

**M-RAJ Enter. LLC v NTD Constr. Corp.**

2009 NY Slip Op 31504(U)

July 7, 2009

Supreme Court, New York County

Docket Number: 601560/08

Judge: Michael D. Stallman

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: Hon. MICHAEL D. STALLMAN  
*Justice*

PART 7

M-RAJ ENTERPRISE, LLC,

INDEX NO. 601560/08

Plaintiff,

- v -

MOTION DATE 2/19/09

MOTION SEQ. NO. 001

MOTION CAL. NO. 21

NTD CONSTRUCTION CORP., TIMOTHY  
DEVLIN, JOHN COMACK, JTP WATERWORKS,  
INC. and JOHN SAMIDA,

Defendants.

The following papers, numbered 1 to 8 were read on this motion for summary judgment

	PAPERS NUMBERED
Notice of Motion— Affirmation — Exhibits A-K	<u>1-3</u>
Answering Affirmation — Exhibits A-B	<u>4-6</u>
Replying Affirmation — Exhibit A	<u>7</u>
Supplemental Affirmation — Exhibit A, B	<u>8</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, It is hereby ordered that plaintiff's motion is decided in accordance with the annexed memorandum decision and order.

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

Dated: 7/7/09  
New York, New York

**FILED**  
JUL 10 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

J.S.C.

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

HON. MICHAEL D. STALLMAN

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 7**

-----X  
M-RAJ ENTERPRISE LLC,

Plaintiff,

Index No. 601560/08

- against -

NTD CONSTRUCTION CORP, TIMOTHY DEVLIN, JOHN  
COMACK, JTP WATERWORKS, INC., and JOHN SAMIDA

Decision and Order

Defendants.

-----X  
**HON. MICHAEL D. STALLMAN, J.:**

**FILED**  
JUL 10 2009  
COUNTY CLERKS OFFICE  
NEW YORK

In this action, plaintiff alleges that it hired defendant NTD Construction Corp. (NTD) to rehabilitate a building that plaintiff owned. Although plaintiff claims that it paid \$1.37 million to NTD, of which \$1.18 million was for the work of subcontractors, NTD allegedly disbursed only \$430,346 to the subcontractors. Plaintiffs claim that, as a result, subcontractors placed mechanic's liens on the property, notwithstanding that plaintiff's contract with NTD required NTD to obtain lien waivers from subcontractors. Plaintiff claims that it terminated NTD on March 26, 2008, due to NTD's alleged numerous breach of the contract. Plaintiff moves for summary judgment on the first through fifth causes of action of the complaint, and for a default judgment in its favor on the seventh cause of action.

**BACKGROUND**

The complaint asserts seven causes of action. Plaintiff seeks injunctive and declaratory relief against NTD, its president, defendant Timothy Devlin, and an officer, defendant John Comack, requiring them to disburse the monies to the subcontractors (first and fourth causes of action). Plaintiff alleges that defendants converted the funds (second cause of action), and seek an accounting

(third cause of action). Plaintiff seeks damages as a result of the delay of NTD's alleged failure to perform (sixth cause of action). Finally, plaintiff seeks to recover an advance payment made to a subcontractor, JTP Waterworks, which plaintiff hired directly following NTD's termination. According to plaintiff, the subcontractor failed to perform work as hired. Plaintiff moves for summary judgment on the first five causes of action, and for a default judgment on the seventh cause of action.

### DISCUSSION

Plaintiff argues that defendants violated the Lien Law because they refused to pay over the remaining sums received from plaintiff. Plaintiff contends that the failure to pay trust funds constitutes a conversion of trust funds, in violation of Lien Law §§ 72 and 79-a.

“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. We have repeatedly recognized that the primary purpose of article 3-A and its predecessors [is] to ensure that those who have directly expended labor and materials to improve real property [or a public improvement] at the direction of the owner or a general contractor' receive payment for the work actually performed.”

Aspro Mech. Contr. v Fleet Bank, 1 NY3d 324, 328 (2004)(internal citations and quotation marks omitted); Lien Law § 70. Trust proceeds that are “paid, transferred or applied for any purpose other than a purpose of the trust . . . , before payment or discharge of all trust claims with respect to the trust, is a diversion of trust assets.” Lien Law § 72. Lien Law § 71 (4) provides that “persons having claims for payment of amounts for which the trustee is authorized to use trusts assets” are trust beneficiaries.

As the owner of the building, plaintiff is not among the three types of plaintiffs permitted under Lien Law to bring an action to enforce a trust. Plaintiff is not a holder of a trust claim (i.e.,

a trust beneficiary), a person subrogated to the right of a beneficiary of the trust holding a trust claim, or a trustee. See Lien Law § 77 (1). Even if plaintiff had standing to enforce the trust, this action is not in the proper form for such an action. An action to enforce the trust “shall conform as nearly as may be to the practice” of class actions governed under Article 9 of the CPLR. Lien Law § 77 (1). Thus, the Court cannot entertain plaintiff’s claims for enforcement of the trust, especially in the absence of those non-parties, i.e., the subcontractors, who are contemplated trust beneficiaries and whom should have received notice of the action had an action to enforce the trust been brought in its proper form. Moreover, Lien Law § 72 does not define the diversion of trust assets as the trustee’s failure to distribute the assets of the trust. Rather, pursuant to Lien Law § 77 (3) (a) (iv), those persons permitted to enforce the trust may seek an order for distribution of any trust assets available for distribution, or may seek an interim or final accounting pursuant to Lien Law § 77 (3) (a) (i).

Therefore, plaintiff’s motion for summary judgment on the first, second, third, and fifth causes of action is denied. Pursuant to CPLR 3212 (b), the Court grants defendants reverse summary judgment dismissing these causes of action for lack of standing, and dismissing the complaint as against the individual defendants Timothy Devlin and John Comack. It appears that these causes of action and individual liability of Devlin and Comack are based on plaintiff’s incorrect belief that it may assert the remedies available to trust beneficiaries under Article 3-A of the Lien Law. To the extent that plaintiff’s second cause of action, for conversion of trust proceeds, pleads common-law conversion, plaintiff is neither the owner of the trust proceeds, nor has any right of possession to them.

Turning to the fourth cause of action, plaintiff contends that NTD breached paragraph 9.6.2

of the General Conditions of Contract for Construction, which provides, in pertinent part:

“The Contractor shall promptly pay each Subcontractor, upon receipt of payment from the Owner, out of the amount paid to the Contractor on account of such Subcontractor’s portion of the Work, the amount to which said Subcontractor is entitled, reflecting percentages actually retained from payments to the Contractor on account of such Subcontractor to make payments to Sub-subcontractors in a similar manner.”

Brody Suppl. Affirm., Ex A.<sup>1</sup> An officer of the architect that plaintiff hired states that, in discussions with NTD’s principals, Devlin and Comack, “they told him that only \$430,346 actually was paid to NTD’s subcontractors, and admitted that they still had a balance of \$745,334 in their hands for which they have not accounted.” Tirmizi Aff. ¶ 5. Comack and Devlin assert that all of the subcontractors’ liens are bloated or do not account for legitimate back charges attributed to the subcontractors’ work. Comack Opp. Aff. ¶ 9; Devlin Opp. Aff. ¶ 7. Comack’s and Devlin’s affidavits raise an issue of fact arises as to whether NTD has paid the subcontractors all the amounts to which they are entitled. Therefore, summary judgment on the fourth cause of action based on NTD’s alleged breach of paragraph 9.6.2 of the General Conditions to the contract is denied.

Plaintiff also relies upon paragraph 9.3.3 of the General Conditions to the Contract, which provides, in relevant part:

“The Contractor further warrants that upon submittal of an Application for Payment all Work for which Certificates for Payment have been previously issued and payments received from the Owner shall, to the best of the Contractor’s knowledge, information and belief, be free and clear of liens, claims . . . in favor of the Contractor, Subcontractors, material suppliers, or other persons or entities making a claim by reason of having provided labor, materials and equipment relating to the Work.”

---

<sup>1</sup> Paragraph 8.1.2 of the parties’ contract incorporates the 1997 edition of the General Conditions for the Contract for Construction, AIA Document A201-1997. Noguee Affirm., Ex C. Plaintiff has submitted a sample of AIA Document A201-1997.

Brody Suppl. Affirm., Ex A. However, plaintiff has not demonstrated that NTD has breached this warranty. The warranty is given in connection with submission of an application for payment. Plaintiff did not submit any payment applications on this motion, for the Court to determine whether the work contained in the application for payment was free and clear of liens. Therefore, summary judgment based on NTD's alleged breach of paragraph 9.3.3 of the General Conditions to the contract is denied.

Plaintiff also alleges that NTD breached paragraph (1) of the Supplemental Agreement, which requires

“That within five (5) business days of the execution of this Agreement, Contractor will provide Owner with the following:

\* \* \*

- b. Notarized lien waivers for all trades which have performed any work on the Building so far;
- c. Notarized lien waivers within five (5) business days of each requisition paid by Owner.”

Nogee Affirm., Ex D. By notice of termination dated March 26, 2008, plaintiff stated that lien waivers were not submitted with respect to the work of Detore Electrical Construction Company, Inc. and Perimeter Bridge & Scaffold Company, Inc. (*id.*, Ex F). The notice of termination states that the last requisition that the Owner paid was on February 20, 2008.

NTD contends that plaintiff already breached the initial contract when it was forced to sign the Supplemental Agreement or face termination. Comack and Devlin claim that NTD encountered many unforeseen conditions, such as structural problems, that made it impossible to perform under the contract and created delays. Comack Opp. Aff. ¶¶ 5-7; Devlin Opp. Aff. ¶¶ 4-6. In addition, Devlin claims that the subcontractors' liens filed at the time of NTD's termination were not paid because plaintiff refused to pay requisition # 10, in the amount of \$272,693.51 which was submitted

to plaintiff for payment. Devlin Opp. Aff. ¶ 9. Devlin claims that Perimeter Bridge & Scaffold Company, Inc. had agreed to accept \$10,000 less than the value of the lien filed, to be paid from the money received from payment requisition # 10. Ibid.

Whether plaintiff properly refused to payment requisition # 10 raises an issue fact warranting denial of plaintiff's motion for summary judgment on the fourth cause of action. The record does not contain enough information for the Court to determine, as a matter of law, that plaintiff validly exercised its rights under the parties' contract to withhold payment of requisition # 10. Neither is it clear from the record when requisition # 10 was submitted to plaintiff, to determine whether the plaintiff's obligation to pay the requisition, arose before or after NTD was required to obtain lien waivers under the Supplemental Agreement. It cannot be determined from the record which work of the subcontractors that requisition # 10 would have been covered.

As to the branch of plaintiff's motion for a default judgment on the seventh cause of action, plaintiff submits a copy of an agreement between plaintiff and JTP Waterworks (Tirmizi Aff., Ex J.), and a copy of a check to JTP Waterworks for \$25,000. Id., Ex K. Plaintiff submits copies of affidavits of service of the summons and complaint upon JTP Waterworks and Samida, reflecting service on May 29, 2008 by delivery to an officer manager who is an alleged co-worker of Samida and allegedly authorized to accept service for JTP Waterworks. Id., Ex G. An additional mailing of the summons was made upon Samida by regular mail. Id., Ex H. An officer of plaintiff avers that JTP Waterworks has failed to and refused to perform any work under the agreement. Tirmizi Aff. ¶¶ 13-14.

Given all the above, plaintiff is granted a default judgment against JTP Waterworks, Inc. Default judgment against Samida is denied. The contract is clearly with JTP Waterworks, Inc.

Nothing in the contract indicates that Samida is personally liable for the performance of the agreement. Although plaintiff claims that it retained other workers at a cost in excess of \$50,000 as a result of JTP Waterworks's breach, the amount of damages resulting from the breach is hereby referred to a Special Referee to hear and determine.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment on the first, second, third, fourth, and fifth causes of action is denied; and it is further

ORDERED that, pursuant to CPLR 3212 (b), all defendants are granted reverse summary judgment dismissing the first, second, third, and fifth causes of action; and it is further

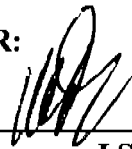
ORDERED that the complaint is severed and dismissed as against defendants John Comack and Timothy Devlin, and the Clerk is directed to enter judgment in Comack's and Devlin's favor accordingly; and it is further

ORDERED that the branch of plaintiff's motion for a default judgment on the seventh cause of action against defendants JTP Waterworks, Inc. and John Samida is granted as to liability against JTP Waterworks; and it is further

ORDERED that the seventh cause of action is hereby severed as against JTP Waterworks, Inc., and the amount of damages to be awarded against JTP Waterworks is hereby referred to a Special Referee to hear and determine.

*July 7, 2009*  
Dated: *June 23, 2009*  
New York, New York

ENTER:



\_\_\_\_\_  
J.S.C.  
MICHAEL D. STALMAN  
COUNTY CLERK'S OFFICE  
NEW YORK

**FILED**

JUL 10 2009

**NEW YORK COUNTY SUPREME COURT - SPECIAL REFEREE CALENDAR**

**INFORMATION SHEET**

**Title of Action: M-RAJ ENTERPRISE, LLC v NTD CONSTRUCTION CORP.**

**Index No.: 601560/2008**

**Issues Referred to HEAR AND DETERMINE: Assessment of damages against defaulting party JTP Waterworks, Inc.**

**Estimated Time Needed for Hearing: 1-2 Days**

**Attorney for Plaintiff:** Jeffrey L. Nogee, Esq.  
Borah Goldstein Altschuler Nahins & Goidel, PC  
377 Broadway  
New York, NY 10013  
(212) 431-1300  
Fax (212) 334-0960

**Defendant JTP Waterworks:** JTP Waterworks, Inc.  
**(in default)** 37 Blackheath Rd  
Long Beach, NY 11561

---

Please attach this form to a copy of the order of reference or transcript and file, as soon as possible after issuance and in any event within 60 days thereof, with:

Special Referee Clerk - Motion Support Office  
60 Centre Street - Room 119, New York, New York 10007

- - You will be notified by mail of the date and time of the hearing.
- - Please direct all inquiries to the Special Referee Clerk (646-386-3028)
- - Usually, cases are assigned to a Referee and the hearing commences on the original hearing date. Counsel therefore should be prepared with witnesses and evidence on the original date. Counsel are required to consult with all adversaries in regard to requests or applications for an adjournment.