

Tri-Crete, Inc. v Forthill Constr. Corp.

2022 NY Slip Op 31515(U)

May 10, 2022

Supreme Court, New York County

Docket Number: Index No. 452340/2018

Judge: Sabrina Kraus

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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. SABRINA KRAUS PART 57TR

Justice

-----X

TRI-CRETE, INC.,

Plaintiff,

- v -

FORTHILL CONSTRUCTION CORP., TRAVELERS
CASUALTY AND SURETY COMPANY OF AMERICA, ABC
COMPANIES, JOHN DOES

Defendant.

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INDEX NO. 452340/2018

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42

were read on this motion to/for DISMISSAL.

PENDING MOTION

Gilbane Residential Construction LLC (“Gilbane Residential”) and Travelers Casualty and Surety Company of America (“Travelers”) move to dismiss the Third Cause of Action of Tri-Crete, Inc. (“TCI”)’s complaint.

The attacked claim of TCI is for mechanic’s lien foreclosure. It fails as a matter of law because there is no “lien fund” to which it may attach and the absence of a “lien fund” is fatal to TCI’s lien foreclosure claim.

Gilbane Residential was the construction manager for a project known as 1010 Park Avenue-Extell, located at 1010 Park Avenue, New York, NY 10028 (the “1010 Park Project”). Forthill Construction Company (“Forthill”) was a concrete subcontractor to Gilbane Residential on that project. TCI claims to be an unpaid supplier to Gilbane Residential on that project and

has filed a mechanic's lien and brought a lien foreclosure action. Gilbane Residential, through Travelers, has discharged the TCI lien by posting a lien discharge bonds.

Forthill materially breached its contract with Gilbane Residential at the 1010 Park Project by completely abandoning it. Forthill's material breach by abandonment entitles Gilbane Residential to damages from Forthill and precludes, as a matter of law, Forthill from recovering any damages from Gilbane Residential with respect to the 1010 Park Project. Because Forthill's material breach pre-dates the filing of the liens by TCI, and because Gilbane Residential did not owe and never will owe any money to Forthill on the 1010 Park Project, the TCI lien must fail as a matter of law. TCI cannot establish the essential predicate to the viability of its lien, namely, that there was due or to become due money from Gilbane Residential to Forthill at the time it filed its lien.

The absence of a Gilbane Residential/Forthill lien fund is fatal to the lien foreclosure claim of those below Forthill, like TCI. Thus, as this court has determined, on the motion for summary judgment by the plaintiffs in Action No. 1, that Forthill materially breached the 1010 Park Subcontract, as a matter of law no lien fund exists and the TCI lien must be dismissed as a matter of law.

ALLEGED FACTS

The related actions stem from one written construction subcontract agreement between Gilbane Residential and Forthill, whereby Forthill agreed to work as a structural concrete subcontractor to Gilbane Residential. Gilbane Residential and Forthill entered into the 1010 Park Subcontract on or about December 28, 2016. On December 20, 2017 Forthill could not perform its work because it could not procure the requisite concrete for the 1010 Park Project

On December 22, 2017, Gilbane Residential gave Forthill written notice that it had materially breached the 1010 Park Subcontract and demanded adequate assurance of Forthill's ability to complete the 1010 Park Subcontract, and provided Forthill a 48-hour opportunity to cure, or else Gilbane Residential would hold Forthill in default and terminate it. Forthill ignored this notice of default, failed to respond to it and did not return to work at the 1010 Park Project.

On December 28, 2017, Gilbane Residential gave Forthill written notice that because Forthill failed to timely cure its material breaches of the 1010 Park Subcontract, Forthill was in default of the 1010 Park Subcontract and as a result, Forthill's employment under the 1010 Park Subcontract was terminated for cause. Forthill did not respond to the 1010 Park Termination Notice nor did it ever return to the 1010 Park Project.

On January 11, 2018, TCI filed a Notice Under Mechanic's Lien Law against the 1010 Park project. On February 7, 2018, Gilbane discharged the TCI Lien by filing lien discharge bond No. 106835794, which Travelers issued.

DISCUSSION

It is axiomatic that the rights of a mechanic's lienor are dependent on the existence of a lien fund, sums due and owing or to become due and owing, at the tier immediately above the lienor in the contractual hierarchy. *Peri Formwork Sys., Inc. v Lumbermens Mut. Cas. Co.*, 65 AD3d 533, 535 [2d Dept 2009]; *Peri Formwork Sys., Inc. v Lumbermens Mut. Cas. Co.*, 112 AD3d 171, 177 [2d Dept 2013].

In this case, for TCI's lien to be viable there would have to be a "lien fund" existing between Gilbane Residential and Forthill on the 1010 Park Project. Forthill's material breach and abandonment of the 1010 Park Project and Subcontract preclude the existence of the requisite "lien fund" and, thus, the lien and foreclosure claim must be dismissed as a matter of law.

As the court has determined on the related summary judgment motion that Forthill materially breached and abandoned the 1010 Park Project and Subcontract, there is no material question of fact in this action with respect to the lien and summary judgment is proper. Summary judgment is warranted, as here, when there are no factual disputes to be resolved by the trier of fact, *Mallad Constr. Corp. v. County Fed. Sav. & Loan Ass'n*, 32 NY2d 285 [1973], when, as here, all triable issues are legal, *Long Island R.R. Co. v. Northville Indus. Corp.*, 41 NY2d 455 [1977], or when, as here, uncontroverted facts allow only one conclusion as a matter of law. *Alvord & Swift v. Stewart M. Muller Constr. Co., Inc.*, 46 NY2d 276 [1978].

CONCLUSION

WHEREFORE it is hereby:

ORDERED that defendant's motion is granted and the third cause of action is dismissed with prejudice; and it is further

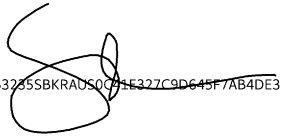
ORDERED that lien filed by TCI on January 11, 2018 and docketed in the Office of the New York County Clerk for the property known as 1010 Park Avenue, New York, New York, Block 1496, Lot 1101-1102 is hereby vacated, canceled and discharged; and it is further

ORDERED that, within 20 days from entry of this order, movant shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.

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<u>5/10/2022</u> DATE		<u>SABRINA KRAUS, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE