

<b>O'Keeffe's Inc. v 400 Times Sq. Assoc., LLC</b>
2020 NY Slip Op 30208(U)
January 31, 2020
Supreme Court, New York County
Docket Number: 150702/2019
Judge: Joel M. Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. JOEL M. COHEN **PART** **IAS MOTION 3EFM**

*Justice*

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O'KEEFE'S INC. D/B/A SAFTI FIRST,

Plaintiff,

- v -

400 TIMES SQUARE ASSOCIATES, LLC, BRF  
CONSTRUCTION CORP., SCOTT 42 DEVELOPMENT,  
LTD, CACTUS ON NINTH, LLC, NEW YORK CITY  
ENVIRONMENTAL CONTROL BOARD, NES EQUIPMENT  
SERVICES CORPORATION D/B/A NES RENTALS,  
KENSEAL CONSTRUCTION PRODUCTS OF MARYLAND  
INC. N/K/A HD SUPPLY CONSTRUCTION SUPPLY, LTD.,  
TANNER BOLT & NUT INC., FENSTE INC.

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 24, 27, 28, 30, 31, 32, 33, 34, 35, 49

were read on this motion to

DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 002) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45

were read on this motion to

COMPEL DISCOVERY

Upon the following documents:

Plaintiff O'Keefe's Inc. seeks to dismiss Defendants 400 Times Square Associates' and BRE Construction Corp.'s ("Defendants") counterclaim for abuse of process (Motion Sequence 001) and also seeks to compel Defendants to produce a Verified Statement of books and records in compliance with Lien Law §8, 75 and 76 (motion sequence 002). For the following reasons, Plaintiff's motions are Granted.

Motion Sequence 001

Plaintiff seeks dismissal of Defendants' counterclaim for abuse of process. "In its broadest sense, abuse of process may be defined as misuse or perversion of regularly issued legal process for a purpose not justified by the nature of the process." See *Matthews v. New York City Dep't. of Social Servs., Child Welfare Admin.*, 217 A.D.2d 413, 415 (1<sup>st</sup> Dep't 1995); *Syllman v. Nissan*, 18 A.D.3d 221 (1st Dep't 2005). "Abuse of process has three essential elements: (1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective." *Curiano v. Suozzi*, 63 N.Y.2d 113, 116 (1984). Generally, the mere commencement of an action alone is not sufficient to state a claim. See *Matthews v. New York City Dep't. of Social Servs., Child Welfare Admin.*, 217 A.D.2d at 415 (1<sup>st</sup> Dep't 1995); *Syllman v. Nissan*, 18 A.D.3d 221 (1st Dep't 2005) ("A malicious motive in commencing an action is insufficient to support such a claim because 'the institution of a civil action by summons and complaint is not legally considered process capable of being abused'"); *Kaplan v. Karambelas*, 2017 WL 1493897 (N.Y. Sup., 2017) ("defendant's counterclaim for abuse of process must be dismissed as the allegations underlying this counterclaim are solely based on plaintiff's commencement of the instant civil action, which is not legally considered process capable of being abused.").

Here, Plaintiff commenced an action claiming entitlement to monies owed for its provision of fire-rated glass and framing products in connection with construction activities at 400 W. 42<sup>nd</sup> Street, New York, New York. Plaintiff alleges that it provided the materials at the behest of and for the benefit of Defendants but was not paid. Defendants' counterclaim is that Plaintiff *was* paid, and Defendants nevertheless are being made to defend a lawsuit they believe to be meritless. As noted above, even assuming Defendants' allegations about the Complaint's

lack of merit are true, Defendants have not stated a viable claim for abuse of process.

Accordingly, Plaintiff's motion to dismiss Defendants' counterclaim is Granted.<sup>1</sup>

### Motion Sequence 002

In discovery, Plaintiff seeks from Defendants: 1) a verified statement setting forth and explaining pertinent entries with respect to the trust assets and 2) terms of the contracts entered into between Defendants and relevant contractors who allegedly made use of Plaintiff's material at the real property located at 400 W. 42<sup>nd</sup> Street, New York, New York. Relying on Lien Law §8, §75 and §76, Plaintiff served Defendants with demands for such a verified statement and applicable contracts. Defendants have refused to provide responses to these demands, necessitating the instant motion. No opposition to this motion has been filed.

Under Lien Law §75 and §76, a materialman, such as Plaintiff, is a Lien Law trust beneficiary and thus is entitled to a verified statement setting forth and explaining pertinent entries with respect to the trust assets from the Defendants. §75 of the Lien Law obligates all trustees to maintain careful and accurate books and records of all transactions from the constructive trust. §76 establishes that a trust beneficiary, such as Plaintiff, has the right to inspect the books and records of the trustee or to receive, at its option, a verified statement from the trustee setting forth and explaining the entries with respect to the trust assets." *East Coast Wholesalers, Inc. v. John J. Moran Co., Inc.*, 42 A.D.2d 605, 605 (2<sup>nd</sup> Dep't 1973)

Specifically, § 76(1) provides that any beneficiary of the trust holding a trust claim shall be entitled, after the expiration of thirty days from the date of his trust claim became payable, "to

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<sup>1</sup> The law provides ample recourse in the event a Defendant can show that a Plaintiff's claims for relief are frivolous, including a motion for sanctions (when appropriate) if and when the case is dismissed. Advancing a tort claim for abuse of process is not one of them.

receive a verified statement setting forth the entries with respect to the trust contained in” the books and records maintained by the trustee. § 76(4) prescribes service of the verified statement “within ten days after service of a request”. § 76(5) states that “[i]f a trustee on whom a request for examination and copying or for a verified statement is served as provided in this section shall refuse to comply therewith or shall fail to comply therewith within ten days, or shall apply to the court for an order to vacate the request, the beneficiary may apply to such court for an order directing that the trustee comply with the request.”

Applying these provisions, and having received no opposition from Defendants, the Court finds that Plaintiff is entitled to receive a verified statement setting forth the entries with respect to the trust contained in the books and records maintained by the trustee under the Lien Law.

Lien Law § 8 provides, in pertinent part, as follows: “A statement of the terms of a contract made between an owner and a contractor, pursuant to which an improvement of real property is being made, and, of the amount due or to become due thereon shall be furnished upon demand in writing by the owner, or his duly authorized agent, to a subcontractor, laborer or material man performing labor for or furnishing materials to a contractor, or subcontractor, under such contract.” Applying this law to the instant action, Defendants have an obligation to provide contract terms to Plaintiff with respect to sub-contractor Crowne Architectural Systems, Inc, which Defendants have refused to do. Having received no opposition to this motion, the relief sought by Plaintiff is granted.

Finally, Plaintiff seeks attorneys’ fees associated with the filing and preparation of the instant motion. Considering Defendants’ failure to offer any defenses or legal justification for

their failure to disclose information that they are required by statute to provide, the Court grants Plaintiff's request and awards reasonable attorneys' fees associated with motion sequence 002.

Therefore, it is:

**ORDERED** that Plaintiff's motion to dismiss Defendants' counterclaim for abuse of process (motion sequence 001) is Granted; it is further

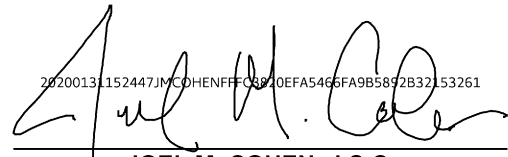
**ORDERED** that Plaintiff's motion to compel production of a Verified Statement and contract terms between the Defendants and Sub Contractor Crowne Architectural Systems, Inc under the Lien Law is granted; and it is further

**ORDERED** that Defendants are directed to pay Plaintiff's reasonable attorneys' fees and costs in connection with motion sequence 002 only; and it is further

**ORDERED** that Plaintiff is to serve Defendants with a bill of reasonable costs.

This constitutes the Decision and Order of the Court.

1/31/2020  
DATE

  
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JOEL M. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER  
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: