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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN PART 21
Justice

B & B CONSTRUCTION, INC.,

Petitioner,

-v-

PRESTIGE PLUMBING AND HEATING, INC.,

Respondent.

INDEX NO. 100410/12

MOTION DATE 2/2/12

MOTION SEQ. NO. 001

The following papers, numbered 1 to 9 were read on this petition to discharge mechanic's lien and to compel a further itemized statement

Order to Show Cause— Affidavit — Verified Petition—Exhibits A-F; Affirmation	No(s).	1-3; 4
Verified Answer; Affirmation In Opposition; Affidavit in Opposition— Exhibit 1	No(s).	5; 6; 7
Reply Affirmation	No(s).	8
Supplemental Affirmation— Exhibit 2	No(s).	9

Upon the foregoing papers, it is ADJUDGED that this petition to vacate a mechanic's lien filed by respondent and to compel a further itemized statement of lien is denied, and the proceeding is dismissed.

Petitioner is a general contractor allegedly hired by Devonshire Associates, LLC (Devonshire) to perform work on certain units in a condominium apartment building located at 28 East 10th Street, New York, New York. Petitioner claims that it hired respondent, a plumbing subcontractor, to perform plumbing work on certain units at the building.

On or about December 21, 2011, respondent filed a notice of mechanic's lien in the amount of $1,362,390.50 against condominium units purportedly owned by Devonshire, named in the notice as units "11G, 12A, 12C, 12G, 3A, 5G, 7C, 8K, PH12H, PHA, PHC, PHG, PHH" with corresponding block and lot numbers. (Verified Petition, Ex A.) On or about December 30, 2011, respondent furnished petitioner with an itemized statement of lien dated December 28, 2011, which four exhibits attached. (Verified Petition, Ex F.) Respondent thereafter executed a Partial Release of Mechanic's Lien dated January 10,

(Continued . . .)

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

2012, with respect to Units 3A, 5G, and 11G, which was apparently filed with the Clerk of New York County on January 10, 2012. (Verified Petition, Ex C.)

Petitioner seeks to discharge respondent's lien on the ground that respondent never performed any work or furnished any materials to the units named in the notice of mechanic's lien, except for Unit PH12H. To support its contention, petitioner relies upon respondent's itemized statement, which petitioner claims does not contain a single purchase order, change order, or other document pertaining to work allegedly performed all the units named in the lien except for Unit PH12H. As to that unit, petitioner asserts that only $4,290 is owed to respondent for work on Unit PH12H. Therefore, petitioner seeks a money judgment and reasonable attorneys' fees against respondent on the ground that respondent willfully exaggerated its lien.

If discharge of the entire lien were not granted, petitioner seeks, in the alternative, a discharge of the lien as against all units except for Unit PH12H, and a reduction of the amount of the lien to $4290. Lastly, petitioner wants the Court to compel respondent to provide petitioner with an "adequate" itemized statement.

The branch of the petition to discharge the lien pursuant to Lien Law § 19 is denied.

> "Lien Law § 19(6) provides, with respect to a mechanic's lien for a private improvement, that a court may summarily discharge 'of record the alleged lien' when 'it appears from the face of the notice of lien that the claimant has no valid lien by reason of the character of the labor or materials furnished and for which a lien is claimed, or where for any other reason the notice of lien is invalid by reason of failure to comply with the provisions of section nine of this article, or where it appears from the public records that such notice has not been filed in accordance with the provisions of section ten of this article."

(*Construction for Commerce, Inc. v 1325 48th St., LLC*, 90 AD3d 975, 975-976 [2d Dept 2011].)

"It is well settled that a court has no inherent power to vacate or

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discharge a notice of lien except as authorized by Lien Law § 19 (6)." (*Matter of Lowe*, 4 AD3d 476, 476 [2d Dept 2004].) "[I]n the absence of a defect upon the face of the notice of the lien, 'any dispute regarding the validity of the lien must await trial thereof by foreclosure.'" (*Bryan's Quality Plus, LLC v Dorime*, 80 AD3d 639, 641 [2d Dept 2011] [citation omitted]; *Pontos Renovation v Kitano Arms Corp.*, 204 AD2d 87 [1st Dept 1994]; *Matter of Schiavone Constr. Co. (Fischer & Porter Co.)*, 181 AD2d 580, 581 [1st Dept 1992].)

Petitioner essentially argues that the itemized statement, which is extrinsic to the notice of mechanic's lien, establishes that respondent did not perform work or furnish materials to the units named in the lien (except for Unit PH12H). Petitioner also argues that the lien is defective on its face because Units 11G, 3A, and 5G "were not owned by Petitioner B&B [*sic*][1] at the time the Mechanic's Lien was filed." (Lasser Reply Affirm. ¶ 8.) However, such factual disputes must await trial of the foreclosure action. (*See Slazer Enter. Owner, LLC v Gotham Greenwich Const. Co., LLC*, 50 AD3d 341 [1st Dept 2008] [disputes concerning whether the insurance allegedly procured by respondent is a lienable item, and whether other items constituting the lien have been paid, must await trial of the foreclosure action].) The fact that respondent filed a Partial Release of Mechanic's Lien at to Units 11G, 3A, and 5G, after petitioner informed respondent that Devonshire did not own Units 11G, 3A, and 5G, does not render the notice defective on its face.

In this application to discharge the lien, petitioner is not entitled to either a reduction in the amount of the lien nor money damages and attorneys' fees due to respondent's alleged willful exaggeration of the lien. "Although Lien Law § 39 provides that a willfully exaggerated lien is void, the issue of willful or fraudulent exaggeration is one that also ordinarily must be determined at the trial of the foreclosure action." (*Aaron v Great Bay Contr.*, 290 AD2d 326 [1st Dept 2002]; *see Mel-Stu Constr. Corp. v Melwood Constr. Corp.*, 101 AD2d 809, 810 [2d Dept 1984] [claim of willful exaggeration based upon sections 39 and 39-a of the Lien Law and may only be interposed in an action or proceeding to foreclose a mechanic's lien].)

In sum, petitioner has not demonstrated a valid ground to discharge

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[1]Petitioner most likely meant to refer Devonshire.

summarily respondent's lien pursuant to Lien Law § 19 (6), even if petitioner were ultimately to prevail either in any action to foreclose on the lien or on any counterclaim for willful exaggeration of the lien in that foreclosure action. Lien Law § 19 "contains no provision which authorizes the court to vacate or discharge a mechanic's lien based upon the interest of justice." (*Coppola Gen. Contr. Corp. v Noble House Constr. of N.Y.*, 224 AD2d 856, 857 [3d Dept 1996].)

The branch of the petition seeking to compel respondent to provide an "adequate" itemized statement is denied. Respondent claims that the itemized statement delivered to petitioner sets forth the items of labor and/or material and the value thereof which make up the amount for which respondent claims a lien. As petitioner points out, the processed and unprocessed change orders refer to work that does not, on its face, appear to be done the units named in the lien. For example, change order # 186 is to "Supply Labor and Material To: Install Hot and Cold Riser Valves Off Each Riser for Apartment 9AB." (Verified Petition, Ex F [Itemized Statement, Ex C].) Apartment 9AB is not one of the units named in the lien.

Respondent apparently takes the position that work ostensibly performed on some units is lienable against other units owned Devonshire. (See Cermele Suppl. Affirm. ¶ 10; Pietracatella Aff. ¶ 9 ["all units are directly improved by Prestige's numerous installations of shut-off valves and check valves."].) Petitioner counters that such a position runs contrary to Real Property Law § 339-*l* (2), to the extent that unit owners did not consent to the labor performed or materials furnished. These issues must await trial of the foreclosure action. (*Slazer Enter. Owner, LLC*, 50 AD3d 341; *Care Sys. v Laramee*, 155 AD2d 770, 771 [3d Dept 1989] [critical issue of whether defendant requested or consented to the performance of the extras as alleged by plaintiff must be determined at trial].)

Petitioner contends that the itemized statement contains an inconsistency. According to petitioner, change orders # 212, 242, 252, 255, and 259 were listed as not completed on a continuation sheet in Exhibit A to the itemized statement, but these change orders were also submitted as Exhibit C, which respondents was for additional and extra work performed at the request of petitioner, for which petitioner refused for failed to fully process change orders.

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Because petitioner's objections to the itemized statement are not in the nature of the sufficiency of the description of the items of labor and/or material furnished, or their value, the Court does not find that respondent delivered an insufficient itemized statement to petitioner. The issue of whether or not respondent performed the work in the change orders for which respondent claimed payment is not an issue which goes to the sufficiency of the detail of the itemized statement. Therefore, the branch of the petition seeking to compel respondent to provide an "adequate" itemized statement is denied.

Dated: 7/25/12
New York, New York

_____, J.S.C.

1. Check one: ..... ■ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. Check if appropriate:..... PETITION IS ☐ GRANTED ■ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

HON. MICHAEL D. STALLMAN