UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SPECRITE DESIGN, LLC,

Plaintiff,

– against –

ELLI N.Y. DESIGN CORP., J. KOKOLAKIS CONTRACTING, INC., LIBERTY MUTUAL INSURANCE COMPANY, AND JOHN DOES 1-10, JOHN DOES 10-20,

Defendants.

OPINION AND ORDER

16 Civ. 6154 (ER)

Ramos, D.J.:

Specrite Design, LLC ("Specrite" or "Plaintiff") brings this action against Elli N.Y. Design Corp. ("Elli"), J. Kokolakis Contracting Inc. ("Kokolakis"), and Liberty Mutual Insurance Company ("Liberty Mutual," collectively, the "Defendants"), alleging that Elli breached an agreement under which Plaintiff performed labor and furnished materials in connection with a contract for a public improvement project. Specrite also seeks to foreclose on a lien and asserts a claim against the discharge of lien bond acquired to insure it (the "Lien Foreclosure Claims"). Before the Court is Kokolakis and Liberty Mutual's motion to stay Counts I and II of the Complaint, pending the outcome of a related action in New York County Supreme Court. For the reasons set forth below, Kokolakis and Liberty Mutual's motion is GRANTED.

I. Background

A. Factual Background[1]

On August 2, 2012, Kokolakis entered into a public improvement contract (the "Contract") with the Dormitory Authority for the State of New York ("DASNY") for a project known as the Bronx Mental Health Redevelopment, Children's Center, Bronx, New York (the "Project"). Complaint ("Compl"), Doc. 1, ¶¶ 8, 16; Trif Decl. Ex A, at 1–2. On April 28, 2014, Kokolakis entered into an agreement (the "Subcontract") with Elli wherein Elli agreed to fabricate and install architectural woodwork, casework, and millwork for the Project. Answer at 8; Trif Decl. Ex. A, at 23. The Subcontract expressly allows Kokolakis to "deduct any monies due or to become due" to Elli in case of Elli's default. *Id*. at 14. Sometime thereafter, Elli, in turn, entered into an agreement with Specrite (the "Specrite Subcontract") pursuant to which Specrite agreed to furnish certain labor and materials for the Project. Compl. ¶ 8.

Elli allegedly breached the Specrite Subcontract by failing to pay Specrite the full amount due for labor performed and materials furnished for the Project. *Id*. at ¶ 11. On March 14, 2016, Specrite filed with the DASNY a Notice of Lien for Public Improvement (the "Lien"), claiming that Elli owed $109,763.91 for work performed under the Specrite Subcontract. *Id*. at ¶¶ 13–14. Subsequently, Liberty Mutual issued a bond, bearing the bond number 015049636, discharging the Lien (the "Discharging Bond").[2] *Id*. at ¶ 18.

[1] The following factual background is based on allegations in the Complaint, and the declaration, memoranda, and exhibits submitted in connection with the motion to stay. Evidence outside of the pleadings maybe considered by a court to determine factual issues in examining a motion to stay. *Kappel v. Comfort*, 914 F.Supp. 1056 (S.D.N.Y. 1996).

[2] Kokolakis and Liberty Mutual claim that the bond was issued by Kokolakis as principal and Liberty Mutual as surety. Mem. Supp. Mot. Stay, at 3.

B. Related State Action

On March 21, 2016, Elli filed a contract breach claim against Kokolakis and Liberty Mutual in the Bronx County Supreme Court ("State Court Action"), seeking to recover $221,716.77 due under the Subcontract. Trif Decl., Ex. B. On June 27, 2016, Kokolakis and Liberty Mutual filed an answer to the state court complaint, denying the breach claim, and counterclaiming that Elli breached the Subcontract by, among other things, "performing its scope of work in a poor and unworkmanlike manner and failing to cure its defaults under the Subcontract." *Id.*, Ex. C, at 6.

On September 12, 2016, the State Court Action was transferred to New York County pursuant to the parties' stipulation. *Id.*, Ex. D. On July 7, 2016, the parties commenced discovery in the State Court action. *Id.*, Ex. E & F.

C. Procedural History

On August 3, 2016, Specrite filed this action to recover money due under the Specrite Subcontract. Compl. (Doc. 1). In the Complaint, Specrite asserts eight causes of action, two of which are relevant to this motion: Count I is a claim for foreclosure of the Lien, and Count II is a claim to recover under the Discharging Bond (together with Count I, the "Foreclosure Claims"). *Id.* at 3–5. Elli answered on September 29, 2016. Doc. 20. In the same document, Elli also asserted cross-claims against Kokolakis and Liberty Mutual for breach of the Subcontract, asking to recover $221,716.77.[3] *Id.*

On October 25, 2016, Kokolakis and Liberty Mutual filed the instant motion to stay the Foreclosure Claims. Doc. 28.

[3] Kokolakis and Liberty Mutual also moved to dismiss the cross-claims brought by Elli. Doc. 24. On Nov. 23, 2016, the parties submitted a stipulation to withdraw the cross-claims and motion to dismiss cross-claims. Doc. 28. Therefore, the Court will not address Elli's cross-claims.

II. Legal Standards

A stay is "not a matter of right," even where irreparable injury might result. *Virginian Ry. Co.*, 272 U.S. 658, 672 (1926). Rather, it is "an exercise of judicial discretion," and "[t]he propriety of its issue is dependent upon the circumstances of the particular case." *Id.* at 672–73. Yet the Court's discretion is not unguided. *Kappel v. Comfort*, 914 F.Supp. 1056, 1058 (S.D.N.Y. 1996). A court may stay proceedings in one suit to abide by the proceedings in another even if the parties or the issues in the two cases are not identical. *Caspian Investments, Ltd. v. Vicom Holdings, Ltd.*, 770 F.Supp. 880, 884 (S.D.N.Y.1991) (citing *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936)).

Courts examining motions to stay consider five factors[4]: "(1) the private interests of the plaintiffs in proceeding expeditiously with the civil litigation as balanced against the prejudice to the plaintiffs if delayed; (2) the private interests of and burden on the defendants; (3) the interests of the courts; (4) the interests of persons not parties to the civil litigation; and (5) the public interest." *Royal Park Invs.SA/NV v. Bank of Am. Corp.*, 941 F. Supp. 2d 367 (S.D.N.Y. 2013); *see also Tradewinds Airlines v. Soros*, 2009 WL 435298 (S.D.N.Y. 2011) (staying a civil case pending the disposition of a contested default judgment before the Superior Court of the State of North Carolina). In balancing these factors, courts must make a case-by-case determination, in which the basic goal is to avoid prejudice. *Volmar Distributors, Inc. v. New York Post Co.*, 152 F.R.D. 36, 39. (S.D.N.Y. 1993). "The proponent of a stay bears the burden of establishing its need." *Clinton v. Jones*, 520 U.S. 681, 708 (1997).

[4] In Kokolakis and Liberty Mutual's memorandum in support of their motion to stay, they cite to the seven-factor test in *De Carvalhosa v. Lindgren*, 546 F.Supp.228, 230 (S.D.N.Y. 1982). Mem. Supp. Mot. Stay, at 3. However, *De Carvalhosa* concerns a motion for a stay where there is a federal proceeding and a similar cause of action pending in state court. Here, the instant federal action and state action involve different parties and different causes of action. *See* Mem. Supp. Mot. Stay, at 3–4. In any event, if the Court applied the seven-factor test, the outcome would be no different.

III. Discussion

A. The Balancing of Interests and Prejudice to the Parties

Section 5 of New York State's Lien Law provides that persons performing labor for or furnishing materials to a contractor or the subcontractor for a public improvement project, upon timely notice, could file a mechanics' lien for the value of the labor performed. McKinney's Lien Law §5. There is no dispute that Lien Law §5 applies to this action, and the parties agree that the Lien and notice were timely filed. Compl. ¶4; Mem. Supp. Mot. Stay, at 3. Both parties also agree that the amount of the lien fund—the amount due from Kokolakis to Elli under the Subcontract—determines what Specrite can recover under the Lien Foreclosure Claims. The parties' dispute centers on the point at which we look to see how much is in the lien fund.

Kokolakis and Liberty Mutual assert that because the Subcontract expressly allows Kokolakis to utilize earned and unearned funds to cure any default on Elli's part, Kokolakis has the right to use monies otherwise payable to Elli—i.e., the lien fund—to pay for any work required to cure the default. Mem. Supp. Mot. Stay, at 5–6. Therefore, if the State Court determines that Elli defaulted, it could find that the lien fund was properly depleted as a result of Kokolakis's subsequent efforts to cure the default. Reply Mem. Supp. Mot. Stay, at 4–5 (citing *Scarsdale Nat. Bank & Trust Co. v. U.S. Fid. & Guar. Co.*, 264 N.Y. 159 (1934)). In that event, the argument continues, a stay here is appropriate because the State Court Action may render the instant action moot if there is nothing left in the fund. Mem. Supp. Mot. Stay, at 5–6.

In contrast, Specrite argues that under Lien Law §5, the Lien Foreclosure Claims turn on the amount due from Kokolakis to Elli *at the time* the lien was filed—here on March 14, 2016—not whether there was a subsequent default by Elli. Mem. Opp. Mot. Stay, at 3–4 (citing *American Radiator Co. v. New York*, 223 N.Y. 193 (1918)). In other words, Specrite contends

that if the lien fund was sufficient to satisfy its (Specrite's) Lien as of March 14, 2016, it is immaterial whether Elli subsequently defaulted. Specrite contends that the existence and extent of a lien fund is "an extremely fact sensitive issue," and that "careful attention must be paid to the timing of the filing of the liens, as well as when any alleged default occurred." *Id.* at 4.

Kokolakis has the better of the argument. Courts have uniformly held that under Lien Law §5,[5] the right to a lien can only be enforced to the extent of the amount "due or to become due to the contractor or subcontractor on whose credit the labor and materials are furnished under *his* contract." *Hempstead Concrete Corp. v. Elite Assocs., Inc.*, 203 A.D.2d 521, 523 (1994); *see also Harsco Corp., Patent Scaffolding Co. Div. v. N.Y. City Dep't of Gen. Servs.*, 1993 WL 138829, at *3 (S.D.N.Y. Apr. 23, 1993) (holding that a lienor who supplied materials to a subcontractor is "restricted in his claim to satisfaction out of whatever amount, if any, is due and unpaid from the contractor to the subcontractor."). The upshot of the foregoing is that under New York law, a party supplying materials to a subcontractor has only a derivative lien, being substituted to the right of the subcontractor. *See Rukeyser v. Fountain & Choate, Inc*., 185 A.D. 263, 267 (1st Dep't 1918) ("In the absence of fraud between the general contractor and his subcontractor . . . one performing labor or furnishing materials to the latter becomes entitled, by subrogation only, to his right to file a mechanic's lien for money due or to grow to from the former . . . ").[6] Here, even though the Lien was discharged by the issuance of Liberty Mutual's

[5] The Court, sitting in diversity, shall apply New York law on substantive matters such as the interpretation of payment bonds for public works projects. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427 (1996).

[6] To be sure, there may be instances in which this statutory scheme renders unfair results, as when an innocent subcontractor goes unpaid because the general contractor has defaulted. This important limitation of Section 5 of the Lien Law has not gone unnoticed. *See Graham Architectural Prod. Corp. v. St. Paul Mercury Ins. Co.*, 303 F. Supp. 2d 274, 279 (E.D.N.Y. 2004) (noting that "if nothing is due on the contract between the contractor and the public entity, an individual supplying materials or labor for the project cannot have a lien under § 5") (citing *Upson v. United Eng'g & Contracting Co.*, 72 Misc. 541, 544 (Sup. Ct. 1911)); *see also Chittenden Lumber Co. v. Silberblatt & Lasker, Inc.*, 288 N.Y. 396, 400 (1942) (commenting on § 5: "the courts, and apparently the Legislature, recognized the fact that 'if . . . the contractor owes no money . . . then laborers employed by the

surety bond, the same test for the validity of a lien and the amount in the lien fund applies. "The filing of a bond does not extinguish the lien but merely shifts it from the public funds to the bond." *Chelsea Equip. & Servs. Corp. v. N.Y. City Health & Hosps. Corp.*, No. 96 CIV. 0147 (MBM), 1997 WL 790581, at *3 (S.D.N.Y. Dec. 24, 1997). Accordingly, an action to enforce a discharged lien is in substance an action to test the validity of the lien and to enforce the lien to the extent it is valid. *Id.*

Applying the foregoing, Kokolakis is right that the State Court Action, which will decide whether or not Elli has defaulted, and how much Kokolakis spent or will spend to cure the default, will determine the existence and extent of the lien fund. Plaintiff relies exclusively on *American Radiator Co. v. New York,* 223 N.Y. 193, 198 (1918), for the argument that it is entitled to whatever was in the lien fund—up to the amount of his claim—at the time it filed the lien. Mem. Opp. Mot. Stay, at 3–4. However, in that case, the court reached the conclusion that a contractor's subsequent default did not terminate subcontractor's rights under the lien because the contract expressly provided that progress payments that had been certified "shall be made in installments." Hence, *American Radiator* is inapposite.

This case is more akin to *Scarsdale Nat. Bank & Trust Co. v. U.S. Fid. & Guar. Co.*, 264 N.Y. 159, 163 (1934). In that case, as in the instant case, the contract allowed the owner to apply earned monies to complete the project in case of the contractor's default. In *Scarsdale Nat. Bank*, the contract provided:

---

subcontractor, like persons furnishing materials to the subcontractor, may go unpaid'") (quoting *Devitt v. Schottin,* 274 N.Y. 188, 194 (1937)). It is for this reason that in 1938, the New York legislature enacted Section 137 of the Finance Law, which provides that, for any "contract for the prosecution of a public improvement for . . . a public benefit corporation," a condition to the approval of such contract is "a bond guaranteeing prompt payment of moneys due to all persons furnishing labor or materials to the contractor or any subcontractors in the prosecution of the work provided for in such contract." *Nouveau Indus. Inc. v. Liberty Mut. Ins. Co*., 2011 WL 10901796, at *1 (S.D.N.Y. Sept. 7, 2011) (citing N.Y. State Fin. Law § 137(1)). However, the parties agree that § 137 is inapplicable in this case. Doc. 31, at 2; Doc. 32.

> "If the work to be done under this contract shall be abandoned by the contractor . . . the commission shall thereupon have the power to complete or contract for the completion of the work . . . . The expenses, losses or damages so charged shall in addition to any other indemnification provided for elsewhere in this contract, be deducted and paid by the commission out of such moneys as may be due or may at any time thereafter grow due to the contractor under and by virtue of this contract, or any part thereof."

Scarsdale Nat. Bank, 264 N.Y.at 162.

Similarly, in this case, the Subcontract between Kokolakis and Elli provides that should Elli at any time default, Kokolakis shall "have the right to [r]emedy the default by . . . correcting, furnishing, performing or otherwise completing the work . . . , and deducting the cost . . . from any monies due or become due to [Elli]." Trif Decl. Ex. A, at 14.

Therefore, if the State Court determined that Elli had defaulted, Kokolakis would be entitled to utilize monies earned by and unpaid to Elli to do the work properly, and the amount of the lien fund would be the difference between the cost of completion and monies earned and unpaid to Elli at the time of the default. Thus, if Kokolakis expended more money to complete the Project than it owed to Elli, there would be nothing in the lien fund, and Specrite would have no right to recover under the Lien. If this happened, the Lien Foreclosure Claims would be rendered moot.

Additionally, the Court is not persuaded by the argument that Specrite is not a party in the State Court Action and thus should not be bound by the decision in that court. It is well settled that a non-party could be bound by a judgement on the same issue if its interests are derivative from a party in the previous action. *See Bernhard v. Bank of Am. Nat. Trust & Sav. Ass'n*, 19 Cal. 2d 807, 812 (1942). Specifically, issue preclusion applies if "(1) the issue in question was actually and necessarily decided in a prior proceeding, and (2) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the first

proceeding." *Colon v. Coughlin*, 58 F.3d 865, 869 (2d Cir. 1995). Here, Specrite's right under the Lien is derivative of Elli's right under the Subcontract. As plaintiff in the State Court Action, Elli has the opportunity to fully litigate its rights and remedies against Kokolakis, which, as noted, will determine the existence and extent of the lien fund, and will be binding on Specrite. *See Greco v. Local.com Corp.*, 806 F. Supp. 2d 653 (S.D.N.Y. 2011) (holding that res judicata barred plaintiff's derivative claim against the same defendant when another plaintiff in the prior action vigorously prosecuted the claim). Moreover, Specrite can still request information related to the existence and extent of the lien fund through subpoenas. Reply Mem. Supp. Mot. Stay, at 6; *see also* Mem. Opp. Mot. Stay, at 5.

The Court notes that Kokolakis has not made any showing of how long the State Court Action would take to resolve. Nevertheless, once a decision is reached in the State Court, which has been in discovery for over a year, the stay would be automatically lifted, and Specrite can proceed with its Lien Foreclosure Claims in this Court. Moreover, any loss caused by the stay will be monetary in nature, and therefore will be susceptible to an award of interest. *Wing Shing Prod. (BVI) Ltd. v. Simatelex Manufactory Co.*, 2005 WL 912184, at *2 (S.D.N.Y. Apr. 19, 2005). Accordingly, this factor weighs for a stay.

B. The Court's Interests

Courts grant stays where judicial efficiency will be promoted or the possibility of conflicts between different courts will be minimized. *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *U.S. E.P.A.*., 630 F.Supp.2d 295, 304 (S.D.N.Y. 2009) (quoting *N.Y. Power Auth. v. United States*, 42 Fed. Cl. 795, 799 (Fed. Cir. 1999)). Maintaining an efficient docket falls within "the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Louis Vuitton*

Malletier S.A. v. LY USA, Inc., 676 F.3d 83, 96 (2d Cir. 2012) (internal quotations omitted). Here, as noted, Specrite's Lien Foreclosure Claims are contingent upon the outcome in the State Court Action. Indeed, to let this action go forward without a stay would lead to unnecessary litigation that is time-consuming for this Court and for the parties. Accordingly, this factor weighs for a stay.

C. The Interests of Persons Not Parties to this Litigation

Neither party has addressed the effect that a stay would have on non-parties to this action. Accordingly, the Court finds this factor neutral.

D. The Public Interest

Neither party has addressed the effect that a stay would have on public interest. Generally, considerations of judicial economy are viewed as relevant to the public interest. *Payne v. Jumeriah Hospitality & Leisure (USA) Inc.*, 808 F.Supp.2d 604, 604 (S.D.N.Y. 2011). Accordingly, this factor weighs for stay.

IV. Conclusion

For the reasons stated above, Kokolakis and Liberty Mutual's motion to stay Count I and Count II of the Complaint is GRANTED. The clerk of this Court is respectfully directed to terminate the motion, Doc. 24. The parties are directed to attend a status conference on August 9, 2017 at 11:30am to discuss a discovery schedule for the balance of the Counts.

It is SO ORDERED.

Dated: July 20, 2017
New York, New York

Edgardo Ramos, U.S.D.J.