SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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G BUILDERS II, LLC.,

Plaintiff,

- v -

GREAT MIDWEST INSURANCE COMPANY, and SUMMIT GLORY PROPERTY, LLC,

Defendant.

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INDEX NO. 152153/2022

MOTION DATE

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168

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

In motion sequence number 001, defendants Great Midwest Insurance Company (Great Midwest) and Summit Glory Property LLC (Summit) move pursuant to CPLR 3212, for summary judgment in defendants' favor (i) dismissing the second amended complaint (SAC) (NYSCEF Doc. No. [NYSCEF] 32, SAC) and (ii) on their counterclaims against plaintiff G Builders II, LLC (GB2) for willful exaggeration of GB2's mechanic's lien. Defendants seek monetary damages in the amount of $1,484,238.29 for the willful exaggeration of the mechanic's lien and $84,932.07 for costs incurred to bond GB2's original and amended mechanic's liens as well as Summit's attorneys' fees.

Background

Summit is the owner of the real property located at 28 Liberty Street, New York, New York 10005 (Property). (NYSCEF 46, SAC ¶ 5; NYSCEF 47, Answer to SAC with Counterclaim ¶ 5.) Great Midwest is Summit's surety. (NYSCEF 46, SAC ¶ 16.)

On December 31, 2018, nonparty LFH Food Hall Operating, LLC (LFH) entered into a lease agreement, amended on March 31, 2020, with Summit to construct and operate a food hall at the Property (LFH Lease). (NYSCEF 49, LFH Lease; NYSCEF 50, First Amended LFH Lease.) On August 3, 2021, LFH hired GB2[1] as general contractor to construct the food hall. (NYSCEF 51, Construction Contract.) On September 30, 2022,[2] GB2 filed a mechanic's lien against the Property in the amount of $1,484,238.29 for labor and materials furnished (Lien). (NYSCEF 63, Mechanic's Lien; NYSCEF 66, Notice of Mechanic Lien.) On March 11, 2022, GB2 filed this action to foreclose on the Lien. (*See* NYSCEF 41, Summons and Complaint.[3])

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[1] Although the construction contract lists "G Builders LLC" as the contracting party (*see* NYSCEF 51, Construction Contract), George Figliolia, managing member of GB2, submits an affidavit stating that the missing roman numeral "II" was a typo and asserts that references to "G Builders II, LLC" on other relevant documents evidence that GB2 was the contracting party. (NYSCEF 113, Figliolia aff ¶¶ 1, 6-7, 9, 12.)

[2] On February 3, 2022, GB2 incorrectly filed a mechanic lien against Summit Glory LLC rather than Summit and incorrectly stated that it was employed by nonparty Forthright Holdings (Forthright) rather than LFH. (*See* NYSCEF 63, Mechanic's Lien). The lien against defendant Summit was eventually filed on September 30, 2022. (NYSCEF 66, Notice of Mechanic's Lien.) On October 7, 2022, GB2 released the incorrectly filed mechanic's lien against Summit Glory LLC without prejudice. (NYSCEF 67, First Mechanic Lien Release.) The court notes that nonparty Jose Ortiz is Forthright's owner. (NYSCEF 103, tr at 15:16-18 [Ortiz Depo].) Ortiz signed the Construction Contract on behalf of LFH, as "Owner." (NYSCEF 51, Construction Contract at 16.)

[3] GB2 amended the complaint twice, first on February 22, 2023 (NYSCEF 43, Amended Compliant) and a second time on August 3, 2023 (NYSCEF 46, SAC).

On February 13, 2023, Summit made a demand upon GB2 for an itemized statement of the Lien pursuant to Lien Law § 38. (NYSCEF 69, Demand for Itemized Statement.) GB2 provided Summit with an itemized statement dated March 15, 2023 (Itemized Statement). (NYSCEF 70, Itemized Statement.) According to the Itemized Statement, Summit owed a total sum of $1,484,238.29. (*Id.* ¶ 1.) This amount allegedly included payments for (i) work performed by GB2's subcontractors in the amount of $545,035; (ii) labor costs of $99,660; (iii) project schedule, site logistic and site safety plans in the amount of $13,500; (iv) project insurance in the amount of $299,316.62; (v) materials and other services in the amount of $256,589.21; (vi) project bonds in the amount of $86,057.74; and (vii) overhead and markups in the amount of $184,079.72. (*Id.* at ¶¶ 5, 6-11.)

On December 14, 2023, GB2 filed a partial lien release and discharge, executed on August 18, 2023, reducing the Lien amount to $1,286,648.90.[4] (NYSCEF 80, Partial Lien Release.) Then, on February 22, 2024, GB2 filed a second partial lien release and discharge, executed on November 13, 2023, further reducing the Lien amount to $1,230,434.90.[5] (NYSCEF 131, Partial Release and Discharge of Lien.)

Legal Standard

Under CPLR 3212, "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient

[4] The $197,553.39 discharged included the $111,495.65 charged for material cost increases and the $86,057.74 charged for project specific bonds. (*See* NYSCEF 113, Figliolia aff ¶¶ 49, 57.)

[5] The $56,250 discharged was the amount charged for GB2's subcontractor A&M Warshaw Plumbing and Heating's (A&M) alleged plumbing services. (*See* NYSCEF 113, Figliolia aff ¶ 30.)

evidence to demonstrate the absence of any material issues of fact." (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citations omitted].) Once the movant has made such a showing, the burden shifts to the opposing party to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact." (*Zuckerman v New* York, 49 NY2d 557, 562 [1980].) "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." (*Id.*) "[S]ummary judgment may be granted as to one or more causes of action, or part thereof, in favor of any one or more parties, to the extent warranted, on such terms as may be just." (CPLR 3212 [e].)

Discussion

GB2 asserts a cause of action for foreclosure of the Lien. Defendants assert a counterclaim, pursuant to Lien Law §§ 39 and 39-a, for willful exaggeration of the Lien.

"To establish the right to enforce a mechanic's lien, a contractor must make a prima facie case that the lien is valid, and that it is entitled to the amount asserted in the lien." (*J.T. Magen & Co., Inc. v Nissan N. Am., Inc.*, 178 AD3d 466, 466 [1st Dept 2019] [citation omitted].) "[A] counterclaim seeking to declare a mechanic's lien void for willful exaggeration . . . is properly made in a contractor's action to foreclose the lien." (*Strongback Corp. v N.E.D. Cambridge Av. Dev. Corp.*, 25 AD3d 392, 393 [1st Dept 2006] [citations omitted].) If the court finds "that a lienor has willfully exaggerated the amount for which he claims a lien as stated in his notice of lien, his lien shall be declared void and no recovery shall be had thereon." (Lien Law § 39; *see also Goodman v Del-Sa-Co Foods, Inc.*, 15 NY2d 191, 194 [1965] (["[w]here there is *any* willful exaggeration in the amount of the lien as filed, the entire lien is forfeited."].)

Willful Exaggeration of Lien

Defendants contend that GB2 willfully exaggerated the Lien amount. "The burden is upon the opponent of the lien to show that the amounts set forth were intentionally and deliberately exaggerated." (*Fidelity New York, FSB v Kensington-Johnson Corp.*, 234 AD2d 263, 263 [2d Dept 1996] [internal quotation marks and citations omitted].) Because "[s]uch a burden necessarily involves proof as to the credibility of the lienor . . . the issue of . . . [willful] exaggeration is one that is ordinarily determined at the trial of the foreclosure action, and not on summary disposition." (*On the Level Enters., Inc. v 49 E. Houston LLC*, 104 AD3d 500, 500 [1st Dept 2013] [citations omitted].) "Evidence from which willfulness might be inferred is not sufficient to meet a moving party's burden, because every available inference must be drawn in the non-moving party's favor." (*Esperanza Mansion Group LLC v Mehlenbacher*, 240 AD3d 1356, 1357 [4th Dept 2025] [internal quotation marks and citation omitted].) Accordingly, summary judgment is only warranted "where the evidence concerning whether or not the lienor wilfully exaggerated the lien is conclusive." (*Id.*; *LMF-RS Contr., Inc. v Kaljic*, 126 AD3d 436, 437 [1st Dept 2015] ["[s]ummary disposition is warranted, because the evidence that the amount of the lien was wilfully exaggerated is conclusive"] [citation omitted].) Here, defendants have met their burden.

Defendants argue that the individual components of the Lien are incorrect because they include (i) $545,035 for subcontractors for which there is no basis; (ii) $99,660 in unauthorized labor costs; (ii) $385,374.36 for insurance and bonds that never existed; (iv) $184,079.72 for proscribed overhead and lost profits; (v) $13,499.18 for inappropriately included general computer costs; (vi) $41,100 for unsubstantiated

pre-construction services; (vii) $47,294.38 for overstated and unsubstantiated COVID-related costs; (viii) $43,200 for unsubstantiated metals; and (ix) $111,495.65 for exaggerated increased material costs.

It is clear from the evidence submitted that the basis for the Lien amount is the February 2, 2022 application for payment that GB2 addressed to Forthright Holdings (Forthright)[6] (Application for Payment). (NYSCEF 117, Application for Payment.) The entries included on the Itemized Statement, are identical to the line-items found in column 'G' on the Application for Payment. (*Compare* NYSCEF 70, Itemized Statement *with* NYSCEF 117, Application for Payment at 6-7). Based on the amounts and percentages of "total [work] complete and stored to date" found in column 'G,' it is clear that GB2 calculated the Lien amount based on the percentage-of-completion method. This is inappropriate.

Courts have rejected the use of the percentage-of-completion method for calculating lien amounts in circumstances where the contractor has not substantially performed under the contract and parts of the lien amount are based on work performed by subcontractors that the contractor has not paid. (*See Abra Constr. Corp. v 112 Duane Assoc., LLC*, 59 AD3d 263, 263-64 [1st Dept 2009] [held that "[t]he percentage-of-completion was not an accurate indicator of [the contractor's] alleged damages, since [the contractor] failed to establish substantial completion of the contract as a whole" and "for the additional reason that [the contractor] sought to obtain the benefit of the percentage of completion of work performed by other subcontractors, for which [the

[6] Figliolia testified that including Forthright as "Owner" on the Application of Payment instead of LFH was an error. (NYSCEF 87, tr at 193:23-195:9 [Fig.)

contractor] did not pay."].) Here, Figliolia affirms that "GB2 liened for under ten percent of the $15,677,926.37 it could have earned had the Project moved forward to completion." (NYSCEF 113, Figliolia aff ¶¶ 1, 19.) He also affirms that "GB2 does not claim to have started physical construction." (*Id*. ¶ 16.) Accordingly, GB2 concedes that the Project was nowhere near substantial completion and the use of the percentage-of-completion method to calculate the Lien amounts was, therefore, not appropriate. Additionally, GB2 concedes that no subcontractors were ever paid. (NYSCEF 87, tr at 214:14-15 [Figliolia Depo] ["we've said none of these subs were paid, to my knowledge"].)

Nevertheless, even if the percentage-of-completion method was an appropriate way to calculate the Lien amount, GB2 fails to rebut defendants' challenge to each line item and thus it cannot substantiate the Lien amount.

Work Performed by Subcontractors

GB2 asserts that subcontractors performed work in the amount of $545,035. (NYSCEF 70, Itemized Statement ¶ 5.) Defendants, however, point to Figliolia's testimony that no subcontractors were paid. (NYSCEF 87, tr at 214:14-15 [Figliolia Depo].) They further point out that they have never been presented with one check, wire payment, accounting entry, or any other proof of payment. The court agrees that the record is devoid of such evidence. While GB2 produced an application of payment from Hydro Air Mechanical LLC (Hydro) for $150,000, Figliolia testified GB2 never paid Hydro. (NYSCEF 76, Hydro Air Application for Payment; NYSCEF 122, tr at 229:17-22 [Figliolia Depo].) As to the remaining $395,035, Figliolia admits that the $56,250 attributed to A&M was included in error. (NYSCEF 113, Figliolia aff ¶ 30 ["(w)hen

compiling information to determine the amount of the Lien, our office mistakenly attributed $56,520 as due and owing to A&M"]; NYSCEF 131, November 13, 2023 Partial Release and Discharge of Lien [reduced the Lien amount by $56,250 twenty months *after* filing this action to foreclose on the Lien and only after Michael Warshaw[7] affirmed that A&M "performed no work and provided no materials to the Project" and "A&M never invoiced (GB2), or any other entity associated with (GB2)" (NYSCEF 92, Warshaw aff ¶ 8)].) However, Figliolia's conclusive statement that this was an error without any proof is insufficient to support a conclusion the error "was an honest mistake or subject to a bona fide good faith dispute." (*LMF-RS Contr., Inc. v Kaljic*, 2013 NY Slip Op 32352[U], *5 [Sup Ct, NY County 2013], *affd* 126 AD3d 436 [1st Dept 2015].) Regarding any other subcontractor claim, GB2 fails to present any evidence to otherwise substantiate the costs attributed to work allegedly performed to raise an issue of fact.[8]

$99,660 in Labor Costs

Section 8.1.1 of the Construction Contract provides that "[t]he Cost of the Work shall **not** include . . . [s]alaries and other compensation of the Contractor's personnel

[7] Michael Warshaw is the President of A&M. (NYSCEF 92, Warshaw aff ¶ 1.)
[8] The purchase order signed by Robert Design Group LLC (RDG) on July 26, 2021 (NYSCEF 119) may verify that the parties had a contract for $1,525,000 but it does not substantiate that RDG performed architectural millwork in the amount of $181,097.50. Similarly, the October 18, 2021 Purchase Order (NYSCEF 120), the October 26, 2021, November 1, 2021, and November 23, 2021 Project Submittals (NYSCEF 126), and the Job Kickoff Meeting Documents (NYSCEF 135) may evidence that GB2 contracted with Hydro for HVAC services in the amount of $3,265,000, but these documents do not substantiate the $274,000 Lien amount attributed to Hydro. Neither does the November 8, 2021 Purchase Order between Hydro and its subcontractor DNT Enterprises, Inc. (NYSCEF 136.) Lastly, the GTI Electrical (GTI) Cost Breakdown (NYSCEF 139 [dated *prior* to LFH and GB2's August 3, 2021 Construction Contract]) in the amount of $1,622,303.85 fails to substantiate the $33,187.50 Lien amount attributed to GTI.

stationed at the Contractor's principal office or office other than the site office, except as specifically provided in Section 7.2 or as may be provided in Article 15." (NYSCEF 51, Construction Contract § 8.1.1. [emphasis added].) The court notes that none of the provisions in Section 7.2[9] or Article 15 are applicable here. Accordingly, GB2 is prohibited under the Construction Contract from charging the itemized labor costs as part of the Cost of the Work, and GB2 was not permitted, therefore, to include such costs in the Lien. (*See C.C.C. Renovations, Inc. v Victoria Towers Dev. Corp.*, 168 AD3d 664, 666 [2d Dept 2019] [holding that "[t]he amount of the lien is limited by the contract under which it is claimed, and ordinarily a lienor is bound by the price term contained in the contract to which it is a party"].)

In any event, the $99,660 allegedly incurred in labor costs is not substantiated. The total hours worked by each of the employees as provided for in the Itemized Statement do not correspond with the payroll entry sheet for the Project. (*Compare* NYSCEF 70, Itemized Statement ¶ 6 *with* NYSCEF 83, Payroll Record). A number of employees are named on the Itemized Statement, but do not appear on the payroll record (e.g., Grace Sibley and Louis Figliolia). Furthermore, the Itemized Statement indicates that Lisa Legere[10] worked 75 hours on the Project (NYSCEF 70, Itemized Statement ¶ 6), but the payroll entry sheet logs about a third of those hours as having occurred *after* February 2, 2022, the last day GB2 performed work for the Project

[9] Figliolia asserts in his affidavit that GB2 was permitted to include the labor costs pursuant to section 7.2.2.1. (NYSCEF 113, Figliolia aff ¶ 40.) However, the contract language explicitly sets forth that GB2's entitlement to reimbursement for work performed "at a location other than the site" is "limited to the personnel and activities listed," and no names or activities are, in fact, listed. (NYSCEF 51, Construction Contract § 7.2.2.1.)

[10] Legere was GB2's Assistant Project Manager. (NYSCEF 151, Legere aff ¶ 1.)

(NYSCEF 83, Payroll Record; NYSCEF 113, Figliolia aff ¶ 46). Legere explains this as "appear[ing] to be the result of a data entry error in the system." (NYSCEF 151, Legere aff ¶ 3.) However, missing and allegedly misdated hours are not the only discrepancy between the Itemized Statement and the payroll record; the hourly rates of employees also widely differ. Figliolia states that "the two and a half time rate is standard within the construction industry." (NYSCEF 113, Figliolia aff ¶ 47.) However, some employees' hourly rates on the Itemized Statement are close to six times the rate provided for on the payroll entry sheet (compare Danny Arango's hourly rate of $25.30 on the payroll entry sheet with his hourly rate of $150 on the Itemized Statement). These are significant discrepancies, most of which are unexplained. Thus, the court concludes that GB2 willfully exaggerated the Lien when it included the $99,660 in what clearly appears to be inflated labor costs.

$385,374.36 for Insurance and Bonds

Section 7.6.1 of the Construction Contract provides that GB2 is entitled to reimbursement of "[p]remiums for that portion of insurance and bonds required by the Contract Documents that can be *directly attributed* to this Contract." (NYSCEF 51, Construction Contract § 7.6.1 [emphasis added].) In a letter to Great Midwest, GB2's counsel, Jeremy R. Kalina, Esq., states that a general insurance policy and billing statements for such could be produced, but "the word *specific* in the phrase 'project *specific* insurance' in the Itemized Statement of Lien may have been included as a result of an honest mistake." (NYSCEF 78, August 18, 2023 Kalina Letter ¶ 5.) In support of their motion, defendants submit a copy of GB2's general insurance policy and the billing statements for premium payments. (NYSCEF 81, Commercial General

Liability Insurance; NYSCEF 82, GB2 Insurance Billing Statements.) It is undisputed that this general insurance policy applied to several projects. In fact, Figliolia states that "Defendants presume that a separate policy was purchased for this project, when in fact, Plaintiff alleged, and supported, the fact that it apportioned the total insurance it purchased by project, rendering it 'project specific.'" (NYSCEF 113, Figliolia aff ¶ 48.) Even accepting Figliolia's assertion that this is project specific because he apportioned an amount specifically to the Project, he never explains how such apportionment was calculated, and accordingly, how GB2 determined the $299,316.62 lien amount for the policy. Rather, he provides a general explanation that it was determined by "the cost of insurance with some cost of operating the insurance, the risk management that goes with it." (NYSCEF 122, tr at 259:21-24 [Figliolia Depo].) He provides no support for any calculation.

Similarly, as to the Bonds, in the same letter to Great Midwest, Kalina states that the "[p]roject specific bond costs may have been included in the itemized statement as a result of an honest mistake." (NYSCEF 78, August 18, 2023 Kalina Letter ¶ 6.) During his deposition, Figliolia further testified that the bond was never purchased "[a]nd the bonding company didn't charge us any processing as well." (NYSCEF 87, tr at 268:13-21 [Figliolia Depo].) Although GB2 filed a partial release and discharge for the full amount of the bond on August 18, 2023, almost a year and a half after it filed this foreclosure action (NYSCEF 80, August 18, 2023 Partial Lien Release), a conclusory declaration of a good faith mistake and filing of a partial discharge of the lien amount does not preclude a finding of willful exaggeration on summary judgment. (*See LMF-RS Contracting, Inc.*, 2013 NY Slip Op 32352[U], *4 [finding willful exaggeration, even

when plaintiff had filed a partial discharge when such filing "did not materialize until 11 months after the filing of the lien" and "after plaintiff commenced a foreclosure action on the original lien and questions of wilful exaggeration arose."].)

$184,079.72 for Overhead and Lost Profits

The Itemized Lien Statement includes an entry in the amount of $184,079.72 for "overhead and markup on completed work."[11] (NYSCEF 70, Itemized Statement ¶ 11.) Figliolia testified that 'overhead and markup' means "overhead and profit." (NYSCEF 122, tr at 306:3-5 [Figliolia Depo].)

Section 8.1.4 of the Construction Contract provides that "[t]he Cost of the Work shall **not** include . . . [o]verhead and general expenses, except as may be expressly included in Article 7." (NYSCEF 51, Construction Contract § 8.1.4. [emphasis added].) Article 7 does not authorize GB2 to seek reimbursement for overhead and profits. (*Id.* art 7.) Accordingly, there was no basis for GB2 to include the $184,079.72 in the Lien Amount and GB2 cannot claim such inclusion was in error when explicitly proscribed by the contract. (*See* Lien Law § 4(1) ["the 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."]; *see also Northe Group, Inc. v Spread NYC, LLC*, 88 AD3d 557, 557-58 [1st Dept 2011] [found willful exaggeration where "the documentary evidence, including . . . the parties' written agreement, demonstrate[d] conclusively that plaintiff was . . . prohibited from marking up contracting services."].)

[11] This amount corresponds to column G, line item 20-999999 labeled "Fee," on the February 2, 2022 Application for Payment. (NYSCEF 117, Application for Payment at 7.)

$13,499.18 for General Computer Costs

The Itemized Statement includes entries in the amounts of $1,349.92, $11,744.28, and $404.98 for Sage 3000 software, Procore software, and IT support, respectively. (NYSCEF 70, Itemized Statement ¶ 9.) Defendants assert that these costs had nothing to do with the Project. Rather, they point to Figliolia's testimony that he purchased this software for various projects and jobs. (NYSCEF 122, tr at 304:20-24 [Figliolia Depo].) While GB2 submits an invoice and payment receipt in the amount of $72,424.74 for Procore software (NYSCEF 85, Procore Invoice), when asked how GB2 "came up with the [$11,744.28] to charge to Summit," Figliolia simply responded that "its one of the jobs that were there. The other jobs must have made up the balance." (NYSCEF 122, tr at 304:15-19 [Figliolia Depo].) GB2 provides no other proof explaining the calculation, nor substantiating the $1,349.92 allegedly paid for Sage 3000 software and the $404.98 liened for "IT Support."

Again, Figliolia asserts that "[i]f these items are deemed not lienable, they were not done with intentionality or willfulness." (NYSCEF 113, Figliolia ¶ 52.) Such a conclusory statement is not sufficient to defeat a motion for summary judgment. (*LMF-RS*, 2013 NY Slip Op 32352[U], *9 [finding willful exaggeration where "plaintiff provide[d] no proof in admissible form to support its conclusion that such exaggeration was an honest mistake or subject to a bona fide good faith dispute regarding work performed and material provided."].)

$41,100 for Pre-Construction Services

Defendants assert that the lien item for "Pre-Construction Services" is speculative. They cite to Figliolia's testimony where he testified that the claimed 26

percent completion of pre-construction services was determined by the "Project team just thought that that's where they were at, I guess. Maybe reflected in our billing as well." (NYSCEF 122, tr at 305:21-23 [Figliolia Depo].) Although Figliolia later clarified in his affidavit that "my project team . . . reviewed this line item . . . and determined the percentage of completion based on items including involvement in the designing of the project, drawing review and logistics - and justified it to me based on the time spent on these items of work" (NYSCEF 113, Figliolia aff ¶ 53), he provides no further documentation, such as the suggested billing, to verify this lien item.

$47,294.38 for COVID-Related Costs

GB2 includes an entry in the amount of $47,294.38 for "COVID-19 Law" on the Itemized Statement. (NYSCEF 70, Itemized Statement ¶ 9.) Defendants submit two invoices for the purchase of masks and hand sanitizer and two checks, the only documents they received from GB2 to support of its claim for this Lien item. (NYSCEF 86, Covid Invoices.) One invoice is in the amount of $16,423.79 for N95 masks; the second invoice is in the amount of $137.13 for hand sanitizer, and the two checks are in the amounts of $8,211.89 and $8,211.90 for what GB2 alleges to be payments for COVID materials. (*Id*.) There are several issues with respect to this documentation. First, the invoices and checks are all dated *prior* to LFH and GB2 executing the Construction Contract. (See id. [the invoices and checks are all dated in 2020]; NYSCEF 51, Construction Contract [executed August 3, 2021].) Figliolia explains that "it is common – and happened here – that work of a contract is performed upon agreement of the parties prior to the execution of the ultimate contract." (NYSCEF 113, Figliolia aff ¶ 54.) However, even if the court were to accept this explanation, a second

question remains whether the provided checks were, in fact, payment for COVID materials since they are not accompanied by invoices nor is there anything on the checks designating them payments for COVID materials. (*See* NYSCEF 86, Covid Checks at 4-5.) Regardless, this only accounts for $32,984.71 of the $47,294.38 liened and GB2 offers no explanation for the discrepancy.

Further, Jason Berkeley[12] testified that "COVID-19 law had to do with testing onsite. No workers came onsite so there was no money expended on these. Site labor, logistics, and safety – site safety. There was nothing filed that I had signed off on or saw. There were no site safety personnel ever here." (NYSCEF 125, tr at 141:12-19 [Berkeley Depo].)

In such circumstances, the exaggeration must be deemed willful. (*See LMF-RS*, 126 AD3d at 437 ["the evidence that the amount of the lien was wilfully exaggerated is conclusive" where "[p]laintiff included in its lien amount items that are not for labor or materials" and "plaintiff has failed to even attempt to explain the discrepancies."].)

$43,200 for Steel and Other Metals

The Itemized Statement further includes entries in the amounts of $10,350 for "Structured Steel" and $32,850 for "Ornamental/Misc. Metals." (NYSCEF 70, Itemized Statement ¶ 9.) Generally, "entitlement to relief under the Lien Law is predicated on a showing that labor or materials have been furnished and have been expended or used so as to have become an inseparable part of the object of the particular contract." (*P.T. & L. Constr. Co. v Winnick*, 59 AD2d 368, 370 [3d Dept 1977].) Figliolia testified that

[12] Berkeley is "COO of Four Street Capital Management and managing director of Fosun Hive Holdings, which is the 24 entity that holds 28 Liberty." (NYSCEF 125, tr at 9:21-24 [Berkeley Depo].)

the structured steel "wasn't delivered to the site." (NYSCEF 89, tr at 300:6-21 [Figliolia Depo].) Similarly, Figliolia testified that the ornamental/ miscellaneous metals were never delivered to Summit nor to the Project site. (*Id.* at 301:3-8.) Berkeley, corroborated that "no hard costs shown on here were ever brought onsite, done, or put in place." (NYSCEF 125, tr at 142: 3-6 [Berkeley Depo].) He also testified that "there were no shop drawings reviewed and/or approved by the architect that would have justified releasing anyone to fabricate or procure materials for this project." (*Id.* at 126:7-11.)

When asked about the $43,200 liened for steel and other metals, Figliolia explained that "[t]en percent of the agreed upon line items in the AIA application for payment were billed by GB2 for services prior to purchase." (NYSCEF 113, Figliolia aff ¶ 56.) Section 12.1.4 of the Construction Contract provides that "[w]ith each Application for Payment, the Contractor shall submit [documentation] to demonstrate . . . **payments already made** by the Contractor on account of the Cost of the Work." (NYSCEF 51, Construction Contract § 12.1.4 [emphasis added].) Article 7.1.1 defines 'Cost of the Work" as "costs necessarily **incurred** by the Contractor in the proper performance of the Work." (*Id.* § 7.1.1 [emphasis added].) Accordingly, the contract language unambiguously provides that GB2 is only entitled to collect payment for costs actually incurred and paid for. Here, GB2 concedes that it seeks payment for materials "prior to purchase." (NYSCEF 113, Figliolia aff ¶ 56.) Because GB2 has not provided any documentation to substantiate the lien amount and undoubtedly knew that the Construction Contract only permitted reimbursement for documented costs, GB2 cannot in good faith claim that liening $43,200 for steel and other metals was in error.

$111,495.65 for Increased Material Costs

Finally, the Itemized Lien Statement includes an entry in the amount of $111,495.65 for "Material Cost Increase." (NYSCEF 70, Itemized Statement ¶ 9.) During discovery, Kalina informed Great Midwest that the amount "may have been included in the itemized statement as a result of an honest mistake." (NYSCEF 78, August 18, 2023 Kalina Letter ¶ 9.) GB2 proceeded to file a partial release and discharge for the full amount. (NYSCEF 80, August 18, 2023 Partial Lien Release.) Despite GB2 filing the partial release less than a week earlier, Figliolia did not provide that the $111,495.65 was included in error during his August 24, 2023 deposition. Instead, Figliolia stated that "I'm not sure whether some of that is valid or not." (NYSCEF 89, tr at 270:19-20 [Figliolia Depo].) Half a year later, Figliolia stated that "those costs were included in the lien as a honest mistake and were removed upon learning of the mistake during discovery, reducing the lien amount." (NYSCEF 113, Figliolia aff ¶ 57.)

The court is unpersuaded by Figliolia's self-serving affirmation that the $111,495.65 was included by mistake. (*Marjam Supply Co., Inc. v Telyas*, 2016 NY Slip Op 32492[U], *8 [Sup Ct, NY County 2016], citing *Caraballo v Kingsbridge Apt. Corp.*, 59 AD3d 270, 270 [1st Dept 2009] ["[s]elf-serving affidavits with bare conclusory allegations are insufficient to defeat a motion for summary judgment"]; *see also Harty v Lenci*, 294 AD2d 296, 298 [1st Dept 2002] ["[a] party's affidavit that contradicts [his] prior sworn testimony creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment."].)

Based on the foregoing information, "this is not a case involving a mere inaccuracy or honest mistake in setting the amount of the lien." (*Strongback Corp. v N.E.D. Cambridge Ave. Dev. Corp.*, 25 AD3d 392, [1st Dept 2006].) The inclusion of cost items proscribed by the Construction Contract, combined with the general lack of records evidencing costs and number of alleged good faith errors, leads the court to conclude that GB2 willfully exaggerated the Lien. (*See Inter Metal Fabricators, Inc. v HRH Constr. LLC*, 94 AD3d 529, 529 [1st Dept 2012] [held that defendants "demonstrated conclusively that the amount of the lien was wilfully exaggerated" where "evidence includes documents, created by plaintiff . . . that tend to show that plaintiff knowingly marked up its costs and expenses" and "testimony by plaintiff's vice president and chief operating officer admitting to the overcharges."]; *see also* Goodman, 15 NY2d 191, 194 [1965] (["[w]here there is *any* willful exaggeration in the amount of the lien as filed, the entire lien is forfeited."].) Accordingly, defendants' motion for summary judgment on their counterclaim for willful exaggeration of the Lien is granted, and GB2's second amended complaint is dismissed.

Damages

"Where a lien has been discharged under [Lien Law § 39], Lien Law § 39-a permits the recovery of damages." (*Wellbilt Equip. Corp. v Fireman*, 275 AD2d 162, 165 [1st Dept 2000]; *On the Level Enters.*, 104 AD3d at 500 ["[a] claim under Lien Law 39-a is subject to summary disposition where the evidence concerning whether or not lienor willfully exaggerated the lien is conclusive."] [citation omitted]; *see also Goodman,* 15 NY2d at 198 [held that the two sections "must be read together."].) Lien Law § 39-a provides that

> "[w]here in any action or proceeding to enforce a mechanic's lien upon a private or public improvement the court shall have declared said lien to be void on account of wilful exaggeration the person filing such notice of lien shall be liable in damages to the owner or contractor. The damages which said owner or contractor shall be entitled to recover, shall include the amount of any premium for a bond given to obtain the discharge of the lien or the interest on any money deposited for the purpose of discharging the lien, reasonable attorney's fees for services in securing the discharge of the lien, and an amount equal to the difference by which the amount claimed to be due or to become due as stated in the notice of lien exceeded the amount actually due or to become due thereon." (Lien Law § 39-a.)

Here, defendants seek a judgment against GB2 in the amount of (i) $1,484,238.29 for the willful exaggeration of the mechanic's lien; (ii) $84,932.07 for costs incurred to bond over GB2's original and amended mechanic's lien; and (iii) Summit's attorneys' fees. (NYSCEF 39, Notice of Motion at 1-2.)

Amount of Lien

Lien Law § 39-a provides that that once a lien is deemed to have been willfully exaggerated, the owner "shall be entitled to recover . . . an amount equal to the difference by which the amount claimed to be due or to become due as stated in the notice of lien exceeded the amount actually due or to become due thereon." (Lien Law § 39-a.) Here, defendants request a monetary judgment in the amount of $1,484,238.29 for the willful exaggeration of the mechanic's lien. (NYSCEF 39, Notice of Motion at 1.) However, defendants are not entitled to damages equal to the total lien amount. (*Durand Realty Co. v Stolman*, 197 Misc 208, * 210-11 [Sup Ct, NY County 1949], *affd* 280 AD 758 [1st Dept 1952] [rejected the contention that "the punishment for filing a wilfully exaggerated lien . . . [is] damages for the full amount claimed," holding instead that "the amount of damages should equal the amount by which the amount actually due was willfully exaggerated."].) Instead, defendants are entitled only to the

amount that can be proven to have been willfully exaggerated. (*See Goodman*, 15 NY2d at 194 ["section 39-a imposes a penalty to be measured by the amount of the willful exaggeration."].) The issue of damages shall be referred to a referee.

Costs Incurred to Bond Over the Lien

Lien Law § 39-a provides that that once a lien is deemed to have been willfully exaggerated, the owner "shall be entitled to recover . . .the amount of any premium for a bond given to obtain the discharge of the lien or the interest on any money deposited for the purpose of discharging the lien." (Lien Law § 39-a.) Here, defendants request a monetary judgement in the amount of $84,932.07 for costs incurred to bond over GB2's original and amended mechanic's lien. (NYSCEF 39, Notice of Motion at 2; NYSCEF 109, Invoices and Payments for Mechanic's Lien.) Because the court has found that plaintiff willfully exaggerated the Lien, defendants are entitled to recover the $84,932.07 incurred to bond the Lien.

Attorney's Fees

Lien Law § 39-a provides that that once a lien is deemed to have been willfully exaggerated, the owner "shall be entitled to recover . . . reasonable attorney's fees for services in securing the discharge of the lien." (Lien Law § 39-a.) Because the court found that GB2 willfully exaggerated the Lien, defendants are entitled to recover reasonable attorneys' fees. (*See Consumer Protection Restoration, LLC v Hickory House Tenants Corp.*, 236 AD3d 744, 748 [2d Dept 2025] [providing that attorneys' fees are limited to "the legal fees incurred in securing the discharge of the mechanic's lien . . . and not relating to other issues."].) The issue of the amount of reasonable attorneys' fees to be award shall be referred to a referee.

Accordingly, it is

ORDERED that defendants' motion for summary judgment seeking to vacate the mechanics' lien filed September 30, 2022 against the real property located at 28 Liberty Street, New York, New York 10005 in the amount of $1,484,238.29[13] is granted and the County Clerk is directed to enter judgment and vacate and discharge such lien; and it is further

ORDERED that plaintiff's second amended complaint is dismissed; and it is further

ORDERED that Summit is awarded costs incurred to bond plaintiff's mechanic's liens in the amount of $84,932.07; and it is further

ORDERED that a Judicial Hearing Officer (JHO) or Special Referee shall be designated to hear and report to this court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose:

(1) the amount of defendants' damages awarded pursuant to Lien Law § 39-a and

(2) the reasonable value of legal services rendered by defendants' counsel in discharging the mechanic's lien; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the

[13] The final reduced amount is $1,230,434.90.

website of this court), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that parties shall immediately consult one another and iLead Law Group shall, within 15 days from the date of this Order, submit to the Special Referee an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts.

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12/24/2025
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:	X	**CASE DISPOSED**			**NON-FINAL DISPOSITION**		
	X	**GRANTED**		**DENIED**	**GRANTED IN PART**		**OTHER**
APPLICATION:		**SETTLE ORDER**			**SUBMIT ORDER**		
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**			**FIDUCIARY APPOINTMENT**		**REFERENCE**