

Bay Crane Serv. Inc. v Metropolitan Steel Indus., Inc.
2021 NY Slip Op 31537(U)
May 6, 2021
Supreme Court, New York County
Docket Number: 155961/2016
Judge: Alexander M. Tisch
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ALEXANDER M. TISCH PART IAS MOTION 18EFM

Justice

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BAY CRANE SERVICE INC., BAY CRANE SERVICE OF
LONG ISLAND, INC., BAY CRANE SERVICE OF NEW
JERSEY, INC.,

Plaintiff,

- v -

METROPOLITAN STEEL INDUSTRIES, INC., TISHMAN
CONSTRUCTION CORP., FEDERAL INSURANCE
COMPANY, JOHN DOE 1 THROUGH JOHN DOE 10

Defendant.

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INDEX NO. 155961/2016
MOTION DATE 10/22/2020
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 63, 64, 65, 66, 67, 68, 69, 70, 71

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

In this action, inter alia, to recover damages for breach of contract and to foreclose mechanic's liens, plaintiffs Bay Crane Service Inc. (Bay Crane) and Bay Crane Service of New Jersey, Inc. (Bay Crane NJ) move for summary judgment on the seventh and ninth causes of action in the complaint.

Defendants Tishman Construction Corp. (Tishman) and Federal Insurance Company (Federal) oppose the motion, and Tishman cross-moves for summary judgment dismissing the complaint insofar as asserted against it.

BACKGROUND

This action arises out of a construction project known as Riverside Center Building 5 (the Project), located at 1 West End Avenue in the County, City and State of New York (the Property). Defendant Tishman served as the construction manager for the Project. Tishman subcontracted the structural steel fabrication and erection work to defendant Metropolitan Steel

Industries, Inc. (MSI). MSI, in turn, entered into agreements with plaintiffs Bay Crane, Bay Crane Service of Long Island, Inc. (Bay Crane LI) and Bay Crane NJ, to rent cranes and related equipment needed for MSI's work on the Project.

According to plaintiffs, from about October 19, 2015 through January 22, 2016, they duly performed their obligations pursuant to their agreements with MSI. Plaintiffs assert that despite their demands for payment, some or all of the amounts owed to them went unpaid.

On May 6, 2016, Bay Crane, Bay Crane LI, and Bay Crane NJ, each filed a notice of mechanic's lien against the Property for the respective sums of \$115,630.28, \$1,400.00, and \$88,092.50, representing the unpaid fees. Tishman secured bonds from defendant Federal, as surety, to discharge the mechanic's liens.

On July 18, 2016, plaintiffs commenced this action against MSI, Tishman, and Federal,¹ seeking to recover damages for breach of contract and unjust enrichment against MSI (fourth through sixth causes of action), to foreclose on the mechanic's liens (seventh through ninth causes of action), and to recover on accounts stated (tenth through twelfth causes of action). MSI filed for bankruptcy protection in August 2016 and has not appeared in this action.

Bay Crane and Bay Crane NJ now move for summary judgment against Tishman and Federal on the seventh and ninth causes of action, which seek foreclosure of the mechanic's liens filed by Bay Crane and Bay Crane NJ, respectively. Tishman and Federal oppose the motion, and Tishman cross-moves for summary judgment dismissing the complaint insofar as asserted against it. For the reasons that follow, the motion and cross motion are denied.

¹ Plaintiffs also name John Doe 1 through 10 as defendants, identifying them as those individuals and/or entities unknown to plaintiffs and having or claiming an interest in, or lien upon, the Property.

DISCUSSION

On a motion for summary judgment, the “movant bears the heavy burden of establishing ‘a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact’” (*Deleon v New York City Sanitation Dept.*, 25 NY3d 1102, 1106 [2015], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). “Once this showing has been made . . . , the burden shifts to the party opposing the motion . . . to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Alvarez v Prospect Hosp.*, 68 NY2d at 324; see *Zuckerman v City of New York*, 49 NY2d at 562). On the motion, the “facts must be viewed ‘in the light most favorable to the non-moving party’” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]).

The court’s function on a motion for summary judgment “is issue finding rather than issue determination” (*Genesis Merchant Partners, L.P. v Gilbride, Tusa, Last & Spellane, LLC*, 157 AD3d 479, 481 [1st Dept 2018]). The motion “should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable” (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]).

The Lien Law

Pursuant to Lien Law § 3:

“A contractor [or] subcontractor . . . who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof, or of [the owner's] agent . . . shall have a lien for the principal and interest, of the value, or the agreed price, of such labor . . . or materials . . . from the time of filing a notice of such lien.”

The lienor has the burden of establishing “the amount of the outstanding debt by submitting *proof of either the price of its contract or the value of the labor and materials supplied*. The amount of the lien is limited by the contract under which it is claimed, and ordinarily a lienor is bound by the price term contained in the contract to which it is a party” (*NGU, Inc. v City of New York*, 189 AD3d 850, 852 [2d Dept 2020] [internal quotation marks and citations omitted] [emphasis added]).

“In addition to a lienor’s right to recover being limited by the contract price or reasonable value of the materials provided, it is further limited by the principle of subrogation” (*Peri Formwork Sys., Inc. v Lumbermens Mut. Cas. Co.*, 112 AD3d 171, 176 [2d Dept 2013]; see *C.C.C. Renovations, Inc. v Victoria Towers Dev. Corp.*, 168 AD3d 664, 666 [2d Dept 2019]). Lien Law § 4 (1) provides that a mechanic’s lien “shall extend to the owner’s right, title or interest in the real property and improvements, existing at the time of filing the notice of lien.” Moreover, “the lien shall not be for a sum greater than the sum earned and unpaid on the contract at the time of filing the notice of lien, and any sum subsequently earned thereon” (Lien Law § 4 [1]). As such,

“no individual mechanic’s lien can exceed the amount owed by the owner to the general contractor at the time of filing the lien. Money still due and owing from the owner to the contractor at the time of the filing of the lien, plus any sums subsequently earned thereon, is known as the ‘lien fund.’ The subcontractor’s right to recover is derivative or subrogated to the right of the general contractor to recover. Thus, if the general contractor is not owed any amount under its contract with the owner, then the subcontractor may not recover. . . . Where sub-subcontractors are involved, this rule becomes more complex, because the principle of subrogation applies to all tiers of subcontractor liens. Each party is subrogated to the rights of the contractor or subcontractor on the contracting tier above him. Therefore, in the case of a sub-subcontractor or a materialman to a subcontractor, it may not enforce its lien for an amount in excess of either (1) the amount of money owed to him by the subcontractor; (2) the amount of money owed by the general contractor to the subcontractor; or (3) the amount of money owed by the owner to the general contractor”

(*Peri Formwork Sys., Inc. v Lumbermens Mut. Cas. Co.*, 112 AD3d at 176-177 [internal quotation marks and citations omitted]).

Bay Crane and Bay Crane NJ's Motion

Applying the foregoing principles here, Bay Crane and Bay Crane NJ are not entitled to summary judgment. First, they fail to establish the price of the contract or the value of the labor and/or materials they supplied. In this regard, plaintiffs' Chief Financial Officer, Stuart Doloboff, states in his affidavit that:

“During the period between November 2015 and January 2016, Plaintiffs agreed to lease, and [MSI] agreed to purchase, various crane rental and related services from Plaintiffs at prices mutually agreed upon, several crane and related equipment rentals (collectively, the ‘Agreements’) - Copies of said Agreements are annexed hereto as Exhibit ‘A’”

(Doloboff Affidavit at ¶ 7, NYSCEF Doc. No. 25). However, the one-page document annexed to Doloboff's Affidavit as “Exhibit A,” entitled “Standard Rental Agreement,” does not specify a price (Standard Rental Agreement, NYSCEF Doc. No. 26). Assuming the contract prices were encompassed in another agreement (which is the implication from Doloboff's Affidavit), Doloboff does not identify such writing and fails to submit it with his affidavit (*see Residential Credit Solutions, Inc. v Gould*, 171 AD3d 638, 638-639 [1st Dept 2019] [“where an affiant's knowledge is based on unidentified and unproduced records, ‘the affidavit lacks any probative value’ and cannot be the basis for an award of summary judgment”], quoting *Dempsey v Intercontinental Hotel Corp.*, 126 AD2d 477, 479 [1st Dept 1987]; *see U.S. Bank N.A. v 22 S. Madison, LLC*, 170 AD3d 772, 774 [2d Dept 2019]).

The invoices attached to Doloboff's affidavit also fail to establish either the price of the contract or the value of the labor and/or materials supplied (Invoices, NYSCEF Doc. No. 27). Bay Crane and Bay Crane NJ cannot rely on their own invoices to establish the contract price without proof that the invoices accurately reflect the agreement they reached with MSI.

In addition, Bay Crane and Bay Crane NJ submit no evidence establishing that Tishman owed money to MSI when the liens were filed (*see Strober Bros. v Kitano Arms Corp.*, 224 AD2d 351, 353 [1st Dept 1996] [“the burden of proving the existence of a lien fund and entitlement to recovery of a lien lies with the lienholder”]; *Kenvil United Corp. v Tishman Constr. Corp. of NY*, 2020 NY Slip Op 32323 [U], **4-5 [Sup Ct, NY County 2020] [“As [plaintiff] has not established its prima facie case as to whether Tishman owed any money to MSI when the [plaintiff’s] Lien was filed, [plaintiff’s] motion for summary judgment must be denied”]).

Since Bay Crane and Bay Crane NJ fail to meet their initial burden of coming forward with evidence showing prima facie entitlement to judgment as a matter of law, it is unnecessary to determine whether the submissions in opposition raise a triable issue of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853; *Matter of New York City Asbestos Litig.*, 176 AD3d 506, 506 [1st Dept 2019]).

Tishman’s Cross Motion

Tishman contends that the complaint should be dismissed insofar as asserted against it because there are no funds due and owing from Tishman to MSI out of which plaintiffs’ liens can be satisfied. In support, Tishman submits its subcontract with MSI, pursuant to which MSI agreed to perform certain work on the Project for the contract price of \$4,750,000.00 (Tishman/MSI Subcontract at ¶ 58, NYSCEF Doc. No. 35). It also proffers the affidavit of its Vice President, Richard Ortiz, Tishman’s Senior Project Manager on the Project, wherein Ortiz explains that as a result of four change orders, the original contract price was adjusted to \$4,892,092.00 (Ortiz Affidavit at ¶ 11, NYSCEF Doc. No. 34). He further states that Tishman paid MSI the sum of \$4,771,548.45 for MSI’s work (*id.*). As proof of the amounts paid, Ortiz

annexes a payment summary spreadsheet and waiver of liens and release forms which indicate that as of May 15, 2016, a balance of \$120,543.55 remained unpaid on the subcontract with MSI (Payment Summary, NYSCEF Doc. No. 36; Waiver of Liens and Release Forms, NYSCEF Doc. No. 48).

The Court notes that since plaintiffs filed their liens on May 6, 2016, the foregoing documents suggest that full payment to MSI had not been made by Tishman prior to plaintiffs filing their liens. Therefore, it would appear from Tishman's own submissions, that a lien fund existed to which plaintiffs' liens could attach.

Tishman argues that despite the \$120,543.55 balance, it did not owe any amount to MSI at the time the liens were filed. In this regard, Ortiz states that in or about March 2016, Tishman terminated MSI's subcontract for cause because MSI "mis-fabricated certain key elements of work and had failed to perform in accordance with the Project schedule" (Ortiz Affidavit at ¶ 7, NYSCEF Doc. No. 34). He asserts that after MSI's default, Tishman had to correct and complete MSI's work, causing Tishman to incur expenses in the amount of \$1,634,351.36, far exceeding the balance remaining on the subcontract with MSI.

Ortiz annexes various exhibits to his affidavit consisting of, among other things, requests for payment and cancelled checks, which he asserts document the expenses incurred by Tishman in correcting and completing MSI's work. However, other than the conclusory statements made by Ortiz in his affidavit, Tishman offers no evidence concerning MSI's alleged breach or establishing that it caused Tishman to incur such expenses. Thus, Tishman fails to eliminate the existence of triable issue of fact with respect to whether it owed MSI money at the time plaintiffs filed their liens (*see Kenvil United Corp. v Tishman Constr. Corp. of NY*, 2020 NY Slip Op 32323 [U], **5-6).

Tishman's failure to establish its prima facie entitlement to judgment as a matter of law requires the denial of the cross motion without regard to the sufficiency of the opposing papers.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby:

ORDERED that the motion of plaintiffs Bay Crane Service Inc. and Bay Crane Service of New Jersey, Inc. for summary judgment on the seventh and ninth causes of action in the complaint is denied; and it is further

ORDERED that defendant Tishman Construction Corp.'s cross motion for summary judgment dismissing the complaint insofar as asserted against it is denied.

This constitutes the decision and order of the court.

5/6/2021
DATE

ALEXANDER M. TISCH, J.S.C.

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