

**Matter of SN Contr., Inc. v Bank of New York
Mellon Corp.**

2008 NY Slip Op 30122(U)

January 11, 2008

Supreme Court, New York County

Docket Number: 0112345/2007

Judge: Walter Tolub

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: WALTER B. TOLUB
Justice

PART 15

In the Matter of the Application of
SN CONTRACTING, INC., and
SOLAMAN MIA

INDEX NO. 112345/2007

Petitioner,

for an order cancelling and vacating a certain
Judgment Restraining Notice Issued by the
BANK OF NEW YORK MELLON CORPORATION
d/b/a BANK OF NEW YORK

MOTION DATE _____
MOTION SEQ. NO. 001

Respondent.

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be given based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
1415).

Dated: 1/11/08

WALTER B. TOLUB, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 15

-----x
In the Matter of the Application of

SN CONTRACTING, INC. and SOLAMAN MIA,

Index No. 112345/07

Petitioners,

- against -

for an Order cancelling and
a certain Judgment Restraining
issued by THE BANK OF NEW YORK MELLON
CORPORATION d/b/a BANK OF NEW YORK,

Respondent.
-----x

HON. WALTER B. TOLUB, J.:

Petitioners, SN Contracting, Inc. ("SN Contracting") and Solaman Mia, move, by Order to Show Cause, pursuant to Article 3-A of the Lien Law, to summarily cancel and vacate a Restraining Notice to Garnishee, dated July 6, 2007, issued by respondent The Bank of New York Mellon Corporation d/b/a Bank of New York ("Bank of New York"). Petitioners also seek to recover the costs and attorney's fees incurred in filing this petition.

BACKGROUND

Solaman Mia is the president of SN Contracting, a construction company with its principal place of business in the Bronx. By Judgment entered May 2, 2005, in an action entitled *The Bank of New York v SN Contracting, Inc.* (Index No. 10620/04, Sup Ct, Westchester County), the court awarded judgment in favor of the Bank of New York and against SN Contracting ad Solaman Mia in the amount of \$111,488.22. The submissions indicate that Bank

FILED TO JUDGMENT
This judgment and notice of entry, counsel or other interested party must appear in person at the Judgment Clerk's Desk (Room 4875)

of New York assigned its interest in the Judgment to JP Morgan Chase by Purchase and Assumption Agreement, dated April 7, 2006, and amended and restated October 1, 2006.¹

On July 6, 2007, Bank of New York issued a Restraining Notice to Garnishee ("Restraining Notice") and Information Subpoena seeking to attach the assets of SN Contracting and Solaman Mia held in bank accounts at Washington Mutual Bank ("Washington Mutual"). On August 20, 2007, Bank of New York attached the bank accounts of SN Contracting and Solaman Mia at Washington Mutual as an enforcement of the May 2, 2005 Judgment.

By letter, dated August 27, 2007, counsel for SN Contracting and Solaman Mia requested release of the attachment, advising Bank of New York, *inter alia*, that the funds attached are trust assets under the Lien Law, and that their clients' Lien Law obligations exceed the balance in the bank accounts. The August 27, 2007 letter further stated, in part:

The funds at issue involve (2) small construction jobs; Aminul Islan (2489 Arthur Avenue, Bronx, NY) and William Frezelli (415 West 141 St., NY, NY). All of the actual construction work at both projects has [sic] been subcontracted to others. The Islan job is thirty (30%) complete and the Prezelli job

¹Bank of New York is the judgment creditor pursuant to the May 2, 2005 Judgment. JP Morgan Chase appears in this proceeding as an assignee of said judgment pursuant to the April 7, 2006 Purchase and Assumption Agreement. However, since documents prepared after the reported assignment continue to name Bank of New York as the judgment creditor, the Court will refer only to Bank of New York as the judgment creditor in this action.

is eighty-five (85%) complete. On the Islan job, our clients have present lien law obligations of \$31,185.15 and on the Frezelli, lien law interests are \$49,603.98 (together these amounts total \$80,789.13). Neither project will yield much in terms of profit; our clients expect about \$13,417.13 of gross profit on the Islan job and about \$6,815.70 on the Frezelli job. These profit numbers do not include any overhead or expense incurred by Mr. Mia and must be discounted by fifty percent (50%) to account for same. The owners' payments were made to Mr. Mia because the homeowners are not sophisticated and equate him as their contractor

(Aff in Opp, Exh G). In the letter, counsel also expressed his clients' interest in working with Bank of New York to satisfy the judgment. Along with the letter, counsel submitted copies of contracts, subcontracts, invoices, and checks to demonstrate the application of the Lien Law. The submissions reveal that SN Contracting and Solaman Mia received payments totaling \$73,000, paid \$32,600 to subcontractors and suppliers for work performed on the two construction contracts, and have outstanding obligations to subcontractors and suppliers totaling \$80,780.13 (Order to Show Cause, Exhs G, H). Bank of New York declined to withdraw the Restraining Notice and this proceeding ensued.

SN Contracting filed a petition and order to show cause seeking, *inter alia*, to cancel and vacate the Restraining Notice, pursuant to Article 3-A of the Lien Law. Petitioners essentially claim that the funds in the Washington Mutual accounts are Lien Law funds due to subcontractors and suppliers; that the continued

existence of the Restraining Notice has resulted in the refusal of Washington Mutual to honor checks drawn on the accounts bearing said funds; and that, as a result, petitioners are unable to pay trust fund beneficiaries.

Respondent answered, generally denying the allegations in the petition. On September 18, 2007, the Court signed a temporary restraining order enjoining Washington Mutual from paying any funds from petitioners' accounts to Bank of New York.

DISCUSSION

As stated, petitioners assert that Bank of New York wrongfully attached trust assets, which are due to subcontractors and material suppliers on two construction projects, pursuant to the Lien Law. Petitioners contend that they have trust assets totaling \$72,630.87 in accounts at Washington Mutual, with \$66,947 in Solaman Mia's account and \$5,683.63 in SN Contracting's account.

Article 3-A of the Lien Law (Lien Law §§ 70-79[a]) creates trust funds out of certain construction payments or funds to assure payment to subcontractors and suppliers (see *Caristo Constr. Corp. v Diners Fin Corp.*, 21 NY2d 507, 512 [1968]). These statutory provisions were intended to insure that funds obtained as payment for the performance of construction contracts are in fact used to pay the cost of the improvement of real property contemplated by said contracts (see *Canron Corp. v City*

of New York, 89 NY2d 147, 153-154 [1996]). The statute defines a trust to include "funds ... received by a contractor under or in connection with a contract for an improvement of real property, or home improvement ... and any right of action for any such funds" (Lien Law § 70[1]). The contractor must hold those trust assets for certain expenditures arising out of the improvement and incurred in the performance of its contract, including the "payment of claims of subcontractors" (Lien Law § 71[2][a]). The subcontractor's claim for payment for work performed on the improvement is thus deemed a trust claim (Lien Law § 71[3][b]), and the subcontractor is designated a "beneficiary" of the contractor's "trust" (Lien Law § 71[4]). An improper diversion of the contractor's trust asset occurs when any such trust asset is paid, transferred or applied for a non-trust purpose; that is, for any purpose other than the expenditures authorized in § 71[2], before all of the trust claims have been paid or discharged (Lien Law § 72[1]). To assist in enforcing these provisions, Lien Law § 76(1) allows "any beneficiary of the trust holding a trust claim" to examine the trustee's books.

In opposing the petition, Bank of New York argues that petitioners fail to establish that the funds on deposit are trust assets. Specifically, Bank of New York asserts that petitioners failed to maintain proper books and records of trust deposits and expenditures. Bank of New York also asserts that Solaman Mia

commingled trust assets with his personal deposits by accepting as trust assets checks made payable to him, and failing to transfer the funds into SN Contracting's account. Bank of New York further contends that based on the documents submitted by petitioners, significant non-trust assets are on deposit in petitioners' Washington Mutual account, which are subject to execution to satisfy the Judgment in its favor.

The submissions reveal, and the parties do not dispute that petitioners received payments or trust assets totaling \$73,000 for work performed on the two abovementioned construction projects. The fact that the payments were made to Solaman Mia, the president of SN Contracting, and deposited into his account at Washington Mutual does not alter their status as trust assets since the payments were received by SN Contracting and Solaman Mia in connection with home improvement contracts (see Lien Law § 70[1]).

The submissions also indicate that SN Contracting made payments totaling \$32,600 from the trust assets to subcontractors and suppliers. Thus, petitioners have established that \$40,400 of the total amount on deposit in the accounts at Washington Mutual constitute trust assets under Article 3-A of the Lien Law. Petitioners must hold and apply said trust assets toward the payment of the subcontractors and suppliers (Lien Law § 71[2][a]).

Given petitioners' assertion that the total amount on deposit in their Washington Mutual accounts is \$72,630.87, the Court concludes that \$32,230.87 of that amount constitute non-trust assets, which are not exempt from attachment for the purpose of satisfying the judgment. Thus, Bank of New York may properly execute and levy on petitioners' Washington Mutual accounts in the amount of \$32,230.87 toward the May 2, 2005 Judgment.

Petitioners' request for costs and attorney's fees is denied.

Accordingly, it is

ADJUDGED that the petition is granted to the extent that the Restraining Notice to Garnishee, dated July 6, 2007, issued by respondent The Bank of New York Mellon Corporation d/b/a Bank of New York ("Bank of New York") is cancelled and vacated with respect to \$40,400 on deposit in petitioners' accounts at Washington Mutual Bank, which constitute trust assets under Article 3-A of the Lien Law, and the petition is otherwise denied.

This constitutes the decision and judgment of this court.

Dated: 1/11/08

ENTER:


B. Tolub J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1415).