

At an IAS Term, Part 21 of the Supreme Court
of the State of New York, County of Kings
located at 360 Adams Street, Brooklyn
New York on the 1st day of July 2009.

PRESENT:
HON. LAURA L. JACOBSON

Justice

Decision

In the Matter of the Application of
ROEBLING, PARK, LLC,

Petitioner,

Index No.:34573/2008

For an Order Summarily Discharging
of Record a notice of Lien Dated
November 12, 2008, filed by

NORTH SHORE PLUMBING SUPPLY CO.,
Lienor.

The following papers numbered 1 to 5 read on this Motion:

Papers	Numbered
Order to Show Cause and Affirmation Annexed	1-2
Affidavit in Opposition	3
Reply	4
Memorandum of Law	5

Petitioner Roebing Park LLC (hereinafter "Robeling") moves for an order summarily discharging of record the Notice of Mechanic's Lien filed by North Shore Plumbing Supply Co. in the Office of the Clerk of the County of Kings on November 14, 2008, against petitioner Roebing, as owner of certain premises, pursuant to Section 4 of the Lien Law of the State of New York, upon the ground that there is no money owed to Millenium Mechanical Contractors, Inc, the contractor with whom the owner contracted, and there is no lien fund for the lien filed by the lienor to attach to, and for such other and

further relief as to the Court may seem just and proper.

Petitioner Roebling is the owner of certain property located at 229 North 8th Street in Brooklyn, New York. Petitioner is presently building a new residential condominium on the subject property. Petitioner hired Millenium Mechanical Contractors, Inc. (hereafter "Millenium") as the plumbing contractor for the project. Petitioner and Millenium entered into a written agreement whereby, Millenium was to provide plumbing, heating, piping and fire sprinkler work necessary for the project at the contract price of \$985,000.00. Lienor North Shore Plumbing Supply Company (hereinafter "North Shore") was a material supplier from whom Millenium purchased plumbing supplies. Petitioner alleges that Millenium received payments from petitioner, totaling \$985,000.00 and that Millenium signed a waiver of lien on November 13, 2008, indicating that it had been paid in full. On November 14, 2008, North Shore filed a Notice of Mechanic's lien in the amount of \$30,594.69. The lien states that the first day materials were furnished was 2/21/2008 and the last day materials were furnished was 6/6/2008.

Petitioner asserts that it seeks discharge of the lien because the construction lender will not disburse construction loan funds until the lien is removed and that as a result, the lien is holding up the progress of the construction project. Petitioner contends that there is no money owed to Millenium, the party with whom petitioner contracted, that it paid Millenium for the materials furnished by the lienor North Shore prior to the date that the lien was filed and that there is no lien fund to which the lien can attach. Petitioner further alleges that the parol evidence rule prevents modification of the written waiver of lien executed by Millenium's president. Attached as an exhibit to petitioner's papers was a copy of the waiver of lien executed by Millenium's president Jeffrey Troodler on November 13, 2008. The Waiver stated in pertinent part:

The undersigned, in consideration of payment(s) made to us this date in the sum of \$985,000.00 which sum represents all monies due us on this project hereby waives and releases

(1)all actions, debts, claims and demands against the Owner on account of all work, services, equipment and material performed and furnished by us to date, in connection with the labor and materials required to be furnished pursuant to a contract dated January 15, 2007 for the referenced project and

(2)all mechanic's lien, materialman's liens or like liens, and all rights to file any such liens in the future relating to work

performed to the date of this instrument, against said real property on account of said work, services , equipment and materials performed or furnished by us.

Also included in petitioner's papers is a two page document entitled "Roebbling Park LLC. Vendor History Detail As of November 13, 2008". The document seems to indicate that there is a balance due of \$14, 303.77. The document also indicates that payments were made to BMW Plumbing Supplies (hereinafter "BMW") and that there is a balance due to BMW of \$10,132.77.

In opposition to the application, lienor North Shore submitted an affidavit from Jeffrey Troodler, President of Millenium. Mr. Troodler states that petitioner is not being honest with the court since petitioner owes additional monies to Millenium for work performed by Millenium on the subject project. While acknowledging that the original contract price was \$985,000.00 and that he executed a Waiver of Lien on Millenium's behalf on November 13, 2008, Mr. Troodler contends that petitioner has failed to mention that Millenium performed additional work for the petitioner that was over and above the base contract price. According to Mr. Troodler, Millenium relocated certain piping for kitchen sinks, relocated the dry valve and relocated piping for certain lavatories when the owner changed the design for some of the plumbing work. Mr. Troodler alleges that he specifically told petitioner that this was change order work and that the November 13, 2008 waiver only applied to the base contract. Mr. Troodler claims that he never intended to waive Millenium's right to seek additional compensation for the change order work. He states that Millenium does owe North Shore for the monies claimed in the lien. He further contends that he has been advised that the petition is not valid because Millenium signed the waiver not North Shore and that North Shore is not bound by Millenium's waiver and that it has an independent right to file its lien. Mr. Troodler asserts that Millenium still disputes the accounting prepared by petitioner in that petitioner only paid Millenium the sum of \$970,696.23. According to Mr. Troodler, Millenium never authorized petitioner to pay supplier BMW and any additional monies due to BMW is for extra work for which petitioner still owes Millenium. Mr. Troodler contends that issues regarding the monies owed by petitioner to Millenium must be decided in Court and not on a motion since the issue of the additional work remains open. Attached to Mr. Troodler's affidavit was a statement on Millenium letterhead dated January 22, 2009 regarding the subject project which is addressed to petitioner. The statement reads "Outstanding Amount Due As of January 23, 2009" for "Relocated cast iron roughing and water for fifty four (54) kitchen sinks as per new design"; "Relocated dry valve, labor and materials" and "Relocated cast iron righting and water for seventy eight (78) lavatories as per new design". The statement indicates that the total due is \$152,650.00.

Petitioner asserts in reply, that there was no change order for additional work. Petitioner contends that if the contract for additional work exists, it would have been attached as an exhibit to Mr. Troodler's affidavit. Petitioner alleges that Mr. Troodler's assertion that the waiver only applied to the base contract is barred by the parol evidence rule because it is oral testimony contradicting the written document. Petitioner contends that the letter attached to Mr. Troodler's affidavit regarding alleged outstanding amounts due is a total fabrication and that this is the first time that petitioner has seen this statement. Petitioner further asserts that the statement does not contain any dates for the work allegedly performed and that the prices listed on the statement are inflated. Petitioner argues that North Shore is only entitled to a lien against monies that are owed, but were not paid, to Millenium and that North Shore has no independent right to assert a lien for monies that petitioner paid to Millenium but Millenium did not pay to North Shore. Petitioner contends that Millenium can not dispute petitioner's accounting since it signed a Waiver of Lien. Petitioner asserts that it hired BMW and other contractors because Millenium went out of business and petitioner had to finish Millenium's work and re-do a lot of defective work performed by Millenium. Petitioner further claims that it had to pay Millenium's payroll because Millenium ran out of money. Petitioner argues that it is clear that although Millenium was paid in full by petitioner, Millenium failed to pay its material supplier lienor North Shore. Petitioner asserts that it incurred a great deal of additional expense because Millenium performed its work poorly and went out of business. Petitioner asserts that it does not owe any monies to the lienor and that the lien is causing a hardship because petitioner will have to be bonded by the deposit of approximately \$35,000.00 if the lien is not discharged.

Section 4.(1) of the Lien Law states in pertinent part:

If labor is performed for, or materials furnished to, a contractor or subcontractor for an improvement, the lien shall not be for a sum greater than the sum earned and unpaid on the contract at the time of filing the notice of lien, and any sum subsequently earned thereon.

"In the case of a subcontractor, the lien will only attach to those funds due and owing to the general contractor at the time of its filing, or which may thereafter become due and owing" (*Albert J. Bunce Ltd. v Fahey*, 73 AD2d 632 [2nd Dept. 1979]). Indeed, "the rights of lienors are derivative of those of the general contractor and are restricted to satisfaction out of the amount established to be due and owing from the owner to the general contractor" (*C.B. Strain & Son, Inc. v. J. Baranello & Sons*, 90 AD2d 924, 925 [3rd Dept. 1982]). Here, defendant has made a prima facie showing that no funds were due and owing to the general contractor at the time of the filing of the lien. In this instance the general contractor signed a waiver of lien in which he indicated in plain and

unambiguous terms that he had been paid in full. As such, Mr. Troodler's affidavit as to his intentions regarding the waiver is violative of the parol evidence rule and fails to raise a triable issue of fact (see *Better Home Improvement Corp. v. Forovus Realty Corp. et al.*, 235 NYS2d 209 [1962]). Consequently, the lienor has failed to meet its burden by showing that sums were due and owing by the owner to the general contractor at the time that the lien was filed, to which its lien could attach (see *Mid-Island Lumber & Supply Co., Inc., v. Loening*, 78 Misc2d 27 [1974]).

Accordingly, petitioner's application to discharge the mechanic's lien is granted.

Settle Order on Notice.

ENTER:

LAURA L. JACOBSON, JSC

HON. LAURA JACOBSON