

Dired Embed Coating Sys., LLC v Kubik Maltbie, Inc.
2020 NY Slip Op 33086(U)
September 17, 2020
Supreme Court, New York County
Docket Number: 651493/2020
Judge: Laurence L. Love
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LAURENCE L. LOVE PART IAS MOTION 63

Justice

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INDEX NO. 651493/2020

DIRECT EMBED COATING SYSTEMS, LLC,

MOTION DATE 9/11/2020

Plaintiff,

MOTION SEQ. NO. 001

- v -

KUBIK MALTBIE, INC., ROCKEFELLER CENTER NORTH,
INC., and THE GUARANTEE COMPANY OF NORTH
AMERICA,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14
were read on this motion to/for DISMISSAL.

Upon the foregoing documents, the motion is decided as follows:

Plaintiff, Direct Embed Coating Systems, LLC, (“DECS”) commenced this action on
March 5, 2020, by filing a summons and verified complaint seeking to foreclose on a mechanic’s
lien filed on November 27, 2019 in the amount of \$51,224.00. Defendant, Rockefeller Center
North, Inc. (“Rockefeller”), now moves to dismiss the complaint pursuant to CPLR 3211(a)(7).

Rockefeller owns the real property located at 1271 Avenue of the Americas, New York,
NY. Non-party JRM Construction hired Kubik Maltbie, Inc., as a subcontractor to perform certain
work, labor and services on the premises for the benefit of Rockefeller’s tenant, Major League
Baseball. DECS was to create, furnish, and install graphic aluminum wall panels pursuant to the
terms of a purchase order agreement dated June 17, 2019. Kubik agreed to pay DECS \$99,449.00,
and Kubik made an initial payment of \$48,225.00 on or about July 5, 2019. After completion of
the work, on or about October 14, 2019, DECS submitted an invoice to Kubik for the work
performed and requested a final payment of \$51,224.00. Kubik did not pay and DECS filed a

mechanic's lien on November 26, 2019 against the premises for the unpaid balance. On December 9, 2019, Kubik posted a bond, issued by Guarantee Company of North America in the sum of \$56,346.00.

Rockefeller now seeks to dismiss the action as asserted against it as “[o]nce a mechanic’s lien has been discharged by bond, there no longer exists a claim against the real property” (see *Maverick Constr Servs, LLC v Desford P’rs, LLC*, 39 Misc.3d 1210(A) [Sup. Ct., Kings Co. 2013]).

Pursuant to New York Lien Law § 44(3) states, “[i]n an action in a court of record to enforce a lien against real property or a public improvements, the following are necessary parties: all person appearing by the records in the office of the county clerk or register to be owners of such real property or any part thereof.” However, Pursuant to New York Lien Law § 37(7), “[t]he plaintiff in such an action, must prior to the commencement thereof, file in the office of the clerk of the county where the bond is filed, the summons and complaint in such action and shall join as parties defendant, 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.”

Rockefeller argues that “in an action to foreclose a mechanic’s lien as against a bond, Lien Law § 37(7) supersedes Lien Law § 44 in determining the parties to be joined. Section 37(7), does not include the owner of the real property as a party to the action.” And further argues that pursuant to New York Lien Law § 44-b, “any private owner or the state or a public corporation with which a notice of lien is filed shall not be a necessary party defendant in an action to enforce the lien if, either before or after the commencement of the action, a contractor or subcontractor,...(b) in the case of a private improvement, executes a bond or undertaking in accordance with subdivision four of section nineteen of this chapter, to the county clerk with which the notice of lien is filed

conditioned for the payment of any judgment that may be recovered in an action to enforce the lien.”

As discussed in *Doma Inc v 885 Park Avenue Corporation*

The only considerations articulated in *Harlem Plumbing Supply Co. v. Handelsman* (40 AD2d 768 [1972]) 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 (see *Doma Inc. v. 885 Park Avenue Corporation*, 59 Misc.3d 703 [Sup. Ct. 2018]).

As on December 9, 2019, prior to the commencement of this action, Kubik posted a bond conditioned for the payment of any judgment that may be recovered in an action to enforce the lien, they are no longer a necessary party to this action.

ORDERED that the motion of defendant Rockefeller Center North, Inc. to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who are directed to mark the court’s records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh).



9/17/2020
DATE

LAURENCE L. LOVE, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE