Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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City of New York,

Plaintiff,

- against -

32-41 100 Street LLC, Adrian Group LLC, Norma Smith Campbell, The Bank of New York Mellon Corporation, JP Morgan Chase & Co., Pensco Trust Company LLC, Custodian FBO Joseph Gusmorino IRA, The land and Building Located Thereon Known as 32-41 100 Street, Queens, New York, Block 1695, Lot 51, and Jane Doe(s) 1-10,

Defendants.

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Index Number: 714192/18

Motion Date: 10/22/18

Motion Seq. No.: 1

The following papers numbered 1 to 7 read on this motion by defendants, 32-41 100 Street LLC and Adrian Group LLC, to dismiss.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	1-3
Memorandum of Law in Opposition-Appendix.....	4-5
Reply-Exhibit.....	6-7

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by 32-41 and Adrian to dismiss the complaint against them and to cancel the notice of pendency heretofore filed and discharge the lien filed against the property 32-41 100th Street, Flushing, NY 11369 on June 19, 2018 is granted. That branch of the motion for an award of legal fees, costs and disbursements is denied.

This is an action to foreclose a lien filed by the City against the aforementioned property in the sum of $71,631.56 representing the expenses incurred by the City to relocate tenants of the premises who were displaced as a result of a vacate order issued by the City's Department of Buildings (DOB).

The City's Department of Buildings (DOB) issued a peremptory vacate order against the owner and occupants of the aforementioned premises on November 4, 2015, upon the finding of a building

inspector that the premises, a one-family home, was converted into an illegal rooming house with six furnished rooms. It is alleged in the complaint that the tenants who were occupying the premises at that time applied to the Department of Housing Preservation and Development (HPD) for relocation services and that the City incurred $71,631.56 to provide the displaced tenants with alternative housing pursuant to §26-301.1(a) of the Administrative Code of the City of New York.

On the date the vacate order was issued, the property was owned by defendant Norma Smith Campbell, who had purchased the property on December 20, 2013. Campbell thereafter sold the property to defendant Adrian Group for $450,000 and conveyed title to Adrian by deed on April 1, 2016, which deed was recorded on April 14, 2016. Adrian subsequently conveyed title to 32-41 by deed dated March 15, 2018 and recorded on March 27, 2018.

On June 19, 2018, HPD filed a notice of lien against the property, purportedly pursuant to §26-305 of the Administrative Code, in the sum of $71,631.56 representing expenses incurred between November 4, 2015 and June 23, 2017 for the relocation of four tenants. On July 31, 2018, movants served HPD with a demand to commence an action to enforce the relocation lien, which is a prerequisite, pursuant to §59 of the Lien Law, to their seeking the cancellation and discharge of the lien. The City thereupon commenced the present action and and simultaneously filed a notice of pendency on September 17, 2018. The complaint contains two causes of action. The first cause of action seeks a judgment of foreclosure and sale to satisfy the relocation lien. The second cause of action seeks, in the alternative, a money judgment pursuant to §54 of the Lien Law against, inter alia, 32-41 and Adrian in the sum of $71, 631.56, in the event it is determined that the relocation lien is invalid.

Pursuant to §26-305(1) of the Administrative Code, HPD shall be entitled to reimbursement of relocation expenses from the owner of the building from which the tenants were relocated "if... such relocation arose as a result of the negligent or intentional act of such owner, or as a result of his or her failure to maintain such dwelling in accordance with the standards prescribed by the housing or health code governing such dwelling" (emphasis added). Section 26-305(3) provides that HPD "may bring an action against the owner for the recovery of such expenses." In this regard, §54 of the Lien Law provides that a lienor (in this case the City) that fails to establish a valid lien in an action commenced to foreclose on a lien may recover a judgment in that action for the sums owed.

It is clear from the plain wording of the statute that "the owner" who is obligated to reimburse HPD for relocation expenses and against whom HPD may maintain an action to recover such

expenses is the owner whose negligent or intentional act or failure to maintain the premises in accordance with the building or health code resulted in the relocation. It is "such" owner, not any owner of the property, who is obligated to reimburse the City for relocation expenses.

As the Court of Appeals has observed, "Under Administrative Code §26-305, building owners responsible for the violation that caused a vacate order must reimburse HPD's relocation expenses...This statute was enacted in response to what was perceived as 'a calloused attitude' by landlords 'towards providing services to the tenants' and in order to prevent landlords from using code violations to evict tenants that they could not otherwise legally evict (Department of Relocation Mem. in Support of Local Law No. 15[1968] of City of N.Y. at 1 [Oct. 19, 1967]). Accordingly, the statute sought to 'place the cost of relocating unfortunate tenants on the shoulders of owners who have neglected their buildings or who are using the City's administrative functions to accomplish their own greedy financial purposes' and to provide the agency with the opportunity to recoup its relocation expenditures" (Rivera v Dept. of Housing Preservation and development of City of New York, 29 NY 3d 45, 50 [2017] [internal citations omitted]).

Therefore, since it is undisputed that 32-41 and Adrian were not the owners whose negligence, intentional act or failure to adhere to the building or health code resulted in the displacement and relocation of the tenants of the subject premises, the second cause of action for a money judgment against 32-41 and Adrian must be dismissed, as a matter of law.

With respect to the lien placed upon the property, §26-305(4) provides that if the relocation expenses are not recovered, they shall constitute a lien upon the property "governed by the provisions of law regulating mechanics liens". In this regard, §3 of the Lien Law governing mechanics' liens on real property provides, in relevant part, "A contractor...who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof...shall have a lien for the...value, or the agreed price, of such labor...upon the real property...from the time of filing a notice of such lien as prescribed in this chapter" (emphasis added). As noted by the Appellate Division, Second Department, "'The primary purpose of the mechanics' and materialmen's lien...is to provide construction contractors with security. A secondary purpose, however, is to give notice to subsequent purchasers and encumbrancers that there is a charge on the property and that they will take subject to that charge. In that regard, it is similar to (a)...lis pendens notice...'It is...meant to give interim protection to laborers and materialmen by giving notice of a charge on the property" (Carl A.

Morse, Inc. v Rentar Industrial Dev. Corp., 56 AD 2d 30, 37 [2nd Dept 1977][quoting Cook v Carlson, 364 F. Supp. 24 [D.C., S.D. 1973], affd, 43 NY 2d 952 [1978]).

This Court observes that a notice of pendency (the device that used to be called a lis pendens) provides constructive notice of an action or claim against or affecting title to or possession or enjoyment of real property to a prospective purchaser or lienholder of the property, thereby subordinating any title or interest acquired by such purchaser or lienholder to the interests of the plaintiff in the prior action or claim (see 2 N.Y. Jud. Conference Rep. 125 [1957]). The legal concept is simple: Since a notice of pendency, as its title indicates, is meant to constitute notice to future third-party encumbrancers, it cannot logically have priority over the interests of a purchaser who acquires the property prior to the filing of the notice when the purchaser could not have had notice of it. Thus, CPLR 6501 provides, "A notice of pendency may be filed in any action...in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property... The pendency of such an action is constructive notice, from the time of filing of the notice only, to a purchaser from, or incumbrancer against, any defendant named in a notice of pendency indexed in a block index against a block in which property affected is situated or any defendant against whose name a notice of pendency is indexed. A person whose conveyance or incumbrance is recorded after the filing of the notice is bound by all proceedings taken in the action after such filing to the same extent as if he or she were a party" (emphasis added). Furthermore, CPLR 6513 provides, "A notice of pendency shall be effective for a period of three years from the date of filing. Before expiration of a period or extended period, the court, upon motion of the plaintiff and upon such notice as it may require, for good cause shown, may grant an extension for a like additional period. An extension order shall be filed, recorded and indexed before expiration of the prior period." Again, the purpose of a notice of pendency is to assure that the world has constructive notice of a lien or a claim affecting the subject real property.

The same concept applies, as the Second Department has observed, to notices of lien, the difference, of course, being that a notice of pendency is only filed upon the commencement of an action to give notice of the action.

This Court also notes that §4 of the Lien Law provides, with reference to a mechanics' lien, in part, "Such lien shall extend to the owner's right, title or interest in the real property and improvements, existing at the time of filing the notice of lien, or thereafter acquired" (emphasis added).

Thus, a mechanics' lien is for the purpose of providing

security to a contractor who improves real property by giving the contractor an interest in the property and the remedy of foreclosure in the event the owner does not pay for the improvements, but also protection to a subsequent innocent purchaser of the property by requiring that the contractor file a notice of lien in order to secure a superior interest in the property, to the extent of the claim, against the title interest of the subsequent purchaser. Indeed, that the purpose of a notice of lien to afford notice of the lienor's prior interest in the property to any subsequent purchaser is obvious from its very title. A contractor cannot subordinate an owner's title and interest in property to a claim that the contractor had not asserted, and of which the owner had no notice, when the owner purchased the property.

With reference to §4 of the Lien Law, the Court of Appeals, in Matter of Niagra Venture v Sicoli & Massaro, Inc. (77 NY 2d 175[1990]), noted, "The Lien Law may be said to have a dual purpose: first, to provide security for laborers and materialmen and second, to provide notice and a degree of certainty to subsequent purchasers...'Time of filing' in the context of section 4 is a balancing of those interests, providing security for the lienor and protection for the subsequent purchaser, not a haven for property owners seeking to escape their commitments to contractors and materialmen" ((77 NY 2d at 181, citations omitted). In that case, the owner of a 20.6-acre tract hired various contractors to build a theme park on 16.1 acres of the land. Thereafter, the owner transferred title to the developed 16.1-acre portion of the property to the municipality pursuant to a sale-and-leaseback agreement and retained the undeveloped 4.5-acre portion of the land. The contractors, whom the owner did not pay, then filed notices of lien upon the entire 20.6 acres. The Court of Appeals held that the contractors' liens were valid only against the 4.5 acres that the owner retained, but were not valid against the 16.1 acres that were acquired by the municipality prior to the filing of the notice of lien. Stated the Court of Appeals, "Applying those principles to the facts before us: had respondents' liens been filed prior to petitioner's conveyance of the developed portion of the property, they would have operated against petitioner's interest in the entire parcel, irrespective of the actual physical location of the improvements on that parcel. By reason of the 'time of filing' provision of section 4, respondents' liens can operate only against petitioner's remaining interest in the parcel at the time the liens are filed; they cannot reach the interest conveyed to good-faith purchasers before respondents' filings" (id.).

There is one exception to the foregoing, which is set forth in §13(5) of the Lien Law. That section provides, in relevant portion, "No instrument of conveyance recorded subsequent to the commencement of the improvement, and before the expiration of the

period specified in section ten of this chapter for filing of notice of lien after the completion of the improvement, shall be valid as against liens filed within a corresponding period of time measured from the recording of such conveyance, unless the instrument contains a covenant by the grantor that he will receive the consideration for such conveyance and will hold the right to receive such consideration as a trust fund to be applied first for the purpose of paying the cost of the improvement and that he will apply the same first to the payment of the cost of the improvement before using any part of the total of the same for any other purpose. Nothing in this subdivision shall be construed as imposing upon the grantee any obligation to see to the proper application of such consideration by the grantor." Section 10(1) allows a notice of lien to be filed at any time during the progress of the work but requires the notice to be filed within eight months of completion of the work or, if the work is to a one-family home, within four months of completion.

Section 13(5) was added to address the concern the Legislature had about fraudulent transfers made by owners to thwart a contractor's remedy for enforcement of mechanics' liens. It provides as the only exception to the general principle that a mechanics' lien, like a notice of pendency, has prospective effect only, by rendering a deed to the property recorded after the start of the contractor's work but within eight, or four months of completion of the work ineffective for purposes of priority of interest in the property against the lien that was filed within that time frame, except if the deed contains a covenant by the grantor that the moneys received from the sale of the property shall be held by the grantor in trust for the payment of any improvements to the property and applied first to such payment, in which case, the eight-month or four-month provision, as the case may be, would not apply and the lien would then extend to the owner's title and interest existing at the time of filing of the notice of lien, pursuant to §4 of the Lien Law.

This exception was addressed by the Appellate Division, Second Department, in Thurber Lumber Co., Inc. v NFB Development Corp. (215 AD 2d 551[2nd Dept 1995]). It was held that since the plaintiff had filed its notice of lien against the property after the owner had conveyed title to the property to the defendant and after the deed was recorded, and since the deed contained the aforementioned statutory language of §13(5) of the Lien Law, and in the absence of any proof of collusion or fraud, the notice of lien was ineffective against the defendant transferee of the property. Indeed, a notice of lien filed after the conveyance of the property by deed containing the trust fund covenant is ineffective against the purchaser of the property even if the deed was not recorded until after the lien was filed (see Leonard Engineering, Inc. v Zephyr Petroleum Corp., 135 AD 2d 795 [2nd Dept 1987]).

The City's argument that §13(5) of the Lien Law does not apply to relocation liens because §26-305(4)(a) provides that a relocation lien must be filed within one year of the incurring of the last expense, as opposed to eight months or four months, with respect to the filing of a mechanics' lien, upon completion of a contractor's improvements to the property, is unsupported by reference to any controlling authority. Indeed, no authority whatsoever is cited by counsel holding that the provisions of the Lien Law do not apply to relocation liens notwithstanding the explicit wording of the Administrative Code to the contrary merely because the deadline for filing a mechanics' lien is different from the deadline for filing a relocation lien.

By the same token, this Court notes that a relocation lien is effective for ten years and may be renewed for successive ten-year periods by court order issued and filed prior to the expiration of the last ten-year period, unless an action is brought to enforce or discharge the lien (§26-305[4][b]), whereas a mechanics' lien is effective for one year and may be extended within that one year for a succeeding period of one year (see Lien Law §17), and that a mechanics' lien, by definition, concerns only the expenses incurred by contractors, laborers, materialmen and gardeners in connection with the improvement of real property. This Court trusts that the City Council was well aware that HPD is not a contractor or gardener and that relocation expenses are not building improvement expenses. Yet in promulgating §26-305(4), it deemed it appropriate to provide that relocation liens are to be governed by the provisions regulating mechanics' liens. That the subject matter of a mechanics' lien is different from that of a relocation lien, and that, owing to the unique concerns underlying mechanics' liens and relocation liens, the time frames for the filing, duration and extension of the two liens differ, does not nullify that provision of §26-305(4) requiring relocations liens to be governed by the provisions governing mechanics' liens.

Indeed, if, arguendo, §13(5) did not apply to relocation liens, then the exception contained therein would not apply and the lien filed after the transfer of the property to two succeeding purchasers would be invalid regardless of whether the deeds contained any trust covenant.

Whether it be a relocation lien or a mechanics' lien, the basic purpose and principles underlying liens in general apply, those being the dual purpose of affording the lienor the ability to recover expenses incurred as a result of an act of a property owner through the remedy of foreclosure while affording protection to a good faith purchaser or grantee of the property by imposing a notice requirement as a condition to securing a superior title or interest in the property. A lien upon real property encumbers title to the property and entitles the lienor to foreclose upon the

property to satisfy the debt secured by it. Thus, as with a notice of pendency, in order to secure an interest superior to that of a future purchaser or transferee, the lienor is required to file a notice of lien to give notice to any future good faith purchaser or transferee. And so, a relocation lien is explicitly governed by the same rules regulating mechanics' liens.

Thus, the City's counsel's argument that the sections of the Lien Law covering mechanics' liens and cases concerning mechanics' liens cited by movants are inapposite in that they do not deal with relocation liens is without merit, since §26-305(4) of the Administrative Code specifically states that relocation liens are "governed by the provisions of law regulating mechanics liens" (see Rivera v HPD, supra at 51). Indeed, as a reflection of the general rule set forth in the afore-referenced sections of the Lien Law that mechanics' liens are effective only from the date they are filed, §26-305(4)(a) states, concerning relocation liens, "No such lien shall be valid for any purpose until the department shall file a notice of lien containing the same particulars as are required to be stated with reference to mechanics liens".

Therefore, the relocation lien filed against the subject property on June 19, 2018, after title to the property had been transferred to two succeeding grantees, is invalid.

The City's mere speculation that movants may not have been good-faith purchasers and that the transfer of title to them may have been fraudulent fails to raise a triable issue of fact.

The City's additional contention that the filing of the vacate order, which filing, pursuant to §28-207.4.2 of the Administrative Code, constitutes notice of the vacate order to any subsequent owner subjecting the owner to the order, also constitutes notice of the lien that was subsequently filed is unsupported by any authority. A vacate order is clearly not a notice of lien. The only notice that the filing of a vacate order provides to a subsequent purchaser is that such order exists and the owner is subject to it. The City's argument that movants' constructive notice of the vacate order issued on November 4, 2015 also constituted notice that relocation expenses might be incurred by the City and, therefore, that movants were on notice of a relocation lien is wholly without merit. The vacate order that was issued provides no information that any tenants were displaced or that any tenants applied for, and were granted, relocation services. A bare vacate order provides no notice that the City incurred relocation expenses.

Moreover, the City has failed to demonstrate that it even filed the vacate order. Although counsel represents that it was filed on the same date it was issued on the DOB's Building Information System website, no proof thereof is annexed to the

City's opposition papers and, therefore, the City has failed to demonstrate that movants, on the dates they acquired title to the property, had constructive notice of the vacate order. But in any event, since a vacate order is not a notice of lien, its filing would not satisfy the notice requirement of a notice of lien.

Thus, without merit also is the City's related argument that a balancing of the equities favors the City because even though the notice of lien was not filed until after movants acquired title to the property, the vacate order was filed prior to their acquisition of title and, therefore, they should have reasonably been alerted that tenants had been displaced and applied for and were provided relocation services.

Since the City did not file the notice of lien, and thus did not provide the statutorily mandated notice, until after movants acquired title to the property, and since the deed from Campbell to Adrian contained the requisite trust fund covenant required under §13(5) of the Lien Law[1], the lien was invalid.

Accordingly, it is ORDERED, that the action is dismissed against 32-41 and Adrian; and it is further

ORDERED, that the notice of lien filed by the Division of Property Management and Client Services of the Department of Housing Preservation and Development of the City of New York in the office of the Clerk of the County of Queens on June 19, 2018 against the property known as 32-41 100th Street, Flushing, NY, indexed against Block 1695, Lot 51 in the Borough of Queens, in the amount of $71,631.56 be and the same is hereby vacated and cancelled of record, and the County Clerk of Queens County is directed to cancel and discharge said notice of lien and is directed to enter upon the margin of the record of same a Notice of Cancellation referring to this Order; and it is further

ORDERED, that the Clerk of the County of Queens is directed to cancel and discharge a certain notice of pendency filed in this action on June 19, 2018, against the property known as 32-41 100th Street, Queens, NY, indexed against Block 1695, Lot 51 in the Borough of Queens, and said Clerk is hereby directed to enter upon the margin of the record of same a Notice of Cancellation referring to this Order; and it is further

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[1]The deed from Adrian to 32-41 also contains the same trust fund language, but that fact is irrelevant to our analysis. Since the lien was invalid and thus Adrian took title to the property free of any relocation lien encumbrance, its subsequent transfer of title to 32-41 was consequently also clear and free of any relocation lien.

ORDERED, that the Clerk of the County of Queens be served with a copy of this Order with Notice of Entry without undue delay; and it is further

ORDERED that the remaining branch of the motion for an order awarding movants costs, disbursements and legal fees is denied, and it is further

ORDERED, that the caption of this action is amended to read as follows:

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City of New York,

Index Number: 714192/18

Plaintiff,

- against -

Norma Smith Campbell, The Bank of New York Mellon Corporation, JP Morgan Chase & Co., Pensco Trust Company LLC, Custodian FBO Joseph Gusmorino IRA,

Defendants.

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Dated: November 2, 2018

KEVIN J. KERRIGAN, J.S.C.