

Apple City Bldrs. Corp. v 46-50 Gansevoort St., LLC

2023 NY Slip Op 30573(U)

February 21, 2023

Supreme Court, New York County

Docket Number: Index No. 157632/2017

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 41

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 APPLE CITY BUILDERS CORP.,

Index No. 157632/2017

Plaintiff

- against -

DECISION AND ORDER

46-50 GANSEVOORT STREET, LLC,
 52-58 GANSEVOORT STREET, LLC,
 60-74 GANSEVOORT STREET, LLC,

Defendants
 -----x

LUCY BILLINGS, J.S.C.:

Defendants move for summary judgment dismissing the complaint and vacating the mechanic's lien plaintiff filed against defendants' real property at 46-50 Gansevoort Street, 52-58 Gansevoort Street, and 60-74 Gansevoort Street, in New York County. C.P.L.R. § 3212(b); New York Lien Law §§ 3, 19(5). When plaintiff performed improvements on defendants' premises, a prior owner, nonparty Gansevoort Street Properties, LLC, owned the premises. Nonparty William Gottlieb Management, LLC (WGM), was the prior owner's managing agent and now is defendants' manager.

I. DEFENDANTS' EVIDENCE

Defendants' witness Julio Hernandez, currently employed by WGM, was not employed by WGM when plaintiff performed the improvements and therefore lacks personal knowledge of the improvements and whether WGM's or the prior owner's records at the time of the improvements were created in the regular course of business. C.P.L.R. § 4518(a); Buffington v. Catholic Sch.

Region of Northwest & Southwest Bronx, 198 A.D.3d 410, 411 (1st Dep't 2021); Doe v. Intercontinental Hotels Group, PLC, 193 A.D.3d 410, 411 (1st Dep't 2021); HSBC Bank USA, N.A. v. Greene, 190 A.D.3d 417, 418 (1st Dep't 2021). Plaintiff's lien attached to its complaint, however, claims plaintiff performed heating, ventilation, and air conditioning (HVAC) and other work for a commercial tenant, MPBED, Inc., at the premises from February 19 to November 3, 2010. The parties also stipulated on the record November 10, 2022, that a commercial lease dated December 4, 1996, and lease modifications for terms extending to June 30, 2012, between WGM as the landlord and LeGans Restaurant, Inc., as the tenant for the ground floor and basement of 46 Gansevoort Street were authenticated and admissible for purposes of defendants' motion.

Hernandez alleges and presents checks indicating that MPBED paid rent on LeGans Restaurant's behalf. Even were he competent to attest that WGM maintained these checks in the regular course of WGM's business, demonstrating the entity that paid rent, he does not lay that foundation for the checks' admissibility. Doe v. Intercontinental Hotels Group, PLC, 193 A.D.3d at 411; HSBC Bank USA, N.A. v. Greene, 190 A.D.3d at 418; People v. Bell, 153 A.D.3d 401, 412 (1st Dep't 2017). Nevertheless, as explained below, for purposes of this motion the tenant's identity is inconsequential. The only material fact is that a tenant was in possession of the premises on which plaintiff performed its work.

II. INVOICES ## 342, 362, AND 378

Three of the four invoices to MPBED supporting plaintiff's lien show that its work was entirely within the 46 Gansevoort Street premises. The fourth invoice shows HVAC work for MPBED on the building's roof. Paragraph 8 of the Lease Modification and Extension Agreement dated September 29, 2010, provides that "Tenant shall have free access to the roof of the Premises to clean, repair and maintain its HVAC." Aff. of Julio Hernandez Ex. I.

New York Lien Law § 3 provides that real property owners' interests may be subject to a mechanic's lien only if the work performed at the property was "with the consent or at the request of the owner thereof, or of his agent." Plaintiff does not claim its work was at the owner's request, but claims defendants' predecessor or its managing agent WGM consented to plaintiff's work. Where plaintiff claims the owner's or agent's consent, the owner must retain possession and control of the property. Ferrara v. Peaches Cafe LLC, 32 N.Y.3d 348, 353 (2018); Matell Contr. v. Fleetword Park Dev., LLC, 111 A.D.3d 681, 683 (2d Dep't 2013); Mediterranean Contr., Inc. v. 115 Hoyt, LLC, 94 A.D.3d 1063, 1064 (2d Dep't 2012); Drapaniotis v. 36-08 33rd St. Corp., 48 A.D.3d 736, 737 (2d Dep't 2008). The lease establishes that defendants' predecessor and WGM did not retain possession and control of the leased premises where plaintiff performed the work reflected in invoices 342, 362, and 378.

Regarding plaintiff's work within the leased premises

reflected in those invoices, the landlord's or agent's consent thus is immaterial. Therefore the court grants defendants' motion for summary judgment to the extent of dismissing the complaint's claims to recover the amounts specified in invoices 342, 362, and 378, a total of \$37,600, plus interest, and vacates so much of plaintiff's mechanic's lien for those amounts.

C.P.L.R. § 3212(b) and (e); N.Y. Lien Law §§ 3, 19(5); Interior Bldg. Servs., Inc. v. Broadway 1384 LLC, 73 A.D.3d 529, 529 (1st Dep't 2010).

III. INVOICE # 300

To support the absence of consent to plaintiff's HVAC work on the roof outside the leased premises, reflected in invoice # 300 for the installation of two HVAC units, defendants, lacking a witness with personal knowledge, may rely only on the lease provision, "Nothing in the article shall be construed to give Owner title to or prevent Tenant's removal of . . . equipment" Hernandez Aff. Ex. F, art. 3. This provision eliminates the owner's right to reap the benefits of the HVAC work, but does not negate that fact that the owner or its agent may have consented to plaintiff's installation of the tenant's HVAC system. Conceivably, the owner even may have entered a side agreement with the tenant to retain its system when the lease expired in 2012.

Moreover, while WGM's obligation under ¶ 8 of the Lease Modification and Extension Agreement to provide the tenant access to the roof for its HVAC units does not alone amount to consent

to plaintiff's installation, that obligation may have furnished the occasion for WGM's consent. Plaintiff's witness, its shareholder Raul Escarza, admits that the tenant at 46 Gansevoort Street hired plaintiff to install rooftop HVAC equipment, and Escarza himself never visited the building, but he attests that he communicated constantly with the owner's representative and property manager, Hernandez's predecessor. The owner's representative not only granted plaintiff access to the roof, but also coordinated deliveries of the equipment, scheduling of a crane and closure of the street in front of the building to raise the equipment onto the roof, and permanent installation of 25 feet long beams to support the equipment.

This evidence at minimum raises an inference that the owner did not just acquiesce in plaintiff's installation, but affirmatively consented to it and assisted with it, contemplating that at least part of the installation would become a permanent part of the property. Ferrara v. Peaches Cafe LLC, 32 N.Y.3d at 354-55; American Constr. Inc. v. Radu Physical Culture, LLC; 93 A.D.3d 580, 580 (1st Dep't 2012); Curtis Partitions Corp. v. Halpern Constr., Inc., 43 A.D.3d 744, 744 (1st Dep't 2007); Icdia Corp. v. Visaggi, 135 A.D.3d 820, 822 (2d Dep't 2016). According to invoice # 300, the installation included new piping, new circuits, and control wiring as well as the permanent beams. In this respect Article 3 of the lease distinguishes fixtures from equipment: "All fixtures and all paneling, partitions, railings, and like installations installed in the premises at any time,

either by Tenant or by Owner on Tenant's behalf, shall, upon installation, become the property of the Owner and shall remain upon and be surrendered with the demised premises." Hernandez Aff. Ex. A. Although this provision refers to installations "in the premises," defendants present no grounds for giving the tenant greater rights to fixtures outside the leased premises than within the premises and for concluding that the two beams plaintiff installed would not become the owner's property. Defendants merely insist that plaintiff never completed this work, but present no admissible evidence of that fact.

IV. CONCLUSION

Notably, Escarza does not address any invoice other than # 300. Therefore the court grants defendants' motion for summary judgment and vacatur of plaintiff's mechanic's lien in part and denies defendants' motion in part. As set forth above, the court grants defendants' motion to the extent of dismissing the complaint's claims to recover the amounts specified in plaintiff's invoices ## 342, 362, and 378 and vacates so much of its mechanic's lien for those amounts. C.P.L.R. § 3212(b) and (e); N.Y. Lien Law §§ 3, 19(5). For the further reasons explained above, the court denies defendants' motion for summary judgment dismissing the complaint's claim to recover the \$33,000 specified in plaintiff's invoice # 300, plus interest, and denies vacatur of so much of its mechanic's lien for that amount. C.P.L.R. § 3212(b); N.Y. Lien Law § 3.

The parties shall appear for a pre-trial conference May 18,

2023, at 12:00 noon, in Part 41, 71 Thomas Street, New York
County.

DATED: February 21, 2023



LUCY BILLINGS, J.S.C.

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