Ideal Supply Co., Inc. v Interstate Fire Protection, Inc.
2016 NY Slip Op 32273(U)
November 4, 2016
Supreme Court, New York County
Docket Number: 652809/2013
Judge: Barry Ostrager
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.

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

_______________________________________X

THE IDEAL SUPPLY CO., INC.,

Plaintiff,

Index No. 652809/2013

-against-

Motion Seq. Nos. 007 & 008

INTERSTATE FIRE PROTECTION, INC.,
PETER M. MIRZ, RICHARD W. TULLY, JR., MYRON
BELLOVIN, INTERSTATE MECHANICAL SERVICES,
INC., and PACE PLUMBING CORP.,

Defendants.

_______________________________________X

OSTRAGER, J:

Presently before the Court are two motions to dismiss the Second Amended Verified Complaint (the "Complaint") by the five appearing defendants in this action. In motion sequence 007, the defendant Peter M. Mirz moves to dismiss the First, Second, Third, and Eighth Causes of Action asserted against him for failure to state a claim pursuant to CPLR §3211(a)(7). The defendants Richard W. Tully, Jr., Myron Bellovin, and Interstate Mechanical Services, Inc. ("IMS") cross-move to dismiss the same claims by adopting the arguments made by co-defendant Mirz (Lipari Aff., ¶ 3). In motion sequence 008, defendant Pace Plumbing Corp. ("Pace") moves to dismiss the Eighth and only Cause of Action asserted against it.

The Causes of Action in the Complaint are as follows: (1) Trust Fund Accounting under New York Lien Law §77; (2) and (3) Trust Fund Diversion; (4) Subcontract Balance; (5) Breach of Subcontract; (6) Quantum Meruit; (7) Account Stated; and (8) Fraud.[1]

---

[1] Plaintiff obtained a default judgment in the amount of $683,081.84 against defendant Interstate Fire Protection (IFP) on all claims asserted in the original complaint after a decision on the record by the Honorable Robert R. Reed who previously presided over this case (*see* NYSCEF Doc. No. 88). IFP is no longer in business (Pace MOL at 2).

In brief, plaintiff Ideal Supply Co., Inc. ("Ideal Supply") provided plumbing supplies, materials and fixtures to defendant Interstate Fire Protection, Inc. ("IFP"), a subcontractor, on 15 different construction projects in New York City in 2011 and 2012 (Complaint, ¶ 13). Plaintiff was not paid the aggregate sum of $545,726.88 for some of the materials it provided to IFP in connection with these projects. Plaintiff alleges that the various General Contractors that managed these projects paid IFP in full, but IFP and its officers and directors, specifically defendants Mirz, Tully, and Bellovin, allegedly diverted the money and failed to pay Ideal Supply for the materials (¶ 11).

Mirz was president of IFP during the time period at issue (Complaint, ¶ 3). Tully was president of IMS (¶ 4) (*see also* opposition papers, Exh. F at 4). Bellovin was allegedly an officer and/or shareholder of defendants IFP and IMS (¶ 5), though Bellovin denies holding these positions. In his affidavit, Bellovin states that he was merely a part-time "controller" at IFP who acted under Mirz's direction and had no authority over the disbursement of project funds (moving papers, Bellovin Aff., ¶ 4). Bellovin presently works as a controller for defendant IMS, an "unrelated separate and distinct corporate entity" (*id.*). IMS and Pace are corporate entities that provide fire protection services and allegedly participated in IFP's misdeeds.

The crux of this dispute appears to lie in the alleged transfer of business assets from IFP to other corporate entities. Plaintiff alleges that between January and March 2012, defendants IFP, Mirz, Bellovin, Tully, IMS, and Pace committed fraud by transferring certain IFP assets and contracts to IMS and/or Pace below fair market value (¶ 205). This transfer of business property was allegedly designed and intended to defraud Ideal Supply, IFP's creditor (¶ 206-07). To support the claim, plaintiff presented a Sales Agreement entered between IFP, IMS, and Pace and dated March 6, 2012 in which it appears that IFP transferred over $1,000,000 in contracts and assets to Pace for $15,000 (*see* opposition papers, Exh. F).

The motions to dismiss by the moving defendants are denied for the following reasons.

The First Cause of Action: Trust Fund Accounting under Lien Law §77

The moving defendants argue that the First Cause of Action is barred by the one-year statute of limitations provided by Lien Law §77(2). Defendants argue that plaintiff acknowledged in the Complaint that the last delivery of materials related to these projects occurred in June 2012, and the claim should have been brought no later than June 2013 (Mirz MOL at 5-6). However, the moving defendants misinterpret the statute of limitations in Lien Law §77(2). Lien Law §77(2) provides with emphasis added that an action to enforce a trust under the Lien Law:

> ... may be maintained at any time during the improvement of real property, or home improvement, or public improvement and successive actions may be maintained from time to time during the improvement provided no other such action is pending at the time of the commencement thereof. *No such action shall be maintainable if commenced more than one year after the completion of such improvement or, in the case of subcontractors or materialmen, after the expiration of one year from the date on which final payment under the claimant's contract became due, whichever is later*, except an action by the trustee for final settlement of his accounts and for his discharge.

The phrase "after completion" means completion of the entire improvement or project, with a literal meaning given the word "completion" (Jenean Taranto, Mechanic's Lien in New York § 15:5 [2016 ed.]; *see also*, *In re Grosso*, 9 B.R. 815, 822 [Bankr. N.D.N.Y 1981]). In addition, "completion of improvement" means completion of the project, and the supplier of a subcontractor must commence an action to impress the trust on funds received by the subcontractor within one year from the time the general contractor completes the entire project, and not from the time the supplier last furnishes labor or materials to the remote subcontractor (76A NY Jur 2d Mechanics' Liens § 403; *see Wynkoop v Mintz*, 17 Misc 2d 1093 [Sup Ct, Kings County 1958]; *see also*, *Matter of A.D. Walker & Co. v Shelter Programs Co.*, 84 AD2d 536 [2d Dept 1981]).

This action was commenced on August 9, 2013 when plaintiff e-filed the Summons and Complaint (NYSCEF Doc. No. 1); *see* CPLR § 304(a). Plaintiff alleges the following end dates for delivery of the materials for the 15 projects at issue:

1) 533-541 Madison Avenue	03/07/2012 (Complaint, ¶ 29)
2) 510 Madison Avenue	05/24/2012 (¶ 37)
3) 231 East 56 Street	06/29/2012 (¶ 45)
4) 1745 Broadway	05/02/2012 (¶ 53)
5) 1585 Broadway	06/04/2012 (¶ 61)
6) 303 East 33 Street	05/21/2011 (¶ 69)
7) 58 Washington Square	11/30/2011 (¶ 77)
8) 40 West 4th Street	01/31/2012 (¶ 85)
9) 850 Third Avenue	10/24/2011 (¶ 93)
10) 30 Rockefeller Plaza	05/29/2012 (¶ 101)
11) 480 West 42 Street	11/29/2011 (¶ 109)
12) 510 Madison Avenue (SAC Capital)	07/31/2012 (¶ 117)
13) 506 Sixth Avenue	06/08/2012 (¶ 125)
14) 25-01 Jackson Avenue	12/23/2011 (¶ 133)
15) Newton Creek Project	06/22/2012 (¶ 141)

Plaintiff also offers a 76-page compilation of documents in its exhibit D (NYSCEF Doc. No. 79) in which plaintiff attempts to show that most projects were completed after June 2012. For example, exhibit D contains Letters of Completion issued by the Department of Buildings (DOB), copies of general ledgers, invoices, and checks, and several lien waiver agreements signed by various project owners that post-date June 2012. The documents in exhibit D raise issues of material fact as to when some of the projects were actually completed, and for this reason the First Cause of Action survives dismissal.

The documents in plaintiff's exhibit D raise triable issues of fact; they do not conclusively establish when these projects were actually completed. For example, in connection with the 533-541 Madison Avenue project, plaintiff provides a DOB Letter of Completion dated March 10, 2015 for Job # 120815029 at 535 Madison Avenue. The letter expressly states that Job # 120815029 was completed on October 15, 2012, but it is unclear whether Ideal Supply

provided materials to this particular job. Further, the DOB letter concerns only 535 Madison Avenue, and not 533-541 Madison Avenue as alleged in the Complaint (¶ 25-32). In addition, plaintiff offers a DOB Letter of Completion with respect to the 510 Madison Avenue project. The letter states Job #120899894 was completed on December 17, 2013 but the next page indicates that the permit for this job expired on December 18, 2012. Plaintiff proffers no explanation as to the job's completion one year after the permit expired. Additionally, plaintiff provides a letter dated November 12, 2012 in which Whole Foods, owner of the 231 East 56 Street project, stated that it paid in full for the materials provided for the project but the letter is silent as to the project's actual completion date.

The Second and Third Causes of Action: Trust Fund Diversion

Plaintiff alleges in the Complaint that defendant IFP was fully paid for its work on the 15 projects but IFP and its corporate officers diverted the aggregate sum of $545,726.88 for "non-trust purposes" in violation of Lien Law Article 3-A (¶ 158, 161). Plaintiff alleges this money should have been used to satisfy Ideal Supply's outstanding bills first (¶ 159). Plaintiff also alleges that Mirz, Bellovin, and Tully are personally liable to Ideal Supply for the diversion of said sum pursuant to Lien Law §79-a (¶ 173).

Article 3-A §70 of the Lien Law provides with emphasis added:

> The funds described in this section received by an owner for or in connection with an improvement of real property in this state, including a home improvement loan, or received by a contractor under or in connection with a contract for an improvement of real property, or home improvement, or a contract for a public improvement in this state, *or received by a subcontractor under or in connection with a subcontract made with the contractor for such improvement of real property* including a home improvement contract or public improvement or made with any subcontractor under any such contract, and any right of action for any such funds due or earned or to become due or earned, *shall constitute assets of a trust for the purposes provided in section seventy-one of this chapter.*

Lien Law §79-a(1)(b) provides in relevant part:

> Any trustee of a trust arising under this article, and any officer, director or agent of such trustee, who applies or consents to the application of trust funds received by the trustee as money or an instrument for the payment of money for any purpose other than the trust purposes of that trust, as defined in section seventy-one, is guilty of larceny and punishable as provided in the penal law if ...(b) such funds were received by the trustee as contractor or subcontractor, as such terms are used in article three-a of this chapter, and the trustee fails to pay, within thirty-one days of the time it is due, any trust claim arising at any time...

Lien Law Section 79-a is clearly a penal statute. Further, a conviction of larceny by misappropriation of trust funds pursuant to Lien Law §79–a requires proof of larcenous intent. *ARA Plumbing & Heating Corp. v Abcon Associates, Inc.*, 44 AD3d 598 (2d 2007), citing *People v Chesler*, 50 NY2d 203, 209 (1980). Moreover, the inquiry on an alleged violation of §79-a is whether any of the defendants were actively participating in the wrong of the corporation or had knowledge of use of trust funds in the corporate business. *People v Rosano*, 69 AD2d 643, 656 (2d Dept 1979), *affd* 50 NY2d 1013 (1980).

Plaintiff has generally alleged acts of diversion or misuse of funds and/or larcenous intent, by defendants Mirz, Tully, and Bellovin. While Bellovin attested that he was not a corporate officer when he worked at IFP, and the Sales Agreement in exhibit F does not bear his signature, discovery is not complete. The plaintiff's argument that these claims cannot be dismissed until plaintiff reviews the accounting records on each project is not entirely without merit. The Complaint alleges the transfer of contracts and assets from defendant IFP to defendants IMS and/or Pace below market value, and plaintiff came forward with sufficient evidence that raise triable issues of fact as to the transfer of contracts and funds out of IFP by defendants Mirz and Tully (Exh. F), and, perhaps, defendant Bellovin.

The moving defendants correctly argue that Lien Law § 79–a imposes criminal penalties and has no statutory civil counterpart. While some New York Courts have found some limited

application for officer liability for violation of Lien Law Article 3-A, the plaintiff has not cited and the Court has not found any First Department cases adopting this position. Nevertheless, there are cases from the Fourth and Second Departments holding that there is civil liability under the statute. *Fleck v Perla,* 40 AD2d 1069 (4th Dept 1972); *Ippolito v TJC Development LLC*, 83 AD3d 57 (2d Dept 2011). The *Ippolito* Court explained:

> While it is not expressly stated in Lien Law § 79–a(1)(b) that the individual officers or agents of a corporation... may be liable in a civil action pursuant to Lien Law article 3–A for the improper diversion of trust funds, there is authority for this position. In *Fleck v. Perla,* 40 A.D.2d 1069, 339 N.Y.S.2d 246, the Fourth Department determined that a corporation's officers could be liable to the beneficiary of a trust for the diversion of the trust funds. The Fourth Department noted that "the Lien Law does not specifically provide for personal liability on the part of an officer of a corporate transferee" ... [h]owever, in determining that an officer could be liable for the diversion of trust funds, the Court relied on, among other things, the principle that "[a]n officer or agent of a corporation is personally liable for his acts which constitute a conversion of the property of a third person; it is no answer to such liability that the act was done while the officer or agent was acting for the corporation" ... We find this conclusion persuasive.

Therefore, because this Court is not prepared to reject the reasoning of two Departments in the Appellate Division, so much of the motion as seeks to dismiss the Second and Third Causes of Action is denied without prejudice to renew on summary judgment after the completion of discovery.

The Eighth Cause of Action: Fraud

The Sales Agreement in plaintiff's exhibit F is between IFP and IMS, and Pace, and signed by Mirz as "President" of IFP, Tully as "President" of IMS, and by the president of Pace. The Agreement provides that IFP "requested that Pace assist with the completion" of certain ongoing IFP work identified in Schedule A of the Agreement. In what appears to be "Schedule A" at the end of exhibit F, there is a copy of an Excel spreadsheet entitled "Projects to be completed by Pace Fire Protection[2]-3.6.12.xls." This spreadsheet contains a list of some 30 IFP

[2] Counsel stated at oral argument on November 1, 2016 that Pace Fire Protection is a d/b/a of Pace Plumbing Corp.

projects worth in excess of $1,000,000, which includes several of the 15 projects at issue such as Whole Foods, SAC Capital, and the Newton Creek projects. In the following page entitled "Bill of Sale," it appears that Pace had purchased these contracts and other equipment from IFP for $15,000.

To state a claim for fraud, a plaintiff must plead with the particularity required by CPLR § 3016(b) a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages. *Bramex Assoc. v CBI Agencies*, 149 AD2d 383, 384 (1st Dept 1989); CPLR § 3016(b). Lastly, the elements of fraud are narrowly defined, requiring proof by clear and convincing evidence, a standard higher than a fair preponderance of the evidence. *Gaidon v Guardian Life Ins. Co. of America*, 94 NY2d 330, 349 (1999).

When a party moves to dismiss a complaint pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action. In considering such a motion, the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *Leon v Martinez,* 84 NY2d 83, 87–88 (1994). However, the Court is permitted to consider evidentiary proof presented by either party, and if it considers such evidentiary proof, the criterion then becomes whether the proponent of the pleading has a cause of action, not whether he has stated one (*Guggenheimer v Ginzburg*, 43 NY2d 268, 276-75 [1977]).

Pace is the only defendant that submitted a Reply in connection with the two motions before the Court, and the Reply fails to address the Sales Agreement. Further, the only affidavit by a person who claims to have personal knowledge relating to these two motions is defendant Bellovin. The plaintiff's allegations related to fraud are conclusory, but plaintiff offered

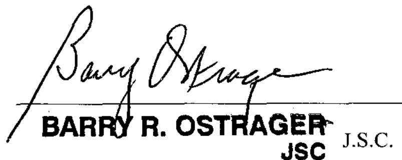
evidentiary proof that the Court cannot ignore. Therefore, the Eight Cause of Action for Fraud survives dismissal.

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss is denied; and it is further

ORDERED that counsel are directed to appear for a conference in Room 341, 60 Centre Street, on November 15, 2016 at 10 a.m.

Dated: November 4, 2016



J.S.C.