Kamco Supply Corp. v Nastasi & Assoc., Inc.
2018 NY Slip Op 31200(U)
June 8, 2018
Supreme Court, New York County
Docket Number: 651725/2015
Judge: Andrea Masley

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

KAMCO SUPPLY CORP. on behalf of itself and all other persons similarly situated as trust fund beneficiaries of Lien Law trusts of which NASTASI & ASSOCIATES, INC., is a trustee,

Plaintiff,

-against-

NASTASI & ASSOCIATES, INC., J.T. MAGEN & COMPANY INC., LIBERTY MUTUAL INSURANCE COMPANY, ANTHONY J. NASTASI, and "JOHN DOE ONE" through "JOHN DOE TEN,"

Defendants.

Index No. 651725/2015

Mot. Seq. No. 002

Decision and Order

Plaintiff, Kamco Supply Corp. (Kamco), individually and on behalf of all other persons similarly situated as trust fund beneficiaries of Lien Law trusts pursuant to the court's October 6, 2015 order, moves, pursuant to CPLR 3124 and 3126, for an order compelling defendants Nastasi & Associates, Inc. (N&A) and Anthony J. Nastasi (Nastasi) to: (1) comply with this court's order, dated October 6, 2015 (*see* NYSCEF Doc. No. 37 [Oing, J.]), by providing a list of all subcontractors, suppliers, and other potential beneficiaries pursuant to the Lien Law in connection with 20 projects with which N&A was engaged; and (2) fully respond to Kamco's discovery demands, and provide access to books or records as required under Lien Law § 75. Kamco also seeks, pursuant to CPLR 3124, an order compelling defendants J.T. Magen & Company Inc. (JTM) and N&A to provide all documents related to those parties' transactions, agreements, and

communications pertaining to the 20 projects identified in the amended complaint.

Defendants JTM and Liberty Mutual Insurance Company (Liberty) cross move, pursuant to CPLR 3212 (b), for an order summarily dismissing the complaint as against them.

Background

The following factual allegations are taken from the amended complaint unless otherwise noted.

Kamco asserts that it provided acoustical tiles to N&A, a subcontractor to a project at 150 East 42nd Street (150 East Project) for which JTM was the general contractor; N&A allegedly failed to pay Kamco $939,301.88 for those materials, and Kamco filed a mechanic's lien for that non-payment. Under that prong of the amended complaint, Kamco seeks to recover the $939,301.88 unpaid balance, plus interest, from N&A and its principal, Nastasi (together, Nastasi Defendants); Kamco also seeks to foreclose on the lien, which has been substituted by a lien discharge bond purchased by JTM from Liberty.

Kamco also asserts that it provided materials to N&A for 20 building construction projects with which N&A was involved since November 1, 2015, and asserts Lien Law trust-diversion class action claims against the Nastasi Defendants. Kamco requests an accounting of all Lien Law trust funds for each of the 20 projects, including one or more projects for which JTM was the general contractor, to identify the beneficiaries of the Lien Law funds and ascertain the amounts paid and owed to N&A for each project. Kamco seeks to recover, on

behalf of itself and the class, damages sustained due to the Nastasi Defendants' alleged misappropriation or diversion of such funds. By order, dated October 6, 2015, the court granted on default Kamco's motion (mot. seq. no. 001), pursuant to Lien Law § 77 and CPLR 902, 903, and 904, to maintain this suit as a Lien Law trust-diversion class action under Article 9 of the CPLR, and directed the Nastasi Defendants to furnish a list of all subcontractors, suppliers, and other potential beneficiaries under Lien Law Article 3-A for each of the projects listed in the amended complaint. The Nastasi Defendants have failed to comply.

Discussion

1. Kamco's Motion as to the Nastasi Defendants

Kamco now moves, pursuant to CPLR 3124, for an order: (1) compelling the Nastasi Defendants to provide the list of all subcontractors, suppliers, and other potential beneficiaries, as directed by the court's October 6, 2015 order; (2) compelling the Nastasi Defendants to formally and adequately respond to Kamco's discovery demands, and provide Kamco access to records required to be maintained under Lien Law § 75; or, alternatively, (3) striking the Nastasi Defendants' answer pursuant to CPLR 3126 (*see* Stern aff ¶¶ 1, 5-17).

In opposition to Kamco's motion, Nastasi states, in his August 15, 2017 affirmation, that neither he nor N&A has access to any books or records of N&A. Nastasi further states that N&A's offices were rented from the Franklin D. Nastasi Trust (Family Trust), and that N&A owed the Family Trust $3.2 million as of January 2014. As a result of that debt, Nastasi was removed as a beneficiary of the Family Trust, though he remained a co-trustee with his siblings. In December

2015, the debt remained at or over $3.2 million, and the Family Trust decided to sell the building in which N&A maintained its offices. Nastasi informed the Family Trust that N&A "had no funds with which to remove and/or store any of its office equipment, records, [or] files," and N&A "failed to properly vacate" building; the Family Trust then "disposed of, or destroyed," all of N&A's equipment, records, and files (Nastasi aff ¶¶ 5-13). Thus, neither Nastasi nor N&A has the books, records, or information—required to be maintained under the Lien Law—sought by Kamco.

Kamco's motion is denied as to the document production demanded of the Nastasi Defendants in connection with the 150 East Project. Kamco requests that it be furnished with the Nastasi Defendants' and the Family Trust's complete bank records if the documents demanded from the Nastasi Defendants have been destroyed or lost. The court has received copies of those complete bank records from First Republic Bank, at which the Nastasi Defendants and the Family Trust maintained their bank accounts, by letter and enclosures, dated May 4, 2018, in response to Kamco's amended subpoena duces tecum served upon the bank. Nastasi asserts all records were destroyed, and Kamco now has the alternate relief it has requested; accordingly, that prong of Kamco's motion is moot.

However, the Nastasi Defendants' have completely failed to comply with the court's October 6, 2015 order granting Kamco's motion to maintain this case as a Lien Law trust-diversion class action, and Nastasi Defendants' affidavits, and the record, demonstrate that the Nastasi Defendants were on notice of this

litigation, served with the court's order granting motion sequence number 001 with notice of entry, and received document discovery demands pertaining to the class action prong of this matter from Kamco in the months before N&A's office building was sold by the Family Trust, of which Nastasi was a co-trustee. The Nastasi Defendants were, therefore, on notice of their obligations to preserve evidence in this matter, but nonetheless permitted the destruction of all N&A records (*see Adrian v Good Neighbor Apt. Assocs.*, 277 AD2d 146 [1st Dept 2000] [a party has a duty to preserve evidence when it has notice of pending litigation]).

A party seeking spoliation sanctions must show that: (1) "the party having control over the evidence possess an obligation to preserve it at the time of its destruction"; (2) "the evidence was destroyed with a culpable state of mind"; and (3) "the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense" (*Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 547 [2015]).

Here, the Nastasi Defendants had control over the evidence, and the culpable state of mind of the Nastasi Defendants can be inferred by the fact that they never responded or attempted to comply with this court's October 6, 2015 order prior to the destruction of N&A books and records in December 2015, despite having received the order with notice of entry and Kamco's related discovery demands in October and early-November 2015; indeed, Nastasi was a co-trustee of the Family Trust that rented office space to, and evicted, N&A,

purportedly leading to the destruction of all business records of the Nastasi Defendants, which the Nastasi Defendants totally failed to preserve. Additionally, the destroyed evidence is plainly relevant in that it would establish the putative class and the extent of damages, if any, Kamco and other similarly situated beneficiaries sustained.

Accordingly, the answer of the Nastasi Defendants is stricken.

2. Kamco's Motion as to JTM and JTM's and Liberty's Cross Motion

JTM and Liberty's cross motion for summary dismissal of the amended complaint as against them is denied. Even if JTM and Liberty had established that there is no trust fund because JTM paid all amounts due to N&A prior to the filing of the mechanic's lien, Kamco has raised a triable issue of fact as to the propriety and completeness of JTM's informal discovery responses, JTM's claimed accountings, and JTM's failure to adequately explain inconsistencies between amounts charged by, and paid to, N&A.

Moreover, Kamco's motion is granted as to JTM. To the extent that JTM has not formally or adequately responded to Kamco's discovery prior discovery demands, it must do so. Additionally, to the extent that JTM's limited responses have raised additional issues to be explored by Kamco in discovery, Kamco may serve a supplemental discovery demand within 20 days of this order.

Accordingly,

Plaintiff Kamco having established that defendants Nastasi & Associates, Inc. and Anthony J. Nastasi have willfully failed to provide discovery as directed in the October 6, 2015 order of this court in that they failed to preserve records,

books, and other information while on notice of this litigation, the October 6, 2015 order, and the plaintiff's related discovery demands,

it is hereby

ORDERED that Kamco's motion is granted and the answer of defendants Nastasi & Associates, Inc. and Anthony J. Nastasi is stricken; and it is further

ORDERED that Kamco's motion to compel discovery from defendant J.T. Magen & Company, Inc. is granted, and it is further

ORDERED that Kamco shall file a supplemental discovery demand upon J.T. Magen & Company, Inc. within 20 days of this order, and J.T. Magen & Company, Inc. shall respond to that supplemental demand and any previously-served discovery demands of Kamco and produce, to the extent it has not already done so, all responsive, non-privileged documents, and a privilege log compliant with Commercial Division Rule 11 (b), in accordance with the Civil Practice Law and Rules; and it is further

ORDERED that the cross motion for summary judgment of defendants J.T. Magen & Company, Inc. and Liberty Mutual Insurance Company is denied; and it is further

ORDERED that counsel shall appear for a status conference in Room 242, 60 Centre Street, on August 14, 2018 at 10:30 A.M.

DATE: 6/8/18

ENTER:

Andrea Masley, JSC
HON. ANDREA MASLEY