

<b>Casella Constr. Corp. v 322 E. 93rd St. LLC</b>
2022 NY Slip Op 30203(U)
January 18, 2022
Supreme Court, New York County
Docket Number: Index No. 155098/2017
Judge: Verna Saunders
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. VERNA L. SAUNDERS, JSC PART 36M

Justice

-----X

INDEX NO. 155098/2017

CASELLA CONSTRUCTION CORPORATION,
Plaintiff,

MOTION SEQ. NO. 006

- v -

322 EAST 93RD STREET LLC, 324 E. 93 LLC,
Defendant.

DECISION + ORDER ON
MOTION

-----X

322 EAST 93RD STREET LLC, 324 E. 93 LLC,
Counterclaimant,

- v -

324 E. 93 LLC,
Additional Counterclaim Defendant,

-----X

324 E. 93 LLC,
Fourth- Party Plaintiff,

- v -

DAVID SHEPHERD and ASHLEY SHEPHERD,
Fourth- Party Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 006) 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 239, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264

were read on this motion to/for

SUMMARY JUDGMENT

Plaintiff commenced this action seeking foreclosure of a mechanic's lien in the amount of \$200,903.00 filed against the property located at 322 East 93rd Street, New York, New York.

Defendant and counterclaimant, 322 East 93rd Street, LLC ("Defendant") moves for summary judgment pursuant to CPLR 3212(a); (b); and (c) in its favor and against plaintiff Casella Construction Corporation ("Casella"). Defendant argues that Casella willfully exaggerated its mechanic's lien, pursuant to Lien Law § 39 in the amount of \$200, 903.40, as it is comprised of duplicative costs for work performed for which Casella had already received full payment.

The undisputed facts are as follows: On or about October 27, 2016, a six-alarm fire broke out at 324 East 93rd Street ("324" or "324 property") causing severe damage to the property, as well as, to the adjoining property at 322 East 93rd Street ("322" or "322 property") as the buildings share a wall. As a result of the fire, the New York City Department of Buildings (DOB) issued a violation and emergency repair order to the owner of 324 and mandated the performance of certain emergency work to the 324 property, as well as to the adjoining properties; to wit: 322 property and 326 East 93rd Street ("326" or "326 property"). The work included the erection of a sidewalk shed and a full demolition of the 324

property, along with remedial work to address the damages caused to the shared walls of the adjoining properties. The violation also required the performance of ancillary work to the adjoining properties such as protective and weatherproofing work to the shared walls.

Defendant asserts that pursuant to relevant subsections of NYC Building Code § 3309, the party performing the construction or demolition work, here 324 East 93<sup>rd</sup> Street LLC, ("324 LLC") is responsible for all costs and expenses relating to the mandatory protective work to the adjoining properties arising from said construction or demolition and the owners of the adjoining properties are only obligated to provide access to their properties through a license agreement. To address the violation, 324 LLC entered into a contract with Casella for performance of the required emergency repair work and the demolition of the 324 property. Since the 324 and 322 properties share a wall, 324 LLC was required to secure the wall at the 322 property and defendant was required to grant access to Casella to perform the work called for under the contract with 324 LLC.

Further, defendant asserts that the work performed to its property by Casella was solely work which arose from the mandated demolition of the 324 property and thus, Casella was to pay for the costs and expense related to said work. Defendant avers Casella was paid \$1,120,016.64 by 324 LLC's insurance company for the work performed to address the emergency work mandated by the DOB violation. Insofar as the emergency work required repair to the adjoining properties, the contract sum included the work to be performed on defendant's property, defendant contends that Casella has been paid in full for the work it performed on its property. Defendant further avers that it never entered into a contract or agreement with Casella which would permit Casella's exaggerated mechanic's lien on its property. In essence, defendant argues that this court should grant its motion for summary judgment voiding the lien on its property and dismissing Casella's cause of action for foreclosure of the lien on the ground that Casella willfully exaggerated the lien in the amount of \$200,903.40 as it is comprised of duplicative costs already paid for by 324 LLC's insurance to cover the work 324 LLC was mandated to perform pursuant to the DOB violation. In addition, defendant seeks statutory damages resulting from the lien.

In opposition, Casella argues that the lien was not exaggerated and was commensurate with the work performed. Casella concedes that it performed emergency work on the three adjoining properties affected by the fire. However, Casella submits that the total cost and apportionment of the work was not determined until completion as it was an emergency project and costs were calculated on a "time and materials" basis. Further, Casella asserts that the 324 LLC contract was not inclusive of all of the work performed on the three buildings nor did it incorporate the complete work in the final engineering schematics as same were not prepared until after the completion of the work and the execution of the contract. Specifically, Casella contends that the contract was prepared so that Casella could begin the demolition project and it was unaware of the scope and total cost of the work until completion. Casella claims that total value of the work performed was \$1,502,148.55 and that Anthony Albanese ("Albanese"), the public adjuster retained by defendant, agreed to and negotiated payment for the work on behalf of defendant. Casella asserts that Albanese agreed to apportionment of the total value of the work performed by Casella at rate of 12.5% to account for half of the stabilization work to the shared wall. Casella further contends that both Albanese and defendant's insurance company consented and agreed to payment for the work performed by Casella. Casella declares that its settlement with Albanese and the insurance carrier for defendant, in the reduced amount of \$185,000.00, was revoked because defendant's representative, Bess Fern, was seeking to maximize recovery from insurance proceeds and refused to tender payment. Casella points to Fern's deposition testimony wherein she did not contest payment of the lien but questioned whether it should be paid from the building's insurance coverage. Casella argues that

the cost of the lien is supported by documentation and an independent estimate. Specifically, Casella asserts that Erik Jaegar, an expert in the estimation of damages and repair costs of buildings affected by fire damages, provided an independent estimate of \$439,745.85 for the value of the work performed to 322 of which defendant would be required to pay \$226,980.84 pursuant to the proposed apportionment agreement. Insofar as the lien filed is less than this amount, to wit: \$200,903.40, Casella avows that the lien was properly filed, was not exaggerated, and the costs sought are not duplicative or fraudulent.

In reply, defendant asserts that Casella's contentions are wholly contradicted by sworn statements made by its owner, Greg Casella. For example, Greg Casella testified at his deposition that he never formed an agreement with defendant with respect to the payment and performance of work on its property but that he entered into an agreement with defendant's insurance company after the work was performed. Further, defendant states that Casella's contention that it had an agreement with defendant, which was authorized by Albanese, directly contradicts his testimony that he did not form an agreement with defendant. Defendant also directs the court to Greg Casella's deposition testimony wherein he states that he expected to be paid from the insurance proceeds of 324 LLC's policy and that he did not have a discussion pertaining to costs with the owner of 322. This statement contradicts Mr. Casella's affidavit wherein he states that while the 322 work was included in its contract with 324 LLC, the costs associated with the work were not included. Defendant further states that additional inconsistencies exist within the opposing papers which argue that the 324 LLC contract did not include the work performed at 322. Defendant asserts that Greg Casella's contention that it discussed cost allocations with Albanese and 322's insurance adjuster, and reached an agreement lacks veracity as Albanese was never mentioned throughout Greg Casella's deposition. Greg Casella also testified that he was aware of the full scope of the work required under the 324 LLC contract and could have estimated the total cost yet, in his affidavit in opposition to the instant motion, he claims that he was not initially aware of the full scope and total cost of the work until the work was completed. In light of the foregoing, defendant argues that Casella has failed to raise any issue of fact to refute defendant's contention that Casella was paid in full for the work performed on the 322 property.

A movant seeking summary judgment in its favor must make *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). The evidentiary proof tendered must be in admissible form. (see *Friends of Animals v Assoc. Fur Manufacturers*, 46 NY2d 1065 [1979]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (see *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). The proof raised by the opponent to the motion "must be sufficient to permit a finding of proximate cause 'based not upon speculation, but upon a logical inference to be drawn from the evidence.'" (*Robinson v City of New York*, 18 AD3d 255 [1st Dept 2005], quoting *Schneider v Kings Highway Hops. Ctr.*, 67 NY2d 743 [1986].)

Lien Law § 39 calls for the voiding of a lien for willful exaggeration stating, "[i]n any action or proceeding to enforce a mechanic's lien upon a private or public improvement or in which the validity of the lien is an issue, if the court shall find that a lienor has willfully exaggerated the amount for which he claims a lien as stated in his notice of lien, his lien shall be declared to be void and no recovery shall be had thereon..." Upon a finding of willful exaggeration, Lien Law §39-a imposes liability upon the lienor for damages incurred by the property owner or contractor due to the lien. Specifically, Lien Law § 39-a provides that [w]here in any action or proceeding to enforce a mechanic's lien upon a private or public improvement the court shall have declared said lien to be void on account of willful exaggeration the person filing such notice of lien shall be liable in damages to the owner or contractor. The damages

which said owner or contractor shall be entitled to recover, shall include the amount of any premium for a bond given to obtain the discharge of the lien or the interest on any money deposited for the purpose of discharging the lien, reasonable attorney's fees for services in securing the discharge of the lien, and an amount equal to the difference by which the amount claimed to be due or to become due as stated in the notice of lien exceeded the amount actually due or to become due thereon."

As a result of the October 27, 2016 fire at the 324 property, the New York City Department of Buildings issued a violation, on October 28, 2016, to the owner of the premises requiring it to "immediately erect a sidewalk shed at the front of the premises and demolish the building" as the building was in danger of a "further collapse endangering the public and adjacent properties" (NYSCEF Doc. No. 210, *DOB Violation*). In compliance with the DOB violation, 324 LLC, through its insurance carrier, entered into a contract with Casella for the demolition of the premises.

The contract between Casella and 324 LLC for the demolition of the 324 property states that "the Contract Sum shall be the fixed amount of any proceeds actually paid by Harleysville Insurance (the 'Insurer'), the Owner's insurance company, to the Owner under Claim No. 037212-GE, in connection with the Policy No. BOP0000051579, apportioned to the Work, as directed pursuant to Violation No. 327756 (the 'violation') issued by DOB for the Premises... necessitated as a result of the fire that occurred on the Premises on or about October 27, 2016. The Owner and the Contractor agree that the Insurance proceeds is the sole and total compensation due to the Contractor for the Contractor's full performance of the Contract." (NYSCEF Doc. No. 211, *Contract between Owner and Contractor Article 4*).

It is undisputed, here, that in order to effectuate the demolition of the 324 property, Casella, would be required to perform certain work on the adjacent properties located on either side of the 324 property, to wit: 322 and 326. In turn, the owners of the adjacent properties were required to grant access to Casella in order to perform the obligations of its contract with 324 LLC. Granting access to perform work necessary to complete a safe demolition of an adjacent property does not confer liability for payment. Casella's assertion that it was unaware of the scope of the work performed until its completion is of no moment. Article 8 of the contract provides that the scope of work includes "Full demolition of the Premises, including, without limitation, the installation of tie-backs and other required party wall support in adjacent structure, installation and maintenance of a sidewalk bridge in front of the premises, and all additional work reasonably inferable from the foregoing scope to render a complete project." Casella was fully aware of the scope of the work and was obliged to estimate the value of the total cost of the work, inclusive of the work to the adjacent properties, necessary to carry out the demolition. While it is not lost on this court that 324 LLC and Casella were required to begin work immediately in response to the violation issued, there is nothing in the record to suggest that defendant can be held accountable for sums not contained within the Contract Sum, agreed to by Casella and 324 LLC, which were purportedly unanticipated when the contract was executed.

Also, Casella's assertion that the adjuster, on behalf of defendant, agreed to apportionment of the total value of the work performed by Casella at a rate of 12.5% for half of the stabilization work to the shared wall is unsupported by the record. The record is devoid of any contract or agreement between Casella and defendant for any work performed to its property in connection with the 324 property fire and resulting demolition. Moreover, purported settlement discussions or negotiations are generally inadmissible with the exceptions of admissions of liability. (see *Gottbetter v Crone Kline Rinde, LLP*, 162 AD3d 579 [1st Dept 2018].) Here, there is no documentary evidence illustrating a settlement or any admission by defendant. To the contrary, Bess Castagnello, defendant's principal, authored an email response to Pat

Server from Casella stating "I can't sign off on something that allocates your cost as my responsibility. Going to need something in writing from 324 East 93<sup>rd</sup> [S]treet[']s principals acknowledging this is their cost and responsibility and indemnifying me from any cost." (NYSCEF Doc. No. 224, *Email*). Furthermore, Casella's claim of reaching an agreement with defendant's adjuster is refuted by the denial letter dated March 22, 2017 from 322's insurance carrier, AIG Primary Casualty Claims, stating its denial of liability with respect to any claim filed by Casella for repairs it performed in connection with the damages caused by the fire at the 324 property as there was no indication that defendant was responsible for the fire. (NYSCEF Doc. No. 263, *Denial Letter*).

Thus, when applying the applicable law to the facts in this case, the court finds that to the degree that Casella knew that its contract with 324 LLC included work performed on the adjacent 322 property and it was paid to perform said work in accordance with the contract, the mechanic's lien upon defendant's property was willfully exaggerated. It is settled that a "claim under Lien Law § 39-a is subject to summary disposition where the evidence concerning whether or not the lienor willfully exaggerated the lien is conclusive." (*On the Level Enterprises, Inc. v 49 East Houston LLC*, 104 A.D.3d 500 [1st Dept 2013], citing *Northe Group, Inc. v Spread NYC, LLC*, 88 AD3d 557 [1st Dept 2011]). Defendant's burden "necessarily involves proof as to the credibility of the lienor" and as such, "the issue of willful or fraudulent exaggeration is one that is ordinarily determined at the trial of the foreclosure action, and not on summary disposition" (*On the Level Enterprises, Inc.*, supra citing *Rosenbaum v Atlas & Design Contrs., Inc.*, 66 AD3d 576 [1st Dept 2009]; *Aaron v Great Bay Contr.*, 290 AD2d 326 [1st Dept 2002]), however, defendant has satisfied its burden of demonstrating through documentary evidence, i.e., the 324 LLC and Casella Contract, DOB Violation, and AIG denial, that Casella was contractually obligated to perform work to the 322 property as part of its demolition of the 324 property and was paid to do so pursuant to its contract with 324 LLC. Therefore, the mechanic's lien on defendant's property is improper. All remaining arguments have been considered and are either without merit or need not be addressed given the findings above. Based upon the foregoing, Defendant's motion for summary judgment is granted and it is hereby,


**ORDERED** that defendant 322 East 93<sup>rd</sup> Street LLC's motion for summary judgment is granted to the extent that Casella Construction Corp's mechanic's lien dated May 23, 2017, in the amount of \$200,903.40 is void and hereby discharged under New York Lien Law § 39; and it is further

**ORDERED** that this matter is hereby referred to a special referee for the assessment of damages incurred in connection with the discharge of the mechanic's lien in accordance with Lien Law §39-a; and it is further

**ORDERED** that within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel shall serve a copy of this decision and order, with notice of entry, upon all parties, as well as, the Clerk of the Court (60 Centre Street, Room 141 B).

This constitutes the decision and order of the Court.

January 18, 2022

  
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HON. VERNA L. SAUNDERS, JSC

CHECK ONE:  CASE DISPOSED  NON-FINAL DISPOSITION  
 GRANTED  DENIED  GRANTED IN PART  OTHER