



7 of 50 DOCUMENTS

**[\*\*1] A. & L. CONSTRUCTION CORP., Plaintiff, - against - EAST HARLEM DEVELOPERS, LLC, Defendant. Index No. 158345/2012**

**158345/2012**

**SUPREME COURT OF NEW YORK, NEW YORK COUNTY**

**2013 N.Y. Misc. LEXIS 3106; 2013 NY Slip Op 31593(U)**

**July 16, 2013, Decided**

**July 17, 2013, Filed**

**NOTICE:** THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

**JUDGES:** [\*1] HON. EILEEN A. RAKOWER, J.S.C.

**OPINION BY:** EILEEN A. RAKOWER

**OPINION**

**DECISION and ORDER**

HON. EILEEN A. RAKOWER

This is an action for foreclosure of a mechanic's lien and judgment in the amount of \$150,229.79 with respect to property located at 178 East 117th Street, New York, New York. The Complaint pleads four causes of action: (1) Foreclosure on a mechanic's lien; (2) breach of contract; (3) account stated; and (4) quantum meruit.

Defendant East Harlem Developers, LLC ("Defendant"), moves for an Order, pursuant to *CPLR* §3212, for summary judgment dismissing the first and second causes of action of Plaintiff's Complaint, discharging the mechanic's lien, and cancelling the notice of pendency. Plaintiff opposes.

In support, Defendant submits the attorney affirmation of Andrew Weltchek. Attached to Weltchek's affirmation, among other documents, is a certified copy of the Certification of A&L Construction Corp. filed on August 23, 2004, contract dated December 11, 2007 in the name of A&L Construction Corp., a mechanic's lien filed in the name of A&L Construction Corp., the Summons and Verified Complaint, Notice of Pendency dated December 10, 2012, Defendant's Verified Answer, and Decision and Order of Hon. Debra [\*2] A. James, Supreme Court, County of New York, dated October 11, 2012, in the case of *A&L Construction Corp. v. East Harlem Developers LLC and TD Bank, N.A.*, Index No. 108255/2011.

[\*\*2] In opposition, Plaintiff submits the attorney affirmation of Stephen Sasson, which annexes the following two exhibits: a copy of the NY Secretary of State corporation search results from plaintiff A.&L. Construction Corp. and a copy of Defendant's Notice of Settlement and A&L Construction Corp.'s opposition filed in connection with the Prior Action.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party

opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. [\*3] (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255, 257 N.E.2d 890, 309 N.Y.S.2d 341 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252, 538 N.Y.S.2d 249 [1st Dept. 1989]).

"The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage." (*Flomenbaum v New York Univ.*, 71 A.D. 3d 80, 91, 890 N.Y.S.2d 493 [1st Dept. 2009]).

*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 [\*4] 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),

[\*\*3] *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.

Here, Defendant moves on the basis that Plaintiff is not the corporation named in the mechanic's lien and contract that Plaintiff seeks to enforce and that Plaintiff lacks capacity to sue for another and dissolved interest. The entity listed in the mechanic's lien and contract is "A&L Construction Corp.," not "A. & L. Construction Corp.," the named plaintiff in this action. Defendant contends that A&L Construction had different owners [\*5] than Plaintiff, never did business with Defendant, and was dissolved more than three years before the parties' contract was entered into or any work was performed on Defendant's property as evidenced by the certified copy of the Certificate of Dissolution of A&L Construction Corp. filed on August 23, 2004.

A previous action was commenced by "A&L Construction Corp." to enforce the same mechanic's lien and enforce the same contract as the instant matter in the action entitled *A&L Construction Corp. v. East Harlem Developers LLC and TD Bank, N.A.*, Index No. 108225/2011 ("Prior Action"). On March 27, 2011, the Prior Action was dismissed as against TD Bank, N.A. On October 11, 2012, the Court issued a decision dismissing the Prior Action against Defendant based on lack of standing. Plaintiff was instructed to commence a new action under its proper corporate name (A.&L. Construction Corp.) and to amend its mechanic's lien pursuant to *NY Lien Law 12-a*. Plaintiff commenced this action in its proper corporate name, but to date, has not amended its mechanic's lien.

In its opposition, Plaintiff contends in its memorandum of law that "a [\*6] scrivener's error misspelled Plaintiff's name on the contract" and that "such minor error does not affect its enforceability as a valid and binding contract" or the lien. However, Plaintiff provides no affidavit or other evidence to support this contention [\*\*4] aside from Plaintiff's counsel's

supporting affirmation, which serves only to attach a copy of the NY Secretary of State corporation search results from plaintiff A.&L. Construction Corp. and a copy of Defendant's Notice of Settlement and A&L Construction Corp.'s opposition filed in connection with the Prior Action. Defendant has therefore established prima facie entitlement to summary judgment, and Plaintiff has failed to demonstrate by admissible evidence any triable issue of fact.

Wherefore, it is hereby,

ORDERED that Defendant's motion for partial summary judgment is granted; and it is further

ORDERED that Plaintiff's first and second causes of action in the Complaint are dismissed; and it is further

ORDERED that the mechanic's lien filed by A&L Construction Corp. with the County Clerk on November 22, 2010 as against lienor East Harlem Developers LLC

is hereby discharged; and it is further

ORDERED that, upon service of this order [\*7] with notice of entry, the Clerk of the County of New York is directed to vacate and cancel the notice of such mechanic's lien; and it is further

ORDERED that Notice of Pendency filed by Plaintiff is cancelled; and it is further

ORDERED that the third and fourth causes of action in the Complaint are severed and shall proceed.

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

DATED: 7/16/13

/s/ Eileen A. Rakower

EILEEN A. RAKOWER, J.S.C.