

**Foremost Contr., LLC v New 118th LLC**

2008 NY Slip Op 32794(U)

October 6, 2008

Supreme Court, New York County

Docket Number: 107819/07

Judge: Martin Shulman

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

PRESENT: MARTIN SHULMAN  
J.S.C.

PART 1

Index Number : 107819/2007  
**FOREMOST CONTRACTING, LLC**  
VS.  
**NEW 118TH LLC**  
SEQUENCE NUMBER : 004  
SUMMARY JUDGMENT

INDEX NO. 107819/07  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 004  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ...  
Answering Affidavits — ~~Exhibits~~  
Replying Affidavits Exhs.

PAPERS NUMBERED  
1, 2  
3, 4  
5

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in  
accordance with the attached decision  
and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**FILED**  
OCT 09 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: OCT - 6 2008

MARTIN SHULMAN  
J.S.C. J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK: PART 1

-----X  
FOREMOST CONTRACTING, LLC,

Plaintiff,

Index No.: 107819/07

-against-

Decision & Order

NEW 118<sup>th</sup> LLC, MICHAEL HERSHKOWITZ  
and MICHAEL DAVIS,

Defendants.

-----X  
MARTIN SHULMAN, J.

**FILED**  
OCT 09 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Plaintiff Foremost Contracting, LLC ("Foremost" or "plaintiff"), a general contractor, commenced this action against defendants New 118<sup>th</sup> LLC (the "LLC"), Michael Hershkowitz ("Hershkowitz") and Michael Davis ("Davis") alleging four causes of action arising from Foremost's construction of a residential apartment building in upper Manhattan. The LLC owns the subject building and entered into a standard AIA contract with Foremost dated as of August 3, 2005 (the "construction contract") for the building's construction. Hershkowitz and Davis are members of the LLC who also signed a letter agreement with plaintiff dated August 2, 2005 (the "letter agreement") which references the construction contract.

Foremost's complaint alleges that it substantially completed construction of the building and is owed a balance of \$681,483.10 under the construction contract and \$282,046 under the letter agreement. Plaintiff has filed a mechanic's lien in that amount against the building and its first cause of action seeks foreclosure thereof. The complaint's remaining causes of action seek damages for: breach of the construction contract against the LLC (2<sup>nd</sup> cause of action); breach of the letter agreement against

Hershkowitz and Davis (3<sup>rd</sup> cause of action); and breach of trust against all defendants (4<sup>th</sup> cause of action).

Defendants appeared by counsel and interposed a verified answer and counterclaims. Soon thereafter, federal criminal charges were brought against Hershkowitz and another member of the LLC (who is not named as a party to this action) for alleged fraud in connection with various construction projects (including that at issue in this action) and an involuntary bankruptcy petition was filed with respect to the LLC.<sup>1</sup> The criminal matter and bankruptcy proceedings remain pending.

In motion sequence 003 (the “discovery motion”), plaintiff moves to strike the verified answer as to Hershkowitz and Davis based upon alleged discovery defaults and for entry of judgment against them as demanded in the complaint. Hershkowitz and Davis oppose the discovery motion.<sup>2</sup> In motion sequence 004 (the “summary judgment motion”), Davis moves for summary judgment dismissing the third and fourth causes of action as against him. Alternatively, Davis requests a stay of this action pursuant to CPLR §2201. Foremost opposes the summary judgment motion, which is hereby consolidated with the discovery motion for disposition. The court first addresses the summary judgment motion.

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<sup>1</sup> By short form order dated October 2, 2007, this court stayed proceedings in this action as to the LLC pending resolution of the bankruptcy proceedings.

<sup>2</sup> All three defendants appeared in this action by the same counsel who, after opposing the discovery motion on behalf of both Hershkowitz and Davis, subsequently withdrew as Hershkowitz’s counsel. Hershkowitz has failed to appear *pro se* or by new counsel.

### SUMMARY JUDGMENT

An award of summary judgment is appropriate when no issues of fact exist. See CPLR 3212(b); *Sun Yau Ko v. Lincoln Sav. Bank*, 99 A.D.2d 943, 473 N.Y.S.2d 397 (1<sup>st</sup> Dept., 1984), *aff'd* 62 N.Y.2d 938, 479 N.Y.S.2d 213 (1984); *Andre v. Pomeroy*, 35 N.Y.2d 361, 362 N.Y.S.2d 131 (1974). In order to prevail on a motion for summary judgment, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316 (1985); *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923 (1986). Indeed, the moving party has the burden to present evidentiary facts to establish his cause sufficiently to entitle him to judgment as a matter of law. *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979).

#### Breach of the Letter Agreement

In support of his request for summary judgment dismissing the third cause of action for breach of the letter agreement, Davis argues that he signed same in his capacity as a member of the LLC, rather than in his individual capacity. Foremost argues that, based upon the letter agreement's unambiguous language, Hershkowitz and Davis signed the letter agreement in their individual capacities.

The letter agreement, which is written on plaintiff's letterhead and references the construction contract, is addressed to Hershkowitz and provides in relevant part:

This letter confirms and memorializes our agreement whereby you promise and undertake to pay Foremost Contracting LLC the sum of \$282,046.00 as additional consideration for the work to be performed and materials to be supplied by Foremost Contracting LLC pursuant to the

[construction contract]. You acknowledge and represent that as a member of New 118 LLC you will benefit from the performance of the [construction contract] and that there is sufficient consideration for this undertaking to support this agreement because, among other matters, Foremost Contracting LLC would not have executed the [construction contract] for less than \$6,631,618.00 without your undertaking as herein provided. (Bracketed matter added)

The letter agreement is signed by Anthony Piscione on behalf of Foremost. Below the phrase "Agreed to and Accepted:" are two signature lines where Hershkowitz's and Davis's individual names and signatures appear.

Plaintiff characterizes the letter agreement as a personal undertaking independent of the construction contract. Davis characterizes it as an amendment to the construction contract.<sup>3</sup>

Davis has not established entitlement to summary judgment dismissing the third cause of action. Contrary to Davis' interpretation, the letter agreement's language does not clearly establish that it was entered into by the LLC and merely signed by Hershkowitz and Davis in their capacities as members thereof. Foremost's interpretation is plausible, thus raising an issue of fact which precludes summary judgment. Accordingly, the portion of Davis' motion for summary judgment dismissing the third cause of action is denied.

**Breach of Trust**

The fourth cause of action for breach of trust seeks damages of \$681,483.10 and is premised upon the alleged misuse of loan proceeds the LLC obtained from North

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<sup>3</sup> Although the construction contract and letter agreement contain different dates, Davis contends, and plaintiff does not dispute, that both documents were signed simultaneously.

Fork Bank in connection with the subject construction project, which funds were required to be held in trust for the payment of the construction work under Lien Law §13<sup>4</sup> and the terms of the loan agreement. Foremost claims that the LLC and its principals used such loan proceeds “for other purposes” rather than pay Foremost for the construction work it performed.

Davis argues that the complaint fails to satisfy the pleading requirements of CPLR 3016(b) and further contends that this cause of action can only be maintained against the LLC and not against him as a member because he is not a party to the LLC’s loan documents (although he did personally guarantee the LLC’s loan from North Fork Bank). As plaintiff correctly notes, corporate officers such as Davis may be liable individually for the misuse of Lien Law trust funds. *See, e.g.*, Lien Law §79-a; *Atlas Building Systems, Inc. v. Rende*, 236 A.D.2d 494, 653 N.Y.S.2d 694 (2<sup>nd</sup> Dept. 1997) (officers and directors of corporate trustee are under a duty to the beneficiaries of a trust administered by the corporation not to cause the corporation to misappropriate trust property and will be personally liable for participation in a breach of the trust).

Nonetheless, dismissal of the fourth cause of action is warranted here due to a procedural infirmity. Lien Law §77(a) provides that actions to enforce a Lien Law trust “may be enforced by the holder of any trust claim . . . **in a representative action**

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<sup>4</sup> Lien Law §13(3) provides in relevant part that building loan mortgages:

. . . shall contain a covenant by the mortgagor that he will receive the advances secured thereby and will hold the right to receive such advances as a trust fund to be applied first for the purpose of paying the cost of improvement, and that he will apply the same first to payment of the cost of improvement before using any part of the total of the same for any other purpose . . .

**brought for the benefit of all beneficiaries of the trust.”** (Emphasis added). Here, Foremost has not brought this action as a representative action for the benefit of all beneficiaries of the trust, thus precluding the court from granting the relief sought in the fourth cause of action, which is accordingly dismissed as to all defendants. See, e.g., *Atlas Building Systems, Inc., supra*.

#### STAY OF PROCEEDINGS AND DISCOVERY MOTION

Alternatively, Davis' summary judgment motion seeks a stay of this action pursuant to CPLR §2201 until such time as the LLC and Hershkowitz are able to appear in this action, aid in the defense, produce documents and testify. The stay is requested because Davis claims to be unable to defend himself in this action since the FBI removed all relevant documentation from the LLC's office and, as more fully discussed *infra*, Hershkowitz has refused to testify in connection with this action, having asserted his fifth amendment privilege against self incrimination.

Davis' request for a stay is denied at this time. Only the third cause of action remains against Davis for breach of the letter agreement. Davis has not established necessity for staying discovery with respect to this cause of action. To the extent that discovery may be unavailable to Davis, he may supplement his responses when the needed documentation becomes available.

Turning to the discovery motion, Foremost moves to strike Davis' and Hershkowitz's answer based upon their failure to respond to interrogatories and appear for depositions, and for judgment on default upon striking same. As previously stated, in opposition to the discovery motion, Hershkowitz has invoked his fifth amendment

privilege against self incrimination. In response to the discovery motion, Davis claims he has not refused to comply with discovery and was under the impression this action would be settled and discontinued as to him.

As to Hershkowitz, the motion to strike the answer is granted and, based upon his failure to appear in this action after counsel was relieved, plaintiff is entitled to judgment against said defendant on liability. The issue of the amount of the judgment to be entered shall be determined at the trial herein.

As to Davis, the motion to strike the answer is denied, provided that Davis serves responses to Foremost's interrogatories and appears for a deposition as set forth herein. Davis shall respond to the interrogatories within 20 days of service of a copy of this decision and order with notice of entry and shall appear for depositions within 40 days of such service. In the event that Davis fails to comply with the foregoing directive, plaintiff shall submit an affirmation detailing the default and shall settle an order on notice striking the answer as to Davis pursuant to CPLR §3126(3).

#### **CONCLUSION**

For the reasons set forth herein, it is

**ORDERED** that defendant Davis' summary judgment motion is granted to the extent that the fourth cause of action is dismissed as against Davis, and is dismissed *sua sponte* as to the remaining defendants; and it is further

**ORDERED** that the remainder of Davis' summary judgment motion is denied; and it is further

**ORDERED** that the discovery motion is denied as to defendant Davis and in the court's discretion, Davis is directed to respond to plaintiff's interrogatories and appear for a deposition as per the court's directives set forth above; and it is further


**ORDERED** that plaintiff's motion is granted to the extent that the answer is hereby stricken as to defendant Hershkowitz, plaintiff is granted a default judgment on liability against Hershkowitz on the third cause of action and an inquest for the assessment of damages against said defendant is hereby directed; and it is further

**ORDERED** that the Clerk is directed to enter judgment accordingly.

Counsel for plaintiff and Davis are directed to appear for a preliminary conference on December 2, 2008 at I.A.S. Part 1, 111 Centre Street, Room 1127B, New York, New York.

The foregoing constitutes this court's Decision and Order.

Dated: October 6, 2008



Martin Shulman, J.S.C.

**FILED**  
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NEW YORK