

**TRM Architecture, Design and Planning, P.C. v
Destiny USA Holdings, LLC**

2018 NY Slip Op 33633(U)

December 13, 2018

Supreme Court, Onondaga County

Docket Number: 2015EF16

Judge: Donald A. Greenwood

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**At a Motion Term of the Supreme
Court of the State of New York,
held in and for the County of
Onondaga on October 23, 2018.**

**PRESENT: HON. DONALD A. GREENWOOD
Supreme Court Justice**

**STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA**

**TRM ARCHITECTURE, DESIGN
AND PLANNING, P.C.,**

Plaintiff,

**DECISION AND ORDER
ON MOTION**

v.

**Index No.: 2015EF16
RJI No.: 33-18-1120**

**DESTINY USA HOLDINGS, LLC,
CITY OF SYRACUSE INDUSTRIAL
DEVELOPMENT AGENCY,**

Defendants.

**APPEARANCES: MARK C. DAVIS, ESQ., OF LIPPES MATHIAS WEXLER FRIEDMAN, LLP
For Plaintiff**

**MICHAEL J. BALESTRA, ESQ., OF BARCLAY DAMON, LLP
For Defendants**

There are three motions before the Court. Defendants move for summary judgment dismissal of the complaint and alternatively for an order that plaintiff's damages, if any, be measured as the reasonable value of its work. Plaintiff has cross-moved to strike the defendants' ninth affirmative defense and counterclaim alleging a wilful exaggeration of the plaintiff's lien, and plaintiff then cross-moved to amend the subject lien *nunc pro tunc*.

The complaint contains causes of action against the two defendants for foreclosure of plaintiff's mechanic's lien, unjust enrichment and quantum meruit. Defendant Syracuse Industrial Development Agency (SIDA) is the record owner of the subject property and defendant

Destiny USA is the private developer of the property and owns the beneficial interest therein as defined in Lien Law section 2(7)¹. According to the complaint, AJA Destiny LLC (AJA) agreed to lease retail space from defendant Destiny USA in order to operate a restaurant. Thereafter, AJA entered into an agreement with plaintiff to perform architectural, structural, mechanical, electrical, plumbing and fire protection professional consulting services associated with the 7500 square foot premises for a fixed fee of \$250,000, plus disbursements. It is further alleged that plaintiff ceased work on the project for nonpayment and that a balance of \$252,736.54 is due and owing. Plaintiff subsequently filed a mechanic's lien in that amount against the subject property. It did not serve Destiny USA with the notice of lien, as demonstrated by its affidavit of service attached to the complaint. Destiny USA then filed a mechanic's lien discharge bond pursuant to Lien Law section 19(4). Defendants served a demand on plaintiff pursuant to Lien Law section 38 seeking an itemization of the labor and materials furnished, which comprised the amount claimed in the mechanic's lien and the terms of the contract pursuant to which labor and materials were furnished. Plaintiff's verified statement signed by its president and sole principal, Matthew Moscati, states that plaintiff entered into a contract for the work that forms the basis for its lien with AJA and the contract identifies Michael Hamilton, on behalf of AJA, as the client and is signed by him.

Defendants have established their entitlement to summary judgment dismissal. They rely, *inter alia*, on the Moscati deposition testimony where he stated that plaintiff was approached by

¹Both parties agree on the legal relationship between the two defendants. However, none of the motion papers filed by either party provided any documentation, including contracts, agreements or leases with respect to that relationship or how the subject property was transferred from defendant Destiny USA to SIDA.

Hamilton to provide architectural services in relation to the subject project. Moscatti further testified that plaintiff's verified statement was accurate to his knowledge. He also testified he negotiated the contract price with Hamilton and that Hamilton did not pay plaintiff for its work. He admitted that plaintiff did not enter into a contract with either defendant, that neither promised payment to the plaintiff and that plaintiff had not commenced litigation against Hamilton.

Defendants have demonstrated their entitlement to dismissal of the second and third causes of action of unjust enrichment and quantum meruit respectively. Recovery under the theories of unjust enrichment and quantum meruit are duplicative of a breach of contract claim and are barred by the existence of a valid and enforceable contract. *See Roth v. Trademark Dev. Co., Inc.*, 90 AD3d 1579 (4th Dept. 2011). By plaintiff's own admission, it executed an express contract for the performance of its work with a third party, AJA, covering the same subject matter and work. Moreover, plaintiff has offered no specific opposition in any of its submissions to the dismissal of these causes of action. As such, the second and third causes of action are dismissed.

The remaining portion of defendants' motion seeks dismissal of plaintiff's cause of action to foreclose its mechanic's lien. Defendants first have shown that the cause of action should be dismissed to the extent it is made against Destiny USA's interest in the property. There is no dispute that the notice of mechanic's lien does not name Destiny USA as an owner. Nor does it identify its beneficial interest in the property. The lien itself names only SIDA as fee owner and the affidavit of service demonstrates that only SIDA and AJA (which was not named in this lawsuit) were served. Defendants have shown that to the extent that the complaint could be read

to attempt to foreclose Destiny USA's ownership of the beneficial interest in the property, this cause of action should be dismissed, as a notice of mechanic's lien identifying only the ownership interest of one part owner is not enforceable against the unidentified interest of another part owner. *See, In re Country Village Heights Condo*, 79 Misc.2d 1088 (Rockland Co. 1975); *see also, JKT Construction, Inc. v. Rose Tree Management & Development Co.*, 2009 Slip. Op. 31019U, 6 to 7 (NY Co. 2009). In addition, they have demonstrated that the notice of mechanic's lien was not properly served here and the failure to do so pursuant to Lien Law section 11 is a fatal defect. *See, 146 West 45th Street Corp. v. McNally*, 591 NYS2d 402 (1st Dept. 1992). Defendants properly note that plaintiff could have filed and foreclosed on a lien against Destiny USA's beneficial interest in the property as the Legislature in 1992 amended Lien Law section 2(7) defining "Public Improvement." However, plaintiff failed to do so. The amendment recognizes the beneficial interest of a private developer in an IDA project and exempts those projects from the definition of public improvement, thereby making them the proper subject of a private improvement mechanic's lien. However, the Legislature expressly stated that the IDA is not held liable in any manner and the IDA's fee interest is not the proper subject of the lien, rather the beneficial interest of the private developer is the ownership interest in the property subject to a private improvement lien. *See, Lien Law § 2(7)*. The statute states " ... nothing contained in this section shall create or be deemed to create any liability upon any industrial development agency for the payment of the cost of any improvement, or otherwise ... 'beneficial interest' shall mean the beneficial incidents of ownership of the improvement to include, but not limited to, the right to possession, the right to claim tax benefits, if any, and the right to purchase or secure title to the improvement pursuant to an executory contract of sale,

option agreement or lease.” The statute is not unique in acknowledging that multiple interests may arise from the ownership or use of property. The definition of “owner” in Lien Law section 2(3) provides that the term “ ... includes the owner in fee of real property or of a less estate therein or lessee for a term of years, a vendee in possession under a contract for the purchase of such real property, and all persons having any right, title or interest in such real property, which may be sold under an execution in pursuance of the provisions of statutes relating to the enforcement of liens of judgment and all persons having any right or franchise granted by a public corporation to use the streets and public places thereof and any right, title or interest in and to such franchisee..” Therefore, defendants are correct that there are two owners under the Lien Law. SIDA is the fee owner, but as an industrial development agency has no real claim to the property or right to benefit economically. The IDA is a legal construct to facilitate economic development. By contrast Destiny USA’s beneficial ownership interest permits it to operate the shopping center and profit as a private developer. While plaintiff failed to properly name Destiny USA as the owner, it incorrectly named SIDA and defendants have likewise established that the cause of action to foreclose the mechanic’s lien should be dismissed to the extent it is made against SIDA’s interest in the property. The 1992 amendment to section 2(7) of the Lien Law excepted IDA projects from the definition of “public improvement” and reflects the unique beneficial interest of a private developer in an IDA project and prohibited the imposition of liability on any kind against an IDA. Thus, plaintiff’s lien as against SIDA, upon which plaintiff now seeks to foreclose against SIDA’s interest, is contrary to the clear language of the statute.

See, Lien Law § 2(7).

These defects cannot be cured by plaintiff's cross-motion to amend the subject lien *nunc pro tunc* pursuant to Lien Law section 12-a(2), which was brought over five years after the filing of the lien and in response to defendant's motion. Courts have dismissed private improvement liens against public owners because on the face of the lien it is invalid. *See, PMNC v. Brothers Insulation Co.*, 266 AD2d 293 (2d Dept. 1999). Plaintiff's lien is facially invalid here because it is not filed against an ownership interest that may be subject of a mechanics lien. In its cross-motion, plaintiff is not requesting that the Court amend the lien, but instead that it create a lien. While Lien Law section 12-a(2) can be used to correct a defect or mistake in a notice of mechanics lien, it presupposes the existence of a valid lien and may not be construed to revive an invalid notice of lien. *See, Northeast Restoration Corp. v. K&J Construction Co, LP*, 304 AD2d 306 (1st Dept. 2003). However, the statute authorizes the type of amendment under specific circumstances where the defect is "plainly a misdescription and not a misidentification." *Rigano v. Vibar Construction*, 24 NY3d 415 (2014). That is not the case here. The two defendants are wholly separate entities; SIDA is a public entity, while Destiny USA is a private corporation. Thus, plaintiff's failure to properly name Destiny USA constitutes a jurisdictional defect which is not curable by amendments. *See, Rigano, supra*.

Inasmuch as defendants' motion for summary judgment dismissal is granted in its entirety, plaintiff's cross-motions are denied.

NOW, therefore, for the foregoing reasons, it is

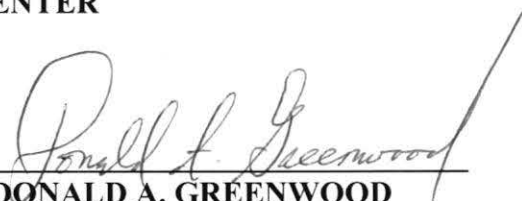
ORDERED, that defendants' motion for summary judgment dismissal of the complaint is granted, and it is further

ORDERED, that the plaintiff's cross-motion to amend its lien *nunc pro tunc* is denied, and it is further

ORDERED, that the plaintiff's cross-motion to strike defendants' ninth affirmative defense and counterclaim concerning willful exaggeration of the lien is denied.

ENTER

Dated: December 13, 2018
Syracuse, New York


DONALD A. GREENWOOD
Supreme Court Justice

Papers Considered:

1. Defendants' Notice of Motion for summary judgment, dated August 9, 2018.
2. Affirmation of Michael J. Balestra, Esq. in support of defendants' motion, dated August 9, 2018, and attached exhibits.
3. Defendants' Memorandum of Law in support of motion, dated August 9, 2018.
4. Plaintiff's Notice of Cross-Motion for summary judgment dismissal of ninth affirmative defense and counterclaim, dated October 1, 2018.
5. Affirmation of Mark C. Davis, Esq. in support of plaintiff's cross-motion, dated October 1, 2018, and attached exhibits.
6. Plaintiff's Memorandum of Law, dated October 1, 2018.
7. Plaintiff's Notice of Cross-Motion to amend lien *nunc pro tunc*, dated October 8, 2018.

8. Affirmation of Mark C. Davis, Esq. in support of motion, dated October 8, 2018, and attached exhibits.
9. Affirmation of Michael J. Balestra, Esq. in opposition to plaintiff's motion for summary judgment, dated October 16, 2018, and attached exhibits.
10. Defendants' Memorandum of Law, dated October 16, 2018.
11. Affirmation of Michael J. Balestra, Esq. in opposition to plaintiff's motion, dated October 16, 2018.
12. Affidavit of William F. Baker, dated October 16, 2018.
13. Defendants' Memorandum of Law in opposition, dated October 16, 2018.