

Slattery v Strong's Mar., LLC
2022 NY Slip Op 35208(U)
September 21, 2022
Supreme Court, Suffolk County
Docket Number: Index No. 612647-2020
Judge: David T. Reilly
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SUPREME COURT OF THE STATE OF NEW YORK

I.A.S. PART 30 SUFFOLK COUNTY

PRESENT:

INDEX NO.: 612647-2020

HON. DAVID T. REILLY, JSC

JOHN J. SLATTERY, JR.,

Plaintiff,

-against-

STRONG'S MARINE, LLC,

Defendant.
_____Wickham, Bressler & Geasa, P.C.
Attorneys for Plaintiff
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Mattituck, NY 11952Twomey, Latham, Shea, Kelley,
Dubin & Quartararo, LLP
Attorneys for Defendant
33 West Second Street
Riverhead, NY 11901

MOTION DATE:	<u>12/01/21</u>
SUBMITTED:	<u>02/02/22</u>
MOTION SEQ. NO.:	<u>2 & 3</u>
MOTION DEC.:	002 <u>MD</u>
	003 <u>MotD</u>

Upon the reading and filing of the following papers in this matter: (1) Plaintiff's Notice of Motion filed on December 1, 2021 and supporting papers; (2) Defendant's Notice of Cross-Motion filed on January 12, 2022 and supporting papers; (3) Plaintiff's Affirmation in Opposition to Cross-Motion and in Further Support of Motion filed on January 12, 2022 and supporting papers (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that Motion Seq. Nos. 002 and 003 are consolidated for purposes of this determination; and it is

ORDERED that plaintiff's motion (002) for an Order granting him partial summary judgment on the issue of liability pursuant to CPLR 3212 is denied; and it is

ORDERED that defendant's cross-motion (003) for an Order granting it partial summary judgment on the issue of liability and summary judgment with respect to the damages sought pursuant to CPLR 3212 is granted in part and denied in part as set forth below.

Plaintiff commenced this action with the filing of a summons and complaint on September 9, 2020 seeking money damages for a cause of action sounding in conversion. Plaintiff alleges that defendant, a boatyard and marina, improperly and without proper notice sold his boat, a 2001 Formula 31 foot Thunderbird (the vessel) at auction. Plaintiff further maintains that the vessel had a fair market value of approximately \$51,000.00 at the time of sale, that defendant bought the vessel

at auction for \$395.00 and took title to the vessel later selling it for \$17,000.00. Defendant has filed an answer containing counterclaims wherein it alleges that plaintiff failed to pay for storage and maintenance fees at the marina for a period of five years, exclusive of interest and service charges. Defendant seeks a money judgment for \$9,408.23.

Plaintiff now moves for partial summary judgment on the issue of liability arguing that defendant failed to provide proper notice of the impending auction of the vessel. Specifically, plaintiff maintains that defendant failed to adhere to the procedures set forth in Lien Law Article 9, §§201, 202 which provide, among other things, that notice of such sale must be published for two weeks in a newspaper published in the town in which the sale is to be held. Plaintiff avers that notice was made in the National Herald which purportedly serves the Greek-American community and is published in Queens County. In addition, plaintiff states that defendant made no efforts to personally serve him with notice of sale and any efforts to properly serve him by mail were insufficient. Finally, plaintiff contends that defendant could not have been the successful bidder at the auction and could not take title to the vessel.

Defendant has filed a cross-motion seeking summary judgment on the issue of liability and argues that the foreclosure auction sale was properly conducted pursuant to Lien Law §§ 184, 200 and 202 and that defendant is entitled to \$9,408.23 in damages. Defendant states that plaintiff stored the vessel in their boatyard beginning in 2008 and made timely payments until the middle of the 2013-2014 storage season when almost all payments stopped. Defendant maintains that plaintiff was provided with monthly invoices which went unpaid and that plaintiff failed to remove the vessel from the storage facility. Therefore, defendant argues, it held a valid garageman's lien on the vessel pursuant to Lien Law §184 and, as such, it was entitled to sell the vessel to satisfy that lien pursuant to Lien Law §200. Finally, defendant avers that the notice of sale was properly published in a newspaper that was distributed at several locations in the Town of Southold where the auction sale was ultimately held.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; *O'Neill v Town of Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]). However, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]; *Rebecchi v Whitmore*, *supra*).

Lien Law §184 provides, in pertinent part,

1. A person keeping a garage, hangar or place for the storage, maintenance, keeping or repair of ... motor boats as defined by article seven of the navigation law ... and

who in connection therewith tows, stores, maintains, keeps or repairs any ... motor boat ... or furnishes gasoline or other supplies therefor at the request or with the consent of the owner or, subject to the provisions of subdivision two of this section ... whether or not such ... motor boat ... is subject to a security interest, has a lien upon such ... motor boat ... for the sum due for such towing, storing, maintaining, keeping or repairing of such ... motor boat ... or for furnishing gasoline or other supplies therefor and may detain such ... motor boat ... at any time it may be lawfully in his possession until such sum is paid ...

(see Lien Law § 184,Consol., Lexis Advance through 2022 released Chapters 1-561).

Here, there has been no real argument set forth that defendant did not hold a valid lien on the vessel subject to the provisions of the storage agreement entered into by the parties on September 30, 2013 (see NYSCEF Doc. No. 59). That agreement specifically provides, “[A]ll storage charges and charges for services, supplies, repairs and materials shall be paid prior to departure of the vessel from Lessor. *Lessor shall have a lien upon the vessel*, it’s contents and equipment, wherever such vessel may be located for any storage, repair, or service charge not paid (see *Id.*, at ¶12)(*Emphasis supplied*). It is uncontested that plaintiff stored the vessel at defendant’s storage yard and incurred significant charges which went unpaid. Rather, the gravamen of plaintiff’s argument is that defendant failed to provide proper notice of the proposed sale.

Lien Law § 201 provides, in pertinent part,

Before such sale is held the lienor shall serve a notice upon the owner with due diligence within such county, if such owner can be found where such lien arose, if not then to the person for whose account the same is then held personally, provided such service can be made with due diligence within the county where such lien arose ...

Any notice permitted herein to be served by mail shall be sent by certified mail, return receipt requested, and by first-class mail ... Such notice shall contain a statement of the following facts:

1. The nature of the debt or the agreement under which the lien arose, with an itemized statement of the claim and the time when due;
2. A brief description of the personal property against which the lien exists;
3. The estimated value of such property;
4. The amount of such lien, at the date of the notice.

It shall also require such owner or any such person to pay the amount of such lien, on or before a day mentioned therein, not less than ten days from the service thereof, and shall state the time when and place where such property will be sold, if such amount is not paid; and it shall state that the owner or any such person is entitled to bring a proceeding under section two hundred one-a of this article within ten days of the service of notice if he disputes the validity of the lien or the amount claimed. If the agreement on which the lien is based provides for the continuous care of property

the lienor is also entitled to receive all sums which may accrue under the agreement, subsequent to the notice and prior to payment or a sale of the property; and the notice shall contain a statement that such additional sum is demanded. Such notice shall be verified by the lienor to the effect that the lien upon such property is valid, that the debt upon which such lien is founded is due and has not been paid and that the facts stated in such notice are true to the best of his knowledge and belief.

(see Lien Law § 201, Consol., Lexis Advance through 2022 released Chapters 1-561).

In April 2019 defendant contracted with Rapid Liens, Inc. to assist defendant in foreclosing on the garageman's lien held against plaintiff's vessel. To that end a "Notice of Lien and Sale" was prepared listing three separate addresses for plaintiff, one of which was a post-office address, one an apartment in New York City listed on the storage agreement and the last at plaintiff's address in Cutchogue, Town of Southold.(see NYSCEF Doc. 61). Rapid Liens, Inc. engaged the services of Certified Mailing Solutions, Inc. to process the certified mailings of the notice to plaintiff. Defendant has submitted a receipt from Certified Mailing Solutions, Inc. which indicates that the notice was sent to plaintiff by certified mail and first class mail at the three addresses and the mailings were not returned. Further, the Court is aware that plaintiff received most, if not all, of the invoices sent by defendant at the post-office address provided and there can be little doubt that plaintiff received notice of the lien and sale. Therefore, the Court finds that defendant fulfilled its obligation with respect to the necessary mailings.

Lien Law § 202, provides, in pertinent part,

Each sale of personal property of a value of one hundred dollars or more, or of any security, to satisfy a lien thereon shall be at public auction to the highest bidder, and shall be held in the city or town where the lien was acquired. After the time for the payment of the amount of the lien specified in the notice required to be served by section two hundred one or two hundred one-a of this article, notice of such sale shall be published once a week, for two consecutive weeks, in a newspaper published in the town or city where such sale is to be held, and such sale shall be held not less than fifteen days from the first publication; if there be no newspaper published in such town, such notice shall be posted at least ten days before such sale in not less than six conspicuous places therein. Such notice shall describe the property to be sold and shall state the name of the person for whose account the same is then held and the time and place of such sale...

(see Lien Law § 202,Consol., Lexis Advance through 2022 released Chapters 1-561).

Plaintiff's final point meriting consideration is that the National Herald newspaper was not published in the Town of Southold where the sale was to be held. In other words, the printing plant was not located in Southold, but rather Long Island City in Queens County. Subdivision 1 of section 202 of the Lien Law states that the notice shall be published "in a newspaper published in the town or city where such sale is to be held."

The Court does not interpret the phrase “newspaper published in the town” to mean that the plant has to be located there, but merely that the newspaper has a circulation in the town (*see generally Lewis v Jim's Boat Yard, Inc.*, 73 Misc2d 24, 341 NYS2d 28 [Suffolk Dist Ct, 2nd Dist 1973]). In defendant’s statement of material facts submitted pursuant to 22 NYCRR §202.8-g, it is stated that the newspaper, The National Herald, is circulated at no less than three different locations within the Town of Southold. That contention uncontroverted and further bolstered by the affidavit of Anthony Tesoriero, a representative of Rapid Liens, Inc. and serves to satisfy the newspaper notice requirement of Lien Law §202.

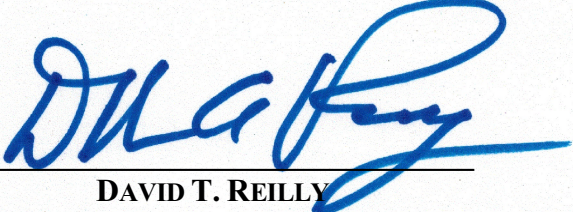
The Court has reviewed plaintiff’s remaining arguments and finds them to be without merit. Accordingly, defendant’s application for partial summary judgment on the issue of liability is granted as the Court finds that the auction/foreclosure sale of the vessel was conducted pursuant to the applicable statutes. Therefore, plaintiff’s motion for partial summary judgment is denied.

With respect to the remaining branches of the defendant’s motion, specifically those seeking summary judgment as to the issue of damages sought by counterclaims and attorney’s fees, the motion is denied. The Court cannot determine on the record before it what amount of attorney’s fees, if any, would be appropriate. Nor can the proper amount of damages, if any, be properly ascertained from the parties’ submissions.

This constitutes the decision and Order of the Court.

Dated: September 21, 2022
Riverhead, New York





DAVID T. REILLY
JUSTICE OF THE SUPREME COURT

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION