

Everest Scaffolding, Inc. v 310 Group, LLC
2022 NY Slip Op 31740(U)
May 31, 2022
Supreme Court, New York County
Docket Number: Index No. 153296/2019
Judge: David B. Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID B. COHEN

PART 58

Justice

-----X

INDEX NO. 153296/2019

EVEREST SCAFFOLDING, INC.,

Plaintiff,

MOTION SEQ. NO. 001

- v -

310 GROUP, LLC and IMPERIEX CONSTRUCTION, INC.,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 30, 31, 32, 33, 34, 35

were read on this motion to/for

SUMMARY JUDGMENT

Plaintiff Everest Scaffolding, Inc. brings this action for breach of contract, account stated, and lien foreclosure, alleging that it supplied scaffolding pursuant to an agreement with defendant Imperieux Construction, Inc. and that it never received payment.

The sole cause of action against defendant 310 Group, LLC (310 Group), owner of the property on which the scaffolding was installed, seeks foreclosure of the mechanic's lien filed by plaintiff against the property. 310 Group moves for summary judgment dismissing that cause of action pursuant to CPLR 3212, asserting that the notice of lien filed by plaintiff expired by operation of law. Plaintiff cross-moves to amend the complaint, pursuant to CPLR 3025(b), to add a single cause of action for unjust enrichment/quantum meruit against 310 Group.

The duration of a mechanic's lien is limited to one year after a notice of lien is filed, unless an action to foreclose the lien is commenced within that time and a notice of pendency is filed or an extension of the lien has been obtained (Lien Law § § 17, 19 [2]). Plaintiff filed its notice of mechanic's lien on June 28, 2018 in the amount of \$55,118.32, and commenced the instant action on March 29, 2019, before the lien was to expire. Plaintiff neither filed a notice of

pendency nor obtained an extension of the lien. Defendant asserts that the lien expired on June 28, 2019 and plaintiff disputes this contention, claiming that its lien was continued via another action, *City Safety Compliance Corp. v 310 Group, LLC*, Sup Ct, New York County, Index No. 153944/2019 (the City action) to enforce another lien on the same property. Under Lien Law § 17, if a lienor is made a party defendant in an action to enforce another lien, and the plaintiff or such defendant has filed a notice of the pendency of the action within the time prescribed in this section, the lien of such defendant is thereby continued (*See, MCK Bldg. Assoc. v St. Lawrence Univ.*, 5 AD3d 911, 912 [3d Dept 2004]). Such action shall be deemed an action to enforce the lien of such defendant lienor. In the event neither of these conditions is accomplished within the statutory period and an extension of the lien is not obtained, the lien automatically expires by operation of law (Lien Law § 17; *Aztec Window & Door Mfg., Inc. v 71 Vil. Rd., LLC*, 60 AD3d 795, 796 [2d Dept 2009]).

Plaintiff is a defendant in the City action. The plaintiff in the City action commenced that action to enforce a lien. The City action was commenced on April 16, 2019, before the expiration date of plaintiff's lien, and two notices of pendency in which plaintiff's lien was named were filed. Nonetheless, defendant contends that the City action does not prevent plaintiff's lien from expiring since plaintiff failed to appear in that action.

Pursuant to Lien Law § 44 (5), a lienor which has been added as a defendant in another action seeking lien foreclosure "shall, by answer in the action, set forth his lien." Failure to do so constitutes a waiver of the lien, unless the lien is admitted in the complaint, and not contested by another defendant (*See, Naber Elec. Corp. v. George A. Fuller Co.*, 62 AD3d 971, 972 [2d Dept 2009] [holder waived its lien when it failed to set forth its lien as a counterclaim or cross claim in its answer, the complaint did not admit the existence and validity of the holder's lien,

and, by denying upon information and belief the lien-related allegations, the owners' answer had the effect of denying the existence and validity of the holder's lien]). The complaint in the City action acknowledges the existence of the lien and defendant does not allege that a defendant in that action contests it. Defendant asserts that the inaction of plaintiff, which did not answer the complaint or appear in the City action, brought about the expiration of its lien.

A defendant who answers but fails to properly set forth its lien in its answer is not necessarily deemed to have waived its lien if the lien is admitted in the complaint and not contested by any defendant (*See, Atlantic Terra Cotta Co. v Rubenfield Constr. Corp.*, 126 Misc 279, 282 [Sup Ct, Kings County 1926]; *see also Edwards & Zuck, P.C. v Cappelli Enters., Inc.*, 124 AD3d 181, 184 [3d Dept 2014]). However, such leeway is generally not afforded to defendant lienors who neither answer nor appear. Mechanic's liens filed by subcontractors who have failed to appear or answer should be discharged (*See, Interior Bldg. Servs., Inc. v Broadway 1384 LLC*, 73 AD3d 529, 529 [1st Dept 2010]; *215 West 28th Street Property Owner LLC v IBK Const. Group LLC*, 2021 NY Slip Op. 30264[U], *2 [Sup Ct, NY County 2021]; *Regal Lbr. Co. v Buck*, 157 Misc 2d 376, 377 [County Ct, Chautauqua County 1993]; *cf RNC Indus., LLC v 267 Sixth St. LLC*, 28 Misc 3d 1209[A], 2010 NY Slip Op 51229[U], *4-5 [Sup Ct, Kings County 2010] [where the plaintiff admitted the defendant's lien in the complaint and filed a notice of pendency and no other defendant contested the lien, the defendant did not waive its lien despite its failure to answer]).

Here, plaintiff waived its lien by failing to appear or answer in the City action and, thus, defendant's motion to dismiss the cause of action for lien foreclosure is granted. The entire complaint is not dismissed as against defendant, however, since plaintiff's cross motion to amend its complaint to add a cause of action for unjust enrichment/quantum meruit against

defendant is granted. Leave to amend pleadings shall be freely given absent prejudice or surprise resulting directly from the delay (*Lindo v Brett*, 149 AD3d 459, 463 [1st Dept 2017]). Since defendant does not oppose the cross motion, it has failed to demonstrate that it would be prejudiced in any way by the amendment.

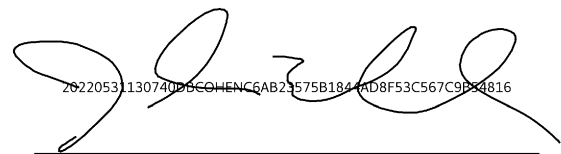
Accordingly, it is hereby:

ORDERED that the motion of defendant 310 Group LLC for summary judgment dismissing the complaint is granted to the extent of dismissing the third cause of action requesting lien foreclosure and is otherwise denied; and it is further

ORDERED that plaintiff's cross motion to amend the complaint by adding a cause of action sounding in unjust enrichment/quantum meruit is granted, and the proposed amended complaint in the form set forth in NYSCEF Doc. 31 is deemed served on defendants; and it is further

ORDERED that defendant is directed to serve an answer to the amended complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a status conference via Microsoft Teams on July 12, 2022 at 3:30 p.m. unless they submit a discovery stipulation to be so-ordered by the court to the Part 58 Clerk by email (SFC-Part58-Clerk@nycourts.gov) at least two business days prior to the scheduled appearance.



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DAVID B. COHEN, J.S.C.

5/31/2022
DATE

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION

GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE