

Kamco Supply Corp. v Nastasi & Assoc., Inc.

2021 NY Slip Op 31203(U)

April 9, 2021

Supreme Court, New York County

Docket Number: 651725/2015

Judge: Andrea Masley

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREA MASLEY

PART IAS MOTION 48EFM

Justice

-----X

KAMCO SUPPLY CORP., on behalf of itself and all
other persons similarly situated a trust fund
beneficiaries of lien law trusts of which Nastasi &
Associates, Inc. is a Trustee,

INDEX NO. 651725/2015

TRIAL DECISION

Plaintiff,

- v -

NASTASI & ASSOCIATES, INC., J.T. MAGEN &
COMPANY INC., LIBERTY MUTUAL INSURANCE
COMPANY, ANTHONY NASTASI, and JOHN DOE
ONE THROUGH JOHN DOE TEN,

Defendants.

-----X

This is an action to foreclose a lien by plaintiff Kamco Supply Company (Kamco) against defendants JT Magen & Company, Inc. (JT) and Liberty Mutual Insurance Company (Liberty). (NYSCEF Doc. No. [NYSCEF] 16, Amended Complaint).

For this Mt. Sinai construction project, JT, as general contractor, agreed to pay \$6.1 million¹ to Nastasi & Associates, of which Anthony J. Nastasi is the principal, (collectively N&A),² the subcontractor, to which Kamco supplied lumber, sheetrock, and

¹ N&A agreed to perform additional services for \$1,026,231 for a total of \$7,126,000. (JSUF ¶12).

² On December 1, 2019, N&A and Kamco settled. (NYSCEF 180, Stipulation of Settlement).

other building supplies. (NYSCEF 192, Joint Statement of Undisputed Facts (JSUF),³ ¶1; NYSCEF 148, PEX⁴ 95, Kamco's Mechanic's Lien).

In accordance with Lien Law §9, Kamco filed its lien on April 29, 2015. (NYSCEF 148). On May 1, 2015, JT bonded the lien with Liberty pursuant to Lien Law §19. (PEX 96, 0714, bond).⁵

After the court rendered its decision on various motions for summary judgment, the issues for trial are: (1) Whether Kamco is owed \$939,301.88 for the materials it supplied to N&A for the Mount Sinai project; (2) whether JT paid N&A in full; (3) whether the lien trust is funded because JT owed N&A when Kamco's lien was filed. (NYSCEF 176, July 1, 2019 decision).

This decision is based on the documents and testimony presented at trial. The court rejects Kamco's reliance in its post-trial brief on NYSCEF 148, a document it presented on its motion for summary judgment, to establish that JT was owed \$26 million on the Mt. Sinai project when Kamco filed its lien.

JT's motion for a directed verdict at the close of plaintiff's case is denied for the same reasons that its summary judgment motion was denied. (Tr. 43:8-49:13). As to JT's request to dismiss the action because Kamco failed to establish both that (1) Mt. Sinai owed JT and (2) JT owed N&A, the request is denied for failure to support its request with any law in support of its proposition. (Tr. 45:4-49:13). Rather, Kamco must establish one or the other, not both. (*See Peri Formwork Sys, Inc v Lumbermens*

³ On consent, all documents referenced in the JSUF are in evidence. (NYSCEF 186, December 16, 2019, Transcript [Tr.] 55:2-57:4).

⁴ Plaintiff's exhibits are designated as PEX, exhibit number followed by page number, if any.

⁵ Parties shall file all trial exhibits mentioned in this decision in NYSCEF.

Mut. Cas. Co., 112 AD3d 171, 176-177 [2d Dept 2013], *lv to appeal denied*, 23 NY3d 907 [2014]).

At trial, Kamco established that by the time the lien was filed on April 29, 2015, N&A owed it \$939,301.88 on the Mt. Sinai project. (NYSCEF 180, Dec. 1, 2019, Stipulation of Settlement between N&A and Kamco; PEX 2- PEX 84, Kamco's unpaid invoices to N&A; Castellino Trial Aff. ¶¶23). N&A's debts to Kamco began on April 8, 2015 when N&A bounced its first check to Kamco for about \$50,000. (PEX 93, 0695-0706; Tr. 15:17-22). The court rejects JT's reliance on Kamco's settlement with N&A for the proposition that nothing is currently owing to Kamco. While N&A consents to a confession of judgment, there is no evidence that N&A has actually paid Kamco.

As to the remaining issues, JT contends that it paid N&A in full and thus there is no lien fund and no funds were available to Kamco on April 29, 2015 when it filed its lien. As to the \$2 million N&A paid to JT, JT insists that it was partial payment of a valid \$5 million mortgage loan and Kamco fails to prove that N&A's payments came from N&A's trust funds.

Kamco contends that trust funds are available to fund Kamco's lien. First, JT did not pay N&A in full for the Mt. Sinai project. Kamco challenges deductions from JT's checks to N&A totaling \$812,500 allegedly to repay undocumented cash advances to N&A; only one such advance or \$500,000 made four months prior to the start of the Mt. Sinai project, was documented, but it was designated with a project number not assigned to the Mt. Sinai project. (PEX 99-0731, JT check #231612). Second, Kamco challenges payments totaling \$2 million N&A made to JT, using cashier's checks all drawn on N&A's bank in the amount of \$500,000 each, allegedly to repay a \$5 million

loan from JT's owner not JT. Kamco argues that N&A impermissibly used \$2 million of trust fund monies to reimburse JT against the Loan; trust funds are to be used to pay wages and suppliers, not a personal loan for a home.

JT's records show its payments to N&A for \$6,919,664.67.⁶ (JSUF ¶6). N&A executed a lien waiver dated February 27, 2015, in the amount of \$6,919,664.67. (JSUF ¶7, DEX⁷ JTM006). N&A submitted nine requisitions in support of the lien waiver amount and JT's checks evidence payments of those requisitions. (DEX JTM003, N&A's requisitions). On March 3, 2015, after the lien waiver, N&A submitted the tenth and last requisition for work performed and to be performed through March 31, 2015 and requesting payment for the retainage of \$122,000, exclusive of change orders. (DEX JTM003, 016- 017). However, according to JT's records, there was no payment of \$122,000. (Castellino Trial Aff. ¶14). As to the October 20, 2014 change order for \$707,779.53 (DEX JTM002, 001), JT paid N&A \$637,001.62 leaving a balance of \$70,777.91. (PEX 85, 0564; Castellino Trial Aff. ¶¶12, 15)). As to the remaining change orders, JT paid N&A \$312,163.09 leaving balance of \$6,288.38. (See DEX JTM002, 022, April 2, 2015 change order; Castellino ¶16).

In support of Kamco's argument that \$812,500 was owing to K&A arising from JT's improper deductions, Kamco offered the testimony of credit manager Charles Castellino, a Kamco employee of 25 years. (Court Exhibit 1). JT objected to Castellino

⁶ In its post-trial brief, JT asserts that it established at trial the \$6.9 million paid by JT to N&A was net of such credits. (NYSCEF 187, Defendants' Response to Plaintiff's Post-Trial Brief, p.8, footnote 4). As JT's only witness testified to very little, the only evidence JT has to rely on is the JSUF and the documents attached thereto.

⁷ Defendants' exhibits are designated DEX exhibit number followed by page number, if any.

but failed to offer any competing testimony. (JT's December 13, 2019 letter to court).⁸ While the court observed that Castellino testified credibly and was extremely knowledgeable about bookkeeping, collecting debts for Kamco, and his prior employers, he was not qualified as an expert witness and thus his observations are given no weight as to the "unusual" relationship between JT and N&A. Castellino could easily have qualified as a bookkeeping expert if Kamco had so moved. However, one need not be an expert to trace the invoices, job numbers JT assigned to the Mt. Sinai project (14-0088) and payments between JT and N&A. The court rejects defendant's objection to Castellino's color coding as he clearly and thoughtfully explained it at trial and it is helpful to the court, not misleading. JT's objection to Castellino's synopsis (PEX 85, 0564) is denied as it is based on JT's documents including checks, requisitions and change orders, accounts payable register, checks. Again, Castellino explained it, his testimony was credible, and the court gives it great weight.

Castellino identified \$812,500 in impermissible deductions from JT's payments to N&A. Kamco established that the \$312,500 in alleged advances to N&A for the Mt Sinai project were undocumented. Accordingly, JT's deductions for the alleged phantom loans were impermissible. The court finds that JT owed N&A \$312,500 when Kamco filed its lien. As to the \$500,000 advance made on May 6, 2014, the notation "140001" does not match the project number JT assigned to the Mt. Sinai project and there was no testimony to explain otherwise. The court rejects JT's argument that it is effectively paying for the same materials and services twice. JT's records demonstrate that these

⁸ Defendants must file this, and all other documents mentioned in the decision in NYSCEF.

amounts were owed to N&A but never paid to N&A. Therefore, the entire \$812,500 is not justified by alleged advances and the court finds that JT owed N&A \$812,500 when Kamco filed its lien.

On December 19, 2013, JT's Morris Regan allegedly loaned Nastasi, as trustee of the Franklin D. Nastasi Trust, Lena Nastasi, \$4,500,000 secured by a home mortgage (Loan). (JSUF ¶ 10; DEX JTM013, Loan Agreement).⁹ According to the insurance documents, (DEX JTM013, 010-012), the property mortgaged is a home.¹⁰ (DEX JTM013-033). The outstanding balance of the Loan, and all accrued and unpaid interest, was to be paid on the maturity date of December 31, 2014. (JSUF ¶11). The Loan proceeds were distributed from JT's account at HSBC by check in the amount of \$5,000,000¹¹ dated November 18, 2013 to the order of Sandton Credit Opportunities Special Holdings LLC. (JSUF ¶12; DEX JTM014, checks for the loan proceeds). The Loan was guaranteed by Nastasi, individually, and N&A. (JSUF ¶13; DEX JTM013, 065). Starting in September 2014, N&A made four payments with cashier's checks from First Republic Bank, each in the amount of \$500,000 to JT totaling \$2,000,000 in repayment of the Loan. (JSUF ¶14; PEX 92, 687-0691, bank checks). This is the same bank where Nastasi deposited his JT payments. (PEX 86, bank statements).

Defendants offered the testimony of Steve Mount. (Direct Testimony and Affidavit, Court Exhibit 3). He has been the treasurer of JT for over 20 years. (Tr. 51:9-

⁹ Oddly, the mortgage is not signed by Regan; his name is typed on the page following Nastasi's written signature.

¹⁰ The court notes the similarity of addresses between the mortgaged property and Nastasi's home address listed on his driver's license. (DEX JTM013, 005).

¹¹ No explanation is offered for the discrepancy between the mortgage document (\$4.5 million) and the proceeds paid (\$5 million).

13). Mount identified Maurice or Morris Regan as the owner of JT. DEX 13, JTM014 shows a loan from Regan to Nastasi as trustee of the Franklin D. Nastasi Trust. (Tr. 52:24-53:5). Mount, the treasurer of JT, was not responsible for tracking the Loan. (Tr. 53:18-54:2). While the \$5,000,000 loan was made by Regan, according to the documents, the funds came from JT. (JSUF ¶12). Otherwise, Mount knew nothing about the Loan and had no further testimony.

The documentary evidence establishes that each of these \$500,000 payments was made days after JT paid N&A for the Mt. Sinai project. JT's payments were made: September 29, 2014; October 14, 2014; November 20, 2014; December 23, 2014. (PEX 86, JT's checks and Nastasi's deposit records). Cashier's checks were dated: September 30, 2014 (1 day later); October 22, 2014 (8 days later); November 21, 2014 (1 day later); December 30, 2014 (7 days later). (JSUF ¶14; PEX 92, 0687-0691).

As to the \$2 million N&A paid toward the Loan, Kamco has established impermissible deductions from N&A's trust fund to pay JT toward Regan's \$5 million loan. Kamco does not challenge the Loan. (JSUF ¶10).¹² While the Loan was guaranteed by N&A, there is no evidence that the borrower, the Franklin D. Nastasi Trust, failed to pay. (JSUF ¶13; JTM013-065). Indeed, the \$2 million payments preceded the mortgage due date of December 31, 2014. While N&A admits to disbursing funds from the Mt. Sinai trust funds to entities not entitled to lien law funds, it

¹² While defendant offered the mortgage documents to explain the \$2 million payments, and the parties agreed to put the mortgage document in evidence, (JSUF ¶ 10), the court finds the documents unreliable. Defendant's witness Steve Mount was unable to give any meaningful testimony about the mortgage. Defendants failed to offer a witness competent to testify about the mortgage, the difference between the proceeds and the amount stated on the mortgage, and the absence of Regan's signature.

did not identify the \$2 million payments to JT here as such improper payments.

(Stipulation of Settlement 7th Whereas clause). Nevertheless, the cashier's checks are from N&A's bank and obfuscating the account number with cashier's checks will not be rewarded.

The court finds that regardless of who made the loan, JT or Regan, N&A's trust funds should not have been used to repay the Loan. To the extent that these payments are better characterized as trust fund diversions, then Kamco's request to conform the pleadings to the proof is granted.

Accordingly, Kamco's lien is valid because there are sufficient funds available since JT owed N&A when the lien was filed. Kamco established that \$2,940,788.38¹³ is available to satisfy Kamco's lien of \$939,301.88. As discussed above, the admissible documentary evidence and testimony establish that JT owed N&A \$812,500 and accepted \$2 million from N&A trust fund proceeds as payment for the Loan. The court cannot conclude the JT paid N&A in full where amounts N&A invoiced JT after the lien waiver were not paid: \$122,000 and \$6,288.38. However, JT is entitled to a credit of \$187,755.53 for its payments to National Acoustics Inc. to complete the work N&A work when N&A abandoned the Mt. Sinai job. (JSUF ¶ 9; DEX JTM007, the agreement and change orders between JT and National Acoustics for National Acoustics; DEX JTM008, distribution report showing the amounts paid to National Acoustics, and checks issued to National Acoustics in connection with the Mount Sinai Project, and

¹³ Consists of: \$812,500; \$2 million; \$122,000 incurred after Nastasi's lien waiver; \$6,288.38 April change order after Nastasi's lien waiver.

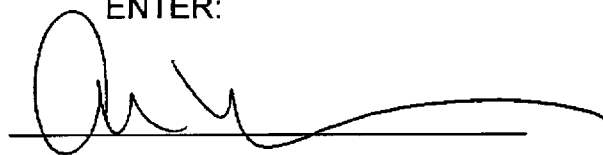
Subcontractor Final Waiver of Lien executed by National Acoustics). Even with that deduction, there are sufficient amounts owing from JT to N&A available to fund the trust.

Accordingly, the court finds in favor of Kamco.

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff Kamco Supply Corp. and against defendants JT Magen & Company Inc. and Liberty Mutual Insurance Company in the amount of \$939,301.88, together with interest at the rate of 9% per annum from the date of April 29, 2015 until the date of the decision and order, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of cost for a total sum of \$_____.

April 9, 2021

ENTER:

A handwritten signature in black ink, appearing to read 'Andrea Masley', is written over a horizontal line. The signature is fluid and cursive.

Justice Andrea Masley