

<p>534 W. 42nd St. LLC v BFI Constr. Corp.</p>
<p>2010 NY Slip Op 33175(U)</p>
<p>November 1, 2010</p>
<p>Supreme Court, New York County</p>
<p>Docket Number: 109633/10</p>
<p>Judge: Eileen A. Rakower</p>
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<p>This opinion is uncorrected and not selected for official publication.</p>

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

HON. EILEEN A. RAKOWER

PRESENT: _____

Justice

PART 15134 West 4th Street, LLC INDEX NO. 109633/10

MOTION DATE _____

- v -

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

BFI Construction Corp.

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

1, 2, 34, 5Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):Dated: 11/10*FILED*
NOV 10 2010
NEW YORK
COUNTY CLERK'S OFFICE**HON. EILEEN A. RAKOWER**Check one: FINAL DISPOSITION NON-FINAL DISPOSITIONCheck if appropriate: DO NOT POST REFERENCE SUBMIT ORDER/JUDG. SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

534 WEST 42ND STREET LLC,

Petitioner

-against-

BFI CONSTRUCTION CORP.,

Respondent

Index No.
109633/10
**ORDER AND
DECISION**
Mot. Seq.: 001

EILEEN A. RAKOWER, J.S.C.

Petitioner, 534 West 42nd Street LLC (“534 West”), a wholly owned subsidiary of non-party Madison Realty Capital L.P. (“Madison”), brings this petition seeking an Order, pursuant to New York Lien Law §§ 3, 19(6) and 9(2), discharging and cancelling a Notice of Mechanic’s Lien, which was filed by respondent BFI Construction Corp. (“BFI”) against the property known as 534 West 42nd Street in the County and State of New York on June 3, 2010. BFI opposes.

The subject property was originally owned by Shao Lin Operating, LLC (“Shao Lin”). On February 21, 2006 Shao Lin contracted with BFI to act as the construction manager for the construction of a new building at the subject location. BFI commenced work on April 13, 2006. The agreed price of the labor and materials was \$6,382,141.41. On December 14, 2007, Shao Lin executed a “Building Loan Note” in the amount of \$3,971,932.86, an “Amended and Restated Note” in the amount of \$2,045,222.14 and a “Project Loan Note,” in the amount of \$2,182,845.00, with Madison as lender.

Shao Lin defaulted on the loan as of June 13, 2009, when it failed to make payment. On that date, the loan was accelerated and Shao Lin owed a total of \$7,980,461.46. As a result of Shao Lin’s default, Madison and Shao Lin executed a Deed Agreement on December 12, 2009, whereby the subject property was

transferred to 534 West. The Deed Agreement states, in relevant part:

to avoid the costs and expenses in connection with defending Lender's foreclosure of the Security Agreement and Lender's pursuit of any other remedies available pursuant to the Loan Documents, as well as the stigmatization by the appearance of foreclosure proceedings, Borrower has agreed to convey and deed the Property . . . to Lender Affiliate, in accordance with the terms and conditions of this Agreement, subject to the lien of the Security Agreement and all obligations due under the note."

On December 30, 2009, certain exhibits to the Deed Agreement were executed including: Exhibit "A" the "Bargain and Sale Deed with Covenant Against Grantor's Acts; Exhibit "B," the "Bill of Sale;" Exhibit "C," the "Absolute Assignment of Contracts, Permits and Development Rights; and "Exhibit D," "Indemnity."

On June 1, 2010, BFI filed a Notice Under Mechanic's Lien Law ("Notice of Lien"), which stated that there was an outstanding balance, for work performed at the subject property, in the amount of \$39,536.58. The Notice of Lien states that the last item of labor, material and equipment was furnished on January 14, 2010.

Madison, in support of its motion, argues that the Notice of Lien should be discharged because: (a) pursuant to Lien Law §3, BFI failed to establish that the labor and materials "were furnished at the request of, or with the consent of, the owner at the time of the filing of the Lien, *to wit*, [534 West];" and (b) because the Notice of Lien does not state the proper owner "for whom improvements were provided." Thus, Madison asserts, the Notice of Lien is facially invalid and must be dismissed pursuant to Lien Law §§19(6) and 9(2).

BFI, in opposition, argues that §9 only requires that a lien contain the name of the owner of the property against whom an interest is claimed. BFI points out that the owner of the subject property at the time that the Lien was filed was 534 West, which is the entity named on the Notice of Lien. BFI also claims that there is nothing in §9 which requires an "averment of consent."

Lien Law §19(6) states, in relevant part:

Where it appears from the face of the notice of lien that the claimant has no valid lien by reason of the character of the labor or materials furnished and for which a lien is claimed, *or where for any other reason the notice of lien is invalid by reason of failure to comply with the provisions of section nine of this article*, or where it appears from the public records that such notice has not been filed in accordance with the provisions of section ten of this article, the owner or any other party in interest, may apply to the supreme court of this state, or to any justice thereof, or to the county judge of the county in which the notice of lien is filed, for an order summarily discharging of record the alleged lien. (emphasis added).

Lien Law §9 states, in relevant part:

The notice of lien shall state:

1. The name and residence of the lienor; and if the lienor is a partnership or a corporation, the business address of such firm, or corporation, the names of partners and principal place of business, and if a foreign corporation, its principal place of business within the state.
- 1-a. The name and address of the lienor's attorney, if any.
2. The name of the owner of the real property against whose interest therein a lien is claimed, and the interest of the owner as far as known to the lienor.
3. The name of the person by whom the lienor was employed, or to whom he furnished or is to furnish materials; or, if the lienor is a contractor or subcontractor, the person with whom the contract was made.
4. The labor performed or materials furnished and the agreed price or value thereof, or materials actually manufactured for but not delivered to the real property and the agreed price or value thereof.

5. The amount unpaid to the lienor for such labor or materials.
6. The time when the first and last items of work were performed and materials were furnished.
7. The property subject to the lien, with a description thereof sufficient for identification; and if in a city or village, its location by street and number, if known. A failure to state the name of the true owner or contractor, or a misdescription of the true owner, shall not affect the validity of the lien. The notice must be verified by the lienor or his agent, to the effect that the statements therein contained are true to his knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

The Notice of Lien lists: (1) plaintiff's name and residence; (1-a) the name and address of plaintiff's attorneys, as Schwartz & Blumenstein 250 West 57th Street, Suite 1619, New York, New York 10107; (2) the name of the owner of the real property against whose interest therein a lien is claimed, as 534 WEST 42ND STREET, LLC; (3) the name of plaintiff's employer, as Shao Lin; (4) Shao Lin, as the entity to which plaintiff furnished materials and performed services, and the agreed upon price of the value of the labor performed and materials furnished by the lienor, as \$6,382,141.41; (5) the amount unpaid to plaintiff, as \$39,536.58; (6) the time when the first item of labor or material was furnished, as April 13, 2006, and the last item, as January 14, 2010; and (7) a description of the property subject to the lien "sufficient for identification," as 534 West 42nd Street, New York, NY 10036, and situated on Block 1070, Lot 49, and a verification by plaintiff that the statements contained in the Notice of Lien are true to his knowledge. On its face, the Notice of Lien complies with Lien Law §9.

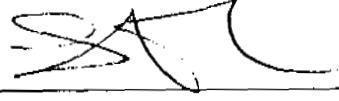
Although Lien Law §3 requires that labor must be performed at the "request of the owner," Lien Law §9 does not require that the Notice of Lien contain such a statement. It is well settled that "a lien may be summarily discharged only for defects appearing on its face." (*Di-Com Corp. V. Active Fire Sprinkler Corp.*, 36 AD2d 20[1st Dept. 1971]). Thus, the issue of whether 534 West consented to performance of work at the subject property must "await trial of the foreclosure action." (*Pontos*

Renovation Inc. v. Kitano Arms Corp., 204 AD2d 87[1st Dept. 1994]).

Wherefore it is hereby
ORDERED that the petition is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: November 1, 2010


EILEEN A. RAKOWER, J.S.C.

FILED
NOV 10 2010
NEW YORK
COUNTY CLERK'S OFFICE