H&L Ironworks Corp. v McGovern & Co., LLC
2018 NY Slip Op 30108(U)
January 19, 2018
Supreme Court, New York County
Docket Number: 153853/2016
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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H&L IRONWORKS CORP., on behalf of itself and on behalf of all persons entitled to share in the funds received by McGovern & Company LLC in connection with a project identified as 10 East 53rd Street, New York, New York,

Plaintiff,

-against-

MCGOVERN & COMPANY, LLC, 10E53 OWNER LLC, ATLANTIC SPECIALTY INSURANCE COMPANY, DANIEL G. MCGOVERN, and "JOHN DOE NO. 1" through "JOHN DOE NO. 10", defendants being fictitious and unknown to plaintiff but intended to be parties liable for the diversion of trust funds pursuant to Article 3-A of the Lien Law,

Defendants.

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DECISION/ORDER

Index no. 153853/2016

Mot Seq. 006

HON. CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

This is a lien foreclosure action. Plaintiff, H&L Ironworks Corp. ("Plaintiff"), now moves for an order pursuant to CPLR 3212 granting Plaintiff and all persons entitled to share in the funds received by McGovern & Company LLC in connection with a project identified as 10 East 53rd Street, New York, New York summary judgment of the fourth and fifth causes of action contained in its amended complaint ("Complaint"), interim relief pursuant to Lien Law § 77(3), and to sever its fourth and fifth causes of action. Defendants, McGovern & Company, LLC and Daniel G. McGovern (collectively "Defendants"), now cross-move to, *inter alia*, dismiss the fourth and fifth causes of action under CPLR 3211.

Factual Background

According to the Complaint, defendant 10E53 Owner LLC ("10E53") is the owner of a building and construction project (the "Project"). The Complaint further claims that defendant

McGovern & Co. was hired by 10E53 as a general contractor for the Project and that Plaintiff was hired by defendant McGovern & Co. to perform work at the Project. Defendant Daniel G. McGovern is the president of defendant McGovern & Co. Plaintiff's fourth and fifth causes of action allege that defendant McGovern & Co. received funds in connection with the Project for labor, constituting trust assets under Lien Law article 3-A. Plaintiff further alleges that it furnished labor and materials, but that it was not paid. Additionally, Plaintiff alleges that Defendants diverted trust assets from the trust in violation of Lien Law article 3-A.

Plaintiff's Motion

In support of its motion for partial summary judgment, Plaintiff first argues that defendant McGovern & Co. has failed to furnish an adequate verified statement of trust assets pursuant to Lien Law § 75(3) and is therefore presumptively liable for diverting trust assets.

Plaintiff also argues that defendant McGovern & Co. diverted funds from the trust. In support of its argument, Plaintiff claims that 10E53 paid defendant McGovern & Co. a total of $17,590,802.43 for work to be done on the Project. Plaintiff further argues that defendant McGovern & Co. paid in excess of $11,519,604.50 of trust funds for purposes other than the trust. Further, Plaintiff claims that as of August 31, 2016, the bank account which once held the trust assets had a balance of $187.09. Moreover, Plaintiff submits the affidavit of Robert DeWitt, a represent Senior Vice President of Construction for SL Green Realty Corp., which is a fully integrated real estate investment trust with an ownership interest in 10E53, wherein he states that four of the nine agreements between 10E53 and defendant McGovern & Co. involved steel work where defendant McGovern & Co. hired Plaintiff as a subcontractor (Wood Aff., Ex. K, DeWitt Aff., ¶8). Further, Plaintiff argues that defendant Daniel McGovern should be held personally liable for defendant McGovern & Co.'s alleged diversion of the Project trust funds, since he is the managing member with financial control over the defendant McGovern & Co.'s finances.

Additionally, Plaintiff argues that if its application for partial summary judgment is granted, that that the fourth and fifth claims be severed and that a trial be held on damages on those claims. Finally, Plaintiff argues that immediate interim relief should be granted pursuant to Lien Law § 77(3)(a)(i), (iv)-(v).

Defendants' Cross-Motion and Opposition

In support of its cross-motion, Defendants argue that Plaintiff's fourth and fifth causes of action should be dismissed for failure to state a claim. Specifically, Defendants argue Plaintiff should have alleged four separate causes of action, since there were four contracts between defendants McGovern & Co. and 10E53, and four separate contacts between defendant McGovern & Co. and Plaintiff, and thus four separate trust funds. Defendants further contend that the Complaint fails to identify each alleged trust fund and what agreement Plaintiff claimed to perform. Next, Defendants argue that the stipulation of partial discontinuance dated May 9, 2017, discontinuing the claims asserted against defendants 10E53 and Atlantic Specialty Insurance Company ("ASIC") (the "Stipulation") should be vacated, since it was filed without counsel for Defendants' signatures. Moreover, Defendants argue that allowing the Complaint to be discontinued as against 10E53 and ASIC would prejudice defendants in completing discovery. Further, Defendants argue that they should be granted leave to amend their answer to add counterclaims and cross-claims.

In opposition to Plaintiff's motion, Defendants argue that there is a material issue of fact as to whether Plaintiff is entitled to payments pursuant to its agreements with defendant McGovern & Co., since Plaintiff failed to complete the work contemplated by the agreements. Further, Defendants argue that Plaintiff failed to show an improper diversion of trust assets. Moreover, Defendants argue that there is no presumption of a trust diversion, since it complied with the Court's August 30, 2016 order requiring that it furnish a supplemental verified

statement as to trust accounts payable only and that the Court ruled that Defendants substantially complied with the Court's July 19, 2016 order requiring that it furnish Plaintiff with a verified statement. Finally, Defendants argue that Plaintiff speculated that the money that was distributed from the bank account was a trust asset diversion.

Plaintiff's Opposition and Reply

Plaintiff argues that only one trust exists, since, first, the work it performed and the monies at issue were regarding the Project, and second, Defendants' verified statement does not reference to multiple trust funds. Plaintiff argues that partial summary judgment is appropriate, since defendant McGovern & Co. diverted trust assets from the trust. Further, Plaintiff contends that Plaintiff is entitled to a surety bond and forensic accounting since Defendants have not explained the location of the trust assets. Finally, Plaintiff argues that the branch of Defendants motion to amend its answer should be denied, as they failed to clearly show the changes or additions to be made to the pleading, and that the affidavit of defendant McGovern fails to offer a basis to alleging damages incurred by Plaintiff.

Defendants' Reply

In reply, Defendants first argue that the subcontracts between Plaintiff and Defendants created four separate trust funds. Defendants next argue that Plaintiff is not entitled to partial summary judgment of the fourth and fifth causes of action, since Plaintiff failed to establish their right to receive payment on their underlying construction claim. Defendants further argue that they should be granted leave to amend their answer. Finally, Defendants argue that Plaintiff is not entitled to relief under Lien Law § 77, since it failed to prove its entitlement to the trust funds assets.

Discussion

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' " (*Aspro Mech. Contr., Inc. v. Fleet Bank, NA*, 1 N.Y.3d 324, 328 [2004], quoting *Caristo Constr. Corp. v. Diners Fin. Corp.*, 21 N.Y.2d 507, 512 [1968], citing Lien Law §§ 70, 71). "[T]he primary purpose of the Lien Law is to ensure that 'those who have directly expended labor and materials to improve real property . . . at the direction of the owner or a general contractor' receive payment for the work actually performed" (*Canron Corp. v. City of New York*, 89 N.Y.2d 147, 155, [1996]). "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' " (*Aspro Mech. Contr., Inc.*, 1 N.Y.3d at 328, quoting Lien Law § 70[1], [3]; *see also City of New York v. Cross Bay Contr. Corp.*, 93 N.Y.2d 14, 19 [1999]). Lien Law § 70(2) provides that:

> "[t]he funds received by a contractor or subcontractor and the rights of action with respect thereto, under or in connection with each contract or subcontract, shall be a separate trust and the contractor or subcontractor shall be the trustee thereof."

Here, it is undisputed that there were four contracts between 10E53 and defendant McGovern & Co. under which McGovern & Co. received funds from 10E53 for the improvement of real property (i.e. construction at the Project). As a result, each contract between 10E53 and defendant McGovern & Co. established a separate trust (Lien Law § 70(1), (2); *see also In re IDI Const. Co., Inc.*, 345 B.R. 60, 65 [Bankr. S.D.N.Y. 2006], citing *Canron Corp.*, 89 N.Y.2d 147 ["If the contractor is engaged in multiple projects, the funds received in connection with each contract comprise a separate trust"]; *Colonia Ins. Co. v. United States*, 1996 WL

68533, at *3 [E.D.N.Y. Jan. 25, 1996] ["The funds received on each contract constitute separate trusts of which the contractor becomes a trustee"]; *In re Colby Const. Corp.*, 76 B.R. 50, 52 [Bankr. S.D.N.Y. 1987]; *In re Grosso*, 9 B.R. 815, 821 [Bankr. N.D.N.Y. 1981]).

Since each contract wherein defendant McGovern & Co. received funds established a separate trust, Plaintiff was required to state a separate cause of action for each claim in which it alleges that a trust fund has been established (*see* § 70[2]; *Hamburg Bros. v. Jachles*, 210 A.D.2d 985, 985 [4th Dept 1994] [affirming trial court's order directing plaintiff to "amend its complaint to state a separate cause of action for each claim in which plaintiff alleges a trust fund has been established" pursuant to Lien Law article 3-A]).

The Court in its discretion grants Plaintiff leave to amend the Complaint to state a separate cause of action for each action in which Plaintiff contends that a trust fund has been established, as there is no prejudice or surprise to Defendants in doing so (*see* CPLR 3025[b]; *JPMorgan Chase Bank, N.A. v. Low Cost Bearings N.Y. Inc.*, 107 A.D.3d 643, 644 [1st Dept 2013]; *Hamburg Bros.*, 210 A.D.2d 985, 985). Indeed, while the Complaint references "[t]rust funds created in connection with the Project" (¶¶39, 47), Defendants' opposition acknowledges that Plaintiff alleges that four agreements between 10E53 and defendant McGovern & Co. involved steelwork where Plaintiff was engaged to perform (Cheng Opp. Aff., ¶11). Further, Plaintiff's opposition argues that if separate trust funds did exist in this matter, "an amendment of the Article 3-A Claims would be appropriate" (Reply MOL, Opp. 6-7). Moreover, Defendants' citation to *Hamburg Bros.* does not support the outright dismissal of Plaintiff's claims. Accordingly, the branch of Plaintiff's motion for partial summary judgment of its fourth and fifth causes of action is denied and to sever and to hold a trial on damages on those claims is denied, without prejudice.

Interim relief under Lien Law § 77(3)(a)(i), (iv)-(v) is preconditioned by a valid trust being determined and established (*see Canron Corp. v. City of New York*, 89 N.Y.2d 147, 153 [1996]; *Brooklyn Navy Yard Dev. Corp. v. J.M. Dennis Const. Corp.*, 12 A.D.3d 630, 631–632 [2d Dept 2004]; *S.C. Steel Corp. v. Miller*, 170 A.D.2d 592, 594 [2d Dept 1991]; *Joseph Davis Indus. Servs. v. Sicoli & Massaro, Inc.*, 289 A.D.2d 984 [4d Dept 2001]; *Frontier Excavating, Inc. v. Sovereign Const. Co.*, 30 A.D.2d 487, 491 [4d Dept 1968], which, as discussed above, has not occurred in this matter. Accordingly, Plaintiff's request for interim relief at is premature at this juncture.

Stipulation of Discontinuance

CPLR 3217(a)(2) requires that a discontinuance by stipulation be a "writing signed by all attorneys of record for all parties." The requirement for the signature of the attorneys for all parties is mandatory, without which the discontinuance must be sought by motion (*Phillips v. Trommel Const.*, 101 A.D.3d 1097, 1098 [2d Dept 2012]; *C.W. Brown, Inc. v HCE, Inc.*, 8 AD3d 520, 521 [2d Dept 2004]; [holding that the failure of all attorneys of record for all the parties renders the stipulation ineffective]). Defendants correctly argue, and Plaintiff's opposition does not argue contrary, that the Stipulation fails to include the signatures of Defendants or counsel for Defendants. Accordingly, the action has not been properly discontinued by Plaintiff against 10E53 and ASIC, and thus is deemed to still be viable as asserted against them.

Leave to Amend

A motion for leave to amend, pursuant to CPLR 3025(b), is committed to the sound discretion of the trial court (*Edenwald Contr. Co. v. City of New York*, 60 N.Y.2d 957, 959 [1983]; *Oil Heat Inst. of Long Is. Ins. Trust v. RMTS Assocs., LLC*, 4 A.D.3d 290 [1st Dept 2004]). In the absence of prejudice or surprise, leave to amend is freely granted (*see* CPLR 3025[b]). The court should examine, but need not decide, the merits of the proposed pleading

unless it is patently insufficient (*see Hospital for Joint Diseases Orthpaedic Inst. v. James Katsikis Envtl. Contrs., Inc.*, 173 A.D.2d 210 [1st Dept 1991]). CPLR 3025(b) requires that "[a]ny motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading."

Here, the affidavit of defendant Daniel McGovern submitted in support of the motion for leave to amend sufficiently demonstrates that the counterclaims and cross-claims are not palpably lacking in merit and the record fails to demonstrate any prejudice to Plaintiff or defendants 10E53 and ASIC in granting the leave to amend. Moreover, Defendants' failure to clearly show the changes made in the attached answer is not fatal to their application.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion of Plaintiff H&L Ironworks Corp. is denied, without prejudice. It is further

ORDERED that the branch of the cross-motion of defendants McGovern & Company, LLC and Daniel G. McGovern to vacate the May 9, 2017 stipulation of partial discontinuance (E-File Doc. No. 186) is granted, and the Complaint as against 10E53 Owner LLC, Atlantic Specialty Insurance Company is reinstated. It is further

ORDERED that the branch of the cross-motion of defendants McGovern & Company, LLC and Daniel G. McGovern for leave to amend their answer is granted. It is further

ORDERED that the branch of the cross-motion of defendants McGovern & Company, LLC and Daniel G. McGovern to dismiss the Complaint of Plaintiff H&L Ironworks Corp. is granted, to the extent that Plaintiff shall file a second amended complaint within twenty (20) days of notice of entry. Defendants McGovern & Company, LLC, Daniel G. McGovern, 10E53 Owner LLC, and Atlantic Specialty Insurance Company shall file their respective amended answers twenty (20) days after receipt of the second amended complaint. It is further

ORDERED that the parties shall appear for an in-court status conference on March 20, 2018 at 2:15 p.m. It is further

ORDERED that plaintiff H&L Ironworks Corp. shall serve a copy of this order with notice of entry upon all parties within ten (10) days of entry.

This constitutes the decision and order of the Court.

Dated: January 19, 2018

Hon. Carol Robinson Edmead, J.S.C

HON. CAROL R. EDMEAD
J.S.C.