

Pinnacle Evt. Corp. v MDB Dev. Corp.

2013 NY Slip Op 32406(U)

October 3, 2013

Sup Ct, New York County

Docket Number: 650944/2013

Judge: O. Peter Sherwood

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: O. PETER SHERWOOD
Justice

PART 49

PINNACLE ENVIRONMENTAL CORP.

Plaintiff,

-against-

MDB DEVELOPMENT CORP. et al.,

Defendants.

INDEX NO. 650944/2013

MOTION DATE June 21, 2013

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to were read on this motion for, inter alia, class certification

Table with 2 columns: Description of papers and PAPERS NUMBERED. Rows include Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Cross-Motion: Yes No

Upon the foregoing papers, plaintiff's motion for an order, inter alia, pursuant to Lien Law § 77 (1) and CPLR § 902, certifying this action as a class action, is decided in accordance with the accompanying Decision.

Dated: October 3, 2013

O.P. Sherwood
O. PETER SHERWOOD, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49**

-----X
**PINNACLE ENVIRONMENTAL CORP. on behalf of
itself and on behalf of all other persons entitled to share
in the trust funds received by MDB DEVELOPMENT
CORP. a/k/a M.D.B. DEVELOPMENT CORP., as
subcontractor, from Shirin Construction Inc., as
contractor, pursuant to Lien Law Article 3-A, in
connection with the improvement of real property known
as the Local Law 11 work to the building situated at 4
Irving Place, in the City, County, and State of New York,**

**DECISION AND ORDER
Index No. 650944/2013
Mot. Seq. No. 001**

**Plaintiff,
-against-**

**MDB DEVELOPMENT CORP. a/k/a M.D.B.
DEVELOPMENT CORP., MICHAEL J. DEBELLAS,
MICHAEL RACHLIN, STEPHEN DEBELLAS, JOHN
DOE and JANE DOE NOS. 1 TO 10, fictitious names,
true names being unknown, who are or were officers,
directors, shareholders, or agents of trustee, MDB
DEVELOPMENT CORP. a/k/a M.D.B. DEVELOPMENT
CORP., claimed to apply or consented to the application
of trust funds for purposes other than those of the Trust,
or who are or were recipients of funds diverted from the
Trust described in the Complaint,**

Defendants.

-----X
O. PETER SHERWOOD, J.:

In this action under Lien Law article 3-A, plaintiff Pinnacle Environmental Corp. (“Pinnacle” or “plaintiff”), individually and on behalf of other subcontractors who performed work on the Property, moves for an order, pursuant to Lien Law § 77 (1) and CPLR § 902, determining that this action may be maintained as a class action, describing the class as set forth in the Notice of Motion, directing the named defendants to provide plaintiff with a list of all Lien Law Article 3-A trust beneficiaries, and directing the manner of service of the notice to members of the class pursuant to

Consolidated Edison Company of New York (“Con Ed”) is the owner of property at 4 Irving Place in Manhattan (the “Property”). Con Ed, as owner, entered into a contract with Shirin Construction Inc. (“Shirin”), under which Shirin agreed to make alterations and improvements to the Property (the “Project”). On August 4, 2010, Shirin, as general contractor, entered into a subcontract with MDB Development Corp. (“MDB”), under which MDB, as subcontractor, agreed to undertake certain duties and responsibilities relating to Local Law 11 alterations, remediations and improvements to the Property. Thereafter, MDB entered into a subcontract with Pinnacle whereby Pinnacle agreed to provide labor for the asbestos removal and lead paint removal work at the Property for the sum of \$241,000.00 (the “Subcontract”). The Subcontract amount was later increased by way of unit price work. The adjusted Subcontract amount, with credits and unit price work, was \$412,856.00. Pinnacle claims that it performed all the work required by the Subcontract up until Shirin terminated the subcontract with MDB, but that, despite due demand, it has not been paid the balance due for the work in the amount of \$217,706.00.

Plaintiff asserts that Shirin made payments to MDB in connection with the Project for labor, materials, and equipment furnished by MDB’s subcontractors and suppliers which constitute trust funds within the meaning of Article 3-A of the Lien Law and that MDB became the trustee of those trust funds. Plaintiff further asserts that MDB was required to hold such trust funds for the payment of costs and expenditures directly relating to the Project and for the benefit of all persons and entities furnishing and supplying labor, materials and equipment for the Project. Pinnacle maintains that, instead, MDB diverted such trust funds for non-trust purposes and failed to pay its subcontractors and suppliers for labor, materials and equipment furnished to the Project. Pinnacle, individually and on behalf of the other contractors and suppliers hired by MDB, brought this action against MDB,

Michael J. DeBellas (President and sole shareholder of MDB), Michael J. Rachlin (MDB's Vice President), Stephen DeBellas (MDB's accounts manager) and John Doe and Jane Doe Nos. 1 to 10 (being fictitious names of persons and/or entities that caused MDB to divert Lien Law Article 3-A trust funds for purposes other than those allowed under the Lien Law), essentially seeking to recover such payments made to MDB and wrongfully diverted from the corpus of the trust imposed by Article 3-A of the Lien Law.

Plaintiff's complaint alleges two causes of action against all defendants for diversion of trust funds and seeks a judgment adjudging that each of the defendants is a trustee of the funds paid by Shirin for the Project's improvements and is liable to the beneficiaries for all trust funds paid by Shirin, compelling defendants to account for the monies received by them and to furnish a verified statement that complies with the Lien Law, and awarding it and all others who are joined in this action compensatory and punitive damages, together with interest and costs, including attorneys' fees.

MDB, Michael DeBellas and Stephen DeBellas (the "MDB Defendants") interpose an answer in which they admit MDB received payments from Shirin in the sum of \$650,035.69 and that MDB failed to make certain payments to its subcontractors, but otherwise generally deny the allegations of the complaint, and assert several affirmative defenses, including that plaintiff's claims should be dismissed on the ground of another action pending before this court, and that the amount Pinnacle claims is due is inaccurate as it was the result of change order work that was not performed at MDB's request or direction.

Michael Rachlin ("Rachlin"), who alleges he was wrongfully terminated by MDB, interposes an answer with cross claims against the MDB Defendants for indemnification of any damages, costs

and expenses incurred as a result of such defendants' improper conduct with respect to the disbursement of funds by MDB (first cross claim), an award of damages in the sum of \$360,000.00, representing unpaid wages and commissions due him as MDB's employee, plus interest and attorneys' fees (second cross claim), and a declaratory judgment that a restrictive covenant in an agreement between Rachlin and MDB is null and void by reason of MDB's prior breach (third cross claim).

In their reply to Rachlin's cross claims, the MDB Defendants assert a "Faithless Servant" defense pursuant to which Rachlin is not entitled to any compensation alleged to be owed, breach of his employment agreement, and breach of fiduciary duties to MDB and cross claims against Rachlin to recover for losses and expenses, including wages, commissions and benefits MDB paid Rachlin, incurred as a result of Rachlin's breach of his fiduciary duties, breach of his employment agreement, and being a "Faithless Servant".

Pinnacle now moves, *inter alia*, to certify the action as a class action pursuant to CPLR article 9 and Lien Law § 77 (1). No opposition to plaintiff's motion has been submitted.

"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'" (*Aspro Mech. Contr. v Fleet Bank*, 1 NY3d 324, 328 [2004] [internal citations omitted]). The primary purpose of Lien Law Article 3-A is to ensure that those who have expended labor and materials to improve real property at the direction of an owner or a general contractor receive payment for the work actually performed (*id.*; see *Langston v Triboro Contracting, Inc.*, 44 AD3d 365 [1st Dept 2007]). Thus, "Lien Law article 3-A mandates that once

a trust comes into existence, its funds may not be diverted for non-trust purposes” (*Matter of RLI Ins. Co., Sur. Div. v New York State Dept. of Labor*, 97 NY2d 256, 263 [2002]).

Under section 77 (1) of the Lien Law, a trust arising under Lien Law article 3-A must be enforced by the holder of any trust claim “in a representative action for the benefit of all beneficiaries of the trust” provided such action is timely asserted as a class action in accordance with CPLR § 902 (*see West End Interiors, Ltd. v Aim Construction & Contracting Corp.*, 286 AD2d 250, 253 [1st Dept. 2001]). It also provides that in any such action “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 [CPLR] article nine...” and that the requirements of CPLR § 901 (a) (1) may be waived. Lien Law § 77 (2) states that the action may be maintained at any time during the improvement of the real property or public improvement, but that no such action may be maintained if commenced more than one year after the completion of the improvement, or, in the case of subcontractors and materialmen, after the expiration of one year from the date on which final payment under the claimant’s contract became due, whichever is later.

In order to be entitled to class action certification in the context of an action pursuant to Lien Law article 3-A, a party must establish: (1) there are questions of law or fact common to the class which predominate over any questions affecting only individual members; (2) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (3) the representative party will fairly and adequately protect the interests of the class (*see* CPLR § 901 [a][2], [3], [4]; Lien Law § 77 [1]).

Here, Pinnacle has identified the potential class members as being all beneficiaries of Lien Law Article 3-A trust funds created in connection with the Project. Pinnacle does not yet know the

number or identity of all those trust beneficiaries who furnished labor and materials for the Project and have not yet been paid and seeks to have defendants identify such individuals or entities. The absence of such information is not fatal to Pinnacle's application for class certification since Lien Law § 77 (1) specifically provides that the requirements of CPLR § 901 (a) (1) may be waived.

With respect to the prerequisite of commonality between class members, while each individual member may have unique issues related to their particular trade or scope of work, there are common questions of law raised that are identical for all members of the class, namely, whether a trust was formed, whether trust funds were diverted and whether the class members are beneficiaries of the trust.

Pinnacle's claim is also typical of other members of the class in that it claims that it performed work on the Project constituting improvements to the real property, that the work was not paid for, and that defendants diverted trust funds under Lien Law Article 3-A. Only the type of work and the balance owed to each class member differ. "To be typical, 'it is not necessary that the claims of the named plaintiff be identical to those of the class'" (*Pruitt v Rockefeller Ctr. Props.*, 167 AD2d 14, 22 [1st Dept 1991], quoting *Super Glue Corp. v Avis Rent A Car Sys.*, 132 AD2d 604, 607 [2d Dept 1987]).

As to the prerequisite of adequacy, Pinnacle asserts that it has a substantial claim and is in a position to fairly and adequately represent the interests of the class. It has offered no facts to show that it will "fairly and adequately protect the interests of the class" CPLR 901(a) (4). However, Pinnacle has yet to conduct discovery to enable it to address adequately this and certain other of the requirements of CPLR 901 and 902. The motion for class certification must be denied for insufficiency of the record. Pinnacle may renew the motion after the parties have conducted limited

discovery on the CPLR 901 (a) issues (*see Greiger v American Tobacco Co.*, 252 AD2d 474, 476-77 [2d Dept 1998]).

Upon review of the record against the relevant factors, plaintiff has not satisfied the relevant criteria for class certification.

Accordingly, it is hereby

ORDERED that plaintiff's motion for class certification is DENIED without prejudice to renew; and it further

ORDERED that all counsel for the respective parties shall appear for a preliminary conference on Wednesday, November 6, 2013 at 9:30 AM in Part 49, Courtroom 252, 60 Centre Street, New York, New York.

This constitutes the decision and order of the Court.

DATED: October 3, 2013

ENTER,



O. PETER SHERWOOD

J.S.C.