

**B & G Elec. Contrs. of N.Y. Inc. v New York City
Economic Dev. Corp.**

2012 NY Slip Op 33469(U)

June 22, 2012

Sup Ct, Bronx County

Docket Number: 381565/10

Judge: Howard H. Sherman

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PART 04

Case Disposed
 Settle Order
 Schedule Appearance

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF BRONX:

-----X
 B & G ELECTRICAL

Index No. 0381565/2010

-against-

Hon. HOWARD H. SHERMAN

NYC ECONOMIC DEVELOPMENT

Justice.

-----X

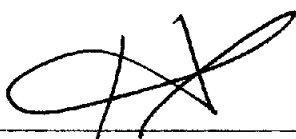
The following papers numbered 1 to 3A Read on this motion, DISMISSAL
 Noticed on May 11 2011 and duly submitted as No. _____ on the Motion Calendar of _____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed ^{A-EE}	1	
Answering Affidavit and Exhibits	2	
Replying Affidavit and Exhibits	3	
----- Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law	1A, 2A	3A

Upon the foregoing papers this motion by defendants for an order dismissing counterclaims and cross claim of Instate and the counterclaim and cross-claim of King Freeze is decided in accordance with the accompanying decision to be filed herewith

Motion is Respectfully Referred to:
 Justice: _____
 Dated: _____

Dated: 6/22/13

Hon. 
HOWARD H. SHERMAN, J.S.C.

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

-----x
B & G Electrical Contractors of N.Y. Inc. and
Crana Electrical Inc.,

Plaintiff,

-against-

New York City Economic Development Corporation
BTM Development Partners, LLC,
U.S. Specialty Insurance Company,
Tr-Line Contracting Corp., P & P Mechanical, Inc.,
Tristate Plumbing Services Corp., King Freeze Mechanical
Corp., John Grando, Inc., Fresh Meadow Communication
& Electrical Contracting Corp., Flooring Solutions , Inc.,
Ace Wire & Cable Co. Inc., Door Automation Corp.,
Diam-N-Blue Mechanical Corp., and John Doe # 1 through
John Doe #25 *inclusive, the last names being fictitious and
unknown to plaintiff such persons intended to be tenants,
occupants, persons , corporations , or other entities, if any,
having or claiming an interest in or lien upon the premises
described in the complaint*

Defendants

-----x
In the Matter of the Application of:

King Freeze Mechanical Corporation

Lienor ,

*For an Order Pursuant to Lien Law Section 12-a(2) of the
Lien Law directing the Clerk of the County of the Bronx to
correctly docket Certain Notices Under Mechanic's Lien Law
Against Premises known as 700 Gateway Center, Bronx,
New York*

DECISION/ORDER

Howard H. Sherman

Index No. 381565/10

Index No. 260398/11

-----x

-----x

In the Matter of the Application of:

Index No. 260399/11

Tristate Plumbing Services Corp.

Lienor ,

For an Order Pursuant to Lien Law Section 12-a(2) of the Lien Law directing the Clerk of the County of the Bronx to correctly docket Certain Notices Under Mechanic's Lien Law Against Premises known as 700 Gateway Center, Bronx, New York , Block 2357, Lots 1, 45 .

-----x

The motion of defendants EDC, BTM and U.S. Specialty Insurance Company in the first entitled action and the proceedings for orders pursuant to Section 12-a(2) of the Lien Law are consolidated for purposes of disposition.

Underlying Facts

In the first entitled action plaintiff subcontractors seek *inter alia* to foreclose on certain mechanic's liens filed against real property once known as The Bronx Terminal Market and now known as Gateway Plaza.

The City of New York ("City") is the owner in fee of the real property, and effective September 14, 2006, City leased to New York City Economic Development Center ("EDC")¹ as tenant, for a period of 49 years, the property identified as Block 2356, Lot 20; Block 2357, Lots 1 and 86, and Block 2539, Lots 32 and p/o 60. By Assignment and Assumption of Lease of the same date, EDC assigned to the commercial developer, BTM

¹EDC is a local development corporation organized pursuant to Section 1411 of the New York State Not-For-Profit Corporation Law

Development Partners ("BTM"), its right, title, and interest in and to the lease.

Also, on the same day, by Memorandum of Lease Agreement, BTM entered into a sublease with New York City Industrial Development Agency (" Agency ").² BTM and the agency then entered into an Installment Sale Agreement and Assignment of Lease for the sale and assignment of the leasehold in the property to BTM.

By agreement dated August 5, 2009, by and between BTM and Tri-line Contracting Corp. ("Tri-Line"), the latter agreed to furnish the labor , materials, and services in connection with the construction of "Michaels "and "Youngworld", retail stores to be located at the center's 700 Exterior Street address. Nearly two months later, BTM and Tri-Line entered into another agreement for construction of a "Conways" store at that location

By notice dated June 18, 2010, BTM invoked its right to terminate for default its contract with Tri-Line . The contractor was directed to remove its tools and equipment from the project site within three days of receipt of the letter.

By letter dated June 24, 2010, Tri-Line advised their clients, including BTM, that Chase Bank had frozen their accounts receivable and deleted their operating checking account, and as a result of which, the contractor had no funds with which " to operate in a normal fashion." The letter also advised that BTM's subcontractors with open balances

²By the terms thereof, the agency had no option to extend the term of the Lease Agreement or to purchase the facilities.

were exercising liens on projects. ³

Procedural History

1) B&G and Crana Action

Tri-Line's subcontractors B&G Electrical Contractors of N.Y. Inc. (B&G) and Crana Electric Inc. ("Crana") commenced an action in August 2010, seeking *inter alia*, to foreclose on the mechanic's liens they have filed against Block 2357, Lot 1, as well as Lots 35 and 45. ⁴ In addition to EDC, BTM, and Tri-Line, the named defendants include other Tri-Line's subcontractors that had filed mechanic's liens against the property: Diam-N-Blue Mechanical Corp. ("Dian-N-Blue"), Tristate Plumbing Services Corp. ("Tristate"), King Freeze Mechanical Corporation ("King Freeze"), P & P Mechanical Inc., ("P & P"), Fresh Meadow Communications & Electrical Contracting Corp. ("Fresh Meadows"), Flooring Solutions, Inc. ("Flooring Solutions"), Ace Wire & Cable Co. Inc. ("Ace Wire"), and Door Automation Corp. ("Door Automation").

B&G and Crana each claim that it had a series of agreements with Tri-Line pursuant to which it provided labor and materials for improvement of the property, payment for which remains due and owing. The mechanic's liens and the corresponding causes of action are set forth below.

³ The subcontractors filed approximately forty-six (46) mechanic's liens against the subject property claiming an aggregate amount in excess of two million dollars.

⁴ The last two lots do not as yet exist, but according to a Land Title Survey, are to be carved out of Block 2357, Lots 1 and 86.

B & G Liens

1. Notice dated June 29, 2010 for supplied and installed heaters and miscellaneous electrical materials in amount of \$5,250.00 as against Block 2357, Lot 1, 45 [First Cause of Action].
2. Notice dated June 29, 2010 for supplied and installed fire alarm equipment, interior lighting switch gear panels and electrical materials in amount of \$14,500.00 as against Block 2357, Lot 1, 45 [Seventh Cause of Action].
3. Notice dated June 29, 2010 for supplied and installed floor boxes , switch gear panels and electrical materials in amount of \$196,777.43 as against Block 2357, Lot 1, 45 [Thirteenth Cause of Action].
4. Notice dated June 29, 2010 for supplied and installed fire alarm equipment, interior lighting, and switch gear panels, in the amount of \$ 245,700.00 as against Block 2357, Lot 1, 45 [Nineteenth Cause of Action].

Crana Liens

1. Notice dated June 24, 2010 for supplied and installed electrical materials in the amount of \$ 76,389.26 as against Block 2357, Lot 1 [Twenty-Fifth Cause of Action].
2. Notice dated June 24, 2010 for supplied and installed electrical materials in the amount of \$ 92, 865.00 as against Block 2357, Lot 1 [Thirty-First Cause of Action].

As pertinent here, the owner of the real property designated in each of the above notices is New York City Economic Development Corp., and the interest of the designated owner is listed as "fee simple."

In addition to foreclosure of the respective liens, both plaintiffs assert claims against

Tri-Line for breach of contract and for accounts stated .

B & G also asserts claims against Tri-Line , EDC and BTM for unjust enrichment and quantum meruit, and , as against Tri-Line and BTM , a claim for violation of the trust provisions of Article 3-A of the Lien Law.

Crana interposes claims against EDC and BTM for unjust enrichment and quantum meruit, and as against Tri-Line and BTM , one for violation of the trust provisions .

In March 2011, defendant **Tristate** served an amended answer asserting a cross-claim against Tri-Line for breach of contract, and a second cross-claim as against Tri-Line and BTM for violation of Article 3-A Lien Law trust fund obligations . Tristate also interposed counterclaims against all parties seeking to foreclose on its four mechanic's liens alleged to have priority against any lien filed by plaintiffs.

Also, in March , defendant **Freeze King** served an answer with cross-claims and counterclaims, seeking respectively to enforce the Article 3-A trust against Tri-Line and BTM , and to be adjudged to have a valid lien against the premises for \$248, 000.00 having priority against all other mechanic's liens filed against the premises .

Related Actions

1) In May 2011, **King Freeze** commenced a proceeding [Index No. 260398/11] seeking an order pursuant to Lien Law § 12-a(2):1 deeming the lien property served ; 2) allowing King Freeze to serve a Notice under Mechanic's Lien upon the City of New York and BTM,

and 3) directing the Clerk of the County to accept and docket the affidavits of service of same. The motion is supported by copies of four Notices of liens for materials and services performed by *Tristate* [Exhibit A].

2) Also in May 2011, *Tristate* commenced a proceeding [Index No. 260399/11] seeking the same relief with respect to its liens. The four lien notices upon which relief is sought are tendered as Exhibit A, and are set forth below.

Tristate Liens

1. Notice dated June 30, 2010, for supplied and installed pipe , fittings, hot water heater, and plumbing fixtures in the amount of \$18,950.00 as against Block 2356, Lot 20 .
2. Notice dated June 30, 2010, for supplied and plumbing fixtures , hot water heater in the amount of \$ 9,200.00 as against Block 2357, Lots 1, 45.
3. Notice dated June 30, 2010 for supplied and installed pipe , hot water heater, and plumbing fixtures in the amount of \$11,000.00 as against Block 2357, Lots 1, 45 .
4. Notice dated July 9, 2010 for supplied and installed pipe , plumbing fixtures, hot water heater, etc. in the amount of \$11,439.00 as against Block 2357, Lot 1.

All of the above Notices designate New York City Economic Development Corp. as the fee simple owner of the real property .

Answer

BTM served answers in both proceedings and interposed two counterclaims alleging respectively, that King Freeze and Tristate's mechanic's liens were jurisdictionally defective and could not be cured by amendment as they misidentified EDC, and not the City of New York, as the fee owner of the property, and City owned property is inalienable under City Charter §383. BTM also argues that the petitioners failed to give notice of their applications to all parties required to be given such notice by the statute, and failed to personally serve BTM.

Motion in B & G /Crana action

As stipulated,⁵ defendants EDC, BTM and U.S. Specialty Insurance Company now move pursuant to CPLR 3211 (a) (1) and (7) for an order dismissing :

1) the first through fifth counterclaims asserted by **Tristate**, and the counterclaim of **King Freeze** that seek foreclosure of their respective mechanic's liens on the grounds that: the liens misidentify EDC as the fee owner of the property ; proofs of service of the notices upon the true owner were not filed with the county clerk , and a private mechanic's lien cannot be filed against publically owned property;

⁵ By stipulation dated May 20, 2011, all causes of action and counterclaims as among plaintiffs and defendants EDC, U.S. Specialty Insurance Company, and BTM were discontinued with prejudice. By stipulation dated November 30, 2011, the action was discontinued against Diam-N-Blu and Flooring Solutions, as were the claims, counterclaims and cross-claims asserted by these defendants.

2) the second cross-claims asserted by **Tristate** and **King Freeze** as against BTM alleging violation of the trust provisions of Article 3-A of the Lien Law on the grounds that neither subcontractor is a beneficiary of any trust

Discussion and Conclusions

Upon review of defendants' motion to dismiss, the court is required to determine whether the subcontractors' claims state causes of action. It is settled that such a motion must be denied if from the four corners of the counterclaims/ cross-claim "factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Polonetsky v Better Homes Depot*, 97 NY2d 46, 54, 760 N.E.2d 1274, 735 N.Y.S.2d 479 [2001], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 372 N.E.2d 17, 401 N.Y.S.2d 182 [1977])." 511 W. 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144,151-152 [2002] The Court also noted the following criteria to be observed

In furtherance of this task, we liberally construe the complaint (see e.g. *Leon v Martinez*, 84 NY2d 83, 87, 638 N.E.2d 511, 614 N.Y.S.2d 972 [1994]; CPLR 3026), and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion (see *Sokoloff v Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 414, 729 N.Y.S.2d 425, 754 N.E.2d 184 [2001] [collecting cases]; *Wieder v Skala*, 80 NY2d 628, 631, 609 N.E.2d 105, 593 N.Y.S.2d 752 [1992]). We also accord plaintiffs the benefit of every possible favorable inference (see *Sokoloff*, 96 N.Y.2d at 414, 729 N.Y.S.2d 425, 754 N.E.2d 184). Dismissal under CPLR 3211 (a) (1) is warranted "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon*, 84 N.Y.2d at 87-88; see generally *Siegel*, NY Prac § 269, at 428 [3d ed]).

Id. at 152

Pursuant to Lien Law § 9(2), a notice of a mechanic's lien must set forth the name of the owner of the real property against whose interest therein a lien was claimed. In pertinent part, Subsection (7) provides the following with respect to this requirement.

A failure to state the name of the true owner or contractor, or a misdescription of the true owner, shall not affect the validity of the lien. The notice must be verified by the lienor or his agent, to the effect that the statements therein contained are true to his knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

In addition, Lien Law § 23 requires that the provisions of the article pertaining to mechanic's liens be " construed liberally to secure the beneficial interests and purposes thereof[]", with " substantial compliance with its several provisions [to be] sufficient for the validity of a lien and to give jurisdiction to the courts to enforce the same." However, it is also settled that in those cases in which the notice of the lien " 'totally misidentifies the true owner' of the real property as of the date it was filed, the defect is jurisdictional and the notice is void." (Long Industries Construction Corp. v. Appelaniz, 298 A.D.2d 309, 784 N.Y.S. 2d 496 [1st Dept. 2002], citing Matter of Kleet Lbr. Co., 197 A.D.2d 576,577 , 602 N.Y.S. 2d 663 [1st Dept. 1993]).

The distinction is thus drawn between those notices that identify, but inaccurately describe the actual owner, with these notices "presuppos[ing] the existence of a valid lien " (Northeast Restoration Corp. v. K & J Construction Co., L.P., 304 A.D.2d 306, 307, 757

N.Y.S.2d 542 [1st Dept. 2003] being subject to amendment nunc pro tunc see, Lien Law § 12-a; see also, PM Contracting Company, Inc. v. 32 AA Assocs. LLC., 4 A.D.3d 198, 772 N.Y.S.2d 269 [1st Dept. 2004]), and those jurisdictionally defective notices in which the true owner of the property as of the date of filing is completely misidentified.

It is the finding of this court that based on the documentary evidence here, the movants have demonstrated that the designation of EDC as the fee owner of the real property is a misidentification of the fee owner of the property, and not an amendable misdescription of the true owner, and as such the notices are jurisdictionally defective.

In addition, defendants also demonstrate that the subcontractors' private mechanic's liens would be invalid as against city-owned property as such properties are inalienable under New York City Charter § 383 (see, EMC Iron Works v. City of New York, 294 A.D.2d 173, 742 N.Y.S.2d 230 [1st Dept. 2002], citing authority of Kennedy & Co. v. New York World's Fair 1930, 260 App Div 386, 389, *affd* 288 NY 494).

Though Tristate and King Freeze assert their liens as against as the "fee owner" of the real property, it is to be noted as well, that a mechanic's lien may not attach to the *leasehold* [emphasis added] of the tenant of publically- owned land (see, Avon Electrical Supplies, Inc., v. Voltaic Electric Company, Inc., 203 A.D.2d 404, 610 N.Y.S.2d 852 [2d Dept. 1994], citing authority of Matter of Paerdegat Boat & Racquet Club, Inc. v. Zarrelli, 83 A.D.2d 444, 445 N.Y.S.2d , *revd* on other grounds 57 N.Y.2d 996, 443 N.E. 2d 277 [1982];

Plattsburgh Quarries v. Markoff, 164 A.D.2d 30, 563 N.Y.S.2d 139; Albany County Indus. Dev. Agency v. Gastinger Ries Walker Architects, 144 A.D.2d 891, 534 N.Y.S.2d 823 [3d Dept. 1988]).

As noted by the First Department in EMC Iron Works, op. cit., "an entity desiring to secure an interest [upon City-owned properties] must file a 'public improvement lien' not a 'mechanic's lien,'" (Id. At 174). The public improvement lien does not attach to municipal property, but is secured by the moneys of the public corporation applicable to the construction of the improvement (Lien Law § 5).

To the extent that an Article 3-A trust claim is dependent upon a valid mechanic's lien or contractual privity, defendants have also demonstrated entitlement to dismissal of the subcontractors' cross-claims as against the developer. As the court observed in Quantum Corporate Funding Ltd. V. L.P.G. Assocs., Inc., 246 A.D.2d 320, 322 667 N.Y.S.2d 702 [1st Dept. 1998], "while a subcontractor that has not received payment for work performed or materials supplied to a contractor 'is clearly a beneficiary of the trust assets received by the contractor' (*Onodaga Commercial Dry Wall Corp. V. Sylan Glen Co.*, 26 AD2d 130, 133, *affd* 21 NY2d for reasons stated below), the statute does not make the owner a 'guarantor of payment to the creditors of the contractor' (*supra*, at 133)."

As defendants have demonstrated that the subcontractors' mechanic's liens sought to be foreclosed are jurisdictionally defective and are not subject to amendment, and that

there are no viable trust claims against BTM pursuant to Article 3-A of the Lien Law, the motion of the moving defendants in the first entitled action to dismiss the 1) the first through fifth counterclaims asserted by Tristate, and the counterclaim of King Freeze that seek foreclosure of their respective mechanic's liens and 2) the second cross-claims asserted by Tristate and King Freeze as against BTM are dismissed pursuant to CPLR 3211(a)(1) and (7).

In addition, for the reasons above stated, as well as the failure of both petitioners to serve all existing lienors pursuant to Lien Law § 12-a(2), the petitions of King Freeze and Tristate are dismissed.

This constitutes the decision and order of this court.

Dated: June ~~20~~²², 2012



Howard H. Sherman