

Matter of Breeze Natl., Inc. v Stonebridge, Inc.

2024 NY Slip Op 30419(U)

February 6, 2024

Supreme Court, New York County

Docket Number: Index No. 157821/2023

Judge: John J. Kelley

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

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INDEX NO. 157821/2023

In the Matter of

MOTION DATE 11/08/2023

BREEZE NATIONAL, INC.,

MOTION SEQ. NO. 001

Petitioner,

- v -

**DECISION, ORDER, and
JUDGMENT**

STONEBRIDGE, INC.,

Respondent.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13

were read on this motion to/for VACATE DEMAND TO INSPECT BOOKS AND RECORDS.

This is a proceeding pursuant Lien Law § 76(5), pursuant to which the petitioner seeks to vacate the respondent's amended demand to examine the petitioner's books and records. The respondent does not oppose the petition. The petition is granted, and the demand is vacated.

On or about December 17, 2023, the petitioner, as general contractor, entered into a prime contract with Consolidated Edison Company of New York, Inc., pursuant to which it agreed to perform certain demolition work for a project located at 1 Hudson Avenue, Brooklyn, New York. On or about January 3, 2023, the petitioner entered into a Standard Form of Agreement Between Contractor and Subcontractor (the subcontract), pursuant to which the petitioner retained the respondent as a subcontractor in connection with the project. The petitioner agreed to pay the respondent the sum of \$1.8 million in consideration of the work that the respondent agreed to perform.

According to the petitioner, on March 31, 2023 and April 30, 2023, respectively, the respondent submitted two pay applications to the petitioner, which the petitioner alleged that it thereafter had paid in full in the aggregate sum of \$855,000, as well as executed lien waivers indicating that the respondent had been paid in full through July 7, 2023. As the petitioner explained it, as of April 4, 2023, it already had prepared a notice of back charge, claiming that it was entitled to an offset of monies otherwise owed to the respondent under the subcontract, based upon the respondent's alleged failure fully to perform its obligations thereunder. On July 21, 2023, the petitioner sent an email to the respondent, outlining its claim of back charges in the aggregate sum of \$581,192.91, and forwarded the notice of back charge to the respondent along with the email, which enumerated back charges for increased insurance costs, liquidated damages, and extended work shifts that the petitioner claimed that it was forced to incur or undertake, due to the respondent's alleged breaches of the subcontract and lack of preparation.

On July 25, 2023, the respondent sent the petitioner a Lien Law § 76 demand (the original demand), requesting to examine the petitioner's books and records to ascertain the basis for the claim of back charges. On July 27, 2023, the petitioner rejected the original demand as defective. That same day, the respondent sent the petitioner an amended Lien Law § 76 demand via FedEx overnight delivery service, which, according to the petitioner, did not rectify the defects in the original demand, but simply described the project in more detail than had been set forth in the original demand, and backdated the claim for unpaid monies under the contract to April 30, 2023. This proceeding ensued.

Lien Law § 70(1) provides that funds

“received by an owner for or in connection with an improvement of real property in this state . . . or received by a contractor under or in connection with a contract for an improvement of real property . . . and any right of action for any such funds due or earned or to become due or earned, shall constitute assets of a trust.”

Pursuant to that statute and the other provisions of Lien Law article 3-A, owners and contractors are required to maintain funds in trust in order to provide protection to certain parties involved in

the improvement of real property, ensuring that they will be properly compensated for their services (see *Anthony DeMarco & Sons Nursery, LLC v Maxim Constr. Serv. Corp.*, 130 AD3d 1409, 1410-1411 [3rd Dept 2015]). A party holding trust funds must comply with Lien Law § 76(1) by providing, upon request, “a verified statement setting forth the entries with respect to the trust contained in [its] books or records,” to “[a]ny beneficiary of the trust holding a trust claim” who has waited until “after the expiration of thirty days from the date his trust claim became payable.” A demand under Lien Law § 76 is premature as a matter of law when it is served less than 30 days after such claim became payable (see *Matter of Isadore Rosen & Sons, Inc. v Conforti & Eisele, Inc.*, 40 AD2d 794, 794-795 [1st Dept 1972]; *Hansen Excavating Co. v Comet Const. Corp.*, 14 AD2d 911 [2d Dept 1961]). Moreover, under Lien Law § 76(2), the “[r]equest for such examination . . . shall be made in writing served personally or by registered or certified mail.”

The petitioner established that the claim did not accrue on April 30, 2023, as asserted by the respondent in its amended demand, and has not yet accrued, because the respondent already had submitted a partial lien waiver for all monies due and owing through July 7, 2023, and because the respondent has not yet provided the petitioner with a final application for the remaining subcontract balance, with all pertinent documentation, as required by Article 11.3 of the subcontract. The respondent declined to oppose the petition and, thus, has failed to rebut that showing. Moreover, the respondent did not serve the demand personally or by registered or certified mail. Accordingly, the respondent’s amended demand must be vacated on the grounds that it was premature and not properly “served as provided in” Lien Law § 76(5) (*Hansen Excavating Co. v Comet Const. Corp.*, 14 AD2d at 911).

Accordingly, it is,

ORDERED and ADJUDGED that the petition is granted, without opposition, and the respondent’s Amended Demand to examine the petitioner’s books and records, dated July 27, 2023, be, and hereby is, vacated.

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

2/6/2024
DATE


JOHN J. KELLEY, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED		<input type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
						REFERENCE