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

Present: Hon. Shlomo S. Hagler *Justice* **IAS Part:** 17

MAVERICK CONSTRUCTION SERVICES LLC,

Plaintiff,

- against -

INDEX NO.: 102962/2011

ALEX DEMBITZER, ROSA ABRAMOWITZ DEMBITZER, RIVER 52 LLC, JACQUELINE FRIED, SAN-DAR ASSOCIATES, and "JOHN DOES" numbers 1 through 5

MOTION SEQ. NO.: 002

Defendants,

and

MEK ENTERPRISES, LTD.,

DECISION and ORDER

Additional Defendant on the Counterclaims.

Motion by defendants Alex Dembitzer, Rosa Abramowitz Dembitzer, Jacqueline Fried, and River 52 LLC for summary judgment dismissing the complaint or, alternatively, for a protective order.

Cross-Motion: ☐ No ☑ Yes **Number of Cross-Motions:** 1

Cross-Motion by plaintiff to reserve sanctions against moving defendants for engaging in frivolous motion practice and for leave to amend the Summons and Complaint.

Upon the submitted papers listed on page 2 and the oral arguments heard by this Court, it is hereby ordered that defendants' motion is denied in full and plaintiff's cross-motion is granted in part and denied in part as set forth in the attached separate written Decision and Order.

Dated: May 28, 2014
New York, New York

Hon. Shlomo S. Hagler, J.S.C.

Check one:	☐ **Final Disposition**		☑ **Non-Final Disposition**	
Motion is:	☐ Granted	☑ Denied	☐ Granted in Part	☐ Other
Cross -Motion is:	☐ Granted	☐ Denied	☑ Granted in Part	☐ Other
Check if Appropriate:	☐ SETTLE ORDER		☐ SUBMIT ORDER	
	☐ DO NOT POST		☐ REFERENCE	

(continued on page 2)

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DECISION and ORDER

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(continued from first page)

The following papers were submitted and considered upon this motion and cross-motion:

	Papers Numbered
Stipulation Dated July 30, 2013 to Amend the Pleadings to Add Maverick LLC as Plaintiff	1
Notice of Motion by Defendants River 52 LLC, Alex Dembitzer, Rosa Abromowitz Dembitzer, and Jacqueline Fried, for Summary Judgment Dismissing the Complaint and the Mechanic's Lien and Notice of Pendency or, Alternatively, for a Protective Order	2
Affirmation of Defendants' Counsel Andrew Weltchek, Esq., in Support of Defendants' Motion with Exhibits 1 through 16	3
Affirmation of Joseph N. Paykin, Esq., in Support of Defendants' Motion	4
Defendants Memorandum of Law in Support of Defendants' Motion	5
Plaintiff's Notice of Cross-Motion Reserving Sanctions Pursuant to NYCCR § 130-1.1 and for Leave to Amend the Summons and Complaint	6
Affidavit of Michael Kadoe in Opposition to Defendants' Motion with Exhibits "A" through "D"	7
Affirmation of Plaintiff's Counsel Eve Y. Searls, Esq. in Support of Plaintiff's Cross-Motion and in Opposition to Defendants' Motion with Exhibits "A" through "H"	8
Plaintiff's Memorandum of Law in Support of Plaintiff's Cross-Motion and in Opposition to Defendants' Motion	9
Affirmation of Additional Defendant on the Counterclaims MKE's Counsel Andrew Borsen, Esq. in Opposition to Defendants' Motion with Exhibit "A"	10
Defendants' Reply Memorandum of Law in Further Support of Defendants' Motion and in Opposition to Plaintiff's Cross-Motion	11
Affirmation of Defendants' Counsel Andrew Weltchek, Esq., Dated December 13, 2012	12
Affidavit of Lorenzo Cesare, dated December 13, 2012	13
Affirmation of Plaintiff's Counsel Eve Y. Searls, Esq., in Reply to Plaintiff's Cross-Motion with Exhibit "A"	14
Transcript of Oral Argument of February 25, 2013	15

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 17

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MAVERICK CONSTRUCTION SERVICES LLC,

Plaintiff,

- against -

ALEX DEMBITZER, ROSA ABRAMOWITZ DEMBITZER, RIVER 52 LLC, JACQUELINE FRIED, SAN-DAR ASSOCIATES, and "JOHN DOES" numbers 1 through 5

Defendants,

and

MEK ENTERPRISES, LTD.,

Additional Defendant on the Counterclaims.

----------X

Index No.: 102962/2011

Motion Sequence No.: 002

DECISION & ORDER

HON. SHLOMO S. HAGLER, J.S.C.:

Defendants Alex Dembitzer, Rosa Abramowitz Dembitzer ("Rosa Dembitzer"), Jacqueline Fried ("Fried"), (collectively "the Dembitzer Family defendants") and River 52 LLC ("River 52") (collectively "defendants")[1] move under motion sequence number 002 for summary judgment dismissing the complaint, the Notice of Pendency and the Mechanic's Lien, or for a protective order. Plaintiff Maverick Construction Services LLC ("Maverick" or "plaintiff") cross-moves reserving sanctions against these defendants for engaging in frivolous motion practice and for leave to amend the Summons and Complaint. Both the motion and cross-motion are consolidated herein for disposition.

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1. Defendants San-Dar and "John Does" 1 through 5, have not joined in this motion and are therefore not referenced or referred to as "defendants" in this decision and order unless specifically named.

FACTUAL BACKGROUND

This action relates to a mechanic's lien regarding construction work at 425 East 52nd Street, New York, New York 10022, also described as Block 1364, Lot 14 ("the Premises"). On or about August 21, 2009, defendant Fried was the owner in fee simple of the Premises. (Amended Verified Complaint at ¶ 7; Verified Answer of defendants at ¶ 7.) On or about September 25, 2009, defendant Fried conveyed ownership of the Premises to defendant River 52. (Amended Verified Complaint at ¶ 9; Verified Answer of Defendants at ¶ 9; Exhibit 3 to the Notice of Motion and Affirmation of Defendants' Counsel Andrew Weltchek, dated October 14, 2012 ["Weltchek Aff."]; Exhibit "A" to the Affirmation of Plaintiff's Counsel Eve Y. Searls, Esq., dated November 21, 2012, in Support of Plaintiff's Opposition to Defendants' Motion ["Searls Aff."].) Beginning on or about September 25, 2009, and for all times thereafter relevant to this action, River 52 was the owner of record of the Premises. (Amended Verified Complaint at ¶ 10; Verified Answer of defendants at ¶ 10; Weltchek Aff. at ¶ 5.) Defendant Alex Dembitzer is a member of defendant River 52. (Amended Verified Complaint at ¶ 12; Verified Answer of defendants at ¶ 12.) Defendant Fried, the prior owner of the premises, is the mother of Alex Dembitzer, and Rosa Dembitzer is the wife of Alex Dembitzer. (Weltchek Aff. at ¶ 5.) Plaintiff alleges that the Premises is a residence of defendants Alex Dembitzer, Rosa Dembitzer and Fried.

In the summer of 2009, additional defendant on the counterclaims M.E.K. Enterprises, Ltd. ("MEK"), submitted proposals to Alex Dembitzer to perform construction renovations at the Premises. (Exhibit 2 to the Notice of Motion and Weltcheck Aff. at ¶ 6; Affidavit of Michael

Kadoe[2] dated November 14, 2012, in support of plaintiff's opposition to defendants' motion for summary judgment ["Kadoe Aff."], at ¶ 4.) Although a contract was never signed between MEK and any of the defendants, MEK began work on the premises sometime in August or September of 2009. (Weltchek Aff. at ¶ 7; Kadoe Aff. at ¶ 11.)

Kadoe, on behalf of MEK, alleges that he understood that the Dembitzer Family defendants were in charge of the renovations to the Premises and dealt with various members of the Dembitzer family, primarily Alex Dembitzer. Kadoe, on behalf of MEK, alleges that the Dembitzer Family defendants requested various change orders which resulting in additional construction costs and charges.

MEK performed work at the Premises through the beginning of April 2010. The plaintiff and MEK disagree with defendants as to which party was responsible for the termination of the work and the reasons for that termination. In addition, the parties disagree as to the amount of work which was complete and the amounts due for the completed work. Defendants also allege that MEK, through Kadoe, executed various lien releases upon defendants' payments during the period of construction. Plaintiff and MEK claim that while MEK, through Kadoe, executed some lien releases, they did not represent full payments for the work that was done and also allege that several of the lien releases defendants submitted as proof in their motion were forged and were not signed by Kadoe or another agent of MEK.

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2. In his affidavit, Michael Kadoe states that he is the president of MEK. However, the New York State Department of State Division of Corporations' database lists the chairman or chief executive officer of M.E.K. Enterprises, Ltd. as Michael Kadog. (Exhibit 16 to the Notice of Motion and Weltcheck Aff. at ¶ 37.) In addition, as various documents show, Michael Kadoe has also been known as Michael Kadosh. (Exhibits 6 and 7 to the Notice of Motion and Weltcheck Aff. at ¶¶ 39 through 45.)

On or about June 21, 2010, MEK filed a Notice of Mechanic's Lien against the Premises in the amount of $463,727.00 which it claimed was the difference between $828,627.00, the total agreed upon price and value of the work, labor and material it supplied, and the sum of $365,000.00 which defendants paid.[3] The Notice of Mechanic's Lien was verified by MEK's attorney at the time, Matthew T. Worner, Esq., based on his knowledge gathered from the books and records of MEK as well as conversations with MEK officers and/or employees.

MEK originally filed this action to foreclose on its lien by summons and verified complaint on or about March 10, 2011. The Dembitzer Family defendants and River 52 filed their verified answer with affirmative defenses and counterclaims on or about May 19, 2011. On or about August 26, 2011, MEK mailed its unverified answer to the defendants' counterclaims, to which the defendants responded by letter dated September 1, 2011, rejecting MEK's answer to the counterclaims as being untimely and unverified.

On or about March 20, 2012, Matthew T. Worner, Esq., moved by Order to Show Cause to be relieved as counsel for MEK, which was granted by the Court's order dated May 7, 2012 and entered on May 11, 2012. Also on or about May 7, 2012, MEK assigned its mechanic's lien to Maverick, which was substituted as the plaintiff in this action by stipulation executed by counsel for all the parties at September 2012 and filed with the court on October 1, 2012. (Exhibit 14 to the Notice of Motion.)

In this motion, defendants have moved for summary judgment dismissing the complaint on the grounds that the mechanic's lien was willfully exaggerated.

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3. In fact, when the amount MEK alleges was paid by the defendants ($365,000.00) is subtracted from the amount MEK claims for the work, labor and materials it provided ($828,627.00), the balance totals $463,627.00, or $100.00 less than the lien amount.

DISCUSSION

Unverified and Untimely Answer to Defendant's Counterclaims Resulting in a Request for a Default Judgment on the Counterclaims

Defendants rejected MEK's general denial Answer to Counterclaims, dated August 26, 2011 and received on August 30, 2011, as untimely and unverified by letter dated September 1, 2011. (Exhibits 11 and 12 to the Notice of Motion and Weltcheck Aff. at ¶ 31). As a result, defendants seek to strike MEK's Answer to the Counterclaims and seek a default judgment against MEK on their Counterclaims.

As noted by Professor David Siegel, since the verification provisions are part of the pleadings article, a defective or missing verification is subject to CPLR § 3026, which mandates disregarding all pleading defects if no substantial right is prejudiced. (Siegel, NY Prac § 235 [5th ed]. *See also* CPLR § 2101[f].) Defendants have not presented any claim or argument that MEK's unverified and late Answer to defendants' counterclaims resulted in any substantial right of theirs being prejudiced. Furthermore, MEK has rectified its unverified answer to defendants' counterclaims by submitting a corrective verification by Kadoe, which was submitted as Exhibit "A" to the Affirmation of Andrew Borsen, Esq., dated November 21, 2012, in Opposition to Defendants' Motion. As such, defendants' application for a default judgment against MEK on the defendants' counterclaims is denied.

Summary Judgment

The Court of Appeals in *Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 441 (1968) set forth the standard for granting summary judgment as follows:

> To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented. (*Di Menna & Sons v City of New York*, 301 NY 118, 92 NE2d 918.) This drastic remedy should not be granted where there is any doubt as to the existence of such issues, or where the issue is 'arguable' [sic]. (*Barrett v Jacobs*, 255 NY 520, 522, 175 NE 275.) The court may not weigh the credibility of the affiants on a motion for summary judgment unless it clearly appears that the issues are not genuine, but feigned. (*Curry v Mackenzie*, 239 NY 267, 269-270, 146 NE 375, 376.)

The First Department in *Broadway 111th Street Associates v Morris*, 160 AD2d 182, 184-85 (1st Dept 1990) emphasized that:

> [A]s repeatedly held, the remedy of summary judgment is a drastic one which should not be granted where there is any doubt as to the existence of a triable issue (*Moskowitz v Garlock*, 23 A.D.2d 943, 944) or where the issue is even arguable (*Barrett v Jacobs*, 255 N.Y. 520, 522), since it serves to deprive a party of his [or her] day in court. Relief should be granted only where no genuine, triable issue of fact exists (see *Werfel v Zivnostenska Banka*, 287 N.Y. 91).

In addition, the movant has the initial burden of proving entitlement to summary judgment. As the Court of Appeals in *Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 853 (1985) held:

> The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*see Zuckerman v City of New York*, 49 N.Y.2d 557, 562; *Sillman v Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Matter of Redemption Church of Christ v Williams*, 84 A.D.2d 648, 649; *Greenberg v Manlon Realty*, 43 A.D.2d 968, 969).

If this showing is made, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial (CPLR § 3212[b]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]; *Freedman v Chemical Construction Corp.*, 43 NY2d 260, 401 NYS2d 176 [1977];

Spearmon v Times Square Stores Corp., 96 AD2d 552 [2d Dept 1983]). "It is incumbent upon a [litigant] who opposes a motion for summary judgment to assemble, lay bare and reveal [his, her, or its] proof, in order to show that the matters set up in [the] answer are real and are capable of being established upon a trial." (*Spearmon*, 96 AD2d at 553 [quoting *Di Sabato v Soffes*, 9 AD2d 297, 301 (1st Dept 1959)]). If the opposing party fails to submit evidentiary facts to controvert the facts set forth in the movant's papers, the movant's facts may be deemed admitted and summary judgment granted since no triable issue of fact exists (*Kuehne & Nagel, Inc. v F.W. Baiden*, 36 NY2d 539 [1975]).

"The court may not weigh the credibility of the affiants on a motion for summary judgment unless it clearly appears that the issues are not genuine, but feigned" (*Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d at 439 [citing *Curry v Mackenzie*, 239 NY 267, 269-270]; *See also Dell v Turner Const. Co.*, 299 AD2d 293 [1st Dept 2002]; *Alvarez v New York City Hous. Auth.*, 295 AD2d 225 [2002]).

Dismissal of Complaint and the Mechanic's Lien for Willful Exaggeration

Defendants move to dismiss the complaint on the ground that MEK's mechanic's lien (which has been assigned to Maverick) was willfully exaggerated. In support of their argument, defendants present documents produced in discovery by MEK, including invoices and records of payments (Exhibit 6 to the Notice of Motion) which it argues show that the amount due for the work MEK completed was overstated and that the amounts paid by the defendants was understated. Maverick and MEK assert that they sincerely believed that the amounts claimed in the mechanic's lien was

correct and that the defendants misrepresent the amount of work which MEK actually completed. (Kadoe Aff., at ¶¶ 26-29.)

The issue of whether a lien was willfully or fraudulently exaggerated is normally an question of fact that must be determined at trial and not on a motion for summary judgment (*On the Level Enter., Inc. v 49 East Houston LLC*, 104 AD3d 500, 500 [1st Dept 2013]; *Aaron v Great Bay Contr., Inc.*, 290 AD2d 326, 326 [1st Dept 2002]; *Executive Towers at Lido, LLC v Metro Constr. Servs.*, 303 AD2d 545, 545-546 [2d Dept 2003]; *Coppola Gen. Constr. Corp. v Noble House Constr. of N.Y., Inc.*, 224 AD2d 856, 857 [3d Dept 1996]). Inaccuracies or improper charges in the amount claimed in a mechanic's lien alone are insufficient to void the lien; a willful or fraudulent exaggeration is required (*Goodman v Del-Sa-Co Foods, Inc.*, 15 NY2d 191,194 [1965]; *Fidelity N.Y. v Kensington-Johnson Corp.*, 234 AD2d 263, 263 [2d Dept 1996]; *East Hills Metro, Inc. v J.M. Dennis Constr. Corp.*, 277 AD2d 348, 348 [2d Dept 2000]; *Minelli Constr. Co., Inc. v Arben Corp.*, 1 AD3d 580, 581; *Park Place Carpentry & Builders, Inc. v DiVito*, 74 AD3d 928, 929 [2d Dept 2010]; *On the Level Enter., Inc.*, 194 AD3d at 501). Furthermore, the burden is upon the party claiming the willful exaggeration to prove it (*Goodman v Del-Sa-Co Foods, Inc.*, 15 NY2d at 194; *Fidelity N.Y.*, 234 AD2d at 263; *Minelli Constr. Co., Inc.*, 1 AD3d at 581).

In the action at bar, defendants point to certain inaccuracies in the lien amount claimed by MEK based on invoices, payment records and other documents. Kadoe, on behalf of MEK, denies any willful exaggeration, averring that he genuinely believed that the amounts claimed in the lien were accurate and disputes the amount of work completed. While defendants allege that charges billed by MEK a few days after work at the Premises ceased were improper, Kadoe argues that such

charges reflect work that was completed either prior to the termination of the work or for materials provided or purchased but which were not paid for prior to the end of the work.

As noted above, the burden here is on the defendants to prove that there was a willful exaggeration of the lien amount by MEK. Defendants have failed to meet that burden.[4] Instead there seems to be a dispute as the amount of work and materials provided by MEK and the amount of payments made by the defendants. Such a dispute creates an issue of fact to be resolved at a trial (*Aaron v Great Bay Contr., Inc.*, 290 AD2d at 326).

The cases cited by defendants in support of their entitlement to summary judgment, are not applicable to this case. In *Strongback Corp. v N.E.D. Cambridge Ave. Dev. Corp.*, 25 AD3d 392 [1st Dept 2006], the Appellate Division held that the contractor's lien should be discharged for willful exaggeration. However, in that case the contractor had filed a lien for nearly twice the amount of work completed and failed to provide a proper affidavit disputing defendant's documentary evidence, thus effectively conceding that the lien was willfully exaggerated and not a mere inaccuracy or honest mistake. In *Inter Metal Fabricators, Inc. v HRH Constr. LLC*, 94 AD3d 529 (1st Dept 2012) and *Northe Group , Inc. v Spread NYC LLC*, 88 AD3d 557 (1st Dept 2011), the submitted documentary evidence conclusively demonstrated that the liens in those cases were willfully exaggerated. Even in *Rosenbaum v Atlas & Design Contractors, Inc.*, 66 AD3d 576 [1st Dept 2009], which defendants cited, while the First Department upheld the trial court's determination that the value of the services provided in question was willfully exaggerated rather than an honest mistake,

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4. In the Defendants' Reply Memorandum of Law in Support of Motion for Summary Judgment or Protective Order and in Opposition to Plaintiff's Cross-Motion ("Defendants' Reply Mem of Law") at pages 3-4, defendants seem to attempt to shift the burden to Maverick and MEK to show that the mistakes alleged in the lien amount were not willful rather than merely inaccurate. However, that burden of proof rests on the defendants as proponents of the motion.

it was noted that the trial court's determination was made after a non-jury trial and that such a determination was "credibility-based." However, on a summary judgment motion, the court is not permitted to make such credibility determinations (*Ferrante v American Lung Assn.*, 90 NY2d 623, 631 [1997]; *Psihogios v Stavropoulos*, 269 AD2 295, 296 [1st Dept 2000]).

In the case at bar, not only have Maverick and MEK provided a proper affidavit from Kadoe raising an issue of fact regarding whether any incorrect amount requested in the lien was willfully exaggerated and dispute the figures alleged by the defendants, but this Court's examination of the documentary evidence presented show conflicting amounts in different documents for the work and materials provided by MEK and payments made by the defendants. This raises questions of fact rather than conclusive proof of willful or fraudulent exaggeration. Furthermore, the amount in dispute is less than $50,000.00 for a project whose total cost was to be approximately $1.5 million dollars and the completed work which Maverick and MEK allege was worth over $800,000 and which defendants allege was only worth approximately $675,000, a disputed amount of approximately five percent (5%) of the total project cost and fifteen percent (15%) of the completed work. Therefore, defendants have not met their burden to conclusively demonstrate that Maverick and MEK willfully exaggerated the amount of the lien.

Purported Releases and Waivers of Lien

Another issue presented by defendants is the purported releases and waivers of liens allegedly signed by Kadoe on behalf of MEK. Defendants presented nine (9) such releases and waivers of liens and argue that such releases provide proof of MEK's willful exaggeration of the lien amount (Exhibit 5 to the Notice of Motion). Kadoe claims that he did not sign the releases (Kadoe Aff. at

¶ 23). In opposition to Kadoe's claims, defendants present the affidavit of Lorenzo Cesare ("Cesare"), director of finance for Sky Management Services, LLC which provides property management services for the Premises and River 52 and did so during the time MEK performed the work at the Premises ("Cesare Aff."). Cesare claims that he observed Kadoe sign all of the releases attached as Exhibit 5 to the Notice of Motion (Cesare Aff. at ¶¶ 3, 6 and 7). Furthermore, defendants attached three (3) such releases provided by MEK in discovery as attachments to Cesare Aff. as Exhibit 17. However even a cursory examination of the three releases produced by MEK and attached to the Cesare Aff. as Exhibit 17 with the same dated releases attached as Exhibit 5 to the Notice of Motion show that the signatures are markedly different. Furthermore, a number of the releases attached as Exhibit 5 to the Notice of Motion, seem to be reproductions rather than original signatures. These inconsistencies create questions of fact as to the legitimacy of at least some of the releases and waivers of lien submitted by defendants and challenged by Kadoe. While a court may make a handwriting comparison pursuant to CPLR § 4536, such a comparison "is not appropriate on a motion for summary judgment, but, rather, gives rise to an issue of fact" (*Dyckman v Barrett*, 187 AD2d 553, 555 [2d Dept 1992]; *Seoulbank N.Y. Agency v D & J Export & Import Corp.*, 270 AD2d 193, 194 [1st Dept 2000]. *Cf. James v Albank*, 307 AD2d 1024, 1025 [2d Dept 2003]).

Challenge to the Verification of the Lien and Complaint

Defendants also allege that the verification of the mechanic's lien and the complaint by MEK's prior attorney Matthew T. Worner, Esq. ("Worner") was invalid, alleging that Worner lacked personal knowledge of the facts and circumstance underlying the lien and complaint. The basis for defendants' allegation is that Worner moved to be discharged as counsel for MEK during

discovery because of problems he was encountering in obtaining information from MEK and Kadoe to properly respond to defendants' discovery demands. In opposition, Kadoe avers that he supplied Worner with the relevant facts and circumstances and provided Worner with the necessary books and records to prepare the lien and complaint (Kadoe Aff. at ¶ 26).. Thus, Worner's verification of the lien and complaint was proper and valid. Any issues which arose between MEK and Worner later during discovery does not invalidate Worner's previous verifications.

Dismissal of Complaint Against Dembitzer Defendants

Defendants argue in their memorandum of law that summary judgment should be granted to the Dembitzer Family defendants on the ground that they are not the owners of the Premises and the only agreement that could have existed would have been between MEK and River 52 as owner of the Premises. However, Alex Dembitzer has admitted that he is a member of River 52 LLC, and Maverick and MEK have presented evidence that all of the Dembitzer Family defendants, and especially Alex Dembitzer were actively participating in the direction of the work performed by MEK as reflected in Exhibits "B" and "C" to the Kadoe Aff. Furthermore, Maverick and MEK have alleged that the Premises was meant to serve and does serve as a residence for the Dembitzer Family defendants. While defendants argue that the Dembitzer Family defendants are citizens and residents of the State of Israel, they have not denied that they also reside at the Premises or submitted any affidavits or other evidence that they do not reside at the Premises for certain periods of time. Since there is no written contract between MEK and the owner of the Premises, it is arguably a question of fact as to whom the work at the Premises was being provided or the role the Dembitzer Family defendants had on this project or in River 52.

Branch of Defendants' Motion for a Protective Order

Defendant's have alternately moved for a protective order cancelling plaintiff's notices for depositions of the Dembitzer Family defendants on the ground that they do not own the Premises where the work was done and that, as citizens and residents of Israel, such depositions would create a hardship for them (Defendants' Memorandum of Law in Support of Defendants' Motion at page 8). As discussed above, there are issues of fact regarding the role of the Dembitzer Family defendants in the work MEK performed at the Premises. Furthermore, defendants have not submitted any affidavits or other evidence that they do not spend time in the New York area at any time or to support the claim that their appearing for depositions would create a hardship for them. Therefore, the portion of defendants' motion for a protective order is denied at this time without prejudice.

Branch of Cross-Motion by Plaintiff Reserving Sanctions Against Defendants Pursuant to NYCCR § 131-1.1

Plaintiff has cross-moved "reserving sanctions" against defendants for frivolous motion practice pursuant to NYCCR 131-1.1. This Court is not aware of the availability of such a motion "reserving" sanctions; either a party makes a motion for sanctions pursuant to NYCCR 131-1.1 or does not. Therefore, plaintiff's cross-motion is denied. In any event, such a cross-motion is further denied as there are legitimate issues of fact and law raised by defendants' motion and plaintiff's opposition, which makes a cross-motion for sanctions inappropriate.

Branch of Cross-Motion by Plaintiff for Leave to Amend the Summons and Complaint

Plaintiff has also cross-moved for leave to amend the Summons and Complaint, a copy of which was attached as Exhibit "H" to the Searls Aff. The primary purpose of the proposed amended

complaint is to add causes of action related to plaintiff's allegations regarding the releases and waivers of lien which defendants raised in their motion. CPLR § 3025(b) provides that leave to amend a pleading or supplement it by setting forth additional causes of action "shall be freely given upon such terms as may be just . . ." Thus it is within the court's discretion to grant or deny such a motion to amend, unless prejudice or surprise ensues (*McCaskey, Davies and Assocs. v New York City Health & Hosps. Corp.*, 59 NY2d 755, 757 [1983]). Here, defendants have not raised any claims of prejudice or surprise. The only objection raised by defendants in the Defendants' Reply Memo of Law is that plaintiff's amended complaint's causes of action have no merit. Although lack of merit is a valid ground for denying leave to amend the complaint, that argument fails here. As discussed above, there are real and legitimate questions regarding the validity and genuineness of the releases and waivers of lien sufficient to sustain the causes of action added in the proposed amended complaint. Accordingly, that portion of plaintiff's cross-motion for leave to serve and file the proposed amended summons and complaint is granted.

CONCLUSION

Accordingly, based upon the forgoing, it is hereby

ORDERED that the motion for summary judgment or for a protective order staying further discovery by defendants Alex Dembitzer, Rosa Abramowitz Dembitzer, Jacqueline Fried, and River 52 LLC is hereby denied, and it is further,

ORDERED that the portion of the cross-motion by plaintiff Maverick Construction Services, Inc. to reserve sanctions against the defendants is denied, and it is further

ORDERED that the portion of the cross-motion by plaintiff Maverick Construction Services, Inc. for leave to serve and file an amended summons and complaint is hereby granted.

The foregoing constitutes the decision and order of this Court.

ENTER:

Dated: May 28, 2014
New York, New York

Hon. Shlomo S. Hagler, J.S.C.