Matter of SRS Enterprises, Inc. v Mecar Metal
2021 NY Slip Op 32307(U)
November 10, 2021
Supreme Court, New York County
Docket Number: Index No. 152411/2021
Judge: Alexander M. Tisch
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ALEXANDER TISCH** **PART** **18**

Justice

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IN THE MATTER OF THE APPLICATION OF SRS ENTERPRISES, INC.,

Petitioner,

- v -

MECAR METAL C/O ROSEMEX, INC., ROSEMEX, INC.

Respondents.

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INDEX NO. 152411/2021

MOTION DATE 04/19/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32

were read on this motion to/for DISCHARGE/CANCEL MECHANICS LIEN.

In this special proceeding, petitioner SRS Enterprises, Inc. (petitioner or SRS) seeks an Order pursuant to Lien Law § 19(6), discharging two liens filed by respondents Mecar Metal c/o Rosemex, Inc. (Mecar Metal) and Rosemex, Inc. (Rosemex) (collectively respondents) on the ground that the liens are invalid. Respondents cross move for leave to file an amended lien and extend time to file and serve an answer if required to assert counter claims.

Background

The petition alleges that the initial lien, filed September 29, 2020 (first lien), names the wrong party with which Rosemex contracted, was not lawfully filed by Rosemex pursuant to the Lien Law as a supplier to a material man, and was filed outside the relevant limitations period of the Lien Law. Petitioner further alleges that the lien filed December 3, 2020, (second lien), which purported to amend the first lien, also named the wrong party with which Rosemex contracted, was not lawfully filed by Rosemex pursuant to the Lien Law as a supplier to a material man and was not filed as an amendment to the first lien, but is, instead, a duplicate of

the first lien. Further, petitioner alleges that because the second lien was filed more than 60 days after the first lien, it is not a proper amendment under Lien Law § 12-a. Finally, according to petitioner, both liens were filed more than eight months after the last provision of materials to the site, and, therefore, were filed in violation of Lien Law § 10(1).

On or about September 29, 2020, Rosemex filed the first lien in the Office of the Clerk of New York County, in the amount of $128,825.92, against 825 7th Avenue, New York, NY 10019, Block 1006, Lot 1004 (the Property). The lien documents state that the lien is for materials furnished for "heating cabinets and improvement of the real property herein to be used as a commercial space" (Petition, exhibit A). According to the petition, the first lien misidentifies the party with whom Rosemex contracted as HVAC subcontractor Henick-Lane Inc. (Henick-Lane), and that, in fact, Rosemex contracted with petitioner, who was the actual material man in contract with Henick-Lane.

On November 9, 2020, petitioner, filed a bond in the amount of $141,708.52, with the New York County Clerk to discharge the first lien. On December 3, 2020, Rosemex filed the second lien in the same amount, $128,825.92. According to petitioner, even though the second lien was purportedly filed as an amendment to the first lien, it was filed as a separate lien and "does not identify or otherwise reference the First Lien" (Petition at 4). On February 5, 2021, petitioner attempted to file a rider to the bond on the first lien seeking to discharge the second lien, as a purported amendment to the first lien. In its petition, petitioner explains that the clerk denied the rider as the second lien was not an amendment to the first lien: "The New York County Clerk, however, rejected the rider, stating that the second lien was not an amendment to the first lien, but rather a separate, independent mechanic's lien" (Petition at 4). In a February 5, 2021 letter from the New York County Clerk's Office, it states, in part:

> "The documents submitted for the discharging of a mechanics lien are being rejected for the following reasons:
> -As per directions of supervisor, a new bond must be submitted.
> The lien filed 12/3/2020 is a new lien, not an amended lien, and as such a new bond discharging said lien must be obtained"

(petition, exhibit H).

On January 14, 2021 and February 5, 8, 9, and 10, 2021, petitioner's counsel contacted Rosemex's counsel requesting that Rosemex discharge the second lien and "either properly file a purported amendment to the first lien, or discharge the first lien, and provided Rosemex's counsel with the Clerk's Rejection Letter" (Petition at 4-5).

It is petitioner's position that Rosemex refused to correct or discharge the second lien. Consequently, petitioner filed a second bond with the New York County Clerk. Petitioner states that as the party that filed the bonds to discharge the first and second liens, it is a party of interest with standing to seek discharge of the liens.

Petitioner argues that these two liens must be discharged pursuant to Lien Law § 19(6), which requires the discharge of a mechanics' lien that is invalid on its face. Both liens are defective, according to petitioner, as they identify Henick-Lane as the party with whom Rosemex contracted. However, petitioner states that this is false, and that Rosemex contracted with petitioner, a materialman, to supply materials to the Property.

Petitioner argues that under New York law, one who sells equipment to a materialman, rather than directly to a subcontractor, contractor, or owner for installation is not a materialman, and is, therefore, not entitled to file a mechanics lien.

Petitioner further argues, in the alternative, that the liens should be vacated and discharged because they were both filed more than eight months after Rosemex purportedly finally furnished the subject materials. Rosemex's liens state that the "time when the last item of

material was furnished was 12/5/2019." The first lien was filed on September 29, 2020 and the second lien was filed on December 3, 2020.

Finally, petitioner argues that the second lien should be discharged as a duplicative lien on the Property for the same work and in the same amount as the first lien.

In opposition respondents argue that petitioner's application to discharge the liens must be denied on the grounds that: (1) Mecar Metal was a materialman that furnished material to Henick-Lane, as subcontractor, for the improvement of the Property; (2) the second lien amended the first lien to reflect an updated last day of work and lienor's name to reflect "Mecar Metal, Inc."; and (3) both mechanic's liens were timely filed in accordance with the lien law.

As to their first argument, respondents contend that Mecar Metal, and not SRS, was the manufacturer who furnished the materials to Henick-Lane to improve the Property. Respondents argue that "[t]he definition of 'materialman' under the definition section of Lien Law § 2 does not include one who merely brokers materials, but who does not manufacture and ship materials for the improvement of the premises" (respondents aff in opp at 3, citing *Robert Mfg. Co. v South Bay Corp.*, 82 Misc2d 250 [Sup Ct, Nassau County 1975]). Respondents rely on the affirmation of Luc Fouquette (Fouquette), President of Mecar Metal, for the proposition that Mecar Metal was the manufacturer of the heating units for the Property, and, pursuant to specifications from Henick-Lane, custom manufactured the units for the Property and delivered them there. In his affirmation, Fouquette states:

> "The purpose of this affirmation is to inform the Court that Mecar Metal was the manufacturer of heating units custom-made to the specifications requested and approved by [Henick-Lane] and shipped to it at the [Property]" (Mecar Metal furnished the heating radiator cabinets and enclosures for the improvement of the [Property] with the consent of SRS, [Henick-Lane], the general contractor and owner of the Project"

(Fouqette affirmation, ¶ 2).

Fouquette further states: "During the Project, Rosemex helped Mecar Metal with its business operations, such as providing the sales and marketing of the products manufactured by Mecar Metal" (Fouqette affirmation, ¶ 3). According to Fouqette, SRS did not manufacture the heating units, but instead "entered into a contract with Rosemex to act as its the [sic] broker and agent by assisting with the procurement of purchase orders for the custom-made heating and ventilation products" (*id.*, ¶ 4).

In reply and in opposition to respondents' cross motion requesting leave for Mecar to file a mechanic's lien nunc pro tunc, petitioner argues that such an order is unnecessary as the original letter from the clerk's office unambiguously stated that the second lien was filed as a separated lien. Further, petitioner argues that it did what it could to notify respondents to correct the second lien filing, but respondents did not, and consequently, petitioner was forced to "choose between incurring the expense of bonding a superfluous lien or unjustly pay[ing] a settlement in order to remove the Second Lien" (*id.*) Accordingly, petitioner argues that it would be unfair to grant respondents' cross motion, and, instead, the lien should be discharged.

Petitioner further argues that Mecar Metal was not a materialman, but was, instead, a supplier to a supplier to a materialman. Petitioner takes issue with respondents' characterization of SRS as simply a representative of Rosemex. Petitioner argues that this is not the truth and relies upon the affirmation of Fouquette for the fact that Mecar Metal manufactures products which Rosemex then sells. Petitioner further states that "subcontractor Henick-Lane, LLC contracted with Petitioner for certain HVAC materials. Petitioner then purchased those materials from Rosemex, who obtained the materials [from Mecar] necessary to fulfil its contract with Petitioner" (aff in reply at 4, citing affirmation of Fouqette, ¶¶ 3 and 5, and exhibit B [an SRS

purchase order indicating Henick Lane as the shipping recipient and Rosemex as the vendor (internal citations omitted)]).

Petitioner further cites its contract with Rosemex for the proposition that it was not Rosemex's agent. According to petitioner, the "Agent Contract & Rep Agreement" (Agent contract) between SRS and Rosemex did not establish an agency relationship. On the contrary, petitioner argues, the language of this contract establishes SRS as an independent entity. Pursuant to the Agent contract, SRS and Rosemex agreed: "This is to confirm that . . . Rosemex . . . appoints you as exclusive representative to distribute and/or sell the products specifically listed below in the territory assigned hereunder on an exclusive basis" (Lum affirmation, exhibit 3 (Agent Contract) at 1). In making its argument, petitioner highlights the language: "The representative shall be an independent businessman in performing this sales agreement and shall not be an agent, servant or employee of the company" (*id.*).

Discussion

According to the First Department, "[i]n the absence of a defect upon the face of the notice of lien, any dispute regarding the validity of the lien must await trial of the foreclosure action" (*Pontos Renovation v Kitano Arms Corp.*, 204 AD2d 87, 87 [1st Dept 1994] [internal quotation marks and citation omitted]; *see also Care Sys. v Laramee*, 155 AD2d 770, 771 [3d Dept 1989] ["In order to succeed on its application for summary discharge of the notice of lien, defendant is required to demonstrate that the notice of lien filed by plaintiff is in contravention of the requirements imposed by Lien Law § 19 (6)"]).

NY Lien Law § 19 addresses the discharge of a lien for private improvement. Pursuant to section 19(6), states:

> "Where it appears from the face of the notice of lien that the claimant has no valid lien by reason of the character of the labor or materials furnished and for which a lien is claimed,

> or where for any other reason the notice of lien is invalid by reason of failure to comply with the provisions of section nine of this article, or where it appears from the public records that such notice has not been filed in accordance with the provisions of section ten of this article, the owner or any other party in interest, may apply to the supreme court of this state . . . ."

NY Lien Law § 3 states that "[a] contractor, subcontractor, laborer, materialman . . . who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof, or of his agent, contractor or subcontractor . . . shall have a lien for the principal and interest, of the value, or the agreed price, of such labor . . . or materials upon the real property." A "materialman" as defined by NY Lien Law § 2 (12) is: "any person who furnishes material or the use of machinery, tools, or equipment . . . either to an owner, contractor or subcontractor, for, in the prosecution of such improvement."

NY Lien Law § 9(3) states that the notice of lien must include: "[t]he name of the person by whom the lienor was employed, or to whom he furnished or is to furnish materials; or, if the lienor is a contractor or subcontractor, the person with whom the contract was made." NY Lien Law § 10 states that a notice of lien must be filed at any time during the work or "within eight months after the completion of the contract, or the final performance of the work, or the final furnishing of materials . . . ." Further, pursuant to CPLR 409(b), the court must apply the same test to determine a petition in a special proceeding, as that applied to a motion for summary judgment (*see Matter of Friends World Coll. v Nicklin*, 249 AD2d 393, 394 [2d Dept 1998]). According to NY Lien Law § 12-a, "Amendment": a lien may be amended to reduce its amount when:

> "[w]ithin sixty days after the original filing, a lienor may amend his lien upon twenty days notice to existing lienors, mortgagees and the owner, provided that no action or proceeding to enforce or cancel the mechanics' lien has been brought in the interim, where the purpose of the amendment is to reduce the amount of the lien, except the question of wilful exaggeration shall survive such amendment"

The petition commencing this special proceeding seeks to discharge the lien pursuant to Lien Law § 19(6), on the ground that the first lien names the wrong party with which Rosemex contracted and was not lawfully filed by Rosemex as a supplier to a materialman and is, therefore, defective on its face.

Petitioner argues that the lien states that Rosemex contracted with HVAC subcontractor, Henick-Lane, but that Rosemex actually contracted with petitioner, who was the actual materialman in privity of contract with Henick-Lane on the project. The contract relied upon in the petition, is a purchase order on SRS stationary, indicating Rosemex as the vendor and that the goods are to be shipped to Henick-Lane. In opposition, respondents argue that petitioner was simply the broker for the goods to be shipped from Mecar Metal, the manufacturer, to Henick-Lane, the subcontractor for the owner.

The statutorily presumed authority to bind the owner's land does not extend to materialmen" (*Carl A Morse, Inc. v Rentar Indus. Dev. Corp.*, 85 Misc2d 304, 309 [Sup Ct, Queens Cty 1976] citing *Dorn v Johnson Corp.*, 16 AD2d 1009, 1010 [3d Dept 1962] and Lien Law § 3). A petitioner's lien would be "valid and enforcible only if he furnished the materials in question to the 'contractor' . . . or to the contractor's 'subcontractor or legal representative'" (*Dorn*, 16 AD2d at 1010). The lien is valid if "the owner consented to the lienor's performance, or if the vendee was acting as the owner's agent" (*Melniker v Grae*, 82 AD2d 798, 799 [2d Dept 1981]). Allegations of the owner's consent need not be mentioned in the notice of lien (*id.* at 799). Additionally, to sustain a lien, "the owner must either be an affirmative factor in procuring the improvement to be made, or having possession and control of the premises assent to the improvement in the expectation that he [or she] will reap the benefit of it" (*Elliott-Williams Co., Inc. v Impromptu Gourmet, Inc.*, 28 AD3d 706, 707 [2d Dept 2006] [internal

quotation marks and citation omitted]). "[P]rivity of contract is not a prerequisite to recovery on a mechanic's lien" (*Matell Contr. Co., Inc. Fleetwood Park Dev., LLC*, 111 AD3d 681, 684 [2d Dept 2013]).

The Court finds that the submitted documents establish a relationship pursuant to Lien Law § 3 between Rosemex Inc.-Mecar Metal Inc. and the Project subcontractor, Henick-Lane, to permit Rosemex Inc.-Mecar Metal Inc. to file this mechanics lien. According to Fouquette's affidavit: "Mecar Metal was the manufacturer of heating units custom-made to the specifications requested and approved by Henick-Lane, Inc. and shipped to it . . ." (Fouquette aff, ¶ 2). He further avers that during the course of the Project, "Henick-Lane requested Mecar Metal to submit submittals to it for the Heating Units to ensure that the said units would be compatible with the Project" (Fouquette aff, ¶ 5). Additionally, the SRS purchase order identifies Rosemex, Inc./Mecar Metal Inc. as the "Vendor" and indicates that this "Vendor" should ship the materials to Henick-Lane Inc.

The Court finds, therefore, that Rosemex-Inc./Mecar Metal Inc. qualifies as a materialman under NY Lien Law § 2(12) as it was the entity that furnished the materials to the subcontractor, Henick-Lane. Rosemex Inc./Mecar Metal Inc. is the manufacturer who constructed the heating units that were installed at the Property and should be entitled to file a mechanics lien for the work it performed (*see Robert Mfg. Co*, 82 Misc2d 250 at 253). In that decision, the court cites NY Lien Law § 23 for the proposition that "[t]his article is to be construed liberally to secure the beneficial interests and purposes thereof. A substantial compliance with its several provisions shall be sufficient for the validity of a lien . . ." Thus, the identification of Henick-Lane as the "name of the party by whom the lienor furnished or is to

furnish the materials" is not a defect on the face of this notice of mechanic's lien and cannot be grounds for its discharge.

On the second point, the Court agrees with respondents' argument that Mecar Metal's lien was filed within the eight-month period required by Lien Law § 10(1). Respondents argue that Executive Order 202.8, which tolled the statute of limitations for filing deadlines, including deadlines for civil cases, with no exceptions. The Executive Order states that the tolling applied to any "filing, or service of any legal action, notice . . . as prescribed by the procedural laws of the state, including but not limited to . . . by any other statute . . ." (Executive Order 202.8). The Governor then extended the tolling period set forth in Executive Order 202.8 in subsequent Executive Orders. Executive Order 202.67 extended 202.8 until November 3, 2020, by stating: "do hereby continue the suspensions and modifications of law, and any directives not superceded by a subsequent directive contained in Executive Orders 202 . . ." Executive Order 202.72 extended 202.67 until December 3, 2020, by virtue of the same language.

The Court finds, based upon the language of the Executive Orders, and in particular, the language that states that the Executive Order tolls the filing of any notice, that the notice of lien filed September 29, 2020 was filed timely. This, therefore, cannot constitute a defect in the filing of the mechanics lien and cannot be grounds for its discharge.

In this case, the initial mechanic's lien was filed on September 29, 2020. The September 29, 2020 notice of lien states that the last item of material was furnished on October 25, 2019. If the statute of limitations accrued on that date, the deadline would be June 25, 2020. The so-called "amended" mechanic's lien was filed on December 3, 2020. The amended lien states that the last item of material was furnished to the Property on December 5, 2019. If the time

limitations accrued from December 5, 2019, then the eight-month deadline would be on August 5, 2020. However, that date also was extended by the Executive Orders discussed above.

Finally, petitioner argues that the mechanic's lien filed on December 3, 2020, the so-called "amended" or "second" lien, must be discharged as it does not qualify as an amendment to the first lien and is, therefore, simply duplicative of the first lien. The Court disagrees. NY Lien Law § 10(1) "permits the filing of a notice of lien 'at any time during the progress of the work and the furnishing of the materials, or within eight months after the completion of the contract . . . or the final furnishing of the materials, dating from the last item of work performed or materials furnished'" (*see Danica Plumbing & Heating, LLC v 3536 Cambridge Ave.*, LLC, 62 AD3d 426, 427 [1st Dept 2009] citing NY Lien Law § 10(1)). "Moreover, the Lien Law is permissive and allows the filing of successive liens for the same work to cure an irregularity in an earlier lien, as long as the successive lien is filed within the period prescribed in section 10" (*id.*). The December 3, 2020 notice of lien, indicating that it is filed as an "amended lien" on the Property in the same amount as the "first lien," was filed to cure an "irregularity" in the first lien and was timely, under the Executive Orders discussed above (*see Matter of 361 Broadway Associates Holdings, LLC v Blonder Builders Inc.*, 178 AD3d 494, 494 [1st Dept 2019]). Although August 5, 2020 was eight months after December 5, 2019, because of Executive Orders 202.8 and 202.72, which tolled the time to file such a notice until December 2020, this filing was timely. This second lien differs from the first lien in that it indicates the lienor as "Mecar Metal c/o Rosemex" and states that the last item of material was furnished on December 5, 2019. Accordingly, the Court finds that it is not duplicative of the first lien and is a permissible filing under the Lien Law. The Court, therefore, will not discharge the lien on this ground.

In accordance with the foregoing, it is hereby ORDERED that respondents' cross motion is denied; and it is further

ORDERED that the petition is denied and the proceeding is dismissed.

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

11/10/2021
DATE

ALEXANDER TISCH, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE