

**Power-Up Elec. Contr. Corp. v Eldan Constr. Corp.**

2011 NY Slip Op 31798(U)

June 21, 2011

Supreme Court, Nassau County

Docket Number: 017688/2007

Judge: Ira B. Warshawsky

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**SHORT FORM ORDER**

**SUPREME COURT: STATE OF NEW YORK  
COUNTY OF NASSAU**

**HON. IRA B. WARSHAWSKY,  
Justice.**

**TRIAL/IAS PART 7**

POWER-UP ELECTRICAL CONTRACTING CORP., on  
behalf of itself and all other persons similarly situated as trust  
fund beneficiaries of Lien Law Trusts of which Aegis  
Construction, Inc. is a trustee,

Plaintiff,

INDEX NO.:017688/2007  
MOTION DATE: 4/22/11  
SEQUENCE NO .:07

- against -

ELDAN CONSTRUCTION CORP., DANIEL MENDELSON,  
and JOHN DOES "1" through "10".

Defendants.

The following documents were read on this motion:

- Motion by G.F. Construction, Inc., s/h/a John Doe "7" pursuant to CPLR § 902  
allowing the action to proceed as a Class Action to comply with Lien  
Law Art. 3-A and permitting G.F. to proceed as the class representative ... 1.
- Affirmation of Gayle E. Rosen, Esq., counsel for Power-Up in Support ..... 2.
- Affirmation in Opposition on behalf of Eldan Construction Corp. .... 3.
- Reply Affirmation on behalf of G.F. Construction in Further Support of Motion 4.

**PRELIMINARY STATEMENT**

G.F. Construction, Inc. ("G.F.") claims to be John Doe "7" and moves pursuant to CPLR § 902 for an Order permitting the action to proceed as a class action and substituting G.F. as the class representative in place of Power-Up Electrical Contracting Corp. ("Power-Up). Power-Up

supports the application of GF, while defendant Eldan opposes it. Eldan's opposition is based upon a claim that the application by GF is untimely, that GF has not laid claim to trust funds involving any other than Woodbridge, one of the properties for which Power-Up asserts claim to trust funds; GF fails to satisfy the essential elements for a class action; they assert claims involving only four of the six projects for which Power-Up claims damages; and that GF did not file any claims in this action until 2009, beyond the one-year statute of limitations under Lien Law § 77.

#### BACKGROUND

Power-Up commenced an action on behalf of itself and all other persons similarly situated as trust fund beneficiaries of Lien Law Trusts of which Aegis Construction, Inc. is a trustee. The defendants were Eldan Construction Corp., Daniel Mendelsohn, the principal of Eldan, and John Does #s 1 — 10.

The First Cause of Action against Eldan alleges an agreement between Power-Up and Eldan for Power-Up to provide electrical labor and services at various locations throughout New York State, for which they are owed \$93,808.11, with interest from September 1, 2007. The Second Cause of Action asserts a claim for unjust enrichment against Eldan for the same labor and services. The Third Cause of Action alleges an account stated between Power-Up and Eldan.

In the Fourth Cause of Action plaintiff asserts that Mendelsohn is the owner of 37 Woodbridge Lane, Sea Cliff, New York, at which premises Power-Up provided improvements, and, within four months of the completion of the work, filed a Mechanic's Lien in the Office of the Nassau County Clerk in the amount of \$16,777.78. The complaint goes on to assert that John Does #s 1 — 10 are made parties to the action "by reason of the possible liens, encumbrances or interest which may have been filed against the Premises".

The Fifth, and last, Cause of Action asserts that the action is brought as a class action under Rule 7023 because § 77 of the Lien Law requires that an action to enforce trusts under Article 3A of the Lien Law be brought as a class action, and that such action is brought as a class action "because (1) the class is so numerous that joinder of all members is impractical; (2) that there are common questions of law and fact to the class; (3) the claims and defenses of the

representative parties are typical of the claims and defenses of the class; and (4) the representative parties will adequately protect the interests of the class”. It then identifies six projects at which Power-Up provided services to Eldan, and claims that monies paid to Eldan and monies becoming due to Eldan in payment for its performance of contracts for the improvement of the properties constitute trust funds pursuant to the provisions of Article 3A of the Lien Law, of which Eldan is trustee, with the duties, obligations and liabilities of trustees of each trust pursuant to Art. 3A of the Lien Law.

Eldan submitted a verified answer dated June 14, 2008, asserting a counterclaim for alleged defective performance of services. G.F. served a verified answer with counterclaims and cross-claims dated November 5, 2009. The first counterclaim and cross-claim alleges excavation services at 37 Woodbridge Lane, Sea Cliff, at the instance and request of Eldan, as contractor, with the knowledge and consent of Mendelsohn, owner, in the amount of \$82,576.00. Within four months of the performance of the services, G.F. filed a Mechanic’s Lien in the Nassau County Clerk’s Office. The Second cross-claim against Eldan and Mendelsohn asserts a breach of contract with damages in the aforementioned amount. The Third cross-claim alleges unjust enrichment against Eldan and Mendelsohn for the work performed at 37 Woodbridge Lane.

#### DISCUSSION

“Article 3-A of the Lien Law establishes a comprehensive series of trusts to insure that monies coming into the hands of an owner or contractor on a construction project are used to pay contractors, subcontractors, architects, engineers, laborers, materialmen, and others who perform labor or furnish material for the project. “. (Haig, Commercial Litigation in New York, § 86.10 [3d ed.]). Any application of the trust funds for other than those specifically permitted by Lien Law § 71 is deemed a diversion of trust assets for which the trustee has absolute civil liability, and may also incur criminal penalties pursuant to Lien Law § 79-a. *Id.* While both Power-Up and G.F. have alleged filing of Mechanic’s Liens, such filings are independent of, and not a prerequisite to, the enforcement of trusts created under Article 3-A. An action to enforce a claim under Sec. 3-A of the Lien Law must be commenced within one year of the completion of the improvement.

In this case Power-Up commenced its action to enforce rights under Art. 3-A by filing a

Summons and Verified Complaint on October 3, 2007. More than two years later, on November 6, 2009, G.F. filed its verified answer with cross-claims against defendants Eldan and Mendelsohn. An action to enforce a trust under Art. 3-A of the Lien Law must be brought in the form of a class action, and the “practice, pleadings, forms and procedure shall conform as nearly as may be to the practice, pleadings, forms and procedure 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.

This paragraph relates to the claim that the number of members of the class is so numerous as to make joinder impractical. While the number of members of the class is not believed to be so numerous as to make joinder impractical, the Court waives any such consideration in this matter.

There is no Court approval required for the commencement of a class action under CPLR § 901, but a motion to confirm the class must be filed within 60 days after defendants’ answering time has expired. The named representative in this action, Power-Up, did not do so. The Court does not consider such motion to be essential for the pursuit of a Class Action under Art. 3-A of the Lien Law, since a class action is the only procedure authorized for the prosecution of a claim for breach of trust. The failure of Power-Up to move to confirm the class is not considered relevant by the Court.

While G.F. filed its answer some two years after the commencement of the action, Power-Up has not rejected it, and is not required to do so. As defendant points out, it seems unlikely that G.F. was intended to be one of the John Doe defendants; rather, they are one of the “other persons similarly situated as trust fund beneficiaries of Lien Law Trusts of which Aegis Construction, Inc., is a trustee.” G.F.’s cross-claims against Eldan and Mendelsohn, therefore relate back to the service of the Power-Up complaint, within one year of the completion of the work.

Defendant asserts that by its answer with cross-claims and counterclaims, G.F. failed to put defendant on notice that it was claiming against trust funds in the hands of, or to come into the hands of Eldan. The title of the action, however, brought on behalf of Power-Up and other

persons similarly situated as trust fund beneficiaries, should certainly have placed defendants on notice that there were persons similarly situated to Power-Up on whose behalf the action was being brought. 189 B.R.

Defendant points to the five years since the work done by G.F. was completed, the four years since Power-Up commenced its action, and two years since G.F. appeared. The extensive time that it has taken to bring the claims to fruition is not commendable, but the “statute of limitations found in Article 3-A of the N.Y. Lien Law is considered to be a procedural, rather than a substantive condition to the enforcement of a claim against the contractor”. (*In re Tripp*, 189 B.R. 29, 35 [U.S.B.C., N.D.N.Y.1995]). Even if the statute of limitations has run, the trust continues “ ‘ until all claims for services and material on the improvement . . . have been paid. *Id.* (internal citations omitted).

The motions by G.F. for this action to proceed as a class action under Art. 3-A of the Lien Law, and for certification of the class pursuant to Civil Practice Law and Rules § 902, and for leave to proceed as the representative of the class are granted.

This constitutes the Decision and Order of the Court.

Dated: June 21, 2011

  
J.S.C.

**ENTERED**

JUN 24 2011

NASSAU COUNTY  
COUNTY CLERK'S OFFICE