

Mega Contr. Group, LLC v NAF PAK Plumbing & Heating Corp.

2024 NY Slip Op 35566(U)

February 1, 2024

Supreme Court, Queens County

Docket Number: Index No. 722053/2021

Judge: Leonard Livote

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This opinion is uncorrected and not selected for official publication.

FILED & RECORDED

2/5/2024

9:41 AM

COUNTY CLERK
QUEENS COUNTY

SHORT FORM ORDER

SHORT FORM ORDER

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE Leonard Livote

Supreme Court Justice

COMMERCIAL DIVISION PART A

-----X

MEGA CONTRACTING GROUP, LLC

Index No: 722053/2021

Plaintiff,

-against-

Motion Date: 8/8/2023

NAF PAK PLUMBING & HEATING CORP.

Seq. No: 2

Defendant.

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The following papers numbered below read on this motion by Plaintiff for an Order: (a) pursuant to CPLR 3216, dismissing the counter claims of defendant NAF PAK PLUMBING & HEATING CORP. ("Naf Pak") for want of prosecution; (b) pursuant to New York Lien Law §19(2), discharging, vacating, and canceling Naf Pak's mechanic's lien and the lien bond, No. 015216225, filed by Mega and issued by surety Liberty Mutual Insurance Company, to discharge the mechanic's lien at issue; (c) ordering the Kings County Clerk to amend its records to reflect the discharge and cancellation of the mechanic's lien and bond; and (d) for such other and further relief as to the court deems just and proper.

PAPERS

NUMBERED

Notice of Motion, Affirmation, Affidavits
and Exhibits.....26-37
Cross Motion, Affirmation, Affidavits
and Exhibits.....
Answering Affirmations, Affidavits
And Exhibits.....
Reply Affirmations, Affidavits
And Exhibits.....
Other

Upon the foregoing papers, the motion is granted without opposition as set forth below.

Plaintiff commenced this action for breach of contract in October of 2021. Defendant interposed an answer with counterclaims. Around November 2021, Defendant filed a mechanic's lien with the Kings County Clerk's office in the amount of \$111,660.66 for purported construction work allegedly performed from February 1, 2019 through June 30, 2021 at the construction project located at 1921 Cortelyou Road, Brooklyn, New York. Around December 1, 2021, Defendant filed a surety bond bearing bond no. 015216225 issued by surety Liberty Mutual Insurance Company, in the amount of \$122,827.00 to discharge the mechanic's lien with the Kings County Clerk's Office. Defendant's counsel withdrew in or around December 2022, but Defendant never retained new counsel or resumed prosecution or defense of this case.

CPLR §3216(a) states, "[w]here a party unreasonably neglects to proceed generally in an action or otherwise delays in the prosecution thereof against any party who may be liable to a separate judgment, or unreasonably fails to serve and file a note of issue, the court, on its own initiative or upon motion, with notice to the parties, may dismiss the party's pleading on terms. Unless the order specifies otherwise, the dismissal is not on the merits." CPLR §3216(b) sets forth three conditions that must be satisfied for a CPLR §3216(a) dismissal, which are: (1) issue must have been joined in the action; (2) one year must have elapsed since the joinder of issue or six months must have elapsed since the issuance of the preliminary court order where such an order has been issued, whichever is later;" and (3) the party seeking such relief shall have served a written demand by registered or certified mail requiring the party against whom such relief is sought to resume prosecution of the action and to serve and file a note of issue within ninety days after receipt of such demand, and further stating that the default by the party upon whom such notice is served in complying with such demand within said ninety day period will serve as a basis for a motion by the party serving said demand for dismissal as against him or her for unreasonably neglecting to proceed.

Here, Plaintiff's attorneys withdrew as counsel pursuant to a court order in November 2022. This order required Plaintiff to retain new counsel within thirty days of service of the order with notice of entry. There has been no communication from Plaintiff or new counsel since that date. On April 14, 2023, Plaintiff served Defendant with a ninety-day notice, which complied with all three conditions precedent as required by CPLR §3216(b). The first requirement is joinder of issue, which was completed no later than on February 17, 2022, when Plaintiff filed its reply to Defendant's counterclaims. Second, the Court takes

judicial notice that the latter of the two time requirements listed in CPLR §3216(b)(2), which is six months after the October 11, 2022 Preliminary Conference Order, i.e. April 11, 2023, has elapsed. Third, Plaintiff served, via certified mail, a copy of a ninety-day notice to resume, upon Defendant.

Defendant has not responded to Plaintiff's ninety-day notice in any capacity. There have been no filings from Defendant and no notices from counsel or Defendant itself. Plaintiff served the ninety-day notice on Defendant over nine months ago, and Defendant has not taken any action to allow this matter to move forward. Defendant has unreasonably neglected to proceed in this action and has unnecessarily delayed the prosecution thereof. Accordingly, the branch of Plaintiff's motion to dismiss Defendant's counterclaims is granted.

With respect to the branch of Plaintiff's motion to discharge and cancel the mechanic's lien and lien bond, New York Lien Law § 17 requires that all mechanic's liens be limited to a one-year duration from the date of filing unless the lienor commences an action to foreclose the lien with a notice of pendency, or unless the lienor acquires an extension of the lien and files the extension with the County Clerk. If the lienor fails to comply with this requirement, the lien is extinguished (Lien Law § 17). New York Lien Law §19(2) states that a lien for labor performed or material furnished may be discharged "by failure to begin an action to foreclose such lien or to secure an order continuing it, within one year from the time of filing the notice of lien..."

Failure to extend the duration of a lien causes the lien to extinguish automatically as a matter of law (*see SCM Corp. v Hudson Overlook Co.*, 58 AD2d 578 [2d Dept 1977]; *Application of Pennington*, 129 N.Y.S.2d 360, 361 [Sup Ct 1954]). A surety bond is discharged when the lien foreclosure action has been discontinued or otherwise dismissed (*see PGA Mech. Contractors, Inc. v GPNZ Realty Co., LLC*, 37 Misc 3d 1210(A) [Sup Ct 2012]). When a lienor fails to timely foreclose on its mechanic's lien, the lien becomes a nullity, and the surety bond becomes discharged (*see id.*)

Here, Defendant filed a mechanic's lien on November 1, 2021 for alleged work performed at a construction project located at 1921 Cortelyou Road, Brooklyn, New York from February 1, 2019 through June 30, 2021. On December 1, 2021, Plaintiff filed bond no. 015216225 issued by surety Liberty Mutual Insurance Company pursuant to Lien Law §19(4) to discharge the lien. This alleged work is the subject of Defendant's counterclaims, but the counterclaims do not seek to foreclose on the lien but instead assert breach of contract and quantum meruit claims. To date, over 20 months later, Defendant has not foreclosed on their mechanic's lien as required by Lien Law §§17 and 19(2). By operation of

law, the mechanic's lien is extinguished, and both the lien and the surety bond are discharged. Accordingly, the branch of Plaintiff's motion to discharge and cancel the mechanic's lien and lien bond is granted, and it is

ORDERED, that Defendant's counterclaims are dismissed; and it is further

ORDERED, that Defendant's mechanic's lien and the lien bond, No. 015216225, filed by Plaintiff and issued by surety Liberty Mutual Insurance Company are discharged, vacated and canceled; and it is further

ORDERED, that the King's County Clerk shall amend its records to reflect the discharge and cancellation of the aforementioned mechanic's lien and bond.

This constitutes the Order of the Court.

Dated: 2/1/2024



Leonard Livote, J.S.C.

FILED & RECORDED

2/5/2024

9:41 AM

COUNTY CLERK
QUEENS COUNTY