

Degraw Constr. Group, Inc. v McGowan Bldrs., Inc.
2017 NY Slip Op 32080(U)
October 2, 2017
Supreme Court, Kings County
Docket Number: 8072/14
Judge: Mark I. Partnow
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part FRP 2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 5th day of September, 2017.

PRESENT:

HON. MARK I. PARTNOW,
Justice.

-----X

DEGRAW CONSTRUCTION GROUP, INC.,

Plaintiff,

- against -

Index No. 8072/14

McGOWAN BUILDERS, INC., YMCA OF GREATER
NEW YORK, LIBERTY MUTUAL INSURANCE
COMPANY and NAN SHAN LOCAL DEVELOPMENT
CORP.,

Defendants.

-----X

The following papers numbered 1 to 6 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	<u>1-3</u>
Opposing Affidavits (Affirmations)_____	<u>4</u>
Reply Affidavits (Affirmations)_____	<u>5-6</u>

Upon the foregoing papers in this action by Degraw Construction Group, Inc. (Degraw) to foreclose mechanic's liens, defendants, McGowan Builders, Inc. (McGowen) and Liberty Mutual Insurance Company (Liberty Mutual), move for an order: (1) declaring that Degraw's mechanic's liens and this action are barred by the terms of the parties' April 26, 2013 settlement agreement (Settlement Agreement); (2) declaring that Degraw's

mechanic's liens were willfully exaggerated and are void, pursuant to Lien Law § 39; (3) granting McGowan summary judgment on its counterclaim for damages under Lien Law § 39-a; and (4) granting McGowan and Liberty Mutual summary judgment dismissing the complaint, pursuant to CPLR 3212.

Background

The YMCA Construction Project

McGowan, a general contractor, entered into a construction contract with defendant, YMCA of Greater New York (YMCA), for a construction project at the YMCA Aquatic Center, Prospect Branch, at 330 Eighth Street in Brooklyn (YMCA Construction Project).

McGowan, in turn, subcontracted with Degraw for Degraw to construct concrete foundations, walls and floors at the YMCA Construction Project (YMCA Subcontract).

The Nan Shan Construction Project

McGowan entered into a construction contract with defendant, Nan Shan Local Development Corp. (Nan Shan), for a construction project at CPC Queens Senior Center/Day Care Center at 133-12/14 41st Street in Flushing (Nan Shan Construction Project).

McGowan subcontracted with Degraw for Degraw to construct concrete foundations, walls and floors at the Nan Shan Construction Project (Nan Shan Subcontract).

The Settlement Agreement

On April 26, 2013, McGowan and DeGraw entered into the Settlement Agreement, entitled “Agreement for Termination for Mutual Convenience and Mutual Release,” to resolve disputes that arose on the YMCA and Nan Shan Construction Projects.

Under the Settlement Agreement, Subcontractor Purchase Order No. 09010-01 for the YMCA Construction Project and Subcontractor Purchase Order No. 10018-01 for the Nan Shan Construction Project were “terminated for the mutual convenience of the parties . . .” subject to certain specified terms and conditions. The Settlement Agreement provides that McGowan shall pay Degraw \$150,000.00 in installments and shall resolve certain liens and claims by subcontractors.

Importantly, paragraph 7 of the Settlement Agreement provides that McGowan and Degraw “release each other from all potential claims against each other on the YMCA and Nan Shan projects *except for claims arising from latent workmanship defects* and claims arising from Degraw’s indemnification obligations . . .” (emphasis added).

The Settlement Agreement also contains a “Mutual Release” which provides that:

“[McGowan] and Degraw agree that upon full performance of their obligations hereunder, any and all claims that could have been asserted under the YMCA Subcontractor Purchase Order and the Nan Shan Subcontractor Purchase Order shall forever be released, *except that [McGowan] shall not release Degraw from claims for latent defects in workmanship, should any be discovered.* Furthermore, [McGowan] and Degraw agree that if there is a failure to perform the obligations hereunder, *the sole remedy shall be to enforce this Agreement* and that a breach hereof shall not entitle the non-breaching party to rescind the termination for convenience of either the YMCA or Nan Shan

Subcontractor Purchase Order and/or to assert damage claims alleged to have been caused by default of either Subcontractor Purchase Order. In the event of an action to enforce this Agreement, the prevailing party shall be entitled to recover \$10,000 as liquidated damages plus costs and reasonable legal fees . . .” (emphasis added).

Finally, paragraph 9 of the Settlement Agreement provides that the parties “acknowledge that this Agreement and Release was entered into with the advice of counsel and is not to be construed against either party.”

McGowan’s Discovery Of Latent Defects

After McGowan paid \$100,000.00 of the \$150,000.00 in consideration specified under the Settlement Agreement, McGowan allegedly discovered latent defects in Degraw’s work on the YMCA Construction Project.

By a July 9, 2013 letter, McGowan’s counsel advised Degraw’s counsel that “no further payments will be forthcoming from [McGowan] as a result of latent deficiencies in Degraw’s work on the YMCA project and that became known to [McGowan] after the settlement agreement was executed. . . .” McGowan’s counsel asserted that McGowan’s right of set-off “is implicit in the exception and carve-out from the settlement agreement of claims for latent defects.” Regarding the parties’ remedy for breach of the Settlement Agreement, McGowan’s counsel asserted that:

“I remind you that the sole remedy for an alleged breach of the settlement agreement is an action to enforce the settlement agreement. Should Degraw file a lien on either the YMCA or the Nan Shan project, [McGowan] shall take swift action to obtain a court order(s) for the discharge of such lien(s) and will seek all available remedies, including an award of costs and attorneys’ fees.”

Degraw's counsel responded with a July 11, 2013 letter "as a notice under the settlement agreement" that McGowan "is presently in default in payment of the first installment due of \$10,000 due on June 30, 2013" and that Degraw "will be pursuing all options available to it to collect all sums due and owing [including] the filing of a mechanic's lien on the YMCA project and Nanshan." The letter noted that "the settlement agreement contains a liquidated damage clause of \$10,000 as well as attorney's fees . . . to the prevailing party. All costs incurred will be passed on to your client."

McGowan's counsel responded with a July 12, 2013 letter in which he advised Degraw's counsel that:

"The Settlement Agreement clearly provides for \$10,000.00 in liquidated damages to a party prevailing upon a claim of breach. The Settlement Agreement also clearly provides that an action to enforce the settlement is the sole remedy for an alleged breach . . .

"The lien claims that you are threatening to file on these projects are contrary to the express terms of the Settlement Agreement. Any sum that may be claimed to be due in a lien filed on either project will be completely arbitrary because the Settlement Agreement does not allocate the principal amount of the settlement and/or the current unpaid balance of \$50,000 between the YMCA and the NAN Shan Projects. No provision of the Lien Law will support the threatened lien(s). The underlying Subcontract Purchase Orders were terminated and the only right to payment to Degraw that exists, if any, is based on the Settlement Agreement.

"It is clear that Degraw believes McGowan has breached the Settlement Agreement. Degraw's sole remedy under the Settlement Agreement is to bring an action to enforce the settlement and to adjudicate McGowan's alleged breach. In such action McGowan will seek to establish legitimate setoffs for latent defects which were clearly carved out of the Settlement Agreement. As previously advised, if you

are foolish enough to file a lien on either the Nan Shan or the YMCA project swift action will be taken to obtain a Court Order for the discharge of such lien(s) along with an award of sanctions, court costs and attorneys' fees to the fullest extent available under the Lien Law."

The Mechanic's Liens

Shortly thereafter, Degraw filed two mechanic's liens totaling \$301,686.47.

On July 30, 2013, Degraw filed a \$214,590.46 mechanic's lien with the Kings County Clerk (YMCA Mechanic's Lien) relating to its work on the YMCA Construction Project, which states that Degraw last worked on the YMCA Construction Project on January 18, 2013. Thus, the YMCA Mechanic's Lien is for work Degraw admittedly performed on the YMCA Construction Project prior to the Settlement Agreement.

On August 2, 2013, Degraw filed a \$87,096.01 mechanic's lien with the Queens County Clerk (Nan Shan Mechanic's Lien) relating to its work on the Nan Shan Construction Project, which states that Degraw last worked on the Nan Shan Construction Project on February 1, 2013. Thus, the Nan Shan Mechanic's Lien is for work Degraw admittedly performed on the Nan Shan Construction Project prior to the Settlement Agreement.

The Lien Discharge Bonds

To discharge the YMCA and Nan Shan Mechanic's Liens, McGowan obtained two bonds from Liberty Mutual, as surety, pursuant to Lien Law § 19 (4), for which McGowan paid premiums.

According to McGowan's President,¹ McGowan has incurred premium costs of \$17,023.00 for the YMCA discharge bond and \$6,706.00 for the Nan Shan discharge bond. McGowan also received a September 28, 2016 invoice from Liberty Mutual for \$1,916.00 to renew the Nan Shan discharge bond, which has, presumably, been paid. Thus, McGowan has incurred \$25,645.00 in premiums.

Degraw's Actions To Foreclose On The Mechanic's Liens

On or about May 23, 2014, Degraw commenced an action in Kings County Supreme Court against McGowan, YMCA and Liberty Mutual by filing a summons and a complaint verified by counsel, seeking to foreclose on the YMCA Mechanic's Lien (Kings Action). The complaint in the Kings Action asserted the following four causes of action: (1) against all defendants seeking to foreclose on the YMCA Mechanic's Lien; (2) against McGowan for an account stated in the amount of \$214,590.46 plus interest; (3) against Liberty Mutual as surety; and (4) against McGowan for breach of the YMCA Subcontract.

On or about June 3, 2014, Degraw commenced an action in Queens County Supreme Court against McGowan, Nan Shan and Liberty Mutual by filing a summons and a complaint verified by counsel, seeking to foreclose on the Nan Shan Mechanic's Lien (Queens Action). The complaint in the Queens Action asserted the following four causes of action: (1) against all defendants to foreclose on the Nan Shan Mechanic's Lien; (2) against McGowan for an

¹ See ¶¶ 22-23 of the November 21, 2016 affidavit of Martin McGowan submitted in support of defendants' summary judgment motion (McGowan Affidavit).

account stated in the amount of \$78,096.01 plus interest; (3) against Liberty Mutual as surety; and (4) against McGowan for breach of the Nan Shan Subcontract.

On August 25, 2014, McGowan and Liberty Mutual collectively filed an answer to Degraw's complaint in the Kings Action, denying the material allegations therein, asserting several affirmative defenses and asserting three counterclaims seeking an order: (1) imposing Part 130 sanctions; (2) discharging the YMCA Mechanic's Lien, pursuant to New York Lien Law § 39; and (3) awarding McGowan \$4,721.00, representing the amount it paid Liberty Mutual in discharge bond premiums.

On or about August 18, 2014, McGowan and Liberty Mutual collectively filed an answer to Degraw's complaint in the Queens Action, denying the material allegations therein, asserting several affirmative defenses and asserting three counterclaims seeking an order: (1) imposing Part 130 sanctions; (2) discharging the Nan Shan Mechanic's Lien, pursuant to New York Lien Law § 39; and (3) awarding McGowan \$2,395.00, representing the amount it paid Liberty Mutual in discharge bond premiums.

Subsequently, by an August 18, 2016 order, the Kings Action and the Queens Action were consolidated before the Kings County Supreme Court under index No. 8072/14.

Defendants' Summary Judgment Motion

On or about November 23, 2016, McGowan and Liberty Mutual filed the instant motion, as stated earlier, seeking an order: (1) declaring that the YMCA and Nan Shan Mechanic's Liens and this action are barred by the terms of the Settlement Agreement; (2)

declaring that the YMCA and Nan Shan Mechanic's Liens were willfully exaggerated and void under Lien Law § 39-a; (3) granting summary judgment on McGowan's counterclaim for damages; and (4) granting summary judgment dismissing the complaint.

Defendants contend that the YMCA and Nan Shan Mechanic's Liens and this action "are contrary to the express terms of the Settlement Agreement which limited the remedy for breach thereof to enforcement."² Defendants argue that "plaintiff released and waived all claims and rights, including the right to file liens, arising under the Nan Shan and YMCA Subcontracts in exchange for a payment of \$150,000.00 and other terms and conditions set forth in the Settlement Agreement."³ Defendants also contend that the YMCA and Nan Shan Mechanic's Liens, totaling \$301,686.47, were willfully exaggerated by Degraw, pursuant to Lien Law § 39-a, because only \$50,000.00 out of the \$150,000.00 set forth as consideration in the Settlement Agreement remains outstanding.

Degraw, in opposition, submitted the March 2, 2017 affidavit of its President, Anthony Scibelli (Scibelli Opposition Affidavit), who contends that "[o]nly after a settlement agreement for a reduced sum did MCGOWAN begin complaining about latent defects" and that "[t]his new argument was an attempt to avoid paying the plaintiff and, further, an attempt to avoid the filing of mechanic's liens on the projects."⁴ Scibelli contends that "[t]hese

² See McGowan Affidavit at ¶ 19.

³ See ¶ 15 of the November 23, 2016 affirmation of Joseph J. Hocking, Esq., submitted in support of defendants' summary judgment motion (Hocking Affirmation).

⁴ See Scibelli Opposition Affidavit at ¶¶ 24-25.

projects went on for years without any claims of latent defects.”⁵ Scibelli accuses McGowan of fraud, arguing that McGowan had a “plan” to “prevent plaintiff from filing Mechanic’s Liens on the projects, pay a reduced sum and renege on the settlement.”⁶ Scibelli asserts that “[h]ere, the plaintiff was fraudulently induced into executing the settlement agreement and waiving its alleged right to file Mechanic’s Liens with the understanding that payments would be forthcoming.”⁷ Degraw further argues that summary judgment should be denied because it requires discovery to substantiate McGowan’s claim regarding latent defects.

Discussion

(1)

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should, therefore, only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; see also *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). However, a motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party, as a matter of law (CPLR 3212 [b]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Summary judgment should be

⁵ *Id.* at ¶ 32.

⁶ *Id.* at ¶ 27.

⁷ *Id.* at ¶ 39.

granted where the party opposing the motion for summary judgment fails to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Zuckerman*, 49 NY2d at 562).

“The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment, as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Manicone v City of New York*, 75 AD3d 535, 537 [2010], quoting *Alvarez*, 68 NY2d at 324; see also *Zuckerman*, 49 NY2d at 562; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If it is determined that the movant has made a prima facie showing of entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [1989]; see also *Zuckerman*, 49 NY2d at 562).

In determining whether to grant summary judgment, the court must evaluate whether the issues of fact raised by the opposing party are genuine or unsubstantiated (*Gervasio v Di Napoli*, 134 AD2d 235, 236 [1987]; *Assing v United Rubber Supply Co.*, 126 AD2d 590 [1987]; *Columbus Trust Co. v Campolo*, 110 AD2d 616 [1985], *affd* 66 NY2d 701 [1985]). Mere conclusory statements, expressions of hope, or unsubstantiated allegations are insufficient to defeat a motion for summary judgment (*Gilbert Frank Corp. v Federal Ins.*

Co., 70 NY2d 966, 967 [1988]; *Spodek v Park Prop. Dev. Assoc.*, 263 AD2d 478 [1999]). “[A]verments merely stating conclusions, of fact or of law, are insufficient to defeat summary judgment” (*Banco Popular N. Am. v Victory Taxi Mgt.*, 1 NY3d 381, 383-384 [2004], quoting *Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290 [1973]). Lastly, if there is no genuine issue of fact, the case should be summarily determined (*Andre*, 35 NY2d at 364).

(2)

***This Action And The Mechanic’s Liens Are
Precluded By The Terms Of The Settlement Agreement***

Defendants are entitled to summary judgment dismissing Degraw’s complaint because Degraw filed the YMCA Mechanic’s Lien, the Nan Shan Mechanic’s Lien and this action to foreclose thereupon in contravention of the plain terms of the Settlement Agreement.

“A settlement agreement is a contract which is subject to the ordinary rules of contract construction” (*Texas 1845, LLC v Kyaw*, 117 AD3d 1028 [2014], citing *Cervera v Bressler*, 106 AD3d 683 [2013]). “It is well settled that a contract is to be construed in accordance with the parties’ intent, which is generally discerned from the four corners of the document itself. Consequently, ‘a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms’” (*MHR Capital Partners LP v Presstek, Inc.*, 12 NY3d 640, 645 [2009], quoting *Greenfield v Phillies Records*, 98 NY2d 562, 569 [2002]).

Here, the Settlement Agreement clearly and unambiguously provides that the parties “release each other from all potential claims against each other on the YMCA and Nan Shan projects except for claims arising from latent workmanship defects . . .” The Settlement Agreement – which terminated the YMCA and Nan Shan Subcontracts – explicitly precluded “damage claims alleged to have been caused by default” of those Subcontracts. Importantly, the Settlement Agreement explicitly provides that “if there is a failure to perform the obligations hereunder, *the sole remedy shall be to enforce this Agreement . . .*” (emphasis added). Degraw cannot ignore the plain terms of the parties’ Settlement Agreement, which limits his remedy to an action to enforce its terms.

(3)

Degraw Willfully Exaggerated The Mechanic’s Liens

“Lien Law § 39-a provides, in relevant part, that a willfully exaggerated lien may be voided by the court and the person filing such a notice of lien shall be liable in damages . . .” (*Garrison v All Phase Structure Corp.*, 33 AD3d 661, 662 [2006]). “A determination of willful exaggeration of a mechanic's lien requires proof that the lienor deliberately and intentionally exaggerated the lien amount” (*J. Sackaris & Sons, Inc. v Terra Firma Const. Mgmt. & Gen. Contracting, LLC*, 14 AD3d 538, 541 [2005]). “The burden is upon the opponent of the lien to show that the amounts set forth were ‘intentionally and deliberately exaggerated’” (*Fidelity New York, FSB v Kensington-Johnson Corp.*, 234 AD2d 263, 263 [1996]).

In *Westbury S & S Concrete, Inc. v Manshul Construction Corp.* (121 AD2d 596 [1995]), a factually analogous case, the Appellate Division, Second Department, held that a subcontractor's mechanic's lien was "willfully exaggerated," pursuant to Lien Law § 39-a, because the subcontractor had signed a document waiving its right to file a mechanic's lien for work performed before a certain date and the mechanic's lien included work admittedly performed before that date.

Here, as in *Westbury S & S Concrete, Inc.*, Degraw entered into the Settlement Agreement on April 26, 2013, to resolve the parties' disputes regarding the YMCA and Nan Shan Construction Projects, thereby waiving its right to file mechanic's liens for work it performed on those projects prior to that date. The YMCA Mechanic's Lien states that it is for subcontract work last performed by Degraw on the YMCA Construction Project on January 18, 2013. The Nan Shan Mechanic's Lien states that it is for subcontract work last performed by Degraw on the Nan Shan Construction Project on February 1, 2013. Thus, the subcontract work for which Degraw filed the YMCA and Nan Shan Mechanic's Liens predated the Settlement Agreement. Degraw willfully exaggerated the YMCA and Nan Shan Mechanic's Liens because they included amounts for subcontract work performed prior to the April 26, 2013 Settlement Agreement.

Consequently, the YMCA and Nan Shan Mechanic's Liens are void and Degraw is liable to McGowan for damages in the amount of \$25,645.00, representing the premiums that

McGowan paid Liberty Mutual to discharge the YMCA and Nan Shan Mechanic's Liens.

Accordingly, it is

ORDERED, ADJUDGED AND DECLARED that the YMCA Mechanic's Lien and the Nan Shan Mechanic's Lien, and this action to foreclose thereon, are barred by the terms of the Settlement Agreement; and it is further

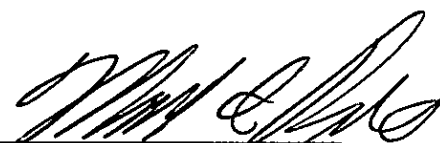
ORDERED, ADJUDGED AND DECLARED that the YMCA Mechanic's Lien and the Nan Shan Mechanic's Lien are void because they were "willfully exaggerated," pursuant to Lien Law § 39-a; and it is further

ORDERED that defendants' motion seeking summary judgment on McGowan's counterclaim for damages under Lien Law § 39-a is granted in the amount of \$25,645.00, representing the amount McGowan paid in premiums to discharge the YMCA and Nan Shan Mechanic's Liens; and it is further

ORDERED that defendants' motion seeking summary judgment dismissing the complaint is granted.

This constitutes the decision, order and judgment of the court.

E N T E R,



J. S. C.

**HON. MARK I PARTNOW
SUPREME COURT JUSTICE**

15

Nancy T. Sunshine

**NANCY T. SUNSHINE
Clerk**

KINGS COUNTY CLERK
FILED
2017 OCT -2 AM 10:43