Rockledge Scaffold Corp. v Tessler Dev. LLC

2013 NY Slip Op 32604(U)

October 17, 2013

Supreme Court, New York County

Docket Number: 151027/12

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

ROCKLEDGE SCAFFOLD CORP.,

Plaintiff,

-against-

INDEX NO. 151027/12

MOTION SEQ. NO. 001

TESSLER DEVELOPMENT LLC, AVENUE OF THE AMERICAS DEVELOPMENT COMPANY, LLC and JOHN DOES "1" through "10" being and intended to be those persons or entities with an interest in the real property,
Defendants.

The following papers were read on this motion and cross-motion.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Reply Affidavits — Exhibits (Memo)	

Cross-Motion: ☐ **Yes** ☐ **No**

Motion sequence 001 is consolidated with motions in two related actions for the purpose of disposition.

All the actions shall be identified as follows: *Rockledge Scaffold Corp. v Tessler Development LLC*, Supreme Court, New York County index No. 151027/2012 (herein action or Action I); *In the Matter of Avenue of the Americas Development Company LLC*, Supreme Court, New York County index No. 102583/2012 (Action II); *Rockledge Scaffold Corp. v Tessler Development LLC*, Supreme Court, New York County index No. 151663/13 (Action III). Each action has an associated motion, and the herein action has a cross-motion. The common dispute concerns alleged nonpayment for construction work at 855 Sixth Avenue a/k/a 855 Avenue of the Americas (the Property).

BACKGROUND

On March 31, 2008, Rockledge Scaffold Corp. (Rockledge) submitted a written proposal to Tessler Development LLC (Tessler), the Property's owner, to erect a temporary fence and gates on the Property for $9,425.00, plus New York City sales tax (*see* Action II, Rubin affirmation, exhibit A). 70% of the total cost was due upon completion of the initial installation. The quote anticipated that the fencing would last six months, but listed a monthly rental fee thereafter. Rockledge submits a copy of a paid invoice, dated April 23, 2008, in the amount of $7,150.04, 70% of the project quote and added tax (*id.*, exhibit B). Rockledge also submits a copy of the invoice for the balance of the installation, dated May 19, 2008, in the amount of $2,827.50, and copies of monthly rental invoices from October 16, 2008 through December 15, 2011, totaling $16,646.40, none of which indicate that they were paid (*id.*).

On November 21, 2008, Rockledge filed a mechanic's lien on the Property in the amount of $3,434.40 (2008 Lien) (Action II, Rubin Affirmation [Aff.], exhibit C). The 2008 Lien states that the work was performed from March 27, 2008 to November 20, 2008. It was evidently satisfied on November 4, 2009 (*id.*, exhibit D). Two days later, on November 6, 2009, Rockledge filed a mechanic's lien on the Property in the amount of $8,644.40 (2009 Lien) (*id.*, exhibit E). The 2009 Lien states that the work was performed from March 27, 2008 to October 27, 2009. It was evidently satisfied on October 27, 2010 (*id.*, exhibit F). Immediately, Rockledge filed another mechanic's lien on the Property in the amount of $13,870.40 (2010 Lien) (*id.*, exhibit G). The 2010 Lien states that the work was performed from March 27, 2008 to October 27, 2010. On December 20, 2011, Rockledge filed a mechanic's lien on the Property in the amount of $19,531.90 (2011 Lien) (*id.*, exhibit H). The 2011 Lien states that the work was performed from March 27, 2008 to December 27, 2011. On March 4, 2012, Rockledge filed a notice of pendency against the Property (2012 Notice) (Action II, Feitner aff, exhibit C). On December 7, 2012 Rockledge filed a mechanic's lien on the Property in the

amount of $24,757.90 (2012 Lien) (Action III, Harrington aff, exhibit C). The 2012 Lien states that the work was performed from March 27, 2008 to November 27, 2012. Subsequently, on February 11, 2013, Rockledge filed a notice of pendency against the Property (2013 Notice) (Action III, Pazzaglini aff, exhibit C).

Meanwhile, Tessler sold the Property to Avenue of the Americas Development Company, LLC (AADC) in December 2010. On March 21, 2012, Rockledge commenced the herein action, asserting causes of action for breach of contract (first), quantum meruit (second), account stated (third), and judgment on the 2011 Lien (Action I, Rubin Aff., exhibit I). On April 3, 2012, AADC commenced Action II, by order to show cause, seeking to vacate or discharge the 2011 Lien. On February 25, 2013, Rockledge commenced Action III, asserting causes of action for breach of contract (first), quantum meruit (second), account stated (third), and judgment on the 2012 Lien (Action III, Harrington aff, exhibit E).

Here, in Action I, AADC moves to consolidate with Action II, and pursuant to CPLR 3211, to dismiss the fourth cause of action (for judgment on the 2011 Lien), cancel the 2012 Notice, and other relief. Rockledge, in turn, cross-moves for leave to effect late service of the summons and complaint upon AADC, and for a default judgment against Tessler. In Action II, AADC moves to vacate and cancel the 2011 Lien, and other relief. In Action III, AADC moves to consolidate with Action I and Action II, vacate and cancel the 2012 Lien, dismiss the fourth cause of action (for judgment on the 2012 Lien), cancel the 2013 Notice, and other relief.

DISCUSSION

Tessler has apparently not appeared in any manner on any of the three actions and motions. Rockledge submits an affidavit of service on Tessler for Action I and the 2012 Notice, dated May 16, 2012 (Action I, Harrington Aff., exhibit J). Service by mail to Tessler, as a follow-up, was evidently effected on July 10, 2012 (*id.*, exhibit K). Therefore, Rockledge's cross-motion in Action I for a default judgment as against Tessler is granted, and the matter shall be

set down for a hearing on damages.

In its opposition to the motion in the herein action, Rockledge makes no mention of AADC's request to consolidate the herein action and Action II. Similarly, in its opposition to the motion in Action III, Rockledge does not address the issue of consolidation of the three actions. Therefore, the Court grants AADC's motion in Action III to consolidate the three actions for purposes of discovery and trial without opposition. AADC's motion for consolidation, in Action I, is moot as a result, and will be denied.

Remaining to be resolved are Rockledge's cross-motion in the herein action for leave to effect late service of the summons and complaint upon AADC in order to validate the 2012 Notice; AADC's motion in the herein action to cancel the 2012 Notice; AADC's motion in the herein action to dismiss the fourth cause of action (for judgment on the 2011 Lien), pursuant to CPLR 3211; AADC's motion in Action II to vacate and cancel the 2011 Lien; AADC's motion in Action III to dismiss the fourth cause of action (for judgment on the 2012 Lien); AADC's motion in Action III to vacate and cancel the 2012 Lien, and cancel the 2013 Notice. Finally, AADC moves in all three actions for payment of its legal fees and expenses, and for sanctions against Rockledge.

Rockledge's Cross-Motion

On March 12, 2012, AADC, pursuant to New York Lien Law § 59, served a notice to commence action on Rockledge (Action I, Fetner aff, exhibit F). In response, Rockledge commenced Action I on March 21, 2012, naming Tessler, AADC and John Does as defendants. According to an affidavit of service submitted by Rockledge, AADC was served with a summons, complaint and the 2012 Notice on May 16, 2012 (Action I, Harrington Aff., exhibit L). CPLR 6512 provides that a "notice of pendency is effective only if, within thirty days after filing, a summons is served upon the defendant or first publication of the summons against the defendant is made pursuant to an order and publication is subsequently completed." Further,

CPLR 6514(a) states that "upon motion of any person aggrieved and upon such notice as it may require, [the court] shall direct any county clerk to cancel a notice of pendency, if service of a summons has not been completed within the time limited by section 6512."

Since Rockledge acknowledges that service of the herein action occurred outside the 30-day window of CPLR 6512, it now cross-moves for leave to permit filing of an affidavit of service upon AADC, nunc pro tunc, to within 30 days of March 21, 2012, the filing date of the action. Rockledge claims that AADC experienced no prejudice as a result of service on May 16, 2012, less than 30 days after the date required by CPLR 6512. In support of its position Rockledge relies upon *Aquilar v Nassau Health Care Corp.* (40 AD3d 788, [2d Dept 2007]), where the Court reversed the dismissal of an action because of failure to timely serve a complaint. The Second Department held that in examining whether a plaintiff has a reasonable excuse for delay in serving the complaint and a meritorious cause of action, "a court should consider all relevant factors, including the extent of the delay, the prejudice to the opposing party, and the lack of an intent to abandon the action" (*id.* at 789).

AADC, in opposition, contends that CPLR 6514(a), unlike CPLR 3102(b), the relevant statute in *Aquilar*, does not allow such room to maneuver. The Court of Appeals considers "a litigant's ability to file a notice of pendency as an 'extraordinary' privilege because of the relative ease by which it can be obtained and its powerful effect on the alienability of real property" (*Matter of Sakow*, 97 NY2d 436, 441 [2002]). Therefore, "this court has required strict compliance with the statutory procedural requirements [of CPLR article 65]" (*id.* [internal quotation marks and citation omitted]).

> "Proper administration of the law [a predecessor of CPLR 6514(a)] by the courts requires promptness on the part of a litigant so favored and that he accept the shield which has been given him upon the terms imposed, and that he not be permitted to so use the privilege granted that it becomes a sword usable against the owner or possessor of realty. If the terms imposed are not met, the privilege is at an end" (*Israelson v Bradley*, 308 NY 511, 516 [1955]; *5303 Realty Corp. v O & Y Equity Corp.*, 64 NY2d 313, 320 [1984] ["To counterbalance the ease with

which a party may hinder another's right to transfer property, this court has required strict compliance with the statutory procedural requirements"]).

By this authority, discussions of prejudice are irrelevant. Rockledge's cross-motion for leave to permit filing of an affidavit of service upon AADC, nunc pro tunc, to within 30 days of March 21, 2012, is denied. One prong of AADC's motion in the herein action requests the cancellation of the 2012 Notice because service was not effected within the time limit of CPLR 6512; it shall be granted. Accordingly, the 2012 Notice is void, having lapsed when the herein action was not served upon AADC within 30 days of the filing of the 2012 Notice. This does not affect the status of the herein action.

AADC's Motion to Dismiss Enforcement of the 2011 Lien – Action I

AADC offers several reasons to vacate the 2011 Lien, including the allegation that Rockledge's work at the Property was temporary and not an improvement, pursuant to Lien Law § 2(4). The Lien Law applies only to improvements, defined at section 2, paragraph 4, as "the demolition, erection, alteration or repair of any structure upon, connected with, or beneath the surface of, any real property and any work done upon such property or materials furnished for its permanent improvement . . . ." Rockledge proposed to Tessler "to furnish, erect and subsequently dismantle and remove approx. 510 L.F. of 8' high plywood fence with two (2) 8' swing gates installed . . . at the above job site location." The $9,425 price for this work "includes Six (6) months lease. If the fence & gates is still required after Six (6) months a monthly lease of $400.00 will become due and payable."[1] Rockledge's subsequent invoices exactly echo these terms. A lien may be applied to "the reasonable rental value for the period of actual use of machinery, tools and equipment" used on an appropriate improvement project (Lien Law § 2[4]).

New York courts have examined the permanency of fixtures and machinery installed on

[1] "Six (6)" was inserted by hand to replace "three (3)" originally printed.

real property many times over decades (*see Wahle-Phillips Co. v Fitzgerald*, 225 NY 137, 141 [1919] [lighting fixtures – permanent]; *Trystate Mech., Inc. v Macy's Retail Holdings, Inc.*, 94 AD3d 1097 [2d Dept 2012] [electrical power and thermal energy equipment – not permanent]; *Matter of New York State Urban Dev. Corp. v Nawam Entertainment, Inc.*, 57 AD3d 249 [1st Dept 2008] [video booths – not permanent]; *Monroe Sav. Bank v First Natl. Bank of Waterloo*, 50 AD2d 314 [4th Dept 1976] [household appliances – permanent]; *Spitz v Brooks & Son, Inc.*, 210 AD 438 [1st Dept 1924] [window shades – not permanent]). The Court of Appeals has determined that a required "element [of permanency] is an intention that attachment be permanent, requiring an objective interpretation of the installer's intention at the time of attachment. Even if the machinery could be removed, the critical factor was whether its installation was intended to be permanent" *Matter of City of New York (Kaiser Woodcraft Corp.)*, 11 NY3d 353, 360 [2008]).

In the context of the Lien Law, several opinions offer relevant guidance on the meaning of permanency. When a company contracted to maintain the vegetation around and near electric utility lines and poles on various easements, "the fact remains that the alleged improvement was not intended to be permanent" (*Chase Lincoln First Bank v New York State Elec. & Gas Corp.*, 182 AD2d 906, 907 [3d Dept 1992]). When a company provided security guard services at a building site, a sister trial court rejected its lien, because "the security guard services do not leave a lasting imprint on the character of the realty. They do not impact on the realty or structure directly, but, rather, are auxiliary, and one step removed from the actual demolition or construction" (*270 Greenwich St. Assoc. LLC v Patrol & Guard Enters., Inc.*, 2010 NY Slip Op 31667[U], *6 [Sup Ct, NY County 2010]). Where the labor performed by the respondent consisted of mowing, trimming, pruning and spraying plant life on the property and in edging, weeding and raking the lawn, gardens, grounds and driveways, "the services performed by the respondent herein cannot be construed to affect a lasting or continuing

change in the character of the property" (*Application of Magowan*, 203 NYS2d 35, 38 [Sup Ct, Suffolk County 1960]).

In one significant instance, a mechanic's lien was found proper by the Court of Appeals where

> "the work and material for maintaining a temporary pavement in the public streets and the protection and maintenance for public use of water mains, gas pipes, electric subways, poles, wires, vaults, etc., for all of which special provision in detail is included in the contract with the city of New York. The maintenance of the temporary pavements, mains, pipes, wires, vaults, etc., are public improvements within the contract made by the construction company with the city as much as the rapid transit railroad which is the ultimate end and purpose of the contract" (*Gates & Co. v Stevens Constr. Co.*, 220 NY 38, 48 [1917]).

Unlike the instant matter, however, those temporary steps were necessary and integral parts of a larger project. While the plywood fence may have protected the Property, it is no more a permanent improvement than the security guard services (*270 Greenwich St. Assoc. LLC v Patrol & Guard Enters., Inc.*, 2010 NY Slip Op 31667[U], *6 [Sup Ct, NY County 2010], *supra*).

Rockledge's proposal is premised on the temporary character of the fencing to be installed and "subsequently dismantle[d]." While there is no termination date on the agreement between Rockledge and Tessler, as the rental payments only have a start date, the arrangement is ultimately a temporary one. The intention, as expressed by Rockledge, was for a temporary installation. The fact that the fencing remains in place does not make it permanent, under New York law. Rockledge's opposition to AADC's motion in the herein action focuses on the accuracy and timing of the mechanic's lien, not the underlying subject matter. Assuming the document itself to have been flawless and timely, Rockledge's work on the Property was not subject to a mechanic's lien.

Under CPLR 3211(a)(7), the court will "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d

83, 87-88 [1994]). Here, Rockledge's claim to have a viable mechanic's lien against the Property does not comport with New York law. AADC's motion in the herein action to dismiss the fourth cause of action (for judgment on the 2011 Lien), pursuant to CPLR 3211, is granted.

AADC's Motion to Vacate the 2011 Lien – Action II

In Action II, AADC moves to vacate and cancel the 2011 Lien. As discussed above, Rockledge's work for Tessler was temporary in character and fails to meet the Lien Law's restriction to "any work done upon such property or materials furnished for its permanent improvement." It is appropriate, therefore, not merely to dismiss the fourth cause of action in Action I, which calls for enforcement of the 2011 Lien, but to vacate the 2011 Lien itself, because it attempts to be a security for work not covered by the Lien Law. AADC's motion to vacate the 2011 Lien is granted.

AADC's Motion to Vacate the 2012 Lien – Action III

In Action III, AADC moves to vacate and cancel the 2012 Lien, dismiss the fourth cause of action (for judgment on the 2012 Lien), and cancel the 2013 Notice. The 2012 Lien differs from the 2011 Lien only by extending the rental period for the materials installed at the Property from December 27, 2011 to November 27, 2012. As set forth above, Rockledge's work did not involve a permanent improvement to the Property, and was not subject to a mechanic's lien. AADC's motion in Action III is, therefore, granted in its entirety. The 2012 Lien is vacated, the cause of action to enforce the 2012 lien is dismissed, and the 2013 Notice is cancelled.

AADC's Motions for Sanctions and Damages

AADC requests, in its motion for Action I, legal fees and expenses, pursuant to CPLR 6514(c), and sanctions, pursuant to Section 130-1.1(a) of the Rules of the Chief Administrator (22 NYCRR § 130-1.2) (Rule 130); in its motion for Action II, legal fees, pursuant to Rule 130; in its motion for Action III, legal fees and expenses, pursuant to CPLR 6514(c), and sanctions,

pursuant to Rule 130.

CPLR 6514(c) provides that the court, "in an order cancelling a notice of pendency under this section, may direct the plaintiff to pay any costs and expenses occasioned by the filing and cancellation, in addition to any costs of the action." This is at the court's discretion, however, this court declines to award AADC costs and expenses in the instant matters (*see Shkolnik v Krutoy*, 65 AD3d 1214, 1216 [2d Dept 2009] ["The court did not improvidently exercise its discretion in denying that branch of the motion . . . for an award, pursuant to CPLR 6514(c), of costs and expenses incurred as a result of the plaintiff's filing of a notice of pendency, notwithstanding that the notice of pendency itself was subsequently cancelled as having been wrongfully filed"]).

Rule 130 allows the court to award costs or impose sanctions upon a written finding of frivolous conduct, that is, "completely without merit in law." AADC's motions for legal fees and expenses, and/or sanctions are denied. "Generally, the imposition of sanctions involves a more persistent pattern of repetitive or meritless motions" than found here (*Sarkar v Pathak*, 67 AD3d 606, 607 [1st Dept 2009]).

Accordingly, it is

ORDERED that Rockledge Scaffold Corp.'s cross-motion in Action I for a default judgment as against Tessler Development LLC is granted without opposition and based on defendant's failure to appear, answer or move with respect to the Summons and Complaint; and it is further,

ORDERED that Rockledge Scaffold Corp. shall file the Note of Issue on or before November 22, 2013, and upon that filing the Clerk shall set a date upon which an inquest will be held assessing damages against the defaulting defendant and entering judgment in accordance therewith; and it is further,

ORDERED that Rockledge Scaffold Corp. shall serve a copy of this Order with Notice of

Entry and Notice of Inquest upon all parties, the County Clerk, and the Clerk of the Trial Support Office within 45 days of entry; and it is further,

ORDERED that Avenue of the Americas Development Company, LLC's motion in Action III to consolidate Action I, Action II and Action III is granted to the extent that they will be consolidated for discovery and trial; and it is further,

ORDERED that Rockledge Scaffold Corp.'s cross-motion in Action I for leave to permit filing of an affidavit of service upon AADC, nunc pro tunc, to within 30 days of March 21, 2012, is denied; and it is further,

ORDERED that Avenue of the Americas Development Company, LLC's motion in Action I to cancel the notice of pendency, filed on March 4, 2012, is granted, and the New York County Clerk is directed to mark his records accordingly upon service of a copy of this order with notice of entry; and it is further,

ORDERED that Avenue of the Americas Development Company, LLC's motion in Action II to vacate the mechanic's lien in the amount of $19,531.90, filed on December 20, 2011, is granted, and the mechanic's lien in the amount of $19,531.90, filed on December 20, 2011 is vacated, and the New York County Clerk is directed to mark his records accordingly upon service of a copy of this order with notice of entry; and it is further,

ORDERED that Avenue of the Americas Development Company, LLC's motion in Action III to vacate the mechanic's lien in the amount of $24,757.90, filed on December 7, 2012, is granted, and the mechanic's lien in the amount of $24,757.90, filed on December 7, 2012, is vacated, and the New York County Clerk is directed to mark his records accordingly upon service of a copy of this order with notice of entry; and it is further,

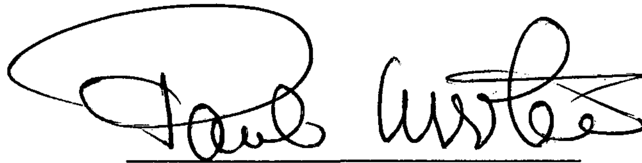
ORDERED that Avenue of the Americas Development Company, LLC's motion in Action III to dismiss the fourth cause of action (for judgment of the 2012 Lien) is granted; and it is further,

ORDERED that Avenue of the Americas Development Company, LLC's motion in Action III to cancel the notice of pendency, filed on February 11, 2013, is granted, and the New York County Clerk is directed to mark his records accordingly upon service of a copy of this order with notice of entry; and it is further,

ORDERED that Avenue of the Americas Development Company, LLC's motions in Actions I, II and III for the award of legal fees and expenses, and/or sanctions, pursuant to CPLR 6514(c) and 22 NYCRR § 130-1.2, are denied.

This constitutes the Decision and Order of the Court.

Dated: Oct. 17, 2013



Paul Wooten J.S.C.

Check one: ☐ **FINAL DISPOSITION** ☒ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST**