

Janus VII LLC v Par Plumbing Co., Inc.
2021 NY Slip Op 32266(U)
November 12, 2021
Supreme Court, New York County
Docket Number: Index No. 158479/2021
Judge: Arlene P. Bluth
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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. ARLENE BLUTH PART 14

Justice

-----X

JANUS VII LLC

Petitioner,

- v -

PAR PLUMBING CO., INC.,

Respondent.

-----X

INDEX NO. 158479/2021

MOTION DATE 11/05/2021

MOTION SEQ. NO. 001

**DECISION + ORDER,
JUDGMENT ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 9, 10, 11, 12, 13, 14, 16

were read on this motion to/for DISCHARGE/CANCEL MECHANIC'S LIEN.

The petition to cancel the mechanic's lien dated July 19, 2021 by respondent is granted.

Background

Petitioner owns a property located at 1361 Amsterdam Avenue in Manhattan. It hired a general contractor to do construction work at the property and respondent was hired as a subcontractor in connection with this work. Respondent then filed a mechanic's lien for \$148,329.00.

Petitioner claims that on July 30, 2021 it served on respondent a notice requiring respondent to commence an action to enforce the mechanic's lien or to show cause why the lien should not be canceled pursuant to Lien Law § 59. It argues that the deadlines in this notice have now passed, respondent did not take the required actions and so the lien should be discharged.

In opposition, respondent claims that petitioner failed to properly serve its notice to commence an action or show cause. Respondent also points out that it was not required to take either step in the notice purportedly served by petitioner because there was already an action

pending against the premises (which prevents respondent from initiating another action). This action was filed by the general contractor against petitioner (respondent is not a party to that case).

Discussion

Lien Law § 59 provides that:

“A mechanic's lien notice of which has been filed on real property or a bond given to discharge the same may be vacated and cancelled or a deposit made to discharge a lien pursuant to section twenty may be returned, by an order of a court of record. Before such order shall be granted, a notice shall be served upon the lienor, either personally or by leaving it as his last known place of residence, with a person of suitable age, with directions to deliver it to the lienor. Such notice shall require the lienor to commence an action to enforce the lien, within a time specified in the notice, not less than thirty days from the time of service, or show cause at a special term of a court of record, or at a county court, in a county in which the property is situated, at a time and place specified therein, why the notice of lien filed or the bond given should not be vacated and cancelled, or the deposit returned, as the case may be. Proof of such service and that the lienor has not commenced the action to foreclose such lien, as directed in the notice, shall be made by affidavit, at the time of applying for such order.”

As an initial matter, the Court finds that, contrary to respondent's arguments, service of the Lien Law § 59 notice was proper. The affidavit of service contends that service of this notice was effectuated by leaving a copy of it with a Jane Doe (who was allegedly authorized to accept) at respondent's address (NYSCEF Doc. No. 4). The Court observes that the address where service was allegedly effectuated is the same as the address for respondent in the mechanic's lien (NYSCEF Doc. No. 2).

Respondent did not sufficiently rebut petitioner's evidence demonstrating that it properly served respondent with the Lien Law § 59 notice. The verified answer merely states, in conclusory fashion, that service was improper. But there was no assertion, for instance, that the location was incorrect or that the description of Jane Doe (upon whom the notice was served)

depicts a person who does not exist. In sum, petitioner submitted evidence showing it served respondent personally via someone authorized to accept service and respondent vaguely responded that service was not proper. That does not justify denying the petition or even raise an issue of fact requiring that the Court hold a hearing about service of the notice. Respondent simply did not articulate exactly how service was improper.

With respect to the merits of the notice, the fact is that respondent does not dispute that it failed to commence an action or bring an order to show cause as directed in the Lien Law § 59 notice. That justifies granting the petition (*Mr. White, L.L.C. v Pink Shirt Constr., Inc.*, 170 AD3d 550, 94 NYS3d 842 [1st Dept 2019] [vacating and cancelling respondent's mechanic's lien where respondent failed to commence an action to enforce the lien]).


Respondent is correct that the Lien Law favors having all controversies concerning the same property be resolved in the same action (*see Henry Quentzel Plumbing Supply Co., Inc. v 60 Pineapple Residence Corp.*, 126 Misc 2d 751, 753, 483 NYS2d 927 [Sup Ct, Kings County 1984]). But nothing cited by respondent permitted it to flat out ignore the Lien Law § 59 notice from petitioner.

Certainly, Lien Law § 62 permits a lienor who files a lien after the commencement of a separate lien enforcement proceeding regarding the same property to make an application to be made a party to that action “at any time up to and including the day preceding the day on which the trial of such action is commenced.” But that scenario would involve *respondent* seeking relief in the pending lien action filed by the general contractor against petitioner (under Index Number 158451/2020). Respondent has not moved to be added to that dispute and although it claims that petitioner was required to add respondent to that action, respondent did not cite any binding case law requiring petitioner to take such steps.

In other words, respondent failed to show that petitioner was prohibited from commencing this proceeding and instead required to add respondent to the other action (where petitioner is defending claims brought by the general contractor).

Accordingly, it is hereby

ADJUDGED that the petition to vacate and cancel the mechanic's lien dated July 19, 2021 and filed by respondent against the property known as 1361 Amsterdam Avenue, New York, New York, Block 1967, Lot 40 is granted and the New York County Clerk is hereby directed to vacate and cancel said lien upon presentation of this order and judgment.

<u>11/12/2021</u> DATE			 <hr/> ARLENE BLUTH, J.S.C.	
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	REFERENCE
			<input type="checkbox"/>	DENIED
			<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT