

**COMMERCIAL DIVISION OF THE SUPREME COURT
ERIE COUNTY, STATE OF NEW YORK**

SICILIA CONSTRUCTION COMPANY, INC.
Individually and on behalf of all Beneficiaries
of the Lien Law Trust arising out of a certain
contract for the Public Improvement herein described

Plaintiff

**MEMORANDUM
DECISION**

vs.

Index No. 258/04

MASTERS EDGE, INC., CARMELLO SCIASCIA,
DINO SCIASCIA, GIUSEPPE SURDI

Defendants

BEFORE: **HON. JOHN M. CURRAN, J.S.C.**

APPEARANCES: **AMIGONE, SANCHEZ, MATTREY & MARSHALL, LLP**
Attorneys for Plaintiff
Richard A. Clack, Esq., of Counsel

DUKE, HOLZMAN, PHOTIADIS & GRESENS, LLP
Attorneys for Defendants
James W. Gresens, Esq., of Counsel

CURRAN, J.

This action was commenced in 2004. It arises out of three construction projects on which plaintiff and defendant, Masters Edge, worked cooperatively in 2000 and 2001. On two of those projects, plaintiff performed work for Masters Edge. On the third project, Masters Edge performed work for the plaintiff.

The first project was owned by Letchworth Central School District (hereinafter referred to as the “Letchworth Project”). On that project, Masters Edge was a subcontractor doing concrete work for its general contractor, Haseley Trucking (“Haseley”), and plaintiff performed work for Masters Edge. On the second project, plaintiff performed work for Masters Edge on a site owned by Keshequa Central School District in Nunda, New York (hereinafter referred to as the “Nunda Project”). On the third project, Masters Edge performed work for plaintiff in connection with work performed on behalf of the Village of Kenmore (hereinafter referred to as the “Kenmore Project”).

The principals of plaintiff and Masters Edge were social acquaintances of one another as well as engaged in similar concrete businesses. The Letchworth Project came about when plaintiff was looking for work in July of 2000. At that time, Masters Edge had already been performing work as part of the Letchworth Project and had in place an understanding with Haseley as to its compensation. Additionally, Masters Edge had in place an understanding as to price with its main supplier of concrete, Hanson Aggregates BRD, Inc. (“Hanson”). One of plaintiff’s principals, Charles Marotta (“Marotta”), testified that he and the president of Masters Edge, Giuseppe Surdi (“Surdi”), agreed that Masters Edge would pay to plaintiff whatever Masters Edge was receiving for compensation from Haseley for the concrete work, less the actual cost of materials which were to be paid directly by Masters Edge. Plaintiff performed its work on the Letchworth Project in 2000 and 2001. Plaintiff submitted its handwritten slips to Masters Edge constituting its invoices for the services rendered and they were timely paid. Surdi testified that Masters Edge paid to plaintiff everything it received from Haseley for the

concrete work performed by plaintiff and that it did so only after Haseley had paid Masters Edge.

Plaintiff never complained that it had not been paid for its work on the Letchworth Project until after this litigation had been commenced, discovery had occurred and an amended complaint served. The record reflects that, during the course of the discovery process, plaintiff concluded that Masters Edge had deducted from amounts owed to plaintiff a cost of materials which was in excess of the actual cost charged to Masters Edge by Hanson. On this basis, plaintiff purports to compute additional monies owed to it on the Letchworth Project. Plaintiff's evidence in this regard relies upon delivery slips received from Hanson at the job site representing the amount of product delivered to the site (Exhibit 18) and the amounts previously deducted on what was owed to plaintiff as to certain "time and materials work" performed for the Letchworth Project (Exhibit 15). Plaintiff asserts that, by comparing these two documents, the proof establishes that Masters Edge deducted more for the cost of the materials than was actually charged to it by Hanson. Plaintiff's proof is complicated by the fact that the original business records of Masters Edge maintained in connection with the Letchworth Project (other than the computer printout attached as part of Exhibit 9) were allegedly destroyed in a fire or otherwise inexplicably discarded.

The Nunda Project was the second one on which the parties cooperated and came about when Haseley approached plaintiff to do the work. The parties agree that Masters Edge did not want to be involved in the work because Haseley had been a slow payer of its invoices in the past. Nevertheless, Masters Edge agreed to enter into a similar arrangement with Haseley as it had with the Letchworth Project and allowed plaintiff to perform the concrete

work on the Nunda Project. Marotta testified that the compensation arrangement was the same as on the Letchworth Project in that plaintiff was to be paid everything that Masters Edge received from Haseley for the performance of the labor, again less the actual cost of materials to be paid directly by Masters Edge. Surdi testified that Masters Edge gave plaintiff the price they quoted as evidenced by Exhibit 1 but in turn marked up that price to Haseley as evidenced in Exhibit 3. Surdi testified that he never assured Marotta that he would not charge a mark up to Haseley. On cross-examination, Surdi admitted that he prepared Exhibit 1 to mislead Marotta into thinking that those were the prices he was getting from Haseley. Surdi also admitted that he did so to pretend like he was getting those prices from Haseley when in fact he was getting more as evidenced by Exhibit 3.

Plaintiff completed its work on the Nunda Project in 2000. It submitted its handwritten slips seeking payment on a timely basis to Masters Edge. Masters Edge sought payment from Haseley but Haseley ultimately defaulted in its full payment of the amounts due. Masters Edge thereafter hired a law firm to protect its interests with respect to its claim against Haseley but that law firm was purportedly negligent in doing so. As a result, Masters Edge pursued a claim against that law firm which paid the amounts owed by Haseley in full. Masters Edge refused to pay those amounts to plaintiff until plaintiff agreed that Masters Edge could deduct the attorneys fees it paid in recovering the amounts owed as well as the other computations made by Masters Edge shown in Exhibit 12. The parties dispute whether plaintiff consented to a deduction for attorneys fees although it ultimately became clear that plaintiff did not so consent as this lawsuit continued.

Masters Edge received the money from the law firm in full payment of the claim against Haseley in April of 2005. Masters Edge did not pay the amounts it admitted it owed to plaintiff until October of 2008. In the meantime, the proof is undisputed that Masters Edge expended the balance of the monies received from Haseley through the law firm on other matters unrelated to the Nunda Project.

As to the Kenmore Project, the parties agree that the compensation arrangement was for plaintiff to pay to Masters Edge everything it received from the Village of Kenmore with respect to the concrete work, less the cost of materials. The proof establishes that this was in fact done. The only remaining item, as alleged in the third cause of action of the second amended complaint, was the cost of a bond in the sum of \$752.00. Surdi testified at trial that he admitted he owed this amount to plaintiff and the Court thereupon granted plaintiff's motion for a directed verdict on the basis of admissions pursuant to CPLR 4401 and entered judgment in the amount of \$752.00 plus pre-judgment interest at the lawful rate. Thus, the third cause of action in the second amended complaint was disposed of prior to the completion of the trial.

The second amended complaint contains two other causes of action. The first cause of action seeks payment on the Nunda Project and the Letchworth Project. The second cause of action alleges a violation of Article 3-A of the New York Lien Law based on the expenditure by Masters Edge of trust funds as received from Haseley Trucking through the law firm. Plaintiff alleges that all three of the officers of Masters Edge, i.e., Surdi, Dino Sciascia and Carmello Sciascia, are personally liable pursuant to the Lien Law for the trust funds expended on other matters.

As to the Letchworth Project, the credible testimony establishes that Masters Edge agreed to pay to plaintiff everything it received from Haseley Trucking for the concrete labor services, less the cost of materials. While the record appears to support a conclusion that Masters Edge most likely inflated the cost of those materials, the proof on this issue was speculative and inconclusive. Both of the witnesses who testified on behalf of the plaintiff admitted that they had no knowledge as to how much was owed on the Letchworth Project and were unable to calculate the amount allegedly owed with any reliability. Accordingly, the Court cannot award plaintiff any damages on the Letchworth Project because plaintiff was unable to compute those damages by a preponderance of the evidence.

As to the Nunda Project, the record reflects that Surdi intentionally misled the plaintiff as to how much it would be paid on that project. Moreover, the credible evidence establishes that the arrangement between the parties on the Nunda Project was exactly the same as for the Letchworth Project and the Kenmore Project: Masters Edge obligated itself to pay to plaintiff whatever it received for concrete labor services from Haseley, less the actual cost of materials. The evidence clearly shows that Masters Edge failed to honor its bargain in this regard.

The computations set forth by Masters Edge in Exhibit 12 are inaccurate for a number of reasons. First, the evidence shows that the amount of \$9,650.20 represented by Check No. 7711 dated January 30, 2001, was not paid to plaintiff in connection with the Nunda Project but rather with respect to the Letchworth Project. Exhibit 9 substantiates this conclusion. Second, Exhibit 12 misrepresents the amounts deducted for the cost of materials. Exhibit 14 establishes that the materials costs on the Nunda Project were \$20,335.84. Exhibit

12 overstates that amount by more than \$8,000.00. Finally, Exhibit 12 deducts attorneys' fees paid by Masters Edge in recouping monies from Haseley Trucking which was not part of the original bargain entered into between the parties. Moreover, the credible evidence shows that this bargain was never altered and that plaintiff never consented to a deduction for the attorneys' fees.

Based on the foregoing, the Court calculates that plaintiff's damages on the first cause of action for the Nunda Project are as follows:

	\$ 96,034.90	(received from Haseley - Ex. 14)
-	<u>20,335.84</u>	(actual cost of materials - Ex. 14)
	\$ 75,699.06	
-	<u>16,674.53</u>	(amounts paid in 2000 and 2001 - Ex. 12)
	\$ 59,024.53	
+	<u>18,592.68</u>	(9% interest from 5-1-05 to 10-30-08)
	\$ 77,617.21	
-	<u>13,154.88</u>	(paid 10-30-08)
	\$ 64,462.33	(amount owed since 11-1-08, plus interest thereafter at 9%)

Based on the above calculation, plaintiff is entitled to judgment against Masters Edge on the first cause of action in the sum of \$64,462.33, plus interest at the lawful rate since November 1, 2008, together with all costs and disbursements to be taxed.

With respect to the second cause of action for a violation of the Lien Law, the credible evidence establishes that all three individual defendants were aware that monies were owed to plaintiff with respect to the Nunda Project, understood that the monies received from Haseley through the law firm were owed to plaintiff with respect to the Nunda Project, and participated in Masters Edge as officers to disburse those monies on matters unrelated to the Nunda Project. The proof therefore establishes that all three individuals, i.e., Surdi, Dino Sciascia and Carmello Sciascia, knowingly participated in the unlawful use of trust funds

(*Schwadron v Freund*, 69 Misc 2d 342 [Sup Ct, Rockland County 1972]). These three individuals are therefore personally liable for amounts owed to plaintiff. However, the parties agree that, for a violation of Lien Law, it is appropriate to deduct the amounts of attorneys' fees incurred in collecting against Haseley and the law firm. Therefore, plaintiff is entitled to enter judgment against Masters Edge and the three individuals, jointly and severally, for a violation of the Lien Law trust provisions of Article 3-A of the New York Lien Law in the amount calculated as follows:

	\$ 64,462.33
-	<u>12,358.64</u>
	\$ 52,103.69

Accordingly, plaintiff is entitled to judgment against Masters Edge, Surdi, Dino Sciascia and Carmello Sciascia, jointly and severally, on the second cause of action in the sum of \$52,103.69, plus prejudgment interest at the lawful rate since November 1, 2008, together with costs and disbursements to be taxed.

To avoid potential for double recovery, it is understood that payments made on either cause of action reduce amounts owed on both causes of action.

As indicated, the Court also will enter judgment on the verdict directed during trial as to the third cause of action. Plaintiff's counsel is to settle the Order and Judgment upon this decision with counsel for the defendants.

DATED: December 9, 2009

HON. JOHN M. CURRAN, J.S.C.