

**LMF-RS Contr., Inc. v Kaljic**

2013 NY Slip Op 32352(U)

September 27, 2013

Sup Ct, NY County

Docket Number: 652976/2012

Judge: Eileen A. Rakower

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER  
Justice

PART 15

LMF-RS CONTRACTING, INC.,  
Plaintiff,

INDEX NO. 652976/2012

- v -

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 6,7

NEVZET KALJIC, CHRISTINA KALJIC  
and 5 LLC,  
Defendants.

MOTION CAL. NO. \_\_\_\_\_

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answer — Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion: Yes  No

This is an action to foreclose a Mechanic’s Lien for labor performed and material provided by plaintiff to defendants Nevzet Kaljic, Christina Kaljic, and Seko Worldwide for the purposes of building a hair salon on the 7<sup>th</sup> floor at 5 East 57<sup>th</sup> Street, New York, NY 10022 (“the Building”). Defendant 5 LLC is the owner and landlord of the Building. On September 12, 2012, LMF-RS Contracting, Inc. filed a “Notice Under Mechanic’s Lien Law” claiming a lien for general construction services on the property, 5 East 57<sup>th</sup> Street, 7<sup>th</sup> Floor, New York, NY in the amount of \$295,000. Defendants Kaljic and Kaljic move for summary judgment vacating the mechanic’s lien for willful exaggeration, and seek a preliminary injunction restraining 5LLC from enforcing a judgment of possession and executing upon a warrant of eviction obtained against them in a Civil Court proceeding entitled *5LLC v. Nevzet Kaljic and Christina Kaljic*.

The Kaljics, husband and wife, sought to open a hair salon in the subject premises. They did not have the funds to build out the space, and entered into an oral agreement with Franco Lucic, whereby, the Kaljics claim Mr. Lucic agreed to fund and perform the construction of the salon, in exchange for a 35% interest in the salon business. The Kaljics claim that Lucic did not perform, and so they entered into a second oral agreement with Pedja Saveljic. According to the Kaljics, Saveljic promised to fund and perform the construction of the salon in exchange for a 35% interest in the salon business. The Kaljics maintain that Saveljic also “broke his agreement.” The Kaljics claim they never entered into any agreement with LMF-RS Contracting Inc. The Kaljics claim they had to finish the salon themselves. According to the Kaljics, the salon was completed and operating by November 14, 2012.

Movants claim that the amount of the lien was wilfully exaggerated, including, among other things, amounts loaned to the Kaljics to pay rent. Movants urge that because the lienor wilfully exaggerated the lien, that pursuant to Lien Law §§39 and 39a, the lien should be vacated. Movants argue that the basis for the warrant of eviction obtained against them in Civil Court was the existence of the lien, and thus, upon vacatur of the lien, 5LLC should be restrained from enforcing the warrant of eviction.

5LLC opposes the portion of the motion seeking to restrain its action regarding the warrant of eviction. 5LLC does not oppose the motion for summary judgment seeking to vacate the lien.

LMF-RS Contracting, Inc. opposes the motion for summary judgment. All parties were heard before the court at oral argument on September 17, 2013. After oral argument and for the reasons stated herein, the motion is resolved as follows.

A finding of wilful exaggeration can only be made upon an action seeking to foreclose the mechanic’s lien, and then, only at the trial of the action or on a motion for summary judgment after discovery is complete.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party

opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*See, Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*See, Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]).

Movants, in support of their motion, provide the lease between the agent for the owner and the Kaljics, as tenants, dated November 17, 2010; the original summons and complaint; the Notice Under Mechanic's Lien Law filed September 12, 2012; the amended verified complaint with verified answer and counterclaims; the Notice of Petition in the related action in the Civil Court entitled *5LLC v. Nevzet Kaljic and Christina Kaljic*; the tenant's verified answer and counterclaim in the *5LLC* action; a So Ordered stipulation setting forth the understanding of the parties in the *5LLC* action and consenting to the final judgment of possession with warrant of eviction upon certain conditions; the prior motion to dismiss with opposition and reply, as well as notice of cross motion with opposition and reply along with this Court's decision; an Order to Show Cause brought before the Civil Court seeking to stay the warrant of eviction with the decision of Hon. James E. D'Auguste; copies of checks from LMF-RS Contracting Inc to Nevzet Kaljic for the sums of \$14,000 dated March 1, 2012 and \$15,000 dated January 31, 2012; the notice of eviction; and an order to show cause brought in the instant case. Movants represent that the checks for \$14,000 and \$15,000 represent loans to pay rent, and were purposely included in the \$295,000 amount of the lien, demonstrating a wilful exaggeration of the lien.

The Burden is upon movant to show a wilful exaggeration of the lien. Wilful means intentional and deliberate (see *Reetz, Inc. v. Stackler*, 24 Misc.2d 291). The Kaljics must show that the \$295,000 lien was inflated maliciously or with fraudulent intent. (*NDL Associates, Inc. v. Villanova Heights, Inc.*, 99 AD3d 450[1st Dept. 2012]). The fact that a lien may contain improper charges does not, in and of itself, establish that a plaintiff willfully exaggerated a lien. (*Minelli Const. Co., Inc. v. Arben Corp.*, 1 AD3d 580 [2<sup>nd</sup> Dept. 2003]) Upon such a prima facie showing, Plaintiff must demonstrate that the claimed amount was subject to a bona fide good faith dispute.

The Lien itself states that it is for work performed and materials furnished for

General Construction Services. The material furnished was listed as “sheetrock, floors, tiles, wood and paneling, paint, stain, stone, electrical wiring and finishes, partial a/c equipment, doors, hardware, customized furniture, *etc.*” [emphasis added]. Upon signing, Dione Herring, agent of LMF-RS Contracting, Inc. stated that “said labor and materials were performed and furnished for and used to the improvements of the real property hereinbefore described.” No affidavit from Herring is provided and no statement of what information went into filing the lien for \$295,000 elaborates on the conclusions contained therein. The lien simply states “The agreed price and value of the work performed was \$295,000.00. The agreed price and value of the material furnished is included in above. The agreed price and value of the material actually manufactured for but not delivered to the real property is \$n/a. the agreed price and value was \$295,000.00.”

The Kaljics demanded, pursuant to New York Lien Law §38, “a verified statement in writing setting forth the items of labor and material and the agreed price or value thereof for which you claim a mechanic’s lien as indicated by a notice of lien, dated September 12, 2012” in the amount of \$295,000. That demand was dated June 25, 2013 and required a response within five days after receipt of the demand. Plaintiff responded in detail, and purported to demonstrate with “about 250 pages of source documentation” a total due of \$258,388.20. The pages provided include monthly totals prepared by “LMF/PEDJA.” Included among these amounts were “additional items,” not materials and supplies, but rather copies of checks made payable to the landlord’s management company, Duell Management. Mr. Saveljic, in an August 2013 affidavit, states “we have determined that the amount of the lien as originally presented should have been \$258,388.20. We also have now determined that \$14,764.36 of that total actually reflected a separate potential claim against the tenant, not the building owner.”

Ultimately, by way of an attorney affirmation submitted after oral argument, dated September 23, 2013, Plaintiff concedes an “honest mistake” and “requests that the Court grant its motion and allow amendment of the pending lien *nunc pro tunc*, by reducing the lien amount from the original \$295,000.00 to \$243,623.84.”

New York Lien Law §12-a provides for amendment to an existing lien.

1. Within sixty days after the original filing, a lienor may amend his lien upon twenty days notice to existing lienors, mortgagees and the owner,

provided that no action or proceeding to enforce or cancel the mechanics' lien has been brought in the interim, where the purpose of the amendment is to reduce the amount of the lien, except the question of wilful exaggeration shall survive such amendment.

Movants point to the affidavit of Pedja Saveljic itself to show that, contrary to the lien statement of Herring that "the agreed price and value was \$295,000.00," Mr. Saveljic states that "all parties now agree that despite informal discussions, there was never any agreement of any kind between plaintiff and the tenant [the Kaljics]." The absence of an agreement alone is not determinative of whether the lien was wilfully exaggerated. However, it is the absence of any explanation for how the plaintiff arrived at this "good faith" figure of \$295,000 on the face of the lien that is most glaring. Plaintiff conclusively declares that an exhaustive detailed analysis gave light to a good faith mistake of including in the lien total amounts not for work performed and material furnished to the premises, and that the "currently presented mechanic's lien claim for \$243,623.84" is a slight revision representing more than "82% of the original estimate." Nevertheless, such "slightly revised claim" did not materialize until 11 months after the filing of the lien, after the summary proceedings resulted in the issuance of a warrant of eviction against the Kaljics for failing to release, bond or otherwise satisfy the lien on the building, and after plaintiff commenced a foreclosure action on the original lien and questions of wilful exaggeration arose.

This is not a case involving a mere inaccuracy in setting the amount of the lien. (See *Strongback Corporation v. N.E.D. Cambridge Avenue Development Corp.*, 25 AD3d 392 [1<sup>st</sup> Dept. 2006]). The lien is conclusively exaggerated, and plaintiff provides no proof in admissible form to support its conclusion that such exaggeration was an honest mistake or subject to a bona fide good faith dispute regarding work performed and material provided to the premises.

While the lien itself must be declared void pursuant to Lien Law §§ 39 and 39a, it is NOT the Order of this Court that the warrant of eviction should be stayed. After oral argument on this issue, and for the reason stated there and here, such relief is denied. The Kaljics chose their path in their dispute with their landlord. A finding of wilful exaggeration must await the trial of the foreclosure action or the motion for summary judgment, after discovery is complete, and the foreclosure action is ripe for determination. However, the Kaljics waited until June 2013, to file their demand

[\* 6]

pursuant to Lien Law § 38, which exposed the exaggerated lien. This was after entering into the January 2013 stipulation agreeing to bond or otherwise discharge the mechanics' lien by a date certain, after the issuance of the warrant of eviction, after the filing of an order to show cause in Civil Court to stay that warrant of eviction, and having taken no action to bond the lien.

Wherefore, it is hereby

ORDERED that the motion for summary judgment seeking to vacate the mechanics' lien dated September 12, 2012 filed against property located at 5 East 57<sup>th</sup> Street, in the county and state of New York for wilful exaggeration of such lien is granted and the Clerk is directed to enter judgment vacating such lien; and it is further

ORDERED that the motion for a preliminary injunction is denied; and it is further

ORDERED that plaintiff's motion (motion sequence 7) to amend the lien is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: 9/27/13

  
\_\_\_\_\_  
HON. EILEEN A. RAKOWER, J.S.C.

Check one:      FINAL DISPOSITION    X NON-FINAL DISPOSITION

Check if appropriate:     DO NOT POST     REFERENCE