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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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WILLIAM SOMERVILLE, INC.,

Index No.101084/2004

Plaintiff,

DECISION/ORDER

-against-

THE A.J. GROUP, INC., 1114 AVENUE OF THE AMERICAS, LLC and EUROHYPO,

Defendants.

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In this action for, *inter alia*, foreclosure of a mechanic's lien, defendant Eurohypo ("Eurohypo") moves for an order (1) pursuant to CPLR § 3211 [a][10],dismissing plaintiff William Somerville, Inc.'s ("Somerville") complaint for failing to join necessary parties as required by New York Lien Law § 44; (2) pursuant to New York Lien Law § 19 [6], discharging Somerville's Notice of Mechanic's Lien as facially defective under New York Lien Law § 9; and (3)dismissing Somerville's complaint pursuant to CPLR § 3211 [a][7] for failing to state causes of action for breach of contract and for a deficiency judgment.

Background

According to the affidavit of Eurohypo's U.S. Legal Director, Larry Candido ("the Candido affidavit"), Eurohypo hired defendant The A.J. Group, Inc. ("the A.J. Group") on or about November 18, 2002 to serve as general contractor for the construction of Eurohypo's new office space on the 29th floor of the building located at 1114 Avenue of the Americas, New York,

New York and more commonly known as the Grace Building ("the Grace Building"). Candido claims that during the years 2002 and 2003 the A.J. Group hired various subcontractors, including plaintiff Somerville, to complete the construction of the new office space. Candido further claims that Eurohypo never engaged or contracted with any of the subcontractors hired by the A.J. Group and that it never had a contractual relationship with Somerville in connection with the construction work being done at the Grace Building. Candido also states that all payments for work performed and materials furnished pursuant to the contract between Eurohypo and it general contractor, the A.J. Group, were made by Eurohypo directly to the A.J. Group. According to Candido, these monies were paid in trust to the A.J. Group for payment to the A.J. Group's subcontractors.

According to the affirmation of Somerville's attorney, Stuart Zisholtz, Somerville is in the business of furnishing and installing paneling, partitions and walls for commercial construction projects throughout the New York metropolitan area. Zisholtz claims that Somerville was engaged and hired by the A.J. Group on or about November 18, 2002 to perform certain work and furnish certain materials at Eurohypo's new office space. Zisholtz contends that Somerville performed that work and furnished those materials and is presently owed a sum of $53,792. Zisholtz further claims that as a result of this non-payment,

Somerville filed a notice of mechanic's lien against the Grace Building on or about January 12, 2004 with the Clerk of the Court of New York County for $16,292, the full amount Somerville claims was lienable. Somerville's notice of mechanic's lien describes the work performed by Somerville at the Grace Building as "installation of paneling, partitions, walls, doors, frames and related construction work." The notice of mechanic's lien similarly describes the materials Somerville furnished as "paneling, partitions, walls, doors, frames and other related construction materials" and states that Somerville performed its first item of work and furnished its first item of material at the Grace Building on November 18, 2002. The lien lists December 30, 2003 as the last date Somerville furnished material at the Grace Building, but no date is given as to the time Somerville performed its last item of work there. Somerville commenced the instant action to foreclose its mechanic's lien on January 22, 2004.

Somerville's Complaint

In asserting its claim for foreclosure of a mechanic's lien against all defendants,[1] Somerville alleges in its complaint that on or about November 18, 2002, in furtherance of its agreement with Eurohypo and defendant 1114 Avenue of the Americas, LLC, the

[1] Somerville's complaint also asserts breach of contract and account stated causes of action solely against defendant the A.J. Group, Inc.

A.J. Group hired and engaged Somerville to perform certain work, labor and services and to furnish certain materials in connection with the construction and improvement of the 29th floor of the Grace Building. Somerville further alleges that from on or about November 18, 2002 to on or about December 30, 2003 it duly performed all the work, labor and services to be performed on its part and duly furnished all the materials it was required to furnish. The complaint alleges that the agreed upon price and fair and reasonable value of the work, labor and services performed by Somerville, as well as the materials furnished, was $552,792. According to the complaint, Somerville has only been paid a total of $499,000, leaving a balance due and owing to Somerville of $53,792. The complaint goes on to allege that (1) on or about January 12, 2004, Somerville duly filed a notice of mechanic's lien setting forth the lienable sum of $16,292; (2) all the work, labor and services performed and all the materials furnished by Somerville for the amount claimed in the mechanic's lien were delivered to and incorporated into the 29th Floor of the Grace Building; and (3) Somerville's mechanic's lien has not been paid, cancelled or discharged and is presently a valid lien against the Grace Building. Somerville concludes the foreclosure cause of action portion of its complaint by alleging that at the time Somerville filed its notice of mechanic's lien, defendants Eurohypo and 1114 Avenue of the Americas, LLC owed defendant the

A.J. Group sums of money in excess of the amount allegedly owed to Somerville.

Moreover, in the complaint's "wherefore" clause, Somerville not only demands judgment on its foreclosure cause of action, but also demands a deficiency judgment against the defendants, jointly and severally, and, in the event its mechanic's lien is declared invalid, judgment against the defendants, including Eurohypo, jointly and severally, for the sum of $16,292.

Eurohypo's Motion to Dismiss

In moving to dismiss Somerville's complaint Eurohypo first contends that Somerville, in violation of New York Lien Law § 44, has failed to join as defendants in this foreclosure action any of the nine other entities which Eurohypo contends have also filed notices of mechanic's liens against the Grace Building. Eurohypo argues that these ten notices of mechanic's liens total approximately $655,000 in claims against the Grace Building and argues that any ruling or judgment rendered in the absence of the other nine lienors would have an adverse impact upon those alleged lienors and their claims. Under these circumstances, Eurohypo argues, dismissal of Somerville's complaint is warranted under CPLR § 3211 [a] [10] on the ground that "the court should not proceed in the absence of a person who should be a party."

Eurohypo also contends that Somerville's notice of mechanic's lien ("the notice")is facially defective and should be

discharged as of record. Specifically, Eurohypo contends that the mechanic's lien's references to "installation of paneling, partitions, walls, doors, frames, and related construction work" and "paneling, partitions, walls, doors, frames and related construction materials" are too vague to adequately identify the work performed and the materials furnished by Somerville in connection with the construction and improvement of the 29th floor of the Grace Building. Eurohypo claims that these "meaningless recitations" are wholly inadequate for compliance with Lien Law § 9 [4] and warrant the lien's discharge of record pursuant to Lien Law § 19 [6]. Eurohypo also argues that Somerville's notice should be discharged as of record pursuant to Lien Law § 19 [6] because it fails to state when Somerville performed its last item of work at the Grace Building, as required by Lien Law § 9 [6].

Finally, Eurohypo argues that Somerville's complaint should be dismissed pursuant to CPLR § 3211 [a] [7] for failing to state a cause of action. Specifically, Eurohypo contends that Somerville has failed to state a breach of contract cause of action against it because Somerville's complaint does not allege that (1) a contract was formed between Somerville and Eurohypo; (2) Somerville performed its obligations under the contract; (3) Eurohypo failed to perform its contractual obligations; and (4) Somerville suffered damages as a result of Eurohypo's breach.

Eurohypo argues that Somerville's failure to plead such facts is fatal to the demand for money damages contained in the "wherefore" clause of Somerville's complaint. Moreover, Eurohypo argues that Somerville's failure to plead any facts establishing a relationship of contractual privity between it and Eurohypo means that Somerville is not entitled to the deficiency judgment against Eurohypo also demanded in the "wherefore" clause of Somerville's complaint.

Somerville's Opposition

In addressing Eurohypo's contention that it failed to name all of the lienors who filed notices of mechanic's liens against the Grace Building as defendants in this action, Somerville argues that Eurohypo has not properly established the existence of these alleged nine other mechanic's liens because it has not attached copies of these liens to its motion to dismiss. In alternative, Somerville contends that it is willing to amend its summons and complaint to add all necessary parties as defendants in this action and argues that dismissal of its complaint at this early stage would be extremely prejudicial. Somerville states that while the A.J. Group, through its counsel, has consented to allow Somerville to amend its complaint to add all necessary parties, Eurohypo has not, despite the fact that Eurohypo, which Somerville claims has not yet answered the complaint, would not be prejudiced if Somerville were permitted the opportunity to

serve an amended complaint naming all ten mechanic's lienors as defendants.

With respect to the alleged defects in its notice of mechanic's lien, Somerville argues that while Lien Law § 9 requires a lienor to indicate on its mechanic's lien the work performed and the materials furnished by the lienor, the statute does not require a mechanic's lien to contain each and every detail regarding the work performed and the materials furnished. Therefore, Somerville argues, the description of the work performed and the materials furnished set forth in its notice of mechanic's lien is more than sufficient to satisfy the requirements of Lien Law § 9. Somerville further contends that, contrary to Eurohypo's claim, its notice of mechanic's lien does in fact indicate the time when Somerville performed its last item of work at the Grace Building. Somerville argues that paragraph six of the notice of mechanic's lien, which requires Somerville, as lienor, to indicate on one line the time when its last item of work was performed and, on an entirely separate line, the time when its last item of material was furnished, should be read as one continuous sentence, despite the fact that the two lines are not joined by the word "and."[2] Under this interpretation,

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[2] In listing November 18, 2002 as the time when it both performed its first item of work and furnished its item of material, Somerville combined these two distinct sections of its notice of mechanic's lien into one continuous sentence through the use of the word "and" which causes the notice of mechanic's

December 30, 2003, the date listed by Somerville as the time when it furnished its last item of material, would also be read as the time when Somerville performed its last item of work at the Grace Building.

As to its demand for a deficiency judgment, Somerville argues that it has the right, pursuant to Lien Law § 58, to seek a deficiency against any party liable after the sale of the Grace Building and that it therefore has the right to demand in its complaint a deficiency judgment against all defendants, including Eurohypo. Somerville also contends that its lack of contractual privity with Eurohypo is irrelevant because it is the funds Eurohypo allegedly owes the A.J. Group, pursuant to their contract, which form the basis of Somerville's mechanic's lien. Because Eurohypo has failed to establish that it paid the A.J. Group in full, Somerville contends that it has a valid mechanic's lien against the monies being withheld by Eurohypo.

Finally, in response to what it describes as Eurohypo's attempt to dismiss its complaint based upon "super technicalities," Somerville argues that Eurohypo's motion to dismiss is a blatant violation of the Lien Law because Eurohypo's application for an order summarily discharging Somerville's lien has not been made upon a verified petition, which Somerville

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[footnote 2 continued] lien to read "[t]he time when the first item of work was performed *and* the time when the first item of material was furnished was November 18, 2002" [emphasis added].

argues is required by Lien Law § 19 [6]. Somerville also claims that because its mechanic's lien is valid, and because Eurohypo's motion is frivolous and defective, Eurohypo should be sanctioned pursuant to 22 NYCRR 130.1-1.

Eurohypo's Reply

As part of the reply affidavit of its U.S. Legal Director, Larry Candido ("the Candido reply affidavit"), Eurohypo submits copies of the nine additional notices of mechanic's liens it claims were filed against the Grace Building prior to the date Somerville filed its notice of mechanic's lien. Eurohypo also reiterates its argument that Somerville's failure to name these additional lienors as defendants in this action is a fatal defect under Lien Law § 44 [1] warranting dismissal of Somerville's complaint pursuant to CPLR § 3211 [a] [10]. The Candido reply affidavit further claims that in letters dated April 6, 2004 and April 8, 2004, which are also attached to the Candido reply affidavit as exhibits, Eurohypo's counsel consented to Somerville's joinder of the other nine lienors on the condition that Somerville provide Eurohypo with proof of service of a supplemental summons and amended complaint. Candido claims that Eurohypo's counsel also agreed to withdraw the portion of its motion seeking dismissal of Somerville's complaint for failure to join necessary parties. However, according to the Candido reply affidavit, Somerville never responded to either of these letters.

Eurohypo also uses its reply papers to reiterate its arguments that Somerville's mechanic's lien is facially defective under Lien Law § 9 and that Somerville has failed to allege the contractual privity necessary to entitle Somerville to a deficiency judgment against Eurohypo. Eurohypo also addresses Somerville's contention that Eurohypo's motion to discharge the notice of mechanic's lien is defective under Lien Law § 19 (6) because it was not made upon a verified petition by arguing that there is no legal basis which supports Somerville's contention. According to Eurohypo, the language of Lien Law § 19 (6) is permissive, not mandatory and the Court has full authority to rule on a motion to dismiss a mechanic's lien made in the course of a foreclosure action. Moreover, Eurohypo argues that it would make no sense to require a defendant in a mechanic's lien foreclosure action who wishes to challenge the validity of the mechanic's lien to do so by commencing an entirely separate action. Eurohypo concludes its reply by arguing that sanctions should be imposed upon Somerville and its attorney on the ground that Somerville's motion for sanctions against Eurohypo, itself, constitutes frivolous conduct.

Analysis

At the outset, the Court notes that it will not impose sanctions on either the parties to this action or their attorneys. 22 NYCRR § 130-1.1 permits a court, in its

discretion, to award sanctions for frivolous conduct. In determining whether the conduct undertaken was frivolous, the court considers, among other things, the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party (22 NYCRR § 130-1.1). As neither party has made a showing that the other's conduct on this motion was intentional, willful or frivolous, the Court is of the opinion that the drastic remedy of sanctions is unwarranted in this case.

As for the sufficiency of Somerville's notice of mechanic's line, the grounds for the discharge of a mechanic's lien interposed against a nonpublic improvement are provided for in Lien Law § 19. According Lien Law § 19 (6), a lien may be discharged "where . . . the notice of lien is invalid by reason of failure to comply with the provisions of section nine of this article . . . ." The provisions of Lien Law § 9 pertinent to the instant notice of mechanic's lien are Lien Law § 9 (4), which requires a notice of lien to indicate "the labor performed or materials furnished and the agreed price or value thereof . . . ," and Lien Law § 9 (6), which requires that a notice of lien include the "time when the first and last items of work were

performed and materials were furnished." When determining whether a notice of lien adequately describes the information required by Lien Law §§ 9 (4) & (6), the Court must be mindful of the fact that while a valid lien is created when a lienor files a notice of lien that substantially complies with the provisions of Lien Law § 9, the failure of a notice of lien to comply with a material requirement of Lien Law § 9 voids the lien (*Fibernet Telecom Group, Inc. v East Coast Optical Services*, 195 Misc 2d 461, 462, 760 NYS2d 621 [Sup Ct NY County 2002]; *Corina Associates, Inc. v McManus, Longe, Brockwehl, Inc.*, 39 AD2d 613,614, 330 NYS2d 847 [3d Dept 1972]). Moreover, the Court must "construe liberally" the requirements of Lien Law § 9 "to secure the beneficial interests and purposes" of the Lien Law as a whole (Lien Law § 23; *PM Contr. Co. v 32 AA Assocs. LLC*, 4 AD3d 198, 199, 772 NYS2d 269 [1st Dept 2004]). At the same time however, this liberal construction of Lien Law § 9 must be balanced against the overall purpose of that section, which is to provide owners, purchasers and lien creditors with the notice that is essential for their security (*Fibernet Telecom Group, Inc.*, 195 Misc 2d at 463).

Applying these principals to the instant case, the Court finds that Somerville's notice of mechanic's lien substantially complies with the requirements of Lien Law § 9 (4) and adequately apprises all interested parties of both the materials furnished

and the work performed by Somerville. Somerville's description of the work it performed at the Grace Building, i.e., "installation of paneling, partitions, walls, doors, frames and related construction work," is more than adequate in light of the fact that descriptions as vague as "supervision and superintendence," "carpenter work and floor laying," and "plumbing and gas fitting" have all been deemed sufficient (8-8 Warren's Weed New York Real Property § 3.01). Moreover, the description contained in Somerville's notice of mechanic's lien is much more detailed than the work performed descriptions held to be insufficient in the two cases cited by Eurohypo (*compare Charles Hyman, Inc. v Olsen Industries,* Inc., 227 AD2d 270, 277, 642 NYS2d 306 [1st Dept 1996] [plaintiff's liens were properly discharged for failing to identify the labor supplied or the materials provided to defendants]; San *Marco Constr. Corp. v Gilbert*, 15 Misc 2d 208, 211, 178 NYS2d 137 [Sup Ct Westchester County 1958] [notice of lien is insufficient insofar as it states that the labor performed was "equipment and machinery"]).

Somerville's description of the materials it furnished at the Grace Building, i.e., "paneling, partitions, walls, doors, frames and other related construction materials," is similarly sufficient for the purposes of Lien Law § 9 (4) given that "merely including the nature of the material . . . supplied will suffice as long as it is sufficient to apprise the owner of the

material . . . for which the lien claimed" (*id.*). Because Eurohypo has admitted in the Candido affidavit that Somerville was hired as a subcontractor to complete the construction of Eurohypo's office space on the 29th floor of the Grace Building, Somerville's description of the materials furnished gives Eurohypo adequate notice that Somerville's mechanic's lien is claimed for the "paneling, partitions, walls, doors, frames and other related construction materials" furnished at the 29th floor of the Grace Building.

It is the failure of Somerville's notice of mechanic's lien to indicate the time when the Somerville's last item of work was performed, however, which not only renders the notice of lien facially invalid, but which also warrants its discharge of record. As discussed *supra*, Lien Law § 9 (6) requires a notice of lien to state "time when the first and last items of work were performed and materials were furnished." While approximate dates or unintentionally erroneous dates will generally not be considered fatal jurisdictional defects, "[a] failure to set forth *any* date as to when the first or last item of work was performed . . . constitutes a jurisdictional defect rendering the lien invalid" (8-8 Warren's Weed New York Real Property § 3.01 [emphasis added]). Had Somerville intended December 30, 2003 to stand for both the time when it performed its last item of work *and* the time when it furnished its last item of material,

Somerville could have combined these two independent sections of its notice of mechanic's lien by using the word "and," just as it did when indicating November 18, 2002 as both the time when it first performed work at the Grace Building *and* the time when it first furnished materials there. Having failed to do so, the Court cannot, as Somerville urges, read these separate and distinct portions of the notice of mechanic's lien as one continuous sentence. Thus, notwithstanding the general principal of Lien Law § 23, that the requirements of the Lien Law are to be "construed liberally," Somerville's failure to indicate on its notice of lien the time when its last item of work was performed at the Grace Building is a fatal jurisdictional defect that requires that Somerville's notice of mechanic's lien be discharged of record pursuant to Lien Law § 19 (6).

Moreover, Somerville's contention, in support of which Somerville cites no case law, that Eurohypo's motion to discharge the notice of mechanic's lien is defective because it is not supported by a verified petition is without merit. While an application to summarily discharge a mechanic's lien made pursuant to Lien Law § 19 (6) "must be made upon a verified petition accompanied by other written proof showing a proper case therefor . . . ," it would be a drastic and nonsensical waste of the Court's resources to require Eurohypo, as a defendant in an already commenced lien foreclosure action, to commence an

entirely separate proceeding to discharge the very same lien Somerville is seeking to have foreclosed. Therefore, it was procedurally proper for Eurohypo to move in this foreclosure action to discharge Somerville's notice of mechanic's lien.

Having determined that Somerville's notice of lien should be discharged of record for failing to comply with the requirements of Lien Law § 9 (6), the only remaining issue to be resolved is whether Somerville is entitled to demand in the "wherefore" clause of its complaint "that in the event Plaintiff's Mechanic's Lien be declared invalid, that Plaintiff have judgment against the Defendants, any or all of them, jointly and severally, for the sum of $16,292."[3] While Somerville's attorney has argued in his affirmation in opposition that Somerville's lack of privity with Eurohypo is irrelevant for the purposes of Somerville's mechanic's lien, Somerville has not advanced any argument why, in the event its mechanic's lien is declared in valid, it should be entitled to a judgment, which sounds in breach of contract, against Eurohypo for $16, 292. While it is true that a subcontractor need not be in contractual privity with a property owner to in order to foreclose on a mechanic's lien, (*Worlock Paving Corp. v Camperlino*, 222 AD2d 1097, 1098, 636 NYS2d 510

[3] The Court's determination that Somerville's notice of mechanic's lien is facially invalid renders moot the issues regarding Somerville's failure to join the other nine mechanic's lienors as defendants in this action, and its entitlement to a deficiency judgment against Eurohypo.

[4th Dept 1995]), it is equally well settled that "a subcontractor may not assert a cause of action which is contractual in nature against parties with whom it is not in privity" (*Delta Electric, Inc. v Ingram & Greene, Inc.*, 123 AD2d 369, 370, 506 NYS2d 594 [2d Dept 1986]; *quoting Martirano Constr. Corp. v Briar Contracting Corp.*, 104 AD2d 1028, 1030, 481 NYS2d 105 [2d Dept 1984]; *see also Eastern States Electrical Contractors, Inc. v William L. Crow Construction Company*, 153 AD2d 522, 523, 544 NYS2d 600 [1st Dept 1987] ["a subcontractor may not assert a contractual claim against an owner with whom it is not in privity"]). As Somerville has asserted a breach of contract claim against defendant the A.J. Group, Inc., there is nothing pleaded in Somerville's complaint to indicate that it was in privity of contract with Eurohypo. Therefore, Somerville cannot demand in its "wherefore" clause that, in event its mechanic's lien is declared invalid, it have judgment against Eurohypo and the other defendants, jointly and severally, for the sum of $16,292 because such relief is simply not available as against Eurohypo.

Accordingly, it is hereby

ORDERED that plaintiff William Somerville, Inc.'s complaint is dismissed in its entirety as to defendant Eurohypo; and it is further

ORDERED that plaintiff Williams Somerville, Inc., and defendants the A.J. Group, Inc. and 1114 Avenue of the Americas, LLC, are to appear for a Preliminary Conference before Justice Carol Edmead at 60 Centre Street, New York, New York, Room 543 on August 24, 2004 at 2:15 p.m.; and it is further

ORDERED that defendant Eurohypo is directed to serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: July 1, 2004

Hon. Carol Edmead, J.S.C.