

141 Chrystie St. Corp. v Fine Line Mic Corp.
2016 NY Slip Op 32363(U)
December 1, 2016
Supreme Court, New York County
Docket Number: 157533/2016
Judge: Carol R. Edmead
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD J.S.C. Justice

PART 35

Index Number : 157533/2016
141 CHRYSTIE STREET CORP.
vs.
FINE LINE MIC CORP.
SEQUENCE NUMBER : 001
VACATE NOTICE OF LIEN

INDEX NO.
MOTION DATE 10/28/16
MOTION SEQ. NO.

The following papers, numbered 1 to , were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).
Answering Affidavits — Exhibits No(s).
Replying Affidavits No(s).

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

Motion sequence 001 and 002 are consolidated for joint disposition as follows:

In this action, petitioner, 141 Chrystie Street Corp. ("petitioner"), as owner and landlord of the premises located at 141 Chrystie Street, New York, New York (the "Premises"), seeks to vacate and cancel of record the Notice of Lien (the "Lien") filed on March 1, 2106 by Fine Line Mic Corp. ("Fine Line" or "respondent") (motion sequence 001). Petitioner contends that in response to the Lien, on July 12, 2016, it served upon Fine Line a Notice to Commence Action or Show Cause ("Notice to Commence") pursuant to Lien Law §59. Petitioner served Fine Line by affixing same to the door of "133 Chrystie Street, #2 Brooklyn, N.Y. 11212," followed by certified mail the following day to said address, with an additional mailing to Michael W. Goldstein, Esq. at 299 Broadway, New York, New York. Although Fine Line's counsel advised petitioner of his representation of Fine Line, Fine Line failed to commence an action to enforce the Lien by the August 22, 2016 deadline as stated in the Notice to Commence. Petitioner also contends that it did not contract for, or consent to, any of the work performed by Fine Line as alleged in the Lien. The party that allegedly contracted with Fine Line to perform the subject construction work, was petitioner's former commercial tenant, who was evicted in 2015 for, inter alia, causing unlawful construction to be performed at the Premises without petitioner's knowledge and consent. The Lien remains a lien of record against the Premises, and should be vacated and canceled pursuant to Lien Law §59.

Fine Line opposes the petition and moves to dismiss the petition on the ground that it was improperly served by nail and mail in violation of Lien Law §59, CPLR §311, and Business

Dated: , J.S.C.

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

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

Corporations Law §306 (motion sequence 002). Further, Lien Law §59 is a discretionary statute and does not require dismissal for failure to commence foreclosure within the timeframe provided in a notice. In light of petitioner's improper service of the Notice to Commence, the time to foreclose on the Lien has not begun to run. In any event, Fine Line commenced an action to foreclose on the Lien. Fine Line has complied with Lien Law §59, there is no prejudice to petitioner for failing to foreclose within the time specified in the Notice to Commence, and the parties should be permitted litigate the foreclosure action.

In response, petitioner argues that respondent never served its Lien upon petitioner in accordance with Lien Law 11. And, petitioner properly served the Notice to Commence at the address listed in the Lien. Lien Law §59 does not state the manner of service where the lienor or personal of suitable age is not present or able to be located. The process server attempted to personally serve respondent and there was no answer and the business sign was removed. Thus, the process server was compelled to affix the Notice to Commence to respondent's door. And, CPLR 311 does not apply to Lien Law §59. Since respondent did not commence foreclosure proceedings within the 30-day period thereafter, the Lien should be discharged. Petitioner also served the instant petition pursuant to BCL 306 on September 22, 2016 and by personal service on September 23, 2016 upon respondent's President, in addition to certified mail. And, respondent's counsel agreed to accept service of the petition. Furthermore, respondent's belated foreclosure complaint, dated more than 30 days after the deadline in the Notice to Commence, was never served upon petitioner.

Respondent subsequently adds that the Lien was mailed to petitioner by certified mail with return receipt requested, and on April 8, 2015, petitioner's President signed the return receipt. Petitioner did not serve respondent with any Notice to Commence action or leave any copy of it at his place of residence with any person of suitable age. The CPLR governs the procedure herein, and consistent with Lien Law §59, CPLR 311 does not permit "nail and mail" service upon corporations.

Discussion

Lien Law §59 provides that before an order vacating or cancelling a mechanic's lien may issue, "a notice shall be served upon the lienor, either personally or by leaving it [at] his last known place of residence, with a person of suitable age, with directions to deliver it to the lienor."¹ The provision regarding service of the notice must be strictly followed (*In re Eastchester Church, Inc.*, 44 Misc. 3d 653, 989 N.Y.S.2d 287 [Supreme Court, Bronx County 2014] (finding that service of notice to commence and foreclose lien could not be done by certified mail and first class mail"); *see also, Application of Euclid Concrete Corp.*, 279 A.D. 594, 107 N.Y.S.2d 237 [2d Dept 1951]; *Drake Const. Corp. v. Kenn Equipment Co.*, 274 A.D. 809, 79 N.Y.S.2d 747 [2d Dept 1948] (denying application to cancel a mechanic's lien based on lienor's alleged failure to commence an action to enforce the lien where the notice failed to comply substantially with Lien Law § 59); *cf., Apollo Const. & Development, Inc. v. Mazza*, 13

¹ Lien Law §59 continues: "Such notice shall require the lienor to commence an action to enforce the lien, within a time specified in the notice, not less than thirty days from the time of service, or show cause . . . why the notice of lien filed or the bond given should not be vacated and cancelled, or the deposit returned, as the case may be."

Misc.3d 1, 822 N.Y.S.2d 357 [Supreme Court, App. Term 2006] (finding notice to enforce the lien by a date certain was properly served where the notice was left with a person of suitable age and discretion *at the residence of the sole officer of the plaintiff corporation*, whose offices were located in the same premises, “as is required by the plain wording of Lien Law § 59” and stating that service “pursuant to CPLR 311,² which enumerates the requirements for service upon a corporation at the commencement of an action, is not required by the terms of Lien Law § 59”). Section 59 requires “personal service *or substituted service at the lienor's residence*” (*Application of Jericho Jewish Ctr.*, 28 Misc. 2d 458, 210 N.Y.S.2d 77 [Supreme Court, Nassau County 1960]).

Hence, service of the Notice to Commence can be made in one of two ways: (1) personally or (2) by leaving it at the lienor’s last known place of residence, with a person of suitable age. In *Apollo Const. & Development, Inc. v. Mazza (supra)*, service upon the corporation was deemed proper where the notice was left with a person of suitable age at the corporation’s officer’s residence and said residence was the same as the corporation’s office.

Here, the affidavit of service of the Notice to Commence indicates that it was served by affixing same to the door of Fine Line’s “residence,” which in this case, was identified in the Lien as “133 Chrystie Street, New York, NY 10002,” followed by regular mail to 133 Chrystie Street and certified mail to Michael W. Goldstein, Esq. However, such “nail and mail” method of service at 133 Chrystie Street is not authorized by Lien Law § 59, and petitioner did not seek leave of Court prior to employing this method of service. While it is undisputed that 133 Chrystie Street, New York, NY 10002 was the “residence” of Fine Line,³ the Notice to Commence was not left with anyone of suitable age and discretion. And, the mailing to Michael W. Goldstein, Esq. to 299 Broadway, New York, New York is of no moment.

It is also noted that Lien Law § 59 does not require the Court to vacate and cancel a lien upon a party’s failure to commence an action to foreclose on a lien, and the “decision to cancel a lien undertaking pursuant to Lien Law section 59 for failure timely to commence a lien foreclosure proceeding rests with the sound discretion of the court” (*S A F La Sala Corp. v. S & H 88th Street Associates*, 138 A.D.2d 241, 525 N.Y.S.2d 206 [1st Dept 1988]). Indeed, this section “affords [the] Supreme Court the discretion to consider the equities of the situation,” where the lienor furnishes “the court with evidence sufficient to warrant a denial of petitioner's application to vacate the liens” (*Kushaqua Estates Inc. v. Bonded Concrete Inc.*, 215 A.D.2d 993, 627 N.Y.S.2d 140 [3d Dept 1995]). Fine Line commenced an action on September 27, 2016 to foreclose on the Lien, and the parties, in the exercise of this Court’s discretion, may litigate the enforceability and validity of the Lien in such action.

In light of petitioner’s failure to comply with Lien Law § 59's service requirements of the Notice to Commence, upon which the petition is premised, the petition is denied. Correspondingly, the cross-motion by Fine Line to dismiss for failure to effect proper service of

² CPLR 311(a) provides that personal service upon a corporation “shall be made by delivering the summons as follows: 1. upon any domestic . . . corporation, to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service.

³ That Fine Line’s President, Steven Ng, was not personally served or that the Notice to Commence was not left at his personal residence is of no moment, as Mr. Ng is not identified as the Lienor on the subject Lien.

the Notice to Commence is warranted.

And, petitioner's additional contention that the Lien is subject to discharge and cancellation based on Fine Line's failure to serve petitioner pursuant to Lien Law §11 and failure to provide an affidavit of service, lacks merit.

Lien Law §11 provides that

Within five days before or thirty days after filing the notice of lien, the lienor shall serve a copy of such notice upon the owner, . . . ; if the owner be a corporation, said service shall be made (i) by delivering such copy to and leaving the same with the president, vice-president, secretary or clerk to the corporation, the cashier, treasurer or a director or managing agent thereof, personally, within the state, or (ii) if such officer cannot be found within the state by affixing a copy thereof conspicuously on such property between the hours of nine o'clock in the forenoon and four o'clock in the afternoon, or (iii) by registered or certified mail addressed to its last known place of business. Failure to file proof of such a service with the county clerk within thirty-five days after the notice of lien is filed shall terminate the notice as a lien.

The record demonstrates that Fine Line caused the Notice of Mechanic's Lien to be served by certified mail upon petitioner's address at 141 Chrystie Street, New York, New York on March 23, 2016, within 30 days after the March 1, 2016 filing of Lien, and petitioner does not dispute that such address is its last known place of business. The affidavit of service bears a filing stamp of the Clerk's Office indicating that the affidavit of service was filed on March 28, 2016, within 35 days after the Lien was filed on March 1, 2016.

Therefore, as petitioner fails to sufficiently establish a basis to vacate and cancel of record the Lien, the petition is dismissed.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the petition to vacate and cancel of record the Notice of Lien filed on March 1, 2106 by Fine Line Mic Corp. (motion sequence 001) is denied; and it is further

ORDERED that respondent's motion (sequence 002) to dismiss the petition is granted, and the petition is hereby dismissed; and it is further

ORDERED that the Clerk may enter judgment accordingly; and it is further

ORDERED that respondent shall serve a copy of this order with notice of entry upon petitioner within 20 days of entry.

This constitutes the decision and order of the Court.

DATED: 12/1/2016

HON. CAROL R. EDMEAD
J.S.C.

J.S.C.

1. CHECK ONE :

2. CHECK AS APPROPRIATE :

3. CHECK IF APPROPRIATE :

DO NOT POST

FIDUCIARY APPOINTMENT

REFERENCE

CASE DISPOSED
MOTION IS: GRANTED DENIED NON-FINAL DISPOSITION
 SETTLE ORDER GRANTED IN PART OTHER
 SUBMIT ORDER