SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Robert D. KALISH **PART 29**
Justice

PREMIUM MILLWORK, INC.,

Plaintiff,

- v -

GREAT AMERICAN INSURANCE COMPANY,

Defendant.

INDEX NO. 154106/2018

MOTION DATE 6/21/18

MOTION SEQ. NO. 001

DECISION AND ORDER

NYSCEF Doc Nos. 3–17 were read on this motion to dismiss.

Motion by Defendant Great American Insurance Company ("GAI") pursuant to CPLR 3211 (a) (1) and (7) for an order dismissing the complaint of Plaintiff Premium Millwork, Inc. ("Premium") in its entirety, canceling and vacating the Notice of Mechanic's Lien filed by Plaintiff on November 25, 2014 (the "Lien"), canceling and vacating the Discharge of Mechanic's Lien Bond executed by Greenhope Properties LLC ("Greenhope") and GAI on May 28, 2015 (the "Bond"), and discharging Greenhope and GAI from any liability under the Bond is granted.

BACKGROUND

Premium commenced the instant action on May 3, 2018, by e-filing a summons and complaint ("Complaint"). The Complaint alleges that Premium performed certain construction, renovation, and improvement work at 133 Greene Street, Apt. 5S, New York, New York 10012, Block 514, Lot 28 (the "Premises"). The Complaint further alleges that, "within four months after the last item of labor and services were performed," Premium filed the Lien in the amount of $58,335.00. (Complaint ¶ 9.) The Complaint then states that Premium seeks to foreclose on the Bond, dated May 22, 2015, by Jean Chalopin, Managing Member of Greenhope, and GAI. Premium and is seeking a judgment declaring that the Lien is valid, a judgment in favor of Premium and against GAI in the amount of $58,335.00, together with interest from November 24, 2014, and an award for Premium's costs in this action, including reasonable attorney's fees.

On June 1, 2018, GAI filed the instant motion.[1] GAI argues in its moving papers that the Lien is facially invalid because it was filed more than four months after Premium last performed work and furnished materials. GAI has annexed a copy of the Lien as exhibit A. The Lien states

[1] A prior action involving Plaintiff and the Lien proceeded under index no. 151879/2015 and was discontinued on May 1, 2018, without prejudice. While GAI was not a party to the prior action, the Court will consider the merits of the Lien in the interest of judicial economy as relates to GAI's application to cancel and vacate both the Lien and the Bond and to discharge Greenhope and GAI from any liability under the Bond.

that Premium, as lienor, last performed work and furnished materials at the Premises, known as "Chalopin," on June 15, 2014. The Lien is dated October 30, 2014, and is signed by Julio Cuenca, President, Premium Millwork, Inc. The Lien bears a stamp indicating that the Lien was filed with the New York County Clerk on November 25, 2014, at 10:20 a.m.

Premium argues in its opposition papers that Premium filed the Lien "within eight months after the last item of labor and services were performed." (Affirmation of Chan ¶ 5.) Premium then argues that it "seeks the Court to give plaintiff's Complaint a liberal construction and the benefit of every possible favorable inference." (*Id.* ¶ 11.) Premium further argues that, "[u]pon information and belief, the subject project [] is a commercial construction project. As a result, the lien is not facially invalid on its facts because the subject lien was filed within eight (8) months from the last day the plaintiff performed its work." (*Id.* ¶ 14.)

GAI argues in its reply papers that the Complaint's allegation that Premium filed the lien "within four months after the last item of labor and services were performed," not eight months as stated in Premium's opposition papers, indicates an acknowledgement in the Complaint that the Premises are residential. GAI further argues that a four-month limitations period applies to the filing of the Lien. GAI has annexed as exhibit A to its reply papers a property data sheet from the New York City Department of Finance, Office of the City Register, Document ID 2011072601462001, indicating that the Premises are a "single residential coop unit." The data sheet also states that the grantee/buyer was Greenhope, "c/o Jean Chalopin." GAI then argues that, pursuant to the Lien Law, a lienor must file a mechanic's lien against a residential dwelling within four months from the date the lienor last performed work or furnished materials.

DISCUSSION

When considering a CPLR 3211 (a) (7) motion to dismiss for failure to state a cause of action, "'the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory.'" (*Peery v United Capital Corp.*, 84 AD3d 1201, 1201–02 [2d Dept 2011], quoting *Breytman v Olinville Realty, LLC*, 54 AD3d 703, 703–704 [2d Dept 2008].) "It is axiomatic that, on a motion brought pursuant to CPLR 3211, our analysis of a plaintiff's claims is limited to the four corners of the pleading." (*Nomura Home Equity Loan, Inc. v Nomura Credit & Capital, Inc.*, 133 Ad3d 96, 105 [1st Dept 2015], *aff'd* 30 NY3d 572 [2017].) "'The criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.'" (*Sigmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, 403 [1st Dept 2013], quoting *Leon v Martinez*, 84 NY2d 83, 88 [1994].) "Such a motion should be granted only where, even viewing the allegations as true, the plaintiff still cannot establish a cause of action." (*Kamen v Berkeley Co-op. Towers Section II Corp.*, 98 AD3d 1086, 1086 [2d Dept 2012], citing *Hartman v Morganstern*, 28 AD3d 423, 424 [2d Dept 2006].)

A CPLR 3211 (a) (1) motion to dismiss based upon that the action is barred by documentary evidence "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of

law." (*Goshen v Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326 [2002]; *see also Amsterdam Hospitality Group, LLC v Marshall-Alan Assocs., Inc.*, 120 AD3d 431, 433 [1st Dept 2014].)

Lien Law § 10 (1) states, in relevant part, that

> "Notice of lien may be filed at any time during the progress of the work and the furnishing of the materials, or, within eight months after the completion of the contract, or the final performance of the work, or the final furnishing of the materials, dating from the last item of work performed or materials furnished; provided, however, that where the improvement is related to real property improved or to be improved with a single family dwelling, the notice of lien may be filed at any time during the progress of the work and the furnishing of the materials, or, within four months after the completion of the contract, or the final performance of the work, or the final furnishing of the materials, dating from the last item of work performed or materials furnished . . . ."

"The reach of a mechanic's lien is completely controlled by statute. In order to effectuate it, the notice of lien must be filed within four months after completion of the work (Lien Law § 10.)" (*Perrin v Stempinski Realty Corp.*, 15 AD2d 48, 49 [1st Dept 1961] [internal citation omitted].) It is appropriate for the Supreme Court to dismiss a complaint in an action to foreclose a mechanic's lien and to vacate a notice of mechanic's lien where a defendant establishes prima facie that the notice of mechanic's lien was not timely filed pursuant to Lien Law § 10. (*See Ren. Reh. Systems Co., Inc. v Faulkner*, 85 AD3d 752, 753 [2d Dept 2011].) Where a notice of lien encompasses a single condominium unit or cooperative apartment, such unit or apartment is a single-family dwelling under the Lien Law, regardless of whether the larger building or property constitutes a multiple dwelling, and the four-month limitations period applies. (*See Matter of City of Albany Indus. Dev. Agency v DeGraff-Moffly/Gen. Contrs.*, 164 AD2d 20, 22 [3d Dept 1990]; *In re Abbott*, 14 Misc3d 983, 985–986 [Sup Ct, NY County 2007].)

In the instant motion, GAI has shown prima facie that the Lien was for a project where the work was last performed, and the materials were last furnished, on June 15, 2014. GAI has further shown prima facie that the Lien was dated October 30, 2014, and filed November 25, 2014. GAI has further shown prima facie that the Lien was for work done in a single unit, Apartment 5S, known as "Chalopin." To the extent that Premium raised an issue of fact, contrary to the allegations in the Complaint, as to whether the Premises are a single-family dwelling under the Lien Law, GAI has resolved that issue in reply by annexing the property data sheet indicating that the Premises are a single residential coop unit relating to property connected to Jean Chalopin, who signed the Bond on behalf of Greenhope, with GAI as surety.

Based upon the foregoing, the Court finds that the Lien was not timely filed pursuant to Lien Law § 10 (1). As such, the Court finds that Premium does not have a cause of action against GAI in the instant Complaint.

CONCLUSION

Accordingly, it is

ORDERED that the motion by Defendant Great American Insurance Company ("GAI") pursuant to CPLR 3211 (a) (1) and (7) for an order dismissing the complaint of Plaintiff Premium Millwork, Inc. ("Premium") in its entirety, canceling and vacating the Notice of Mechanic's Lien filed by Plaintiff on November 25, 2014, canceling and vacating the Discharge of Mechanic's Lien Bond executed by Greenhope Properties LLC ("Greenhope") and GAI on May 28, 2015, and discharging Greenhope and GAI from any liability under the Bond is granted; and it is further

ORDERED that the complaint is dismissed in its entirety as against GAI, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the notice of mechanic's lien in the sum of $58,335.00, filed by Premium on November 25, 2014, with the County Clerk of the County of New York (the "County Clerk") against the real property located at 133 Greene Street, Apt. 5S, New York, New York 10012, in the County and State of New York, and designated on the tax map as Block 514, Lot 28, is hereby vacated and canceled, and the County Clerk shall amend its records accordingly; and it is further

ORDERED that the County Clerk shall release and discharge the bond in the sum of $64,168.50, posted with the County Clerk on May 28, 2015, under index no. 100952/2015.

The foregoing constitutes the decision and order of the Court.

Dated: July 9, 2018
New York, New York

J.S.C.
HON. ROBERT D. KALISH

1. Check one:..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. Check if appropriate:..... MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE