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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NASSAU

PRESENT:

Hon. Burton S. Joseph,

Justice.

IN THE MATTER OF i. park LAKE SUCCESS LLC,

Petitioner,

- against -

NORTHEAST RESTORATION CORP.,

Respondent.

Trial/IAS	Part 19
Index No.	13623/2001
Motion No.	001
Motion Date	Oct. 3, 2001

Papers Numbered

Notice of Motion, Affidavit & Exhibits Annexed.....	1
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Upon the foregoing papers and for the following reasons, the application by Petitioner i.park Lake Success, LL.C., for an order discharging a lien, is denied.

In October, 2000, Petitioner, the owner of an office building complex situated in Great Neck, New York, engaged Respondent Northeast Restoration Corp. to perform roof repairs at its premises. Between October, 2000, and April 27, 2001, Northeast performed the required work and provided materials incident thereto, and periodically submitted invoices to Petitioner during the course of the work. As Northeast's invoices were received, discrepancies were allegedly noted by Petitioner with regard to amounts claimed due and credits not deducted.

On July 10, 2001, several months after the work was completed, Petitioner's

Director of Construction, Michael Ambrosino, met with one Harry Donas, Northeast's president, for the purpose of reconciling the account between Petitioner and Northeast. The total owed for the work was $208,700.21. At the said meeting and upon a review of the account records, the parties executed a document entitled "Final", providing that the sum of "$132,599.65" had been paid by Petitioner to Northeast as of that date, and that the balance due to Northeast for all work performed and materials furnished to completion of the project was the sum of $57,400.25, for an alleged total agreed amount of $190,000.00. The Agreement also released any and all further claims of Northeast against Petitioner and waived any right to file a mechanic's lien against the premises with respect to the work performed or materials furnished. A check in the sum of $57,400.25, dated July 7, 2001, was hand delivered by Petitioner to Mr. Donas, on which was noted "final payment". That check was presented for payment and cleared.

Shortly following that meeting, Donas corresponded with Petitioner purporting to disclaim the aforesaid Agreement and asserting that "$137,599.65" have not been received by Northeast and that "$195,000" was the total settlement agreed-upon. Immediately upon receipt of the Donas letter of July 10, 2001, the Petitioner responded to it by letter of July 12, 2001, advising Mr. Donas that his "second thoughts" were self-serving and did not alter or affect the Agreement reached or the effect of the release and waiver provided. No response was received, but on August 14, 2001, Northeast caused to be filed a Mechanic's Lien against the premises claiming an amount due of $18,700.41, the difference between the $208,700.21 originally owed and the $189,999.80 paid by the Petitioner.

By Order to Show Cause and Petition, returnable October 3, 2001, Petitioner commenced the instant special proceeding to discharge and vacate the Mechanic's Lien filed by

Northeast, on the grounds that it constitutes a breach of the Agreement and is patently willfully exaggerated and an abuse of process, and should be declared void pursuant to the Lien Law. In opposition to the Petition, Northeast argues that material issues of fact prevent the summary discharge of the Lien, in that the real agreement between the parties called for a total final payment of $195,000 and that Petitioner fraudulently changed the amount already paid from "$137,599.65" to "$132,599.65."

Lien Law § 19 provides the only grounds for the discharge of a mechanic's lien for private improvement; such grounds include: the subsequent filing of a release or a bond, the rendering of a judgment for the amount claimed, and the facial defectiveness of the notice of lien. "In the absence of a defect upon the face of the notice of lien, any dispute regarding the validity of the lien must await trial of the foreclosure action" (*Coppola Gen. Contr. Corp. v Noble House Constr.,* 224 AD2d 856, 857; *Care Sys. v Laramee,* 155 AD2d 770, 771). Although Lien Law § 39 provides that a willfully exaggerated lien is void (*see, Goodman v Del-Sa-Co Foods,* 15 NY2d 191, 194-195), the issue of willful and/or fraudulent exaggeration is also one which ordinarily must be determined at the trial of the foreclosure action (*see, Fried Plumbing & Heating Corp. v 245 Glenmore Ave. Corp.,* 55 AD2d 945, 946; *Matter of Upstate Bldrs. Supply Corp. [Maple Knoll Apts.],* 37 AD2d 901, 902, *appeal dismissed* 30 NY2d 515).

Applying these principles to the matter at bar, the Petitioner has failed to meet its burden as the proponent of this motion for the summary discharge of the Lien. Although the Petitioner has submitted sufficient proof supporting the discharge of the Lien, Northeast met its ensuing burden by providing admissible evidence tending to raise triable issues of fact as to the validity of the Agreement and the propriety of the amount charged in the Lien. Issues of

credibility, as appearing herein, are better determined by the trier of fact (*see, New Day Builders, Inc. v SJC Realty,* 219 AD2d 623, 624; *Fried Plumbing & Heating Corp. v 245 Glenmore Ave. Corp., supra,* at 946). Accordingly, the application must be denied at this juncture of the proceedings.

A conference to try to resolve the issues presented in this proceeding has been scheduled before the undersigned at Part 19, located in the Second floor of the Supreme Court, Nassau County, on the 11th day of January, 2002, at 11:00 A.M. Counsel shall be present with their clients. A copy of this order with notice of entry and affidavits of service shall be served on the Calendar Clerk within seven days after entry. This constitutes the decision and order of the Court.

ENTER:

Dated: Mineola, New York
November 27, 2001

Burton S. Joseph
J.S.C.