

Fine Line MIC Corp. v 141 Chrystie St. Corp.
2018 NY Slip Op 30876(U)
May 9, 2018
Supreme Court, New York County
Docket Number: 158127/2016
Judge: Barbara Jaffe
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE

PART 12

Justice

-----X
FINE LINE MIC CORP.,

INDEX NO. 158127/2016

Plaintiff,

MOTION DATE _____

- v -

MOTION SEQ. NO. 1, 2

141 CHRYSTIE STREET CORP.,

DECISION AND ORDER

Defendant.

-----X
The following e-filed documents, listed by NYSCEF document number 5, 6, 8, 9, 10, 11, 12, 13, 14, 20, 21, 22, 23, 27, 30, 32, 33, 34, 35, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 52, 53, 54

were read on this application for summary judgment

Upon the foregoing documents, it is

In this action based on a mechanic's lien filed by plaintiff against defendant, the owner of the building at issue, defendant moves pursuant to CPLR 3212 for an order summarily dismissing the complaint and granting it a judgment on its first, second, third, fourth, fifth, and sixth counterclaims; declaring plaintiff's lien void and directing a hearing on damages; and awarding sanctions against plaintiff (sequence one). Plaintiff opposes and, by notice of cross motion, moves to amend the complaint and for partial summary judgment on liability. Defendant opposes the cross motion.

By notice of motion filed under sequence two, plaintiff again moves to amend its complaint. Defendant opposes.

Following the submission of these motions, the action was stayed given the unavailability of plaintiff's counsel, which unavailability has recently lapsed.

I. MOTION AND CROSS MOTION FOR SUMMARY JUDGMENT

A. Dismissal of plaintiff's complaint

Defendant moves to dismiss plaintiff's claims for foreclosure of the mechanic's lien, *quantum meruit*, and unjust enrichment on the grounds that there is no privity of contract between it and plaintiff, as any alleged contract to perform work at the building was between plaintiff and Fays's Restaurant and Bar Inc., a tenant in the building. It thus denies that plaintiff may enforce the lien against defendant. It also denies that the work was performed with its knowledge or consent, and contends that the lien is willfully exaggerated as, rather than performing renovations, plaintiff demolished and destroyed the building's interior. (NYSCEF 32).

Plaintiff, in opposition to defendant's motion and in support of its cross motion, submits an affidavit from its president, who states therein that defendant asked him to perform repairs at Fay's and that it submitted design plans to defendant, which accepted plaintiff's work. (NYSCEF 40).

By notice dated July 5, 2017, defendant rejected the cross motion as untimely served and as it sought summary judgment against a non-party. (NYSCEF 47). It also opposed the motion on the merits, denying that it requested or consented to plaintiff's work, and argues that the notice of lien is thus defective as it states therein that defendant consented to the work. (NYSCEF 53).

As privity of contract is not required between a contractor and property owner in an action to foreclose a mechanic's lien, the action may not be dismissed on this ground. (*See Kuhn v Kober*, 203 AD2d 536 [2d Dept 1994] [motion to dismiss properly denied as it was irrelevant that there was no privity of contract between contractor and owner]).

Defendant's other arguments about a lack of consent to the alleged work and its dispute that any work was performed for which plaintiff should be paid are not properly addressed here, as there are disputed accounts of what occurred which cannot be resolved summarily. (*See e.g., Icdia Corp. v Visaggi*, 135 AD3d 820 [2d Dept 2016] [summary judgment denied as factual issue existed as to owner's consent to work]).

In any event, summary discharge of a lien is permitted only for the grounds set forth in Lien Law § 19, which does not include as a ground a dispute as to the scope, amount, or quality of the work at issue. (*Rivera v Dept. of Hous. Preservation and Dev. of City of New York*, 29 NY3d 45 [2017] [allegedly unreasonable amount of claimed expenses in lien not basis for summary discharge of lien; resolution of disputes regarding expenses should be decided after trial and not in summary proceeding]; *Matter of Northside Tower Realty LLC v Klin Constr. Group, Inc.*, 73 AD3d 1072 [2d Dept 2010] [court has no inherent power to vacate or discharge lien except as authorized in Lien Law § 19, and thus dispute related to lien's validity had to await trial by foreclosure]).

Nevertheless, given plaintiff's allegation that it entered into a contract with Fay's, its unjust enrichment and *quantum meruit* claims may not be maintained. (*DL Marble & Granite Inc. v Madison Park Owner, LLC*, 105 AD3d 479 [1st Dept 2013] [contract and quasi-contract claims properly dismissed as plaintiff subcontractor did not contract with owner, but rather with

nonparty general contractor]; *Perma Pave Contr. Corp. v Paerdaget Boat and Racquet Club, Inc.*, 156 AD2d 550 [2d Dept 1989] [same]).

While plaintiff's cross motion may have been untimely served, defendant addressed it on the merits and was therefore not prejudiced by its lateness. (*See e.g., Prato v Arzt*, 79 AD3d 622 [1st Dept 2010] [court did not err in declining to reject as untimely opposition to motion absent showing of prejudice]; *see also Adler v Gordon*, 243 AD2d 365 [1st Dept 1997] [plaintiff waived right to contest late service of motion by filing opposition on merits]). However, given the presence of factual disputes, the cross motion for summary judgment is also denied.

B. Judgment on counterclaims and sanctions

Defendant's counterclaims for willful exaggeration of the lien and damages based on a wrongfully-filed lien depend on the resolution of factual disputes, which is not appropriate here. (*See Perma Pave Contr. Corp.*, 156 AD2d at 552 [denial of summary judgment on counterclaim for willful exaggeration of lien was appropriate as movant failed to establish, *prima facie*, that lienor intentionally and deliberately exaggerated amount claimed in lien]; *see also On the Level Enter., Inc. v 49 E. Houson LLC*, 104 AD3d 500 [1st Dept 2013] [as lien may be summarily disposed when evidence conclusively shows willful exaggeration and as burden involves proof as to lienor's credibility, issue of willful or fraudulent exaggeration "is one that is ordinarily determined at the trial of the foreclosure action, and not on summary disposition"]).

Its counterclaim for attorney fees and expenses pursuant to Lien Law § 39-a is premature absent an order discharging the lien. And, judgment on its counterclaims for abuse of process, malicious prosecution, and tortious interference with prospective business advantage is also

premature absent a finding that plaintiff's motivation in filing the lien was to harm defendant and/or that plaintiff acted with malice.

Similarly, there is no basis on this record for an award of sanctions against plaintiff and its counsel.

II. MOTION AND CROSS MOTION TO AMEND

Plaintiff seeks to amend its complaint to add as defendants Fay's and three New York City agencies. A review of the proposed amended complaint reflects that the only new claim added is a breach of contract claim against defendant, while no specific facts or claims have been asserted against the agencies. In the affirmation annexed to its notice of motion, counsel provides no basis for moving to amend. (NYSCEF 16). Defendant objected to the motion on various grounds. (NYSCEF 19).

Although plaintiff did not withdraw its motion, it later filed a cross motion to defendant's motion to dismiss and again moved to amend the complaint. Based on the affidavit of its principal, plaintiff has established that its claims against Fay's have merit. However, absent any allegation or evidence concerning the agencies' liability here, plaintiff does not show that its claims against them have merit. Moreover, based on the above, plaintiff may not assert a breach of contract claim against defendant absent evidence of a contractual relationship between them.

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant's motion for summary judgment is granted to the extent of dismissing plaintiff's claims against it for unjust enrichment and quantum meruit, and is otherwise denied; it is further

ORDERED, that plaintiff's cross motion to amend is granted solely to the extent of permitting amendment against Fay's Restaurant and Bar, Inc., and is otherwise denied; its cross motion for summary judgment is also denied; it is further

ORDERED, that plaintiff is directed to amend its supplemental summons and amended complaint to conform to this decision and order, and to serve it on all parties who have appeared in this action by electronic filing within 30 days after entry of this order; it is further

ORDERED, that the amended supplemental summons and amended complaint shall be served, in accordance with the Civil Practice Law and Rules, upon the additional parties in this action within 30 days after entry of this order; it is further

ORDERED, that upon said service, the action shall bear the following caption:

FINE LINE MIC CORP.,

Plaintiff,

- against -

141 CHRYSTIE STREET CORP., and FAY'S
RESTAURANT AND BAR, Inc.,

Defendants.

it is further

ORDERED, that counsel for plaintiff shall serve a copy of this order with notice of entry upon the County clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the additional parties; and it is further

ORDERED, that plaintiff's motion to amend (sequence two) is denied as academic.

5/9/2018

DATE

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BARBARA JAFFE, J.S.C.

HON. BARBARA JAFFE

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CASE DISPOSED

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SETTLE ORDER

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NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

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OTHER

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REFERENCE

APPLICATION:

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