

FILED: NEW YORK COUNTY CLERK 08/07/2017 12:34

NYSCEF DOC. NO. 22

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LUCY BILLINGS
J.S.C.
Justice

PART 46

EZ RUNER CONSTRUCTION CORP.

INDEX NO. 161915/2015

MOTION DATE _____

BLUE NIRVANA, LLC

MOTION SEQ. NO. 001

The following papers, numbered 4 to 20, were read on this motion to dismiss claims
Notice of Motion/Order to Show Cause -- Affidavits -- Exhibits No(e) _____
Answering Affidavits -- Exhibits No(e) _____
Replying Affidavits No(e) _____

Upon the foregoing papers, it is ordered that this motion is and adjudged that:

Pursuant to the accompanying decision, the court grants defendants' motion to dismiss plaintiff's second claim, to recover against Suretec Insurance Company on a mechanic's lien filed by plaintiff against the real property at 120 West 120th Street, New York County, but denies defendants' motion to dismiss plaintiff's third claim, for unjust enrichment against Blue Nirvana. C.P.L.R. § 3211(a)(1) and (7). The court also grants defendants' motion to vacate the lien and cancel the bond posted by defendants to discharge the lien. N.Y. Lien Law §§ 17, 19(2). The court denies defendants' motion insofar as it seeks attorneys' fees.

MOTION CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7/24/17

Lucy Billings, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
 - 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
 - 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 - DO NOT POST FIDUCIARY APPOINTMENT REFERENCE
- 1 of 7

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46
-----x

EZ RUNER CONSTRUCTION CORP.,
Plaintiff

Index No. 161915/2015

- against -

DECISION AND ORDER

BLUE NIRVANA, LLC, and SURETEC
INSURANCE COMPANY,
Defendants

-----x

LUCY BILLINGS, J.S.C.:

Defendants move to dismiss plaintiff's second claim, to recover against defendant surety Suretec Insurance Company on a mechanic's lien filed by plaintiff against the real property at 120 West 120th Street, New York County, owned by defendant Blue Nirvana, LLC, and third claim, for unjust enrichment against Blue Nirvana. C.P.L.R. § 3211(a)(1) and (7). Defendants further move to vacate the lien and cancel the bond posted by the principal Blue Nirvana and surety Suretec Insurance to discharge the lien. N.Y. Lien Law §§ 17, 19(2). Defendants concede that no statutory, regulatory, or contractual basis supports their request for attorneys' fees. Mount Vernon City School Dist. v. Nova Cas. Co., 19 N.Y.3d 28, 39 (2012); Baker v. Health Mgt. Sys., 98 N.Y.2d 80, 88 (2002); Atlantic Dev. Group, LLC v. 296 E. 149th St., LLC, 70 A.D.3d 528, 529 (1st Dep't 2010).

On October 1, 2014, plaintiff filed a mechanic's lien with the New York County Clerk claiming Blue Nirvana owed plaintiff \$14,712.43 pursuant to the parties' contract, under which

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plaintiff agreed to furnish and install plumbing on Blue Nirvana's premises. On July 29, 2015, Blue Nirvana filed a bond, on which Suretec Insurance is the surety, for 110% of the lien, \$16,184.23. Plaintiff neither commenced an action to foreclose the lien nor extended its lien by October 1, 2015.

I. PLAINTIFF'S SECOND CLAIM, AGAINST SURETEC INSURANCE BASED ON THE LIEN

New York Lien Law § 17 requires that:

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, . . . or unless an extension to such lien . . . 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.

"Pursuant to Lien Law § 17, a mechanic's lien expires one year after filing unless an extension is filed with the County Clerk or an action is commenced to foreclose the lien within that time" Thompson Bros. Pile Corp. v. Rosenblum, 134 A.D.3d 1020, 1021 (2d Dep't 2015); Aztec Window & Door Mfg., Inc. v. 71 Vil. Rd., LLC, 60 A.D.3d 795, 796 (2d Dep't 2009). When plaintiff, having filed a mechanic's lien against Blue Nirvana's real property October 1, 2014, neither commenced an action to foreclose the lien nor sought an extension of the lien, it expired. N.Y. Lien Law § 17. Upon the lien's expiration, the property owner Blue Nirvana was entitled to removal of the lien. Thompson Bros. Pile Corp. v. Rosenblum, 134 A.D.3d at 1022-23; Cook v. Carmen S. Paraiso, Inc., 287 A.D.2d 208, 211-12 (4th Dep't 2001).

Lien Law § 19(2) provides similarly: "The failure to begin an action to foreclose such lien or to secure an order continuing it, within one year from . . . filing the notice of lien" automatically discharges the lien. See Cook v. Carmen S. Paraiso, Inc., 287 A.D.2d at 211-12. Therefore plaintiff has forfeited its claim based on the lien against both the real property owner Blue Nirvana and its surety, leaving plaintiff to pursue its underlying breach of contract or quasi-contractual claims against the owner for the work plaintiff claims it performed on the property. 240-35 Assoc. v. Major Bldrs. Corp., 234 A.D.2d 234, 234 (1st Dep't 1996); Cranesville Block Co., Inc. v. Spring Apts., LLC, 53 A.D.3d 998, 1001 (3d Dep't 2008); MCK Bldg. Assoc. v. St. Lawrence Univ., 5 A.D.3d 911, 914 (3d Dep't 2004).

Plaintiff's filing with the New York County Clerk of a notice of claim upon the bond within New York Lien Law § 37(5)(a)'s time limit of four months after Blue Nirvana filed the bond does not abrogate or relieve plaintiff of Lien Law § 19(2)'s time limit to foreclose or extend the lien. Lien Law § 17 expressly dictates that the requirements for continuing the lien beyond the one year duration apply whether the lien is on Blue Nirvana's real property or on the bond. "The provisions of this section in regard to continuing liens shall apply to liens discharged by deposit or by order on the filing of an undertaking." N.Y. Lien Law § 17. When plaintiff filed a mechanic's lien against the property owner Blue Nirvana October

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1, 2014, and then it as the principal and Suretec Insurance as the surety filed a bond to discharge the lien, plaintiff still was required to commence an action to foreclose the lien by October 1, 2015. Cranesville Block Co., Inc. v. Spring Apts., LLC, 53 A.D.3d at 999-1000.

In sum, when plaintiff failed to commence this action seeking foreclosure of the lien by October 1, 2015, it expired. N.Y. Lien Law § 17. Therefore defendants are entitled to dismissal of the claim for foreclosure and to vacatur and cancellation of the lien and bond. N.Y. Lien Law §§ 17, 19(2); Cranesville Block Co., Inc. v. Spring Apts., LLC, 53 A.D.3d at 1001; Pino v. Harnischfeger, 42 A.D.3d 980, 981-92 (4th Dep't 2007); M & A Constr. Corp. v. McTague, 21 A.D.3d 610, 611 (3d Dep't 2005).

II. PLAINTIFF'S THIRD CLAIM, AGAINST BLUE NIRVANA BASED ON UNJUST ENRICHMENT

On the other hand, Blue Nirvana has not admitted the contract under which plaintiff claimed the \$14,712.43 reflected in the mechanic's lien. Since plaintiff also alleges that Blue Nirvana received the benefit of the work plaintiff performed on Blue Nirvana's premises, plaintiff may maintain its unjust enrichment claim in the alternative to its breach of contract claim in the event Blue Nirvana denies an enforceable contract with plaintiff covering the work for which plaintiff claims compensation. Henry Loheac, P.C. v. Children's Corner Learning Ctr., 51 A.D.3d 476, 476 (1st Dep't 2008); IIG Capital LLC v. Archipelago, L.L.C., 36 A.D.3d 401, 408 (1st Dep't 2007); Rab
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Contrs. v. Stillman, 266 A.D.2d 70, 71 (1st Dep't 1999). See Sabre Intl. Sec., Ltd. v. Vulcan Capital Mgt., Inc., 95 A.D.3d 434, 438-39 (1st Dep't 2012).

Plaintiff's allegations that its improvements to Blue Nirvana's premises enriched Blue Nirvana at plaintiff's expense and that allowing Blue Nirvana to retain the enrichment is inequitable and unconscionable support plaintiff's unjust enrichment claim. Georgia Malone & Co., Inc. v. Rieder, 19 N.Y.3d 511, 516 (2012); Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d 173, 182 (2011); Panetta v. Kelly, 17 A.D.3d 163, 166 (1st Dep't 2005). Plaintiff further sustains its unjust enrichment claim by demonstrating a relationship with Blue Nirvana that induced plaintiff's performance of the work for which plaintiff seeks compensation. Plaintiff shows that Blue Nirvana dealt with plaintiff and was aware it was conferring a benefit on Blue Nirvana's premises. Murphy v. 317-319 Second Realty LLC, 95 A.D.3d 443, 445 (1st Dep't 2012). See Georgia Malone & Co., Inc. v. Rieder, 19 N.Y.3d at 518; Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d at 182.

In sum, plaintiff demonstrates that Blue Nirvana was enriched by plaintiff's work, performed without compensation, and that it would be unfair for Blue Nirvana to retain that benefit without payment. Henry Loheac, P.C. v. Children's Corner Learning Ctr., 51 A.D.3d at 476; Panetta v. Kelly, 17 A.D.3d at 166; Rab Contrs. v. Stillman, 266 A.D.2d at 71. See John Anthony Rubino & Co., CPA, P.C. v. Swartz, 84 A.D.3d 599, 599 (1st Dep't

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2011); I.S. Design v. Planned Mgt. Constr. Corp., 243 A.D.2d 425, 426 (1st Dep't 1997).. Therefore the court denies Blue Nirvana's motion to dismiss plaintiff's third claim, for unjust enrichment. C.P.L.R. § 3211(a)(1) and (7).

III. CONCLUSION

For the reasons explained above, the court grants defendants' motion to dismiss plaintiff's second claim, to recover against Suretec Insurance Company on a mechanic's lien filed by plaintiff against the real property at 120 West 120th Street, New York County, but denies defendants' motion to dismiss plaintiff's third claim, for unjust enrichment against Blue Nirvana. C.P.L.R. § 3211(a)(1) and (7). The court also grants defendants' motion to vacate the lien and cancel the bond posted by defendants to discharge the lien. N.Y. Lien Law §§ 17, 19(2). The court denies defendants' motion insofar as it seeks attorneys' fees.

DATED: July 24, 2017

Lucy Billings

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.