

**Colgate Scaffolding & Equipment Corp. v York
Hunter City Services, Inc.**

2002 NY Slip Op 30046(U)

January 24, 2002

Supreme Court, New York County

Docket Number: 0060208/2001

Judge: Paula, J. Omansky

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

PRESENT: PAULA J. OMANSKY
Justice

PART 47

COLGATE SCAFFOLDING

INDEX NO.

602089/01

MOTION DATE

11/20/01

MOTION SEQ. NO.

007

MOTION CAL. NO.

007 32

- v -

YORK HUNTER CITY SERVICES

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED


Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.**

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE

Dated: 1/24/02


PAULA J. OMANSKY

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 47**

-----X
COLGATE SCAFFOLDING & EQUIPMENT CORP., on
behalf of itself and all others entitled
as Lien Law Trust Beneficiaries to share in the
trust funds created pursuant to Article 3-A of
the Lien Law

Index No. 602089/01

Plaintiffs,

DECISION AND ORDER

-against-

YORK HUNTER CITY SERVICES, INC. NEW YORK CITY
SCHOOL CONSTRUCTION AUTHORITY, KENNETH COLAO,
STEVEN GUZZARDI, BILL COTE, ALTON LEWIS,
CRAIG BELESI and JOHN DOES nos. 1 through 10

Defendants.

----- X
PAULA J. OMANSKY, J.:

Plaintiff Colgate Scaffolding & Equipment Corp. ("Colgate") on behalf of itself and all others entitled as Lien Law Trust Beneficiaries moves, pursuant to CPLR 902 and section 77(a) of the Lien Law, for an order declaring that the action may be maintained as a class action. Plaintiff Colgate also requests that the court describe the class as set forth in the complaint and approve the contents and form of service of the proposed notice in the form annexed as exhibit I.

FACTS

Colgate has commenced this action pursuant to Article 3-a and section 77 of the Lien Law to set aside defendants' alleged diversion of Lien Law trust funds arising out of a public improvement, namely the renovation of a large number of school

buildings under "Contract Nos. C000007538, C000007087, and C000007554" (the "Project"). The trust funds consist of monies paid to defendant York Hunter City Services, Inc. ("York Hunter") by the New York City School Construction Authority (SCA"), a non-party, for the benefit of Colgate and other subcontractors, laborers and materialmen who performed the work, labor and services necessary to enable York Hunter to fulfill its contract obligations to SCA as Construction Manager of the Project.

Plaintiff Colgate alleged that York Hunter has abused its position as trustee and diverted trust funds. As of September 18, 2001, Colgate alleges that it has not been paid \$875,223.67, for costs of providing scaffolding and related materials for the Project.

Colgate also states that York Hunter has failed and refused to provide the books and records it is required by law to maintain as trustee of the Lien Law trust funds. On August 15, 2000, Colgate served a demand pursuant to section 76 of the Lien Law requiring York Hunter to produce the Lien Law books and records. Colgate obtained an order from Honorable Alice Schlesinger, dated May 17, 2001 which mandated that York Hunter comply with Colgate's demand. York Hunter did not produce the records and Colgate obtained another order, dated June 13, 2001 which directed compliance with Colgate's demand under the threat of civil and criminal sanctions. Colgate obtained another order, dated July 11, 2001 which imposed

costs and fine of \$100.00 per day against York Hunter for continued noncompliance. IN an order dated October 31, 2001 Justice Schlesinger assessed a \$10,250 sanction against York Hunter.

DISCUSSION

Section 77(1) of the Lien Law permits any party with a trust claim to bring an action to enforce the claim on behalf of all beneficiaries (West End Interiors, Ltd. v Aim Constr. & Contracting Corp., 286 AD2d 250, 253 [1st Dept 2001]). This action must be brought as a class action (Callender v Shirell Air, Inc., 282 AD2d 564, 565 [2d Dept 2001], citing Atlas Bldg. Sys., Inc. v Rende, 236 AD2d 494, 496 [2d Dept 1997]). The practice, pleadings, forms and procedures of actions brought under section 77(1) of the Lien Law

shall conform as nearly as may be to the practice, pleadings, forms and procedure in a class action as provided in article nine of the civil practice law and rules; provided, however, that in determining whether the prerequisites of a class action have been satisfied, the provisions of paragraph one of subdivision (a) of section nine hundred one of such law and rules may be waived at the discretion of the court.

(Lien Law § 77[a]).

Contrary to York Hunter's assertions, plaintiff Colgate has meet the criteria for numerosity alleging that there are 130 contractors and subcontractors involved in the project. According to Colgate, the exact number of potential class members is only known to York Hunter which has failed to comply with the demand letter and numerous court orders. Given the potentially large class and the fact that the court has discretion to waive the

numerosity requirement in CPLR 901(a)(1), the court finds that Colgate statement concerning the number of potential class and its description of the scope of the class to be adequate (Callender v Shirell Air, Inc., supra, 282 AD2d, at 565).

In addition, the requirements of CPLR 901(a)(2) and (3) are satisfied. Although York Hunter maintains that it may refute the claims of some potential class members, this defendant does not specifically state what issue of law or fact applies to some potential class members and not to others (ibid.). Moreover, the fact that individual members of the proposed class may have suffered different damages is not dispositive. In New York, the complexity of the damage issue, or the fact that proof of action damages may differ among individual members of the class is not an automatic bar to class certification (Pruitt v Rockefeller Ctr. Props., Inc., 167 AD2d 14, 22-23 [1st Dept 1991]; Vickers v Home Federal Sav. & Loan Assoc. of East Rochester, 62 AD2d 1171, 1172 [4th Dept 1978]). If necessary, CPLR 906 permits the court to order that an action be maintained on a class basis as to the issue of liability while leaving damages for an individual determination (Vickers v Home Federal Sav. & Loan Assoc. of East Rochester, supra). The court may also carve out subclasses of plaintiffs (Weinberg v Hertz Corp., 116 AD2d 1, 6 [1st Dept], dismissal denied 68 NY2d 901 [1986], affd 69 NY2d 979 [1987]; CPLR 906[2]; see, Lien Law § 77[8][preference of trust classes]). At present, York Hunter

has not stated sufficient facts to require bifurcation of issues or the creation of subclasses.

This court also finds that Colgate, as Construction Manager of the Project, is in a unique position and is able to adequately represent the interests of the class (Cranesville Block Co., Inc. v Crisafulli, 116 AD2d 882, 883 [3d Dept 1986]; CPLR 901[a][3] and [4]). The present record indicates that plaintiff's claims are typical of those of the class and are not antagonistic to the proposed class members (Friar Vanguard Holding Corp., 78 A.D.2d 83, 99 [2d Dept 1980]). Here, the same course of conduct and the same legal theory applies to both Colgate and the unnamed members of the putative class (Pruitt v Rockefeller Ctr. Props. Inc., supra, 167 AD2d, at 22-23).

As for manageability, the disposition of key issues will resolve most, if not all, of the allegations against defendants (Brandon v Chefetz, 106 AD2d 162, 168 [2d Dept 1985]; Friar Vanguard Holding Corp., supra). The action also involves a limited trust and is easily manageable by the court (Cranesville Block Co., Inc. v Crisafulli, supra; CPLR 901[a][3]).

Plaintiff's motion for class certification is granted. The remainder of plaintiff's application is granted to the extent noted in the decretal paragraphs of this order.

Accordingly, it is

ORDERED that plaintiff Colgate's motion is granted and this

action shall be maintained as a class action under article 9 of the CPLR by plaintiff, itself and as representative party for the following class:

all the beneficiaries of the trust created by operation of Article 3-A of the Lien law, consisting of monies paid to defendant York Hunter City Services, Inc. n/k/a York Capital Construction, Inc. ("York Hunter") for the benefit of contractors, subcontractors, laborers and materialmen who performed work, labor and services in connection with the renovation of several schools pursuant to York Hunter's agreement with the New York City School Construction Authority ("SCA") in Contract Nos. C000007538, C000007087, and C000007554.

and it is further

ORDERED that plaintiff Colgate's attorney, the law firm of Atlas & Marantz LLP, shall be designated as Class counsel; and it is further

ORDERED that within ten days of filing of a notice of entry of this order, plaintiff Colgate shall present to the court a plan for giving notice to the class and proposed form of notice to the class and attached proof of claim designated to meet the requirements of CPLR 904 which shall indicate to the class members that unless they "opt out" within a fixed time their claims will be barred. Within ten days thereafter, the defendants shall file with the court and serve upon Colgate their suggestions and objections, if any, to the forms of notice and proof of claim submitted; and it is further

ORDERED that this court hereby retains jurisdiction under Article 9 of the CPLR to correct, modify, annul, vacate, and

supplement this Order from time to time before the decision on the merits of the common questions as it may deem proper; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on March 29, 2002, at 11:00 a.m. at 71 Thomas Street, Room 205, New York, N.Y.

DATED: January 24, 2002

ENTER:



PAULA J. OMANSKY
J.S.C.