

<b>ACS Sys. Assoc., Inc. v Turner Constr. Co.</b>
2020 NY Slip Op 33294(U)
October 6, 2020
Supreme Court, New York County
Docket Number: 654943/2019
Judge: Carol R. Edmead
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. CAROL R. EDMOND PART IAS MOTION 35EFM**

*Justice*

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ACS SYSTEM ASSOCIATES, INC., AND ALL OTHERS IN THE AUTHORIZED CLASS OF CONTRACTORS, SUBCONTRACTORS, AND MATERIALMEN WHO PERFORMED WORK AT 600 WEST 58TH STREET, NEW YORK, NEW YORK, FOR THE BENEFIT OF TURNER CONSTRUCTION COMPANY,

Plaintiff,

- v -

TURNER CONSTRUCTION COMPANY, LIBERTY MUTUAL INSURANCE COMPANY, GC PRODUCTS, INC., THE URBAN GROUP, LTD., KAMCO SUPPLY CORP., ABC CORPS. 1-10, JOHN DOES 1-10

Defendant.

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INDEX NO. 654943/2019  
MOTION DATE 9/24/2020  
MOTION SEQ. NO. 001

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 47, 48, 49, 50, 67 were read on this motion to/for ORDER MAINTAIN CLASS ACTION.

Upon the foregoing documents, it is

ORDERED AND ADJUDGED that class action certification is granted on behalf of ACS System Associates, Inc., ACS is authorized to represent such class, Turner Construction Company is directed to provide a list of all Lien Law Article 3-A trust beneficiaries and their last known addresses to ACS within 20 days after entry of this decision, and ACS is to submit a copy of the proposed notice to the class members to the court within 30 days, which notice is to be mailed to the class members' last known address by certified mail; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for Plaintiffs shall serve a copy of this order along with Notice of Entry on all parties within twenty (20) days.

## MEMORANDUM DECISION

Plaintiff ACS System Associates, Inc. (ACS) moves to certify the fifth cause of action for violation of Lien Law Article 3-A as a class action claim, pursuant to CPLR article 9 and Lien Law § 77 (1) (motion seq. 001). No opposition to ACS's motion has been submitted.

### BACKGROUND

The following are the facts as alleged in the complaint.

Plaintiff ACS's claims arise out of its work at a construction project located at 600 West 58<sup>th</sup> Street, New York, New York (the Premises) (NYSCEF Doc. No. 1, complaint, ¶ 7; NYSCEF Doc. No. 48, affirmation of Gary J. Repke, Jr. [Repke aff], ¶ 4). In March 2018, Hospital for Special Surgery (HSS), as a subtenant of the Premises, retained defendant Turner Construction Company (Turner) to provide general contracting and/or construction management services in connection with the construction of an ambulatory surgical and outpatient center at the Premises (the Project) (compl, ¶¶ 10-11). Turner subcontracted ACS to perform central heating, ventilation, and air conditioning work for the Project in exchange for timely payment of \$3,385,000, subject to additions, deletions, and/or changes directed by HSS or Turner (*id.*, compl, ¶ 12).

During the Project, Turner received and held funds from HSS, which funds were to be used to pay for the labor, materials, equipment, and services furnished by ACS and its sub-subcontractors and suppliers (*id.*, ¶ 64, Repke aff, ¶ 7). ACS performed under its subcontract with Turner, but Turner failed and refused to make full payment to ACS for its undisputed and approved work and services at the Project. The sum of \$1,245,262, along with change order work of \$529,910.51, for a total of \$1,775,172.51, remains due and owing from Turner to ACS (compl, ¶¶ 15-18).

ACS commenced this action on August 27, 2019, within nine months of the last day it furnished labor and materials to the Project (compl, ¶ 22), seeking to recover unpaid amounts for the labor, materials, equipment, and services it furnished to Turner (Repke aff, ¶ 8). Among ACS's various claims, the fifth cause of action is a claim for diversion of trust funds in violation of Article 3-A of the Lien Law (compl, ¶¶ 63-77). ACS asserts this claim against Turner as well as "John Does 1-10," which are alleged shareholders, members, principals, trustees, officers, and/or agents of Turner (compl, ¶ 6).

Prior to filing this action, on July 26, 2019, ACS served Turner with a demand for a verified statement pursuant to Lien Law § 76 (1) (Repke aff, ¶ 10). Turner initially failed to provide such a statement, and ACS commenced a special proceeding to compel it (*see ACS System Associates, Inc. v Turner Construction Co.*, Sup Ct, NY County, Index No. 160112/2019). On November 22, 2019, Turner furnished ACS with the verified statement, and based on its review of such statement, ACS determined that it had a valid Article 3-A Lien Law cause of action (Repke aff, ¶ 12).

ACS's class action claim (the fifth cause of action), asserted pursuant to Lien Law § 77, is brought on behalf of itself and all other subcontractors and materialmen of Turner to whom trust funds were received by Turner and remain due and owing. Thus, in this motion, ACS seeks certification of a class consisting of:

"ACS System Associates, Inc. and all others in the authorized class of subcontractors and materialmen who performed work at 600 West 58<sup>th</sup> Street, New York, New York, for the benefit of Turner Construction Company"

(NYSCEF Doc. No. 47). ACS urges that a trust diversion claim must be brought as a class action; it has identified several putative class members, subcontractors and materialmen; common questions of fact and law predominate; its claims are typical, deriving from same

conduct by Turner; and it can adequately represent the class because its claim is substantial and its counsel is experienced in construction litigation.

### DISCUSSION

ACS's motion to maintain its fifth cause of action—diversion of Article 3-A trust funds-- as a class action claim under CPLR 901 and 902 and Lien Law § 77 (1) is granted. The class members shall be deemed to consist of all beneficiaries of Article 3-A trust funds received by Turner in connection with the Project.

“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 quotation marks and citations omitted]). The Court of Appeals in *Aspro* held that the primary purpose of Article 3-A is to ensure that the contractors and subcontractors and others who have directly expended their materials and labor to improve real property at the direction of the property owner or the general contractor receive payment for the work actually performed (*id.* at 328; *see Matter of RLI Ins. Co., Sur. Div. v New York State Dept. of Labor*, 97 NY2d 256, 264 [2002]; *Langston v Triboro Contr., Inc.*, 44 AD3d 365, 365 [1<sup>st</sup> Dept 2007]). Once a trust comes into existence under Article 3-A “its funds may not be diverted for non-trust purposes” (*Matter of RLI*, 97 NY2d at 263).

Under section 70 (2) of the Lien Law, funds received by an owner or general contractor in connection with each improvement constitute a separate trust and the owner or general contractor is the trustee of those funds (*see ECD NY, Inc. v Britt Realty, LLC*, 47 Misc 3d 923, 926 [Sup Ct, Kings County 2015]). Section 72 (1) provides that “[a]ny transaction by which any trust asset is paid, transferred or applied for any purpose other than a purpose of the trust . . .

before payment or discharge of all trust claims with respect to the trust, is a diversion of trust assets.”

Under Lien Law § 77 (1), an action under Article 3-A for an alleged diversion of trust funds “should be brought as a representative action for the benefit of all beneficiaries of the trust, and ‘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 article nine of the civil practice law and rules’” (*Atlas Bldg. Sys. v Rende*, 236 AD2d 494, 496 [2d Dept 1997], quoting Lien Law § 77 [1]; *see ADCO Elec. Corp. v McMahon*, 38 AD3d 805, 806-807 [2d Dept 2007]; *West End Interiors v Aim Constr. & Contr. Corp.*, 286 AD2d 250, 253 [1<sup>st</sup> Dept 2001]). Thus, any party with a trust claim may bring an action to enforce the claim under this provision on behalf of all potential beneficiaries (*see ADCO*, 38 AD3d at 807; *Fred Geller Electrical, Inc. v Battery Park City Auth.*, 2002 WL 1677667, \*4 [Sup Ct, NY County 2002]). Section 77 (1) also provides that an action to enforce such a trust shall conform “as nearly as may be” to a class action commenced under CPLR article 9, but that the numerosity requirement under CPLR 901 (a) (1) may be waived at the discretion of the court (*see Atlas*, 236 AD2d at 496; *GPK 31-19 LLC v L & L Constr. Dev. Inc.*, 2018 WL 4509444, \*1 [Sup Ct, NY County 2018]; *ECD*, 47 Misc 3d at 926). In fact, a plaintiff’s failure to identify any similarly situated parties as potential class members is not fatal to a claim and may be cured by furnishing notice of the claim to other potential class members (*ADCO*, 38 AD3d at 807; *Brooklyn Navy Yard Dev. Corp. v J.M. Dennis Constr. Corp.*, 12 AD3d 630, 632 [2d Dept 2004]; *GPK*, 2018 WL 4509444, \* 4; *ECD*, 47 Misc 3d at 927).

CPLR 901 (a) permits class certification if: (1) “the class is so numerous that joinder of all members . . . is impracticable; (2) questions of law or fact common to the class . . .

predominate over any questions affecting only individual members; (3) the claims or defenses of the representative parties are typical of [those] of the class; (4) “the representative parties will fairly and adequately protect the interests of the class; and (5) “ a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” These prerequisites should be broadly and liberally construed in favor of class action certification (*Friar v Vanguard Holding Corp.*, 78 AD2d 83, 91 [2d Dept 1980]).

Here, ACS has identified the potential class members as being itself and all “subcontractors and materialmen who performed work at 600 West 58<sup>th</sup> Street, New York, New York, for the benefit of Turner Construction Company.” ACS has specifically identified several putative class members, including defendants GC Products, Inc. and The Urban Group, Ltd., based on their status as subcontractors and materialmen which filed mechanic’s liens against the Project (see NYSCEF Doc. No. 15, GC Product’s answer with counterclaims, ¶¶ 4-10) (*see Spectrum Painting Contrs., Inc. v Kreisler Borg Florman Gen. Constr. Co., Inc.*, 64 AD3d 565, 576 [2d Dept 2009]). It also identified several non-parties, including Alternate Energy Solutions, Beacon Construction Services, Benco, Inc., and Capital Fire Sprinkler Co., which were identified in Turner’s verified statement, and are owed monies for work and materials provided to Turner at the Project (see NYSCEF Doc. No. 49, ACS memorandum in support [ACS memo] at 4-5). In addition, ACS seeks to compel Turner to identify other potential class members as part of this motion. This is sufficient for a claim under Lien Law § 77 (*see Callender v Shirell Air*, 282 AD2d 564, 565 [2d Dept 2001]).

ACS demonstrates the predominance of common questions of law or fact, namely that Turner made payments for non-trust purposes and failed to pay for work and materials provided by trust beneficiaries. While each individual member of ACS’s proposed class may have some

unique issues regarding their particular scope of work or trade, there are common questions of law raised that are identical for all proposed class members, for example, whether a trust was formed, whether the class members are beneficiaries of the trust, and whether trust funds were diverted (*see Mimmorm Realty Corp. v Sunrise Fed. Sav. & Loan Assn.*, 83 AD2d 936, 938 [2d Dept 1981] [predominance satisfied even though separate contracts executed by class members]; *Pinnacle Environmental Corp. v MDB Dev. Corp.*, 2013 WL 5511375, \* 3 [Sup Ct, NY County 2013]).

ACS's claim is typical of other class members in that it claims that it performed work on the Project which constituted improvements to the real property, its work was not paid for, and that Turner diverted trust funds under Article 3-A of the Lien Law. The claim is based on the same conduct by Turner and the same legal theory. The only differences between ACS and the other class member claims are the type of work and the amount of money Turner still owes them. A claim may still be typical even if it is not identical (*see Pruitt v Rockefeller Ctr. Props.*, 167 AD2d 14, 22 [1<sup>st</sup> Dept 1991] [typicality met if arises out of same cause of action and same course of conduct]), and the court finds that typicality is present.

As to adequacy of representation, ACS demonstrates that it has a substantial claim in the amount of over \$1,245,262, and it is in a position to adequately and fairly represent the interests of the class. ACS has not asserted any affirmative claims against any known beneficiaries, nor have any beneficiaries asserted claims against it, so there are no conflicts. It also presents proof that while its counsel does not assert experience in prosecuting class actions, it has extensive experience in construction litigations (see ACS memo at 7). This is sufficient to show that plaintiff's counsel is capable of adequately representing the class.

ACS's maintenance of this action as a class action is superior to individual actions "because it eliminates the risk of inconsistent determinations of the claims of the individual members of the class and avoids the unnecessary costs and delays of multiple lawsuits" (*ECD*, 47 Misc 3d at 927). Also, since a class action is the only form that a lien enforcement proceeding can take under Lien Law § 77 (1), it is superior to all other forms (*see Bay Bridge Constr. Corp. v Hirani Constr. Mgt., Inc.*, 2013 WL 6217885, \*5 [Sup Ct, NY County 2013]).

ACS has also met the requirements of CPLR 902. Class members cannot individually bring trust claims because Lien Law section 77 (1) requires such claims be maintained as a class action (*see ADCO*, 38 AD3d at 806-807; *Brooklyn Navy Yard*, 12 AD3d at 631-632; *West End Interiors*, 286 AD2d at 253). It would be inefficient and impractical for class members to prosecute separate but virtually identical actions against Turner. The relief ACS would obtain in this action would be deemed for the benefit of the entire class and, thus, concentrating this action in one forum benefits all class members. Further, the class is a manageable size as it is limited to subcontractors and materialmen who performed work on this Project for the benefit of Turner.

Finally, the motion for class certification is timely. Under CPLR 902, such a motion must be made no later than 60 days after the time expires for the service of all responsive pleadings for all persons named as defendants in the action. This requirement "is designed to promote an early determination of whether class action relief is appropriate" (*Argento v Wal-Mart Stores, Inc.*, 66 AD3d 930, 932 [2d Dept 2009]). The court has the discretion, pursuant to CPLR 2004, to extend that deadline "either prospectively or retroactively upon good cause shown" (*id.*; *see Gerard v Clermont York Assoc. LLC*, 143 AD3d 478, 478 [1<sup>st</sup> Dept 2016]; *Galdamez v Biordi Constr. Corp.*, 50 AD3d 357, 358 [1<sup>st</sup> Dept 2008] [defendants' conduct during discovery provides basis to deem untimely motion to certify timely]; *Allen v Construction*

*Directions, LLC*, 2019 WL 4885963, \* 2 [Sup Ct, NY County Oct. 3, 2019]; compare *Cruz v Town Sports Intl.*, 116 AD3d 539, 539-540 [1<sup>st</sup> Dept 2014]).

Here, the summons and verified answer with counterclaims and cross-claims was not served on defendant The Urban Group until November 13, 2019, pursuant to Business Corporation Law § 306 (b), and, thus, service was effected on it on that date (NYSCEF Doc. Nos. 28, 29, and 30). Under CPLR 3012 (c), defendant The Urban Group had 30 days from its date of service to answer these pleadings, to wit, December 13, 2019. This motion to certify was made on January 22, 2020, within the 60-day requirement under CPLR 902. The court further notes that Turner did not provide a response to ACS's request for a verified statement pursuant to Lien Law § 76 (1) until November 22, 2019, did not oppose this motion on procedural grounds, and there does not appear to be any prejudice to defendants from any purported delay (*see Gerard*, 143 AD3d at 478; *West End Interiors*, 286 AD2d at 253; *Tokhtaman v County Agency Inc.*, 2020 WL 228337 [Sup Ct, NY County Jan. 10, 2020] [plaintiff's need for pre-certification discovery to determine if she can meet CPLR article 9 requirements constitutes good cause shown]).

Therefore, the class members shall be deemed to consist of ACS and all others in the authorized class of subcontractors and materialmen who performed work at 600 West 58<sup>th</sup> Street, New York, New York, for the benefit of Turner Construction Company. Notice of the claim and an opportunity to be heard must be given to all potential class members.

### CONCLUSION

Accordingly, it is

ORDERED AND ADJUDGED that class action certification is granted on behalf of ACS System Associates, Inc., ACS is authorized to represent such class, Turner Construction Company is directed to provide a list of all Lien Law Article 3-A trust beneficiaries and their last known addresses to ACS within 20 days after entry of this decision, and ACS is to submit a copy

of the proposed notice to the class members to the court within 30 days, which notice is to be mailed to the class members' last known address by certified mail; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for Plaintiffs shall serve a copy of this order along with Notice of Entry on all parties within twenty (20) days.

  
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10/6/2020  
DATE

CAROL R. EDMEAD, J.S.C.

CHECK ONE:

CASE DISPOSED  
 GRANTED  DENIED

NON-FINAL DISPOSITION

GRANTED IN PART  OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE