Timber Solutions, LLC v Rigas
2015 NY Slip Op 31490(U)
August 10, 2015
Supreme Court, Tioga County
Docket Number: 45190
Judge: Eugene D. Faughnan

At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Tioga County Courthouse, Owego, New York, on the 12TH day of June, 2015.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : TIOGA COUNTY

TIMBER SOLUTIONS, LLC,

Plaintiff,

-vs-

ANGELO RIGAS, GEORGE RIGAS, ANTIONA BREGIANOS and PERMIRA CONSTRUCTION GROUP CORP.,

Defendants.

DECISION

Index No. 45190
RJI No.

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EUGENE D. FAUGHNAN, J.S.C.

This matter comes before the Court on the motion of the Defendants, Angelo Rigas, Antiona Bregianos, and George Rigas[1] to vacate a mechanic's lien, cancel a Notice of Pendency and dismiss the Verified Complaint of Timber Solutions, LLC (hereinafter "Plaintiff"). In support of the motion, the movants submitted an affidavit of Arthur J. Semetis, Esq. sworn to on March 4, 2015 with attached Exhibits; affidavit of Angelo Rigas sworn to on March 3, 2015 with attached Exhibits; and affidavits of Antiona Bregianos and George Rigas both dated March 3, 2015. Movants also submitted a Memorandum of Law in support of their motion. In opposition, Plaintiff submitted an affirmation of Robert E. Krahulik, Esq. dated May 29, 2015 with attached Exhibits, an affidavit of Fred Krol sworn to on June 1, 2015 and a Memorandum of Law. Movants then submitted a reply affidavit of Jonathon A. Samter, Esq. dated June 11, 2015 with attached Exhibit, and an additional Memorandum of Law.

BACKGROUND FACTS

Plaintiff filed a Summons and Verified Complaint on October 27, 2014, primarily seeking a mechanic's lien foreclosure. On the same date, Plaintiff filed a *lis pendens*. Plaintiff alleged that the three movants (Angelo Rigas, George Rigas and Antonia Bregianos) were the owners of certain property in the County of Tioga, and that Plaintiff, as general contractor, entered into two contracts with Permira Construction Group Corp. ("Permira") to provide materials and construct a house on these premises. Permira is allegedly a construction company, wholly owned by Angelo Rigas and George Rigas (See Krol affidavit at paragraph 5), although that is not conceded by the movants. The two construction agreements between Plaintiff and Permira were signed April 5, 2013. In both agreements, Permira is identified as the client, and Plaintiff as the Contractor. One contract was for masonry and excavation work, and the other was for the home construction. Plaintiff contends that Permira wrongfully terminated the contract and defaulted in

[1]The fourth Defendant, Permira Construction Group Corp., has not submitted papers on this motion, but has been provided with the motion and opposition.

payments under the contract. (See Verified Complaint at paragraphs 9 and 10). As a result, Plaintiff was unable to complete the home as contracted. Plaintiff alleges that it is due the sum of $97,833 under the contract.

Plaintiff filed a mechanic's lien in the Tioga County Clerk's office on January 31, 2014. The movants argue that the mechanic's lien is invalid for several reasons, including untimely filing of the lien, failure to list all the property owners, failure to file proof of service of the lien in a timely manner, and an incorrect address for one of the owners. Further, movants contend that Angelo Rigas was not served with the summons and complaint within 120 days of the commencement of the action (CPLR §306-b).

Plaintiff contends that the lien was filed within 4 months of the time construction was complete and was therefore timely under Lien Law §10. (Krahulik Affidavit at paragraph 10 and Krol Affidavit at paragraphs 13, 14). Plaintiff also argues that the Notice of Lien set forth the owners as far as was known to the Plaintiff at the time of filing, and that "an affidavit with proof of service as to the certified mailing of copies of the ... lien was filed with the County Clerk within thirty-five (35) days after the notice of lien was filed." (Krahulik Affidavit at paragraph 12).

DISCUSSION

Under Lien Law §10, "where the improvement is related to real property improved or to be improved with a single family dwelling, the notice of lien may be filed at any time during the progress of the work and the furnishing of the materials, or, within four months after the completion of the contract, or the final performance of the work, or the final furnishing of the materials, dating from the last item of work performed or materials furnished..." The mechanic's lien filed by Plaintiff specifically states at paragraph 8 that "work was first performed on or about April 10, 2013 and completed by September 15, 2013." As such, the mechanic's lien would need to be filed by January 15, 2014, and it was not filed until January 31, 2014. Plaintiff submitted affidavits in opposition to the motion contending that the contract was not completed and was not terminated, and that a payment under the contract was received on October 29, 2013, and for

those reasons the mechanic's lien was timely.

Lien Law § 19 (6) provides that where it appears "from the public records that such notice [of lien] has not been filed in accordance with the provisions of section ten" the property owner may apply for a discharge of that lien; and upon verified application showing such invalidity, the court shall make an order discharging the lien.

The mechanic's lien on its face was not timely filed. It specifically stated that the work was completed by September 15, 2013. Thus, the actual filing of the lien was beyond the 4 months after the work was completed. Plaintiff contends that the obligations under the contract were not completed, and therefore, the lien was timely filed. The Lien Law "which intentionally imposes a short filing period for the mechanic's liens, anticipates a *completed* contract as a condition precedent to filing a lien..." *Metivier v. Sarandrea,* 154 Misc2d 355, 358 (Sup. Ct. Oneida County 1992), *aff'd* 187 AD2d 963 (4th Dept. 1992) (italics in original). However, plaintiff has not identified any other date, or facts, that would support a different date to constitute completion of the contract. Plaintiff avers that the contract was not terminated (which is contrary to the Verified Complaint). Krol's affidavit asserts that he attempted a mutual termination of the contract by email on October 11, 2013, and that a payment under the contract was received by him on October 29, 2013. However, the check was not produced and the Court cannot determine what time frame, or work, that covered. Nevertheless, those alleged facts were available at the time of the filing of the lien, yet the lien states that work was completed September 15, 2013. The Court is constrained to look only to the public records in determining if the lien is valid on its face. *Metivier*, *supra.* Where it appears that the specific requirements of the statute have been observed, and that there exists no defect upon the face of the notice of lien, then any dispute regarding the validity of the lien must await trial in an action to foreclose that lien. *Dember Constr. Corp. v P & R Elec. Corp.*, 76 AD2d 540 (2nd Dept. 1980). Conversely, "subdivision (6) of section 19 of the Lien Law authorizes summary discharge whenever: first, the character of the labor or the materials furnished as identified upon the face of the notice of lien, and for which a lien is claimed, discloses the absence of a valid lien; or, second, the notice of lien is invalid for failure of the lienor to have complied with the provisions of section 9 of the Lien Law relative to particular contents of the notice; or, third, public records

disclose a failure to have complied with section 10 of the Lien Law relative to filing requirements." *Dember* at 542. In the instant matter, the mechanic's lien is invalid on its face for failure to file the lien within 4 months, and was therefore a nullity. *See Ren. Reh. Sys. Co., Inc. v. Faulkner,* 85 AD3d 752 (2nd Dept. 2011); *Ward-Carpenter Engrs. v. Sassower,* 163 AD2d 304 (2nd Dept. 1990). Since it was a nullity, the lien must be discharged, and the *lis pendens* vacated. *Ren. Reh., supra; see also Aztec Window & Door Mfg., Inc. v. 71 Vil. Rd., LLC,* 60 AD3d 795 (2nd Dept. 2009).

Even if the Court were to conclude that the lien is not invalid under §10, the Court would still conclude the lien is also invalid because proof of service was not timely filed. Under Lien Law §11, the lien must be served upon the owner within thirty days of the filing of the notice of lien, and "[f]ailure to file proof of such a service with the county clerk within thirty-five days after the notice of lien is filed shall terminate the notice as a lien." Here, the documentary facts show that the notice of lien was filed on January 31, 2014, and the lien was served by mail on February 12, 2014, but not filed in the Clerk's Office until March 12, 2014. This is more than 35 days after the notice was filed. Compliance with the statute is mandatory, and the Court does not have discretion to excuse non-compliance. *Murphy Constr. Corp. v. Morrissey,* 168 AD2d 877 (3rd Dept. 1990); *HMB Acquisition Corp. v. F&K Supply,* 209 AD2d 412 (2nd Dept. 1994); *Paolangeli v. Sopp,* 145 Misc2d 259 (Sup. Ct. Tompkins Co. 1989).

Plaintiff's Verified Complaint and the affirmation of Krahulik state that the proof of service was filed within the requisite 35 days. However, that assertion is belied by the documentary evidence; specifically, the filings in the Clerk's office. "When assessing whether a complaint states a cause of action for purposes of a motion to dismiss pursuant to CPLR 3211 (a) (7), 'the pleading is to be given a liberal construction, the allegations contained within it are assumed to be true and the plaintiff is to be afforded every favorable inference' (*Simkin v Blank*, 19 NY3d 46, 52, 968 NE2d 459, 945 NYS2d 222 [2012]). That favorable treatment is not limitless, however, and 'allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration' (*Gertler v. Goodgold*, 107 AD2d 481, 485, 487 NYS2d 565 [1985], *affd for reasons stated below* 66 NY2d 946, 489 NE2d 748, 498 NYS2d 779 [1985]; *see Brumaghim v. Eckel*, 94 AD3d 1391,

1393, 944 NYS2d 329 n 1 [2012])." *Tenney v. Hodgson Russ, LLP,* 97 AD3d 1089, 1090 (3rd Dept. 2012). In this case, the factual elements of plaintiff's claim with respect to the timely filing of the proof of service are contradicted by the documentary evidence. Thus, the Court concludes that the lien is invalid under §11 and must be **terminated.** The Court also concludes that since the notice of lien is invalid, it must be terminated, and the *lis pendens* which is predicated on the mechanic's lien, must also be **cancelled.**

The movants also argue that Antiona Bregianos was not named in the notice of lien, and that the address for Angelo Rigas was incorrect. In light of the Court's discussion above, those two arguments need not be considered.

Movants contend that if the notice of lien is discharged, and the *lis pendens* is cancelled, that the Verified Complaint must also be dismissed, because it only contained one cause of action, for foreclosure of the mechanic's lien. The Court does not read the Complaint so narrowly. The Verified Complaint seeks equitable relief and legal relief. It requested that the movants and Permira be responsible for any deficiency, and "[i]n case it be determined and adjudged that Plaintiff did not have a valid and subsisting lien, that Plaintiff then be granted a personal judgment against [defendants] in the sum of $97,833.00 with interest thereon..." (Verified Complaint at paragraph 8). This is sufficient to allege a claim in law as well, such that the invalidity of the mechanic's lien does not require dismissal of the complaint. *See e.g. Nelson v. Schrank,* 273 AD 72 (2nd Dept. 1947). Therefore, the motion to dismiss the Complaint is **DENIED.**

Movants also argue that Angelo Rigas was never served with a copy of the Complaint as required under CPLR §306-b. Therefore, they seek dismissal of the Complaint as to him. Plaintiff has not provided any evidence in opposition to that argument, and seems to concede the fact; particularly since the affirmation in opposition actually requests dismissal of the action with respect to Angelo Rigas only. Plaintiff's opposition papers do not state whether Angelo Rigas was served at all.

However, although not referenced by the Plaintiff, an affidavit of service as to Angelo Rigas is on file. It states that substituted service was utilized and that Summons and Verified Complaint were served on a co-tenant, who refused to provide her name. The affidavit of service

further states that service was made on February 24, 2015. Movants papers calculate that the 120 days to serve would have expired on February 22, 2015, but according to the Court's calculation, the 120 days would have expired on February 24, 2015. Thus, the affidavit of service which was filed, on its face, seems to prove timely service. The Court does not determine at this point, if such substitute service was valid; only that there is insufficient evidence at this point to dismiss the complaint against Angelo Rigas under §306-b. Therefore, that portion of the pending motion is **DENIED.**

Movants are directed to submit an order within 60 days of the date of this Decision pursuant to §202.48 of the Uniform Rules for Trial Courts (NYCRR).

This constitutes the Decision of the Court.

Dated: August 10, 2015
Owego, New York

HON. EUGENE D. FAUGHNAN
Supreme Court Justice