

**Marcor Constr., Inc. v Bil-Ray Aluminum Siding of Queens, Inc.**

2012 NY Slip Op 32734(U)

October 26, 2012

Sup Ct, Suffolk County

Docket Number: 705-12

Judge: Thomas F. Whelan

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. COMMERCIAL PART 45 - SUFFOLK COUNTY

**PRESENT:**

Hon. THOMAS F. WHELAN  
Justice of the Supreme Court

MOTION DATE 8/10/12  
ADJ. DATES 9/28/12

Mot. Seq. # 001 - Mot D  
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MARCOR CONSTRUCTION, INC.,  
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Plaintiff,  
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-against-  
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BIL-RAY ALUMINUM SIDING OF QUEENS,  
:  
:  
INC. and CHARLES LEPORIN,  
:  
:  
Defendants.  
:  
-----X

KING & KING, LLP  
Attys. For Plaintiff  
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Long Island City, NY 11101

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Upon the following papers numbered 1 to 11 read on this motion by plaintiff for summary judgment on certain of its causes of action; Notice of Motion/Order to Show Cause and supporting papers 1 - 3; Notice of Cross Motion and supporting papers     ; Answering Affidavits and supporting papers 4; Replying Affidavits and supporting papers 5; 6; Other 9-10 (memorandum); 11 (memorandum); (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that those portions of this motion (#001) wherein the plaintiff seeks summary judgment on its FIRST cause of action for damages from the corporate defendant, Bil-Ray Aluminum Siding of Queens, Inc., by reason of its failure to pay amounts due [\$59,601.00] for construction work performed by the plaintiff is considered under CPLR 3212 and is granted to the extent that partial summary judgment on the issue of the liability of the corporate defendant is awarded to the plaintiff, with a reservation of the determination of the issue of damages pending a trial thereon that shall be scheduled by further order of the court; and it is further

**ORDERED** that those portions of this motion (#001) wherein the plaintiff seeks summary judgment on its FOURTH cause of action against both defendants for recovery of damages in the amount of \$59,601.00 by reason of their violations of the provisions of Article 3-A of the Lien Law is considered thereunder and is granted to the extent that partial summary judgment on the issue of the defendant's liability is awarded to the plaintiff, with a reservation of the determination of the issue of damages pending a trial thereon that shall be scheduled by further order of the court; and it is further

**ORDERED** that the remaining portions of this motion wherein the plaintiff seeks summary judgment on its SECOND cause of action against the corporate defendant to recover the sum of \$59,601.00 under theories of an account stated is denied.

*OK*



This action arises out of series of agreements entered into by the plaintiff and defendant, Bil-Ray Aluminum Siding of Queens, Inc. [hereinafter Bil-Ray] in 2011. Pursuant thereto, Bil-Ray retained the plaintiff to perform roofing and siding work on homes owned by customers of defendant Bil Ray. The jobs were funded directly by the homeowners or by a third-party lender who extended credit to the homeowners. Payment to the plaintiff for its work was premised upon invoices submitted to defendant Bil-Ray after the job was "funded" by delivery of payment in whole or in part to Bil-Ray from the homeowner or from the third-party lender and some confirmation of the performance of the work invoiced by the subcontractors. From January of 2011 through February of 2012, when Bil-Ray ceased its business operations, defendant, Charles LePorin, was Bil-Ray's chief operating officer and as such or as an employee, issued the checks constituting payment of outstanding invoices submitted by the plaintiff and other subcontractors and/or suppliers. Determination of which subcontractor invoices would be paid each week was allegedly left to the discretion of co-defendant LePorin, the sole issuer of Bil-Ray's checks at that time.

Following service of the defendants' joint answer and service of their June 6, 2012 joint response to the plaintiff's Notice To Admit, the plaintiff served this motion wherein it seeks summary judgment on the FIRST, SECOND and FOURTH causes of action set forth in its complaint. The defendants oppose the motion by opposing papers which target, principally, the plaintiff's demands for summary judgment on its Lien Law Article 3-A trust diversion claims against defendant LePorin. For the reasons stated herein, the motion is granted to the extent set forth below.

Claims against general contractors for recovery of the value of work, labor and services performed by subcontractors are actionable by such subcontractors under common-law theories of contract (*see Norberto & Sons, Inc. v County of Nassau*, 16 AD3d 642, 793 NYS2d 75 [2d Dept 2005]; *South Carolina Steel Corp. v Miller*, 170 AD2d 592, 595, 566 NYS2d 368 [2d Dept 1991]). The elements of such a claim are: the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages (*see Elisa Dreier Reporting Corp. v Global NAPs Networks*, 84 AD3d 122, 921 NYS2d 329 [2d Dept 2011]; *JP Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802, 893 NYS2d 237 [2d Dept 2010]; *Palmetto Partners, L.P. v AJW Qualified Partners*, 83 AD3d 804, 921 NYS2d 260 [2d Dept 2011]).

Here, the plaintiff's moving papers demonstrated, prima facie, the existence of the subcontract between it and the corporate defendant Bil-Ray, the plaintiff's performance thereunder, and a default on the part of the corporate defendant in making payment of all amounts due and owing. The plaintiff thus established a prima facie entitlement to summary judgment on the issue of Bil-Ray's liability under the FIRST cause of action wherein the plaintiff seeks the recovery of damages by reason of the defendant's breach of the subcontract that is the subject of this action. However, this award of summary judgment is limited to a partial award on the issue of liability only, since questions of fact regarding the amount of damages recoverable by the plaintiff are apparent from the record. Such questions are derived from the inclusion of admittedly incorrect items set forth in some of the invoices on which the plaintiff relies. A trial on the issue of the plaintiff's damages of the type contemplated by CPLR 3212(c) is thus required and it shall be held upon issuance of a further order once the conditions imposed by the terms of this order have been satisfied.

Denied are those portions of this motion wherein the plaintiff seeks summary judgment on its claims for recovery from the corporate defendant, Bil-Ray, amounts demanded in the plaintiff's SECOND cause of action under theories of an account stated. "An account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due" (*Fleetwood Agency, Inc. v Verde Elec. Corp.*, 85 AD3d 850, 925



NYS2d 576 [2d Dept 2011]). A review of the record indicates that insufficient proof of the existence of the elements of such claims was submitted by the plaintiff on this motion (*see Raytone Plumbing Specialties, Inc. v Sano Constr.*, 92 AD3d 855, 939 NYS2d 116 [2d Dept 2012]; *Digital Ctr., S.L. v Apple Indus., Inc.*, 94 AD3d 571, 942 NYS2d 488 [1st Dept 2012]). Moreover, errors in certain of the items invoiced, some of which were admitted by the plaintiff in its reply papers, sustained some of the corporate defendant's objections to the accounts that were advanced in their opposing papers (*see M&A Constr. Corp. v McTague*, 21 AD3d 610, 800 NYS2d 235 [3d Dept 2005]). Since those objections were not challenged as belated or otherwise delinquent by the plaintiff, the court finds that the plaintiff failed to establish its entitlement to summary judgment on its SECOND cause of action against defendant, Bil-Ray.

The remaining portions of this motion, wherein the plaintiff seeks summary judgment on its FOURTH cause of action is granted to the extent that partial summary judgment is awarded to the plaintiff with respect to the liability of the corporate defendant and defendant, Charles LePorin, individually, for the damages arising from their respective breaches of Article 3-A of the Lien Law.

Article 3-A of the Lien Law creates "trust funds out of certain construction payments or funds to assure payment of subcontractors, suppliers, architects, engineers, laborers, as well as specified taxes and expenses of construction" (*Caristo Constr. Corp. v Diners Fin. Corp.*, 21 NY2d 507, 512, 289 NYS2d 175 [1968]; *see* Lien Law §§ 70, 71). Its primary purpose is to ensure that those who have directly expended labor and materials to improve real property [or a public improvement] at the direction of the owner or a general contractor receive payment for the work actually performed (*see Aspro Mech. Contr., Inc. v Fleet Bank*, 1 NY3d 324, 773 NYS2d 735 [2004]). To ensure this end, the Lien Law establishes that designated funds received by owners, contractors and subcontractors in connection with improvements of real property are trust assets and that a trust begins "when any asset thereof comes into existence, whether or not there shall be at that time any beneficiary of the trust" (Lien Law § 70[1], [3]; *see City of New York v Cross Bay Contr. Corp.*, 93 NY2d 14, 19, 686 NYS2d 750 [1999]). Funds received by an owner under building loan contracts and building loan mortgages are trust assets and the statute requires owner-trustees to apply such assets for payment of the "cost of improvement (*see* Lien Law § 70[5]; § 71[1]). The use of trust assets for any purpose outside the scope of the cost of improvement is deemed "a diversion of trust assets, whether or not there are trust claims in existence at the time of the transaction, and if the diversion occurs by the voluntary act of the trustee or by his consent, such act or consent is a breach of trust" (Lien Law § 72).

Diversions of trust assets thus give rise to strict liability on the part of the trustee, as such diversions may be made with or without volition or consent on the part of such trustee (*see* Lien Law § 72[1]; [2]; [3][a][1]; *Canron Corp. v City of New York*, 89 NY2d 147, 652 NYS2d 211 [1996]; *ARA Plumbing & Heating Corp. v Abcon Assoc.*, 44 AD3d 598, 843 NYS2d 154 [2d Dept 2007]). "Lien Law § 72(1) declares any other use of contract funds "before payment or discharge of all trust claims" to be an improper diversion of trust assets, regardless of the propriety of the trustee's intentions" (*Matter of RLI Ins. Co. v New York State Dept. of Labor*, 97 NY2d 25, 740 NYS2d 272 [2002]). In contrast, a statutory trustee commits a breach of trust only when, through a voluntary act, it uses or permits the use, of a trust asset for any purpose other than those specifically permitted by the statute (*see* Lien Law § 72[1]).

Officers and directors of a corporate trustee are under a duty to the beneficiaries of a trust administered by the corporation not to cause the corporation to misappropriate trust property and will be personally liable for participation in a breach of trust. Corporate officers may thus be held "liable for trust funds otherwise diverted by their corporation provided that the corporate officer charged



knowingly participated in the diversion by the corporation” (*Edgewater Constr. Co., Inc. v 81 & 3 of Watertown*, 1 AD3d 1054, 769 NYS2d 343 [4th Dept 2003]; see also *L.D. Wenger Constr., Co., Inc. v UnBuildit, Inc.*, 73 AD3d 864, 899 NYS2d 885 [2d Dept 2010]; *Greenway Plaza Office Park-1, LLC v Metro Constr.*, 4 AD3d 328, 771 NYS2d 532 [2d Dept 2004]; (“where a director or officer commits, or participates in the commission of a tort, whether or not it is also by or for the corporation, he is liable to third persons injured thereby”); *Atlas Bldg. Sys. v Rende*, 236 AD2d 494, 653 NYS2d 694 [2d Dept 1997]; *South Carolina Steel Corp. v Miller*, 194 AD2d 782, 599 NYS2d 1016 [2d Dept 1993]; *Fleck v Perla*, 40 AD2d 1069, 1070, 339 NYS2d 246 [4th Dept 1972]). Moreover, persons or entities that receive wrongfully diverted trust funds “‘knowing [them] to be the subject of a trust, and to have been transferred in violation of the trustee’s duty or power, takes [the funds] subject to the right of the trustee, and also of the cestui que trust, to reclaim possession thereof, or to recover for [their] conversion’” (*Edgewater Constr. Co., Inc. v 81 & 3 of Watertown*, 1 AD3d 1054, *supra*, quoting *Fleck v Perla*, 40 AD2d at 1070, *supra*; see also *Ippolito v TJC Dev., LLC*, 83 AD3d 57, *supra*).

An action to enforce a trust is available to beneficiaries and certain others under § 77 of Article 3-A of the Lien Law. Among the types of relief that may be sought in such action are the following: 1) determination of the validity of a trust claim; 2) an accounting by the trustee; 3) identification, enjoinder, tracing, setting aside voluntary or involuntary diversions, and/or recovery of trust assets in the hands of any transferee; 4) damages for breach of trust, or participation therein, including punitive damages; 5) an order directing distribution of trust assets; and 6) such other relief as the court deems necessary and proper including, attorney’s fees in cases where the beneficiary brings a representative action. A party may pursue these claims in addition to all other remedies including claims of contractual breaches (see *Bette & Cring, LLC v Brandle Meadows, LLC*, 81 AD3d 1152, 917 NYS2d 717 [3d Dept 2011]; *Love Drywall, Inc. v Harbor Light Dev.*, 72 AD3d 1034, 898 NYS2d 872 [2d Dept 2010]; *South Carolina Steel Corp. v Miller*, 170 AD2d 592, 566 NYS2d 368 [2d Dept 1991]).

Upon review of the record, the court finds that the plaintiff established by sufficient due proof in admissible form, that a voluntary diversion of trust assets in the hands of the corporate defendant occurred when its chief operating officer and/or employee, defendant LePorin, failed to pay trust funds owing to the plaintiff. Such proof included the affidavits submitted by Mr. Viscoso, a former employee of defendant Bil-Ray detailing the existence of trust assets in the hands of the corporate defendant and the voluntary diversion thereof on the part of its officer, director and/or employee, Charles Porin, who failed to pay the plaintiff, out of such trust assets, amount due for work it performed under the terms of its subcontract. The plaintiff thus made a prima facie showing of an improper diversion of trust assets in violation of Lien Law § 72 on the part of the corporate defendant in which defendant LePorin actively participated occurred for which the defendants are liable to the plaintiff.

The court further finds that no genuine questions of fact were raised by the opposing papers submitted by the defendants as they included nothing but innuendo, surmise and self-serving conclusory assertions that someone other than defendant LePorin was responsible for the diversion of trust assets. These assertions were insufficient to raise a question of act regarding an absence of knowing participation on the part of defendant LePorin in the conduct constituting the improper diversion of trust assets. The defendants’ reliance upon the purported waiver of the plaintiff’s liens are wholly unavailing, as such waivers, under the circumstances existent herein, are inconsistent with the spirit, if not the letter, of the prohibition against such waivers set forth in §37 of the Lien Law.

The plaintiff’s failed, however, to establish the accuracy of the amount of the damages demanded. Such a failure requires the court to limit its award of partial summary judgment to the issue



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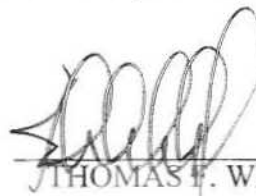
of the defendants' liability to the plaintiff under its FOURTH cause of action. An immediate trial on the issue of such damages as contemplated by CPLR 3212(c) shall be held upon issuance of a further order following satisfaction of the conditions imposed by the terms of this order have been satisfied.

The scheduling of an immediate trial on the issue of the plaintiff's damages is precluded by certain procedural failings in the posture of the plaintiff's FOURTH cause of action for relief under Article 3-A of the Lien Law. Pursuant to Lien Law § 77(1), trust diversion actions must be brought as representative actions for the benefit of all beneficiaries of the trust and "the practice, pleadings, forms and procedure shall conform as nearly as may be to the practice, pleadings, forms and procedure in a class action as provided in Article nine of the civil practice law and rules". Nevertheless, the failure to comply with CPLR Article 9 or to seek an order waiving its application or extending the time to certify is not fatal to the action, as the representation aspects of any such action may be cured after commencement or the requirements therefor are waived by the court (*see ADCO Elec. Corp. v McMahon*, 38 AD3d 805, 835 NYS2d 588 [2d Dept 2007]; *Atlas Bldg. Sys. v Rende*, 236 AD2d 494, *supra*; *Brooklyn Navy Yard Dev. Corp. v J.M. Dennis Constr. Corp.*, 12 AD3d 630, 785 NYS2d 521 [2d Dept 2004]).

Under these circumstances and pursuant to CPLR 3212(e), the court hereby severs the claims upon which partial summary judgment have been granted to the plaintiff, namely, the FIRST, SECOND and FOURTH causes of action set forth in its complaint. These claims shall be the subject of a trial on damages once readied therefor following satisfaction of the procedural class action requirements imposed upon the plaintiff's FOURTH cause of action and such other requirements as may be imposed by further order of the court.

The court grants the plaintiff ninety (90) days leave from the date of this order to move for an order exempting the FOURTH cause of action from applicable class certification requirements or for an order certifying such class in accordance with the requirements of CPLR Article 9 and/or such other relief it deems appropriate after identifying the existence, if any, of the members of the class of beneficiaries and the method of their joinder in this action as contemplated by Lien Law § 77(1) and CPLR Article 9.

Dated: 10/26/12



THOMAS F. WHELAN, J.S.C.