

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10  
Justice

-----X  
WU TOWERS, LLC and VICTORIA TOWERS Index  
DEVELOPMENT CORP., Number: 20922/07  
Petitioners,

- against -

Motion  
Date: 09/11/07

QUANTUM CONSTRUCTION GROUP, INC., and  
NEW YORK CITY DEPARTMENT OF FINANCE,

Motion  
Cal. Number: 15

Respondents.

-----X Motion Seq. No. 1

The following papers numbered 1 to 12 read on this petition for the release of funds deposited with the New York City Commissioner of Finance by petitioners to discharge the mechanic's lien filed by respondent Quantum Construction Group, Inc., directing respondent Quantum to serve an itemized statement of lien, for an order declaring the mechanic's lien null and void and vacating same and awarding damages, including treble damages, and attorney's fees.

Papers  
Numbered

Order to Show Cause-Petition-Exhibits..... 1-4  
Affidavits of Service..... 5-6  
Affirmation in Opposition..... 7-9  
Reply Affirmation..... 10-12

Upon the foregoing papers it is ordered that the petition is decided as follows:

Application by petitioners, pursuant to CPLR 2606(2), for the release of funds deposited with the New York City Commissioner of Finance by petitioners to discharge the mechanic's lien filed by respondent Quantum Construction Group, Inc., for an order, pursuant to Lien Law §38, directing Quantum to serve an itemized statement of lien, for an order, pursuant to Lien Law §39, declaring the lien

null and void and vacating same for Quantum's willful exaggeration of the mechanic's lien and declaring said lien null and void and vacating same, and awarding damages, including treble damages, and attorney's fees, pursuant to Lien Law §39-a, as a result of Quantum's willful exaggeration of the lien, is granted solely to the extent that Quantum is hereby ordered to furnish to petitioners a verified itemized statement setting forth the items of labor and/or material and the value thereof which make up the amount for which it claims a lien, including any and all subcontractors and the sums charged by them for labor and materials, and the contract under which such items were furnished within 30 days after service of a copy of this order with notice of entry, pursuant to Lien Law §38.

Petitioners deposited the sum of \$660,302.54 with the Commissioner of Finance on March 28, 2006 in discharge of the mechanic's lien in the sum of \$654,652.80 filed by Quantum against petitioners affecting the property known as 133-38 Sanford Avenue, Flushing, NY, indexed against Block 5121, Lots 20, 23, 44 and 46 in the Borough of Queens (M/L 109/06).

Petitioners fail to establish, on this record, that \$598,875.07 of the total sum of the lien represents labor and/or material furnished by the subcontractors listed in the petition who were paid directly by petitioners and, therefore, that petitioners are entitled to the release of said amount from the sum deposited with the Commissioner of Finance in discharge of said lien. The petition is verified by petitioner's attorney who merely speculates, "upon information and belief," that Quantum's lien against petitioners reflects the sums paid by petitioners to various subcontractors totaling \$598,875.07 and that, therefore, only \$79,963.67 of the lien represents monies allegedly owing to Quantum for labor and material supplied by it. The petition, moreover, is not supported by any affidavit from an officer of petitioners with knowledge of said assertions. Therefore, that branch of the petition seeking an order directing the Commissioner of Finance to release funds deposited in discharge of the lien is dismissed without prejudice and with leave to commence a new proceeding upon receiving the aforesaid verified itemized statement.

Counsel for Quantum argues that the petition is improper since there is a pending action to foreclose the lien, which action was interposed by way of cross-claim in its answer to a complaint of Nets That Work Co., one of the subcontractors, against various defendants, including Wu Towers and Quantum (Index No. 25648/06).

However, this Court cannot determine, at this juncture,

whether that foreclosure action was validly commenced. The cross-claim to foreclose the lien was interposed only against Wu Towers. Since Victoria Towers is also named and identified in the notice of mechanic's lien filed by Quantum as a fee owner of the subject property and the sum deposited with the Commissioner of Finance to discharge the lien was from both Wu and Victoria, and Victoria is described in the caption of the receipt issued by the County Clerk as an owner, it would appear that Victoria would be a necessary and indispensable party to an action to foreclose the lien, although this Court does not pass upon that issue (see Lien Law §44[3]).

Therefore, that branch of the petition seeking an order directing the Commissioner of Finance to the release of funds deposited in discharge of the lien is dismissed without prejudice.

The branch of the petition seeking an order declaring the lien void and vacating the lien and seeking a judgment for damages on the ground that Quantum wilfully exaggerated the lien, pursuant to Lien Law §39 and 39-a, is dismissed.

Lien Law §39 provides that a lien shall be declared void "if the court shall find that a lienor has wilfully exaggerated the amount for which he claims a lien as stated in the notice of lien." Wilful exaggeration requires proof that the lienor deliberately and intentionally exaggerated the amounts set forth in the notice of lien (see Fidelity New York FSB v. Kensington-Johnson Corp., 234 AD 2d 263 [2<sup>nd</sup> Dept 1996]; Pratt Gen. Contrs. V. Trappey, 177 AD 2d 566 [2<sup>nd</sup> Dept 1991]). Lien Law §39 was intended to protect against "fictitious, groundless and fraudulent liens by unscrupulous lienors" (E-J Elec. Installation Co. V. Miller & Raved, Inc., 51 AD 2d 264, 265 [1<sup>st</sup> Dept 1976]). Therefore, the exaggeration contemplated by §39 is of the lien amount when set forth in the notice of lien. It has nothing to do with a dispute over whether the lienor should stipulate to the release of sums deposited in discharge of an otherwise valid lien.

Petitioners do not contend that the lien itself does not accurately represent the value of the work and/or materials furnished to petitioners by Quantum and, therefore, that the lien was exaggerated. They merely argue that since Quantum refused to consent to the release of the sum of \$598,875.07 of the total amount deposited, after it was informed that the subcontractors were paid said sum directly by petitioners, that such refusal constitutes an exaggeration of the lien.

Even if, arguendo, the refusal by Quantum to consent to the release of the sum at issue could be considered an exaggeration within the meaning of §39, since petitioners have not established,

on this record, that the sums paid to various subcontractors comprised part of the lien, they have failed to prove that Quantum exaggerated the lien. The burden is upon petitioners to show that the lien was deliberately exaggerated (see Fidelity New York FSB v. Kensington-Johnson Corp., 234 AD 2d 263, supra). Petitioners have failed to meet their burden.

Serve a copy of this order with notice of entry without undue delay.

Dated: September 14, 2007

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KEVIN J. KERRIGAN, J.S.C.