Kenvil United Corp. v Tishman Constr. Corp. of N.Y.
2020 NY Slip Op 32323(U)
July 15, 2020
Supreme Court, New York County
Docket Number: 157372/2019
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ANDREW BORROK** **PART** **IAS MOTION 53EFM**

Justice

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KENVIL UNITED CORPORATION,

Plaintiff,

- v -

TISHMAN CONSTRUCTION CORPORATION OF NEW YORK, FEDERAL INSURANCE COMPANY

Defendant.

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INDEX NO. 157372/2017

MOTION DATE 11/19/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

Upon the foregoing documents, Kenvil United Corporation's (**Kenvil**) motion for summary judgment and Tishman Construction Corporation of New York and Federal Insurance Company's (collectively, **Defendants**) cross-motion for summary judgment to dismiss the complaint are denied.

The Relevant Facts and Circumstances

Reference is made to (i) an Agreement (the **Agreement**; NYSCEF Doc. No. 37), dated November 18, 2014, by and between Tishman Construction Corporation of New York (**Tishman**) as Construction Manager and Metropolitan Steel Industries, Inc. (**MSI**) as Contractor, pursuant to which MSI agreed to provide labor, supervision, and materials for construction work at One West End Avenue, New York, New York (the **Property**) for the contract price of $4,750,000 (the **Project**) and (ii) a Subcontract Agreement (the **Subcontractor**

Agreement; NYSCEF Doc. No. 38), dated October 22, 2015, by and between MSI as Contractor and Kenvil as Subcontractor, pursuant to which Kenvil agreed to perform certain work for the contract price of $800,000.

By letter (NYSCEF Doc. No. 39), dated January 4, 2016, Kenvil requested outstanding payment from MSI of $569,989.66 under the Subcontractor Agreement, as well as $99,706.93 for overtime and extra work to correct certain misfabricated steel supplied by MSI. By a second letter (*id.*), dated January 4, 2016, Kenvil requested that Tishman advise whether MSI or Tishman provided a payment bond or any other security for payment of subcontractors on the Project.

On or around March 2016, Tishman terminated MSI for cause because MSI failed to perform in accordance with the Project schedule (NYSCEF Doc. No. 52, ¶ 7). Afterwards, Tishman engaged others, including Kenvil, to complete MSI's scope of work (*id.*, ¶¶ 7-8). Kenvil last provided services for the Project on May 11, 2016 (NYSCEF Doc. No. 33, ¶ 26). Although Tishman paid Kenvil directly for work performed after MSI's termination, Kenvil claims it was not fully paid by MSI for earlier work on the Project.

As a result, Kenvil filed a Mechanic's Lien (the **Lien**; NYSCEF Doc. No. 41), dated August 23, 2016, on the Property for the sum of $607,334.25. The Defendants bonded the Lien by filing a Bond Discharging Mechanic's Lien (the **Bond**; NYSCEF Doc. No. 42), dated September 1, 2016, in the sum of $668,067.68. Subsequently, on August 17, 2017, Kenvil commenced this action to obtain a judgment for enforcement of the Lien.

Discussion

On a motion for summary judgment, the movant "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing is made, the burden shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of a triable issue of fact (*Zuckerman v New York*, 49 NY2d 557, 562 [1980]).

A. Kenvil's Motion for Summary Judgment

Kenvil argues that it is entitled to summary judgment to recover against the Bond because it filed the Lien on which sums are due. In their opposition papers, the Defendants argue that the instant motion should be denied because Kenvil's recovery must be limited to the amount owed from Tishman to MSI (i.e., the lien fund), and there exists an issue of fact as to whether there is any money in the lien fund because notwithstanding that it paid $4,771,548.45 to complete the job when its contract price with MSI was $4,892,092, MSI was in default (*see DiVeronica Bros. v Basset*, 213 AD2d 936, 938 [3d Dept 1995]).

Although a party may recover on a bond by establishing that it has a valid mechanic's lien (*Worlock Paving Corp. v Camperlino*, 222 AD2d 1097, 1098 [4th Dept 1995]), the amount recovered is subject to Section 4 of the Lien Law, which provides that:

> ... If labor is performed for, or materials furnished to, a contractor or subcontractor for an improvement, the lien shall not be for a sum greater than the sum earned and unpaid on the contract at the time of filing the notice of lien, and any sum subsequently earned thereon. ***In no case shall the owner be liable to pay by reason of all liens created***

> ***pursuant to this article a sum greater than the value or agreed price of the labor and materials remaining unpaid, at the time of filing notices of such liens, except as hereinafter provided.***

(NY Lien Law § 4 [emphasis added]).

A subcontractor's right to recover pursuant to a lien is derivative of the general contractor's rights and a subcontractor is restricted to satisfaction from the amount due and owing from the owner to the general contractor (*C.B. Strain & Son, Inc. v J. Baranello & Sons*, 90 AD2d 924, 925 [3d Dept 1982]). In other words, if the general contractor is not owed any sums under its contract with the owner when the subcontractor's notice of lien was filed, the subcontractor may not recover from the owner (*C.C.C. Renovations, Inc. v Victoria Towers Dev. Corp.*, 168 AD3d 664, 666 [2d Dept 2019], citing *Timothy Coffey Nursery/Landscape, Inc. v Gatz*, 304 AD2d 652, 654 [2d Dept 2003]). Further, the subcontractor bears the burden of demonstrating that money is due and owing from the owner to the general contractor under the primary contract (*Timothy Coffey, id.*).

Here, it is undisputed that Kenvil filed its Lien within 8 months after final performance of its work and for the sum of $607,334.25 in unpaid labor and materials (NYSCEF Doc. No. 41). Accordingly, Kenvil has established the Lien is valid. However, inasmuch as Kenvil asserts that there is payment due from MSI under the Subcontractor Agreement (NYSCEF Doc. No. 33, at ¶ 18), Kenvil's right to recover as a subcontractor is conditioned upon the amount owed from Tishman to MSI under the Agreement and Kenvil fails to meet its burden to establish what amount, if any, was owed to MSI under the Agreement when the Lien was filed (*see Timothy Coffey, supra*). As Kenvil has not established its prima facie case as to whether Tishman owed

any money to MSI when the Lien was filed, Kenvil's motion for summary judgment must be denied.

B. Defendants' Motion for Summary Judgment

As an initial matter, Kenvil argues that the Defendants' cross-motion should not be considered because it was filed after the stipulated deadline for opposition papers. Notwithstanding the Defendants' minimal delay, and mindful of the public policy in favor of resolution of matters on the merits, the court exercises its discretion to consider the cross-motion as there is no evidence that Kenvil was prejudiced by any delay in the Defendants' late filing (*see Guzetti v City of NY*, 32 AD3d 234, 234 [1st Dept 2006]).

The Defendants argue that the complaint should be dismissed because MSI was fully paid by Tishman when the Lien was filed and that there is no lien fund to which Kenvil's Lien can attach. The Defendants rely on the affidavit of Richard Ortiz, Vice President of Tishman and Senior Project Manager on the Project, in which he explains that the Agreement's original contract value of $4,750,000 was adjusted to $4,892,092 as a result of four change orders issued to MSI (NYSCEF Doc. No. 52, ¶ 11). To the extent that Tishman asserts that MSI defaulted under the Agreement and no further money is owed to MSI, Tishman adduces no evidence concerning MSI's alleged breach and the record indicates that MSI was paid by Tishman for the sum of $4,771,548.45, which leaves a remaining balance of $120,543.55 under the Agreement (*id.*). Under these circumstances, Tishman has not established that there is an absence of any funds due and owing to MSI out of which the Lien, or some portion thereof, could be satisfied (*contra DiVeronica*, 213 AD2d at 938 [owner established prima facie case that no funds were

due to general contractor from which subcontractor's liens could be satisfied where owner submitted "ample evidence, including expert opinion evidence, to demonstrate that as a result of the defective work performed" by the general contractor, general contractor breached the contract and was liable to owner for damages and therefore "established the absence of any funds due and owing" from which subcontractors' liens could be satisfied]). Accordingly, the Defendants' cross-motion for summary judgment to dismiss the complaint is denied.

Accordingly, it is

ORDERED that Kenvil's motion for summary judgment is denied; and it is further

ORDERED that the Defendants' cross-motion for summary judgment is denied.

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7/15/2020
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE