

<b>Delete Constr. Inc. v Rose Group 583 Park Ave. LLC</b>
2011 NY Slip Op 32320(U)
August 21, 2011
Supreme Court, New York County
Docket Number: 111965/10
Judge: Doris Ling-Cohan
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**SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY**  
**PRESENT: Hon. Doris Ling-Cohan, Justice** **Part 36**

**DELETE CONSTRUCTION INC.,**

**Plaintiff,**

**-against-**

**THE ROSE GROUP 583 PARK AVENUE LLC,  
THIRD CHURCH OF CHRIST SCIENTIST OF NEW  
YORK and JOHN DOES "1" through "10" being and  
intended to be those persons or entities with an interest  
in the real property,**

**Defendants.**

**INDEX NO. 111965/10**

**MOTION SEQ. NO. 001**

**FILED**

**AUG 25 2011**

**NEW YORK  
COUNTY CLERK'S OFFICE**

**The following papers, numbered 1-6 were considered on this motion to dismiss and cross-motion to amend a mechanic's lien:**

**PAPERS**

**NUMBERED**

**Notice of Motion/Order to Show Cause, -- Affidavits -- Exhibits \_\_\_\_\_**  
**Answering Affidavits -- Exhibits \_\_\_\_\_**  
**Replying Affidavits \_\_\_\_\_ (memo of law) \_\_\_\_\_**

**1, 2, 3**  
**\_\_\_\_\_**  
**6**  
**\_\_\_\_\_**

**Cross-Motion: [ X ] Yes [ ] No**

**4, 5**  
**\_\_\_\_\_**

**Upon the foregoing papers, it is ordered that this motion and cross-motion are decided as indicated below.**

**BACKGROUND**

Plaintiff Delete Construction Inc. (Delete) commenced this action seeking damages for an alleged breach of contract and to enforce a mechanic's lien. On or about 2006, Delete entered into one or more agreements with defendant The Rose Group 583 Park Avenue LLC (the Rose Group) to perform carpentry and masonry work at 583 Park Avenue, New York, New York (the Premises), owned by defendant Third Church of Christ Scientist of New York (the Church). Delete performed such carpentry and masonry services from September 2006 through June 2008. Delete provided labor and materials without any objection from the Rose Group or the Church.

Delete alleges that the Rose Group has breached the agreements by failing to pay a remaining balance of \$345,540.21, for the labor and materials supplied. Delete obtained a mechanic's lien dated October 29, 2008 (the Lien) and filed the Lien on or about December 23, 2008. Delete commenced this action, *inter alia*, to enforce the Lien. Delete's complaint alleges four causes of action: (1) breach of contract; (2) *quantum meruit*; (3) account stated; and (4) adjudging that plaintiff has a valid mechanic's lien and to foreclose on it.

Defendants the Rose Group and the Church (collectively the Defendants) now jointly move pursuant to CPLR 3211(a)(1) and (a)(7) and Lien Law §§ 9 and 11 for an order: (1) dismissing Delete's fourth cause of action and vacating the Lien; and (2) vacating the Notice of Pendency of this action dated August 30, 2010. Delete cross-moves pursuant to Lien Law § 12-a(2) for an order amending the Lien to reflect the correct name of the property owner and to modify the caption in this action.

#### DISCUSSION

Defendants argue that Delete failed to correctly name the owner of the Premises and failed to file proof of service within thirty-five days of the filing of the Lien as required by Lien Law §§ 9 and 11 respectively. The Court notes that Defendants subsequently withdrew the portion of their motion with regards to proof of service pursuant to Lien Law § 11, as Delete provided a copy of the file-stamped affidavit of service. However, Defendants maintain that the failure to name the true owner of the Premises is a jurisdictional defect that cannot be corrected by amendment. Additionally, Defendants claim that Delete has failed to state a cause of action and that the documentary evidence definitively disposes of Delete's fourth cause of action seeking to adjudge that Delete has a valid lien on the Premises and to foreclose on the Lien.

On a motion to dismiss pursuant to CPLR 3211(a)(7), the movant has the burden to demonstrate that, based upon the four corners of the complaint liberally construed in favor of the plaintiff, the

pleading states no legally cognizable cause of action. *Leon v Martinez*, 84 NY2d 83, 87-88 (1994). A motion to dismiss the complaint for failure to state a cause of action “will generally depend upon whether or not there was substantial compliance with CPLR 3013.” *Catli v Lindenman*, 40 AD2d 714, 715 (2d Dep’t 1972). If the allegations are not “sufficiently particular to give the court and parties notice of the transactions or occurrences intended to be proved and the material element of each cause of action”, the cause of action will be dismissed. *See Catli*, 40 AD2d at 715. CPLR 3013 provides that “[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.”

Here, Delete pleads that it entered into one or more agreements with the Rose Group for carpentry and masonry and ancillary work to be performed on the Premises. It further pleads that \$345,540.21 is currently due and owing from the Rose Group in breach of these agreements. Delete pleads that it performed the work and provided the materials for which the Rose Group unjustly benefitted. Additionally, Delete pleads that the Rose Group accepted and retained invoices and statements sent by Delete without objection. Finally, Delete pleads that the Church is the fee owner of the Premises and that the Lien was timely filed and served on Defendants. Delete has pleaded with particularity the transactions giving rise to its causes of action.

However, Defendants argue that Delete’s fourth cause of action cannot be maintained as it is based on the Lien which is jurisdictionally defective. Defendants argue that Delete failed to correctly name the owner of the Premises on the Lien and, thus, the Lien is jurisdictionally defective. Defendants also contend that the Notice of Pendency must be cancelled, because it is predicated solely on the defective Lien.

In support of their motion, Defendants proffer the Church’s certificate of incorporation, an Order

dated June 24, 1899 authorizing the Church to change its name, and a copy of the Notice Under Mechanic's Lien Law. The Lien names "Third Church of Christ Scientist of New York" as the owner of the Premises. However, the documentary evidence proffered by Defendants show that the Church's true name is "Third Church of Christ (Scientist) of New York City".

Lien Law § 9(2) states that "[t]he notice of lien shall state...[t]he name of the owner of the real property against whose interest therein a lien is claimed, and the interest of the owner as far as known to the lienor." Nevertheless, Delete states that the Lien is valid pursuant to the Lien Law. Delete contends that it made every effort to ascertain the true legal name of the Church. Delete argues that, as no deed was found in the Automated City Register Information System (ACRIS), it searched the tax records. Delete proffers a quarterly statement of account from the New York City Department of Finance which lists the Church's name as "Third Ch. Christ Scientist".

Lien Law § 9(7) states that "[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." It is well settled that the requirement to name the true owner of the real property is "construed liberally to secure the beneficial interests and purposes of the Lien Law...[and that] substantial compliance...is sufficient for the validity of a lien." *PM Contracting Co., Inc. v 32 AA Associates LLC*, 4 AD3d 198, 199 (1<sup>st</sup> Dep't 2004) (internal quotations omitted); *see also EMC Iron Works v. City of New York*, 294 AD2d 173, 174 (1<sup>st</sup> Dep't 2002), Lien Law § 23. The purpose of a mechanic's lien is to provide protection to persons providing labor or materials for construction projects by providing a security interest on the construction property. *See Strober Brothers, Inc. v Kitano Arms Corp.*, 224 AD2d 351, 352 (1<sup>st</sup> Dep't 1996). The Court of Appeals has held that "[i]f the notice fails to state the name of the true owner then a provision of the 9th section [of the Lien Law] preserved the validity of the lien so far as the person named as owner and against whom a lien is asked in fact, may have some title or interest." *Church E. Gates & Co.*

*v Empire City Racing*, 225 NY 142, 156 (1919).

Here, the Church does not deny that it is the owner of the Premises and the Rose Group does not deny that Delete provided labor and materials, pursuant to several agreements, for which Delete has not been fully compensated. Moreover, Defendants do not deny that they received timely notice of the Lien, or that the Lien is otherwise valid. Defendants merely argue that Delete failed to name the true owner of the Premises. Defendants rely on a case from the Appellate Division, Second Department, to show that “a misidentification of the true owner is a jurisdictional defect which cannot be cured by an amendment nunc pro tunc.” *Tri-State Sol-Aire Corp. v Lakeville Pace Mechanical, Inc.*, 221 AD2d 519, 522 (2<sup>nd</sup> Dep’t 1995). However, the Appellate Division, Second Department, has also held that while misidentification of the true owner of the real property is a jurisdictional defect, a misdescription of the true owner is not. *Tri Quality Mechanical Corp. v Chappastream Corp.*, 138 AD2d 610, 611 (2<sup>nd</sup> Dep’t 1988). In fact, the Appellate Division, Second Department, following a Court of Appeals case, found that “[i]n *Gates*, it was held that a lien which named the corporate owner of premises by its former, slightly different, name, was valid by virtue of substantial compliance with the statutory requirements, while another, which named as owner an individual who was an officer and stockholder of the corporate owner, was invalid.” *Paolo v H.B.M. Enterprises, Inc.*, 95 AD2d 794, 795 (2<sup>nd</sup> Dep’t 1983). Here, Delete named the Church by a slightly different name; “Third Church of Christ Scientist of New York” rather than “Third Church of Christ (Scientist) of New York City”. The Church does not deny that it is the true owner of the Premises. Delete did not misidentify the Church as the true owner, rather Delete merely misdescribed the Church, with a slightly different name.

Based on the unambiguous language of the Lien Law, it is clear that the mere failure to name the true owner of the Premises does not invalidate the Lien. Furthermore, it has been held that the failure to name the true owner of the real estate “caused no apparent prejudice to any existing lienors, mortgagees

or good faith purchasers...and does not otherwise warrant rejection of the lien and dismissal of the action.” *PM Contracting Co., Inc. v 32 AA Associates LLC*, 4 AD3d 198, 200 (1<sup>st</sup> Dep’t 2004). Here, there has been no prejudice shown, or even alleged, by Defendants. Moreover, Defendants do not dispute that they received adequate notice of the Lien. Accordingly, the portion of Defendants’ motion to dismiss Delete’s fourth cause of action is denied. As the Lien is valid and does not warrant rejection, the portion of Defendants’ motion seeking to vacate the Notice of Pendency filed by Delete in connection with this matter is likewise denied.

In support of Delete’s cross-motion to amend the Lien to reflect the correct name of the owner of the Premises and to modify the caption of this action, Delete argues that the Lien Law is to be construed liberally. Delete states that so long as it substantially complies with the Lien Law and there is no prejudice to Defendants, the name listed on the Lien can be amended. Lien Law § 12-a(2) clearly states that “[i]n a proper case, the court may, upon five days’ notice to existing lienors, mortgagees, and owner, make an order amending a notice of lien upon a public or private improvement, nunc pro tunc. However, no amendment shall be granted to the prejudice of an existing lienor, mortgagee or purchaser in good faith, as the case may be.” As stated above, no prejudice is alleged here. The Court of Appeals has held that “[w]here...the person named in the alleged notice of a lien as the owner of the real property...is not an owner of any interest therein..., there is a complete failure to comply with the directions thereof and the alleged lien is ineffectual and worthless.” *Church E. Gates & Co. v Empire City Racing*, 225 NY 142, 156 (1919). However, here, the Church is the true owner of the Premises. Delete has merely named the Church by a slightly different name. The Church does not deny that it is the true owner of the Premises and Defendants do not allege that they did not receive notice of the Lien. The Court of Appeals in *Gates* goes on to state that “the plain legislative intent [is] that the notice of lien should only affect the person whom the notice names, or attempts to name as ‘owner’.” *Id* at 157. Here,

amendment of the Lien would only affect Defendants, who have been adequately put on notice of the Lien. “[T]he Lien Law does not require the lienor to state at his peril the name of the true owner, because it recognizes the fact that notices sometimes have to be filed with expedition, and that it may not always be possible to ascertain who is the true owner; hence it only requires the lienor to do the best he can.” *Abelman v Myer*, 122 AD 470, 472 (2<sup>nd</sup> Dep’t 1907). As such, for the reasons stated above, the portion of Delete’s motion seeking to amend the Lien is granted.

Finally, the portion of Delete’s motion seeking to amend the caption in this action to reflect the correct name of the Church is granted as Defendants have not submitted opposition to such relief. The caption shall read as follow:

-----X

DELETE CONSTRUCTION INC.

Plaintiff,

- against -

THE ROSE GROUP 583 PARK AVENUE LLC,  
THIRD CHURCH OF CHRIST (SCIENTIST) OF  
NEW YORK CITY and JOHN DOES “1” through “10”  
being and intended to be those persons or entities with  
an interest in the real property,

Defendants.

-----X

Accordingly, it is

ORDERED that Defendants’ motion to dismiss is denied; and it is further

ORDERED that plaintiff’s motion to amend is granted; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy of this order with notice of entry, upon all parties; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (Basement of 60 Centre) and the Clerk of Trial Support (Room 158 of 60 Centre), who shall mark their records to reflect the amendment to the caption.

This constitutes the decision/order of the Court.

Dated: 8/21/11

[Signature]  
DORIS LING-COHAN, J.S.C.

Check one:  FINAL DISPOSITION  
Check if Appropriate:  DO NOT POST

NON-FINAL DISPOSITION

J:\Dismiss\Delete Constr. v Rose Group - vacate mechanic's lien, incorrect owner's name.wpd

**FILED**

**AUG 25 2011**

NEW YORK  
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