

<b>Grid Logistics LLC v White Contr. &amp; Renovation Inc.</b>
2022 NY Slip Op 32485(U)
July 25, 2022
Supreme Court, New York County
Docket Number: Index No. 651007/2019
Judge: Arthur Engoron
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ARTHUR ENGORON PART **37****

*Justice*

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GRID LOGISTICS LLC,  Plaintiff,  - v -  WHITE CONTRACTING & RENOVATION INC, PIZZAROTTI, LLC, FIDELITY AND DEPOSIT COMPANY OF MARYLAND, ZURICH AMERICAN INSURANCE COMPANY, USC-KINGS, LLC, JOHN DOE 1 THROUGH JOHN DOE 5,  Defendants.	INDEX NO.	<u>651007/2019</u>  02/28/2022, 03/18/2022, MOTION DATE <u>03/29/2022</u>  MOTION SEQ. NO. <u>008, 009, 010</u>
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**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 008) 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 241, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 269, 270, 271, 272, 273, 274, 276

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 009) 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 242, 265, 275

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 010) 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 243, 266, 267, 268

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents, and for the reasons stated hereinbelow, the motions of Grid Logistics LLC, Men of Steel Rebar Fabricators, LLC, and USC-Kings, LLC are granted.

Background

The owner of the property at 39 West 23<sup>rd</sup> Street (“The Property”), former defendant 39 West 23rd Street, LLC (“Owner”), hired defendant Pizzarotti, LLC (“Pizzarotti”), to be the construction manager of a project there (“The Project”). NYSCEF Doc. No. 12. Pizzarotti appears to have taken over The Project from a previous contractor, non-party Ryder Construction Inc (“Ryder”). NYSCEF Doc. No. 125.

On November 17, 2017, Pizzarotti entered into a subcontract with defendant/third-party plaintiff White Contracting & Renovation, Inc. (“White”), to perform concrete and site work for the Project. NYSCEF Doc. No. 125. The subcontract replaced the contract with Ryder. Id.

White's former Owner and CEO, non-party David McCarthy, alleges there were many additions and change orders to the original contract. NYSCEF Doc. No. 184.

On February 28, 2017, plaintiff, Grid Logistics, LLC ("Grid"), entered into a subcontract with White for soil management services in furtherance of White's subcontract. NYSCEF Doc. Nos. 82. This agreement was amended on December 19, 2017, to add additional services and extend its term. NYSCEF Doc. No. 83.

On June 14, 2018, plaintiff Men of Steel Rebar Fabricators, LLC ("Men of Steel"), entered into a subcontract with White to furnish and supply rebar materials for the Project. NYSCEF Doc. No. 40.

Prior to June 20, 2018, plaintiff USC-Kings, LLC ("USC-Kings"), entered into a subcontract with White to provide concrete and services in furtherance of the Project. NYSCEF Doc. No. 109.

Grid, Men of Steel, and USC-Kings (collectively "Consolidated Plaintiffs"), contend that they completed their work but White ceased paying them starting in September 2018. NYSCEF Doc. Nos. 12, 40, 109.

On September 26, 2018, White submitted "Pay Application No. 16" to Pizzarotti detailing the amounts paid thus far and still owing. NYSCEF Doc. No. 186. The same application also notified Pizzarotti that all work up to that point had been completed. Id.

On October 17, 2018, Grid filed a mechanic's lien against The Property in the amount of \$138,941.00. NYSCEF Doc. No. 13. On October 18, 2018, USC-Kings filed a mechanic's lien against The Property in the amount of \$271,764.58. NYSCEF Doc. No. 229. On December 24, 2018, Men of Steel filed a mechanic's lien against The Property in the amount of \$215,252.41. NYSCEF Doc. No. 194.

White, in turn, contends that it was unable to pay the Consolidated Plaintiffs due to Pizzarotti's refusal to pay it. NYSCEF Doc. No. 53. White affirms that it filed three separate mechanic's liens against The Property for the outstanding balance owed to it: (1) on October 9, 2018 for \$755,751.02; (2) on October 25, 2018 for \$580,000.00; and (3) on June 14, 2019, for \$707,724.00. Id.

On October 30, 2018, defendants Zurich American Insurance Company ("Zurich"), Fidelity and Deposit Company of Maryland ("Fidelity"), and Pizzarotti filed numerous surety bonds worth 110% of the various mechanic's liens filed by the Consolidated Plaintiffs up to that time. NYSCEF Doc. Nos. 4, 142, 231.

In a letter dated June 24, 2019, Pizzarotti notified White that Pizzarotti was purporting to terminate their contract for cause, alleging poor performance, material breaches of their contract, and failure to provide payments to sub-tier contractors. NYSCEF Doc. No. 127.

### Procedural History

The instant case was consolidated from four separate mechanic's lien foreclosure actions.

On February 18, 2019, Grid commenced an action against White, Pizzarotti, Zurich, and Fidelity, under Index No. 651007/2019. NYSCEF Doc. No. 1.

In a Decision and Order dated June 4, 2019, this Court so-ordered a stipulation amending the complaint and removing Owner as a defendant. NYSCEF Doc. No. 23. On June 10, 2019, Grid filed an Amended Complaint. NYSCEF Doc. No. 12.

On May 6, 2019, Men of Steel commenced an action against Pizzarotti, White, Zurich, and Fidelity; it included a cause of action to foreclose its mechanic's lien and a request for class action status for the individual "materialmen" on the project, under Index No. 652655/2019. NYSCEF Doc. No. 40.

In a Decision and Order dated August 14, 2019, Judge Francis Kahn granted Men of Steel's motion for default judgment against White as to liability and ordered an inquest to assess damages. NYSCEF Doc. No. 174.

On October 30, 2019, White commenced an action against Pizzarotti and Zurich under the Index No. 160584/2019. NYSCEF Doc. No. 53.

In a Decision and Order dated September 30, 2019, pursuant to Article 3-A of the New York Lien Law, Men of Steel's class action was "maintained" against Pizzarotti, Alfredo Vinci, Gabrielle Corazza, Marco Martegiani, and John Does #1-10 (collectively, the "Pizzarotti Defendants"). NYSCEF Doc. No. 63. The court approved Men of Steel to represent all subcontractors and "materialmen" who worked on The Project. Id.

In a Decision and Order dated December 20, 2019, this Court consolidated the separate Grid, White, and Men of Steel actions under Index No. 651007/2019 ("Consolidated Action") and added USC-Kings as a defendant. NYSCEF Doc. No. 153.

In a Decision and Order dated May 18, 2020, this Court granted a default judgment in favor of Grid against White as to liability and directed Grid to schedule an inquest to assess damages. NYSCEF Doc. No. 99.

On June 24, 2020, USC-Kings, apparently unaware of the Decision and Order from December 2019, commenced an action under Index No. 154628/2020 against Pizzarotti, Fidelity, Zurich, and White ("USC-Kings Action"). NYSCEF Doc. No. 109.

In a Decision and Order dated January 27, 2021, this Court consolidated the USC-Kings Action into the existing Consolidated Action. NYSCEF Doc. No. 113.

Grid, Men of Steel and USC-Kings now individually move for summary judgment against Pizzarotti, Zurich, and Fidelity. NYSCEF Doc Nos. 168, 198, 224.

Pizzarotti now cross-moves against Men of Steel for summary judgment dismissing all claims asserted by White and Consolidated Plaintiffs, and damages against White totaling \$2,487,682.41, which includes the cost of corrective works, delays, and total lien costs. NYSCEF Doc. No. 253.

### Discussion

In order to prevail on a motion for summary judgment, the moving party must present evidence demonstrating the absence of any material issues of fact. Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986). If so, the burden shifts to the opposing party to present evidence that establishes a material issue of fact that would require a trial to resolve. Zuckerman v City of New York, 49 NY2d 557, 562 (1980). This presentation must be more than a “shadowy semblance of an issue,” in order to defeat the motion for summary judgment. Am. Sav. Bank FSB v Imperato, 159 AD2d 444, 444 (1st Dep’t 1990).

The stated purpose of New York’s Lien Laws is to protect the people who enhance the value of real property by giving those people “an interest in the property to the extent of the value of such materials or labor.” Schaghticoke Powder Co. v Greenwich & Johnsonville Ry. Co., 183 NY 306, 311 (1905); See also Schenectady Homes Corp. v Greenside Painting Corp., 37 NYS2d 53 (County, Ct., Schenectady Count, 1942); B. & F. Concrete Co. v Colton Realty Corp., 17 NYS2d 593 (1940); Charles C. Kellogg & Sons Co. v De Lia, 17 NYS2d 330 (1940). These laws should thus be construed liberally in service of this purpose. Claudio Perfetto, Inc. v Waste Mgt. of New York, LLC, 274 AD2d 389, 390 (2nd Dep’t 2000).

Lien Law § 3 provides that

A contractor, subcontractor, laborer, [or] materialman...who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof, or of his agent, contractor or subcontractor...shall have a lien for the principal and interest, of the value, or the agreed price, of such labor...or materials upon the real property improved or to be improved and upon such improvement, from the time of filing a notice of such lien.

The lienor must then establish the amount of the outstanding debt by “submitting proof of either the price of its contract or the value of the labor and materials supplied.” NGU, Inc. v City of New York, 138 NYS3d 170, 172 (2d Dep’t 2020). Additionally, the amount of the mechanic’s lien is limited by the contract under which it is claimed. Peri Formwork Sys., Inc. v Lumbermens Mut. Cas. Co., 112 AD3d 171 (2d Dep’t 2013).

The lienor may file the notice of lien at any time during the progress of the work, furnishing of materials, or within eight months after completion of the contract. Lien Law § 10. Additionally, the lienor must, within thirty days, serve a copy of the notice of lien upon the property owner and any contractors or subcontractors whom employed them. Lien Law § 11 and 11-b.

To recover on its mechanic's lien, the lienor must demonstrate that a "lien fund" exists. Peri at 176. This is generally defined as the money that the owner of the property still owes to the contractor. Id. When subcontractors are involved, however, "each party is subrogated to the rights of the contractor or subcontractor on the contracting tier above him." Id. (internal citations omitted). Thus, "in the case of a sub-subcontractor or a materialman to a subcontractor, it 'may not enforce its lien for an amount in excess of either (1) the amount of money owed to him by the subcontractor; (2) the amount of money owed by the general contractor to the subcontractor; or (3) the amount of money owed by the owner to the general contractor.'" Id. (internal citations omitted).

A mechanic's lien may be discharged in six ways: (1) issuing a certificate from the lienor that the lien has been satisfied or released; (2) failing to begin a foreclosure action within one year; (3) issuing a court order vacating or cancelling the lien; (4) the owner or contractor executing a bond for 110% of the lien, conditioned on the payment of any judgment rendered against the property; (5) filing a notice of judgment in favor of the property owner or; (6) discharging a facially invalid lien. Lien Law § 19.

Upon a successful lien foreclosure claim, the lienor is also entitled to costs, disbursements, and prejudgment interest. Lien Law § 53.

Article 3-A of the Lien Law provides for "trusts." Lien Law § 70 defines trusts as "The funds...received by an owner for or in connection with an improvement of real property... or received by a contractor under or in connection with a contract for an improvement of real property." The purpose of the trust is to ensure that the funds are properly used to pay contractors, subcontractors, and materialmen for the cost of improvement. Lien Law § 71.

Lien Law § 72 prohibits the misuse of trust funds through diversion, defined as "[a]ny transaction by which any trust asset is paid, transferred or applied for any purpose other than a purpose of the trust as stated...before payment or discharge of all trust claims with respect to the trust." This is true even if there are no trust claims at the time of the transaction. Id. If the diversion is a voluntary act, it is a breach of trust. Id.

#### Plaintiffs' Summary Judgment Motions

Consolidated Plaintiffs now move for summary judgment seeking foreclosure of their mechanic's liens against the bonds filed by Pizzarotti, Zurich, and Fidelity. Additionally, Men of Steel moves, and is joined by the other Consolidated Plaintiffs, for damages based on Pizzarotti's alleged breach of a Lien Law Trust which violated of Article 3-A.

As a preliminary matter, this Court notes that in opposing the instant motions for summary judgment, defendant Pizzarotti, failed to annex a concise, numbered statement responding to material facts asserted by the moving parties, as required by 22 NYCRR 202.8g(b) ("[T]he papers opposing a motion for summary judgment shall include a correspondingly numbered paragraph responding to each numbered paragraph in the statement of the moving party and, if necessary, additional paragraphs containing a separate short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried"). While this was not dispositive in today's decision, it certainly did not help defendant's cause.

However, as there appears to be no prejudice to any party from Pizzarotti's lapse, this Court, in its discretion and in the interest of justice, waives compliance and trusts counsel will not repeat this oversight. CPLR 2001; 22 NYCRR 202.1(b)

As to the merits, Consolidated Plaintiffs have shown they are entitled to the value of their mechanic's liens for the work completed on the Project, having established the amounts outstanding (\$215,252.41 for Men of Steel, \$138,941.00 for Grid, and \$271,764.58 for USC-Kings) by submitting, inter alia, their original contracts with White (Grid and Men of Steel), invoices issued to White (Grid, Men of Steel, and USC-Kings), and statements of account (Grid, Men of Steel, and USC-Kings). NYSCEF Doc. Nos. 191, 192, 193, 201, 202, 203, 204, 227, 228.

Consolidated Plaintiffs correctly filed their liens within eight months of completing their work, served notice on Owner, general contractor, and subcontractor within thirty days of filing. NYSCEF Doc. Nos. 194, 196. Additionally, the default judgment against White has already demonstrated the validity of Grid and Men of Steel's liens. NYSCEF Doc. Nos. 174, 214.

Consolidated Plaintiffs have also established that there is a "lien fund" to which their mechanic's liens may attach, namely the lien bonds for 110% of the amounts owed. NYSCEF Doc. Nos. 186, 195. Pizzarotti, by its own admission, withheld payments from White totaling \$495,751.02, citing deficiencies in the work White performed. NYSCEF Doc. No. 254. Pizzarotti, however, did not formally move to terminate its contract with White until June 24, 2019, nearly a year after the unpaid invoices were issued and mechanic's liens were filed. NYSCEF Doc. No. 127. On January 2, 2019, Zurich, Fidelity, and Pizzarotti, filed surety bonds in response to the mechanic's liens. NYSCEF Doc. No. 195.

Thus, Consolidated Plaintiffs' motions for summary judgment against Pizzarotti, Zurich, and Fidelity on its lien foreclosure claim should be granted.

Though Men of Steel have demonstrated that there is a gap between the amount Owner paid Pizzarotti and the amount Pizzarotti paid White, they have not demonstrated that Pizzarotti violated the Lien Law Trust. While Lien Law § 71(2) requires that trusts be used for "expenditures arising out of the improvement of real property," there are six different valid uses of trusts, only one of which is paying subcontractors. They have not demonstrated that the discrepancy is due to an unlawful use of the trust assets. Thus, their request for partial summary judgment on this claim should be denied.

#### Pizzarotti's Cross-Motion for Summary Judgment

Pizzarotti, in its cross-motion, seeks (1) summary judgment dismissing all claims asserted by White; (2) summary judgment dismissing all claims asserted by Grid, Men of Steel, and USC-Kings; and (3) \$2,487,682.41 in damages against White for alleged breach of contract.

For the reasons stated above, Pizzarotti's cross-motion for summary judgment against Grid, Men of Steel, and USC-Kings is hereby denied. Additionally, the lien waivers included in the contract and releases that White signed, and which were intended to shield Pizzarotti from liability, are "void as against public policy and wholly unenforceable" and thus unpersuasive in the instant motions. Lien Law § 34.

Pizzarotti’s cross-motion for summary judgment to dismiss all claims asserted by White, however, is granted due to White’s default.

As to Pizzarotti’s counterclaims for damages, its arguments are without merit. Pizzarotti sent the letter allegedly terminating White for cause eight months *after* White had filed its mechanic’s liens and the unpaid invoices had accrued well before the “termination.”

Conclusion

Thus, Men of Steel Rebar Fabricators, LLC’s motion for summary judgment on its second cause of action, to foreclose on its mechanic’s lien, is hereby granted and the Clerk is directed to enter judgment in its favor in the amount of \$215,252.41, plus statutory interest from December 24, 2018. Men of Steel LLC’s motion for partial summary judgment on its first cause of action, based on an alleged for violation of the Lien Law Trust, is denied.

Grid Logistics motion for summary judgment to foreclose on its mechanic’s lien is hereby granted and the Clerk is hereby directed to enter judgment in its favor in the amount of \$138,941.00, plus statutory interest from October 17, 2018.

USC-Kings, LLC’s motion for summary judgment to foreclose on its mechanic’s lien is hereby granted and the Clerk is hereby directed to enter judgment in its favor in the amount of \$271,764.58, plus interest from October 18, 2018.

Pizzarotti, LLC’s cross-motion for summary judgment to dismiss the claims by Men of Steel Rebar Fabricators, LLC, Grid Logistics, LLC, and USC-Kings, LLC is denied, and its motion for summary judgment to dismiss White’s claims is granted, on default. Finally, Pizzarotti, LLC’s counterclaim for damages is dismissed.



7/25/2022  
DATE

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ARTHUR ENGORON, 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