

<b>Singer Equip. Co., Inc. v Chapin Sch., Ltd.</b>
2020 NY Slip Op 33293(U)
October 6, 2020
Supreme Court, New York County
Docket Number: 654538/2017
Judge: O. Peter Sherwood
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.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49**

----- X  
**SINGER EQUIPMENT COMPANY, INC., Individually and  
on behalf of all others similarly situated,**

**Plaintiff,**

- v -

**THE CHAPIN SCHOOL, LTD., IBEX CONSTRUCTION  
COMPANY, LLC and ANDY FRANKL, Individually,**

**Defendants.**

----- X  
**SINGER EQUIPMENT COMPANY, INC.,**

**Plaintiff,**

- v -

**THE CHAPIN SCHOOL, LTD., d/b/a THE CHAPIN  
SCHOOL, DIRECTOR DOOR INDUSTRIES, LTD., AND  
ATLANTIC SPECIALTY INSURANCE COMPANY,**

**Defendants.**

----- X  
**O. PETER SHERWOOD, J.:**

The motions and cross-motions in these two cases, motion sequence 009 in the lien foreclosure action, index number 654732/2016 (2016 Case) and motion sequence 002 in the trust fund action, index number 654538/2017 (2017 Case) are consolidated for decision. Rule 19-a statements were filed in the 2017 Case only (*see* Docs. 61 [Chapin statement] and 70 [Singer response])<sup>1</sup> and were adopted in the 2016 Case (*see* 2016 Doc. 205). Accordingly, the facts in both motions are taken from the parties' 19-a statements in the 2017 Case.

**I. FACTS**

These actions arise out of a construction project for the renovation and expansion of school building at 100 East End Ave (the Project) owned by defendant The Chapin School, Ltd (Chapin). The Project had two phases: first, excavation of the property and creation of a

---

<sup>1</sup> References to "Doc" followed by a number refer to documents filed in the 2017 Case in the New York State Courts Electronic Filing (NYSCEF) system. Documents filed in the 2016 Case are referenced as "2016 Doc." followed by a number.

cafeteria below the current building and structural work; then the addition of new floors on top of the current building. Chapin and Jones Lang LaSalla Americas, Inc. (JLL) entered into a written Project Management Agreement in 2014 whereby JLL agreed to act as Project Manager on behalf of Chapin. Chapin and Ibex Construction Company, LLC (Ibex) entered into a letter of intent for Ibex to act as contractor on the Project (the LOI). The parties dispute the nature of the agreement and the relationship between Chapin and Ibex. Chapin claims, and plaintiff Singer Equipment Company (Singer) contests, Chapin authorized Ibex to retain subcontractors to do work for fixed amounts, for which Ibex was paid cost plus a 5% fee. Ibex submitted monthly payment requisitions together with a signed lien waiver form to JLL, which would approve payments to Ibex and the subcontractors. Chapin withheld retainage from Ibex<sup>2</sup>. In March 2016, a subcontractor told Chapin and JLL that Ibex had not paid it for work for which Chapin had paid Ibex. Chapin and JLL determined Ibex had failed to pay subcontractors almost \$2.5 million, including \$234 thousand Chapin paid to Ibex which should have been paid to Singer. Chapin references a letter from Andy Frankl, president of Ibex, in which Ibex admits the subcontractors were underpaid/underfunded by almost \$2.3 million (Ibex Funding Letter dated April 29, 2016, 2017 NYSCEF Doc. No. 52)<sup>3</sup>. On June 20, 2016, Chapin terminated Ibex. Frankl and Ibex were subsequently indicted for defrauding subcontractors on other construction projects. Ibex is out of business.

Ibex hired Singer as a subcontractor in February 2015 to provide and install food service equipment on the Premises. Chapin paid \$224,000 to Ibex for Singer's work, but Ibex failed to pay Singer. Singer claims Chapin diverted \$1.8 million in retainage earned by Ibex (Retainage). Singer claims Chapin used the Retainage for other work on the Project after Ibex was fired. Before Ibex was terminated it and its subcontractors were paid almost \$40 million. After Ibex was fired, Chapin paid \$4.8 million to subcontractors for their work and materials. The parties dispute whether Ibex defaulted, Chapin had made overpayments to Ibex, what was paid to complete the Project after Ibex was terminated, and whether Chapin has back charges against Ibex which would reduce the amount of a trust fund. To support its cross-motion, Singer further

---

<sup>2</sup> RETAINAGE is defined as a percentage of what a landowner pays a contractor, withheld until the construction has been satisfactorily completed and all mechanic's liens are released or have expired (Black's Law Dictionary [11th ed. 2019]).

<sup>3</sup> Plaintiff contends (erroneously) this was an admission funds had been diverted (*see* 2017 Doc. 52).

claims, and Chapin does not dispute, that Chapin withheld almost \$2 million as Retainage, which was disbursed to some subcontractors and not to others.

Singer asserts claims against Chapin (1) that the Retainage should be held in trust for the Ibex subcontractors and suppliers, if not used for the completion of the Project; (2) for bond funds obtained by Chapin that should have been applied to project costs (Doc. No. 54); (3) against Ibex for the diversion of funds paid it by Chapin which should have been held in trust for Singer; and (4) against Frankl, personally for causing misappropriation of assets paid to Ibex which should have been held in trust (*id.*). The second cause of action alleging diversion of bond funds has been dismissed voluntarily (see Doc. 45).

## **II. TRUST FUND ACTION (2017 CASE)**

In motion sequence two in the trust fund action, Chapin argues the case should be dismissed as to it because the \$224,000 which Singer seeks was paid to Ibex on behalf of Singer and then diverted (Memo at 3). Chapin further contends that the \$1.8 million previously kept as retainage was paid to other subcontractors. That amount is also more than off-set by 1) the funds Chapin paid to Ibex which payments Ibex diverted, 2) the expense of fixing Ibex's defective work and 3) hiring a new contractor to perform work within the scope of Ibex's work (Memo at 3). Chapin argues the Retainage never came due to Ibex, because retained funds are not due until the project is completed and the contractor's obligations fulfilled. Ibex defaulted and failed to complete the work, so the funds never became trust funds held for the benefit of subcontractors (*id.* at 3-4). Ibex never earned the Retainage, so Lien Law § 70(6) does not apply.

Further, even if the Retainage was held in trust, it was properly used for work on the Project after Ibex's termination. Lien Law § 71(2) allows trust assets to be used for various purposes, including claims of subcontractors, architects, laborers, and materialmen. It does not specify an order in which such claims should be considered (Memo at 6-7). Plaintiff does not allege that Retainage funds were used for an improper purpose, which is required for this claim (*id.* at 7-8).

### **A. Singer's Opposition and Cross-Motion for Summary Judgment**

In its motion for partial summary judgment Singer asks the court to declare that money withheld from approved payments to Ibex were due or to become due to Ibex and constitute trust funds for which plaintiff was a beneficiary.

Singer contends Chapin was not permitted to release the Retainage on its own discretion (Opp at 3, Doc. 75). This was a cost-plus agreement, not a lump sum contract, so the LOI with Ibex did not state a specific scope of work (*id.*). Accordingly, Chapin cannot show any contract with any responsibilities Ibex failed to meet. Moreover, Ibex was wrongfully terminated. The stated reason, failure to pay subcontractors, is not proper basis to terminate (*id.* at 4). Chapin suffered no damages because, as owner it had no duty to pay the unpaid subcontractors and was not responsible for any underpayments. Even if termination were proper, Ibex would still be entitled to be paid for all completed work at the agreed upon cost-plus rate (*id.*).

As far as Chapin claims money owed Ibex is offset by other expenses, those claims have not been adjudicated between Chapin and Ibex. Any offsets are not established here as a matter of law. The proper place to adjudicate offsets would be in an action to determine the rights of all lien holders, not as a defense here. The amount of any offsets is not more than the Retainage (*id.*). Further, the funds were not Chapin's to spend on the Project. They were assets of a contractor's trust and Ibex was the trustee (*id.* at 5). Even a trustee does not have discretion, when an action such as this has been commenced.

Singer admits "Chapin spent that [withheld] \$1,993,880.00 in direct payments to subcontractors either as retainage Chapin believed may have been withheld by Ibex from payments to those subcontractors or for continued work on the project" (*id.* at 8).

The payments to Ibex were based on amounts approved by Chapin for work completed and materials purchased, as there was no agreement for Ibex to perform specific work (*id.* at 9-10). Accordingly, that money had been earned by Ibex. Ibex's failure to pay subcontractors does not, without a contractual term allowing it, permit Chapin to terminate Ibex or to use that money to make direct payments to the subcontractors (*id.* at 10). Ibex has an unqualified right to those funds (*id.* at 12). Ibex's right to the Retainage was not dependent on the completion of the Project, as this was a "time and materials" arrangement (*id.* at 12-13). It is not disputed that the work had been performed and materials obtained before the Retainage was withheld.

As to the offsets alleged by Chapin, \$1 million for "alleged extended general conditions, extended supervision, delays, legal fees, bonding costs and additional payroll and consulting costs have no support at all and should not be considered" (*id.* at 14). Chapin has provided documentation for the \$804,000 but Chapin's claim that money went to correct Ibex's defective work is merely conclusory (*id.* at 14-15).

Chapin did not have discretion to decide whether the Retainage was spent on proper trust purposes (*id.* at 15- 16). While Lien Law § 74 grants the trustee the authority to determine how and to whom trust funds will be distributed, Chapin was not the trustee, Ibex was (*id.* at 15). Further, once an action has commenced, the trustee no longer has complete discretion (*id.* at 15-16, citing Lien Law §§ 74[2], 77).

### **B. Chapin’s Reply and Opposition to Cross-Motion**

Chapin argues Singer’s opposition and cross-motion fail because Singer has failed to bring admissible evidence to support its positions (Reply at 3-4, Doc. 94). Chapin claims the Retainage never became due and owing to Ibex because the Project was never completed (*id.* at 4, citing *In re Lynch III Properties Corp.*, 125 BR 857, 863 [Bankr EDNY 1991] [“the bank is under no obligation to pay the mechanics' lienors funds it has rightfully retained unless all conditions in the Building Loan Contract have been satisfied”]). While Singer argues Ibex’s compensation was on a “time and materials” basis, the work at issue was performed “pursuant to written change orders containing fixed scopes of work and lump sum prices” (Reply at 5, citing Juliano Reply Aff, NYSCEF Doc. No. 213, ¶¶ 11-13). According to the LOI, Ibex was required to promptly pay subcontractors, and it did not do so. Nor was the work called for in the change orders completed as required (Reply at 5). Ibex was properly terminated, failed to earn the Retainage, and there is no cause of action here.

### **C. Singer’s Sur-Reply in Support of its Cross-Motion**

Singer submits an over-long sur-reply brief in violation of Commercial Division Rule 17, NYCRR § 202.70, Rule 17. It argues that Ibex’s failure to pay subcontractors does not create an obligation for Chapin to pay them, and liens are only valid as far as Chapin owes Ibex money. As far as Chapin made payments to subcontractors based on Ibex’s failure to pay them, Singer received no such payments, and was not consulted on this matter (Sur-reply at 2-3). Singer argues Chapin did not have a contractual right to hold back money and that the funds were due and owing Ibex, so Chapin did not have a right to keep retainage (*id.* at 4). In absence of a contractual right to hold back funds, approved payments made for designated purposes are deemed due upon certification for payment (*id.* at 6). Here, Chapin has not reserved a right to withhold funds for any purpose, the withheld funds were due and owing Ibex and Ibex’s alleged default is irrelevant. Nor is there any allegation Chapin paid out the money before receiving notice of Singer’s lien. Any money paid out for additional work, rather than work for which

Ibex had not paid the contractors, is irrelevant and improper (*id.* at 8). There is no dispute the LOI is a “cost-plus” arrangement, and Singer argues the change orders also reflect a cost-plus payment plan, so the payments were pre-earned by Ibex when approved (*id.* at 10).

Singer also argues that Chapin has failed to establish that Ibex breached (*id.* at 13-14), that a breach, even if material, would have resulted in the forfeiture of the Retainage which had already been earned and approved (*id.* at 14-15). Further, although if Ibex was terminated, the agreement all together was not. The cost of remediation work (the actual injury) is not established (*id.* at 16). Chapin has not established its entitlement to its claimed offsets (*id.* at 17). The \$1 million for general fees and costs is unsupported and the \$804,000 is not sufficiently documented (*id.* at 17-18). Self-serving statements are insufficient.

### **III. LIEN FORECLOSURE ACTION (2016 Case)**

The 2016 Case is based on the same Project as the 2017 Case. Singer asserts claims against the proceeds of Chapin’s Phase A and Phase B bonds and seeks a judgment declaring the validity, extent and priority of its claim (Seconded Amended Compl., p. 8, 2016 Doc. 172). Singer has withdrawn the against the bond proceeds and has limited its claim to funds in the Retainage (*see* Notice of Motion, 2016Doc. 204 and Transcript at p. 5, Doc. 267).

On the motion Singer adopts the arguments it made in motion sequence no. 002 the trust fund case (*see* 2016Docs. 205 and 252).

#### **A. Chapin’s Opp and Cross-Motion**

Chapin opposes the motion and cross-moves for summary judgment dismissing the complaint in this action as far as it seeks foreclosure of Singer’s mechanic’s lien against the Project. Chapin argues, as it did above, that the retainage never became due and owing to Ibex because Ibex breached its contract with Chapin by failing to pay subcontractors, was terminated for default, and failed to complete its scope of work. Alternatively, the money was spent satisfying Ibex’s other obligations, so there is no money to which Singer’s lien could attach. Further, as Singer argues that Chapin, as the owner, had no obligation to pay the subcontractors, the action should be dismissed (*see* Chapin Opp. at 3, 2016Doc. 233).

Chapin, as above, argues its contract with Ibex was not on a “time and materials” basis, but pursuant to written orders each with a fixed scope of work for a lump sum price (*id.* at 4, citing *Juliano Aff*, ¶¶ 27-31). Further, the LOI allowed Chapin to terminate Ibex for cause if Ibex failed to pay its contractors, which it did (*id.*, citing *Juliano Aff*, ¶¶ 32-37). Further, as

above, Chapin argues the Retainage funds were not due and owing Ibex when it defaulted. Chapin completed the scope of work of the Project using those retained funds (and more).

### **B. Director Door Industries, Ltd.'s Claims**

In its second amended complaint Singer named Director Door Industries, Ltd (Director Door), another subcontractor that had filed a mechanics lien against the Project as a defendant (see Compl. para. 36, 2016Doc. 172). Director filed an answer and asserted a cross-claim against Chapin claiming it is entitled to approximately \$335,000 from Chapin. In motion sequence 009, Chapin seeks dismissal of the cross-claim and Director Doors has asserts a cross-motion against Chapin based on its mechanics lien. These competing motions assert essentially the same claims and defenses advanced in motion sequence 002.

Direct Door alleges Ibex entered into an agreement with Director Door for the supply and delivery of hollow metal phase 1 work materials. On May 27, 2016, within 8 months of the delivery of the last of the materials, Director Door filed a mechanic's lien for about \$335,000. Chapin and defendant Atlantic Specialty Insurance Company issued and filed a bond purporting to cancel the Director Door lien that August. Chapin terminated Ibex from the Project on June 27, 2016. On July 21, 2016, and thereafter, despite having had notice of Director Door's lien, Chapin used the Retainage to pay other materialmen and subcontractors (*see* Director Door Opp. at 6).

Director Door adopts the arguments of Singer in the companion case, discussed above. If the court finds the retainage does not constitute lien fund assets, Director Door is still entitled to be paid for the supplied materials, which Chapin kept and for which it did not pay (*id.* at 14). According to Chapin's records, it paid Ibex \$75, 000 for the Hollow Metal – Phase I Work Materials, withholding \$8,300 (*id.* at 15). Therefore, Director Door is entitled to \$335,000 (*id.*).

## **IV. DISCUSSION**

### **A. Standard**

The standards for summary judgment are well settled. Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see* CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 329 [1986]; *Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form, which may include

deposition transcripts and other proof annexed to an attorney's affirmation (*see Alvarez v Prospect Hosp., supra; Olan v Farrell Lines*, 64 NY2d 1092 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Absent a sufficient showing, the court should deny the motion without regard to the strength of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Once the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see Kaufman v Silver*, 90 NY2d 204, 208 [1997]). Although the court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see Negri v Stop & Shop*, 65 NY2d 625 [1985]) and summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see Rotuba Extruders, v Ceppos*, 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and “[a] shadowy semblance of an issue” are insufficient to defeat a summary judgment motion (*S.J. Capalin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]; *see Zuckerman v City of New York, supra; Ehrlich v American Moninger Greenhouse Mfg. Corp.*, 26 NY2d 255, 259 [1970]).

Lastly, “[a] motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility” (*Ruiz v Griffin*, 71 AD3d 1112 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]).

### **B. Existence of a Trust**

“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 citations omitted]). The primary purpose of Lien Law Article 3-A is to ensure that those who have expended labor and materials to improve real property at the direction of an owner or a general contractor receive payment for the work actually performed (*id.*; *see Langston v Triboro Contracting, Inc.*, 44 AD3d 365 [1st Dept 2007]). Thus, “Lien Law article 3-A mandates that once a trust comes into existence, its funds may not be diverted for

non-trust purposes” (*Matter of RLI Ins. Co., Sur. Div. v New York State Dept. of Labor*, 97 NY2d 256, 263 [2002]).

The parties agree that if the Retainage was due and owing to Ibex, Singer and Director Door may claim against it, as an asset held in trust for the benefit of Singer and the other subcontractors. However, the parties dispute whether those funds were earned by Ibex, or whether Ibex breached its contract with Chapin and the Retainage funds were either unearned or properly used to complete or repair incomplete parts of the Project.

The LOI provides “Owner will pay Contractor for its actual, provable costs incurred in connection with the performance of the work, plus a fee of 5%. . . . Contractor shall be entitled to submit applications for payment monthly for reimbursement of costs incurred, plus the amount of Contractor’s fee earned as of date of same. Owner shall pay sums due under such invoices within thirty (30) days of receipt” (LOI, Doc. no.74). The LOI also contemplates the parties’ plan to enter into a future formal agreement.

As Chapin argues and Singer does not dispute, Chapin and Ibex then entered into a series of fixed-price scopes of work (embodied in the Change Orders (Docs. No. 85-88). Between June 2016 when Ibex was terminated and January 2018, Chapin paid \$4,808,847 for work represented by Change Orders which work Ibex failed to complete (*see* Juliano Aff., Doc. No. 84).

The parties do not dispute Ibex failed to pay funds due to its subcontractors but Singer and Direct Door maintain that failure is not a breach of the LOI. The court disagrees. Under the terms of the LOI, each time Ibex submits an invoice for partial payment in connection with work performed, it is required to certify and warrant on a lien waiver form (see form appended to the LOI as exhibit B, Doc. No. 50) “that it has fully paid to date all vendors and subcontractors in connection with the Project” (*id.* ex. B). Ibex’s admitted failure to pay its vendors and subcontractors constitutes a breach of that lien waiver provision of the LOI.

The court has considered the parties’ other arguments, including Chapin’s argument that the Retainage funds were used for proper purposes, and finds them either unavailing or superfluous considering the finding made in this Decision and Order.

It is hereby

**ORDERED** that the motion for summary judgment (motion sequence number 002) of defendant, The Chapin School Ltd. in the action bearing Index Number 654538/2017 is **GRANTED** and the complaint as to it is hereby **DISMISSED**: and it is further

**ORDERED** that the motion of plaintiff, Singer Equipment, Co., Inc. for summary judgment in the action bearing Index Number 654732/2016 (motion sequence number 009), declaring that monies withheld by defendant Chapin School Ltd. from certain approved payments to Ibex Construction Co., LLC is **DENIED** and the cross-motion of defendant Chapin School Ltd. to dismiss the complaint as to it is **GRANTED**: and it is further

**ORDERED** that the cross-motion of defendant, Director Door Industries, Ltd. in the action bearing Index Number 654732/2016 is **DENIED** and the cross-motion of defendant, The Chapin School, Ltd. is **GRANTED**; and it is further

**ORDERED** that the complaints and cross-complaints as against The Chapin School, Ltd. are hereby **DISMISSED** in their entirety in both cases and the Clerk of the Court is directed to enter judgment against plaintiff Singer Equipment Co., Inc. and defendant Director Door Industries, Ltd. in favor of defendant The Chapin School, Ltd. dismissing the complaints as to it together with costs and disbursements as taxed in both cases against Singer Equipment Co., Inc. upon presentation of a proper bill of costs; and it is further

**ORDERED** that the cases having been dismissed as to The Chapin School, Ltd. the decision of this court dated October 1, 2018 granting Singer's motion for class certification is hereby **VACATED** as to defendant, The Chapin School, Ltd. and any notice to be sent pursuant to said decision shall state that the case has been dismissed as against The Chapin School, Ltd.

This constitutes the decision and order of the court.

**DATED: October 6, 2020**

**ENTER,**

*O. P. Sherwood*  

---

**O. PETER SHERWOOD J.S.C.**