

Kamco Supply Corp. v Nevada Constr. Corp.

2011 NY Slip Op 32170(U)

July 14, 2011

Sup Ct, NY County

Docket Number: 105487/01

Judge: Joan A. Madden

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

PRESENT: Hon Joan A. Madden
Judge

PART 11

Index Number : 105487/2001
KAMCO SUPPLY
vs.
NEVADA CONSTRUCTION & DRYWALL
SEQUENCE NUMBER : 019
CONFIRM/REJECT REFEREE REPORT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *and cross motion are decided*
in accordance with the attached Memorandum Decision & Order

FILED

JUL 21 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: July 14, 2011

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART 11

-----X

KAMCO SUPPLY CORP., on
behalf of itself and other persons
similarly situated as
trust fund beneficiaries of Lien Law
Trusts of which NEVADA CONSTRUCTION AND
DRYWALL INC., and ABCOM ASSOCIATES, INC.
as trustees,

Index No. 105487/01

DECISION AND ORDER

Plaintiff,

-against-

NEVADA CONSTRUCTION CORP., U.S.A. CONSTRUCTION
AND DRYWALL, INC., MUTUAL REDEVELOPMENT HOUSES INC.,
SAINT VINCENTS CATHOLIC MEDICAL CENTERS OF NEW YORK,
ABCON ASSOCIATES, INC., LANNY TAYLOR, ESSENTIAL
ELECTRIC CORP., UNIQUE STATEMENTS IN WOOD, INC,
G&D PAINTING, INC., GRANDVIEW CONTRACTING CORP.,
FIDELITY AND DEPOSIT COMPANY OF MARYLAND, MICHAEL
ZENOBIO, JR. CHRISTOPHER ZENOBIO a/k/a CHRIS ZENOBIO,
DIVERSIFIED CARTING INC., DIRECTOR-
COMMERCIAL INDUSTRIES, LLC, CLEAR IMAGE GLASS,
INC., CITY STORE GATES MFG. CORP., APPLE FLOOR
COVERING, INC. and 'JOHN DOE 1' THROUGH 'JOHN DOE TEN,'

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Defendants.

-----X

JOAN A. MADDEN, J:

Plaintiff Kamco Supply Corp. ("Kamco") moves for an order
(1) confirming the report of the Honorable William P. McCooe, JHO
dated October 25, 2010, granting attorneys' fees in the amount of
\$108,788.60, and costs and disbursements of \$2,185.51 for a total
of \$110,974.11, (2) pursuant to this court's decision and order
dated July 21, 2010, upon submitted proofs of claims received
determining which claimants are trust fund beneficiaries and the
quantum of their claims for distribution purposes, (3) pursuant to

Lien Law § 77(3)(a)(vi) allowing the disbursements of the \$326,365.62 recovered on the judgment against defendant Abcon Associates, Inc. a/k/a Abcon Associates ("Abcon") as follows (a) \$108,788 for attorney's fees and \$2,185.51 for disbursements to Marshall Stern, P.C. ("Stern"), counsel to Kamco, in connection with efforts to recover Lien Law 3-A trust funds, (b) \$25,000 to pay for the surety of Jay Stuart Dankberg, who was appointed Receiver to recover the judgment, together with interest from July 17, 2009; (c) the balance of \$190,391.51 to go to claimants based on their percentage of the amount due to the claimants as a whole; and (2) extending the receivership of Mr. Dankberg.

Saint Vincents Catholic Medical Centers of New York ("Saint Vincents") cross moves for an order (1) directing the distribution from the trust fund to St. Vincents in an amount that its \$66,877 claim is proportional to the total claim as determined by the court; (2) dismissing the complaint against St. Vincents, Mutual Redevelopment and Fidelity and releasing the surety bonds or, in the alternative, reducing the bonds proportional to the satisfaction of the judgment by the \$326,365.62 recovered from Abcon, (3) award any remainder of the trust fund to St. Vincents in satisfaction of its October 6, 2004 and October 26, 2010 judgment against Abcon.¹

¹St. Vincents has filed for bankruptcy protection under Chapter 11 of the Bankruptcy Code. However, it has submitted a supplemental affirmation from counsel showing that it does not

Defendants Abcon, Michael Zenobio, Jr., and Christopher Zenobio a/k/a Chris Zenobio (together "the Abcon defendants") oppose the motion and cross motion.

Background

This action arises out of a construction project to build a primary care facility on two floors of an existing commercial space located at 275-77 8th Avenue, New York, NY ("the premises"). St Vincents, which had leased the premises from its owner Mutual Redevelopment Houses, Inc. ("Mutual"), hired Abcon as the general contractor on the project. Kamco and certain of the defendants were suppliers and subcontractors on the project. Kamco has been represented throughout this litigation by Stern.

This action began as one to foreclose on a mechanic's lien. On or about April 21, 2001, St. Vincents answered and asserted four cross claims against Abcon alleging Abcon's breach of its contract with St. Vincents. Subsequently, based on information that Kamco obtained from St. Vincents, Kamco amended its complaint to allege a failure 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

require the bankruptcy court's approval to pursue its claims in this proceeding.

court found that Kamco had met the statutory requirements to allow the action to proceed as a Lien Law trust fund action.

On or about July 2, 2002, the parties entered into a stipulation agreeing to, inter alia, the appointment of a Special Referee to hear and determine all disputes regarding disclosure and the disbursements of trust fund moneys. In light of the stipulation, by decision and order dated July 25, 2002, this court referred the issue regarding the disclosure and the disbursements of trust fund moneys to a Special Referee.

The matter was assigned to Special Referee Nicholas Doyle ("Doyle"). After Abcon failed to bring any witnesses to the original hearing date, Abcon obtained an adjournment through its counsel Neil Greenstein. On the adjourn date, only Abcon's principal Michael Zenobio, Jr. ("Zenobio") appeared at the hearing. The report indicates that Doyle informed Zenobio that a corporation must appear by counsel but that Zenobio told Doyle that Mr. Greenstein was not appearing for personal reasons, and that it was unclear whether Mr. Greenstein's firm still represented Abcon. In his report Doyle wrote that:

In light of the fact that Mr. Greenstein never contacted me, prior to the date of this hearing; that the initial adjournment was granted to Abcon and that Abcon had a lengthy period in which to prepare for this hearing and/or substitute counsel, I find that Abcon was not entitled to an adjournment and was unable to proceed with evidence, at this hearing, due to its appearance without counsel. Accordingly, I find Abcon failed to

offer any proof that it produced documentation in response to all of St Vincents' requests and in compliance with the requirements of Lien Law §§ 75 and 76. Therefore I find and recommend that Abcon has 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 then 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 Vincents (\$833,484,009) and the amount paid by Abcon to those entities involved in the project (\$543,551.39). By decision and order dated March 27, 2003, this court confirmed the report. The court also found that after considering the evidence in the record, that Kamco was entitled to summary judgment on its Lien Law claim. The court held that Abcon's failure to keep books and records as required by Lien Law § 75 gave rise to a presumption that the \$289,933 shortfall was not used for the purpose of the project, and that the evidence submitted by Abcon in opposition was insufficient to raise a triable issue of fact.

Subsequently, based on the unopposed request of Kamco, the court amended the March 27, 2003 decision and order on May 8, 2003, to reflect that summary judgment was granted as against Abcon as well as its principals Michael Zenobio, Jr., and Christopher Zenobio a/k/a Chris Zenobio.

Judgment was entered on June 17, 2003, in favor of Kamco and against the Abcon defendants in the amount of \$372,630.71.² In the meantime, the Abcon defendants appealed the court's grant of summary judgment in favor of Kamco on the Lien Law claim, and the judgment entered thereon. By decision dated June 24, 2004, the Appellate Division, First Department dismissed the appeal, finding that "no appeal lies from either order or judgment appealed from, both papers having been entered as a consequence of defendants-appellants default in appearing." See Kamco v. Nevada Construction, et al, 8 AD3d 196 (1st Dept 2004).

After judgment was entered in favor of Kamco, this court entertained thirteen motions in the action, most related to an attempt to enforce Kamco's judgment.

In addition, to the matters before this court, according to the affirmation of Marshall Stern, Esq., he has represented Kamco in a litigation in Nassau County involving ABCON Trust, which led to the foreclosure sale of ABCON's corporate property; and two actions for the foreclosures of properties in Nassau and Suffolk County which were consolidated before a Nassau County judge and resulted in an order of foreclosure of two parcels of property

²This amount consists of the principal amount of \$289,933, plus interest from April 24, 2000 in the amount of \$82,142.39 and costs and disbursements of \$555.32. Since the judgment was entered in the amount of \$372,630.71 on June 17, 2003, interest has accrued, according to Mr. Stern, at a rate of the \$33,536.76 per year.

neither of which has been sold.

Mr. Stern has also been involved on Kamco's behalf in an action in the Federal District Court for the Eastern District of New York before the Honorable Leonard D. Wetzlar. The federal action concerned money due and owing Abcon for a claim against the U.S. Postal Service for a termination for convenience at a Queens Postal facility. The United States Postal Service could not decide among the competing claims and deposited the moneys with the Clerk of the Court of the Eastern District of New York and commenced an interpleader action in 2005 naming various judgment creditors of Abcon, including Kamco. Subsequently, Judge Wetzlar held a settlement conference wherein all the defendants, except Abcon, agreed to settlement, which provided for the payment of \$326,365.62 to Stern, as counsel for Kamco.

Kamco then moved to distribute the money obtained in the settlement to pay Stern's disbursements and attorneys' fees, to pay the premium for a bond for Jay Stuart Dankberg, the receiver appointed to collect all profits and interests of Abcon's principals, and to disburse the remaining amounts to the claimants based on their percentage of the total amount due to the claimants, which Kamco asserts equals \$336,332.14. Kamco also sought to extend the receivership of Mr. Dankberg.

The Abcon defendants oppose the motion, arguing, *inter alia*, that there was insufficient evidence to substantiate the amounts

owed to each claimant, that Kamco failed to provide sufficient proof to warrant an award of attorneys' fees and disbursements., and that a hearing is needed to determine the reasonable amount of attorneys' fees. The Abcon defendants also object to the use of the money to pay the premium on the receiver's bond, asserting that there is insufficient proof of the need for such a receiver.

In reply, Kamco argued that Abcon is foreclosed by the court's decision and order granting summary judgment on the Section 3-A of the Lien Law claim from challenging the validity of the underlying claims. As for the distribution of the recovered funds, Kamco argued that only the trust beneficiaries have standing to challenge such distribution and that none of them have done so, although they were served with the motion.

By decision and order dated July 21, 2010, this court granted Kamco's application for attorneys' fees to the extent of finding that Kamco was entitled to such fees from the monies recovered thus far from Abcon, and set the matter down for a hearing as to the appropriate amount of the award. The court also found that any distribution of the fund to the claimants had to await the determination of the amount of attorneys' fees due and owing to Kamco, and therefore that Kamco's request to distribute the fund to the claimants must be held in abeyance. The court further found that while the Abcon defendants had no standing to challenge the amounts to which the claimants of the

fund are entitled, that the evidentiary support for the amount of the claims was lacking and noted that any distribution of funds to the claimants must be supported by proof of such claims and their amounts, and granted Kamco leave to renew its application for distribution of the fund to the claimants upon evidence that the claimants performed the work at the project and are owed the amounts they seek.

The court also found that St. Vincents was entitled to receive trust fund moneys based on the assignment of claims to it by certain trust fund beneficiaries.

A hearing regarding the amount of attorneys' fees and disbursements to which Stern was entitled from the trust fund was held before Judge McCooe on October 25, 2010. Stern appeared at the hearing with boxes of documents and a witness. Also present at the hearing was Edward M. Cuddy III, Esq., counsel for St. Vincents, Mutual Redevelopment and Fidelity, Seth Levine, Esq., counsel for Abcon defendants and the receiver, Jay Dankberg. Mr. Cuddy stated at the hearing that he had no objection to the attorneys' fee application, and Mr. Levine stated that he took no position.

After hearing testimony from Mr. Stern, Judge McCooe granted his application for attorneys' fees in the amount of \$108,788.60, and costs and disbursements of \$2,185.51 for a total of \$110,974.11.

Kamco's Motion

Kamco now moves to confirm the report of Judge McCooe, and this aspect of the motion is granted without opposition.

Kamco also renews its request to distribute the \$190,391.51 remainder of the fund to the claimants, based on their percentage of the amount due to the claimant as whole (which is \$336,832,14), and in support of this request submits further evidence that the claimants performed the work at the project and are owed the amounts they seek. Abcon opposes this request, asserting that the proof submitted by Kamco is insufficient and argues, *inter alia*, that one of the trust beneficiaries, Essential Electric, is not entitled to the funds as it allegedly lacked a license to perform certain work.

Abcon's opposition is unavailing. As found by this court in its decision and order dated July 21, 2010, Abcon lacks standing to oppose the distribution of the trust funds, as it is not a beneficiary of the fund. Notably, not one of the trust beneficiaries has opposed the motion to distribute the monies. Moreover, Essential Electric has pointed to proof that it was properly licensed at the time the work was performed and submits an affidavit from a former employee of Abcon stating that Essential Electric performed its duties under its contract. Under these circumstances, and as Kamco has submitted sufficient proof as to the beneficiaries' claims, Kamco's motion to

distribute the \$190,391.51 to the claimants is granted.

As for Kamco's request to pay \$25,000 for the premiums on the bond and other costs incurred by Jay Dankberg, who was appointed Receiver to recover the judgment, such request is denied without prejudice to renewal upon proof regarding the cost of the bond and other costs. Upon providing such proof, Kamco may also renew its request to extend the receivership of Mr. Dankberg upon a showing that such receivership is warranted and appropriate under the circumstances here.

St. Vincents' Cross Motion

St. Vincents cross moves for an order (1) directing the distribution from the trust fund to St. Vincents in an amount which is proportional to the total claim as determined by the court; (2) dismissing the complaint against St. Vincents, Mutual Redevelopment and Fidelity and releasing the surety bonds or, in the alternative, reducing the bonds proportional to the satisfaction of the judgment by the \$326,365.62 recovered from Abcon, (3) awarding any remainder of the trust fund to St. Vincents in satisfaction of its October 6, 2004 and October 26, 2010 judgments against Abcon.

First, as the proof submitted on this motion and cross motion includes evidence that St. Vincents paid certain beneficiaries and was assigned their claims totaling \$66,877, St. Vincents' cross motion is granted to the extent of directing the

distribution of fund monies to it based on its proportional amount of the whole.³

As for St. Vincents' request that court dismiss the claims against it and release and cancel certain bonds, such request is denied as premature as the claims of the trust beneficiaries have not been satisfied in full. However, St. Vincents' alternative request to reduce the bonds in proportion to the satisfaction of Kamco's June 17, 2003 judgment by the \$326,365.62 recovered from Abcon is granted.⁴

Finally, while St. Vincents is entitled to receive trust funds moneys based on the assignment of claims to it by certain trust beneficiaries, it provides no legal authority to support its position that a judgment creditor that is not a trust beneficiary can recover from the trust fund. In any event, St. Vincents' acknowledges that it is not entitled to obtain use of the trust fund to satisfy its outstanding judgment against Abcon until the beneficiaries of the trust have been paid, and the \$190,391.51 remaining following the payment of attorneys' fees and disbursements is insufficient to pay the trust beneficiaries

³These claimants and the amounts of their claims are as follows: Nova Plumbing and Heating, Inc. (\$15,000), Upright Expeditors, Inc. (\$3,300), Aero Mechanical (\$16,900), Ambrosio Plumbing and Heating, Inc. (\$23,677), and Misan Electric, Inc. (\$8,000).

⁴St. Vincents seeks to reduce the bond by 57%, in light of the \$326,365.62 received in federal interpleader action from Abcon.

in full. Thus, St. Vincents' request that it be awarded any remainder of the trust fund to satisfy its judgment against Abcon is denied without prejudice to renewal in the event that the claims of the trust beneficiaries are fully satisfied.

Kamco shall settle an order on notice in accordance with the foregoing and provide in such order for the payment of attorneys' fees and disbursements to Stern in the amount of \$110,974.11, the amount of disbursement to each of the claimants, including St. Vincents, of the \$190,391.51, based on their percentage of the whole, and reserving \$25,000 for the payment of premiums on the bond and other expenses allegedly incurred by the Receiver upon proper proof.

Dated: July 14, 2011


J.S.C.

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