

**Matter of 20 W. 40 Bryant Park Owner, LLC v RCI
PLBG, Inc.**

2023 NY Slip Op 31813(U)

May 30, 2023

Supreme Court, New York County

Docket Number: Index No. 151165/2023

Judge: John J. Kelley

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. JOHN J. KELLEY

PART

56M

Justice

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In the Matter of

20 WEST 40 BRYANT PARK OWNER, LLC,

Petitioner,

- v -

RCI PLBG, INC.,

Respondent.

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INDEX NO. 151165/2023MOTION DATE 03/02/2023MOTION SEQ. NO. 001

AMENDED DECISION, ORDER, and JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10

were read on this motion to/for

VACATE MECHANICS LIEN

The court's prior decision and order, also dated May 30, 2023, is recalled and vacated, upon the court's own motion, to correct certain inaccuracies in the recitation of the facts, and the following order and judgment is substituted therefor:

In this proceeding pursuant to Lien Law §§ 9, 10 and 19, the petitioner, 20 West 40 Bryant Park Owner, LLC, seeks to vacate and cancel a mechanic's lien. The respondent, RCI PLBG, Inc. (RCI), does not oppose the petition. The petition is granted, without opposition.

On September 6, 2022, RCI recorded a mechanic's lien against a condominium development located at 20 West 40th Street in Manhattan, designated as Block 841, Lots 1001 through 1061, on the tax map of the City of New York, Borough of Manhattan, to secure payment of the sum of \$438,000.00 for labor and plumbing materials that RCI allegedly provided or delivered to the petitioner in connection with improvements to the development.

On February 6, 2023, the petitioner filed the proposed order to show cause initiating this proceeding, along with the petition and supporting papers, and served RCI with all of those papers on February 17, 2023, in accordance with the terms of the order to show cause. The petitioner alleged that RCI completed all of the work that is the subject of the lien by May 31,

2019, and that RCI did not timely file the lien within eight months after it completed the work. The petitioner further alleged that it is and was not the owner of most of the lots on which the RCI performed its work. Rather, the petitioner asserted that, as indicated on the condominium declaration and amended condominium declaration that it had previously filed with the New York City Register, it owned only lots 1007, 1015, 1028, 1037, 1041, 1042, 1045, 1047, 1051, 1054, 1058, 1059, 1060 and 1061 on of the date that RCI filed the mechanic's lien, that 43 distinct persons and entities owned the remaining 46 lots within the development, and that, in any event, RCI misidentified the owner of all of the lots as "20 West 40th Street Condominium," a non-existent entity.

Lien Law § 19(6) states, in pertinent part, that

"[w]here it appears from the face of the notice of lien that the claimant has no valid lien by reason of the character of the labor or materials furnished and for which a lien is claimed, *or where for any other reason the notice of lien is invalid by reason of failure to comply with the provisions of section nine of this article, or where it appears from the public records that such notice has not been filed in accordance with the provisions of section ten of this article*, the owner or any other party in interest, may apply to the supreme court of this state, or to any justice thereof, or to the county judge of the county in which the notice of lien is filed, for an order summarily discharging of record the alleged lien"

(emphasis added).

As relevant here, Lien Law §10(1) provides that a

"[n]otice of lien may be filed at any time during the progress of the work and the furnishing of the materials, or, within eight months after the completion of the contract, or the final performance of the work, or the final furnishing of the materials, dating from the last item of work performed or materials furnished."

By declining to oppose the petition, RCI failed to rebut the petitioner's prima facie showing that the mechanic's lien was filed more than eight months after RCI completed its work. Hence, the lien must be discharged on that ground (*see Matter of 361 Broadway Assoc. Holdings, LLC v Blonder Bldrs, Inc.*, 178 AD3d 494, 494 [1st Dept 2019]).

Lien Law § 9(2) provides, in relevant part, that a notice of mechanic's lien shall identify "[t]he name of the owner of the real property against whose interest therein a lien is claimed,

and the interest of the owner as far as known to the lienor.” Nonetheless, the failure to state the true owner, or the misdescription of the true owner, will not affect the validity a notice of lien (Lien Law § 9[7]). Hence, under certain circumstances, including where third parties would not be prejudiced, the lienor may amend the notice of lien (*see Matter of Rigano v Vibar Constr., Inc.*, 24 NY3d 415, 419 [2014], overruling the Appellate Division, Second Department’s decisions in *Tri-State Sol-Aire Corp. v Lakeville Pace Mech.*, 221 AD2d 519, 521, 522 [2d Dept 1995] and *Matter of Tri-Quality Mech. Corp. v Chappastream Corp.*, 138 AD2d 610, 611 [2d Dept 1988], which had held that “a misidentification of the true owner is a jurisdictional defect which cannot be cured by an amendment nunc pro tunc”]). In *Matter of Rigano*, the misnomer consisted of identifying the owner as an entity whose stock was wholly owned by the true owner, and the Court of Appeals permitted the amendment.

In the instant dispute, however, RCI never sought leave to amend the notice of lien at any time. Hence, the “lien was defective because it misidentified the owner of the property” (*KSK Constr. Group, LLC v 26 E. 64 th St., LLC*, 126 AD3d 568, 569 [1st Dept 2015]; *see also Matter of Rigano v Vibar Constr., Inc.*, 24 NY3d at 420]). Consequently, the petitioner is entitled to the discharge of the lien on that ground as well.

On May 23, 2023, counsel for the petitioner appeared in court to inform the court that, on November 22, 2022, it had paid a cash bond in into the Court and Trust Fund in the sum of \$452,834.48 to discharge the lien, and the court was advised that the petitioner was issued Court and Trust Fund Receipt No. 50-0546. Although the court has authority to direct that the petitioner be reimbursed for the money that it had deposited, the court must await a specific request for that relief. While the court thus grants the petition to vacate the mechanic’s lien filed by RCI against subject the property, it does so without prejudice to a separate application by the petitioner to recover the amount that it deposited with the Court and Trust Fund.

Accordingly, it is,

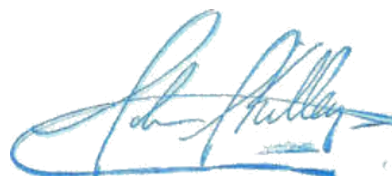
ORDERED and ADJUDGED that the petition to vacate the mechanic's lien that had been filed on September 6, 2022 against the real property located at 20 West 40th Street in Manhattan, designated as Block 841, Lots 1001 through 1061, on the tax map of the City of New York, Borough of Manhattan, is granted, without opposition; and it is further,

ORDERED and ADJUDGED that the mechanic's lien filed on September 6, 2022 against the real property located at 20 West 40th Street in Manhattan, designated as Block 841, Lots 1001 through 1061, on the tax map of the City of New York, Borough of Manhattan, be, and hereby is, vacated, discharged, and canceled; and it is further,

ORDERED that, upon service upon him of a copy of this order with notice of entry, the County Clerk of the County of New York is directed to discharge, cancel, and vacate the mechanic's lien filed on September 6, 2022 against the real property located at 20 West 40th Street in Manhattan, designated as Block 841, Lots 1001 through 1061, on the tax map of the City of New York, Borough of Manhattan.

This constitutes the Amended Decision, Order, and Judgment of the court.

5/30/2023
DATE



JOHN J. KELLEY, J.S.C.

CHECK ONE:

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CASE DISPOSED

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GRANTED

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DENIED

☐

NON-FINAL DISPOSITION

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GRANTED IN PART

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OTHER

APPLICATION:

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SETTLE ORDER

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SUBMIT ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

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FIDUCIARY APPOINTMENT

☐

REFERENCE