Malayan Banking Berhad, N.Y. Branch v Park Place Dev. Primary LLC
2023 NY Slip Op 31569(U)
May 5, 2023
Supreme Court, New York County
Docket Number: Index No. 850083/2020
Judge: Francis A. Kahn III
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. FRANCIS A. KAHN, III** **PART** **32**

Justice

---X

INDEX NO. 850083/2020

MOTION DATE ________

MOTION SEQ. NO. 006

MALAYAN BANKING BERHAD, NEW YORK BRANCH, INTESA SANPAOLO S.P.A., NEW YORK BRANCH, WARBA BANK K.S.C.P., 45 PARK PLACE INVESTMENTS, LLC,

Plaintiff,

- v -

PARK PLACE DEVELOPMENT PRIMARY LLC,PARK PLACE PARTNERS DEVELOPMENT LLC,45 PARK PLACE PARTNERS, LLC,SOHO PROPERTIES GENERAL PARTNER, LLC,SHARIF EL-GAMAL, STATE OF NEW YORK CIVIL RECOVERIES BUREAU, GILBANE RESIDENTIAL CONSTRUCTION LLC,US CRANE & RIGGING LLC,CONSTRUCTION REALTY SAFETY GROUP INC.,TRADE OFF PLUS, LLC,ALL-CITY METAL INC.,PERMASTEELISA NORTH AMERICA CORP., NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, TRANSCONTINENTAL STEEL CORP., ISMAEL LEYVA ARCHITECT, P.C.,PERI FORMWORK SYSTEMS, INC.,ULE GROUP CORP. D/B/A UNITED LIGHTING ELECTRICAL CORP., S&E BRIDGE & SCAFFOLD LLC,JOHN DOES 1-100, SOHO PROPERTIES INC.,THE PACE COMPANNIES NEW YROK, INC.,PEAK MECHANICAL SOLUTIONS, INC.,MEN OF STEEL REBAR FABRICATORS, LLC,GOTHAM DRYWALL, INC.,TRANSCONTINENTAL STEEL CORP., ISMAEL LEYVA ARCHITECT, P.C.,PERI FORMWORK SYSTEMS, INC.,ULE GROUP CORP. D/B/A UNITED LIGHTING ELECTRICAL CORP., S&E BRIDGE & SCAFFOLD LLC,

Defendant.

DECISION + ORDER ON MOTION

---X

The following e-filed documents, listed by NYSCEF document number (Motion 006) 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER .

Upon the foregoing documents, the motion is determined as follows:

This is an action to, *inter alia*, foreclose on two mortgages, both dated May 17, 2016, given by Defendant Park Place Development Primary LLC ("Borrower") to Plaintiff Malayan Banking Berhad, New York Branch ("Plaintiff") which encumber a parcel of real property located at 43 – 47 Park Place, New York, New York (Block 126, Lot 8). Permasteelisa North America Corp. ("PNA"), a mechanic's

lienor, answered and pled seven affirmative defenses as well as six crossclaims and a counterclaim. The fourth crossclaim and counterclaim seek foreclosure on its mechanic's lien, a determination of the extent and priority of each lien and, ostensibly, a determination that PNA's mechanic's liens are superior to all other liens on the premises, including Plaintiff's mortgage. The other facts and procedural circumstances regarding the litigation so far and the underlying transaction were recounted *ad nauseum* in this Court's decisions on Motion Sequence Numbers 2, 3, 4 and 5 (NYSCEF Doc Nos 665, 666, 667 and 795) and will only be repeated or supplemented where necessary.

Defendant Borrower moves for, *inter alia*, summary judgment pursuant to CPLR §3212 dismissing Defendant PNA's crossclaim for foreclosure of its mechanic's liens, summary judgment against PNA on Borrower's "First Counterclaim", to void PNA's liens and to cancel the notice of pendency filed by PNA. Defendant PNA opposes the motion.

Borrower's argument that PNA's second and third lien filings were invalid for increasing the amount claimed in the initial lien is misplaced. "[T]he Lien Law is permissive and allows the filing of successive liens for the same work to cure an irregularity in an earlier lien, as long as the successive lien is filed within the period prescribed in section 10 [of the Lien Law]" (*Danica Plumbing & Heating, LLC v. 3536 Cambridge Ave., LLC*, 62 AD3d 426, 427 [1st Dept 2009]; *see also Berger Mfg. Co. v New York*, 206 NY 24, 32 [1912]["Such authority would seem to include the right to file a second lien within the time so provided"]; *Madison Lexington Venture v Thomas Crimmins Contracting Co.*, 159 AD2d 256, 257 [1st Dept 1990]). With respect to the propriety of a successive lien for an increased amount, "there is no restriction upon a person furnishing materials or labor for the construction of a building which confines him to one lien or prevents him from filing a lien on the completion of a contract, because during the performance of the contract he has filed notices of liens for separate installments due thereunder" (*Clarke v Heylman*, 80 AD 572, 577-78 [1st Dept 1903]). In other words, "[i]f a timely filing has been made for work and materials furnished up to the time of filing, successive filings could be made as additional work is performed or materials are furnished or as additional amounts become due under the contract" (34 NY Prac., Mechanics' Liens in New York § 3:8 [2022-2023 ed.]).

Borrower's reliance on Lien Law §12-a and *Perrin v Stempinski Realty Corp.*, 15 AD2d 48 [1st Dept 1961] is inapposite in this case. Section 12-a of the Lien Law provides as follows:

> Within sixty days after the original filing, a lienor may amend his lien upon twenty days notice to existing lienors, mortgagees and the owner, provided that no action or proceeding to enforce or cancel the mechanics' lien has been brought in the interim, where the purpose of the amendment is to reduce the amount of the lien, except the question of wilful exaggeration shall survive such amendment.

Borrower posits that this statute applies to every mechanic's lien and that after a lien is filed, any additional filing must comply with section 12-a. The fallacy underlying this interpretation is the assumption that there is no difference between "successive" liens and "amended" liens. Section 10 of the Lien Law places no limitation on the number of liens that may be filed so long as they are filed within the applicable period, in this case eight months, and sufficient under Lien Law §§9 and 23. The Appellate Division, First Department has repeatedly recognized that timely filed successive liens are viable (*see 361 Broadway Associates Holdings, LLC v Blonder Builders Inc.*, 178 AD3d 494 [1st Dep't 2019]; *Danica Plumbing & Heating, LLC v 3536 Cambridge Ave., LLC*, supra; *Madison Lexington Venture v Thomas Crimmins Contracting Co.*, 159 AD2d 256 [1st Dep't 1990]; *Clarke v Heylman*, supra). However, by filing a successive lien, "any such subsequent filing would be effective only from

the date thereof and, presumably, would create a lien that was subordinate to mortgages and other liens that intervened between the original defective filing and the later corrective filing" (34 NY Prac., Mechanics' Liens in New York § 3:13 [2022-2023 ed.]).

Unlike successive liens, an amendment of a subsisting lien was not recognized under common-law (*see In re James Passero & Sons, Inc.*, 237 AD 638, 639 [4th Dept 1933]). Section 12-a was a remedial enactment intended to allow a court to correct, in certain limited circumstances, a non-conforming lien which would accord the lienor the priority of the original filing date (*see Application of Upstate Builders Supply Corp.*, 63 Misc. 2d 35 [Sup Ct Onondaga Cty 1970]). Moreover, the sixty-day limitation period contained in Section 12-a appears to extend past the filing dates contained in section 10. Given the liberal construction accorded to provisions of the Lien Law to "secure [its] beneficial interest and purpose" (*Strober Bros. v Kitano Arms Corp.*, 224 AD2d 351, 352 [1st Dept 1996]), construing section 12-a as intended to abrogate the filing of successive liens is not tenable. The First Department's decision in *Perrin v Stempinski Realty Corp.*, 15 AD2d 48 [1st Dept 1961], contrary to Borrower's assertion, is not contrary. Borrower is correct that the Court in *Perrin* recognized that an amendment of a mechanic's lien did not exist at common law and, therefore, an amendment which sought to increase the amount due could not stand as it was not permissible under section 12-a. What Borrower overlooks is the First Department's tacit recognition in that decision of the possibility of a successive lien. It noted that "[p]rior to 1932 no amendment of any kind was permissible and a notice of lien defective in any way was ineffectual and incurable". Then, the Court stated that "once the limitation period of four months [in Section 10] had passed the contractor could not secure his claim against the owner by lien against the property" (*id.* at 49). Thus, it acknowledged that while a defective lien was a nullity, a contractor's right to lien security did not expire until the limitation period ended.

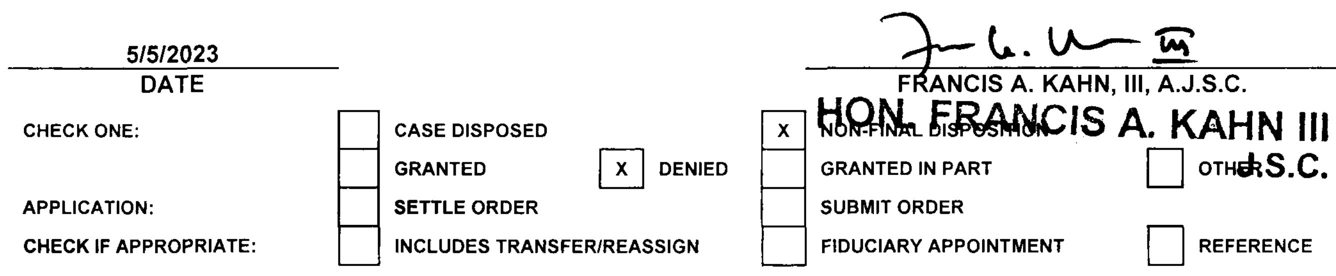
As to the substantive representations made by PNA in the liens, Section 39 of the Lien Law authorizes the court to declare a lien void if the amount claimed owed is found have been willfully exaggerated (*see* Lien Law § 39). The burden is on the party asserting the existence of a willful exaggeration to establish same (*see On the Level Enterprises, Inc. v 49 E. Houston LLC*, 104 AD3d 500 [1st Dept 2013]). "[T]he issue of willful or fraudulent exaggeration is one that is ordinarily determined at the trial of the foreclosure action, and not on summary disposition" (*id.*). However, summary disposition is possible where the evidence concerning the misrepresentation is "conclusive" (*see Northe Group, Inc. v Spread NYC, LLC*, 88 AD3d 557 [1st Dept 2011]). That burden "necessarily involves proof as to the credibility of the lienor" (*On the Level Enterprises, Inc. v 49 E. Houston LLC*, supra; *see also Rosenbaum v Atlas & Design Contrs., Inc.*, 66 AD3d 576 [1st Dept 2009]).

Here, Borrower failed to conclusively establish any of the liens are willfully exaggerated. Completely absent is any proof that impugns the credibility of the representations made by PNA. The mere fact that PNA filed successive liens with overlapping costs does not *ipso facto* mean it is seeking double recovery for the same costs. Both the second and third liens are referred to as "corrected" and "amended" as opposed to new or independent. Further, these successive liens refer to the initial lien and specify the differences in the latter two.

Considering the strict construction of Lien Law §39 in favor of the party against which the penalty therein is sought to be applied (*East Hills Metro, Inc. v. J.M. Dennis Constr. Corp.*, 277 AD2d 348, 349 [2d Dept 2000], the Borrower's characterization of PNA's claims of increased costs caused by delays which "extended the workload" and "disrupted the production schedule" as claims for lost profits is not established. On the contrary, it would appear such costs can be included in a mechanic's lien (*see*

L. B. Foster Co. v. Terry Contracting, Inc., 34 AD2d 638, 639 [1st Dept 1970]; *see also Bryan's Quality Plus, LLC v Dorime*, 80 AD3d 639, 640 [2d Dept 2011]). Also absent is proof that PNA "intentionally or deliberately" inflated the amount it claims is owed (*see Collins v Peckham Road Corp.*, 18 AD2d 860, 861 [3d Dept 1963]). At most, Borrower posits that PNA included claims "for items other than those permissibly subject to a lien pursuant to Lien Law §§ 3 and 4" and, therefore, deceitful intent is automatically established. Even the case law relied upon by Movant does not stand for that proposition (*see East Hills Metro, Inc. v. J.M. Dennis Constr. Corp.*, 183 Misc. 2d 439 [Sup Ct Nass. Cty 2000]; *Goldberger-Raabin, Inc. v. 74 Second Ave. Corp.*, 252 NY 336 [1929] ["Section 9 says that the notice of lien shall state, among other things, the labor performed and the agreed price or value thereof, and the amount unpaid for such labor. This does not mean that the lien is void if the amounts stated are inaccurate; it means that the lien shall state the claim of the lienor which, upon the trial, may appear to be much less than the amount stated."]).

Accordingly, Borrower's motion is denied as it failed to demonstrate a *prima facie* entitlement to dismissal under Lien Law §39.



5/5/2023
DATE

FRANCIS A. KAHN, III, A.J.S.C.
HON. FRANCIS A. KAHN III
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