

150 Nassau Assoc. LLC v RC Dolner LLC

2006 NY Slip Op 30683(U)

February 17, 2006

Supreme Court, New York County

Docket Number: 601879/04

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE, J.S.C.

PART 10

Index Number : 601879/2004
150 NASSAU ASSOCIATES LLC.

INDEX NO. _____

vs
RC DOLNER LLC

MOTION DATE 12/15/05

Sequence Number : 001

MOTION SEQ. NO. _____

MECHANICS LIEN - *vacate etc*

MOTION CAL. NO. _____

_____ on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ~~motion~~

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

FILED

MAR 01 2006

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: FEB 17 2006

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X
150 NASSAU ASSOCIATES LLC,

Plaintiff/Counterclaim Defendant,

-against-

RC DOLNER LLC,

Defendant/Counterclaim Plaintiff,

KENSINGTON-NASSAU LLC,

Additional Counterclaim Plaintiff,

-against-

150 MEZZANINE LLC, *et al.*

Defendants.
-----X

Decision/Order

Index No.: 601879/04

Seq. No. : 001

Present:

Hon. Judith J. Gische

J.S.C.

FILED
MAR 01 2006
NEW YORK
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Pltf/CC Def't motion [mechanics lien] w/FHS affirm in support, affirm in support (HS), exhs	1
Def/CC Pltf Dolner affid in support (AJF, Sr.) w/exhs	2
Pltf/CC Def reply affirm in further support (FHS) w/HS affirm in further support, exhs	3

Upon the foregoing papers, the decision and order of the court is as follows:

The underlying action is for, among other relief, damages arising from an alleged breach of contract, and the vacature of an amended mechanic's lien filed by defendant RC Dolner LLC against plaintiff. Before the court is plaintiff's motion for an order immediately vacating the lien in question.

Background

Plaintiff 150 Nassau Associates LLC was the owner of the premises located at 150 Nassau Street in downtown Manhattan ["premises"] at the time defendant RC Dolner LLC ["Dolner"] did exterior and interior renovations to the premises. Ownership has since been transferred to 2 Spruce LLC, pursuant to a deed recorded February 26, 2003. 2 Spruce LLC is a named 3rd party defendant. Hereinafter, these two entities are collectively referred to as the "owners" of the premises.

As per the document entitled "Release and Partial Waiver of Liens from RC Dolner LLC to Owner [150 Nassau Associates LLC] Conditional Upon Payment," dated April 27, 2004, the owner and Dolner agreed owner would pay the sum of \$31,295,715.66 for work, services, materials and/or equipment furnished in connection with the renovation of the premises, through April 23, 2004 ["release"]. This money was paid by the owner and accepted by Dolner. Thereafter, on June 9, 2004, Dolner filed a mechanic's lien in the amount of \$2,239,547.80. The owners served a demand for a verified itemized statement dated June 17, 2004 and thereafter brought a Petition for an order pursuant to Lien Law § 38, requiring Dolner to respond to that demand (I/M/O 150 Nassau Associates LLC v. RC Dolner LLC, Supreme Court, New York Co., Index No. 110523/04). The presiding judge, Hon. Karen S. Smith ordered Dolner to respond, as per her order dated December 7, 2004, thereby granting the petition.

Dolner complied with the order by serving an amended Verified Statement of Lien dated December 23, 2004, showing that the amount due was in the reduced amount of \$1,052,164.95. Dolner then brought a Petition to amend the June 9th Notice of Mechanic's Lien (I/M/O RC Dolner LLC v. 2 Spruce Street LLC, Supreme Court, New

York Co., Index No. 101392/05) and harmonize it with the December 23rd amended statement. The petition was granted by Hon. Kibbie F. Payne by decision and judgment filed May 23, 2005. The amendment was *nunc pro tunc*.

The owners presently argue that lien should be immediately vacated in its entirety because it asserts a monetary claim for the same time period covered by the release. They argue further that the lien is for a far greater sum than they could conceivably owe, even assuming they owe Dolner any unpaid monies, and finally, they argue that Dolner is required to indemnify them against all liens asserted against them by sub-contractors. Dolner opposes the motion in all respects, first because it is premature (no discovery yet),¹ and on the merits (the owners owe them the money). Thus, Dolner argues that the lien is entirely proper and should not be vacated until there is a trial or other ultimate resolution of this case.

Discussion

It is significant that the court does not have before it a motion for summary judgment. Thus, semantics aside, plaintiff seeks to obtain immediate relief that is not discernibly different than its 6th cause of action (and others), without a trial.

Although a court can void a lien on the ground of willful exaggeration [Pratt General Contractors v. Trappey, 177 AD2d 566 (2nd Dept 1991)], this is commonly after a dispositive motion [See: Strongback Corp. v N.E.D. Cambridge Avenue Dev. Corp., ___AD3d___, 2006 WL 59750 (1st dept. 2006) (motion for summary judgment)] or trial

¹There is, in fact, a pending motion for discovery not yet submitted to the court (e.g. sequence number 002).

[See: Goodman d/b/a Keystone v. Del-Sa-Foods, Inc., 15 NY2d 191 (1965)]. This is because the allegedly aggrieved party asserting a Lien Law § 39 claim bears the burden of showing the exaggeration is intentional and deliberate [Pratt General Contractors, supra; Goodman v. Del-Sa-Foods Inc., supra], tantamount to a fabricated claim, not just an honest difference of opinion, or mere inaccuracy. E-J Elec Installation Co. v. Miller v. Raved, Inc., 51 AD2d 264 (1st dept. 1976) *app dism* 39 NY2d 898 (1976).

All of the owners' claims are disputed by Dolner. Even accepting that the owners have bona fide indemnification claims, these claims remain to be tried (or for other final resolution), along with the all the other claims, counterclaims, and cross claims asserted by and between the parties in this action. The motion by 150 Nassau Associates LLC is therefore denied in all respects without prejudice to renewal upon adjudication of the parties underlying disputes.

Conclusion

The motion by 150 Nassau Associates LLC is hereby denied, in all respects, for the reasons provided.

Any relief not expressly addressed herein has nonetheless considered by the court and is denied.

This shall constitute the Decision and Order of the Court.

Dated: New York, New York
February 17, 2006

SO ORDERED

HON. JUDITH J. GISCHE, J.S.C.

FILED
MAR 01 2006
NEW YORK
COUNTY CLERK'S OFFICE