

**Peri Formwork Sys., Inc. v Lumbermens Mut. Cas.
Co.**

2010 NY Slip Op 33925(U)

December 13, 2010

Sup Ct, Westchester County

Docket Number: 16146/05

Judge: Gerald E. Loehr

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
PERI FORMWORK SYSTEMS, INC.,

FILED
AND ENTERED
ON 12/14 2010
WESTCHESTER
COUNTY CLERK

Plaintiff,

-against-

LUMBERMENS MUTUAL CASUALTY
COMPANY, et al.,

Defendants.
-----X

DECISION AND ORDER

Index No.: 16146/05

FILED
DEC 14 2010
TIMOTHY C. DONI
COUNTY CLERK
COUNTY OF WESTCHESTER

LOEHR, J.

The Court having conducted a bench trial in this action¹ makes the following findings of fact and conclusions of law. The White Plains City Center (the "Project") located in White Plains, New York, is a privately owned mixed-use real estate development. The Project contains various structures which include: (i) the Retail Building ; (ii) the Garage; (iii) the North Residential Tower; (iv) the South Residential Tower; (v) the Lofts Tower; and (vi) the Air Rights Building. Defendant LC White Plains, LLC ("LC White Plains") hired George A. Fuller

¹ Four separate but related actions were commenced: *Peri Formworks Systems, Inc. v Arch Ins. Co.*, Index No. 3320/05; *Peri Formwork Systems, Inc. v Arch Ins. Co.*, Index No. 22518/05; *Naber Electric Corp. v George A. Fuller Company*, Index No. 2487/05 and the above captioned action. All were consolidated under the above caption. The party Plaintiff to the instant proceeding, which seeks recovery on the discharge bonds, is Peri Formwork Systems, Inc. and the party Defendants are Arch Insurance Company, Cappelli Enterprises, Inc., George A. Fuller Company, Inc. and LC White Plains, LLC. Roger & Sons Concrete Co. was also a Defendant but the action was settled against such Defendant. In the consolidated actions, Plaintiff also sought recovery against Lumbermens Mutual Casualty Company, American Motorists Insurance Company and Arch Insurance based on their having issued payment bonds on the Project. The Complaints were dismissed based on Plaintiff's failure to provide timely notice of its claim under the bonds (*Peri Formwork Systems, Inc. v Lumbermaens Mut. Cas. Co.*, 65 AD3d 533 [2d Dept 2009]).

Company, Inc. (“Fuller”) as the general contractor on the Project. Fuller hired Roger & Sons Concrete Co. (“Roger”) as the concrete subcontractor for various structures on the Project. Roger worked on the North Tower, the Garage, the South Tower Plaza, the Loft Building and the Air Rights Building. Separate contracts were drafted between Fuller and Roger with respect to the work to be done on the different structures. None of them were executed. Rather, Roger performed under oral agreements which provided generally that Roger would be paid on a “time and materials basis.” In order to insure that Roger’s suppliers and vendors were paid, after approving the invoices, Roger forwarded them to Fuller who issued joint checks.

Roger contracted with Plaintiff to supply formwork for the concrete. Plaintiff supplied formwork to Roger which was used by Roger on the various structures of the Project. In 2004, Fuller refused to pay any further invoices submitted by Plaintiff and forwarded by Roger apparently on the grounds that Roger was over its budget. On March 19, 2004, Plaintiff filed a notice of mechanic’s lien in the amount of \$423,905.97 against the Project. The notice stated the owner of the Project to be Defendants Cappelli Enterprises, Inc. (“CEI”) and/or LC White Plains. On March 31, 2004, Defendant CEI, as Principal, and Defendant Arch Insurance Co., Inc. (“Arch”), as Surety, posted a Surety Bond in the amount \$466,296.57, discharging the lien pursuant to Lien Law § 19[4]. On November 4, 2004, Plaintiff filed a second notice of mechanic’s lien in the additional amount of \$57,966.89, and on September 26, 2005, CEI, as Principal, and Arch, as Surety, posted a lien discharge bond in the amount of \$63,763.58.

Plaintiff commenced actions against CEI and Arch on the discharge bonds. LC White Plains and Fuller were also named as Defendants although no theory of recovery against them is set forth in the Complaints. Thereafter, Plaintiff and all the Defendants moved for summary judgment on the discharge bond claims. In their motion, the Defendants challenged the validity

of the amounts Plaintiff claimed was due under the Roger's contracts. In a Decision dated March 24, 2008, Justice Rudolph denied Defendants' motion and granted Plaintiff summary judgment for the amount of the bonds, holding:

“The Court finds that Peri has established its entitlement to summary judgment as to the Arch surety lien bonds filed with respect to the amounts alleged to be due under the Rogers' contracts; defendants have raised no genuine issues of fact with respect thereto.”

The Defendants appealed. On September 1, 2009, the Appellate Division, Second Department, modified the decision, holding:

“The plaintiff's liens were valid only as to any amount still due and unpaid to the subcontractor, Rogers & Sons Concrete, Inc. (see *Clifford Broman & Son v Town of Babylon*, 222 AD2d 643; *Ace Constr Co. v Garfield & Arma Assoc.*, 148 Misc 2d 475, 477). Since a triable issue of fact exists as to whether the subcontractor was owed any money and, if so, the amount, at the time the plaintiff's liens were filed, the plaintiff was not entitled to summary judgment.”

The Appellate Division otherwise affirmed Justice Rudolph's Decision (*Peri Formwork Systems, Inc. v Lumbermens Mut. Cas. Co.*, 65 AD3d 533 [2d Dept 2009]).

At trial, the parties Stipulated that \$750,761.91 was paid by Fuller to Roger, or on behalf of Roger, after March 19, 2004. Moreover, the evidence showed that Fuller paid Roger, or on behalf of Roger, in excess of \$2,669,000 after Plaintiff filed its liens. That notwithstanding, Defendants moved to dismiss the bond claims on the grounds that Plaintiff failed to prove the reasonable value of the materials it supplied.

Where, as here, an owner is not in privity with a subcontractor, the measure of the subcontractor's lien is the value of the labor and material added to the property, rather than the

contract price (*Gentile's, Inc. v Terisi*, 10 AD2d 765 [3d Dept 1960]; *Umbaugh Builders, Inc. v Parr Co. of Suffolk, Inc.*, 86 Misc2d 1036 [Sup Ct Suffolk Co 1976]). Be that as it may, as indicated above, Defendants challenged the validity of the liens when they moved for summary judgment before Justice Rudolph. Whether they challenged them as exceeding the reasonable value of the materials furnished does not appear. In any event, Justice Rudolph held them valid as to the amounts claimed therein and that holding was affirmed on appeal. It is therefore the law of the case. Accordingly, Plaintiff is entitled to judgment against CEI and Arch in the amount of \$530,060.15, the total of the bonds, without costs (CPLR 8101; General Obligations Law § 7-301; Lien Law § 3, 4[1]; *Tri-City Elec. Co. v State of New York*, 63 NY2d 969 [1984]; *Casa Redimix Concrete Corp. v Cosner Const. Corp.*, 68 AD3d 673 [1st Dept 2009]).

Although not pleaded in the Complaints, Plaintiff seeks what it now characterizes as a “deficiency judgment” against Defendants LC White Plains and Fuller in the amount of \$530,332.05, the difference between its filed liens, with interest, and the total amount of the bonds.

Upon the filing of the bonds, the Plaintiff's liens were “discharged,” *i.e.* they were shifted from the real property of the Project to the bonds (*Tri-City Elec. Co. v State of New York*, 63 NY2d 969 [1984]; *White Plains Sash & Door Co. v Doyle*, 262 NY 16 [1933]). The liability of an owner or general contractor for a deficiency judgment turns on whether and to what extent such party has liability to the lienor independent of the lien law. Thus, Lien Law § 54 provides:

“If the lienor shall fail, for any reason, to establish a valid lien in an action under the provisions of this article, he may recover judgment therein for such sums as are due him, or which he might recover in an action on a contract, against any party to the action.”

The purpose behind section 54 was to preserve whatever common law relief a lienor had against

a party despite the invalidity of the lien (*see Di Menna v Cooper & Evans Co.*, 220 NY 391 [1917]). However, the mere consent by an owner or general contractor to have work performed by a subcontractor creates no personal liability unless such party has assented to such obligation (*Brigham v Duany*, 241 NY 435 [1926]; *Contelmo's Sand & Gravel, Inc. v J & J Milano, Inc.*, 96 AD2d 1090 [2d Dept 1983]; *see R. Kraft, KPL v Fisk Associates (In re Milleree Corp.)*, 70 BR 780 [Bankr SDNY 1987]); *cf Tager v Healy Ave. Realty Corp.*, 14 AD2d 584 [2d Dept 1961][plaintiff entitled to deficiency judgment only against contracting party]; *Builders Millwork Co. v Nicolaysen*, 282 AD 765 [2d Dept 1953][subcontractor not entitled to personal judgment against owner not in privity]).

Plaintiff argued that to deny it a deficiency judgment is to allow the Defendants to have discharged liens in excess of \$1 million for \$530,000, the total of the bonds. Lien Law § 19[4] provides that an owner is entitled to discharge a mechanic's lien upon filing a bond in the amount of 110% of the lien. Presumably the premium is to secure the lienor for interest accruing between the discharge and the obtaining of a judgment. Moreover, such section authorizes the Court to require an owner to post additional security, where, through a change in circumstances, a posted bond becomes insufficient (*see Tri-City Elec Co. v State of New York*, 63 NY2d 969, 971 [1984]; *Case Redimix Concrete Corp. v Cosner Constr. Corp.*, 68 AD3d 673 [1st Dept 2009]; *Schroeder v Page*, 124 AD 253 [1st Dept 1908]). Here, in June 2010, almost six years after the bonds were posted, Plaintiff in fact moved for additional security. The application was denied as having been made on insufficient evidence and on the eve of trial. Thus, Defendants were able to discharge the liens for only \$530,000 because Plaintiff failed to timely seek additional security therefor.

Accordingly, the Complaints are dismissed as against Defendants LC White Plains and Fuller. This constitutes the decision and order of the Court.

Dated: White Plains, New York
December 13, 2010



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Acting J.S.C.

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