

Falco v Miller

2017 NY Slip Op 33158(U)

June 19, 2017

Supreme Court, Suffolk County

Docket Number: Index No. 606648/15

Judge: Jr., Paul J. Baisley

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**SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY**

PRESENT:

HON. PAUL J. BAISLEY, JR., J.S.C.

-----X
ANTHONY J. FALCO, AS EXECUTOR OF THE
ESTATE OF PAULINE FALCO, DECEASED,

Plaintiff,

-against-

RAHEEM MILLER,

Defendant.
-----X

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DECISION & ORDER AFTER
INQUEST

PLAINTIFF'S ATTORNEY:

GANFER & SHORE, LLP
360 Lexington Avenue
New York, New York 10017

DEFENDANT'S ATTORNEY:

CHRISTOPHER J. CASSAR, P.C.
13 East Carver Street
Huntington, New York 11743

On May 15, 2015, defendant Raheem Miller filed a mechanic's lien against premises located at 21 Blackberry Lane, Huntington, New York (the "subject premises") and owned of record by Pauline Falco, who died in January 2015. At the time, the premises were occupied by defendant, his girlfriend Jaclyn Larkin (Pauline Falco's granddaughter), and their two minor children. The mechanic's lien stated that Mr. Miller had furnished labor and materials for "major improvements" to decedent's premises for an agreed price of \$160,000.00.¹ On June 24, 2015, plaintiff Anthony J. Falco, as Executor of the Estate of Pauline Falco (the "Estate"), commenced the instant action to vacate and discharge the mechanic's lien on the ground that Mr. Miller was not a licensed contractor and accordingly the mechanic's lien was void and unenforceable. The complaint sought money damages against defendant based on plaintiff's alleged inability to market and sell the premises, as well as attorney's fees, costs and disbursements incurred in connection with the action. Defendant appeared in the action solely for the purpose of contesting jurisdiction; after a traverse hearing, the court sustained jurisdiction.

Pursuant to a decision and order of this court (BAISLEY, J.) dated June 22, 2016, the court granted plaintiff a default judgment against defendant as to plaintiff's first, second and third causes of action to determine the invalidity of the lien, for fraud, and for prospective tortious interference with contract. Plaintiff's fourth cause of action for willful exaggeration of the lien pursuant to Lien Law §39-a was dismissed on technical grounds. Pursuant to the order, an inquest was held before the undersigned on August 11, 2016 to determine the amount of damages, including attorney's fees, sustained by plaintiff as a result of defendant Raheem Miller's wrongful filing of the mechanic's lien. The court reserved decision pending the receipt of the parties' post-hearing submissions.

¹ The "major improvements" allegedly included roofing, siding, sheetrock, lumber, fixtures, flooring, paint, shrubbery, gravel, doors, windows, hardware, etc.

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The court notes that while the matter was *sub judice*, and the day before the mechanic's lien was to expire pursuant to Lien Law §17, Raheem Miller, by his attorneys, Christopher Cassar, P.C., commenced a separate action in this court against plaintiff seeking to recover for the same alleged services under theories of quantum meruit and unjust enrichment, and seeking to impose a constructive trust against the subject premises in favor of his child, Mia Renee Miller.² (The caption also named as a plaintiff the infant's mother, Jaclyn Miller, but it was subsequently established that she never consented to be a plaintiff in the action and the complaint was subsequently dismissed as to her.) In connection with the second action, Raheem Miller filed a notice of pendency against the subject premises on June 14, 2016. Pursuant to the order of this court (BAISLEY, J.) dated December 14, 2016, the complaint in the second action was dismissed with prejudice, the notice of pendency was cancelled and vacated, and the court ordered a hearing to determine the amount of fees, costs and sanctions to be assessed against Raheem Miller and his attorney for frivolous conduct pursuant to 22 NYCRR §130-1.1. That hearing was held before the undersigned on January 25, 2017 and is the subject of a separate order issued simultaneously herewith.

As to the inquest in the instant matter, plaintiff Anthony Falco, the Executor of the Estate of Pauline Falco, and plaintiff's attorney, William A. Jaskola, Esq., testified on behalf of the Estate. Defendant Raheem Miller was present at the inquest along with his attorney, Christopher J. Cassar, Esq., who cross-examined plaintiff's witnesses, but no witnesses were produced on behalf of defendant. Documents admitted into evidence included the retainer agreement (Ex 1); an appraisal of the subject premises reflecting a value of \$420,000.00 as of January 17, 2015 (the date of death of Pauline Falco) (Ex 2); a broker's listing agreement dated February 23, 2016 reflecting a list price of \$399,000.00 (Ex 3); tax statement for the subject premises showing tax arrears totaling \$43,456.69 dating from 2012 and printouts of tax payment history (Ex 4); homeowner's insurance documents concerning subject premises and copies of checks purportedly reflecting premium payments (Ex 5); bank statements for the Estate and various utility bills for the subject premises (Ex 6); and plaintiff's attorney's invoices for professional services with summary sheets showing legal fees and disbursements from June 2015 through July 2016 (Ex 7).

Plaintiff testified that as a result of defendant's wrongful filing of the mechanic's lien, prospective buyers were deterred and the Estate was unable to sell the subject premises. He testified that the property was appraised at \$420,000.00 as of the date of Pauline Falco's death. He testified that when the house was first placed on the market in March 2016 it was listed at \$399,000.00, which was subsequently reduced to \$379,000.00 and then to \$349,000.00. Plaintiff further testified that although there have been several "low-ball" offers, plaintiff has not received an acceptable offer and the subject property is not under contract.

Plaintiff also testified that because he was unable to sell the property as a result of defendant's mechanic's lien, the Estate was forced to incur additional carrying costs for the

² *Raheem Miller, Jaclyn Larkin and Mia Renee Miller, an infant, by her parent and guardian, Raheem Miller, v. Anthony Falco, as Executor of the Estate of Pauline Falco, commenced on June 14, 2016 under Index No. 609001/16.*

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subject property. Plaintiff introduced into evidence various documents purporting to reflect the carrying costs for the subject premises. These included tax statements and insurance documents (Ex 4 and Ex 5), together with a single water bill dated March 29, 2016, a gas bill covering the billing period February 16, 2016 to March 1, 2016, and an electric bill dated April 8, 2016 (Ex 6). Plaintiff seeks to recover those additional carrying costs as part of the Estate's damages herein, but did not quantify the amount he was seeking to recover.

Plaintiff also testified that the Estate incurred substantial attorneys' fees as a result of defendant's wrongful filing of the mechanic's lien. He testified that the Estate's attorneys were forced to commence the instant action to vacate the lien, which ultimately resulted in the order of June 22, 2016. He testified that there are other legal matters involving the Estate, including the above-mentioned action in which Raheem Miller filed a notice of pendency, and that he has paid approximately \$170,000.00 in attorney's fees for all of those matters to the law firm of Ganfer & Shore, LLP.

Plaintiff's attorney, William A. Jaskola, Esq., a commercial litigation associate of Ganfer & Shore, LLP, testified that he was the lead attorney principally responsible for handling this matter under the supervision of the managing partner, Steven Shore. Mr. Jaskola was also principally responsible for three other matters involving the Estate: a holdover proceeding in Third District Court to remove the current occupants of the subject property (the decedent's granddaughter and her two children); litigation in Suffolk County Surrogate's Court, where Raheem Miller also filed a notice of claim against the Estate for \$160,000.00 for the same services and materials that were the subject of this mechanic's lien; and defendant's recently commenced action in this court in which he filed a notice of pendency against the subject premises.

Mr. Jaskola testified that his firm issued monthly aggregate invoices to plaintiff which encompassed all of the matters the firm was handling for the Estate. He testified that he reviewed the invoices rendered by his firm during the period June 2015 through July 2016 and highlighted those billing entries or the portions thereof that were solely for the instant mechanic's lien action. Based on that review, he compiled summary sheets for each invoice that reflected the date, billing attorney, amount of time expended, hourly billing rate, and line item charge for each of the services he identified as related to the instant matter. Those services included, *inter alia*, research regarding the licensing requirements for filing a mechanic's lien; drafting the summons and complaint; arranging for service of process; preparing a motion for default; preparing a response to defendant's cross-motion to dismiss complaint; preparing for and attending the traverse hearing; preparing for the instant inquest; as well as numerous telephone calls, conference calls, and emails with plaintiff and others.

The summary sheets prepared by Mr. Jaskola reflect that the only individuals whose services were billed to plaintiff for this matter were Mr. Jaskola and Mr. Shore, whose hourly billing rates were, respectively, \$375.00, subsequently increased to \$385.00; and \$595.00, subsequently increased to \$625.00. Mr. Jaskola testified that the legal fees for the instant matter totaled \$26,234.00, with disbursements of \$2,529.64, for a total of \$28,763.64.

Upon the conclusion of the hearing, the parties briefed the issue of whether plaintiff was entitled to recover attorney's fees herein. As defendant correctly argues, the dismissal of plaintiff's cause of action for damages for willful exaggeration of the mechanic's lien precludes plaintiff from recovering attorney's fees under Lien Law §39 and/or §39-a (*Pamco Industries v MPAC, Inc.*, 231 AD2d 504 [2d Dept 1996]). That does not end the inquiry, however. As acknowledged by defendant's attorney, attorney's fees may be imposed against a party and/or his attorney for "frivolous conduct" (22 NYCRR §130-1.1). Conduct is frivolous if:

- (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
- (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
- (3) it asserts material factual statements that are false.

In determining whether conduct is "frivolous," the court is required to consider, *inter alia*, "the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, or should have been apparent, or was brought to the attention of counsel or the party" (22 NYCRR §130-1.1(c)).

Here, the court has already determined that the filing of the mechanic's lien herein was without basis in fact or law. It is undisputed that Raheem Miller was not a licensed home improvement contractor at the time of filing of the mechanic's lien (or, apparently, at any time). The mechanic's lien identifies Christopher Cassar, Esq. as the attorney for Raheem Miller as lienor. As an attorney, Mr. Cassar knew or should have known that his client Raheem Miller was not a licensed home improvement contractor and that accordingly he was not entitled to file a mechanic's lien against the Estate's property (Suffolk County Code §563-3(A)). The record establishes that plaintiff's counsel brought the issue of defendant's licensure status to the attention of Mr. Cassar, who took no action in response.

Moreover, the facts and circumstances herein compel the conclusion that the filing of the mechanic's lien was undertaken primarily for the purpose of interfering with the Estate's efforts to sell the property, so as to enable defendant and/or his girlfriend and children to remain in the house as long as possible. The submissions and the court's records show that plaintiff was compelled to institute a holdover proceeding in the Third District Court for an order evicting Raheem Miller, Jaclyn Larkin, their two children, and any other occupants from the premises. Raheem Miller's subsequent filing of a notice of pendency against the property – the day before the mechanic's lien was to expire – was also clearly designed to and had the effect of preventing the Estate from selling the property and distributing the proceeds to Pauline Falco's beneficiaries as directed in her will, providing further evidence of defendant's intention to prolong the resolution of the Estate and "harass[] or maliciously injur[e]" plaintiff.

In light of the foregoing, the court is constrained to conclude that Mr. Miller's actions and those of his counsel in filing and continuing the mechanic's lien of record constituted "frivolous conduct" as contemplated by 22 NYCRR §130-1.1 (*Navin v Mosquera*, 30 AD3d 883[3d Dept

2006]). The court finds that in the facts and circumstances herein, an award of attorney's fees, as requested by plaintiff in its verified complaint, is appropriate.

The factors to be considered in determining the reasonableness of an attorney's fee award include "(1) the time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented; (2) the lawyer's experience, ability, and reputation; (3) the amount involved and benefit resulting to the client from the services; (4) the customary fee charged for similar services; (5) the contingency or certainty of compensation; (6) the results obtained; and (7) the responsibility involved" (*Diaz v Audi of America, Inc.*, 57 AD3d 828, 830 [2d Dept 2008]). The determination must also take into account the hours reasonably expended and the prevailing hourly rate for similar legal work in the community (*RMP Capital Corp. v Victory Jet, LLC*, 139 AD3d 836 [2d Dept 2016]).

Mr. Jaskola testified as to his educational and professional background, which includes 20 years' experience as a commercial litigation attorney at various firms in Nassau County and New York City. No evidence was offered as to the background and experience of the other attorney whose services appear on the invoices, Steven Shore. In light of the foregoing, the court is constrained to disallow all of the charges attributable to Mr. Shore.

The submissions reflect that a total of 65.2 hours was expended in connection with this matter, 58.3 of which were attributable to Mr. Jaskola. Although substantially all of the services alleged to have been performed by Mr. Jaskola appear to have been reasonable and necessary, the firm's utilization of "block billing" in its invoices precludes meaningful review of the reasonableness of the time expended for any of the services particularized therein. It is well established that where the time records and other evidentiary proof submitted in support of an application for attorney's fees are deficient, the court has discretion to reduce the number of billable hours (*RMP Capital Corp.*, *supra*, 139 AD3d 836 at 840; *Matter of Rourke v New York State Dept. of Correctional Services*, 245 AD2d 870 [3d Dept 1997]). Rather than engage in a page-by-page and line-by-line analysis of the submitted invoices, the court exercises its discretion and reduces the number of total billable hours by 20%, from 58.3 to 46.6.

As to the hourly billing rate, Mr. Jaskola offered no evidence to establish that an hourly billing rate of \$385.00 for a commercial litigation associate is the prevailing rate for similar legal work in Suffolk County where the action was commenced. The court finds that the billing rate is excessive for the Suffolk County area for the time period at issue, and finds that an hourly billing rate of \$350.00 is more reasonable and appropriate.

Accordingly, the court finds plaintiff is entitled to recover the Estate's attorney's fees in the amount of \$16,310.00. The court further finds that the attorney's fees should be paid by Raheem Miller and his attorney, Christopher Cassar, P.C., jointly and severally.

As to the other items of damages sought by plaintiff, it is well established that the filing of a false mechanic's lien constitutes an injury to property (*Ghiglione v Friedman*, 115 AD 606 [2d Dept 1906]). The court finds that plaintiff's testimony created a colorable argument that the Estate was unable to market and sell the property and incurred additional carrying costs and a loss of profits as a result. However, plaintiff's evidence, including the scant utility bills admitted into

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evidence, falls far short of quantifying the Estate's claims for such items of damages. Plaintiff's evidence also fails to establish that but for the mechanic's lien, the subject premises would have sold for a certain price within a certain time period, and any such conclusion would be purely speculative. In addition, plaintiff's testimony as to the substantial repairs he has been making to the house (including replacing windows and doors, installing new bathroom vanities, replacing carpeting) suggests that other factors may have contributed to plaintiff's inability to find a buyer for the property. Accordingly, the court declines to make an award for such items of damages.

The foregoing constitutes the decision and order of this court.

Dated: June 19, 2017


J.S.C.
HON. PAUL J. BAISLEY JR.