

**Matter of Europa Constr. Corp. v K & R Constr.
Corp.**

2010 NY Slip Op 32853(U)

October 8, 2010

Supreme Court, Nassau County

Docket Number: 600068-10

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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In the Matter of

**TRIAL/IAS PART: 22
NASSAU COUNTY**

EUROPA CONSTRUCTION CORP.,

**Index No: 600068-10
Motion Seq. No: 1
Submission Date: 8/16/10**

**On behalf of themselves and as a representative
For all others who may be deemed
beneficiaries of a certain Trust Created
Pursuant to Lien Law Article 3-A,**

Plaintiffs,

-against-

**K & R CONSTRUCTION CORP. d/b/a
K & R CONSTRUCTION COMPANY, and
YAACOV MOREDECHAI,**

Defendants.

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Papers Read on this Order to Show Cause:

- Order to Show Cause, Affidavit in Support,**
- Affirmation in Support and Exhibits.....x**
- Affirmation in Opposition and Exhibit (Affirmation of**
- Y. Mordechai and Attachment).....x**

This matter is before the court on the Order to Show Cause filed by Plaintiffs on July 29, 2010 and submitted on August 16, 2010. For the reasons set forth below, the Court 1) denies, as moot, Plaintiffs' request for an Order directing Defendants to provide a Verified Statement pursuant to Lien Law § 76; and 2) denies Plaintiffs' application for an Order, pursuant to Lien Law § 77(3)(a)(v), requiring Defendants to post security. The Court, however, directs that

Defendants place any funds they receive from Tally Realty in connection with the construction project at issue into an escrow account maintained by Defendants' counsel, which funds shall remain in the escrow account pending further stipulation of the parties or court order.

BACKGROUND

A. Relief Sought

Plaintiffs move for an Order 1) directing Defendants to immediately comply with the demands of Plaintiff Europa Construction Corp. ("Plaintiff" or "Europa") for a Verified Statement pursuant to New York Lien Law ("Lien Law") § 76; and 2) pursuant to Lien Law § 77(3)(a)(v), requiring Defendants, as trustees of Trust Funds, to give security in the amount of at least \$131,420.66 to insure the proper distribution of the trust assets.

Defendants oppose Plaintiff's application.

B. The Parties' History

The Complaint (Ex. B to OSC) alleges as follows:

Europa is a New York corporation with its principal place of business in Jamaica, New York. Defendant K & R Construction Corp. d/b/a K & R Construction Company ("K & R") is a New York corporation with its principal place of business in Brooklyn, New York. Defendant Yaacov Moredechai ("Moredechai") is an officer and/or director of K & R.

K & R entered into an agreement with Lefferts Avenue Condominium Inc. in connection with the project ("Project") known as Lefferts Avenue Condo in Brooklyn, New York. At Defendants' request, Europa supplied concrete materials and labor to the Defendants in connection with the Project. Despite Europa's performance, Defendants failed and refused to pay the balance ("Balance") of \$131,420.66 due and owing for the materials supplied by Europa.

In the First Cause of Action, titled "Trust Fund Accounting," Plaintiffs allege that the funds paid to Defendants constitute trust funds under the Lien Law and that Europa is entitled to judgment against the Defendants, jointly and severally, directing that they be required to account for all monies they received for the Project and awarding Plaintiff counsel fees. In the Second Cause of Action, titled "Trust Fund Diversion," Plaintiffs allege that Defendants have unlawfully diverted trust funds created under Article 3-A of the Lien Law and have failed to keep and maintain books and records for those trust funds. Europa seeks a judgment against the

Defendants, jointly and severally, and all other officers and directors of the Defendants, adjudging that they are trustees of all sums paid to them on account of all improvements and that they are liable to the beneficiaries in the amount of at least \$131,420.66, as well as punitive damages, interest and counsel fees.

The Third, Fourth and Fifth Causes of Action are based on breach of contract, quantum meruit and account stated, respectively. Plaintiffs seek judgment in the sum of \$131,420.66, plus interest.

In his Affidavit in Support, Alcides Rodrigues (“Rodrigues”) affirms as follows:

Rodrigues is the Vice-President of Europa. Rodrigues affirms that, upon information and belief, K & R entered into an agreement with nonparty Lefferts Avenue Condominium Inc. in connection with the Project. From July of 2007 through May of 2008, at Defendants’ request, Europa supplied concrete materials and labor to Defendants to be used at the Project. Europa performed its obligations with regard to the Project, and Defendants accepted the materials and labor that Europa supplied. Defendants have failed to pay the Balance due and owing to Europa.

The original contract price was \$275,000. Two change orders increased the contract price to \$321,420.66. In support of this assertion, Rodrigues provides a copy of a July 22, 2008 letter (“Modification Letter”) that Europa faxed to Moredechai that read as follows:

Dear Mr. Moredechai:

This is an invoice for job site Lefferts Avenue Condo, Lefferts Avenue, Brooklyn, NY

a) Original Contract	\$ 275,000.00
b) Change Order # 1	41,580.66
c) Change Order # 2	4,840.00

Sub-Total	\$ 321,420.66
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Paid on Account	90,000.00
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Total Amount Due	\$ 231,420.66
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	- <u>100,000.00</u>	8/6/08
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	131,420.66
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We appreciate your prompt payment. Thank you for your continued business.

Sincerely,

[Rodrigues]

The Modification Letter is typed, except that the entries of "100,000.00," "8/6/08" and "131,420.66" at the bottom of that Letter are handwritten. Rodrigues affirms that Defendants made payments of \$190,000, leaving the Balance due and owing. Defendants never objected to these invoices. Rodrigues affirms that the total value of the material and labor that Europa provided to Defendants that remains unpaid is \$131,420.66.

In his Affirmation in Support, counsel for Europa affirms as follows:

In their Answer with Affirmative Defenses (Ex. C to OSC), Defendants admitted that Moredechai is an officer and/or director of K & R. On or about January 14, 2010, Plaintiff served on Defendants a Demand for a Verified Statement pursuant to Lien Law § 26 ("Demand"), requiring Defendants to deliver to Plaintiffs' counsel a Verified Statement setting forth the entries regarding the books and records maintained for the Lien Law Trust that, Plaintiffs contend, was established by law. Plaintiffs memorialized and reiterated that demand in a subsequent letter to Defendants' counsel dated June 17, 2010 (Ex. D to OSC) which makes reference to Plaintiffs' prior demand.

On May 18, 2010, at a conference before the Court, counsel for Defendants represented that Defendants anticipated that the Project was going to be resumed on or before July 1, 2010 and this matter would be resolved at that time. Based on that representation, Plaintiffs forewent seeking a Court order. Since that conference, however, Defendants provided Plaintiffs with no updated information regarding the status of the Project. On or about June 17, 2010, Plaintiffs served Defendants with another Demand (Ex. F to OSC) to which Defendants have not responded.

Counsel for Defendants affirms that on August 13, 2010, Defendants provided Plaintiff with an affirmation by Defendant Mordechai¹ that included the Statement detailing the monies that K & R received and disbursed in connection with the Project (Ex. A to Taub Aff. in Opp.).

¹ The Affiant's last name is spelled "Moredechai" in the Complaint, but the proper spelling is apparently "Mordechai."

Defendants' counsel avers, further, that he advised Plaintiffs' counsel that he will provide any additional information he requests.

Counsel for Defendants submits that, while Defendants admit that they entered into a contract with Europa in the amount of \$275,000, they dispute the amount owed. Defendants deny that they ever modified the contract and requested that additional work be done. Counsel for Defendants disputes the reliability of the Modification Letter in light of the absence of any fax confirmation on that document, or any notation reflecting Defendants' consent to the alleged modification. Thus, counsel submits, the Court should conclude that the amount of the contract between Europa and Defendants was \$275,000, not \$321,420.66 as alleged by Plaintiffs.

Defendants have paid Europa the sum of \$196,400, and concede that they owe Europa a balance of \$53,600.00. Mordechai's Affirmation, and the attached documentation, reflect that Defendants made appropriate payments from the K & R account, and are owed approximately \$100,000 by the developer of the Project. This sum would cover the outstanding balance that Defendants owe to Europa. Under the circumstances, counsel for Defendants submits that it would be inappropriate to require Defendants to post a bond.

In his Affirmation in Opposition, Mordechai affirms as follows:

K & R received the following payments from Tally Realty ("Tally") for the Project:

1) \$65,700.00 on December 24, 2007, 2) \$173,250.00 on June 23, 2008, and 3) \$179,550.00 on July 31, 2008. Tally still owes K & R approximately \$100,000.

K & R's contract price with Europa was for a total of \$275,000.00. Europa made payments to Europa totaling \$196,400.00. In support, Mordechai provides a copy of a document titled "Payments Made [on] Behalf of the 382 Lefferts Avenue Job" ("Statement") which contains the date, check number, amount and payee of checks written by K & R in connection with the Project as well as payroll and cash expenses incurred during the Project. The Statement reflects the following payments to Europa: 1) check number 2778 on April 2, 2008 for \$6,400, 2) check number 2815 on May 28, 2008 for \$50,000, 3) check number 2833 on June 20, 2008 for \$40,000, 4) check number 92 on August 6, 2008 for \$70,000, and 5) check number 93 on August 6, 2008 for \$30,000. The Statement reflects that K & R paid a total of \$408,518.59 in expenses from May 14, 2007 to January 16, 2009 and that a total of \$9,981.41 remains in K &

R's account.

C. The Parties' Positions

Europa submits that, as a Lien Law beneficiary, it is entitled to a response to its Demands. Europa asserts, further, that Defendants' failure to respond to its Demands demonstrates that

- 1) Defendants are asserting dominion and control over the trust funds they received; and
- 2) there is a danger that the assets will be dissipated or diverted from the trust purposes before judgment. Thus, Europa seeks an Order, pursuant to Lien Law § 77(3)(a)(v) requiring Defendants to post security in a sum of at least \$131,420.66.

Defendants dispute the sum Plaintiffs claim they are owed, denying that the contract between the parties was modified upward and contending that the Modification Letter does not contain persuasive evidence that there was any modification. Moreover, Defendants submit that they have demonstrated their good faith by paying a substantial portion of the sum owed to Plaintiffs, and have explained that their delay in paying the remaining sums owed is attributable to Tally's failure to pay Defendants an outstanding \$100,000. Accordingly, Plaintiffs have not met their burden entitling them to the requested relief.

RULING OF THE COURT

A. Trust Funds under the Lien Law

Lien Law § 72, titled "Diversion of trust funds," provides, in pertinent part, as follows at subdivision 1:

Any transaction by which any trust asset is paid, transferred or applied for any purpose other than a purpose of the trust as stated in subdivision one or subdivision two of section seventy-one, before payment or discharge of all trust claims with respect to the trust, is a diversion of trust assets...

Lien Law §§ 71(2)(a) - (e) provide as follows:

The trust assets of which a contractor or subcontractor is trustee shall be held and applied for the following expenditures arising out of the improvement of real property, including home improvement or public improvement and incurred in the performance of his contract or subcontract, as the case may be:

(a) payment of claims of subcontractors, architects, engineers, surveyors, laborers and materialmen;

(b) payment of the amount of taxes based on payrolls including such persons and withheld or required to be withheld and taxes based on the purchase price or value of materials or equipment required to be installed or furnished in connection with the performance of the improvement;

(c) payment of taxes and unemployment insurance and other contributions due by reason of the employment out of which such claims arose;

(d) payment of any benefits or wage supplements, or the amounts necessary to provide such benefits or furnish such supplements, to the extent that the trustee, as employer, is obligated to pay or provide such benefits or furnish such supplements by any agreement to which he is a party;

(e) payment of premiums on a surety bond or bonds filed and premiums on insurance accrued during the making of the improvement, including home improvement, or public improvement;

Lien Law § 76, titled “Right of beneficiaries to examine books or records and make copies, or to receive statement,” provides, in pertinent part, as follows at subdivision 1:

Any beneficiary of the trust holding a trust claim shall be entitled, upon request, after the expiration of thirty days from the date his trust claim became payable, and thereafter not oftener than once in each month, (a) to examine the books or records of the trustee with respect to the trust, and to make copies of any part or parts thereof relating to the trust; or (b) at the beneficiary's option to receive a verified statement setting forth the entries with respect to the trust contained in such books or records.

Lien Law § 77(3)(a)(v) permits the Court to issue:

An order requiring the trustee to give security to ensure the proper distribution of the trust assets, either during the pendency of the action or thereafter, or to furnish assurance therefor in any other manner, if it appears that there is danger that such assets or asset will be dissipated before judgment or diverted from trust purposes[.]

Article 3-A of the Lien Law impresses with a trust any funds paid or payable to a contractor under or in connection with a contract for an improvement of real property. *LeChase Data v. Goebert*, 6 N.Y.3d 281, 289 (2006), quoting Lien Law § 70(1). 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 at the direction of the owner or a general contractor receive payment for the work actually performed. *Id.*, quoting *Aspro Mech. Contr. v. Fleet Bank*, 1

N.Y.3d 324, 328 (2004) (internal quotation marks and citations omitted). To this end, Lien Law § 72 declares any other use of contract funds before payment or discharge of all trust claims to be an improper diversion of trust assets, regardless of the propriety of the trustee's intentions. *Id.*, citing *Matter of RLI Ins. Co., Sur. Div. v. New York State Dept. of Labor*, 97 N.Y.2d 256, 263 (2002).

Under Lien Law § 77(3)(a)(v), a court may issue an order requiring the trustee to give security to ensure the proper distribution of the trust assets, either during the pendency of the action or thereafter, or to furnish assurance in any other manner, if it appears that there is a danger that such assets will be dissipated before judgment or diverted from trust purposes. *Brooklyn Navy Yard Dev. Corp. v. J.M. Dennis Constr. Corp.*, 12 A.D.3d 630, 632 (2d Dept. 2004), *app. den., app. disp.*, 5 N.Y.3d 748 (2005) quoting Lien Law § 77(3)(a)(v). In *Brooklyn Navy Yard, supra*, the Second Department held that the trial court properly directed the defendant contractor and its principals to post security in light of the plaintiff's showing that such relief was necessary to ensure the proper distribution of assets during the pendency of the action. *Id.*

B. Application of these Principles to the Instant Action

The Court concludes that Defendants have endeavored to comply with Lien Law § 76(1)(b) by providing Plaintiff with the Statement which outlines the specific costs incurred in connection with the Project. Moreover, counsel for Defendants has affirmed that he will provide any additional information that Plaintiff's counsel requests. In light of the Statement, and the sworn assurances of Defendants' counsel that he will supplement that Statement at Plaintiff's request, the Court denies, as moot, Plaintiff's application to direct Defendants to provide a Verified Statement pursuant to Lien Law § 76.

With respect to Plaintiffs' application, pursuant to Lien Law § 77(3)(a)(v), the Court notes that there is a dispute as to the balance that K & R owes to Europa, although both parties agree that Defendants have paid Europa a total of approximately \$190,000. Europa relies on the Modification Letter in support of its contention that the initial contract with K & R was modified upward, leaving a balance in excess of \$130,000. The Court notes that the changes on the Modification Letter, purportedly reflecting the upward modification, are not initialed or

otherwise acknowledged by Defendants. Defendants dispute that there was a modification, and submit that they owe a total of approximately \$53,000. Defendants affirm, further, that Tally, a third party involved with the Project, owes Defendants \$100,000, which funds Defendants will use to pay Europa. Under the circumstances, the Court concludes that Plaintiffs have not made the requisite showing that the posting of security by K & R is necessary to ensure the proper distribution of assets during the pendency of this action. The Court, however, directs that Defendants place any funds they receive from Tally Realty in connection with the Project into an escrow account maintained by Defendants' counsel, which funds shall remain in the escrow account pending further stipulation of the parties or court order.

All matters not decided herein are hereby denied.

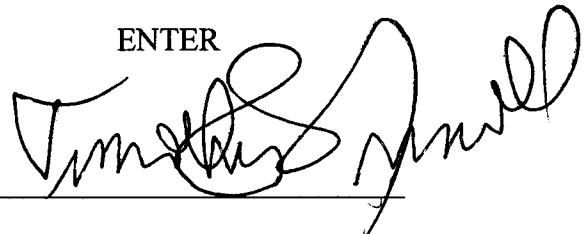
This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a Compliance Conference on October 20, 2010 at 9:30 a.m.

DATED: Mineola, NY

October 8, 2010

ENTER



HON. TIMOTHY S. DRISCOLL

ENTERED

OCT 13 2010

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**