

Matter of M.A. Angeliades, Inc.
2011 NY Slip Op 32984(U)
November 15, 2011
Supreme Court, New York County
Docket Number: 108357/11
Judge: Joan M. Kenney
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

JOAN M. KENNEY

Index Number : 108357/2014 S.C.

M.A. ANGELIADES, INC.

vs

PMS CONSTRUCTION MANAGEMENT

Sequence Number : 002

REARGUMENT/ RECONSIDERATION

PART 8

INDEX NO. 108357/11

MOTION DATE 9/30/11

MOTION SEQ. NO. 002

The following papers, numbered 1 to 17, were read on this motion to/for Reargue/reconsider

Notice of Motion/Order to Show Cause — Affidavits — Exhibits <u>+ memo g.l.w</u>	No(s). <u>1-7</u>
Answering Affidavits — Exhibits _____	No(s). <u>8-16</u>
Replying Affidavits _____	No(s). <u>17</u>

Upon the foregoing papers, It is ordered that this motion is

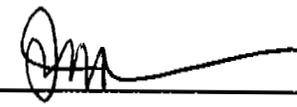
MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

FILED

NOV 14 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11/3/11


_____, J.S.C.

JOAN M. KENNEY

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT 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: PART 8

-----x
In the Matter of the Demand of M.A.
Angeliades, Inc. Upon PMS
Construction Management Corp. for a
Statement pursuant to Lien Law § 76
-----x

**DECISION,
ORDER & JUDGMENT**

Index No.: 108357/11

JOAN M. KENNEY, J.:

Papers considered in review of this motion:

FILED

Papers	Numbered
Notice of Motion & Aff.	1-2
Exhibits	3-6
Memorandum of Law in Support	7
Aff. in Opp. & Exhibits	8-16
Aff. in Reply	17

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Petitioner moves, pursuant to CPLR 2221, for leave to renew its previous motion and, upon renewal, for an order directing respondent to serve a verified statement as required by Lien Law § 76. By order of this court, dated August 16, 2011, petitioner's previous motion was denied, without prejudice to renew, based on a misunderstanding as to the original submission papers.

FACTUAL BACKGROUND

Respondent was the construction manager for NYCHA, as owner, for a public improvement project known as Red Hook East and West Houses, located at Buildings, numbers 11 through 18, in Brooklyn, New York (the project). Aff. in Opp. As construction manager, respondent entered into a contract with petitioner to provide exterior brickwork, parapet wall replacement and roofing replacement for the project. According to respondent, its only function in relation to the project was to provide oversight and consulting, and petitioner was to act as the trade contractor, bearing primary

responsibility for the project's timely and satisfactory completion. *Id.* The court notes that the contract between petitioner and respondent for this project has not been provided.

Article 7 of the agreement between NYCHA and respondent states that respondent's services are to include, among other things: "investigation, planning, pre-construction, construction, construction management, supervision and coordination of all work necessary and required for the Project" *Id.*

On June 8, 2011, petitioner demanded a verified statement from respondent, as the Lien Law trustee, setting forth the entries with respect to the books and records maintained for the Lien Law Trust regarding retainage, final payment or any monies outstanding for which petitioner claims the right to payment for the project. Petition, Ex. 1. On June 18, 2011, respondent sent a statement to petitioner that indicated that petitioner was owed the amount of \$2,779,691.15. *Id.*

On June 23, 2011, respondent provided a "Verified Statement of Lien Law Trust Funds" (Verified Statement), which indicated that it had received payments from NYCHA totaling \$15,689,067.58 for payment to petitioner for petitioner's work in connection with the project, which it had turned over to petitioner. *Id.* According to the Verified Statement, NYCHA has withheld retainage in relation to petitioner's work in the amount of \$825,747.62, and no other trust accounts are payable to petitioner. *Id.* The Verified Statement

indicated amounts paid and owing only to petitioner.

On July 28, 2011, respondent provided an "Amended Verified Statement of Lien Law Trust Funds" (Amended Verified Statement), which indicated the following:

"B. [Respondent] has made payments totaling \$15,786,177.33 to all Trade Contractors and suppliers at the Project, including payments totaling \$15,689,067.58 to [petitioner], payments totaling \$20,734.00 to American Standard Testing and Consulting Laboratories, Inc., 1300 Jericho Turnpike, New Hyde Park, New York; payments totaling \$49,255.75 to Warren & Panzer, Engineers, P.C., 228 East 445th Street, New York, New York; and payments totaling \$27,120.00 to Haider Engineering, P.C., 755 Merrick Road, Baldwin, New York, as set forth in the table annexed hereto as Exhibit

"A". Trust Assets Paid

All of the foregoing payments were made on behalf of NYCHA by [respondent] as Construction Manager and agent of NYCHA. The payments were made by check through [respondent]'s corporate office at 92 North Avenue, New Rochelle, New York. Paul Stevens, as President of [respondent], consented to the making of the foregoing payments on behalf of NYCHA.

C. Trust Assets Receivable

NYCHA has withheld retainage in relation to [petitioner]'s work at the Project totaling \$825,747.62, as set forth in the table annexed hereto as Exhibit "A".

D. Trust Assets Payable

[Respondent] has received payments totaling \$15,786,169.80 from NYCHA for construction services performed by Trade Contractors at the Project, and has made payments totaling \$15,786,177.33 to Trade Contractors for construction services performed at the Project, leaving \$0.00 in trust assets payable in relation to the Project, as set forth in the table annexed hereto as Exhibit "A".

Opp., Ex. B.

This Amended Verified Statement includes, in a footnote, that, by providing this information, respondent does not admit to being a Lien Law trustee. *Id.* Exhibit "A," attached to the Amended Verified Statement of Lien Law Trust Funds, consists of a total of

20 lines, representing four years worth of work on a multi-million dollar project, indicating funds received and payments made, with retainage, to the four entities noted in the body of the statement.

Petitioner contends that the statement provided by respondent is insufficient under the provisions of the Lien Law in that it fails to specify the list of payments that respondent received from NYCHA, to which petitioner maintains that it is entitled.

In opposition, respondent maintains that it was neither the owner, contractor nor general contractor of the project and, therefore, is not obligated to provide the information sought by petitioner. Further, respondent argues that any fees that it received for providing consulting services are not part of any Lien Law trust. Lastly, respondent states that it has made good faith efforts to comply with petitioner's demands, which demands respondent characterizes as attempts to harass it.

In reply, petitioner avers that respondent has already been determined, by another judge of this court, to be a contractor for the project. The bases of this assertion is: the transcript of a hearing held on August 16, 2011; a claim petitioner asserted against respondent and NYCHA, in which the judge stated that respondent was the general contractor; and a short-form so-ordered stipulation of June 15, 2011, in which respondent was ordered "to provide an affidavit by June 29, 2011 stating whether the retainage has been paid by the owner, the amount paid, the amount of retainage outstanding, if any, and the date(s) when payment of the retainage

was made by the owner." Opp., Ex. E. Further, petitioner maintains that all funds received by respondent are to be deemed Lien Law trust funds, because the Lien Law does not carve out any exception for funds described as payments for consulting services. Lastly, petitioner refutes the allegation that it is attempting to harass respondent.

DISCUSSION

Two issues are presented for determination by the instant motion: (1) Whether the Amended Verified Statement provided by respondent meets the requirements of Lien Law § 76; and, if not, (2) whether a party designated as a project's construction manager, pursuant to its contract with the owner, may be deemed a trustee of Lien Law trust funds.

Article 3-A of the Lien Law (Lien Law §§ 70-79) mandates that funds received by an owner of realty, a contractor or a subcontractor, in connection with improvements to real property, be held in trust for the payment of expenses and claims of persons designated as beneficiaries. Section 75 provides, among other things, that the trustee shall "keep books or records" respecting the trust, containing "entries" specified in such section. Section 76 (4) of the Lien Law permits, among other things, a beneficiary of the trust to obtain "a statement, subscribed by the trustee or an officer thereof and verified on his own knowledge, setting forth the entries with respect to the trust contained in the books and records kept by the trustee pursuant to [Lien Law] § 75 and the names and

addresses of the person or persons who ... made or consented to the making of the payments shown." These records, upon which the statement is to be based, must contain entries regarding accounts receivable, accounts payable, funds received, funds paid and other transfers, with specific information regarding each trust transaction. Lien Law § 73 (3).

There is no question that petitioner qualifies as a beneficiary of such trust, having provided materials and services for the improvement of public property.

The Amended Verified Statement and accompanying "Exhibit A" provided by respondent provide only a simple spreadsheet listing the contractors and payments made, without any particulars regarding the contracts for such work or the person who consented to each payment, and does not include all monies received by respondent from NYCHA with respect to the project. Therefore, the court concludes that the Amended Verified Statement provided by respondent does not comport with the requirements of Lien Law § 76. *Matter of Bette & Cring, Inc. v Brandle Meadows, LLC*, 81 AD3d 1152 (3d Dept 2011).

Having determined that petitioner is entitled to a more detailed Verified Statement of Lien Law Trust Funds, the court must now consider whether respondent, characterized as the project's construction manager, is the entity responsible to maintain and provide such records as a Lien Law trustee. As previously noted, the persons responsible to act as such a trustee, pursuant to Article 3-A of the Lien Law, are the owner, contractor or

subcontractor of the project.

Section 70 (1) of the Lien Law defines the trust as being composed of all funds received by an owner, a contractor or a subcontractor in connection with real property, home improvement or the improvement of public property. The purpose of such trusts is to ensure that workers who provide services for such improvements are paid, and the trustee is obligated to maintain the trust until all workers are paid, and may not divert funds to its own use. Lien Law § 71.

"The term 'contractor' is defined under section 2 (9) of the Lien Law as follows: "the term "contractor", when used in this chapter, means a person who enters into a contract with the owner of real property for the improvement thereof, or with the state or a public corporation for a public improvement."

Burns Electric Co., Inc. v Walton Street Associates, 136 AD2d 291, 294 (4th Dept), *affd* 73 NY2d 738 (1988).

Although the terms used in a contract are not necessarily controlling as to the true nature of the relationship between the parties (*id.* at 295), in the instant matter, the contract between NYCHA and respondent specifies that respondent was to perform services far in excess of those typically performed by an entity acting exclusively as a construction manager. See *Walls v Turner Construction Company*, 4 NY3d 861 (2005). Moreover, in the earlier action between petitioner against respondent and NYCHA, the court found that respondent was the general contractor for the project as well as the construction manager, as no other entity assumed or

performed the role of general contractor.

There is no question that respondent received monies from NYCHA that it was supposed to use to pay the contractors and subcontractors on the project, and the purpose of Article 3-A of the Lien Law is to ensure that such funds reach the laborers who work on such projects. To find that respondent, under such circumstances, was not acting as a trustee for such funds would be a total misinterpretation of the purpose and intent of the Lien Law.

Therefore, based on the foregoing, this court finds that respondent does qualify, under the facts of this particular case, as a Lien Law trustee and, as such, must provide petitioner with a Verified Statement of Lien Law Trust Funds that meets the requirements of Lien Law § 76. Based on the foregoing, it is hereby

ORDERED that leave is granted to petitioner to renew its previous motion; and it is further

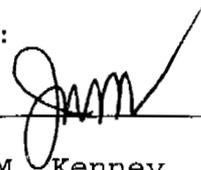
ORDERED and ADJUDGED that, upon renewal, petitioner's motion is granted and respondent is ordered to serve a Verified Statement of Lien Law Trust Funds as required by Lien Law § 76 (5) within 10 days after receipt of this order with notice of entry.

Dated: November 3, 2011

FILED

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ENTER: 

Joan M. Kenney, J.S.C.