

Davis & Warshow, Inc. v Nu Citi Plumbing, Inc.

2011 NY Slip Op 33816(U)

August 16, 2011

Sup Ct, Queens County

Docket Number: 26913/10

Judge: Robert J. McDonald

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behalf of Nu Citi. The Johnston defendants did business as defendant Nu Citi and used the plumbing license of defendant Melvin Peltz to do so. Defendant Nu Citi used the supplies sold by the plaintiff to complete work on construction projects, and the defendant corporation received payment for its work. However, defendant Nu Citi failed to pay the sum of \$88,148.13. Instead of paying the plaintiff, defendant Nu Citi issued numerous checks to entities associated with the Johnston defendants. The plaintiff based its sixth cause of action, which it asserts against the Johnston defendants, among others, on section 72 of the Lien Law pertaining to the diversion of trust funds designated as such by Article 3-A of the Lien Law.

The Johnston defendants deny ever being a shareholder, director, officer, or employee of defendant Nu Citi. They further deny that they ever received any supplies sold by plaintiff D&W or received any money from any projects for which D&W supplies were used.

"It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference***." (*Jacobs v. Macy's East, Inc.*, 262 AD2d 607, 608; *Leon v. Martinez*, 84 NY2d 83.) The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (see, *Stukuls v. State of New York*, 42 NY2d 272; *Jacobs v. Macy's East Inc.*, *supra*), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading. (See, *Rovello v. Orofino Realty Co., Inc.*, 40 NY2d 633.) The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint. (See, *Rovello v. Orofino Realty Co., Inc. supra*; *Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 229 AD2d 159.) "The court must accept the facts alleged in the pleading and the submissions in opposition to the motion as true, and accord the plaintiff the benefit of every possible favorable inference ***." (*Operative Cake Corp. v. Nassour*, 21 AD3d 1020, 1021; see, *Aranki v. Goldman & Associates, LLP*, 34 AD3d 510.)

"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. Under Lien Law § 70, all funds received by an owner or contractor on a public or private improvement in New York constitute assets of a statutory trust for which the owner or contractor is designated as statutory trustee. Beneficiaries to whom such assets may be properly paid are listed in Lien Law § 71. Any application of trust assets for a purpose other than those specifically permitted by § 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." (4B NY Prac, Com. Litig. in New York State Courts § 86:10 [2d ed]; see, *Canron Corp. v City of New York*, 89 NY2d 147.)

The trust assets held by a contractor or subcontractor are to be used for, inter alia, " (a) payment of claims of subcontractors, architects, engineers, surveyors, laborers and *materialmen* ***." (Italics added.) (Lien Law § 71; See, *H. Verby Co., Inc. v. Plainview Associates*, 6 Misc.3d 1011[A] [Table], 2005 WL 119710 [Text].)

"An improper diversion of the contractor's trust assets occurs when any such trust asset is paid, transferred or applied for a nontrust purpose, that is, for any purpose other than the expenditures authorized in section 71(2), before all of the trust claims have been paid or discharged (Lien Law § 72[1]). A trust beneficiary may enforce its rights against any nonbeneficiary who receives trust assets with knowledge of their trust status ***." (*Canron Corp. v City of New York*, supra 154; see Lien Law § 77[3][a][I], [vi].)

The complaint states a cause of action against the Johnston defendants.

The plaintiff has alleged that the Johnston defendants purchased supplies from it on behalf of defendant Nu Citi and that, knowing that the supplies had been used on construction projects, they diverted sums received in payment by Nu Citi to entities controlled by themselves. The complaint adequately alleges that the Johnston defendants, acting as corporate officers of Nu Citi, caused the corporation to misappropriate trust assets. "Any person who knowingly causes misappropriation of trust property by a corporation is personally liable for participation in a breach of trust ***." (*Schwadron v. Freund*, 69 Misc2d 342, 348.) The plaintiff has adequately alleged that the Johnston defendants knowingly and actively participated in the diversion of trust assets. (See, *Ben Soep Co., Inc. v. Highgate Hall of Orange County, Inc.*, 71 AD2d 825.) The Johnston defendants allegedly diverted the trust assets to themselves with

knowledge of the nature of the funds. "A trust beneficiary may enforce its rights against any nonbeneficiary who receives trust assets with knowledge of their trust status ***." (*Canron Corp. v. City of New York, supra*, 154; see Lien Law § 77[3][a][I], [vi].) "[A] beneficiary under the provisions of Article 3-A of the Lien Law can bring an action to recover trust assets in the hands of a corporate transferee *** ." (*Fleck v. Perla*, 40 AD2d 1069, 1069.

The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (see, *Stukuls v. State of New York, supra; Jacobs v. Macy's East Inc., supra*), and the affidavits from the Johnston defendants denying any role as a shareholder, director, or officer of Nu Citi and denying receipt of "any money individually from any job in which Plaintiff's products were used" cannot be used for that purpose.

Dated: Long Island City, N.Y.
August 16, 2011

ROBERT J. MCDONALD
J.S.C.