

**Matter of Federal Ins. Co. v New York City Dept. of
Fin.**

2012 NY Slip Op 30792(U)

March 27, 2012

Sup Ct, NY County

Docket Number: 114421/11

Judge: Doris Ling-Cohan

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

PRESENT: Hon. DORIS LING--COHAN, Justice

PART 36

In the Matter of the Application of
Federal Insurance Company

Petitioner

-against-

New York City Department of Finance, and
New York City Department of Parks and
Recreation,

Respondent

INDEX NO. 114421/11
MOTION DATE
MOTION SEQ. NO. 002, 003
MOTION CAL.NO.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

The following papers, numbered 1 to 7 were read on this motion to amend:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/Order to Show Cause - Affidavits - Exhibits	<u>1, 2</u>
Supplemental Petitioner Affidavits	<u>3, 4</u>
Answering Affidavits - Exhibits (Memo) of City	<u>5</u>
Replying Affidavits (Reply Memo) of Marcano; unsworn letter	<u>6, 7</u>

Cross-Motion: [] Yes [X] No

Upon the foregoing papers, it is ordered that motion seqs. 002 and 003 are consolidated for joint decision and are decided as set forth below.

Background

Respondent New York City Department of Parks and Recreation ("City") entered into a multi-million dollar construction contract ("Contract") with non-party Pile Foundation Construction, Inc. ("Pile") for, among other things, the reconstruction of bulkheads and relieving platforms from Jackson Street to East 14th Street in Manhattan, as part of a project to create a promenade along the East River for the public's use and enjoyment ("Project").

Because of non-performance by non-party Pile, Petitioner Federal Insurance Company ("Federal"), as surety, to enable Pile to avoid defaulting under the Contract, entered into an agreement concerning Federal's funding of the project. Performance and payment bonds were

issued by Federal.

Pursuant to the Funding Agreement executed in February 2008 between Pile and Federal, Federal agreed to fund the Project, in exchange for, among other things, Pile's assignment to Federal of all moneys due, and to become due, from the City in connection with the Project (the "Assignment"). Federal perfected its interest in the Contract funds by registering the Assignment and recording a UCC-1 financing agreement. These actions between Pile and Federal occurred prior to the entry of the Marcano judgment and service of the Restraining Notice.

On or about February 2007, Carmen Marcano ("Marcano") commenced a lawsuit against Pile and others in the Supreme Court of Kings County (*Marcano v Pretigiagomo, et al*, Kings Index No 8221/2007), for alleged injuries sustained as a result of stepping on a nail protruding from a sidewalk at a location in Brooklyn, which is unrelated to the Project. In or about January 2011, Marcano obtained a default judgment against Pile in the amount of \$608,890.38.

On or about October 26, 2011, Marcano, as judgment creditor in the Kings County action, served the City with a Restraining Notice, forbidding the City to make or suffer any sale, assignment or transfer of, or any interference with, any property in which non-party Pile has an interest, or to pay over, or otherwise dispose of, any debt to Pile. Thereafter, on November 18, 2011, Marcano served an Execution with Notice of Garnishee to the City, and the City was subsequently served with a Marshal's Notice of Levy and Sale in the amount of the Marcano judgment.

Before the court are two (2) motions: (1) an order to show cause by petitioner Federal pursuant to CPLR §7806, declaring that a certain restraining notice, execution and levy issued in connection with a judgment awarded to Marcano in the case of *Marcano v Pretigiagomo, et al*, Kings County Supreme Court, Index No 8221/2007, do not provide any basis for respondents New York City Department of Finance and the City, to withhold payments otherwise due to

3] Federal in connection with the Contract; and directing respondents to release to Federal all payments withheld pursuant to such restraining notice, execution and levy; and (2) Respondents' motion pursuant to, *inter alia*, CPLR §401 seeking leave to serve an interpleader complaint pursuant to CPLR 1006(b) to add parties to this proceeding.

At oral argument of the within motions on February 15, 2012 and March 21, 2012, the City agreed with Petitioner that the funds in dispute are Lien Law Trust Funds, which Pile no longer has an equitable interest in, as a result of the Assignment, and are not available to Marciano to satisfy a judgment against non-party Pile, and thus, cannot be restrained. Counsel for Marciano appeared on both court dates and Marciano's husband testified; Marciano's submissions were considered by the court.

Discussion

As detailed below, petitioner's motion is granted to the extent of declaring that the restraining notice, execution and levy issued in connection with a judgment awarded to Marciano in the case of *Marciano v Pretigiagomo, et al*, Kings County Supreme Court, Index No 8221/2007, do not provide any basis for respondents New York City Department of Finance and the City, to withhold payments otherwise owed to Federal in connection with the Contract and directing respondents to release to Federal all payments withheld pursuant to such restraining notice, execution and levy¹, as it is undisputed that the amounts in dispute are funds received by Federal which are governed by Art. 3-A of Lien Law, and, thus, must be held in trust for and first applied to Lien Law Trust Beneficiaries.

Petitioner, in addition to its initial submissions, has produced two additional detailed affidavits [John Lovett & David J. Stryjewski] which indicate, *inter alia*, that "trust claim costs

¹ Such funds are to be released to extent that normal City approval process has been completed (such as approval by NYC Dept. of Parks & Recreations). See ¶18 of Affirmation of Richard Schulsohn, Esq., submitted in Support of City's Motion, Seq. 002.

under the Contract, including costs already paid and costs remaining to be paid, are expected to total \$55,454,428.20.” [¶ 8, Lovett Affidavit] and Petitioner “Federal’s projected loss under the Contract, for labor and materials claims alone, is \$21,049,696.26” [¶ 12, Lovett Affidavit].

Thus, there are no funds under the Contract which can go to anyone other than Lien Law Trust Beneficiaries. As stated by the Court of Appeals:

“Article 3-A of the Lien Law provides that ‘funds ... received by a contractor under or in connection with a contract for ... a public improvement ... and any right of action for any such funds due or earned or to become due or earned, shall constitute assets of a trust.’ The assets of an article 3-A trust ‘shall be held and applied’ to payment of article 3-A trust beneficiaries and costs of the improvement to real property (Lien Law §71). ... As a matter of statutory construction and under our precedents, even before funds are ‘due or earned,’ they become assets of an article 3-A trust. ... [It] commences ‘when any asset thereof comes into existence’ and continues until all trust claims have been paid or discharged, or all assets have been applied for trust purposes. ... Trust claims are ‘deemed to be in existence from the time of the making of the contract or the occurrence of the transaction out of which the claim arises’. ... Lien Law article 3-A mandates that once a trust comes into existence, its funds may not be diverted for non-trust purposes. Use of trust assets for any purpose other than the expenditures authorized in Lien Law §71 before all trust claims have been paid or discharged constitutes an improper diversion of trust assets, regardless of the propriety of the trustee’s intentions. ... Only after all trust claims have been paid or discharged does a beneficial interest in the remaining balance vest in the trustee owner or contractor.

Matter of RLI Ins. Co., Sur. Div. v New York State Dept. of Labor, 97 NY2d 256, 261-263

(2002)(internal citations omitted).

Furthermore, the Restraining Notice, Execution and Levy are improper because Pile no longer has *any* interest in the funds that Marcano seeks to collect, having entered into a General Indemnity Agreement, dated February 25, 2004, in which the Contract funds were assigned to Federal (prior to the entry of Marcano’s judgment), *inter alia*, as security for Federal’s issuance of surety bonds. As indicated earlier, Federal perfected its interest in the Contract funds by registering the Assignment and recording a UCC-1 financing statement, prior to the entry of Marcano’s judgment and service of the Restraining Notice.

Where a surety performs on its payment bond, pursuant to a contractor’s default, a

general agreement of indemnity is a “valid common law assignment” of contract funds, providing the surety with a preference over subsequent judgment creditors. *Orciuoli v August Bohl Contr. Co., Inc.*, 80 AD2d 13, 15 (3rd Dept 1981); *see also Chemical Bank v. Meltzer*, 93 NY2d 296 (1999)(“a surety is entitled to...priority”); *United States Fidelity and Guaranty Co., v. Triborough Bridge Authority*, 297 NY 31 (1947)(“the surety’s rights are prior to those of the intervener...”); *United States Fidelity and Guaranty Co. v. Carnegie Trust Co.*, 161 AD 435 (1st Dept 1914)(“[t]he surety..became subrogated to all the rights, liens and privileges of the principal creditor, including the right to a preference...”); *United States Cas. Co. v Met Contr. Corp.*, 11 Misc2d 492 (Supreme Court, New York Co. 1956) (The “attaching creditor stands no better than his debtor and if such debtor has no equitable interest in the property the creditor acquires nothing by an attachment.”). Thus, by virtue of the Assignment, the General Indemnity Agreement, and the UCC 1 Financing Statement, Pile divested its interest in the funds that are, or may have become, due and owing under the Contract, and no longer has any right to those funds, which now have been assigned to Federal. As Pile no longer has any equitable interest in the Contract funds, it follows that Marciano, as a judgment creditor of Pile, cannot restrain such funds, nor obtain rights superior to her judgment debtor, Pile.

The Court notes that in rendering this decision, it has considered the arguments of Carmen Marciano, including the affirmation in support and exhibits in the Order to Show Cause (“OSC”) submitted by Carmen Marciano in the Kings County proceeding [*Marciano v NYC Dept. of Finance*, Index no. 932/12]² and the additional unsworn, undated, and unsigned, two page

² The court notes that, apparently, such OSC was never signed by Honorable Yvonne Lewis as she wrote “denied”. Although she also wrote “referred to Justice Doris Lynn [sic] Cohan”, the court is at a loss to understand what was actually transferred, as she declined to sign the OSC and specifically wrote “denied”, and the named respondents in such Kings County proceeding, were not served pursuant to CPLR §308. Also, the New York County Clerk never received the file containing such “reference” from the Kings County Clerk, but, given the parties’ insistence, merely marked duplicate papers as mot. seq. 003 under the within

letter of Carmen Marciano, submitted in court at the March 21, 2012 appearance, for purposes of opposing to petitioner's request for relief. Moreover, Marciano's attorneys had a full opportunity to inform the court at the two court appearances on this matter, as did Mrs. Marciano's husband, Rosendo Marciano, who was given an opportunity to testify.

At the first court date, counsel for Marciano conceded that the funds received from the City under the relevant Contract are trust fund proceeds, but asserted, without any proof, that there may be excess funds not earmarked to be paid to trust fund beneficiaries, which may be available to pay other claims such as the Marciano judgment. At the February 15, 2012 court date, the parties agreed that petitioner would provide a detailed affidavit to support that this was not the case (and counsel for Marciano agreed that this would be sufficient). Petitioner has in fact supplied two detailed affidavits in which it is indicated that there are no excess funds. In its submissions, Marciano has not countered this with any evidence. Further, at today's court appearance, Marciano has provided only oral assertions, speculation, and unsupported innuendo, that Pile committed fraud to avoid its creditors. The court notes that, significantly, it is not disputed that the Assignment occurred, prior to the entry of a default judgment against Pile. While this court may be sympathetic to Marciano's predicament, in that she has recovered a judgment for injuries and seeks the money owed to her, this is insufficient in a court of law to overcome the undisputed affidavits before the court, submitted by petitioner, to which the City respondent does not dispute. The court notes that Marciano has other available post-judgment remedies available to her.³

Respondents' motion to, *inter alia*, serve an interpleader complaint is denied as moot, as

proceeding *Federal Ins. Co. v Dept. of Finance*, filed under NY County Index No. 114421/11, notwithstanding that such OSC was brought as a separate proceeding.

³ To the extent that Marciano has orally sought "discovery" in this proceeding, there is no automatic right to discovery in a special proceeding. Marciano is free to pursue discovery in the context of her post-judgment remedies.

Marcano has had a full opportunity to oppose plaintiff's application, as explained above.

Accordingly, it is

ORDERED that petitioner's application is granted to the extent that it is ADJUDGED and DECLARED that the restraining notice, execution and levy issued in connection with a judgment awarded to Marcano in the case of *Marcano v Pretigiagomo, et al*, Kings County Supreme Court, Index No 8221/2007, do not provide any basis for respondents New York City Department of Finance and the City, to withhold payments otherwise owed to Federal in connection with the Contract and respondents are directed to release to Federal all payments withheld pursuant to the restraining notice, execution and levy⁴, as it is undisputed that the amounts in dispute are funds received by Federal which are governed by Art. 3 of Lien Law, and must be held in trust for and first applied to Lien Law Trust Beneficiaries; and it is further

ORDERED that respondents motion is deemed moot; and it is further

ORDERED that within 30 days of entry of this order, Federal shall serve a copy upon all parties, as well as counsel for Marcano, with notice of entry.

Dated: 3/27/12


Hon. Doris Ling-Cohan, JSC

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if Appropriate: DO NOT POST

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⁴ Such funds are to be released to extent that normal City approval process has been completed (such as approval by NYC Dept. of Parks & Recreations). See ¶18 of Affirmation of Richard Schulsohn, Esq., submitted in Support of City's Motion, Seq. 002.