Matter of 134-136 W. Houston, LLC v New York City Land Surveyor P.C.
2018 NY Slip Op 30399(U)
March 12, 2018
Supreme Court, New York County
Docket Number: 150737/2017
Judge: Carmen Victoria St. George
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 34

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In the Matter of the Application of

134-136 West Houston, LLC,

Petitioner,

Index No. 150737/2017

For an Order Summarily Discharging of Record a Notice Under Mechanic's Lien Law dated November 10, 2016,

-against-

Decision and Order and Judgment

NEW YORK CITY LAND SURVEYOR P.C.,

Respondent/Lienor.

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Carmen Victoria St. George, J.S.C.:

Petitioner is the owner of the building located at 134-136 West Houston, LLC (the Building). In March of 2016, while petitioner was performing work on its building, it rented two Real Time Vibration Monitoring Systems (RTVM systems) from respondent/lienor New York City Land Surveyor P.C. (the lienor). The lienor remotely monitored the RTVM systems, which were placed on the Building and the adjoining building at 138 West Houston Street. Upon completion of the project the lienor retrieved the RTVM systems and sent petitioner an invoice for $92,867.36. Petitioner contended that the lienor had overbilled him for the work, and the lienor agreed to revisit the bill. Instead of reducing the bill, the lienor sent on that almost $7,000.00 more money. In addition, on November 14, 2016 the lienor filed a Notice Under Mechanic's Lien Law in the New York County Clerk's office for $99,617.36.

In response to the lien, around January 23, 2017, petitioner commenced this proceeding to discharge the lien. Approximately two-and-a-half months later, the lienor instituted a lawsuit (*New York City Land Surveyor P.C. v 134-136 West Houston LLC*, Sup Ct, NY County, Index No. 153212/2017 [the Lawsuit]), also before this Court, in which it seeks to affix a judgment on the lien or, in the alternative, to be granted judgment for $99,617.36.

Petitioner argues that the lien should be discharged because the lienor is not the type of worker, and the RTVM systems are not the type of equipment, covered by the Lien Law. This Court agrees. The lienor is not a "materialman" as defined by Lien Law § 2 (12). This provision applies to persons or entities which furnish machinery, tools, and equipment "in the prosecution of . . . improvement" to the property (*see Harsco Corp. v Gripon Const. Corp.*, 301 AD3d 90, 95 [2nd Dept 2002]). This work must relate to "performance of some part of the contract" (*A&J Buyers, Inc. v Johnson, Drake & Piper, Inc.*, 25 NY2d 265, 270, 271 [1969] [A&J Buyers]). In the case at hand, the lienor provided RTVM systems and services which, though valuable, did not directly relate to the performance of the contract or increase its value.

Also, although rental equipment can be lienable (*see id.* at 270)[1], the equipment must be directly related to the improvement of the property (*see, e.g., Weisman v Maksymowicz*, 109 AD3d 768, 768 [1st Dept 2013] [relying on Lien Law § 3, and denying lien based on the costs associated with "community relations"]). An improvement, as is relevant here, includes "the reasonable rental value for the period of actual use of machinery, tools and equipment . . . [used] *in connection with the demolition, erection, alteration or repair of any real property* . . ." (Lien Law § 2 [4]).

[1] Petitioner's argument to the contrary rests on cases which predate an amendment to the law which allows parties to recover the rental value of rental equipment that is otherwise lienable (*see 200 Franklin Holding LLC v CAP Equip Leasing Corp.*, Sup Ct, Kings County, Dec. 4, 2008, Schmidt, J., index No. 2338/2008).

Significantly, the equipment at issue must be related to a "permanent improvement" of the property (*id.*) Thus, money due to a plaintiff for its work hoisting electrical power and thermal energy equipment to the roof of a store was not lienable because the parties had no intent "to make [the system] a 'permanent improvement' within the meaning of Lien Law § 2 (4)" (*Trystate Mch., Inc. v Macy's Retail Holdings, Inc.*, 94 AD3d 1097, 1098 [2nd Dept 2012]). The issue of permanence also was the critical factor in determining whether the labor of a security guard service – which, like the lienor here, ensured the safety of the project, and which also satisfied a requirement of the New York City Construction Code – was not lienable because the services did not produce a permanent improvement in the property (*270 Greenwich St. Assoc. LLC v Patrol & Guard Enterprises, Inc.* 2010 NY Slip Op 31667 [U]). Based on the above, the Court concludes that the RTVM systems at issue here, which were not permanent and did not permanently improve the property, are not lienable. Similarly, compensation for the labor the lienor provided in monitoring the RTVM systems is not lienable. The lienor does not present any persuasive caselaw or arguments in support of its position to the contrary.

Although it is true "that the statute commands a liberal construction of its provisions [Lien Law 70 (1)] . . . it cannot be stretched to include cases not clearly within its general scope and purpose" (*Burns Electric Co. v Walton Street Assoc.*, 136 AD2d 291, 293 [4th Dept] [citations and inner quotations omitted], *aff'd*, 73 NY2d 738 [1988]). The case at hand is not within the general scope and purpose of the Lien Law. This does not leave the lienor without a remedy, as the matter can be resolved in the Lawsuit's claims for monetary relief. It simply means that, on the facts of this case, there is no basis for asserting a lien.

The Court has considered the parties' additional arguments and they do not alter its conclusion. Therefore, it is

ORDERED that the petition is granted and the Notice of Mechanic's Lien filed by respondent for $99,617.36 ("Lien"), against Block 526, Lot 77, located at 134-136 West Houston, New York, New York, is hereby vacated and cancelled of record; and the Clerk of the County of New York is directed to vacate and cancel the Notice of Mechanic's Lien, and to enter upon the lien docket, or other record of liens, opposite the endorsement of said Lien, a statement that it has been vacated and cancelled of record.

Dated: 3/12, 2018

ENTER:

CARMEN VICTORIA ST. GEORGE, J.S.C.

HON. CARMEN VICTORIA ST. GEORGE
J.S.C.