

**Kamco Supply Corp. v Nevada Constr. &
Drywall, Inc.**

2007 NY Slip Op 32890(U)

September 10, 2007

Supreme Court, New York County

Docket Number: 0105487/2001

Judge: Joan Madden

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

PRESENT: HON. JOAN A. MADDEN
Justice

PART 11

KAMCO SUPPLY CORP.

INDEX NO. : 105487/01

Plaintiffs,

MOTION DATE: 7-19-07

- v -

MOTION SEQ. NO.:014

**NEVADA CONSTRUCTION AND DRYWALL, INC.,
et al**

MOTION CAL. NO.:

Defendant.

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 _____

Cross-Motion: Yes No

PAPERS NUMBERED
FILED
SEP 18 2007
NEW YORK
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In this action brought under Article 3-A of the Lien Law, defendants Abcon Associates ("Abcon"), Michael Zenobia, Jr. and Christopher Zenobia move for an order pursuant to CPLR 5021(a)(2) directing that the Clerk of the Court to partially satisfy a judgment entered against them on June 17, 2003, in favor of plaintiff Kamco Supply Corp. ("Kamco"), on behalf of itself and others persons similarly situated, in the amount of \$372,630.71. Kamco and defendant Saint

Vincent's Catholic Medical Center ("St Vincent's") oppose the motion, which is denied for the reasons below.

This action arises out of a construction project performed for St Vincent's. Abcon was the general contractor on the project. Kamco and some of the defendants were suppliers and subcontractors on the project. This action began as one to foreclose on a mechanic's lien. However, based on information Kamco obtained from St Vincent's, Kamco amended its complaint to allege that Abcon failed to comply with article 3-A of the Lien Law, which requires a general contractor to maintain certain funds intended for construction projects in trust to assure the payment of suppliers, subcontractors and others working on the project. By decision and order dated December 20, 2001, this court found that Kamco had met the statutory requirements to allow the action to proceed as a Lien Law trust fund action.

Subsequently, the parties stipulated to "the appointment of a Special Referee to hear and determine all disputes regarding disclosure and disbursement of trust fund moneys." In his report, the Special Referee found that "Abcon failed to rebut the presumption found in Lien Law § 75(4) which is it had applied or consented to the application of trust funds actually received, for purposes other than a purpose of the trust."

Kamco moved to confirm the Special Referee's report and for summary judgment on its claim under the Lien Law in the amount of \$289,933, representing the difference between the total amount received by Abcon from St Vincent's (\$884,009) and the amount paid by Abcon to those entities involved in the project (\$543,551.39).

By amended decision and order dated May 8, 2003, this court granted the motion to confirm that Special Referee's report and granted summary judgment in favor of Kamco and the similarly situated trust fund beneficiaries, and against Abcon and its principals, Michael Zenobio, Jr. and Christopher Zenobio in the amount of \$289,933, plus any interest accruing on that amount, together with costs and disbursements.

On June 17, 2003, a judgment was entered in favor Kamco on behalf of itself and others persons similarly situated, and against Abcon and its principals, Michael Zenobio, Jr. and Christopher Zenobio in the amount of \$372,630.71, consisting of the principal amount of \$289,933, pre-judgment interest in the amount of \$82,142.39 and costs and disbursements in the

amount of \$555.32 . This amount consists of \$289,933, together with interest in the amount of \$82,142.39 and costs and disbursements.

Although the judgment was entered more than four years ago, Kamco has been unable to collect any of the judgment. In November 2006, in an effort to enforce the judgment, Kamco moved, pursuant to CPLR 5228(a), for the appointment of a special receiver of certain personal property of Abcon, Michael Zenobia, Jr. and Christopher Zenobia, and the court granted the motion, upon consent of defendants' counsel. By order dated May 16, 2007, the court appointed a special receiver for this purpose, and authorized him to "take all necessary action to collect the profits or any other moneys due or to sell the interest" of defendants in certain personal property in an amount sufficient to satisfy the judgment and interest thereon from June 17, 2003.

Defendants now move pursuant to CPLR 5021(a)(2) to direct that the Clerk of the Court to partially satisfy a judgment to the extent of \$14,798.71 (\$11,529.00 claim plus interest), the asserted amount of the claim on trust assets of Clear Image Glass, Inc. ("Clear Image"). In support of the motion, defendants submit a release from Clear Image discharging defendants from liability based on a \$5,000 payment from Abcon, and a Satisfaction of Mechanic's Lien in the sum of \$11,529.00.

Kamco opposes the motion, asserting that it is too late to amend a judgment and that defendants must pay it. Furthermore, Kamco asserts that the judgment should be modified upward to include the \$66,877 paid by St Vincent's to Abcon's subcontractors and that any partial satisfaction of the judgment would be only in the amount of \$5,000 paid by defendants to Clear Image.

St Vincent's also opposes the motion, asserting that the proceedings are stayed with respect to it since it is in bankruptcy and that the, in any event, the motion does not seek relief against it.

CPLR 5102(a)(2) provides, in part that "[t]he clerk of the court in which the judgment was entered...shall make an entry of the satisfaction or partial satisfaction on the docket of the judgment upon...the order of the court, made upon motion with such notice to other persons as the court may require, when the judgment has been wholly or partially satisfied but the judgment

debtor cannot furnish the clerk with the satisfaction or partial satisfaction-piece..." In general, this provision is "useful in any situation in which the judgment has been satisfied in whole or in part but the debtor cannot obtain a satisfaction piece from the judgment creditor." Book 7B, McKinney's Cons. Laws of NY, § 5021(a)(2), at 705.

In this case, however, the issue not addressed by the parties is whether payment of a trust beneficiary results in satisfaction of a judgment obtained on behalf of all trust beneficiaries pursuant to article 3-A of the Lien Law.

"Article 3-A of the Lien Law (Lien Law §§ 70-79-a) create[s] trust funds out of certain construction payments or funds to assure payment of subcontractors, suppliers..." Canron Corp. v City of New York, 89 NY2d 147, 153 (1996)(internal citation omitted). The trust fund provisions contained in Article 3-A of the Lien Law "were intended to insure that funds obtained for financing of an improvement of real property and moneys earned in the performance of a contract for either privately owned improvement or a public improvement will in fact be used to pay the costs of that improvement." Id., at 153-154. As indicated above, in this case, it has been determined that defendants used the assets in the trust fund for purposes other than the trust and, as a result, a judgment was entered against them for these amounts.

While Clear Image is a trust beneficiary, "nothing in Article 3-A gives a single trust beneficiary the right to demand dollar for dollar repayment of its claim against the trust fund, without regard to the other assets and/or other beneficiaries." Higgins-Kieffer, Inc. v. State, 165 Misc2d 425, 429 (Ct Claims, 1995). Instead, the distribution of the assets of the trust must be made in accordance with Lien Law § 77(8), which provides, *inter alia*, for the distribution of assets to trust beneficiaries on a pro rata basis. Id.; see also, Rifunburg Construction, Inc. v. Construction/Directors Managment Systems, Inc., 192 AD2d 1029 (3d Dept 1993).

As the assets of the Article 3-A trust fund belong to the beneficiaries as a whole and must be distributed according to a statutorily prescribed method, defendants cannot not satisfy the judgment by settling with the individual trust beneficiaries. To find otherwise would potentially result in a situation in which trust beneficiaries would be left with the choice of settling with defendants or risk being left without any trust assets to pay their claims. Accordingly, defendants' motion must be denied.

Finally, contrary to Kamco's argument, there is no basis for increasing the judgment by the amount of certain of St Vincent's claims for which defendants' liability has not yet been established.

Accordingly, in view of the above, it is
ORDERED that defendants' motion is denied.

DATED: September 10, 2007



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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