

**Apollo Elec., Inc. v I. Grace Co. Commissioned  
Private Residences, Inc.**

2022 NY Slip Op 31419(U)

April 28, 2022

Supreme Court, New York County

Docket Number: Index No. 653541/2020

Judge: Arlene Bluth

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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. ARLENE BLUTH PART 14**

*Justice*

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APOLLO ELECTRIC, INC.,

Plaintiff,

- v -

THE I. GRACE COMPANY COMMISSIONED PRIVATE  
RESIDENCES, INC.,JEFFREY LEEDS, ELIZABETH LEEDS

Defendant.

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INDEX NO. 653541/2020

MOTION DATE 04/25/2022

MOTION SEQ. NO. 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47

were read on this motion to/for JUDGMENT - DEFAULT.

The motion by defendants Jeffrey and Elizabeth Leeds for a default judgment on their counterclaim is denied and the cross-motion by plaintiff is granted only to the extent the counterclaim is severed and dismissed.

**Background**

In this Lien Law action, the Leeds seek a default judgment on their counterclaim for willful exaggeration of the lien at issue. Previously this Court granted a motion by the Leeds to dismiss the subject mechanic’s lien (a lien for \$156,546.40) without opposition. The Leeds point out that plaintiff no longer has any cause of against them. They point out that plaintiff has simply ignored the counterclaim and so they seek a default judgment on their counterclaim and a judgment for \$156,546.40. The Leeds detail what they claim is plaintiff’s efforts to ignore various court orders and decisions. They also point out that despite the Court dismissing plaintiff’s cause of action against the Leeds, plaintiff has not released the lien.

In opposition, plaintiff contends that the Leeds' willful exaggeration claim is not a viable cause of action because the Court already discharged the lien pursuant to the Leeds' previous motion. Plaintiff insists that a lien must be valid in all other respects in order to maintain a willful exaggeration claim and this lien was dismissed based on a facial defect.

Plaintiff then details alleged discovery disputes with the Leeds and insists the Leeds have failed to provide a single document in response to plaintiff's requests. Plaintiff explains that it did not oppose the Leeds' motion because it planned to discontinue this action, having already settled its claims against defendant I Grace. With respect to why plaintiff did not reply to the counterclaim, counsel for plaintiff explains he was "very ill" and that the Leeds simply moved for a default judgment prior to his ability to move to dismiss the counterclaim.

In reply, the Leeds contend that plaintiff's attempt to use the previous dismissal of the lien as a basis to escape liability is preposterous.

### **Discussion**

As an initial matter, the Court observes that plaintiff failed to cite a reasonable excuse for not replying to the counterclaim. A vague allusion to an illness without any reference to when it occurred and how it prevented counsel from responding to the counterclaim until the Leeds made the instant motion is not sufficient to justify ignoring this deadline. And plaintiff attached nothing from plaintiff itself (such as an affidavit from an owner) to demonstrate it has a meritorious defense to the counterclaim.

However, the Court's analysis does not end there. It must consider whether the Leeds have met their prima facie burden on their counterclaim for willful exaggeration of a lien. Unfortunately, binding case law suggests they have not done so here. The relevant section of the Lien Law providing for a willful exaggeration claim against a lien "by its terms, only permits a

willful exaggeration claim to be asserted in an action to enforce a mechanic's lien, namely, a foreclosure action. Where the lien has been discharged prior to trial, the action is no longer one seeking to enforce a mechanic's lien. The action is, at that juncture, merely one in contract. Additionally, section 39-a provides for damages only where the court shall have declared the lien to be void on account of willful exaggeration pursuant to section 39. Where the lien has been discharged for reasons unrelated to its supposed exaggeration, there remains no lien to be declared void by the court” (*Wellbilt Equip. Corp. v Fireman*, 719 NYS2d 213, 216, 719 NYS2d 213 [1st Dept 2000] [internal quotations and citations omitted]).

Here, the lien was discharged pursuant to a motion by the Leeds. That motion argued that the lien should be discharged because it was untimely—clearly, a reason unrelated to its purported exaggeration. Therefore, the Leeds may not recover damages pursuant to a willful exaggeration claim despite the fact that plaintiff defaulted. However, the Court stresses that nothing in this order prevents the Leeds from seeking damages against plaintiff under another theory of recovery. This decision merely finds that the Leeds cannot pursue a willful exaggeration claim against a lien that was previously discharged on timeliness grounds.

Based on the foregoing, the Court dismisses the counterclaim as it cannot be asserted here.<sup>1</sup> The cross-motion by plaintiff is denied to the extent it sought to strike the Leeds’ answer or sought some type of discovery sanctions. At this point it is unclear what remains of this matter. Plaintiff contends it settled with defendant I Grace and was about to discontinue the matter when the Leeds asserted their counterclaims. As best this Court can tell, all that is left is the Leeds’ crossclaim against co-defendant I Grace. Therefore, the conference on May 31, 2022

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<sup>1</sup> The Court’s dismissal arises from the “such other and further relief” request in the wherefore clause in plaintiff’s affirmation in support of the cross-motion. Although plaintiff did not cite a sufficient basis to vacate its default, the Court cannot overlook the fact that plaintiff raised arguments demonstrating that the Leeds do not have a valid counterclaim. Why plaintiff did not raise these arguments in opposition to the Leeds’ motion to amend is a mystery.

will go forward and the parties must send an update about discovery (or the status of the case itself) by May 24, 2022 as detailed in NYSCEF Doc. No. 20.

The Court stresses, however, that plaintiff must take steps to release the lien in accordance with the Court’s decision discharging it. Counsel for the Leeds contends that the lien is still an encumbrance on the property. Plaintiff must release the lien within 7 days. If it does not, then the Court will entertain an application from the Leeds concerning an appropriate penalty against plaintiff and/or its attorney.

Accordingly, it is hereby

ORDERED that the motion by the Leeds for a default judgment is denied; and it is further

ORDERED that the cross-motion by plaintiff is granted only to the extent that the counterclaim by the Leeds is severed and dismissed; and it is further

ORDERED that plaintiff or its attorney must release the subject lien on or before May 3, 2022.

4/28/2022

DATE



ARLENE BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE