SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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AKI RENOVATIONS GROUP, INC.,

Plaintiff, Decision and order

- against - Index No. 501756/2022

38 PPSW, LLC, 82 CLINTON AVE, LLC, 109 MONTAGUE, LLC, 157 5 AVE, LLC, 238 8 ST, LLC, 346 CLINTON, LLC, 365 5 AVE LLC, 469-473 4 ST, LLC, U.S. SPECIALTY INSURANCE COMPANY, R&T GRANITE WORKS, INC., BIG APPLE WIRING CORP., AP PLUMBING & HVAC LLC, AKI DECOR, INC., AKI CABINETS, INC., GREGORY FOURNIER, FREDERIC LECAO and JOHN DOE Nos. 1 THROUGH 10,

Defendants, July 19, 2022

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38 PPSW, LLC, 82 CLINTON AVE, LLC, 109 MONTAGUE, LLC, 157 5 AVE, LLC, 238 8 ST, LLC, 46 CLINTON, LLC, 365 5 AVE LLC, 469-473 4 ST, LLC,

Counterclaim Plaintiffs,

-against-

HALIL TODIC,

Counterclaim Defendant,

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff and counterclaim defendant have moved seeking to dismiss the ninth and tenth counterclaims filed by the defendants. The defendants oppose the motion. Papers were submitted by the parties and arguments held. After hearing all the arguments this court now makes the following determination.

The plaintiff Aki Renovations Group Inc., was a general contractor hired to do construction work at eight locations owned and managed by the defendants. Aki was terminated from the projects and filed mechanic's liens for alleged unpaid fees. Aki

further instituted this lawsuit alleging breach of contract, quasi-contract and to foreclose upon mechanic's liens filed. The defendants answered and asserted various counterclaims. The plaintiff and counterclaim defendant Halil Todic have moved seeking to dismiss two counterclaims filed, namely for the willful exaggeration of the mechanic's lien (ninth counterclaim) and for a diversion of the trust fund (tenth counterclaim). They argue the wilful exaggeration claim is unsupported and in any event such claim cannot be pursued against Todic. Further, they assert the defendant's have no standing to challenge such liens. The defendants assert there is no basis to dismiss those counterclaims.

Conclusions of Law

It is well settled that upon a motion to dismiss the court must determine, accepting the allegations of the counterclaims as true, whether the party can succeed upon any reasonable view of those facts (Strujan v. Kaufman & Kahn, LLP, 168 AD3d 1114, 93 NYS3d 334 [2d Dept., 2019]). Further, all the allegations in the cunterclaims are deemed true and all reasonable inferences may be drawn in favor of the party that filed such claims (Federal National Mortgage Association v. Grossman, 205 AD3d 770, 165 NYS2d 892 [2d Dept., 2022]). Whether the counterclaims will later survive a motion for summary judgment, or whether the party

will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, Moskowitz v. Masliansky, 198 AD3d 637, 155 NYS3d 414 [2021]).

The defendants argue that Todic, by filing an exaggerated mechanic's lien committed a tort and thus, notwithstanding his role as a corporate office can be held personally liable. Todic argues that no such liability can attach, especially where Todic, in a personal capacity, did not maintain any contractual relationship with any of the defendants.

It is well settled that while a corporate officer may not be held liable for a corporation's wrongs merely because such person is an officer, the individual may be liable for tort in an individual capacity even without piercing the corporate veil (see, Ramos v. 24 Cincinatus Corp., 104 AD3d 619, 961 NYS2d 465 [1st Dept., 2013]). In Neptune Estates, LLC, v. Big Poll & Son Construction LLC, 39 Misc3d 649, 961 NYS2d 896 [Supreme Court Kings County 2013] the court enumerated seven causes of action that one could pursue upon the filing of a false Mechanic's Lien. The court explained that "a number of common law remedies are available to a property owner where damages result from the wilful exaggeration of a lien. For example, a lienor that wilfully exaggerated a lien may be liable for: '(1) fraud; (2) disparagement (sometimes called slander of title); (3)

interference with contract (to extent such lien interferes with existing contracts); (4) interference with prospective business advantage (to extent such lien interferes with potential deals); (5) extortion; (6) malicious prosecution; and (7) malicious abuse of process'" (id). Clearly, the above available causes of action are all torts. Indeed, in Greenway Plaza Office Park-1 LLC v. Metro Construction Services Inc., 4 AD3d 328, 771 NYS2d 532 [2d Dept., 2004] the court specifically permitted a tort action against a corporate officer who wilfully exaggerated a mechanic's lien. Further, lower courts have likewise concluded that the wilful exaggeration of a mechanic's lien is a tort (see, Power Air Conditioning Corp., v. Batirst, 229 LLC, 2017 WL 1375262 [Supreme Court New York County 2017], Honest & Quality Corp., v. 21214 Northern LLC, 2020 WL 2790716 [Supreme Court New York County 2020]). Therefore, the motion seeking to dismiss Todic merely because he is a corporate officer is denied. Todic may be tortuously personally liable for filing the lien.

Concerning the substantive aspects related to the liens, it is well settled that whether the lien amount contained in a mechanic's lien is exaggerated is generally a question of fact (Executive Towers at Lido LLC v. Metro Construction Services, 303 AD2d 545, 756 NYS2d 461 [2d Dept., 2003]). As the court stated in Aaron v. Great Bay Contracting Inc., 290 AD2d 326, 736 NYS2d 359 [1st Dept., 2002] "the validity of the lien plainly turns on

a dispute as to whether respondent has completed the work required by the contract, and, accordingly, must await trial of the foreclosure action" (id). Thus, a determination that a lien was willfully exaggerated generally cannot be decided summarily (see, Scarano Architect, PLLC v. 6322 Holding Corp., 35 Misc3d 1228(A), 954 NYS2d 761 [Supreme Court Kings County 2012]). There are exceptions where the evidence of such exaggeration is "conclusive" (see, LMF-RS Contracting Inc., v. Nevzet Kaljic, 126 AD3d 436, 2 NYS3d 351 [1st Dept., 2015]).

In this case, there are clearly questions of fact whether the liens were exaggerated. The counterclaims provide details concerning the amount paid to the plaintiff, the amount that was required to be paid to complete the plaintiff's unfinished work and the amount of each lien. Todic argues that the counterclaim must be dismissed because "no such specific allegations have been made against Todic (i.e., the amount that the liens were purportedly inflated and the amount of work added and not performed) because no facts relating to exaggeration are known to exist" (see, Memorandum of Law in Reply, page 5). However, as noted, the counterclaims provide sufficient information to survive a motion to dismiss. Of course, further discovery and a possible foreclosure action will ultimately resolve the issues, but there is no basis to conclude at this juncture that the defendants have failed to present sufficient evidence the liens

were wilfully exaggerated. Thus, the motion seeking to dismiss the ninth counterclaim is denied.

Turning to the issue whether an owner has standing to assert a claim for trust fund diversion pursuant to Article 3-A of the lien law, it is clear that only a trustee may pursue such claims (see, Lien Law, §77(1)). An owner is not a trustee of funds received by third parties and thus have no standing to pursue claims of the diversion of such funds (Ferro Fabricators, Inc., v. 1807-1811 Park Avenue Development Corp., 127 AD3d 479, 11 NYS3d 548 [1st Dept., 2015]). The court in Ferro, (id) acknowledged that pursuant to Lien Law §75(5) there are seven instances where an owner can be considered the trustee of an Article 3-A trust and that the mere pursuit of claims on behalf of subcontractors does not confer standing. Article 38 of the contracts does not demand a contrary result. That article states that "the Contractor is a fiduciary and shall treat all monies received on account of the Work as trust funds for the benefit of the Owner, subcontractors, suppliers, and others providing work, labor, services and materials required under this Agreement and all applicable laws, rules and regulations, including the applicable lien law" (id). The inclusion of the owner as receiving the "benefit" of trust funds does not mean the owner has the right to pursue claims for the diversion of such funds. As Article 38 continues to state, that simply means that in the

event the contractor withholds funds to subcontractors, the owner shall be indemnified. Further, Article 38 concludes by noting that "the Contractor must notify the Owner in writing of any monies the Contractor intends to withhold from its subcontractors, suppliers, and vendors and provide reasonable explanation for so doing, which shall be subject to the Owner's approval" (id). Thus, the trust funds are held for the benefit of the owner to the extent enumerated within the article and does not confer upon the owner the right to act as trustee and pursue diversion claims. Therefore, the owner has no standing to pursue claims for the diversion of trust funds and consequently, the motion seeking to dismiss the tenth counterclaim is granted.

So ordered.

ENTER:

DATED: July 19, 2022
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC