permitting same would serve to prejudice the non-party present owner and possible interim purchases of individual units and 3) it assumes the validity of the lien. See *Bridge View Tower, LLC v. Roco G.C. Corp.*, 69 A.D.3d 711, 712, 892 N.Y.S.2d 520, 521 [2d Dept 2010]. “Finally, we note that notice of a defect does not cure the defect or mitigate the prejudice [the lender] would suffer if the amendment were granted.” See *Application of Atlas Tile & Marble Works, Inc. & Atamco Inc.*, 191 A.D.2d 247, 248, 595 N.Y.S.2d 10, 11 [1st Dept 1993]. The Plaintiff has not indicated whether additional purchasers or lien holders would be prejudiced were the Mechanic's Lien to survive. See *E. Coast Elec., Inc. v. 1200 Fifth Assocs., LLC*, 24 Misc. 3d 1246(A), 901 N.Y.S.2d 898 [Sup. Ct., NY Cnty, 2009].

Based upon the foregoing, it is hereby ORDERED as follows:

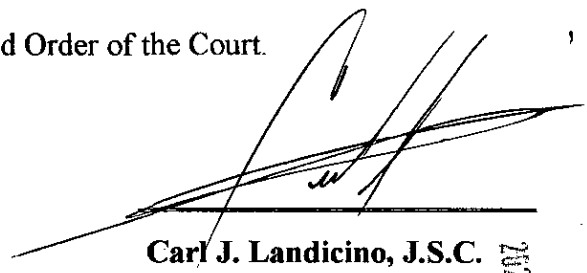
The motion by Defendant Westchester (motion sequence #1) is granted. The Notice of Mechanic's Lien (\$80,697.83) filed by the Plaintiff Herc Rentals, Inc. against non-party 4 Avenue BU, LLC in relation to the property known as 5544 4th Avenue Brooklyn, New York for Block 1046 Lot 37 in the Kings County Clerk's Office is invalid, and Defendant Westchester Fire Insurance Company's Bond in the sum of \$88,767.61 serving to discharge the lien, Bond Number K15745721, shall be released. Defendant to settle an Order, on notice to all parties, with a copy of this decision and order with notice of entry, within sixty days of entry, for purposes of public filing.

Defendant Westchester's application to dismiss the Plaintiff's Tenth Cause of Action as against Defendant Westchester is granted.

The Plaintiff's motion (motion sequence #3) for a default judgment as against Defendants Elevation Holdings, LLC and Brookland Capital, LLC is granted and the actions as against them are severed. Inquest shall be at the time of trial. Plaintiff to Settle an Order, on notice to all parties (by certified mail to the defaulting parties) together with a copy of this decision and order, within sixty days of entry.

The foregoing constitutes the Decision and Order of the Court.

ENTER:



Carl J. Landicino, J.S.C.

2021 APR 23 AM 10:00

KINGS COUNTY CLERK
FILED