

Danya Cebus Constr., LLC v Bella Mgt. Group, Inc.

2020 NY Slip Op 34098(U)

December 8, 2020

Supreme Court, Kings County

Docket Number: 527013/2019

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

X

DANYA CEBUS CONSTRUCTION, LLC,

Petitioner,

-against-

BELLA MANAGEMENT GROUP, INC.,

Respondent.

X

DECISION / ORDER /
JUDGMENT

Index No. 527013/2019
Motion Seq. No. 03
Date Submitted: 09/24/2020

Recitation, as required by CPLR 2219(a), of the papers considered in the review of petitioner's motion to cancel respondent's mechanics lien.

Papers	NYSCEF Doc.
Order to Show Cause, Affirmation and Exhibits	<u>36-41</u>
Affirmation in Opposition, and Memorandum of Law and Exhibits.....	<u>42-51</u>
Reply Affirmation.....	<u>52</u>

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

This is a special proceeding arising out of a mechanic's lien that was filed on March 15, 2019 by respondent (a subcontractor) against the property owner and petitioner, the general contractor. Petitioner served a "Demand for Itemized Statement of Lien Pursuant to Lien Law § 38" on July 5, 2019. A separate action to foreclose on the lien was commenced on September 26, 2019 under Index No. 521186/2019. Petitioner Danya Cebus Construction, LLC ("DCC") filed this special proceeding for an order, pursuant to Lien Law § 38, directing respondent Bella Management Group ("BMG") to provide a Verified Itemized Statement of its Mechanic's Lien, specifically, "(i) the items of labor and/or materials and the value thereof that make up the amount for which Respondent claimed a lien in the amount of \$338,000,00, and (ii) the terms of the

contract under which the items were furnished.” The petition was granted and BMG was ordered to provide a response to the Demand setting forth “the items of labor and/or materials and the value thereof which make up the amount for which BMG claims a mechanic’s lien . . . in the amount of \$338,000.00” within ten days from this court’s July 6, 2020 decision and order (E-File Doc 38 [resolving MS 01 and 02]).

BMG submitted a response (Doc. 30-34) from Laura Peck, stating that it “supplied and installed masonry materials, an external insulating finishing system, roofing materials, and other materials incidental thereto, between 11/29/2017 and 10/1/2018, used for the improvement of the real property” (E-File Doc 30). However, BMG’s principal Laura Peck avers, in her sworn response, that “BMG is attempting to comply with this Court’s Order as fully as possible, but it is being impeded by Petitioner DCC and Subcontractor Dani’s Builders, Inc. (DB), acting in concert to defeat BMG’s Mechanic’s Lien” (*id.*). BMG asserts that DCC, DB, and “a third party named Brett Steinberg[] have conspired to deprive BMG of the benefit of the contract.” Specifically, she claims that [petitioner herein] DCC, the general contractor, entered into a subcontract with BMG [respondent herein], who in turn entered into a subcontract with DB, and “DB performed all labor and provided all materials pursuant” to that contract but “[p]rior to completion of the contract, DCC, DB and Brett Steinberg conspired to divert payments to DB[] that were due to BMG under the contract.”

According to Ms. Peck of BMG, nonparty Brett Steinberg¹ executed an Amendment to [BMG’s] Subcontract with DCC (Doc. 32) on July 27, 2018, without “any real or apparent authority to act on behalf of BMG,” by which BMG purported to reduce

¹ Steinberg is a “cross claim defendant” in the related action to foreclose the lien.

the amount due to BMG under the subcontract from \$338,000 to \$242,310. "In return for Brett Steinberg reducing the contract amount, DCC agreed to, and did, make payments directly to subcontractor DB, cutting BMG out of its subcontract." BMG's president, Laura Peck, avers that she has "been trying for years to get these details from DB [a breakdown of labor and materials in DB's possession]" but DB's principal, nonparty Frank Taveras, has refused to give such information to BMG. BMG also could not provide the original subcontract with DCC, which was allegedly "destroyed in a flood" in 2017. Ms. Peck further claims that Daniel Tavares, Frank Tavares' son, signed a waiver of lien document (Doc. 34) on BMG's part, which she avers was without authority from BMG and therefore is not binding on it.

Now, in Motion Sequence 3, petitioner DCC moves, by order to show cause, to cancel BMG's mechanic's lien pursuant to Lien Law § 38 for BMG's failure to provide the itemized verified statement in accordance with this court's July 6, 2020 order.

Discussion

Lien Law § 38 provides, in pertinent part, that

"[a] lienor who has filed a notice of lien shall, on demand in writing, deliver to the owner or contractor making such demand a statement in writing which shall set forth the items of labor and/or materials and the value thereof which make up the amount for which he claims a lien, and which shall also set forth the terms of the contract under which such items were furnished."

"The purpose of the itemization is to apprise the owner of the details of the lienor's claim" (*F.J.C. Cavo Constr., Inc. v Robinson*, 81 AD2d 1005, 1005 [4th Dept 1981]) and "to enable the petitioner to check the claim" (*Matter of 819 Sixth Ave. Corp. v*

T. & A. Assocs., 24 AD2d 446, 446 [1st Dept 1965]; see *Associated Bldg. Servs., Inc. v Pentecostal Faith Church*, 112 AD3d 1130, 1131 [3d Dept 2013]; *Matter of Solow v Bethlehem Steel Corp.*, 60 AD2d 826, 826 [1st Dept 1978]).

If an itemized statement is necessary “to enable the petitioner to check the claim, the statement served by the lienor should set forth the description, quantity and costs of various kinds of materials and the details as to the nature of labor, time spent and hourly or other rate of the labor charges” (*Matter of 819 Sixth Ave. Corp.*, 24 AD2d at 446 [citations omitted]). The burden of producing an adequate statement rests on the party that filed the lien (see *Matter of 819 Sixth Ave. Corp.*, 24 AD2d at 446; see also *2269 First Ave Owner LLC v BDM Sols. LLC*, 2019 NY Slip Op. 31823[U], 3-6 [NY Sup Ct, New York County 2019]). “General summaries or lump sum statements do not meet the requirements of Lien Law § 38” (*Matter of Maxwell Partners, LLC*, 2006 WL 8085000, at *3).

Courts have cancelled liens where an itemized statement pursuant to Lien Law § 38 was found to be insufficient (*Plain Ave. Stor., LLC v BRT Mgt., LLC*, 165 AD3d 1264, 1265-1266 [2d Dept 2018]), though whether to cancel a lien is addressed to the discretion of the court and the court may, for instance, direct the lienor to submit a revised statement (e.g. *2269 First Ave Owner LLC*, 2019 NY Slip Op. 31823[U], *3-6).

BMG argues that (1) an itemized statement is not necessary here, despite the court's prior order; and that (2) “it has complied with the Court's Order to the extent possible, and is prevented from fully complying by the failure and refusal of DB to provide BMG with the necessary information.” BMG also argues that DCC has failed to comply with its statutory notice requirements. BMG's assertion with regard to the notice

requirements is incorrect, as the underlying petition was served in the appropriate manner and DCC is not required to first seek a revised itemized statement before making this motion. Further, the court has already ordered BMG to provide the itemized statement which it, concededly, was not able to produce. BMG contends that it is incapable of providing the original contract with DCC because of a flood in the office BMG shared with DB in 2017, and then describes a series of allegedly fraudulent transactions involving nonparties DB and the above-named individuals. This is what is known as “the dog ate the homework excuse,” and is rarely sufficient. BMG has not, for instance, tried to obtain (or compel) discovery from those nonparties nor has it made an application to extend its time to comply with its obligation to provide an itemized statement.

Most troubling is Laura Peck’s affidavit, her “Response,” (E-File Doc 30) when read with the other documents in this matter. For example, she states that she is the sole shareholder of BMG. But Frank Tavares’ affidavit (E-File Doc 52 in the lien foreclosure action) states that he is the owner of 49% of the shares of BMG and is also an owner of DB. The court finds that BMG’s Response and exhibits (E-File Docs 30-34) is wholly inadequate, and that the court cannot choose sides. Counsel’s affirmations both dispute the facts as alleged by the other. Once the specter of fraud, conspiracy and the like are raised, the efficient process of filing and then foreclosing on a mechanic’s lien is no longer available. An action to foreclose a mechanic’s lien is not the proper place to raise defenses of fraud and conspiracy. BMG has other remedies. It can sue to be paid and endeavor to prove its case. Here, Ms. Peck seems to be saying that DCC paid DB directly, instead of paying BMG, who then would have paid

DB after taking out BMG's fee. If that is so, the amount of the recorded lien was greatly exaggerated. It is not fair to encumber the project, a completed (Final Certificate of Occupancy issued 11/20/19) brand new apartment building, with BMG's lien if BMG cannot even document the basis for the calculation of the lien.

Accordingly, it is **ORDERED** and **ADJUDGED** that the motion is granted.

The mechanic's lien filed by respondent Bella Management Group, Inc. on March 15, 2019 against the property known as 150 Union Avenue (Block 2238, Lot 49, in the sum of \$338,000.00, against 120 Union Asset LLC as owner, with petitioner Danya Cebus Construction LLC as the general contractor, is hereby vacated, and the Clerk of Kings County is directed to vacate and cancel such lien of record accordingly.

This constitutes the decision, order and judgment of the court.

Dated: December 8, 2020

ENTER:



Hon. Debra Silber, J.S.C.