Capital Concrete NY Inc. v Happy Living Dev. LLC
2021 NY Slip Op 30872(U)
March 17, 2021
Supreme Court, Kings County
Docket Number: 511280/20
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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CAPITAL CONCRETE NY INC.,

Plaintiffs Decision and order

- against - Index No. 511280/20

HAPPY LIVING DEVELOPMENT LLC, 9TH ST DEV LLC, BESPOKE HARLEM WEST LLC, WEST 37TH ST LLC, D SOLNICK DESIGN AND DEVELOPMENT LLC, GALIL PS 488 LLC, PS 48 GROUP LLC, 834 PACIFIC HOLDINGS LLC, W133 OWNER LLC, LEVI BALKANY, WESTCHESTER FIRE INSURANCE COMPANY, March 17, 2021

Respondent,

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PRESENT: HON. LEON RUCHELSMAN

The defendants have moved pursuant to CPLR §3211 on the grounds the plaintiff failed to properly serve a mechanic's lien. The plaintiff opposes the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

Property located at 441 West 37th Street is owned by D Solnick Design and Development LLC and West 37th Street LLC. On November 27, 2019 the plaintiff filed a mechanic's lien and pursuant to Lien Law §11 served 441 West 37th Street within the requisite time. However, the plaintiff never served D Solnick Design. The defendants now seek to dismiss the action on the grounds the defendant D Solnick Design was never served with notice of the lien, a necessary element of Lien Law §11. The plaintiff does not dispute that owner was not served, however,

plaintiff argues service upon one owner is sufficient and consequently, the motion seeking dismissal must be denied.

Conclusions of Law

A mechanic's lien is a legislative creation, remedial in nature, to protect those who improved and enhanced the value of real property by using labor and materials (Niagra Venture v. Sicoli & Massaro, Inc., 77 NY2d 175, 565 NYS2d 449 [1990]). Thus, "a mechanic's lien is an encumbrance on realty" (Perrin v. Stempinski Realty Corp., 15 AD2d 48, 222 NYS2d 148 [1st Dept., 1961]). There is another purpose of a mechanic's lien, namely to provide notice to subsequent purchasers (Niagra Venture, supra). In any event, Lien Law §23 states that the lien laws are "to be construed liberally to secure the beneficial interests and purposes thereof" (id). Notwithstanding that broad and liberal approach, the notice requirement contained in Lien Law §11 requires strict compliance with all its provisions (146 West 45th Street Corp., v. McNally, 188 AD2d 410, 591 NYS2d 402 [1st Dept., 1992]). The question squarely presented is whether service of the mechanic's lien upon one owner and not another owner satisfies the strict requirements of Lien Law §11 which requires service upon "the owner" (id). The statute does not provide any guidance in situations where the property has more than one owner and if service may be effectuated upon only one owner.

There are no cases in New York that discuss this issue although it is addressed in other jurisdictions. Thus, in Maryland the mechanic's lien statute provides that "if there is more than one owner, the subcontractor may comply with this section by giving the notice to any of the owners" (Maryland Real Property Law §9-104(d)). That statutory directive cannot guide this case where the ambiguity is not resolved. Likewise, in Towner v. Remick, 19 Mo.App. 205 [Kansas City Court of Appeals, Missouri, 1885] the court interpreted the Missouri statute which stated that notice must be given "to the owner, owners or agent, or either of them" (Rev.St.Mo. 1879, §3190) to require service of a mechanic's lien upon all owners where there are multiple owners. The state of Arkansas similarly requires notice upon all owners pursuant to a similarly worded statute (see, Doke v. Benton County Lumber Co., 114 Ark 1, 169 SW 327 [Supreme Court of Arkansas 1914]). In Owen Lumber Company v. Chartrand, 270 Kan 215, 14 P3d 395 [Supreme Court of Kansas 2000] the court held that notice upon one owner was sufficient where the language in the statute required notice upon "any one owner of the property" (id).

Where no such statutory clarity exists the consensus among the various jurisdictions that have addressed the issue requires service upon every owner, especially in the context of two spouses jointly owning the property. Thus, in Webber Lumber &

Supply Company v. Erickson, 216 Mass 81, 102 NE 940 [Supreme Judicial Court of Massachusetts, Worcester 1913] the court held that service upon one owner spouse did not thereby constitute service upon the other owner spouse as well and the mechanic's lien was not effective upon the spouse that did not receive notice. Again, in Liese v. Hentze, 326 Ill 633, 158 NE 428 [Supreme Court of Illinois, 1927] the court held that service of the mechanic's lien upon one owner spouse did not confer sufficient notice of the lien upon the other spouse. Further, in Nurmi v. Beardsley, 275 Mich 328, 266 NW 368 [Supreme Court of Michigan 1936] the court held that service of a mechanic's lien upon one owner spouse did not constitute service on the other owner spouse. Again, in Bayes v. Isenberg, 429 NE2d 654 [Court of Appeals of Indiana, First District 1981] the court concluded that notice of the mechanic's lien had to be served upon all owners of the property even thought the owners were two spouses married to each other. There is no legal distinction between two spouses that share ownership or any two individuals or entities that share ownership. Thus, "where the requirement is only that notice be given to "the owner," notice must be given to all owners of co-ownership property in order to bind the interest of all cotenants. Notice to one owner is not necessarily notice to the other owner, even though the other owner is the spouse of the owner receiving the notice and a joint tenant or tenant by the

entireties" (see, 76 ALR3d 605: Who is the Owner Within Mechanic's Lien Statute Requiring Notice of Claim, 1977).

Notwithstanding, the plaintiff asserts by way of comparison that CPLR §6512 when seeking to file a notice of pendency only one owner of a multi-owner property need be served. The plaintiff argues that "the parallels between §11 and CPLR §6512 are clear. Each statute requires that after the filing of a notice affecting title to a property, an owner must be promptly served. Like §11's requirement of service upon 'the owner' in the singular, CPLR §6512 refers to service upon "the defendant" in the singular" (Affirmation in Opposition, page 4). Therefore, since a notice of pendency may be filed against one owner, similarly a notice of the filing of a mechanic's lien may be filed only as to one owner.

CPLR §6512 provides that "a notice of pendency filed before an action is commenced is effective only if, within thirty days after filing, a summons is served upon the defendant" (id). In Washington Heights Federal Savings & Loan Association v. 685A Hancock Street Corp., 41 Misc2d 911, 246 NYS2d 681 [Supreme Court Kings County 1964] the court explained the reference to "the defendant" was a change from the earlier statute which required service upon "a defendant" and that the change was made to conform with other provisions of the CPLR. The court concluded there was no substantive service requirement change effected by

the language change and any ambiguity that arose was "the product of transposing language" among various statutes. Thus, the intent of the legislature was not altered by the change from "a defendant" to "the defendant" and consequently service of the notice of pendency upon one defendant remains sufficient (see, Micheli Contracting Corporation v. Fairwood Associates, 73 AD2d 774, 423 NYS2d 533 [3rd Dept., 1979]). No such statutory changes exist regarding a mechanic's lien and thus service is required upon each owner.

This is not merely a technical distinction based upon prepositional changes and drafting oversights but reflects a fundamental difference between notices of pendency and mechanic's liens.

"Permission to file a notice of pendency of action in specified cases is an added privilege granted to a litigant by statute which does not affect his cause of action. The purpose of the grant of the privilege was to prevent 'the acquisition pendente lite of an interest in the subject-matter of the suit, to the prejudice of the plaintiff..." (see, Israelson v. Bradley, 308 NY 511, 127 NE2d 313 [1955]). Thus, the notice of pendency represents a policy whereby "a suitor's action shall not be impeded or defeated by an alienation of the subject property during the course of the lawsuit" (Cayuga Indian Nation of New York v. Fox, 544 F.Supp 542 [N.D.N.Y. 1982]). By contrast a

mechanic's lien is a mechanism whereby a laborer may file a lien for the value of an agreed upon price of labor and materials. "Subcontractors may enforce their mechanics' liens against the property specified in the notice of lien and any person liable for the debt upon which the lien is founded" (West-Fair Electric Contractors v. Aetna Casualty & Surety Company, 87 NY2d 148, 638 NYS2d 394 [1995]). Thus a laborer may "file and enforce a mechanics' lien against a person liable for the debt upon which the lien is founded, such as the owner, and the real estate being improved" (id). Necessarily, the owner must have consented to such performance of work and the consent is braod and does not necessarily require actual and affirmative consent (see, Ferrara v. Peaches Café LLC, 32 NY3d 348, 91 NYS3d 349 [2018]). Therefore, the connection between the lien and the owners of the property is more direct and consequently requires a greater degree of knowledge and awareness than a mere notice of pendency that only notifies the public of a claim of undefined nature. Thus, requiring service of a notice of pendency upon any defendant suffices for that generalized goal. However, service of a mechanic's lien which is far more personalized in the sense of the relief it ultimately seeks requires service upon each owner.

In this case there is no dispute the mechanic's lien was not served upon D Solinick Design. Thus, the mechanic's lien is not

effective as to that party. Thus, the motion of that party seeking dismissal of the lawsuit is therefore granted.

So ordered.

ENTER:

DATED: March 17, 2021
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC