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Scarano Architect, PLLC v 6322 Holding Corp.

Supreme Court of New York, Kings County

May 20, 2012, Decided

9828/10

Reporter
35 Misc. 3d 1228(A); 954 N.Y.S.2d 761; 2012 N.Y. Misc. LEXIS 2417; 2012 NY Slip Op 50917(U); 2012 WL 1869153

Scarano Architect, PLLC, Plaintiff, against 6322 Holding Corp. and Carver Federal Savings Bank, Defendant.

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PUBLISHED IN TABLE FORMAT IN THE NEW YORK SUPPLEMENT.

Core Terms

movant, exaggerated, mechanic's lien, asserts, void, notice of lien, summary judgment, counterclaim, willful, summary judgment motion, issue of fact, willfully, certificate of occupancy, obligations, damages, parties, argues

Headnotes/Syllabus

Headnotes

[*1228A] **[**761]** Liens--Mechanic's Lien--Willful Exaggeration of Mechanic's Lien. Lien Law--§ 39 (Lien wilfully exaggerated is void).

Counsel: **[***1]** For Plaintiffs: Isaac Tilton, Esq, Itkowitz and Harwood.

For Defendants: Gary Rosen Esq., Gary Rosen Law Firm, PC.

Carver Federal Savings Bank - Pro se.

Judges: Yvonne Lewis, JSC.

Opinion by: Yvonne Lewis

Opinion

Yvonne Lewis, J.

Defendant ***6422 Holding*** Corp. moves for an order granting: ″1. Summary Judgment against Plaintiff in favor of Defendant ***6422 Holding*** Corp.; granting2. Summary Judgment on Defendant ***6422 Holding*** Corp.'s Counterclaims against the Plaintiff, and; 3. finding that Plaintiff willfully exaggerated its Mechanic's Lien″ [*sic*].

Background

The plaintiff has asserted mechanic's liens on six condominium units, owned by movant and in the building located at 6422 Bay Parkway in Brooklyn. The defendant Carver Federal Savings Bank does not take a position in the present dispute between the plaintiff and movant, and has appeared in this action solely to assert that its mortgage interest in one of the units owned by the movant is superior in the event of a judgment of foreclosure and sale. Pursuant to the Lien Law, the plaintiff served the movant with notices of the mechanic's liens, dated March 10, 2010 and May 25, 2010. Thereafter, on May 27, 2010, the plaintiff commenced the instant action by filing a summons **[***2]** and verified complaint. On June 1, 2010, the plaintiff filed a notice of pendency, asserting that the liens encumber the subject property.

The verified complaint states that on or about February 8, 2004, the plaintiff agreed to provide the movant with architectural work in connection with the subject units for the sum of $210,964.88. The complaint further states that the movant has only submitted payment in the amount of $84,555.50, leaving a balance of $126,409.38. The liens are in this amount. The plaintiff asserts four causes of action: foreclosure of the lien, breach of contract, quantum meruit and unjust enrichment. On June 18, 2010, the movant interposed an answer containing several affirmative defenses and two counterclaims. The first counterclaim argues that the notices of mechanic's liens are void because of the plaintiff's willful exaggeration thereof. The second counterclaim asserts that the plaintiff breached the subject agreement, causing damages in the sum of $250,000 to the movant.

Movant's Arguments

6322 Holding Corp. first disputes the amount it owes the plaintiff. It claims that relevant deposition testimony and documents indicate that in 2009, it and the plaintiff [***3] agreed to a substitute deal whereby the plaintiff would discharge the prior debt for the sum of $20,000.00. The movant further claims that it has paid the sum of $15,000.00 to the plaintiff and, therefore, only owes the plaintiff $5,000.00. Upon that claim, the movant reasons that the alleged mechanic's liens in the amount of $126,409.38 are grossly overstated and the lien is therefore void. Indeed, the movant characterizes the plaintiff's actions as frivolous and fraudulent.

Moreover, the movant claims that the plaintiff has a history of asserting mechanic's liens and commencing lawsuits to extort allegedly due sums for questionable architecture work. The movant submits a copy of a recent article from a local newspaper stating that the plaintiff's principal is no longer allowed to file construction plans with the City of New York Department of Buildings. The movant avers that, therefore, the plaintiff was unable to obtain a certificate of occupancy for the subject property. The movant further asserts that it was thus required to obtain a certificate of occupancy at its own expense. Having obtained the certificate of occupancy on its own, the movant concludes that it performed all its [***4] obligations pursuant to the subject agreement and asserts that, in fact, the plaintiff breached the subject agreement.

Next, the movant asserts that the plaintiff's principal admitted, at his deposition, that pursuant to the substitute agreement, the movant owed only $5,000.00 when the notices of lien were served. Moreover, the movant submits a copy of electronic mail, dated February 9, 2010 and from the plaintiff's bookkeeper, that indicates that movant owed only $5,000.00 when the notices of lien were served. The movant also contends that the plaintiff's bookkeeper also testified at her deposition that movant owed only $5,000.00 when the notices of lien were served. Additionally, the movant notes that the bookkeeper testified that the plaintiff charged the movant for interest on amounts allegedly due pursuant to the subject agreement, but that the agreement did not allow the plaintiff to do so.

The movant concludes that, pursuant to *section 39 of the Lien Law*, the subject notices of lien are void because the plaintiff wilfully exaggerated the amount claimed. As a consequence thereof, the movant argues that pursuant to *section 39-a of the Lien Law*, the plaintiff is now liable for all [***5] damages stemming from the exaggerated amount, including reasonable attorney's fees and the difference between the actual and claimed amounts secured by the subject lien.

Plaintiff's Arguments

In opposition to the movant's arguments, the plaintiff first asserts that from 2004 to 2010, and pursuant to a written agreement, the plaintiff provided the movant with architectural services

with respect to the subject property. The plaintiff further asserts that it performed all of its obligations under the agreement for the amount of $210,964.88; however, when the notices of lien were served, the movant owed (and still owes) the balance of $126,409.38, plus interest thereon. The plaintiff also argues that the movant mischaracterizes the alleged substitute deal. The plaintiff acknowledges that, in September of 2009, the movant and the plaintiff agreed to settle the underlying debt for the amount of $20,000.00; however, the plaintiff argues, that contrary to the movant's contention, the September 2009 deal was an accord and not a substitute agreement. The plaintiff reasons that, since as of March of 2010, the movant still had not complied with the accord, the accord was never satisfied, enabling [***6] the plaintiff to claim and assert mechanic's liens for the full amount due: $126.409.38. Lastly, the plaintiff submits the affidavit of its principal, averringin substance to these assertions.

At best, claims the plaintiff, the movant's arguments demonstrate an issue of fact with respect to whether the subsequent agreement was intended to substitute the original agreement. In any event, argues the plaintiff, the movant has failed to demonstrate the absence of issues of material fact with respect to the amount owed-and, therefore, whether the amounts claimed in the notices of lien were exaggerated.

Discussion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should thus only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493, 787 N.Y.S.2d 392 [2005]; *see also* *Andre v Pomeroy, 35 NY2d 361, 364, 320 N.E.2d 853, 362 N.Y.S.2d 131 [1974])*. However, a motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party as a matter of law (*CPLR 3212 [b]*; *Gilbert Frank Corp. v Federal Ins. Co., 70 NY2d 966, 967, 520 N.E.2d 512, 525 N.Y.S.2d 793 [1988]*; [***7] *Zuckerman v City of New York, 49 NY2d 557, 562, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980])* and the party opposing the motion for summary judgment fails to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (*Alvarez v Prospect Hosp., 68 NY2d 320, 324, 501 N.E.2d 572, 508 N.Y.S.2d 923 [1986]*, citing *Zuckerman, 49 NY2d at 562*).

The proponents of a motion for summary judgment must first demonstrate entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact (*Manicone v City of New York, 75 AD3d 535, 537, 905 N.Y.S.2d 640 [2010]*, quoting *Alvarez, 68 NY2d at 324*; *see also* *Zuckerman, 49 NY2d at 562*; *Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853, 476 N.E.2d 642, 487 N.Y.S.2d 316 [1985])*. If the existence of an issue of fact is even arguable, summary judgment must be denied (*Museums at Stony Brook v Vil. of Patchogue Fire Dep't, 146 AD2d 572, 536 N.Y.S.2d 177 [1989])*. Also, parties opposing a motion for summary judgment are entitled to every favorable inference that may be drawn from the pleadings, affidavits and competing contentions (*Nicklas v Tedlen Realty Corp., 305 AD2d 385, 759 N.Y.S.2d 171 [2003]*; *see also* *Akseizer v Kramer, 265 AD2d 356, 696 N.Y.S.2d 849 [1999]*; *McLaughlin v Thaima Realty Corp., 161 AD2d 383, 384, 555 N.Y.S.2d 125 [1990]*; *Gibson v American Export Isbrandtsen Lines, 125 AD2d 65, 74, 511 N.Y.S.2d 631 [1987]*; [***8] *Strychalski v Mekus*, 54 AD2d 1068, 1069, 388 N.Y.S.2d 969 [1976]). Indeed, in deciding a motion for summary judgment, the court is required to accept the opponents' contentions as true and resolve all inferences in the manner most favorable to the opponents (*Pierre-Louis v DeLonghi America, Inc., 66 AD3d 859, 862, 887 N.Y.S.2d 628 [2009]*, citing *Nicklas, 305 AD2d at*

385; Henderson v City of New York, 178 AD2d 129, 130, 576 N.Y.S.2d 562 [1991]; see also Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P., 7 NY3d 96, 105-106, 850 N.E.2d 653, 817 N.Y.S.2d 606 [2006]).

A party seeking summary judgment has the burden of establishing prima facie entitlement to judgment as a matter of law by affirmatively demonstrating the merit of a claim or defense and not by simply pointing to gaps in the proof of an opponent (Nationwide Prop. Cas. v Nestor, 6 AD3d 409, 410, 774 N.Y.S.2d 357 [2004]; Katz v PRO Form Fitness, 3 AD3d 474, 475, 769 N.Y.S.2d 903 [2004]; Kucera v Waldbaums Supermarkets, 304 AD2d 531, 532, 758 N.Y.S.2d 133 [2003]). Lastly, ″[a] motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility′″ (Ruiz v Griffin, 71 AD3d 1112, 1112, 898 N.Y.S.2d 590 [2010], quoting Scott v Long Is. Power Auth., 294 AD2d 348, 741 N.Y.S.2d 708 [2002]; [***9] see also Benetatos v Comerford, 78 AD3d 750, 751-752, 911 N.Y.S.2d 155; Lopez v Beltre, 59 AD3d 683, 685, 873 N.Y.S.2d 726 [2009]; Baker v D.J. Stapleton, Inc., 43 AD3d 839, 841 N.Y.S.2d 382 [2007]).

First, the court rejects the movant's request for a summary finding that the plaintiff willfully exaggerated the amount of the subject lien. The court notes that the movant asserts that, at the time the notices of lien were served, the movant was indebted to the plaintiff in the amount of $5,000.00, but the notices of lien claim a debt owed in the amount of $126,409.38. Also, the movant correctly references the text of Lien Law § 39, (″Lien willfully exaggerated is void″) which provides, in applicable part that: ″[i]n any action or proceeding to enforce a mechanic's lien upon a private or public improvement or in which the validity of the lien is an issue, if the court shall find that a lienor has willfully exaggerated the amount for which he claims a lien as stated in his notice of lien, his lien shall be declared to be void and no recovery shall be had thereon[.]″

Moreover, the movant also correctly references the text of Lien Law § 39-a (″Liability of lienor where lien has been declared void on account of wilful exaggeration″), which provides, [***10] in applicable part that: ″[w]here in any action or proceeding to enforce a mechanic's lien upon a private or public improvement the court shall have declared said lien to be void on account of wilful exaggeration the person filing such notice of lien shall be liable in damages to the owner or contractor.″

However, the movant fails to cite authority permitting this court to summarily make such a finding or declaration of a willfully exaggerated lien on the motion of a party. In fact, the movant cites no authority whatsoever beyond the text of sections 39 and 39-a of the Lien Law. To the contrary, the question of whether the plaintiff herein willfully or fraudulently exaggerated the subject lien must be determined at trial of the foreclosure action and may not be determined summarily (Aaron v Great Bay Contr., 290 AD2d 326, 736 N.Y.S.2d 359 [2002]; see also Executive Towers at Lido v Metro Constr. Servs., 303 AD2d 545, 545, 756 N.Y.S.2d 461 [2003] [″claims under Lien Law §§ 39 and 39-a are not appropriate for summary resolution at this stage of the case″]; Washington 1993 Inc. v Reles, 255 AD2d 745, 680 N.Y.S.2d 715 [1998] [whether contractor deliberately and intentionally exaggerated the lien amount is question of fact to be resolved at [***11] trial]); Aaron v Great Bay Contr., Inc., 290 AD2d 326, 736 N.Y.S.2d 359 [2002] [″issue of willful or fraudulent exaggeration is one that also ordinarily must be determined at the trial of the foreclosure action″]); Matter of Upstate Bldrs. Supply Corp. v Maple Knoll Apts., 37 AD2d 901, 902, 325 N.Y.S.2d 509 [1971] [″We are not required to determine the validity of respondent's claim of willful exaggeration. The right to urge that the lien is void for this reason, is always

reserved for the trial."]; *Matter of T.A. Maloney Contr. Corp. v William E. Blume Inc., 85 Misc 2d 838, 839, 380 N.Y.S.2d 585 [1976]* ["The fact of willful exaggeration may be established only in an action or proceeding to enforce a mechanic's lien rather than on affidavits submitted on a motion to discharge a lien. The right to urge that a lien is void for willful exaggeration is always reserved for trial."]; *Matter of Lustbader Contr., 144 Misc. 875, 876, 259 N.Y.S. 103 [1932]* ["A finding of willful exaggeration not only voids the lien (*section 39, Lien Law*), but also renders the lienor liable for damages (*section 39-a, Lien Law*). It is extremely unlikely that the Legislature intended such a finding to be made in a summary manner upon affidavits, especially when consideration is **[***12]** given to the difficulty of determining the question of willful exaggeration upon conflicting affidavits as to the work done and its value."])

Although the movant claims that correspondence and the deposition testimony of the plaintiff's principal and employees establishes that the movant's debt to the plaintiff is merely $5,000.00, the plaintiff's principal's affidavit states that the agreement made in 2009 was an accord that was never satisfied. "Whether a particular arrangement is an accord or a substituted agreement hinges on the parties' intent, determination of which may be aided by certain presumptions" (*Denburg v Parker Chapin Flattau & Klimpl, 82 NY2d 375, 384, 624 N.E.2d 995, 604 N.Y.S.2d 900 [1993]*, citing *Goldbard v Empire State Mut. Life Ins. Co., 5 AD2d 230, 234, 171 N.Y.S.2d 194 [1958]*). Here, the parties sharply disagree about the characterization of the subject agreement and the movant's debt. The movant has not established as a matter of law "that there was a disputed or unliquidated claim between the parties which they mutually resolved through a new contract discharging all or part of their obligations under the original contract" (*Profex, Inc. v Town of Fishkill*, 65 AD3d 678, 678, 883 N.Y.S.2d 912 [2009]; *see also Merrill Lynch Realty/Carll Burr, Inc. v Skinner, 63 NY2d 590, 596, 473 N.E.2d 229, 483 N.Y.S.2d 979 [1984]*; **[***13]** *Pothos v Arverne Houses, 269 AD2d 377, 378, 702 N.Y.S.2d 392 [2000]*; *Trans World Grocers v Sultana Crackers*, 257 AD2d 616, 617, 684 N.Y.S.2d 284 [1999]). Indeed, it is undisputed that the movant has failed to perform its obligations under the subsequent agreement, which required the movant to pay the plaintiff the sum of $20,000.00; the movant paid only $15,000.00. Therefore, since the satisfaction was not tendered, the plaintiff obligee may sue under, and claim a lien in the amount of, the original claim (*Denburg, 82 NY2d at 383*, *see also Plant City Steel Corp. v National Mach. Exch., 23 NY2d 472, 478, 245 N.E.2d 213, 297 N.Y.S.2d 559 [1969]*; *General Obligations Law § 15-501 [3]*). Moreover, since it appears that the subsequent agreement was not reduced to writing and signed by an agent of the movant, the subsequent agreement between the movant and the plaintiff is thus non-binding and not enforceable (*Denburg, 82 NY2d at 384* ["The purported settlement agreement in the present case was oral and thus unenforceable unless executed"]; *see also Larscy v Hogan & Sons, 239 NY 298, 301-302, 146 N.E. 430 [1925]*; *Reilly v Barrett, 220 NY 170, 173, 115 N.E. 453 [1917]*).

Also, assuming *arguendo* that the plaintiff did in fact exaggerate the amount of the lien, the plaintiff may still recover **[***14]** against the movant. A mechanic's lienholder—here, the plaintiff—is entitled to receive the amount due pursuant to a contract even if the alleged lienee—here, the movant—is entitled to recover damages on account of an exaggerated lien (*Hutchinson Roofing & Sheet Metal Co., Inc. v Gillert Constr. Corp.*, 275 App Div 1048, 92 N.Y.S.2d 76 [1949]). Indeed, an issue of fact exists as to whether *Lien Law § 39* and *§ 39-a* apply to this dispute, since these provisions do not apply to disputes about contract interpretation (*E. J. Dayton, Inc. v Brock, 120 AD2d 560, 502 N.Y.S.2d 53 [1986]*; *see also Howdy Jones Constr. Co. v Parklaw Realty, 76 AD2d 1018, 429 N.Y.S.2d 768 [1980]*, *affd 53 NY2d 718, 421 N.E.2d 846, 439 N.Y.S.2d 354*

[1981]). Since *Lien Law § 39-a* imposes a penalty, the statute is strictly construed in favor of the party against whom the penalty is sought-here, the plaintiff (*Goodman v Del-Sa-Co Foods, 15 NY2d 191, 195, 205 N.E.2d 288, 257 N.Y.S.2d 142 [1965])*.

Additionally, although the movant seeks summary judgment on its counterclaim, the movant simply asserts that the plaintiff's failure to obtain a certificate of occupancy caused the movant to suffer damage. Even assuming the truth of this assertion, the plaintiff would nevertheless be permitted to recover any amounts due from the movant (*see e.g.* **[***15]** *E-J Elec. Installation Co. v Miller & Raved, 51 AD2d 264, 266, 380 N.Y.S.2d 702 [1976]* [″the rights of the parties under the basic contractual arrangements are in no way foreclosed by this determination as to the counterclaims with respect to the enforcement of the mechanic's lien″]; *see also Lepore v Grandview Constr. Corp., 4 AD2d 960, 168 N.Y.S.2d 209 [1957]*, *affd 5 NY2d 897, 156 N.E.2d 710, 183 N.Y.S.2d 79 [1959]*; *Grimpel v Hochman, 74 Misc 2d 39, 47, 343 N.Y.S.2d 507 [1972])*. Thus, since the plaintiff's rights against the movant are not foreclosed by this dispute concerning a mechanic's lien, the movant has not demonstrated the absence of issues of fact concerning its counterclaim.

Lastly, the court notes that, despite the movant's present contentions, this action appears to stem from an honest dispute between the movant property owner and the plaintiff architect, which performed work for the movant but allegedly failed to obtain a certificate of occupancy for condominium units; this court should attribute the difference between the amount of the claimed lien and the amount the movant claims to owe the plaintiff to honest differences of opinion (*see e.g. Regal Lbr. Co. v Buck, 157 Misc 2d 376, 384, 596 N.Y.S.2d 1000 [1993])*. To the extent that the movant's arguments about the plaintiff's **[***16]** bookkeeping or discipline with the City of New York Department of Buildings permits a negative inference about the plaintiff's credibility—and, consequently, whether the dispute concerning the movant's indebtedness is honest—such an inference must be made by the trier of fact and cannot be resolved by a motion for summary judgment *Forrest v Jewish Guild for the Blind, 3 NY3d 295, 314-315, 819 N.E.2d 998, 786 N.Y.S.2d 382 [2004]* [″Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . on a motion for summary judgment″]).

Conclusion

In sum, the motion of the defendant 6322 Holding Corp. is denied in its entirety.

The foregoing constitutes the decision and order of the court.

ENTER,

Yvonne Lewis, JSC