

**Electronic Sec. & Communications Corp. v LS-14 Ave.
LLC**

2023 NY Slip Op 33063(U)

August 21, 2023

Supreme Court, New York County

Docket Number: Index No. 654499/2021

Judge: Lucy Billings

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This opinion is uncorrected and not selected for official publication.

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

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ELECTRONIC SECURITY AND COMMUNICATIONS
CORP.,

Index No. 654499/2021

Plaintiff

- against -

DECISION AND ORDER

LS-14 AVE. LLC, LANDSEA HOLDINGS CORPORATION, LANDSEA HOMES US CORPORATION, LANDSEA HOMES CORPORATION, LANDSEA URBAN LLC, DNA DEVELOPMENT LLC, DNA DEVELOPMENT I, LLC, RYDER CONSTRUCTION, INC., AMPAK ELECTRICAL SERVICES, INC., KATHY DOE (last name unknown), GREG DOE (last name unknown), JOHN DOE (name unknown), SURETEC INSURANCE COMPANY, and ABC CORPORATION 1 THROUGH 5 (names unknown),

Defendants

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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff's claims arise from its work performed at a construction project at 540 Sixth Avenue, New York County. Defendant Ryder Construction, Inc., the project's general contractor, entered a trade contract with defendant subcontractor Ampak Electrical Services, Inc., which hired plaintiff as a sub-subcontractor to install electronic security and communications systems. On January 18, 2021, plaintiff submitted its first requisition for payment to Ampak Electrical Services for \$84,334.50. On March 23, 2021, plaintiff submitted its second

requisition to Ampak Electrical Services that, after several revisions, totaled \$89,353.42.

Upon receiving plaintiff's requisitions, Ampak Electrical Services submitted applications for payment to Ryder Construction, which included plaintiff's completed work. On March 1, 2021, Ampak Electrical Services submitted an application for payment to Ryder Construction for work performed through February 28, 2021 (Application 16), totaling \$135,583.20. On April 1, 2021, Ampak Electrical Services submitted another application for payment (Application 17), for work performed through March 31, 2021, totaling \$40,058.10. Ryder Construction admits that it did not pay Ampak Electrical Services for either application.

Afterward, Ampak Electrical Services defaulted under the trade contract and failed to pay plaintiff for its work. Plaintiff requested direct payment from Ryder Construction, which acknowledged that plaintiff had not been paid for its "\$150-200k of work completed," Aff. of Melissa A. Cohen Ex. R, at 60, and offered to negotiate the amount still owed. After Ryder Construction ultimately refused to pay the requisitions, plaintiff filed two mechanic's liens on the real property at 540 Sixth Avenue, on April 15, 2021, and April 29, 2021, for each of the amounts of plaintiff's two requisitions. Defendant SureTec Insurance Company subsequently issued two bonds, for \$92,288.76

and \$98,288.76, to discharge each lien.

Plaintiff commenced this action within one year of filing the liens, N.Y. Lien Law § 19(2), and now moves for summary judgment against Ryder Construction and SureTec Insurance, to enforce plaintiff's mechanic's liens against the bonds issued for 540 Sixth Avenue, and for unjust enrichment against Ryder Construction. C.P.L.R. § 3212(b) and (e). Defendants LS-14 Ave. LLC, Landsea Holdings Corporation, Landsea Homes US Corporation, Landsea Homes Corporation, Landsea Urban LLC, DNA Development LLC, DNA Development I LLC, Ryder Construction, and SureTec Insurance cross-move for summary judgment dismissing the complaint. C.P.L.R. § 3212(b). The court disregards the cross-motion with respect to DNA Development I, since it did not appear in this action, and plaintiff previously discontinued its claims against this defendant October 13, 2021. NYSCEF Doc. 9. For the reasons explained below, the court grants plaintiff's motion for summary judgment in part and denies the remaining defendants' cross-motion. C.P.L.R. § 3212(b) and (e).

II. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

To obtain summary judgment, the moving parties must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence eliminating all material issues of fact. Bill Birds, Inc. v. Stein Law Firm, P.C., 35 N.Y.3d 173, 179 (2020); Friends of Thayer Lake LLC v. Brown, 27 N.Y.3d

1039, 1043 (2016); Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Taft LLP, 26 N.Y.3d 40, 49 (2015); Voss v. Netherlands Ins. Co., 22 N.Y.3d 728, 734 (2014). Once the moving parties satisfy this standard, the burden shifts to the opposing parties to rebut that prima facie showing, by producing evidence, in admissible form, sufficient to require a trial of material factual issues. Bill Birds, Inc. v. Stein Law Firm, P.C., 35 N.Y.3d at 179; De Lourdes Torres v. Jones, 26 N.Y.3d 742, 763 (2016); Nomura Asset Capital Corp. v. Cadwalader Wickersham & Taft LLP, 26 N.Y.3d at 49; Morales v. D & A Food Serv., 10 N.Y.3d 911, 913 (2008). In evaluating the evidence for purposes of the motion and cross-motion, the court construes the evidence in the light most favorable to the opposing parties. Stonehill Capital Mgt. LLC v. Bank of the W., 28 N.Y.3d 439, 448 (2016); De Lourdes Torres v. Jones, 26 N.Y.3d at 763; William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh, 22 N.Y.3d 470, 475 (2013); Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 503 (2012).

A. Plaintiff's Claim to Enforce Its Mechanic's Liens

Plaintiff may enforce its mechanic's liens against SureTec Insurance's bonds if the liens are valid and plaintiff demonstrates its entitlement to their amounts. J.T. Magen & Co., Inc. v. Nissan N. Am., Inc., 178 A.D.3d 466, 466 (1st Dep't 2019); Ruckle and Guarino, Inc. v. Hangan, 49 A.D.3d 267, 267 (1st Dep't 2008); ASA of New York, Inc. v. Anchor Constr., Inc.,

21 A.D.3d 836, 837 (1st Dep't 2005). "The lienor must establish the amount of the outstanding debt by submitting proof of either the price of its contract or the value of the labor and materials supplied." NGU, Inc. v. City of New York, 189 A.D.3d 850, 850 (2d Dep't 2020); C.C.C. Renovations, Inc. v. Victoria Towers Dev. Corp., 168 A.D.3d 664, 666 (2d Dep't 2019); DHE Homes, Ltd. v. Jamnik, 121 A.D.3d 744, 745 (2d Dep't 2014). A subcontractor need not be in privity with a real property owner or general contractor to enforce a mechanic's lien, Rebar Lathing Corp. v. Century Maxim Const. Corp., 104 A.D.3d 406, 406 (1st Dep't 2013); Grant Ave. v. New York Iron Works, 292 A.D.2d 176 (1st Dep't 2002), but a subcontractor's "lien shall not be for a sum greater than the sum earned and unpaid on the contract at the time of filing the notice of lien, and any sum subsequently earned thereon." N.Y. Lien Law § 4(1). See Peri Formwork Sys., Inc. v. Lumbermens Mut. Cas. Co., 112 A.D.3d 171, 176 (2d Dep't 2013).

Defendants insist that plaintiff's first lien is invalid because Ryder Construction paid Ampak Electrical Services for Application 15 before plaintiff filed its lien. Defendant's payment for Application 15 is irrelevant, however, as to whether plaintiff may enforce its liens, since Ryder Construction still owed Ampak Electrical Services for other applications that covered plaintiff's work when plaintiff filed each lien. Ampak Electrical Services submitted Application 16 to Ryder

Construction for \$135,583.20 March 1, 2021, which Ryder Construction admits it did not pay. Nor did Ryder Construction pay Ampak Electrical Services the \$40,058.10 requested under Application 17 that Ampak Electrical Services submitted April 1, 2021. Thus when plaintiff filed its first mechanic's lien for \$84,334.50 April 15, 2021, and second mechanic's lien for \$89,353.42 April 29, 2021, there was a lien fund to which both liens attached. ASA of New York, Inc. v. Anchor Constr., Inc., 21 A.D.3d at 837; C.C.C. Renovations, Inc. v. Victoria Towers Dev. Corp., 168 A.D.3d at 666; C.S. Behler, Inc. v. Daly & Zilch, 277 A.D.2d 1002, 1002 (4th Dep't 2000).

Defendants also maintain that plaintiff's recovery is limited to only Ampak Electrical Services for breach of its subcontract. The authority on which defendants rely, however, all refers to mechanic's liens filed after full payment or without a lien fund to attach to. Here, defendants do not question the "value of the actual labor and equipment provided by plaintiff . . . to the project." W & W Glass, LLC v. 1113 York Ave. Realty Co., 113 A.D.3d 563, 564 (1st Dep't 2014). In fact, William Freeswick, Ryder Construction's Chief Financial Officer, expressly acknowledged that plaintiff was still owed "\$150-200k of work completed," while he tried to dissuade plaintiff from filing its liens. Cohen Aff. Ex. R, at 60. Ryder Construction's own records further show that Ryder Construction approved

invoices for \$1,096,719.80, but paid only \$921,078.50 to Ampak Electrical Services. Defendants utterly fail to account for this difference, which reflects the sum of Application 16 and 17 (\$135,583.20 + \$40,058.10 = \$175,641.30), and which Ryder Construction admits it never paid.

Instead, defendants present a Change Order dated May 20, 2021, to show that Ampak Electrical Services' remaining work on the project exceeded the amount under the trade contract. Aff. of William Freeswick Ex. 4. Defendants do not offer the Change Order as a contract. In any event, neither Freeswick nor any other witness authenticates the signature for one of the "Landsea" defendants executed four days after Freeswick's signature. Id. at 1. Nor does Freeswick attest that this Change Order was "made in the regular course of any business and that it was the regular course of such business to make it," to render the Change Order admissible as a business record. C.P.L.R. § 4518(a); People v. Ramos, 13 N.Y.3d 914, 915 (2010). See 135 E. 57th St., LLC v. 57th St. Day Spa, LLC, 126 A.D.3d 471, 472 (1st Dep't 2015); People v. Vargas, 99 A.D.3d 481, 481 (1st Dep't 2012); Taylor v. One Bryant Park, LLC, 94 A.D.3d 415, 415 (1st Dep't 2012). Although Freeswick attests that he is "fully familiar with the facts and circumstances," Freeswick Aff. ¶ 1, he does not demonstrate any personal knowledge of Ryder Construction's recordkeeping, as also required to lay a

foundation for business records' admissibility. Matter of Brian T. (Jeannette F.), 121 A.D.3d 500, 500 (1st Dep't 2014); Babikian v. Nikki Midtown, LLC, 60 A.D.3d 470, 472 (1st Dep't 2009); Carrion v. McNally & McNally, Inc., 18 A.D.3d 212, 212 (1st Dep't 2005); DeLeon v. Port Auth. of N.Y. & N.J., 306 A.D.2d 146, 146 (1st Dep't 2003). Even if the court considered the Change Order as interpreted by Freeswick, he is incapable of explaining the basis for the new figures. Shultz v. Cambridge Dev., L.L.C., 200 A.D.3d 624, 624 (1st Dep't 2021); Residential Credit Solutions, Inc. v. Gould, 171 A.D.3d 638, 641 (1st Dep't 2019).

Perhaps more importantly, as suggested above, plaintiff does not seek relief pursuant to a contract. Freeswick attests that: "The cost to complete the Ampak Contract exceeded the amount remaining in the Ampak Contract by \$200,673.61," Freeswick Aff. ¶ 28, but plaintiff seeks to recover the value of plaintiff's labor and materials provided as a sub-subcontractor on the project. N.Y. Lien Law § 3; NGU, Inc. v. City of New York, 189 A.D.3d at 580; C.C.C. Renovations, Inc. v. Victoria Towers Dev. Corp., 168 A.D.3d at 666; DHE Homes, Ltd. v. Jamnik, 121 A.D.3d at 745. Defendants fail to raise any factual issues regarding the value of plaintiff's completed work.

In sum, plaintiff demonstrates that its liens are valid and that it is entitled to the amounts under both liens. Therefore plaintiff may recover the value of its completed work on the

bonds. N.Y. Gen. Oblig. Law § 7-301; Tri-City Elec. Co., Inc. v. People, 63 N.Y.2d 969, 971 (1984); Casa Redimix Concrete Corp. v. Cosner Constr. Corp., 68 A.D.3d 673, 673 (1st Dep't 2009). Since plaintiff is awarded full relief on its second and third claims, the court need not address plaintiff's fourth claim for unjust enrichment.

IV. DEFENDANTS' CROSS-MOTION

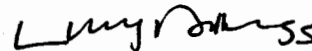
The court denies defendants' cross-motion due to their nonappearance at oral argument April 27, 2023. Moreover, a cross-motion is not a vehicle for relief against a non-moving party. Mugattash v. Choice One Pharm. Corp., 162 A.D.3d 499, 500 (1st Dep't 2018); Hennessey-Diaz v. City of New York, 146 A.D.3d 419, 420 (1st Dep't 2017); Asiedu v. Lieberman, 142 A.D.3d 858, 858 (1st Dep't 2016); Genger v. Genger, 120 A.D.3d 1102, 1103 (1st Dep't 2014). Since plaintiff did not move for summary judgment against LS-14 Ave., Landsea Holdings, Landsea Homes US Corporation, Landsea Homes Corporation, Landsea Urban, DNA Development, and DNA Development, the court also denies their cross-motion as procedurally impermissible. C.P.L.R. § 3212(b).

V. CONCLUSION

For the foregoing reasons, the court grants plaintiff's motion for summary judgment on plaintiff's second and third claims to enforce the mechanic's liens filed against defendants Ryder Construction, Inc., and SureTec Insurance Company.

C.P.L.R. § 3212(b) and (e). The court denies the cross-motion for summary judgment by defendants LS-14 Ave. LLC, Landsea Holdings Corporation, Landsea Homes US Corporation, Landsea Homes Corporation, Landsea Urban LLC, DNA Development LLC, DNA Development I LLC, Ryder Construction, Inc., and SureTec Insurance Company. C.P.L.R. § 3212(b). On plaintiff's second claim, plaintiff shall recover \$85,334.50 on Bond No. 3481379, plus interest at 9% from April 15, 2021, up to the bond's fixed amount. On plaintiff's third claim, plaintiff shall recover \$84,334.50 on Bond No. 3481380, plus interest at 9% from April 29, 2021, up to the bond's fixed amount. This decision constitutes the court's order and judgment. The Clerk shall enter a judgment as specified above.

DATED: August 21, 2023



LUCY BILLINGS, J.S.C.

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