

**Queens Pioneer Constr. Corp. v Ile Constr. Group,
Inc.**

2022 NY Slip Op 33921(U)

November 14, 2022

Supreme Court, Kings County

Docket Number: Index No. 500930/2018

Judge: Carl J. Landicino

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At an IAS Term, Part 81 (MOA) of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 14th day of November, 2022.

P R E S E N T:

HON. CARL J. LANDICINO,

Justice.

-----X
QUEENS PIONEER CONSTRUCTION CORP.,

Plaintiff,

- against -

ILE CONSTRUCTION GROUP, INC., 766
LAFAYETTE, LLC,

Defendants.

-----X
Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Index No.: 500930/2018

DECISION AND ORDER

Motion Sequence #6

Papers Numbered

Notice of Motion/Cross Motion and	
Affidavits (Affirmations) Annexed.....	159-176,
Opposing Affidavits (Affirmations).....	180-183,
Reply Affidavits (Affirmations).....	184

Upon the foregoing papers, and after oral argument, the Court finds as follows:

Defendants, Ile Construction Group, Inc. ("Ile") and 766 Lafayette LLC ("Lafayette") (collectively the "Defendants") move (motion sequence #6) for an order: a) granting renewal of Defendants' motion for summary judgment (motion sequence #4) pursuant to CPLR 2221(c) and dismissing the action, vacating the mechanic's lien and cancelling the notice pendency, or in the alternative, b) declaring the mechanic's lien wilfully exaggerated and void pursuant to Lien Law § 39, together with damages for, *inter alia*, the cost of the bond issued to discharge the lien, or

in the alternative, c) granting leave to amend the answer pursuant to CPLR 3025(b) to include a counterclaim for civil penalty for lien exaggeration, and d) limiting Plaintiff's claim as it relates to the period after October 26, 2016, the date that Plaintiff was dissolved by proclamation.

Plaintiff opposes the motion and contends that it is a late veiled motion to reargue pursuant to CPLR 2221(d) and that the purported "new" facts raised by the Defendant were known to the Defendants at the time the prior motion (sequence #4) was made. The Plaintiff also opposes the motion as being a late summary judgment motion. Plaintiff contends that a wilful exaggeration claim and the determination of what portion of the work was performed after dissolution needs to be determined at trial. Plaintiff also contends that the amended answer would be a surprise and be prejudicial to the Plaintiff and only serve to delay the proceedings.

Renewal

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination" [CPLR 2221 (e)(2)] and "shall contain reasonable justification for the failure to present such facts on the prior motion" [CPLR 2221 (e)(3)]. "The requirement that a motion for renewal be based on new facts is a flexible one, and it is within the court's discretion to grant renewal upon facts known to the moving party at the time of the original motion if the movant offers a reasonable excuse for the failure to present those facts on the prior motion." *Matter of Defendi*, 142 AD3d 500, 502, 35 N.Y.S.3d 495, 497 [2d Dept 2016], quoting *JRP Holding, Inc. v. Pratt*, 113 AD3d 823, 824, 978 N.Y.S.2d 902 2014] [internal quotation marks omitted]; see *Gonzalez v. Vigo Constr. Corp.*, 69 AD3d 565, 566, 892 N.Y.S.2d 194 [2010]; see *Matter of Surdo v. Levittown Pub. School Dist.*, 41 AD3d 486, 486, 837 N.Y.S.2d 315 [2007]; *Griffith v. Wray*, 109 AD3d 512, 970 N.Y.S.2d 458 [2d Dept 2013].

Turning to the merits of the Defendants' motion (motion sequence #6), the Court finds that the Defendants have provided insufficient evidence to support their motion to renew. Defendants contend that new facts not offered on the prior summary judgment motion (motion sequence #4) should change the Court's prior determination. Specifically, Defendants rely on Plaintiff's deposition testimony which was taken after the Defendants' prior summary judgment motion was denied. Defendants argue that their summary judgment motion was based on Plaintiff's lack of capacity to commence this action as Plaintiff was dissolved by proclamation on October 26, 2016. Defendants further argue that during oral arguments the Court held that a corporation may sue or be sued for purposes of windings up its affairs. Defendants direct the Court to Plaintiff's President Brian Lu's deposition testimony taken on October 9, 2020, which states in pertinent part:

Q: Is Queens Pioneer Construction Corp. still active?

A: No.

Q: Is Queens Pioneer Construction Corp. in the process of reinstating or winding up its affairs?

A: No.

See Plaintiff's Deposition Testimony, NYSCEF Document 168, Pages 23-24.

Defendants argue that Mr. Lu's deposition testimony, which was taken after the prior summary judgment motion was decided, provides new facts that should result in the summary judgment motion being granted. Defendants contend that Plaintiff has no standing because a dissolved corporation only has a reasonable time after dissolution to wind up its affairs. Defendants argue that it is unreasonable that Plaintiff waited almost two years after dissolution to commence this action.

Plaintiff opposes the motion and argues that Defendants' motion is not a motion to renew but a motion to reargue, and as such, the motion is untimely.¹ Plaintiff further argues that Defendants' prior motion for summary judgment was not denied based on the status of Plaintiff's corporation status but because there was "a question of fact as to what portion of the claim relates to the period during which the Plaintiff was still an active corporation." (See Decision and Order dated September 1, 2020 (the "Order"), NYSCEF Document 147). Additionally, the Order found "an issue of fact regarding the Plaintiff's claims that accrued prior to the Plaintiff's dissolution. The lien states that the period of time covered by the lien was for work purportedly performed from May 18, 2015, through November 21, 2016. According to the Defendants' document reflecting the dissolution by proclamation of the Plaintiff, the dissolution occurred on October 26, 2016." (Id.). The new evidence provided by Defendants does not resolve this issue. See *MMI Trading, Inc. v. Nathan H. Kelman, Inc.*, 120 AD3d 478, 479, 989 N.Y.S.2d 911, 912 [2d Dept 2014]. Accordingly, the Defendants' motion to renew is denied.

Mechanic's Lien

Defendants argue that Plaintiff's Mechanic's Lien has been wilfully exaggerated and should be declared void pursuant to Lien Law §§ 39 and 39-a which state:

§39. Lien wilfully exaggerated is void. In 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 wilfully 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. No such lienor shall have a right to file any other or further lien for the same claim. A second or subsequent lien filed in contravention of this section may be vacated upon application to the court on two days' notice.

¹ As the motion to renew is denied, the opposition of timeliness is academic.

§39-a. Liability of lienor where lien has been declared void on account of wilful exaggeration. Where 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 wilful 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.

Generally, “[a] determination of willful exaggeration of a mechanic's lien requires proof that the lienor deliberately and intentionally exaggerated the lien amount” *J. Sackaris & Sons, Inc. v. Terra Firma Constr. Mgt. & Gen. Contr., LLC*, 14 AD3d 538, 541, 788 N.Y.S.2d 424 [2d Dept 2005].

Defendants argue that the Mechanic's Lien filed by Plaintiff seeking \$653,964.71 for work performed, labor, services, and materials furnished to the Defendants is wilfully exaggerated. Defendants rely primarily on the affidavit of Nir Sapir, the managing member of 766 Lafayette. In his affidavit, he states that “[t]he Mechanic's Lien filed by Plaintiff is willfully exaggerated inasmuch as it seeks the amount of \$653,964.71, after the parties entered into a stipulation of settlement for \$400,000.00, and without crediting Defendants the \$100,000.00 paid by Defendants to the sub-contractors, suppliers and NYC Department of Buildings violations, was required to be paid by Plaintiff.” (See Affidavit in Support, Nir's Affidavit, Paragraph 6).

Defendants further allege that the Plaintiff and Defendants entered into the Settlement Agreement in February of 2017 for \$400,000.00 to settle the contract. The Settlement Agreement apparently provided that Plaintiff waived its rights to file a mechanic's lien. Plaintiff subsequently filed the Mechanic's Lien on or about June 17, 2017 and commenced this action on or about June

16, 2018. A review of the Settlement Agreement between the parties shows that any release is in consideration of the payments made as part of that agreement. The Defendants provided no proof that they satisfied the terms of the Settlement Agreement. See *Northbay Const. Co. v. Bauco Const. Corp.*, 275 AD2d 310, 311, 711 N.Y.S.2d 510, 511 [2d Dept 2000]; *Patel v. Orma*, 190 AD2d 782, 593 N.Y.S.2d 851, 852 [2d Dept 1993].

In opposition, Plaintiff relies on the affidavit of Mr. Lu. In his affidavit, Mr. Lu states that the Plaintiff “attempted to settle its claims with the Defendants. Though there was a Settlement Agreement entered between the parties wherein the claim was settled and substantially reduced for the purpose of settlement, however, the Defendants breached the Settlement Agreement by refusing and failing to pay the remaining balance without good cause or justification, despite of Plaintiff’s repeated requests of Defendant to pay and comply with the Settlement Agreement.” (See Affirmation in Opposition, Lu Affidavit, Paragraph 8). Mr. Lu continues to state that “[c]ontrary to Defendants’ contention that the lien should be reduced by the purported \$140,000.00, it has been consistently contended by the Plaintiff that those \$140,000.00 were ordered and incurred by the Defendants themselves, not by the Plaintiff, some were not even delivered to the subject job sites, but rather delivered to other sites unrelated to the subject job site. More importantly, as a result of Defendants’ breach of the Settlement Agreement, its first payment of \$100,000.00 has been forfeited, Plaintiff has no obligation to reduce its claims or credit Defendants for the \$100,000.00 payments.” (Id. Paragraphs 10-11). As such, Plaintiff has raised a triable issue of fact as to whether the lien is wilfully exaggerated.

Leave to Amend

Turning to the merits of the Defendants' application pursuant to CPLR 3025(b) granting them leave to serve an amended answer to include a counterclaim for civil penalty for its wilful exaggeration of the mechanic's lien, the Court finds that the Defendants have provided sufficient support for their application. In general, "[m]otions for leave to amend pleadings should be freely granted, absent prejudice or surprise directly resulting from the delay in seeking leave, unless the proposed amendment is palpably insufficient or patently devoid of merit." *Degregorio v. Am. Mfrs. Mut. Ins. Co.*, 90 AD3d 694, 695-96, 934 N.Y.S.2d 457, 460 [2d Dept 2011], quoting *Sinistaj v. Maier*, 82 AD3d 868, 869, 918 N.Y.S.2d 196, 198 [2d Dept 2011]. "Additionally, '[t]he legal sufficiency or merits of a pleading will not be examined unless the insufficiency or lack of merit is clear and free from doubt.'" *Lucido v. Mancuso*, 49 AD3d 220, 227, 851 N.Y.S.2d 238, 243 [2d Dept 2008], quoting *Sample v. Levada*, 8 AD3d 465, 779 N.Y.S.2d 96 [2d Dept 2004].

Defendants argue that the proposed amendment is not palpably insufficient or patently devoid of merit as it is clear that Plaintiff wilfully exaggerated the Mechanic's Lien. Defendants further argue that no further discovery will be required since this constitutes a legal issue and not a factual issue. Although Defendants are moving to amend their answer almost four years after the commencement of this action, the amendment is within a reasonable time as the action has not been certified for trial. See *Alter v. Quality Choice Healthcare, Inc.*, 184 AD3d 612, 123 N.Y.S.3d 840 [2d Dept 2020].

Plaintiff opposes the application. Plaintiff argues that it is surprised and prejudiced by the amended answer with counterclaims and that it will serve to delay the resolution of the action. However, the Court does not find that Plaintiff established that Plaintiff would be prejudiced, and

“[p]rejudice to the adverse party is the main barrier which prevents granting a motion to amend an answer.” *St. Paul Fire & Marine Ins. Co. v. Town of Hempstead*, 291 AD2d 488, 489, 738 N.Y.S.2d 226 [2d Dept 2002], quoting *Bernstein v. Spatola*, 122 AD2d 97, 99, 504 N.Y.S.2d 686 [2d Dept 1986]. The matters addressed in the new amendment are not new. In fact, the allegations relate to the essence of the dispute. As a result, the Court grants the Defendants’ application for leave to amend their answer.

Post Dissolution Work

Defendants argue that the Plaintiff’s claim should be limited to alleged work performed between August of 2016 to October 26, 2016, when Plaintiff was dissolved by proclamation. Defendants rely on Mr. Lu’s November 29, 2020 deposition testimony as follows:

Q: Can you tell me the time frame when this work was performed that remained unpaid?

A: Last payment from Ile was in August of 2016. So from period of 2016, August to November, there was no payment.

See Plaintiff’s Deposition Testimony, NYSCEF Document 168, Page 75.

Defendants contend that based on this deposition testimony, all business after October 26, 2016, except for the purpose of winding up its affairs, was prohibited pursuant to Business Corporation Law 1005(a)(1) which states that “[a]fter dissolution...the corporation shall carry on no business except for the purpose of windings up its affairs.”

Plaintiff’s argument concerning it operating as a *de facto* corporation post dissolution has not been established and has no merit. See *Bruce Supply Corp. v. New Wave Mech., Inc.*, 4 AD3d 444, 773 N.Y.S.2d 408 [2d Dept 2004]. Although Plaintiff is correct that Mr. Lu’s testimony does

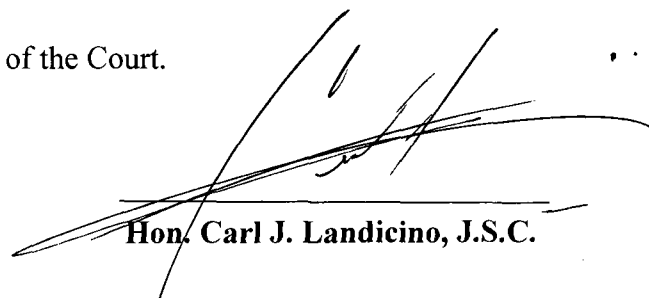
not clearly specify what portion of the work at issue was performed prior to its dissolution, the Court has already held that “the claim was to have existed before dissolution.” *MMI Trading, Inc. v. Nathan H. Kelman, Inc.*, 120 AD3d 478, 989 N.Y.S.2d 911 [2d Dept 2014].

Based on the foregoing, it is hereby ORDERED as follows:

The Defendants’ motion (motion sequence #6) is granted solely to the extent that the Defendant shall have thirty (30) days from entry of this Decision and Order to file and serve the amended answer as reflected in the motion papers. The motion is otherwise denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:



Hon. Carl J. Landicino, J.S.C.

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