

KMS Contr. Inc. v Cauldwell-Wingate Co. LLC

2024 NY Slip Op 32186(U)

June 25, 2024

Supreme Court, New York County

Docket Number: Index No. 158966/2022

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LOUIS L. NOCK PART 38M

Justice

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KMS CONTRACTING INC.,

Plaintiff,

- v -

CAULDWELL-WINGATE COMPANY LLC, LIBERTY
MUTUAL INSURANCE COMPANY, JOHN DOE NO. 1.
THROUGH JOHN DOE NO. 10, JANE DOE NO. 1
THROUGH JANE DOE NO. 10, XYZ CORP. NO. 1
THROUGH XYZ CORP. NO. 10, ABC LLC NO. 1
THROUGH ABC LLC NO. 10,

Defendants.

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INDEX NO. 158966/2022

MOTION DATE 05/26/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, and 29

were read on this motion to/for DISMISS.

LOUIS L. NOCK, J.S.C.

This is an action to foreclose on a mechanic’s lien and for unjust enrichment, arising out of a construction project in which defendant Cauldwell-Wingate Company LLC (“Cauldwell”) acted as general contractor, and entered into an agreement with plaintiff KMS Contracting Inc. (“KMS”) to perform certain work at the project. Cauldwell and defendant Liberty Mutual Insurance Company (“Liberty”), Cauldwell’s insurer, now move to dismiss the first cause of action for lien foreclosure on the grounds that the lien expired prior to the filing of the action. Plaintiff cross-moves for an order extending the time of the mechanic’s lien, nunc pro tunc, to include the date the action was filed. Upon the foregoing documents, the motion is granted, the cross-motion denied, and the complaint dismissed as against Liberty, as set forth in the following memorandum decision.

The complaint alleges that Cauldwell and plaintiff entered into an agreement pursuant to which plaintiff would undertake certain construction services for the sum of \$61,425 (complaint, NYSCEF Doc. No. 1, ¶¶ 6-7). Plaintiff claims that it completed the required work, but Cauldwell failed to pay (*id.*, ¶¶ 9-12). On November 13, 2019, plaintiff filed a notice of mechanic's lien against Cauldwell with the Clerk of New York County for the unpaid amount (mechanic's lien, NYSCEF Doc. No. 16; lien docket entry, NYSCEF Doc. No. 17). Plaintiff extended the lien by notice of extension dated October 21, 2020 (notice of extension, NYSCEF Doc. No. 18). Plaintiff then sought and obtained an ex parte extension order, extending the lien for a year from October 18, 2021, the date of the order (extension order, NYSCEF Doc. No. 19). Plaintiff did not take any steps to further extend the lien, and it expired on October 18, 2022. One day later, plaintiff commenced the instant action.

Lien Law § 17 establishes the time in which a lien remains effective, and provides as follows:

“No lien specified in this article shall be a lien for a longer period than one year after the notice of lien has been filed, unless within that time an action is commenced to foreclose the lien, and a notice of the pendency of such action, whether in a court of record or in a court not of record, is filed with the county clerk of the county in which the notice of lien is filed . . . or unless an extension to such lien, except for a lien on real property improved or to be improved with a single family dwelling, is filed with the county clerk of the county in which the notice of lien is filed within one year from the filing of the original notice of lien, continuing such lien and such lien shall be redocketed as of the date of filing such extension . . . No lien shall be continued by such extension for more than one year from the filing thereof. In the event an action is not commenced to foreclose the lien within such extended period, such lien shall be extinguished unless an order be granted by a court of record or a judge or justice thereof, continuing such lien, and such lien shall be redocketed as of the date of granting such order and a statement made that such lien is continued by virtue of such order . . . No lien shall be continued by court order for more than one year from the granting thereof, but a new order and entry may be made in each of two successive years” (Lien Law § 17).

The courts have interpreted this statute to provide that a lien expires automatically upon any of the events making such an expiration, absent the necessary steps to extend it (*Aztec Window & Door Mfg., Inc. v 71 Vil. Rd., LLC*, 60 AD3d 795, 796 [2d Dept 2009]; *Gallo Bros. Constr. Inc. v Peccolo*, 281 AD2d 811, 813 [3d Dept 2001]). Thus, extension of the term of the liens is only proper where the lienor has taken some action to obtain an extension prior to the expiration date (*Matter of Navillus Tile, Inc.*, 98 AD3d 979 [2d Dept 2012] [“Since the requests for relief set forth in the petitions may be made ex parte, and there may be a gap between the signing of the extension order and its filing, during which the one-year term of the lien may expire without affecting the validity of the lien, LC Main would not be prejudiced by the granting of the extensions nunc pro tunc”]). An action to foreclose a lien commenced after the lien has expired is subject to dismissal (*240-35 Assoc. v Major Builders Corp.*, 234 AD2d 234, 234 [1st Dept 1996]).

Here, plaintiff initially contested that the lien had expired on October 18, 2022, stating that it had instead expired on October 19, 2022. However, in its reply in further support of its cross-motion, plaintiff conceded that the lien had expired (Kadochnikov affirmation, NYSCEF Doc. No. 27, ¶ 2). Thus, the cause of action to foreclose on the lien must be dismissed (*240-35 Assoc.*, 234 AD2d at 234). Plaintiff, relying on *Matter of Navillus Tile, supra* and *Shihan v All Sons Elec. Corp.* (51 Misc 3d 1221[A], 2016 NY Slip Op 50756[U] [Sup Ct, Nassau County 2016]), argues that the court should extend the lien to encompass the filing date, nunc pro tunc, because of prejudice to plaintiff if defendants’ motion is granted. Neither case supports plaintiff’s position. In *Matter of Navillus Tile*, the lienor had filed an application for an extension prior to the expiration date, but the order was not signed until after the lien had expired (*Matter of Navillus Tile*, 98 AD3d at 980). Similarly, in *Shihan*, the lienor timely filed an extension of the

lien, unaware that a court order was necessary because of the real property involved (*Shihan*, 2016 NY Slip Op 50756[U] at *2). Here, by contrast, plaintiff took no action to secure an extension prior to the expiration date. Thus, no extension is available to salvage the lien (*Aztec Window & Door Mfg., Inc.*, 60 AD3d at 796 [“Inasmuch as the plaintiff failed to file a notice of pendency or move to extend the time to do so within the one-year period, the mechanic’s lien expired as a matter of law and should have been discharged”]).

Accordingly, it is hereby

ORDERED that defendants’ motion to dismiss the first cause of action for lien foreclosure is granted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of defendant Liberty Mutual Insurance Company dismissing the complaint against it; and it is further

ORDERED that the Clerk of New York County is directed to vacate the mechanic’s lien filed by plaintiff against the property located at 230 East 128th Street, New York, New York, vacate and cancel the bond filed by defendant Liberty Mutual Insurance Company to discharge the lien, and return the bond to defendant Liberty Mutual Insurance Company within 14 days of the date hereof; and it is further

ORDERED that the remainder of the action is severed and shall continue.

This constitutes the decision and order of the court.



<u>6/25/2024</u>			<u>LOUIS L. NOCK, J.S.C.</u>
DATE			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE