

Onekey, LLC v Knight Harte Constr., Inc.

2017 NY Slip Op 31529(U)

July 17, 2017

Supreme Court, New York County

Docket Number: 656740/2016

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. KATHRYN E. FREED, J.S.C.
Justice

PART 2

-----X

ONEKEY, LLC,
Plaintiff,

INDEX NO. 656740/2016

MOTION DATE _____

- v -

MOTION SEQ. NO. 001

KNIGHT HARTE CONSTRUCTION, INC.,
Defendant.

DECISION AND ORDER

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THE FOLLOWING PAPERS WERE CONSIDERED IN DECIDING THIS MOTION:

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED	1 (Exhs. A-B)
AFFIRMATION IN OPPOSITION	2 (Exhs. A-G)
AFFIDAVIT IN OPPOSITION	3 (Exh. A)

In this action sounding, inter alia, in breach of contract, defendant Knight Harte Communication, Inc. moves, pursuant to Lien Law §§ 75 and 76, for an order (1) directing plaintiff, Onekey, LLC, to provide a verified statement, and (2) awarding defendant attorneys' fees and costs associated with making this motion.

BACKGROUND

This action arises out of a construction project located at 301 East 61st Street, New York, New York (the "Project"). Knight Harte was the subcontractor to Onekey, the general contractor on the Project, pursuant to a written agreement between the parties. Knight Harte seeks to recover damages in excess of \$235,082.99 based on the alleged breach of the parties' agreement by Onekey.

The Complaint includes the following factual allegations. In June 2016, pursuant to a written prime contract, nonparty 61st & 2nd NYC LLC, the owner of the real property located at 301 East 61st Street, New York, New York ("the premises"), retained Onekey to serve as general contractor for the Project. Onekey hired several contractors, including Knight Harte, to work on the Project. The written subcontract, dated June 23, 2016, between the parties required Knight Harte to provide certain labor and materials for the Project in exchange for Onekey's payment of \$253,050.00. During the course of the Project, however, Onekey approved several change orders which increased the value of the subcontract.

A dispute arose between the parties when Knight Harte claimed that it had completed the work contemplated by the subcontract and was owed in excess of \$235,082.99. Onekey claimed that Knight Harte abandoned the Project on October 3, 2016, having completed less than 56% of its obligations under the subcontract, including

those set forth in the change orders, and that Onekey had paid Knight Harte more than the value of the work it had completed under the subcontract.

On October 24, 2016, Knight Harte filed a mechanic's lien against the subject property claiming, in part, that the agreed value of the labor and materials for the subcontract totaled \$474,696.29, and that the amount claimed under the lien is \$235,082.99 (Aff in Opp, Exh A). Thereafter, Knight Harte served Onekey with a Demand for Verified Statement "setting forth the entries contained in Onekey, LLC's books and records" with respect to the Project (Not of Mot, Exh A). In response, Onekey sent Knight Harte a document entitled "Knight Harte-Verified Statement for 301 E 61st Street, NYC" listing, among other things, the total amount owed to Knight Harte for work done on the Project as \$235,551.45, and the amount actually paid to Knight Harte as \$237,863 (Not of Mot, Exh B).

Onekey then commenced this action seeking to recover damages from Knight Harte for, among other things, breach of the subcontract. Specifically, the Complaint alleges causes of action for breach of the subcontract (first cause of action); unjust enrichment (second cause of action); vacatur of the mechanic's lien (third cause of action); and tortious interference with contract and prospective economic advantage (fourth cause of action).

Knight Harte answered, generally denying the allegations in the Complaint, asserting multiple affirmative defenses, and alleging numerous counterclaims. Knight Harte also filed a third-party Complaint against third-party defendants Terence Carroll and John Does 1-10, owners, officers, or directors of Onekey; Allied World Insurance Company, which reportedly filed a discharge of lien bond to guarantee payment of the mechanic's lien; and XYZ Corporation 1-10 and John Does 11-20, which reportedly claimed to have an interest in, or lien against, the Property. Knight Harte sought foreclosure of its mechanic's lien, as well as compensatory and consequential damages. Knight Harte now moves to compel Onekey to furnish a verified statement, and to recover attorney's fees and costs associated with making this motion.

DISCUSSION

Knight Harte claims that the document submitted by Onekey does not meet the minimum statutory requirements for a verified statement. Onekey maintains that it made a good faith effort to comply with the spirit of the law by providing a detailed verified statement as to Onekey's handling of the trust funds that it received from the Owner for the purpose of paying Knight Harte for the labor and materials that Knight Harte actually provided in connection with the Project.

Lien Law article 3-A creates a statutory trust for funds received by owners in connection with improvements to real property in the state (Lien Law §70[1], see *Bette & Cring, LLC v Brandle Meadows, LLC*, 81 AD3d 1152, 1153 [3d Dept 2011]). The primary role of article 3-A is to ensure that those involved with such an improvement will be paid (see *Matter of RLI Ins. Co. v New York State Dept. of Labor*, 97 NY2d 256, 264 [2002]). "Trust claims against the owner include 'claims of contractors, subcontractors ... and materialmen arising out of the improvement, for which the owner is obligated'" (*Matter of Abjen Props., L.P. v Crystal Run Sand & Gravel, Inc.*, 168 AD2d 783, 784 [3d Dept 1990], quoting Lien Law §71[3][a]).

Pursuant to Lien Law §76(1), a trust beneficiary, such as subcontractor Knight Harte (see Lien Law §71[4]), is entitled, at its option, "not [more often] than once in each month, (a) to examine the books or records of the trustee with respect to the trust; ... or (b) ... to receive a verified statement setting forth the entries with respect to the trust." Furthermore, pursuant to Lien Law §75(3), the trustee's books and records must contain detailed entries regarding trust assets receivable, trust accounts payable, trust funds received, trust payments made with trust assets, and transfers in repayment of or to secure advances made pursuant to a "Notice of Lending" together with specific

information underlying each trust transaction (see Lien Law §75[3][A], [B], [C], [D], [E]).

In Lien Law §75, the Legislature has set forth bookkeeping requirements relative to trust funds which are receivable, payable, received, paid, transferred or assigned. The entries must include, among other things, names, addresses, dates of payment or receipt, dates sums become due or are earned or become payable, conditions of payment, nature of claims paid, whether paid by check or cash, and numerous other relevant details (Lien Law §75; see *People v Rosano*, 69 AD2d 643, 656 [2d Dept 1979]). The clear purpose of Lien Law §75 is to protect persons entitled to payment of funds for improvements of realty and to prevent the unscrupulous from diverting the funds to other channels (*People v Rosano, supra*).

Failure of the trustee to keep the books and records required by §75 of the Lien Law is presumptive evidence that the trustee has applied or consented to the application of trust funds actually received as money or an instrument for the payment of money for purposes other than a purpose of the trust as specified in Lien Law §71 (Lien Law §75[4]). If the trustee fails to comply with the beneficiary's request to examine the trustee's books or records or for a verified statement, the beneficiary may apply to the court for an order directing the trustee to comply with the request (Lien Law §76[5]).

This Court's review of the document that Onekey sent to Knight Harte reveals that it does not comply with all of the requirements of Lien Law §75(3). The proffered document relates only to subcontractor Knight Harte, and does not contain the statutorily required entries regarding trust assets receivable, trust accounts payable, trust funds received, trust payments made with trust assets, and transfers in repayment of or to secure advances made pursuant to a "Notice of Lending" together with specific information underlying each trust transaction (see Not of Mot, Exh B; Affirm in Opp, Exh A).

Nor does the document provided by Onekey set forth the names, addresses, dates of payment or receipt, dates sums become due or are earned or become payable, conditions of payment, nature of claims paid, whether paid by check or cash, or other relevant details, as required by the statute (*id.*). There is nothing in Lien Law article 3-A which authorizes a trustee either to maintain separate trusts in connection with a contract of the improvement of real property, or to furnish a verified statement respecting only a portion of the required trust (see *Application of M. Leiken & Son, Inc.*, 39 Misc2d 156 [Sup Ct, Queens County 1963]). Since the Legislature has not seen fit to limit the responsibility of a trustee to the service of a verified statement restricted in scope to the form of statement submitted herein, neither will the Court so limit this responsibility (*id.*). Given the pendency of other

matters in this action, the request for an award of attorney's fees based on the filing of this motion is denied.

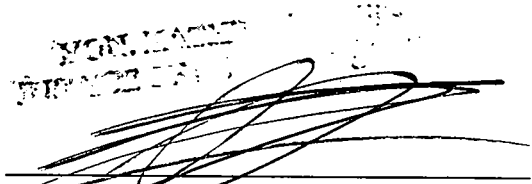
Thus, the branch of the motion that seeks an order directing Onekey to provide a verified statement in compliance with Lien Law §75 is granted, and the motion is otherwise denied.

Therefore, in light of the foregoing, it is:

ORDERED that the motion is granted to the extent that Onekey is directed to serve a further verified statement in compliance with Lien Law §§ 75 and 76 within ten days of service of a copy of the order to be entered hereon, and it is otherwise denied; and it is further

ORDERED that this constitutes the decision and order of the court.

7/17/2017
DATE


HON. KATHRYN E. FREED, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	DO NOT POST		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE