

PennyMac Corp. v Suriel
2022 NY Slip Op 34081(U)
November 21, 2022
Supreme Court, New York County
Docket Number: Index No. 157179/2022
Judge: Nancy M. Bannon
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. NANCY M. BANNON PART 42

Justice

-----X

PENNYMAC CORP.,

Petitioner,

- v -

JULIO JAVIER SURIEL,

Respondent.

-----X

INDEX NO. 157179/2022

MOTION DATE 09/16/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26

were read on this motion to/for DISCHARGE/CANCEL MECHANICS LIEN.

I. INTRODUCTION

PennyMac Corp. (PennyMac), owner of real property located at 156 West 228th Street in New York County petitions the court to discharge and cancel a mechanic's lien against the property pursuant to Lien Law § 59, on the ground that the respondent, Julio Suriel (Suriel), a purported lienor, failed to commence an action to foreclose the lien upon being served notice to do so. The respondent opposes the petition. The petition is granted.

II. BACKGROUND

The subject property was acquired by PennyMac from JP Morgan Chase Bank via foreclosure sale in August 2019, for a sale price of \$500.00, in the action *JP Morgan Chase Bank v Deborah Tully and Julio J. Suriel*, Index No. 113962/2009 (foreclosure action). Suriel's appeals in that action were unsuccessful.

In April 2019, before the foreclosure action was concluded, Suriel, who variously claims to be a tenant, a prior owner or to have some continued interest in the subject property, acting *pro se*, commenced an action against JP Morgan Bank, PennyMac and Deborah Tully, a previous owner and mortgagor, by summons with notice, entitled *Julio Javier Suriel v JP Morgan Chase Bank, N.A. et al.*, (Sup Ct, NY County, Index No. 153608/2019) (prior action). The summons with notice states only that it is an action for "trespass...fraud and other causes

of action” and seeks damages of \$385,000.00. By order dated August 19, 2019, the court (Freed, J.) dismissed the complaint pursuant to CPLR 3211(a)(8) as against PennyMac and JP Morgan Chase Bank and severed and continued the action as against Tully. By an order dated November 28, 2022, the court (Sattler, J.) denied Suriel’s motion to amend, noting the prior foreclosure action and Suriel’s unsuccessful appeals and finding that the proposed amendment was “devoid of merit” and “palpably insufficient”. The court marked that case as disposed.

In the meantime, again acting *pro se*, the respondent filed the subject Notice of Lien against the premises on January 18, 2022, in the amount of \$856,950.00. In the lien document, he claims to be “attorney-in-fact, natural person, lienor”, and a “handyman” with a business address of “c/o Suriel, P.O. Box 452, New York, N.Y. 10002.” No physical business address and no residence address is provided. He attached a list of labor and materials allegedly provided by him to the premises from December 2009, through December 2021, such as “house bathroom, \$25,000; exterior walls and siding \$11,000; interior house walls, \$12,700; boiler, \$2,500” without any documentation or other support.

On or about May 16, 2022, the petitioner served a “Notice to Commence Action or Show Cause Pursuant to New York Lien Law § 59” demanding that the respondent commence a lien foreclosure action on or before June 30, 2022. According to the affidavit of service filed by the petitioner, the process server, Kelvi Frias, made several attempts to serve the Notice to Commence on Suriel at his place of residence at 71 Stanton Street, Apt. 2B, New York, N.Y., on June 9, 20, and 23, 2022, but did not find him thereat. The process server then resorted to “nail and mail” service (CPLR 308) at that location on June 23, 2022. Suriel did not commence a foreclosure action at any time. The only action he took was on July 15, 2022, when, again acting without counsel, he filed the motion to amend in the prior pending action, which was ultimately denied.

The petitioner commenced the instant proceeding on August 23, 2022. The petitioner submits, *inter alia*, copies of the Notice of Lien, the Notice to Commence, proof of service of the Notice to Commence on Suriel, and an affirmation of counsel, Andrea Roberts, Esq, dated August 23, 2022, in which she states that Suriel had not commenced any foreclosure action.

Suriel filed a brief affidavit in opposition, dated September 12, 2022, in which he claims that he still resides at the subject premises and alleges that 71 Stanton Street is his daughter’s

residence which he visits “on occasion.” He thus claims he was not “properly serve[d]” with the Notice to Commence since it was served at the Stanton Street address, but also admits in the same affidavit that he became aware of the notice after the deadline that PennyMac gave him to commence an action, which was June 30, 2022. Nonetheless, he did not commence any foreclosure action at any time after that either. Suriel also alleges that his purported motion to amend his pleading in the prior action related to this mechanic’s lien and satisfied Lien Law § 59. He argues that this proceeding should await decision on that motion. However, as stated, that motion has now been denied as without merit. In any event, as set forth herein, Suriel’s July 15, 2022, filing in that action does not satisfy the requirements of Lien Law § 59.

In reply to Suriel’s affidavit in opposition, PennyMac submits a second sworn affidavit of Kelvi Frias, the process server, dated June 6, 2022, who states that he has first attempted service at the subject premises, 156 West 228th Street, on four occasions, May 18, 2022 in the evening, May 25, 2022 in the evening, May 28, 2022 in the morning, and June 2, 2022, in the afternoon. On all four occasions, he “found respondent was no longer at said address” and the premises “appeared to be vacant” in that “there was no response, no activity and neighbors stated that they have not seen anyone at this house for a very long time.”

III. DISCUSSION

The petitioner has demonstrated entitlement to an order discharging the lien filed by Suriel on January 18, 2022, by meeting all requirements of Lien Law § 59, demonstrating that it effectively served the Notice to Commence on Suriel and that Suriel did not commence a foreclosure action. Lien Law § 59 provides:

A mechanic's lien notice of which has been filed on real property or a bond given to discharge the same may be vacated and cancelled or a deposit made to discharge a lien pursuant to section twenty may be returned, by an order of a court of record. Before such order shall be granted, a notice shall be served upon the lienor, *either personally or by leaving it as [sic] his last known place of residence, with a person of suitable age, with directions to deliver it to the lienor.* Such notice shall require the lienor to commence an action to enforce the lien, within a time specified in the notice, not less than thirty days from the time of service, *or show cause at a special term of a court of record, or at a county court, in a county in which the property is situated, at a time and place specified therein, why the notice of lien filed or the bond given should not be vacated and*

cancelled, or the deposit returned, as the case may be. Proof of such service and that the lienor has not commenced the action to foreclose such lien, as directed in the notice, shall be made by affidavit, at the time of applying for such order” (emphasis supplied).

“The language of the statute is plain and intelligible. The intention of it was clearly to enable the owner to require the lienor to test the validity of his lien speedily, and to give to the court power to vacate or discharge the lien in case the action was not commenced, or sufficient reason presented to the court excusing the lienor for not commencing action in the time named in the notice.” William H. Jackson Co. v Haven, 87 AD 236, 238 (1st Dept 1903) [addressing predecessor statute].

Suriel’s primary argument in opposition to the instant petition is that he was not properly served with the Notice to Commence. This argument is specious. Since Suriel failed to provide a physical address on his Notice of Lien, petitioner PennyMac attempted service on Suriel at the subject property and, when the process server determined that the property was vacant, attempted personal service at the Stanton Street address, which the process server had determined was his residence within the state. When the process server was unable to effectuate personal service, he properly utilized “nail and mail” service upon Suriel, leaving a copy at the door of that location and mailing a copy to him at that location as provided in CPLR 308(4). The process server established due diligence, a prerequisite for resorting to “nail and mail” service under CPLR 308(4). See Wood v Balick, 197 AD2d 438 (1st Dept. 1993). While Suriel admits that 71 Stanton Street is his daughter’s residence which he visits “on occasion”, he also could have, but does not, expressly deny living there. Nor does he offer any proof of his residence or proof to dispute the allegation of the process server that the subject premises were vacant in June 2022. Furthermore, the clearest indicator that service was effectuated as alleged is the fact that Suriel sought relief, although belatedly and improperly, by filing a motion in the prior action on July 15, 2022. Logic dictates that the timing of that filing was not merely coincidental.

Secondly, Suriel’s Notice of Lien is invalid and unenforceable in the first instance and subject to vacatur for several reasons. To the extent that the purported lien was for work he performed on or material he supplied for the property while he owned it, as he has alleged, Suriel cannot file a lien since he was not a “contractor, subcontractor, laborer, materialman.”

See Lien Law § 3. That he may have voluntarily expended monies to improve or repair a property which he owned or in which he lived does not entitle him to a lien to recover those expenditures, and the foreclosure did not change that. Indeed, the foreclosure judgment foreclosed any such claim, that is the very purpose of those proceedings.

Furthermore, Suriel's Notice of Lien is void as it did not meet the requirements of Lien Law § 9, which prescribes the contents of any notice of lien. For example, Suriel identifies himself as a "natural person" but does not provide his personal residence address as expressly required by Lien Law §9(1), and the mere Post Office Box number provided cannot suffice as a business address. See Matter of Fibernet Telecom Group, Inc. v East Coast Optical Svcs, 195 Misc 2d 461, 463 (Sup Ct, NY County 2002) [failure to provide a business address other than a "Post Office Box", a material requirement of Lien Law §9(1) constitutes a failure to substantially comply and voids the lien]. Indeed, Suriel does not even identify a business by name.

Additionally, because Suriel does not claim to have been hired by anyone to do provide the labor and materials for which he seeks to be paid, he does not provide the "name of the person by whom the lienor was employed or to whom he furnished materials" or "the person with whom the contract was made." Lien Law § 9(3). Notably, in that section of the notice, he misstates the statute by writing "persons with whom home improvement contract and/or agreement(s) were entered an/or acquiesced into are ..." The word "acquiesced" does not appear in the statute. Moreover, Suriel lists several names in this section - some appear to be family members and others are wholly unidentified - as well as petitioner PennyMac, notwithstanding that PennyMac was the sole owner when the notice was filed. Further, Suriel seeks recovery for labor and materials furnished as far back as ten years prior to PennyMac acquiring ownership of the property through foreclosure.

Finally, the court is not unmindful that Lien Law § 23 provides that "[t]his article is to be construed liberally ... [and] substantial compliance with its several provisions shall be sufficient for the validity of a lien and to give jurisdiction to the courts to enforce the same" See Pascual v Greenleaf Park Land Co., 245 NY 294 (1927); Brescia Const. Co. v Walart Const. Co., 249 AD 151, 151 (1st Dept 1936), affd. 273 NY 648 (1937); William H. Jackson Co. v Haven, supra. Here, however, Suriel's Notice of Lien falls far short of substantial compliance, even under the most liberal construction of the Lien Law. Moreover, it is well settled that "the decision to cancel a lien undertaking pursuant to Lien Law § 59 for failure timely to commence a lien foreclosure

proceeding rests with the sound discretion of the court.” S A F La Sala Corp. v S & H 88th St. Assoc., 138 AD2d 241, 242 (1st Dept. 1988); see Mr. White LLC v Pink Shirt Constr., Inc. 170 AD3d 50 (1st Dept. 2019) [no foreclosure action commenced]. Under the circumstances presented here, it would be an unsound exercise of discretion to deny the petition and leave the Notice of Lien in place against the subject property.

IV. CONCLUSION


In sum, the petition is granted and the Notice of Lien filed by respondent Suriel is discharged and vacated since, as the purported lienor, he did not substantially comply with the statutory requirements of Lien Law §9 in his Notice of Lien in the first instance and that, in any event, petitioner PennyMac has met all requirements for relief under Lien Law § 59.

Accordingly, and upon the foregoing papers, it is hereby

ORDERED that the petition to discharge the mechanic’s lien filed by the respondent, Julio Javier Suriel, on January 18, 2022, against the subject premises, 156 West 228th Street, New York, New York, 10463, designated as Block 2215 Lot 324, in New York County, is granted, and it is further,

ORDERED that the County Clerk of New York County is directed, upon a receipt of a copy of this order with notice of entry, to vacate, cancel and discharge the mechanic’s lien filed by Julio Javier Suriel on January 18, 2022, against the subject premises, 156 West 228th Street, New York, New York, 10463, designated as Block 2215 Lot 324, in New York County.

This constitutes the Decision and Order of the court.


NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

11/21/2022
DATE

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE