

<b>Manhattan Mech. Contrs., Inc. v Nissan N. Am., Inc.</b>
2019 NY Slip Op 30223(U)
January 28, 2019
Supreme Court, New York County
Docket Number: 154742/2018
Judge: Joel M. Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. JOEL M. COHEN PART IAS MOTION 3EFM**

*Justice*

-----X INDEX NO. 154742/2018

MANHATTAN MECHANICAL CONTRACTORS, INC., 07/12/2018,

Plaintiff, MOTION DATE 07/16/2018

- v - MOTION SEQ. NO. 001 002

NISSAN NORTH AMERICA, INC., GEORGETOWN ELEVENTH AVENUE OWNERS, LLC, ATLANTIC SPECIALTY INSURANCE COMPANY

**DECISION AND ORDER**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 38, 61, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 92, 93, 94, 95, 96

were read on this motion to DISMISS COMPLAINT AND DISCHARGE MECHANIC'S LIEN

The following e-filed documents, listed by NYSCEF document number (Motion 002) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 62, 77, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 97, 98, 99, 100, 101, 102, 103, 104, 105

were read on this motion to DISMISS COMPLAINT AND DISCHARGE MECHANIC'S LIEN

Upon the foregoing documents:

Plaintiff Manhattan Mechanical Contractors, Inc. ("MMC") brings this action against Defendants Nissan North America, Inc. ("Nissan") and Georgetown Eleventh Avenue Owners LLC ("Georgetown") (collectively, "Defendants") to foreclose a mechanic's lien filed against Georgetown. Defendants move to dismiss the Complaint on the ground, *inter alia*, that the lien upon which Plaintiff's claims are based was not timely filed. In addition, Defendants seek an order discharging the lien. Because the Court finds that the lien was untimely, Defendants' motions to dismiss the Complaint and discharge the lien (Mot. Seq. 1 and 2) are granted.<sup>1</sup>

<sup>1</sup> Nissan and Georgetown assert other grounds in support of their motions, some specific to each Defendant. Given the Court's finding that the liens were untimely, there is no need to address the other issues. Motion Sequences 1 and 2 are combined for purposes of this Decision and Order.

The claims in this case emanate from a construction project undertaken at 787 Eleventh Avenue in Manhattan (the “Premises”), which is owned by Georgetown and leased in part by Nissan and in part by a non-party (BICOM) that is currently in bankruptcy. According to the Complaint, BICOM entered into an agreement with non-party J.T. Magen & Company (“Magen”), with the knowledge and consent of Georgetown, to provide general construction labor, services, and materials for the construction and improvement of the Premises. Magen, in turn, entered into a subcontract with MMC to perform certain portions of the work. MMC asserts that it performed all of its obligations under the subcontract, with the knowledge, consent and approval of, and for the benefit of, Georgetown and Nissan.

A mechanic’s lien foreclosure action cannot be maintained when the lien is invalid. *See, e.g., Northeast Restoration Corp. v. K & J Const. Co.*, 304 A.D.2d 306, 306 (1st Dep’t 2003). To be timely, a notice of lien on a private commercial project such as the one at issue here must be filed within eight months of the completion of the contract, or the final performance of work or furnishing of materials under the contract. New York Lien Law § 10. A lien that has not been filed within this time limit must be cancelled and discharged pursuant to Lien Law § 19(6). *See, e.g., Neptune Estates, LLC v. Big Poll 4 Son Constr., LLC.*, 39 Misc.3d 649 (N.Y. Sup. Ct. Kings Cnty. 2013). Moreover, the “work” referenced in the lien must be performed under the contract. Thus, for example, warranty or repair work, or new work performed outside the original contract, does not extend the time to file a lien with respect to the original contract. *See, e.g., Nelson v. Schrank*, 273 A.D. 72, 72-73 (2nd Dep’t 1947); *8th Ave. Recoveries Corp. v. 111 Stellar 8 Owner, LLC.*, 2014 WL 169764, at \*4-5 (N.Y. Sup. Ct. Kings Cnty. Jan. 15, 2014).

In this case, it is undisputed and supported by documentary evidence that general contractor Magen (which was represented by the same counsel representing MMC here) filed a

lien against Georgetown in which it indicated that work on the project ceased as of April 13, 2017. Notwithstanding that fact, MMC asserts in its lien that its work as a *subcontractor* on the same project continued until July 18, 2017, in the form of certain unspecified work on a steam pipe. (NYSCEF 86, Aff. of Ciarian Collis, at ¶5)

MMC filed its lien on January 31, 2018. Accordingly, the lien is timely if MMC's work under the contract ended on July 18, 2017, but untimely if it ended in April 13, 2017 when the general contractor terminated work on the project.

The Court need not resolve any factual disputes as to what work MMC performed on the premises after Magin terminated work on the project as a whole, and whether Georgetown and/or Nissan approved or were aware of such work. The salient point is that any work undertaken by MMC after termination of the project by Magin (the only entity with which MMC is in contractual privity) cannot have been pursuant to its subcontract, which by definition is subject to the scope of the general contract. *Cf. Timothy Coffey Nursery/Landscape v. Gatz*, 304 A.D.2d 652, 653-54 (2nd Dep't 2003) ("the rights of a subcontractor are derivative of the rights of the general contractor and a subcontractor's lien must be satisfied out of funds 'due and owing from the owner to the general contractor' at the time the lien is filed." (citations omitted)). In *Locke v. Goode*, 10 Misc.2d 65 (N.Y. Sup. Ct. Suffolk Cnty. 1957), the Court concluded that work by a subcontractor undertaken after abandonment of the main project by the general contractor is deemed to have been "purely voluntary," and thus cannot be considered in determining the timeliness of the lien. *Id.* at 66-67. This Court would phrase it somewhat differently. Any work done after the conclusion of the general contract could, depending on the facts, be subject to compensation – and a separate lien – as a *distinct* project by the lienor in its own right (*i.e.*, not as Magin's subcontractor under the original project). But MMC cannot bootstrap that follow-on

work to extend the time period for filing a lien in connection with the original contract that was terminated by the general contractor. Because MMC's work under its subcontract necessarily was completed when the general contractor terminated the project, that is April 13, 2018, MMC's lien obtained on January 31, 2018 was not timely and is subject to being discharged.

Even assuming there could be a circumstance in which follow-on subcontract work was so substantively connected to the original project as to warrant tacking it on for purposes of extending the time for obtaining a lien, this is not such a case. The Complaint is conclusory as to the nature of the work, and the information submitted by MMC in responding to the instant motion adds little. The affidavit by Mr. Collis simply asserts without elaboration that additional work was done on a pipe several months after the end of the project. (NYSCEF 86, Aff. of Ciarian Collis, at ¶5). In support, MMC produces only a receipt for the purchase of batteries and miscellaneous items with no explanation how either purchase was related to the original project. (NYSCEF 86, Aff. of Ciarian Collis, Exhibit B). In sum, MMC offers no more than conclusory assertions that are insufficient to support the dubious assertion that work done months after the general contractor terminated the project should extend the statutory deadline for obtaining a lien with respect to its earlier work as a subcontractor.<sup>2</sup>

The court does not believe sufficient grounds are presented to warrant a hearing on alleged "willful exaggeration" of the lien.

This constitutes the decision and order of the Court.


Therefore, it is:

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<sup>2</sup> The Court notes that MMC retains its right to seek payment under its contract from Magin, which is the only entity with which MMC is in privity of contract. Magin has obtained its own lien with respect to work done on the project. This Court's order affects only the lien obtained by MMC.

**ORDERED** that Defendants' motion to dismiss the Complaint and discharge the lien is Granted, the case is dismissed, the lien is discharged, and judgment shall be entered in favor of the Defendants.

1/28/2019  
DATE

  
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JOEL M. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE