

Dunaif v Tru-Facers Corp.
2021 NY Slip Op 31690(U)
May 21, 2021
Supreme Court, New York County
Docket Number: 152704/2020
Judge: Phillip Hom
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: <u>HON. PHILLIP HOM</u>	PART	IAS MOTION 2
<i>Justice</i>		
-----X	INDEX NO.	<u>152704/2020</u>
ANDREA DUNAIF	MOTION DATE	<u>N/A</u>
Petitioner,	MOTION SEQ. NO.	<u>001</u>
- v -		
TRU-FACERS CORP.,	DECISION + ORDER ON MOTION	
Respondent.		
-----X		

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40 were read on this motion to/for DISCHARGE/CANCEL MECHANICS LIEN.

Upon the foregoing documents, it is ORDERED and ADJUDGED that Petitioner Andrea Dunaif's ("Dunaif") Petition to vacate and cancel Respondent Tru-Facers Corp's ("Tru-Facers") Notice of Lien dated and filed with the New York County Clerk on October 29, 2019 is granted.

The Mechanic's Lien

Dunaif's petition seeks to vacate a \$9,500 Mechanic's Lien (the "Lien") dated October 29, 2019 that Tru-Facers placed on her apartment, known on the Land and Tax map of New York County as Block 1746, Lot 1068, and also known as 1485 Fifth Avenue, Apartment 14B, New York, NY 10035. Tru-Facers filed the Lien with the New York County Clerk on October 29, 2019.

On January 22, 2020, Dunaif served a Notice to Commence Action to Enforce Mechanic's Lien dated January 21, 2020 (the "Notice to Commence") on Tru-Facers. Dunaif also provided a copy of the Notice to Commence to Tru-Facer's attorney on January 27, 2020.

The Notice to Commence required Tru-Facers to start an action to enforce the Lien by March 3, 2020. Tru-Facers has not started any actions under the Notice to Commence.

Tru-Facers, through an affidavit by its President Samuel Rivera ("Rivera"), opposes Dunaif's Petition arguing that it is impracticable to foreclose on such a small amount and stating he was hospitalized with Covid-19 from April 5, 2020 through May 9, 2020. Tru-Facers also states that it has itemized the debt in response to a demand from Dunaif and is willing and able to start a foreclosure action, but has not in an attempt to settle this matter. Tru-Facers requests that the Court not vacate the Lien and grant it one last opportunity to start the foreclosure action. Dunaif replies that the Lien was an attempt to make her settle, but that she has no intentions of settling because of the alleged shoddy work that caused her to refuse to make a final payment and lead to Tru-Facers filing the Lien.

Lien Law §59

Lien Law §59 requires a lienor to start an action within the time specified in the notice or show sufficient cause why it has not done so. (*Matter of Selywyn Realty Corp.*, 184 App. Div. 355 [1st Dept. 1918], *aff'd* 224 NY 559 (affirming a trial Court decision to deny a motion to vacate a mechanics lien because delivery of process to sheriff within the time limit started the action)). Lien Law §59's time limits are not mandatory and the determination of whether to vacate a mechanics lien for failure of the lienor to start a proceeding to enforce it within 30 days is within the discretion of the Court. *Matter of Lasa Corp v. Sherwood*, 203 NYS 731(Sup. Ct. Qns. Cty 1960).

Tru-Facers argues that because of the small amount of the Lien, it would not be practical to enforce and it is seeking to settle the alleged debt. While evidence of settlement discussions

may provide grounds for denying a motion to vacate a lien (see *In re Xhema of N.Y., Inc.*, 2012 N.Y. Misc. LEXIS 6952 [Sup. Ct., NY Cty 2012]), Tru-Facers has provided no details of any ongoing settlement negotiations that would excuse it from enforcing its lien. In *Xhema of N.Y.*, the Court denied petitioner's application to vacate a mechanic's lien because there was evidence the parties were attempting to settle the claim through arbitration.

In the present case, there is no evidence of settlement negotiations, only a hope that because of the small size of the claimed debt, there would be settlement discussions. Dunaif's papers make clear that she is unwilling to pay anything else to Tru-Facers and, in fact, would sue Tru-Facers, if it were not cost prohibitive, for alleged damage to her marble tiles and sub-par work requiring her to hire another company to redo the work. The Court appreciates the challenges faced by many because of the Covid-19 pandemic, however Dunaif's notice was served on January 22, 2020 and required action by March 3, 2020, both days were before the mandatory shutdown of businesses in New York¹ and when Rivera was hospitalized with Covid-19. Since Tru-Facers has failed to provide sufficient cause explaining why it has not yet enforced the Lien, Dunaif's application to vacate the Lien is granted.

Conclusion

It is ORDERED and ADJUDGED that the petition is granted. The Mechanic's Lien filed by Respondent Tru-Facers Corp. on October 29, 2019 against the property known on the Land and Tax map of New York County as Block 1746, Lot 1068, and also known as 1485 Fifth Avenue, Apartment 14B, New York, NY 10035, in the amount of \$9,500 against Petitioner

¹ Governor Cuomo did not sign the Executive Order placing New York State on PAUSE, until March 20, 2020. <https://www.syracuse.com/coronavirus/2020/04/coronavirus-timeline-in-ny-heres-how-gov-cuomo-has-responded-to-covid-19-pandemic-since-january.html> (retrieved on May 20, 2021).

Andrea Dunaif is vacated and canceled and the Clerk of New York County is directed to vacate and cancel such Mechanic's Lien in the records.

This constitutes the decision, order and judgment of the Court.

5/21/2021

DATE

CHECK ONE:

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CASE DISPOSED

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GRANTED

☐

DENIED

APPLICATION:

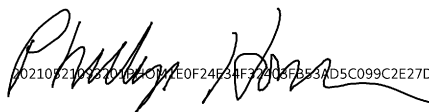
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SETTLE ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN



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PHILLIP HOM, J.S.C.

☐

NON-FINAL DISPOSITION

☐

GRANTED IN PART

☐

OTHER

☐

SUBMIT ORDER

☐

FIDUCIARY APPOINTMENT

☐

REFERENCE