Doma Inc. v 885 Park Ave. Corp.
2018 NY Slip Op 30448(U)
March 13, 2018
Supreme Court, New York County
Docket Number: 159775/2016
Judge: Kathryn E. Freed

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** 2

Justice

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DOMA INC.,

Plaintiff,

- v -

885 PARK AVENUE CORPORATION, JAN GILMAN

Defendant.

INDEX NO. 159775/2016

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26

were read on this motion to/for JUDGMENT - DEFAULT.

In this action for breach of contract and to foreclose a mechanic's lien, plaintiff Doma Inc., a contractor, alleges that it entered into an agreement with defendant Jan Gilman to substantially renovate her home in Apartment 11B of 885 Park Avenue, New York, NY 10021 for an initial cost of $583,800 and, following 39 change orders, an additional cost of $722,509. The building is owned by defendant 885 Park Avenue Corp. (hereinafter the coop), which is a cooperative corporation of which Gilman is a tenant-shareholder. Plaintiff contends that the last day it performed on the contract was September 8, 2016, having substantially completed the work it was hired to do. It asserts that it is owed $177,268.70, and it filed a mechanic's lien against the premises in that amount. Plaintiff now moves for a default judgment against the coop. The coop cross-moves to dismiss the complaint on the ground that a bond discharging the lien has been filed ensuring full payment of the lien amount.

Initially, the coop's delay in answering was not lengthy and, furthermore, its excuse that it did not believe an answer was necessary in light of the posting of a bond comports with its

position in general and is reasonable under the circumstances. For these reasons, this Court accepts the cross motion to dismiss as timely made in lieu of an answer. (*See Emigrant Bank v Rosabianca*, 156 AD3d 468, 472 [1st Dept 2017]; *Antcorp. Inc. v Citirich Realty Corp.*, 140 AD3d 417, 417-418 [1st Dept 2016].)

Turning to the merits of the cross motion, the coop argues that the filing of the bond discharging the lien renders it no longer a necessary party to this action. Plaintiff does not dispute that a bond has been filed that ensures full payment on the amount of the mechanic's lien. It contends that, notwithstanding the posting of the bond, the owner of the property remains a necessary party to an equitable action to foreclose on a mechanic's lien.

The law on this question is not settled. The filing of the bond discharges the mechanic's lien, and any judgment that may be issued in plaintiff's favor on its cause of action to foreclose must state that it is to be paid by the surety rather than be issued against the property. While the inability to proceed against the property after the filing of the bond negates the owner's continued interest in defending the lawsuit, some courts have reasoned that "[t]he nature and character of the pending action has not changed; the deposit was merely substituted as security for the lien which must still be judicially established." (*Harlem Plumbing Supply Co., Inc. v Handelsman*, 40 AD2d 768 [1st Dept 1972].) The Court in *Harlem Plumbing* explained that the lienor has "elected to proceed in equity to enforce its lien, [and the Lien Law] envision[s] the establishment of the validity of such lien before further rights accrue." For that very technical reason, "the owner of the property is a necessary party defendant, although prior owners are not." In support of this conclusion, the Court cited Lien Law § 44 (3), which requires registered owners to be named as parties to an action "to enforce a lien against real property." Following this decision, some motion courts in New York County have concluded that the current owner of

real property remains a necessary party notwithstanding the posting of a bond discharging the mechanic's lien. (*See e.g. New Age Gen. Contr. v 1882 Third, LLC*, 2016 NY Slip Op 30888[U] [Sup Ct, NY County 2016, Edmead, J.]; *Romar Sheet Metal, Inc. v F.W. Sims, Inc.*, 8 Misc 3d 1021[A], 2005 NY Slip Op 51220[U] [Sup Ct, NY County 2005, Heitler, J.])

The First Department, however, appears to stand alone in the view that the owner is a necessary party following the posting of a bond discharging the lien. The Third Department has held that, "[w]here the lien no longer attaches to real property due to the filing of a bond under the Lien Law, . . . the owners of the real property are no longer necessary parties to the action." (*M. Gold & Son, Inc. v A.J. Eckert, Inc.*, 246 AD2d 746, 747 [3d Dept 1998].) This is also the view in the Second Department. (*See Norden Elec. v Ideal Elec. Supply Corp.*, 154 AD2d 580, 581 [2d Dept 1989]; *Bryant Equipment Corp. v A-1 Moore Contr. Corp.*, 51 AD2d 792, 793 [2d Dept 1973].) In *Bryant Equipment Corp.*, the Court reasoned that the discharging bond "replace[s] the real property as the security to be attached and attacked" and activates Lien Law § 37 (7), which requires only that "the principal and surety on the bond, the contractor, and all claimants who have filed notices of claim prior to the date of the filing of such summons and complaint" be necessary parties to the action against the bond. This framework has been followed by motion courts in this County, notwithstanding the contrary authority. (*See Nova Bros., Inc. v James G Kennedy & Co., Inc.*, Index No. 653271/2012, 2016 WL 6125414, [Sup Ct, NY County October 14, 2016, Engoron, J.], *as partially adhered to on rearg* 2017 WL 2226364 [Sup Ct, NY County May 17, 2017 Engoron, J.]; B*enfield Lighting Inc. v A.J.S. Project Mgmt., Inc.*, 2016 NY Slip Op 30953[U] *2 [Sup Ct, NY County 2016, Jaffe, J.]; *see also Danica Group LLC v Atlantic Court LLC*, 23 Misc 3d 1111[A], 2009 NY Slip Op 50708[U] *1-2 [Sup Ct, Kings County 2009, Demarest, J.].)

Since the owner of the building ceases to have a stake in an action by a contractor against a tenant following the posting of a bond, wherein any subsequent action deals with the surety and not the real property, from a public policy perspective, there is no purpose in keeping the owner in the caption. Indeed, to keep the owner of the building in the action would only serve to needlessly increase the costs associated with the ownership and management of real property in this State. The only considerations articulated in *Harlem Plumbing Supply Co., Inc. v Handelsman*, 40 AD2d 768 in support of keeping the owner in the action were purely technical. Given, however, that two other departments of the Appellate Division have disagreed with this technical reasoning, relying on Lien Law § 37 (7); that other motion courts in New York County have followed the Second and Third Departments and avoided the technical problem; inasmuch as this Court can discern no public policy reason to keep the owner in the action under these circumstances; and noting that the First Department has not had occasion to revisit this proposition in many years; this Court follows the rule that, upon the filing of a bond discharging a mechanic's lien, Lien Law § 37 (7) supplants Lien Law § 44 (3) in prescribing the necessary parties to the action, and causes the owner to no longer be a necessary party.

Accordingly, it is hereby

ORDERED that plaintiff's motion for a default against defendant 885 Park Avenue Corporation is denied; and it is further

ORDERED that defendant 885 Park Avenue Corporation's cross motion to dismiss the complaint against it is granted; and the complaint against 885 Park Avenue Corporation is severed and dismissed.

3/13/2018
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED		GRANTED IN PART	X OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT	REFERENCE