

**230 FA, LLC v Kajo Assoc.**

2010 NY Slip Op 31804(U)

July 12, 2010

Sup Ct, NY County

Docket Number: 104964/10

Judge: Alice Schlesinger

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

PRESENT: ALICE SCHLESINGER

PART IA PART 16

Justice

Index Number : 104964/2010

IN RE: 230F A LLC

VS.

KAJO ASSOCIATES

SEQUENCE NUMBER : 001

OTHER RELIEFS

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

petition to vacate a Mechanic's Lien is granted in accordance with the accompanying memorandum decision.

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

JUL 12 2010

Dated: July 12, 2010

Alice Schlesinger  
ALICE SCHLESINGER S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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

-----X  
230 FA, LLC

Petitioner,

Index No.104964/10  
Motion Seq. No. 001

-against-

KAJO ASSOCIATES,

Respondent.  
-----X

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SCHLESINGER, J.:

Petitioner 230 FA, LLC commenced this proceeding seeking an order to summarily discharge a mechanic's lien pursuant to § 19(6) of the Lien Law. Petitioner claims that the rolling shades respondent installed at petitioner's request do not qualify as an improvement of real property and that the lien in question is, therefore, improper and should be discharged. Respondent Kajo Associates opposed the petition; in addition to raising several procedural objections, respondent suggests that the rolling shades do qualify as an improvement of real property because they are custom-made.

*Background*

Petitioner leases commercial space that encompasses the penthouse and rooftop of 230 Fifth Avenue, New York, NY, and operates a bar and lounge there named "230 Fifth." In November of 2009, petitioner contracted for respondent to install sixteen battery-operated mechanical roller shades to cover the windows at its premises. The total cost for the window shades and installation was \$13,000, and petitioner paid \$6,500 as a deposit up-front, before installation. Shortly thereafter respondent delivered and installed the shades by affixing them to the window frames. Petitioner

alleges that the shades were defective and failed to work as promised; therefore, it did not remit the remaining \$6,500 owed to respondent. In response to not being paid the balance owed, respondent filed a notice under the Lien Law for a mechanic's lien against the real property at 230 Fifth Avenue on April 1, 2010. This proceeding to discharge the lien was commenced by filing on April 15, 2010.

### *Discussion*

Mechanic's liens are meant to ensure compensation to contractors, subcontractors and material-persons who preform labor or furnish materials "for the improvement of real property." Lien Law § 3. The main issue before this Court is whether the window shades that respondent installed qualify as an improvement of real property and are, therefore, a proper basis for respondent's lien.

The rolling shades that respondent installed do not qualify as an "improvement" within the meaning of Lien Law § 2(4), which defines the term to mean:

the demolition, erection, alteration or repair of any structure upon, connected with, or beneath the surface of, any real property and any work done upon such property or materials furnished for its *permanent* improvement.

(Emphasis added.) The shades respondent installed are affixed with brackets and, as petitioner points out, can easily be removed with a screwdriver. Respondent neither demolished, erected or altered any structure, nor did it preform work or furnish materials that qualify as a permanent improvement. Therefore, no basis exists for a lien. See *Spitz v. Brooks & Sons, Inc.* 210 AD 438 (First Dep't 1924) (one who furnishes window shades for a building does not have a lien thereon under § 2 of the Lien Law); see also *Negvesky v. United Interior Resources* 32 AD3d 530 (2d Dep't 2006) (readily removable

modular workstations do not qualify as a permanent improvement).

Respondent offers no cases to dispute this position but rather points out that the roller shades it installed are custom-made. That fact, though, is irrelevant as Lien Law § 2 makes no allowance for custom-made materials. The dispositive issue, instead, is whether the shades were permanently affixed, making them a part of the structure. Respondent likewise offers no case law to support its apparent assertion that custom-made materials qualify as permanent improvements.

Respondent raises two procedural objections. First respondent claims that petitioner's affidavit is defective because it is not supported by an affidavit from a person with actual knowledge of the events at issue. Section 19(6) of the Lien Law provides for the summary discharge of a lien if

... 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.

Therefore, facts extrinsic to the notice of lien are irrelevant for the purposes of a proceeding under § 19(6) and an affidavit by a person with actual knowledge of the facts is unnecessary. Furthermore, the underlying facts are undisputed; the sole issue for the Court to consider is whether the roller shades respondent installed qualify as an improvement to real property. An affidavit by a person with actual knowledge would not help the Court decide that issue.

Second, respondent argues that petitioner lacks standing because petitioner is a tenant – not the fee owner – of the property at issue. But petitioner – not the owner – is the contracting party and as such is responsible for removing the lien. Furthermore, the contracting party is listed in the Notice Under Mechanic's Lien Law. (Petition Exhibit B.)

Therefore petitioner has standing to bring this proceeding.

For the reasons stated above, respondent is not entitled to a mechanic's lien based on the removable window shades it installed at petitioner's premises.

Accordingly, it is hereby

ADJUDGED that the petition for summary discharge of the April 1, 2010 mechanic's lien against 230 Fifth Avenue – 20<sup>th</sup> Floor, New York, NY, Block 828, Lot No. 41, pursuant to § 19(6) of the Lien Law, is granted, and the clerk is directed to vacate the lien upon petitioner's service of this decision upon him.

Dated: July 12, 2010

JUL 12 2010



J.S.C.

ALICE SCHLESINGER

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