Thorobird Grand LLC v M. Melnick & Co., Inc.
2025 NY Slip Op 35590(U)
February 6, 2025
Supreme Court, Bronx County
Docket Number: Index No. 816972/2022E
Judge: Fidel E. Gomez
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NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 32

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX
---X
THOROBIRD GRAND LLC and GRAND APTS HOUSING DEVELOPMENT FUND CORPORATION,

Index No. **816972/2022E**

Plaintiff,

Hon. **FIDEL E. GOMEZ**
Justice

- against -

M. MELNICK & CO., INC. and FEDERAL INSURANCE COMPANY,

Defendants.
---X

The following papers numbered 1 to 1, read on this Motion noticed on 12/03/2024, and duly submitted as no. 5 on the Motion Calendar of 12/03/2024.

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause – Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
Notice of Cross-Motion - Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers- Order Appointing Temporary Receiver		
Memorandum of Law		

Defendant's motion is decided in accordance with the Decision and Order annexed hereto.

Dated:
2/6/25

Hon.______________________
FIDEL E. GOMEZ, JSC

1.CHECK ONE ☐ CASE DISPOSED X NON-FINAL DISPOSITION
2. MOTION/CROSS-MOTION IS ☐ GRANTED (MOTION) ☐ DENIED (MOTION)
X GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE. ☐ SETTLE ORDER ☐ FIDUCIARYAPPOINTMENT
☐ SUBMIT ORDER ☐ REFEREE APPOINTMENT
☐ DO NOT POST ☐ NEXT APPEARANCE DATE:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX
--X
THOROBIRD GRAND LLC and GRAND APTS HOUSING DEVELOPMENT FUND 00 CORPORATION,

Plaintiffs,

-against-

DECISION AND ORDER

M. MELNICK & CO., INC. and FEDERAL INSURANCE COMPANY,

Index No. 816972/2022E

Defendants/Counterclaim Plaintiffs,

-against-

BAYPORT CONSTRUCTION CORP., BAYSHORE SAFETY LLC, CORE & MAIN LP, EXTECH BUILDING MATERIALS INC., FXR CONSTRUCTION, INC., NAF PAK PLUMBING & HEATING CORP., NY PLUMBING WHOLESALE & SUPPLY INC., SOLCO PLUMBING SUPPLY, INC., SPEC PERSONNEL, LLC TIGER CABINETS INC., USA INTERIORS LLC, NEW YORK STATE HOUSING FINANCE AGENCY, THE CITY OF NEW YORK, ACTING BY AND THROUGH ITS DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT, MARK REED, T.D. BANK, N.A., ODYSSEY RENOVATION CORPORATION, COLONY HARDWARE CORPORATION, ROCKLEDGE SCAFFOLD CORP., ADKINS CLEANING & LANDSCAPING, LLC D/B/A ADKINS LANDSCAPE CONTRACTING AND JOHN DOES 1-10,

Additional Counterclaim Defendants.
--X

Defendant M. Melnick & Co., Inc. (Melnick) moves, pursuant to CPLR §§ 2221(d) and (e), for leave to renew and reargue the Court's Decision and Order dated May 24, 2024 (the Prior Decision), insofar as the Court held that Melnick's mechanic's liens should be discharged by the

Bronx County Clerk, and upon reargument, reversing the Prior Decision and directing the Bronx County Clerk to reinstate Melnick's mechanic's liens *nunc pro tunc*.

CPLR § 2221(d) - Reargument

"A motion for leave to reargue is addressed to the sound discretion of the Supreme Court" (*Rides Unlimited of New York, Inc. v Engineered Energy Solutions, LLC,* 184 AD3d 695, 695 [2d Dept 2020]; *Bueno v Allam,* 170 AD3d 939, 940 [2d Dept 2019]; *Foley v Roche,* 68 AD2d 558, 567 [1st Dept 1979]).

"A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. Its purpose is to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided. However, reargument may not serve to provide a party an opportunity to advance arguments different from those tendered on the original application. Nor may it be employed as a device for the unsuccessful party to assume a different position inconsistent with that taken on the original motion. . . . 'A motion for reargument is not an appropriate vehicle for raising new questions'" (*Foley* at 567-568; *see also DeSoignies v Cornasesk House Tenants' Corp.,* 21 AD3d 715, 718 [1st Dept 2005] ["Reargument is not available where the movant seeks only to argue 'a new theory of liability not previously advanced'"]).

Plaintiff previously moved for summary judgment, dismissing all counterclaims asserted by Melnick against plaintiffs, and for an Order discharging and canceling Melnick's mechanic's liens. By Decision and Order dated May 24, 2024 (the Prior Decision), this Court (Gomez, J.) granted plaintiff's motion to the extent of dismissing Melnick's fifth, sixth, seventh, eighth[1] and ninth counterclaims and discharging Melnick's mechanic's liens. Otherwise, the motion was denied.

[1]Upon reviewing Melnick's Answer, the Court discovered that there is no eighth counterclaim. Rather, Melnick designates two consecutive ninth counterclaims after its seventh counterclaim. As such, the Court's dismissal of the "eighth" counterclaim in the Prior Decision is actually dismissal of the first ninth counterclaim.

In the instant motion, Melnick seeks renewal and reargument of plaintiffs' summary judgment motion and the Prior Decision to the extent that the Court ordered that Melnick's liens be discharged and canceled by the Bronx County Clerk.

In support of its motion, Melnick contends that in determining plaintiffs' summary judgment motion, the Court misapplied the law by conflating the right to the receipt of funds with the existence of a lien fund under Lien Law § 4. Insofar as the Court based its finding that Melnick's liens should be discharged and canceled, and that Melnick's seventh and both ninth counterclaims should be dismissed, on the ground that there were no lien funds to which Melnick's liens could attach, the Court misapprehended the law and, therefore, grants reargument.

Upon reargument, for the foregoing reasons and those discussed below, the Prior Decision is modified solely to the extent of reinstating Melnick's seventh and two, ninth counterclaims, and Melnick's mechanic's liens. Otherwise, the Prior Decision remains unchanged.

BACKGROUND

The amended complaint filed in this action alleges causes of action for breach of contract, willful exaggeration of mechanic's liens, and slander of title. Specifically, the amended complaint alleges, *inter alia*, as follows: By written agreement dated September 28, 2017 (the "Contract"), between plaintiffs and Melnick, Melnick agreed to perform labor and furnish equipment/materials in connection with the construction of three separate mixed-use, mixed-income, affordable housing building projects in Bronx County. One project is located at 220 East 178th Street (the "Grand I Project"), another project is located at 225 East 179th Street (the "Grand II Project"), and a third project is located at 2195 Morris Avenue (the "Grand III Project" and, together with the Grand I Project and Grand II Project, the "Projects"). Melnick, as principal, and Federal, as surety, provided payment ("Payment Bond") and performance ("Performance Bond") bonds. Pursuant to the Performance Bond dated September 2017, Melnick and Federal ("defendants") agreed to be jointly and severally liable to plaintiffs to the extent required by the Contract. Plaintiffs performed all material terms and conditions under the

Contract, Payment Bond and Performance Bond. On or about June 14, 2019, plaintiffs declared Melnick to be in default of the Contract, terminated the Contract for cause, and demanded that Federal perform its obligations under the Performance Bond.

By written agreement dated October 29, 2019, plaintiffs entered into a contract with Federal, pursuant to which Federal, as surety, agreed to arrange for the performance and completion of Melnick's obligations under the Contract (the "Takeover Agreement"). Federal arranged for the performance of the Contract by hiring J.S. Held, LLC ("Held") to act as Federal's agent, and executed a completion agreement with Melnick pursuant to which Melnick agreed to perform all of the labor and furnish the equipment/materials required to complete the construction of the Projects (the "Completion Agreement"). Plaintiffs performed all material terms and conditions of the Takeover Agreement. On December 6, 2022, Melnick filed a mechanic's lien against the Grand I Project in the amount of $1,143,333.63 and a mechanic's lien against the Grand III Project in the amount of $821,675.95. On December 22, 2022, Federal filed mechanic's liens against the Projects in the respective amounts of $1,827,297.37 (the "Federal Grand I Lien"), $295,440.78 (the "Federal Grand II Lien"), and $1,329,032.046 (the "Federal Grand III Lien"). On January 5, 2023, Federal and Melnick each filed notices of pendency with respect to their lien foreclosure counterclaims in the instant action. Numerous subcontractors have also filed liens against the Projects due to nonpayment by Melnick. Neither Melnick nor Federal have paid those subcontractors.

In its answer, Melnick interposes counterclaims against plaintiffs for, *inter alia,* foreclosure of its mechanic's liens. Melnick's seventh counterclaim is for foreclosure on two mechanic's liens it filed for unpaid work and equipment/materials furnished on the Grand I Project, in the total amount of $1,983,091.27. As noted previously, Melnick alleges two consecutive ninth counterclaims following its seventh counterclaim, but no eighth counterclaim. The first ninth counterclaim is for foreclosure on a mechanic's lien it filed for unpaid work and equipment/materials furnished on the Grand II Project, in the total amount of $184,522.72. The second ninth counterclaim is for foreclosure on two mechanic's liens it filed for unpaid work and equipment/materials furnished on the Grand III Project, in the total amount of $1,264,341.32.

On August 20, 2023, this Court issued a Decision and Order granting plaintiffs' motion for summary judgment to the extent of discharging all mechanic's liens filed by Federal. This Decision and Order was unanimously affirmed by the Appellate Division, First Department by Decision and Order entered December 12, 2024 (*Thorobird v Melnick,* 2024 NY Slip Op 06284 [1st Dept 2024]).

* * * * * * * *

In their prior memorandum of law, plaintiffs argued that Melnick has no right to file mechanic's liens because it assigned its rights to payment to Federal. In that regard, plaintiffs asserted, in pertinent part, the following:

> Melnick's Seventh and two Ninth Causes of Action for foreclosure of mechanic's liens must be dismissed and the Melnick Liens discharged and cancelled because Melnick has no right to payment under the Contract, which is a necessary element to prove a lien foreclosure action and establish a right to a lien.
>
> It is well settled that in order to demonstrate the right to lien and to subsequently foreclose on a lien, a lienor must affirmatively demonstrate an entitlement to the amounts claimed under its lien . . . Where a lienor cannot demonstrate an existing right to collect the funds for which it has liened, the right to lien does not exist and the lien must be discharged and canceled.
>
> Melnick verified that the Melnick Liens are all based on payment rights allegedly arising from the Contract. In the Melnick Lien Itemization, Melnick verified that the contractual basis for the Melnick Liens are the Contract . . ..
>
> As explained *supra*, all of Melnick's rights under the Contract and Takeover Agreement are now Federal's rights. Melnick no longer has any standing to pursue any Contract or Takeover Agreement rights, including payment rights.

In opposition, in its prior memorandum of law, Melnick asserted the following:

> Even assuming *arguendo* that Plaintiffs were correct that Melnick assigned away its rights to pursue the Melnick Counterclaims (Plaintiffs are incorrect) and that Federal did not assign back to Melnick any inadvertently assigned claims (which it did), Melnick would continue to maintain its mechanic's lien rights in any event. Plaintiffs have already taken the position, and this Court has

> agreed, that Federal does not have lien rights of its own because Federal deliberately maintained its status as a surety under the Takeover Agreement, and a surety does not provide labor and materials giving rise to the right to file a mechanic's lien under New York Lien Law.
>
> If Federal cannot file and maintain liens, then it necessarily follows that Melnick can. Plaintiffs' argument otherwise would mean that neither Federal, nor Melnick (the party that performed the work) have rights to maintain liens for the millions of dollars of labor and materials that Plaintiffs have wrongfully refused to pay for. This would create a condition in violation of New York Lien Law § 34, which provides "**Notwithstanding the provisions of any other law, any contract, agreement or understanding whereby the right to file or enforce any lien created under article two is waived, shall be void as against public policy and wholly unenforceable.** Accordingly, Melnick's Liens may not be cancelled by the Court.

In the Prior Decision, with respect to the mechanic's lien issue, the Court opined:

> Finally, Plaintiffs contend that Melnick's seventh, eighth and ninth counterclaims for foreclosure of its mechanic's liens should be dismissed and the liens discharged and cancelled because the liened amounts arose from rights under the Contract and Takeover Agreement that were assigned and subrogated to Federal.
>
> Melnick counters that since this Court previously found that Federal has no lien rights, it necessarily follows that Melnick has lien rights. Precluding both Federal and Melnick from filing mechanic's liens for the millions of dollars of labor and materials that Plaintiffs have wrongfully refused to pay, Melnick asserts, would violate Lien Law § 34.
>
> Lien Law § 3 specifies the persons who may acquire a lien on a private improvement and states, in pertinent part:
>
>> A contractor, subcontractor, laborer, materialman . . . who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof, or of his agent, contractor or subcontractor . . . shall have a lien for the principal and interest, of the value, or the agreed

> price, of such labor . . . from the time of filing a notice of such lien as prescribed in this chapter.

Lien Law § 4 sets forth the extent of the lien that may be filed pursuant to Lien Law § 3, and states, in pertinent part:

> (1) Such lien shall extend to the owner's right, title or interest in the real property and improvements, existing at the time of filing the notice of lien, or thereafter acquired, except as hereafter in this article provided. . . . If labor is performed for, or materials furnished to, a contractor or subcontractor for an improvement, 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, and any sum subsequently earned thereon.

Significantly, "[a] mechanic's lien will attach only to funds due and owing to the general contractor at the time of its filing or which may thereafter become due and owing" (Hartman v Travis, 81 AD2d 692, 693 [3d Dept 1981]["[I]n this case the liens at issue were not filed until July 24 and 26, 1979, at which time, as a result of the release, there was no sum due and owing to the general contractor to which the lien could attach"]; see Bunce, Ltd. v Fahey, 73 AD2d 632, 632 [2d Dept 1979] ["Pursuant to [Lien Law § 4], a mechanic's lien is valid to the extent of the sum earned and unpaid on the contract at the time of filing the notice of lien, and any sum subsequently earned thereon"]). Such liens could not be valid as against the owner unless the money not only was earned, but became due and payable by the owner to the contractor (Dempsey v Mt. Sinai Hospital, 186 AD 334, 339 [1st Dept 1919]).

Here, Melnick filed its mechanic's liens in 2023. Significantly, in 2019, Melnick had already assigned and subrogated to Federal all of its rights to payment for the labor and materials for which it filed those liens. As such, in 2023, there were no funds due and owing to Melnick to which its mechanic's liens could attach. Indeed, the Takeover Agreement provides, in part, that "Federal, the Owner and Melnick acknowledge and agree that (a) by this Agreement and/or by operation of law, Federal has succeeded to all of Melnick's rights to payment and compensation under the Contract and all of its obligations under the Contract on or after the date of this Agreement" and that "Federal will receive payment in accordance with the terms of the Contract,of amounts due and that

> would be due to Melnick under the Contract." Further, as noted above, under the Completion Agreement, Melnick assigned to Federal "all rights, title and interest in and to any funds paid or to be paid by Owner under the Contract and Takeover Agreement." Inasmuch as there were no funds to which Melnick's liens could attach when the liens were filed, they are invalid and unenforceable and must be discharged.
>
> Contrary to Melnick's contention, Lien Law § 34 does not require a different result. Lien Law § 34 provides, in relevant part, that "[n]otwithstanding the provisions of any other law, any contract, agreement or understanding whereby the right to file or enforce any lien created under article two is waived, shall be void as against public policy and wholly unenforceable." Neither the Takeover Agreement nor the Completion Agreement include any provision in which Melnick waived its right to file mechanic's liens. Rather, as discussed above, because Melnick assigned its rights to payment under the Contract and Takeover Agreement to Federal, there were no funds to which its liens could attach. To the extent that Melnick alleges inequity in this result, the Court notes that Melnick is not without recourse against Plaintiffs as its contract counterclaims remain viable.

As Melnick notes, plaintiffs did not argue on the underlying motion that, because of the assignment of funds, Melnick had no lien rights under Lien Law § 4. Rather, plaintiffs argued that the assignment in the Completion Agreement constituted an assignment to Federal of all of Melnick's rights under the Contract, including the right to lien. However, the Court found that Melnick assigned its right to payment only, not its right to lien, under the Completion Agreement. In determining whether Melnick had lien rights, in the absence of any legal authority offered by the parties or found by the Court directly on point, the Court looked to the language of Lien Law § 4, and case law addressing that provision, and held that Melnick did not possess lien rights. Because plaintiffs did not raise Lien Law § 4 in support of their underlying motion, plaintiffs contend that Melnick is precluded from raising arguments on reargument or renewal that rely on "the concept of exhaustion of lien funds and Lien Law § 4." While it is true that, generally, new arguments not previously raised may not be raised on reargument, whereas, here, the Court, *sua sponte,* relied upon Lien Law § 4 in reaching its conclusion on the mechanic's lien issue, it would be inequitable to preclude the parties from raising arguments concerning the Court's reliance on Lien Law § 4. As such, the Court will consider the parties' arguments in this regard.

As an initial matter, it is important to underscore that the purpose of the mechanic's lien statute is to provide an added degree of protection to persons who provide labor and material for construction projects by providing an independently enforceable security interest upon the construction property (*Niagra Venture v Sicoli & Massaro,* 77 NY2d 175, 180 [1990]; *Strober Bros., Inc. v Kitano Arms Corp.,* 224 AD2d 351, 352 [1st Dept 1996]). And, the lien statute is to be construed liberally to secure that beneficial interest and purpose (Lien Law § 23; *Strober Bros., Inc.* at 352; *Madison Lexington Venture v Crimmins Contracting Co.,* 159 AD2d 256, 257 [1st Dept 1990]). Indeed, it has been held that in construing a remedial statute such as the Lien Law, courts should not always confine themselves to the strict legal definition of the terms used, but are at liberty to seek out the intention of the legislature and to give effect to that intention, if by any reasonable construction the language used will permit them to do so (*Standard Sand & Gravel Co. v City of New York,* 172 AD 80,82 [1st Dept 1916]). However, the burden is on the lienor to show that there is a sum due, or to become due, upon which his lien might attach (*Brandt v Burke,* 110 AD 396, 398 [1st Dept 1905]; *see also Brainard v Kings County,* 155 NY 538, 543-544 [1898]).

It is a defense to a lien foreclosure action that there are no funds to which a lien can attach. Indeed, pursuant to Lien Law § 4(1), an owner's liability to a subcontractor is strictly limited to the amount of the lien fund – that amount of money owed the general contractor (*C.C.C. Renovations, Inc. v Victoria Towers Development Corp.,* 168 AD3d 664, 666 [2d Dept 2019]["Thus, no individual mechanic's lien can exceed the total amount owed by the owner to the general contractor at the time of the filing of the notice of lien."]; *Peri Formwork Systems v Lumbermens Mutual Casualty Company,* 112 AD3d 171, 176 [2d Dept 2013]["Money still due and owing from the owner to the contractor at the time of the filing of the lien, plus any sums subsequently earned thereon, is known as the lien fund."[internal citation and quotation marks omitted]). Thus, the subcontractor's right to recover is derivative of the right of the general contractor to recover, and if the general contractor is not owed any amount under its contract with the owner at the time the subcontractor's notice of lien is filed, then the subcontractor may not recover (*Kamco Supply Corp. v Nastasi & Assoc., Inc.,* 216 AD3d 458, 458 [1st Dept 2023] [lien foreclosure claim of subcontractor's materialman dismissed because materialman failed to show that the property owner owed any money to subcontractor when its lien was filed, thus, there "was nothing to which the lien could attach."]; *C.C.C. Renovations, Inc.* at 666 ["The subcontractor's right to recover is derivative of the right of the general contractor to recover, and if the general contractor is not owed any amount under its contract with the owner at the time the subcontractor's notice of lien is filed, then the subcontractor may not recover."]; *Peri Formwork Systems* at 176 ["The subcontractor's right to recover is derivative or subrogated to the right of the general contractor to recover. Thus, if the general contractor is not owed any amount under its contract with the owner, then the subcontractor may not recover."]*;Timothy Coffey Nursery/Landscape, Inc. v Gatz,* 304 AD2d 652, 270 AD2d 817, 818 [4th Dept 2000]["It is well settled that the rights of a subcontractor are derivative of the rights of the general contractor and that a subcontractor's lien must be satisfied out of funds due and owing from the owner to the general contractor at the time the lien was filed." [internal citation and quotation marks omitted]).

In the Prior Decision, the Court reasoned that because Melnick had assigned its rights to payment under the Contract and the Takeover Agreement to Federal, there were no lien funds to which Melnick's liens could attach. This was in error because the Court overlooked the fact that it is undisputed that plaintiffs owe funds to Federal under the Takeover Agreement.[2] Significantly, the Takeover Agreement provides that "Federal will receive payment in accordance with the terms of the Contract, of amounts due and that would be due to Melnick under the Contract." In this regard, for purposes of determining the extent of the lien to which a mechanic's lien might attach, Federal's role under the Takeover Agreement can be likened to that of a general contractor insofar as plaintiffs/owners must pay Federal the funds due and

[2]Plaintiffs do not allege that there are no funds due Federal under the Takeover Agreement.

owing to Melnick under the Contract. Thus, there are lien funds to which Melnick's liens may attach. Further, given the Court's finding that Melnick did not assign its lien rights to Federal, Melnick retained its right to file mechanic's liens to the extent that it was owed funds under the Contract and there were lien funds to which its liens could attach. In this regard, the Court notes that plaintiffs do not contend that Melnick's liens exceed the funds owed to Federal under the Takeover Agreement.

Moreover, the fact that the Takeover Agreement expressly requires Melnick to provide lien releases "as required under the Contract," evinces that plaintiffs understood that Melnick maintained lien rights.

Finally, since the Court based its dismissal of Melnick's foreclosure counterclaims on the erroneous finding that there were no lien funds to which Melnick's liens could attach, those counterclaims must be reinstated.

Given the Court's findings on reargument, it need not reach the parties' arguments concerning renewal.

Based upon the foregoing, it is hereby

ORDERED that Melnick's seventh and both ninth counterclaims are reinstated. It is further

ORDERED that the Bronx County Clerk is directed to reinstate, *nunc pro tunc,* Melnick's mechanic's liens in the respective amounts of $839,757.64, $184,522.85, $449,785.69, $2,039,652, $1,343,646, and $2,474,380. It is further

ORDERED that plaintiffs serve a copy of this Decision and Order upon all defendants, with Notice of Entry, within thirty (30) days of the date hereof.

This constitutes the Decision and Order of this Court.

Dated: Bronx, New York
2/6/25

Hon. ______________________
FIDEL E. GOMEZ, J.S.C.