

Putrelo Bldg. Enters., Inc. v Fahs Constr. Group, Inc.
2022 NY Slip Op 32971(U)
September 6, 2022
Supreme Court, Broome County
Docket Number: Index No. EFCA2018001882
Judge: Eugene D. Faughnan
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Broome County Courthouse, Binghamton, New York, on the 10th day of June 2022.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : COUNTY OF BROOME

PUTRELO BUILDING ENTERPRISES, INC.,

Plaintiff,

vs.

DECISION AND ORDER

Index No. EFCA2018001882

FAHS CONSTRUCTION GROUP, INC., and
LIBERTY MUTUAL INSURANCE COMPANY,

Defendant.

APPEARANCES:

Counsel for Plaintiff:

JASON B. BAILEY, ESQ.
Sheats & Bailey, PLLC
PO Box 586
Liverpool, NY 13088

Counsel for Defendants:

ALAN J. POPE, ESQ.
Coughlin & Gerhart, LLP
99 Corporate Dr.
Binghamton, NY 13904

EUGENE D. FAUGHNAN, J.S.C.

This matter is before the Court to consider the motion by Plaintiff, Putrelo Building Enterprises, Inc. (“Putrelo”) for an Order directing Defendant Fahs Construction Company, Inc. (“Fahs”) to respond to Plaintiff’s Lien Law § 76 demand dated August 16, 2017, or in the alternative, an Order striking Defendant’s Answer.¹ The motion has been opposed by Fahs. The parties appeared before the Court for oral argument on the motion. After due deliberation, this constitutes the Decision and Order of this Court.

BACKGROUND FACTS

Fahs entered into a contract with Office of General Services (“OGS”) for a construction project at the Mohawk Correctional Facility, and then entered into a subcontract with Putrelo for masonry work. Putrelo contends that it completed that work, and additional work on the project, but has not been paid in full for the work it performed. Putrelo claims that it is owed \$877,033.92.

Plaintiff filed a summons and complaint on January 3, 2018, and an amended complaint on June 7, 2018, seeking to recover the unpaid amount plus interest. The amended complaint asserts causes of action for breach of contract, unjust enrichment, account stated and violation of Lien Law Article 3-A, which Plaintiff seeks to enforce pursuant to Lien Law § 77(1), as an action to enforce a statutory trust. Fahs filed an answer with affirmative defenses and amended its answer in July 2018.

The Court had a conference with the parties on April 14, 2020 and issued a discovery scheduling Order. The parties subsequently informed the Court that they needed additional time to complete depositions, so the Court “so ordered” a revised discovery schedule on November 25, 2020. A further Amended Scheduling Order was signed on September 16, 2021. The Court also conducted additional conferences with the parties on February 2, 2022 and April 26, 2022. Putrelo then filed this motion on May 9, 2022.

Putrelo’s motion is based primarily on its claim that Fahs did not adequately respond to Putrelo’s demand for information under Lien Law § 76(1). Putrelo seeks to have the Court order

¹ All the papers filed in connection with the motion and cross motion are included in the NYSCEF electronic case file, and have been considered by the Court.

Fahs to provide a complete response to the demand, or, in the alternative, to strike Defendant's Answer to the Complaint. Fahs raised various defenses to the motion, including an argument that it has complied with the demand.

LEGAL DISCUSSION AND ANALYSIS

Lien Law Article 3-A creates a statutory trust and contains a set of laws that requires owners and subcontractors to “maintain funds in trust in order to ‘provide[] protection to certain parties involved in the improvement of real property, ensuring that they will be properly compensated for their services.’” *Anthony DeMarco & Sons Nursery, LLC v. Maxim Constr. Serv. Corp.*, 130 AD3d 1409, 1411 (3rd Dept. 2015), *quoting Sabol & Rice v. Poughkeepsie Galleria Co.*, 175 AD2d 555, 556 (3rd Dept 1991). The “primary purpose of article 3-A and its predecessors is to ensure that those who have directly expended labor and materials to improve real property [or a public improvement] at the direction of the owner or a general contractor receive payment for the work actually performed.” *Aspro Mech. Contr., Inc. v. Fleet Bank, N.A.*, 1 NY3d 324, 328 (2004) [internal brackets and quotation marks omitted], *quoting Matter of RLI Ins. Co. v New York State Dept. of Labor*, 97 NY2d 256, 264 (2002). Funds received by a contractor from a contract for an improvement of real property “shall constitute assets of a trust” [Lien Law § 70(1)] and the contractor is deemed to be the trustee of that trust. Lien Law § 70(2); *see, Kemper Ins. Cos. v. State of New York*, 70 AD3d 192, 196 (3rd Dept. 2009). The payments received by the contractor must be deposited into a trust account. *Teves v. Greenspun*, 159 AD3d 1105 (3rd Dept. 2018); Lien Law § 71-a (4)(a). The trustee must “maintain books or records with respect to each trust, detailing the trust assets receivable, trust accounts payable, trust funds received, trust payments made with trust assets and transfers in repayment of or to secure advances made pursuant to a notice of lending.” *Anthony DeMarco & Sons Nursery LLC v. Maxim Const. Serv., Corp.*, 130 AD3d at 1411, citing Lien Law § 75(2), (3)(A)-(E); *Matter of Bette & Cring, LLC v. Brandle Meadows, LLC*, 81 AD3d 1152, 1153-1154 (3rd Dept. 2011). “Any use of the trust funds other than the payment of claims under the contract... is an improper diversion of trust assets.” *Kemper Ins. Cos. v. State of New York*, 70 AD3d at 196 (citation omitted). A beneficiary of the trust, such as a subcontractor, is entitled to “receive a verified statement setting forth the entries with respect to the trust contained in such books or records.” Lien Law § 76(1)(b). If the trustee fails to keep the statutorily required books it “shall be

presumptive evidence that the trustee has applied or consented to the application of trust funds ... for purposes other than a purpose of the trust.” Lien Law § 75(4). The trustee is required to keep separate books for the trust funds, although the assets of different projects may be kept in the same account. The records must indicate the beneficiary of the trust and a record of all trust fund payments. Any party with a trust claim may bring an action to enforce the claim on behalf of all the potential beneficiaries. Lien Law § 77(1).

Putrelo served its Lien Law § 76 demand on August 16, 2017 requesting a full Project accounting. Fahs does not dispute that it is a trustee of the funds under the Project and that Putrelo is a beneficiary. Putrelo sought information as to: any amount owed to Fahs and the date it became due; each payment received, the date it was received and where each payment was deposited; each payment made by Fahs on the Project, the date and to whom the payment was made; and any trust claims that are owed as well as the date they became due. The parties engaged in negotiations and discovery and Fahs did not provide a response to the Lien Law §76 demand until November 29, 2021. In that response, Fahs listed the total receipts from OGS for this Project, the unpaid amount claimed as owed from OGS, the total paid to Putrelo, the unpaid amount owed by Fahs and the retainage billed by Putrelo which Fahs claims is not owed. The response also contains a paragraph noting that OGS asserted a liquidated damages claim against Fahs and its subcontractors. Fahs additionally asserted that it submitted a late claim from Putrelo to OGS and a determination has yet to be made on the Putrelo claim.

In its opposition to this motion, Fahs supplemented its response to the Lien Law demand, and included a breakdown of the individual payments made to Fahs by OGS (\$18.2 million), the total amount still owed to Fahs (\$1,003,900), the total amount paid by Fahs to Putrelo (\$2,385,882.63) as well as the dates and amounts paid by Fahs to Putrelo. In addition, Fahs (belatedly) submitted a summary of payments in labor, subcontracts, materials and job-related expenses totaling just over \$20 million. That summary shows the date, the amount and the payee. Fahs claims that it has expended \$1.78 million more in costs than it received from OGS so there could not have been any trust fund diversions. Fahs further argues that Putrelo has improperly ceased all depositions based upon the lien demand, but that Putrelo’s attorneys could have asked about the payments during depositions of Fahs’ employees. Fahs states that it is attempting to resolve payment issues with OGS, and that payments have been withheld by OGS due to project delays, some of which Fahs believes may be attributable to Putrelo.

The documentation attached by Fahs to its opposition papers contain considerable details regarding the payments on this project. The additional documentation highlights the deficiencies of the initial response. However, even with the supplemental information, Fahs' response is lacking in many respects.

Putrelo's motion contains several specific examples of the information missing from Fahs' response. Fahs claims that it is owed over \$1 million, but Fahs does not indicate when the payment became due. Lien Law § 75(3)(A)(3) requires the trustee to provide "the date upon which it became due, earned or payable." That would be relevant to determining what work should have been paid with the funds received, and whether Putrelo's bills should have already been paid. Next, Fahs' documentation does not state the bank where it deposited funds from OGS for this project. Pursuant to Lien Law § 75 (3)(C), that information is required. Furthermore, the payment history provided by Fahs does not provide adequate detail as to the payments. Under Lien Law § 75 (3)(D)(4), the log must contain "a statement of the nature of the trust claim" and details sufficient to determine if the payment was for a trust purpose. The payment history provided by Fahs does not provide details as to what work or services were being paid with those checks. It simply shows its check number, the date of the check, the amount paid and the payee. No information is provided to determine if it was a valid payment related to this project. Lastly, Putrelo is entitled to a verified statement setting forth responses to its demands, not just an unsworn Exhibit to Defendant's opposition papers. *See, Metal Partners Rebar, LLC v. ZDG, LLC*, 2017 NY Misc LEXIS 4532 (Sup. Ct., New York County 2017). The deficiencies in Fahs' responses establish that it has not complied with the various provisions of Lien Law Article 3-A. *See, e.g. Anthony DeMarco & Sons Nursery, LLC v. Maxim Constr. Serv. Corp.*, 130 AD3d 1409. Such failure can be presumptive evidence of diversion of trust funds. Lien Law §75(4). However, at this juncture, Putrelo is mainly seeking a complete and adequate response to its demand under the Lien Law.

Putrelo's amended complaint is based on violation of Article 3-A in general and Lien Law § 77(1) to enforce the trust. In actions to enforce the statutory trust under Lien Law § 77, the Court is authorized, among other things, to "compel an interim of final accounting by the trustee", "such other and further relief as to the court may seems necessary and proper" and "[a]ny provisional or ancillary relief incident to any of such relief." [Lien Law § 77(3)(a)(i), (ix) and (x)].

Although Putrelo's amended complaint is not specifically brought to enforce Lien Law § 76, upon consideration, and in light of the Court's discretion to fashion an appropriate remedy, the Court deems Plaintiff's requested relief of directing Fahs to provide proper responses to its demands as appropriate. Accordingly, Putrelo is entitled to an Order directing Fahs to provide a verified statement in accordance with Lien Law 76(1) and (5).

CONCLUSION

Based upon all the foregoing, it is hereby

ORDERED, that the portion of Plaintiff's motion to compel the Defendant to provide a proper and complete verified statement responsive to Plaintiff's Demand is GRANTED, and Fahs is Ordered to supply Plaintiff with a verified statement within 30 days of this Decision and Order.

THIS CONSTITUTES THE DECISION AND ORDER OF THIS COURT.

Dated: September 6, 2022
Binghamton, New York



HON. EUGENE D. FAUGHNAN
Supreme Court Justice