

277 Mott St., LLC v Fountainhead Constr., LLC
2012 NY Slip Op 30185(U)
January 24, 2012
Sup Ct, NY County
Docket Number: 603168-08
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. JUDITH J. GISCHÉ

PRESENT: _____
Justice

PART 10

Index Number : 603168/2008
277 MOTT LLC
vs.
FOUNTAINHEAD CONSTRUCTION LLC
SEQUENCE NUMBER : 003
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 003

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

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

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

Conference 3/15/2012 at 9:30

FILED

JAN 26 2012

NEW YORK
COUNTY CLERK'S OFFICE

JAN 24 2012

Dated: _____

HON. JUDITH J. GISCHÉ, J.S.C.

1. CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10**

-----X
277 Mott Street, LLC,

Plaintiff (s),

-against-

Fountainhead Construction, LLC,
Steven Abrams and "John Does #1-10,"

Defendant (s).

-----X
Steven Abrams,

3rd-Party Plaintiff,

-against-

Joseph DiPalermo,

3rd Party Defendant.

-----X

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of
this (these) motion(s):

Papers	Numbered
Def Abrams n/m (partial 3212) w/EHP affirm, exhs	1
277 Mott opp w/SRM affirm, DTF affid	2,3
277 Mott exhs in opp (sep back)	4
Def Abrams reply w/JHL affirm, exhs	5

Upon the foregoing papers, the decision and order of the court is as follows:

This action arises from a letter of intent ("LOI") between plaintiff 277 Mott Street, LLC ("277 Mott" sometimes "owner") and defendant Fountainhead Construction, LLC ("FHC" sometimes "contractor") to construct a building at 277 Mott Street, New York,

DECISION/ ORDER

Index No.: 603168-08

Seq. No.: 003

PRESENT:

Hon. Judith J. Gische
J.S.C.

T.P. Index No.
590925/11

FILED

JAN 26 2012

NEW YORK
COUNTY CLERK'S OFFICE

New York ("the property"). Defendant Steven Abrams ("Abrams") was the managing member of FHC when the LOI was made.

In connection with a prior motion by defendants, the court dismissed certain causes of action (Gische J., Order 7/2/09). Subsequently, plaintiff moved for and was granted summary judgment against defendant FHC (Gische J., Order, 12/17/10). The court directed entry of a money judgment in favor of plaintiff against FHC in the principal amount of \$1,533.839.00 and the judgment has been entered. In the meantime, plaintiff's appeal of this court's order of dismissal dated July 2, 2009 was decided. The Appellate Division, First Department reinstated the 1st and 5th through 9th causes of action that had been previously been dismissed by this court (277 Mott St. LLC v. Fountainhead Constr. LLC, 83 AD3d 541 [1st Dept 2011]). The decision on appeal is dated April 19, 2011. On May 17, 2011, plaintiff served an amended complaint asserting 9 causes of action against Abrams. Abrams answered the amended complaint and now moves for summary judgment dismissing the 2nd cause of action against him which is for "diversion of trust funds."

The parties have apparently stipulated to striking the note of issue. That stipulation was not served on the Clerk in the Office of Trial support. Consequently, the case is still on the trial calendar and is scheduled for a "pre-trial" conference March 15, 2012. Given those circumstances and the fact that Abrams recently commenced (November 10, 2011) a third party action against Joseph DiPalermo, another member of FHC, (T.P. Index No. 590925/11), this motion is timely and will be decided on the merits (CPLR § 3212; *Brill v. City of New York*, 2 NY3d 648 [2004]; *Ostrov v. Rozburch*, —AD3d—, 2012 WL 5780 [1st Dept 2012]).

Since many of the facts of this case are set forth in the court's two prior orders, one of which granted summary judgment, and also the decision on appeal, the reader is presumed familiar with each of those decisions. Consequently, unless otherwise provided, the following facts have been established:

Facts and Arguments

In granting plaintiff/owner summary judgment against FHC, the court decided that monies that were received by FHC were never used by it for the project it was hired to do by the owner and the court directed entry of a money judgment against FHC. The court found that the property at Mott street had never progressed beyond a concrete slab.

The second amended complaint sets forth 9 causes of action ("COA"): fraud (1st COA), diversion of trust funds" (2nd COA), breach of contract (3rd COA), "violation of Business Corporation Law" (4th COA), violation of Debtor and Creditor Law § 273, 274, 275, 276 (5th - 8th COA) and attorneys' fees (9th COA). Abrams has moved only with respect to the "diversion of trust funds" cause of action. He argues that 277 Mott does not have standing to assert this cause of action because 277 Mott is the owner of the project/property and plaintiff's "diversion of trust funds" cause of action arises out of Article 3-A of the New York Lien Law ("Lien Law § ____") and that the Lien Law confers standing only to unpaid contractors and material men, not owners like 277 Mott.

The complaint alleges that Abrams represented to 277 Mott's agent, Douglas Fountain¹, that Abrams had extensive construction experience and that he needed a

¹The similarity between Mr. Fountain's name and "Fountainhead" is a coincidence and no claim is made that they are related in any way.

deposit for the project. 277 Mott wired the deposit requested (\$1,533,939) and it was deposited into FHC's account. Abrams is the managing member of FHC. 277 Mott alleges that of the amount deposited, \$1,183,150 was specifically allocated to pay the subcontractors and vendors working on the project. 277 Mott alleges further that only \$300,000 of that money was ever actually paid to such persons and Abrams used the money to pay for personal and/or other debts having nothing to do with the project and/or of no beneficial interest to the owner in any way. 277 Mott claims that Abrams paid off FHC's line of credit and Abrams' own American Express Bill. According to 277 Mott, "[t]he funds transferred by 277 to Fountainhead's account constituted trust funds for the payment of the creditors, including 277 Mott . . ." and "[in] breach and violation of their fiduciary duties, Fountainhead and Abrams cause an amount to be determined by the Court, but believed to be not less than \$1,200,000.00 of the funds they were required to hold in trust, to be disbursed for non-trust purposes." Finally, 277 Mott states that it seeks a money judgment against Abrams in the amount of \$1,533,839 because although it recovered a money judgment against FHC in that amount, "no part...has been paid or is collectible."

Discussion

A movant seeking summary judgment in its favor must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. " Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). The evidentiary proof tendered, however, must be in admissible form. Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 (1979). Once met, this burden shifts to the opposing party who must then demonstrate

the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). Thus, to prevail on his motion for summary judgment, Abrams must prove his third defense which is that, as a matter of law, 277 Mott lacks standing to assert this cause of action under the Lien Law.

Lien Law § 70 defines a trust under the lien law as consisting of funds either "received by an owner for or in connection with an improvement of real property in this state . . . or received by a contractor under or in connection with a contract for an improvement of real property . . ." For example, the proceeds of a building loan contract or mortgage or money received pursuant to a construction contract "shall constitute assets of a trust for the purposes provided in section seventy-one of this chapter."

Lien Law § 71[2][a] states that:

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 material men;

Lien Law § 71[4] further provides that:

Persons having claims for payment of amounts for which the trustee is authorized to use trust assets as provided in this section are beneficiaries of the trust whether or not they have filed or had the right to file a notice of lien as provided in article two of this chapter or shall have recovered a judgment therefor. Where an owner becomes obligated to incur an expenditure as part of the

cost of improvement, any person to whom he is so obligated is a beneficiary.

Lien Law § 77 [1] [a] pertains to actions to enforce a trust:

A trust arising under this article may be enforced by the holder of any trust claim, including any person subrogated to the right of a beneficiary of the trust holding a trust claim, in a representative action brought for the benefit of all beneficiaries of the trust. An action to enforce the trust may also be maintained by the trustee.

The underlying purpose of Article 3-A of the Lien Law is to make sure that persons who have actually performed work for or provided services at the direction of the owner or a general contractor receive payment for the work actually performed (RLI Insurance Co. v. New York State Dept. of Labor, 97 N.Y.2d 256 [2002]. Typically, it is the general contractor (J. Petrocelli Const., Inc. v. Realm Elec. Contractors, Inc., 15 AD3d 444 [2nd Dept 2005]) or subcontractor (Aspro Mech. Contr. v Fleet Bank, 1 N.Y.3d 324 [2004]) that brings an action under the Lien Law for improper diversion of trust assets.

The owner of the property or project is not a beneficiary of the trust, rather the funds "received by an owner ... shall constitute assets of a trust for the purposes provided..." (Lien Law § 70[1]; Broadway Houston Mack Development, LLC v. Kohl, 22 Misc2d 1001 [Sup Ct Suffolk Co 2008] *aff'd* 71 A.D.3d 937 [2nd Dept 2010]). Thus, while the owner may have a claim against the alleged wrongdoer who misappropriated monies the owner entrusted to it for a project, such relief is not available under Article 3-A of the Lien Law because the law is not for the protection of the owner, but of the persons who provided services (see Drapaniotis v 36-08 33rd St. Corp., 48 A.D.3d 736 [2nd Dept 2008]; Broadway Houston Mack Development LLC v. Kohl, trial decision,

supra). Abrams has met his burden by establishing that, as a matter of law, 277 Mott does not have standing under Article 3-A of the Lien Law to assert this particular cause of action against him. Therefore, unless 277 Mott raises an issue of fact, Abrams' motion for summary judgment should be granted.

277 Mott's first argument in opposition to Abrams' motion is that this particular cause of action was reinstated by the Appellate Division when it modified this court's prior order on defendants' motion to dismiss. This is incorrect. Defendants only moved for the dismissal the 1st, 4th and 5th through 9th COA. The diversion of trust funds COA in the original complaint was the 2nd COA. In any event, the burdens on a motion to dismiss are different than those on a motion for summary judgment. Further arguments that Abrams is "hiding" behind "a narrow interpretation of the law" fail to raise a triable issue of fact.

Alternatively, 277 Mott argues that the deposit constitutes a "trust fund for the benefit of creditors" and that 277 Mott is a judgment creditor of FHC which was insolvent when the deposit was made and then diverted by Abrams. 277 Mott contends that under section 508 of the Limited Liability Company Law ("LLCL § ___"), Abrams is liable to the owner for the money that were diverted. One of the cases plaintiff principally relies on discusses the interplay between LLCL § 508 and the Debtor and Creditor Law (In re Die Fliedermas LLC, 323 B.R. 101 [Bkrtcy.S.D.N.Y. 2005]). LLCL § 508, however, grants rights to the LLC to recover monies distributed to a member in violation of such section. It does not give such rights to either a creditor or even a judgment creditor to sue a member directly.

277 Mott argues that even if the money was not subject to an Article 3-a type of

trust, it has alleged sufficient facts to warrant the imposition of a constructive trust because it entrusted specifically identifiable funds to Fountainhead in reliance of the representations made by the defendants. To establish a constructive trust there must be: (1) a confidential or fiduciary relation, (2) a promise, express or implied, (3) a transfer made in reliance on that promise, and (4) unjust enrichment (Bankers Sec. Life Ins. Soc. v. Shakerdge, 49 N.Y.2d 939 [1980]).

A fiduciary relationship "exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation" (EBC I. Inc. v. Goldman Sachs & Co., 5 N.Y.3d 11, 19 [2005]). Such a relationship is based on a "higher level of trust than normally present in the marketplace between those involved in arm's length business transactions" (EBC I. Inc. v. Goldman Sachs & Co., 5 N.Y.3d at 19). Generally, however, where parties have entered into a contract, the court will look at the agreement "to discover ... the nexus of [the parties'] relationship and the particular contractual expression establishing the parties' interdependency" (Id.).

277 Mott did not transfer its property (the deposit money) to Abrams. The money was sent to FHC with the expectation that it would be used, as stated by Mr. Fountain in his sworn affidavit, strictly for the benefit of the owner in beginning the project. In fact, Mr. Fountain states that had it not been for "an explicit agreement and understanding relating to the manner in which the deposit funds were to be allocated, they never would have been wired to [FHC's] account." Furthermore, although there is no contract between the owner and FHC (or Abrams), FHC issued a letter of intent setting forth the agreement to provide construction services to the owner. 277 Mott's

subjective claims of reliance on FHC/Abrams' expertise as a construction manager does not give rise to a confidential relationship between Abrams and the owner, under the particular facts of this case (Societe Nationale D'Exploitation Industrielle Des Tabacs Et Allumettes v. Salomon Bros. Intern., 251 A.D.2d 137 [1st Dept 1998]). Therefore, 277 Mott has not presented sufficient evidence to create a genuine issue of material fact that there was a fiduciary relationship between 277 Mott and Abrams (Zuckerman v. New York, *supra*). In the absence of such a relationship, 277 Mott has no cause of action for a constructive trust.

Since Abrams has proved Article 3-a of the Lien Law does not apply and there is no constructive trust because there was no preexisting fiduciary or confidential relationship between 277 Mott and Abrams, nor did the owner transfer property to Abrams, Abrams' motion for summary judgment, dismissing the 2nd cause of action is hereby granted and that cause of action is severed and dismissed. To the extent that 277 Mott has claims against Abrams for misappropriating its deposit, there are other causes of action in the amended complaint in which that issue may be litigated.

Conclusion

In accordance with the foregoing,

It is hereby

ORDERED that the motion for summary judgment by defendant Steven Abrams, dismissing the 2nd cause of action against him for diversion of trust funds is granted; and it is further

ORDERED that the clerk shall enter judgment in favor of defendant Steven Abrams against plaintiff 277 Mott Street severing and dismissing the 2nd cause of action

against Steven Abrams; and it is further

ORDERED that the remaining claims shall continue and that the previously scheduled **March 15, 2012** court appearance will be a status, not pre-trial, conference; and it is further

ORDERED that any relief requested but not expressly addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
January 24, 2012

So Ordered:



Hon. Judith J. Gische, JSC

FILED

JAN 26 2012

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