

**Inter Connection Elec., Inc. v VII 752 W. End Owner  
LLC**

2013 NY Slip Op 31785(U)

June 28, 2013

Sup Ct, New York County

Docket Number: 102985/2012

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: IAS PART 46

-----X  
 INTER CONNECTION ELECTRIC, INC.,

Plaintiff

Index No. 102985/2012

- against -

VII 752 WEST END OWNER LLC, 752 PARIS  
 WEA LLC, 752 PARIS WEA-II LLC, HELIX  
 PARTNERS, HP BUILDERS, WILLIAM LOZITO,  
 JOSEPH LOZITO, MATTHEW BROWN, NEW YORK  
 COMMUNITY BANK, REMCO MAINTENANCE LLC,  
 and JOHN DOES 1-200, intended to be  
 (i) their heirs, devisees, and  
 personal representatives, and his,  
 their, or any of their successors in  
 right, title, and interest, the names  
 of the last two hundred defendants  
 being unknown to plaintiff, the person  
 or parties intended to be any person  
 in possession of or claiming interest  
 in or lien against the property  
 described in the verified complaint,  
 whose interest may not be protected  
 under applicable emergency rent laws,  
 or (ii) the owners, officers,  
 directors, shareholders, and/or  
 members of defendant VII 752 WEST END  
 OWNER LLC, whose names are currently  
 unknown to plaintiffs but will be  
 discovered during the course of  
 discovery in this action,

DECISION AND ORDER

Defendants

-----X  
 I. BACKGROUND

Plaintiff seeks to recover payment for the work plaintiff  
 undertook as a subcontractor on a construction project where  
 defendant HP Builders LLC was the general contractor and  
 defendant VII 752 West End Owner LLC was the owner. Defendants  
 Helix Partners, HP Builders LLC, William Lozito, Joseph Lozito,

and Matthew Brown move to dismiss plaintiff's First through Sixth and Eighth Claims for Relief under C.P.L.R. § 3211(a)(1), (5), and (7). Plaintiff opposes defendants' motion and cross-moves to join a defendant and to amend the complaint. C.P.L.R. §§ 1001(a), 1002(b), 3025(b).

## II. THE PROPOSED JOINDER AND AMENDMENTS

Plaintiff cross-moves to join Helix Group, Inc., as a defendant and substitute three claims for relief for plaintiff's original eight claims. The proposed First Claim for Relief, which mirrors the Third Claim for Relief in the original complaint, alleges a breach of contract against HP Builders LLC and Helix Group, Inc., in addition to Helix Partners, the only defendant originally sued for a breach of contract.

The proposed Second Claim for Relief, which mirrors the Sixth Claim for Relief in the original complaint, alleges unlawful diversion of a statutory trust fund under New York Lien Law § 77(2) against Helix Group, Inc., in addition to the original defendants Helix Partners, HP Builders LLC, William Lozito, Joseph Lozito, and Matthew Brown. The proposed Third Claim for Relief, which mirrors the Eighth Claim for Relief in the original complaint, alleges violations of the Prompt Payment Act, N.Y. Gen. Bus. Law § 756-a, against defendant Helix Group, Inc., in addition to Helix Partners and HP Builders LLC, the defendants originally sued for diversion of a trust fund.

### III. APPLICABLE STANDARDS

C.P.L.R. § 3025(b) permits amendments to a complaint as long as they do not unfairly surprise or otherwise substantially prejudice defendants, Kocourek v. Booz Allen Hamilton Inc., 85 A.D.3d 502, 504 (1st Dep't 2011); Jacobson v. McNeil Consumer & Specialty Pharms., 68 A.D.3d 652, 655 (1st Dep't 2009); Thompson v. Cooper, 24 A.D.3d 203, 205 (1st Dep't 2005); Zaid Theatre Corp. v. Sona Realty Co., 18 A.D.3d 352, 354-55 (1st Dep't 2005), and the proposed claims for relief, as alleged, are meritorious. Sabo v. Alan B. Brill, P.C., 25 A.D.3d 420, 421 (1st Dep't 2006); Thompson v. Cooper, 24 A.D.3d at 205; Zaid Theatre Corp. v. Sona Realty Co., 18 A.D.3d at 355; Watts v. Wing, 308 A.D.2d 391, 392 (1st Dep't 2003). Plaintiff bears the burden to demonstrate the merits of its proposed claims for relief through admissible evidence. Greentech Research LLC v. Wissman, 104 A.D.3d 540, 541 (1st Dep't 2013); Zaid Theatre Corp. v. Sona Realty Co., 18 A.D.3d at 355; Pacheco v. Fifteen Twenty Seven Assoc., 275 A.D.2d 282, 284 (1st Dep't 2000); Non-Linear Trading Co. v. Braddis Assocs., 243 A.D.2d 107, 116 (1st Dep't 1998). See Sepulveda v. Dayal, 70 A.D.3d 420, 421 (1st Dep't 2010); Spence v. Bear Stearns & Co., 264 A.D.2d 601, 602 (1st Dep't 1999).

Upon defendants' motion to dismiss plaintiff's claims pursuant to C.P.L.R. § 3211(a)(1), the court may not rely on facts alleged by defendants to defeat the claims unless the evidence is in admissible documentary form, demonstrates the absence of any significant dispute regarding those facts, and

completely negates the allegations against defendants. Lawrence v. Graubard Miller, 11 N.Y.3d 588, 595 (2008); Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994); Greenapple v. Capital One, N.A., 92 A.D.3d 548, 550 (1st Dep't 2012); Correa v. Orient-Express Hotels, Inc., 84 A.D.3d 651 (1st Dep't 2011). The court may grant defendants' motion to dismiss claims under C.P.L.R. § 3211(a)(1) only where the admissible documentary evidence utterly refutes plaintiff's allegations and conclusively establishes a defense as a matter of law. Goldman v. Metropolitan Life Ins. Co., 5 N.Y.3d 561, 571 (2005); Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 (2002); 511 W. 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 152 (2002); McCully v. Jersey Partners, Inc., 60 A.D.3d 562 (1st Dep't 2009). If the documentary evidence demonstrates the absence of any claim, that conclusion bars repleading. Meimeteas v. Carter Ladyard & Milburn LLP, 105 A.D.3d 643 (1st Dep't 2013); Montefiore v. Soja, 292 A.D.2d 241, 242 (1st Dep't 2001); Fischbein v. Beitzel, 281 A.D.2d 167 (1st Dep't 2001).

Upon defendants' motion to dismiss claims pursuant to C.P.L.R. § 3211(a)(7), the court must accept the complaint's allegations as true, liberally construe them, and draw all reasonable inferences in plaintiff's favor. Walton v. New York State Dept. of Correctional Servs., 13 N.Y.3d 475, 484 (2009); Nonnon v. City of New York, 9 N.Y.3d 825, 827 (2007); Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d at 326; Wadiak v. Pond Mgt., LLC, 101 A.D.3d 474, 475 (1st Dep't 2012). The court may

dismiss a claim under C.P.L.R. § 3211(a)(7) only if the allegations completely fail to state a claim. Leon v. Martinez, 84 N.Y.2d at 88; Harris v. IG Greenpoint Corp., 72 A.D.3d 608, 609 (1st Dep't 2010); Frank v. DaimlerChrysler Corp., 292 A.D.2d 118, 121 (1st Dep't 2002).

#### IV. PERMITTING JOINDER OF THE PROPOSED ADDITIONAL DEFENDANT

Plaintiff proposes to join Helix Group, Inc., as a defendant pursuant to C.P.L.R. § 1001(a), citing the bid documents plaintiff submitted for its contract for electrical work, addressed to either "Helix Group" or Helix Partners, and signed and approved by defendant William Lozito. Aff. of Jeff Z. Skowronski Ex. A. Plaintiff alleges that it entered the contract with "the entire Lozito 'empire,'" which undertook responsibility for payments to plaintiff, explaining why plaintiff's proposals and invoices were to "Helix Group," Helix Partners, or HP Builders LLC. Skowronski Aff. ¶ 20.

The indiscriminate use of various related entities' names and evident mutual acceptance of this practice may be construed as blurring the distinction among those entities. E.g., F. Garofalo Elec. Co. v. Glick Dev. Affiliates, 188 A.D.2d 326 (1st Dep't 1992). The bid documents addressed to "Helix Group," whether referring to Helix Group, Inc., specifically or the entire Lozito business "empire" that includes Helix Group, Inc., Helix Partners, and HP Builders LLC, directly contradict defendants' insistence that HP Builders LLC, the general contractor, is the only entity against which plaintiff, an

electrical contractor, may claim. At minimum this documentary evidence favors allowing plaintiff to add Helix Group, Inc., as a defendant that plaintiff may claim is liable under the contract for electrical work. C.P.L.R. § 1002(b).

Although plaintiff seeks joinder of Helix Group, Inc., under C.P.L.R. § 1001(a) as a necessary defendant without which complete relief may not equitably be accorded, Mahinda v. Board of Collective Bargaining, 91 A.D.3d 564, 565 (1st Dep't 2012), plaintiff need not meet this standard. Because plaintiff's claims against the new defendant arise from the same transactions and occurrences as the claims against the original defendants, plaintiff may join Helix Group, Inc., as a permissive defendant under C.P.L.R. § 1002(b).

V. DEFENDANTS' CHALLENGE TO THE PROPOSED CLAIMS FOR RELIEF

A. Breach of Contract Claim

Defendants, maintaining the same opposition as against the breach of contract claim in the original complaint, seek dismissal of the proposed First Claim for Relief on the ground of documentary evidence pursuant to C.P.L.R. § 3211(a)(1).

Defendants' reliance on the main construction contract between the owner of the site and its general contractor and the related invoices showing HP Builders LLC as the sole contracting party with VII 752 West End Owner, to rebut plaintiff's proposed First Claim, misses the mark. Documentary evidence of the main construction contract is irrelevant to the alleged breach of the contract for electrical work between plaintiff and the other

defendants, as well as HP Builders LLC, for which plaintiff seeks relief. DL Marble & Granite Inc. v. Madison Park Owner, LLC, 105 A.D.3d 479 (1st Dep't 2013); Sky-Lift Corp. v. Flour City Architectural Metals, 298 A.D.2d 214, 215 (1st Dep't 2002). See Kaback Enters., Inc. v. Time, Inc., 27 A.D.3d 278, 279 (1st Dep't 2006).

Defendants have not conclusively demonstrated, through documentary evidence, the absence of a contractual relationship between plaintiff and both Helix Partners and Helix Group, Inc., to justify dismissal under C.P.L.R. § 3211(a)(1). Superb Gen. Contr. Co. v. City of New York, 70 A.D.3d 517, 518 (1st Dep't 2006); Sky-Lift Corp. v. Flour City Architectural Metals, 298 A.D.2d 214. Nor have defendants supported their proposition that only the general contractor to the main construction contract may be liable to the electrical contractor, regardless of the actual contracting parties in the contract for electrical work. Defendants thus fail to demonstrate that their documentary evidence conclusively establishes, as a matter of law, the absence of any claim by plaintiff for breach of contract against either Helix Partners or Helix Group, Inc. Goldman v. Metropolitan Life Ins. Co., 5 N.Y.3d at 571; Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d at 326; 511 W. 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d at 152; McCully v. Jersey Partners, Inc., 60 A.D.3d 562. Therefore the court permits plaintiff to substitute its new First Claim for its original Third Claim and denies dismissal of that new claim, but

discontinues the original Third Claim. C.P.L.R. §§ 3025(b), 3211(a)(1) and (7), 3217(b).

B. Trust Fund Diversion Claim

Defendants maintain that plaintiff's proposed Second Claim for Relief for diversion of trust funds is time-barred under Lien Law § 77(2), which imposes a one year statute of limitations from completion of the construction to which the funds applied, requiring dismissal under C.P.L.R. § 3211(a)(5). Plaintiff alleges that defendants' failure to satisfy the contractual conditions for completion of the construction, by delivering to the owner documentary clearances, certificates, and approvals from governmental agencies and lien waivers or mechanic's lien releases from contractors or subcontractors, tolled the one year statute of limitations.

In particular, plaintiff points to defendants' inability achieve final completion as required in the main construction contract because plaintiff never provided defendants its own lien waivers or mechanic's lien releases. The affidavit by the owner's managing agent, alleging that work on the project and completion requirements were either accomplished or not required by the owner, and final payments made, two years before plaintiff's commencement of this action, may controvert, but does not totally negate plaintiff's contrary showing that contractual conditions for completion were not met. Defendants provide no documentary substantiation that defendants submitted to the owner all documents required by the contractual conditions for

completion or corroboration from the owner that it waived the requirements to submit those documents. The conflicting allegations thus leave a factual issue whether the construction project was completed, precluding a determination that the statute of limitations has run against plaintiff's trust fund diversion claim under Lien Law § 77(2). Linker v. Malpeso, 105 A.D.3d 593, 594 (1st Dep't 2013); Robinson v. Day, 103 A.D.3d 584, 585 (1st Dep't 2013); Basilotta v. Warshavsky, 91 A.D.3d 460, 461 (1st Dep't 2012); Bloomfield v. Bloomfield, 280 A.D.2d 320, 321 (1st Dep't 2001). Since defendants fail to establish that plaintiff's trust fund diversion claim is time-barred, the court permits plaintiff to substitute its new Second Claim for its original Sixth Claim and denies dismissal of that new claim, but discontinues the original Sixth Claim. C.P.L.R. §§ 3025(b), 3211(a)(5), 3217(b)

C. Prompt Payment Act Claim

Defendants maintain the same opposition to plaintiff's proposed Third Claim for Relief, for violations of General Business Law § 756-a, as against the Eighth Claim for Relief in the original complaint. Defendants limit their challenge to plaintiff's failure to state a claim against the individual defendants William Lozito, Joseph Lozito, and Matthew Brown, because § 756-a imposes liability on only the entities that contracted with plaintiff. C.P.L.R. § 3211(a)(7); N.Y. Gen. Bus. Law § 756-a(3)(b)(ii).

Even accepting plaintiff's allegations as true, plaintiff

admits that "the entire Lozito 'empire'" liable to plaintiff under the subcontract consists of Helix Group, Inc., Helix Partners, and HP Builders LLC. Skowronski Aff. ¶ 20. Plaintiff does not allege the level of complete dominion by the individually named defendants over the corporate entities that would allow the imposition of corporate liability on the individuals, Padilla v. Edison Transport, Inc., 104 A.D.3d 518, 519 (1st Dep't 2013); Robles v. Palazzolo Realty Corp., 66 A.D.3d 417 (1st Dep't 2009); MLM LLC v. Karamouzis, 2 A.D.3d 161, 162 (1st Dep't 2003); Brito v. DILP Corp., 282 A.D.2d 320, 321 (1st Dep't 2001), or that, as an agent of defendant entities, each individual expressed the intention to incur personal liability for the contract for electrical work. Stalker v. Stewart Tenants Corp., 93 A.D.3d 550, 552 (1st Dep't 2012); Crimmins v. Handler & Co., 249 A.D.2d 89, 91-92 (1st Dep't 1998). Because plaintiff fails to state a claim against the individual defendants under the Prompt Payment Act, the court dismisses plaintiff's original Eighth Claim, but permits plaintiff to substitute its new Third Claim against the defendant entities only and not against William Lozito, Joseph Lozito, or Matthew Brown. C.P.L.R. §§ 3025(b), 3211(a)(7).

V. THE ABSENCE OF PREJUDICE TO DEFENDANTS

Insofar as plaintiff may have delayed in seeking to add its proposed claims for relief, delay alone, without prejudice to defendants, does not bar the amendments. Kocourek v. Booz Allen Hamilton, Inc., 85 A.D.3d at 504; Jacobson v. McNeil Consumer &

Specialty Pharms., 68 A.D.3d at 205; Zaid Theatre Corp. v. Sona Realty Co., 18 A.D.3d at 354-55. Defendants do not claim surprise or other prejudice, nor do plaintiff's proposed amendments allege any new conduct, as they differ from the original pleading only by adding a new defendant and discontinuing claims not included in the amendments. Ward v. Eastchester Health Care Ctr., LLC, 34 A.D.3d 247, 248 (1st Dep't 2006); Stone Setting v. Crow and Sutton Ass'n, Inc., 46 A.D.3d 784, 787 (2d Dep't 2007).

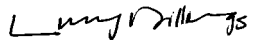
V. DISPOSITION

For the above reasons, the court grants plaintiff's cross-motion to join Helix Group, Inc., as a defendant and to amend the complaint by substituting the proposed First, Second, and Third Claims for Relief for the original claims, but permits the Third Claim only insofar as it seeks relief against defendants Helix Group, Inc., Helix Partners, and HP Builders LLC. C.P.L.R. §§ 1002(b), 3025(b). The court grants defendants' motion to dismiss the Eighth Claim in the original complaint and, because plaintiff's new claims supplant the remainder of the claims in original complaint, also discontinues those original claims. C.P.L.R. §§ 3211(a)(7), 3217(b). The court otherwise denies plaintiff's cross-motion and defendants' motion. C.P.L.R. §§ 3025(b), 3211(a)(1), (5), and (7). Plaintiff shall file and serve an amended complaint as permitted above within 20 days after service of this order with notice of entry. Defendants shall serve any answer within 20 days after service of the

amended complaint. See C.P.L.R. §§ 3012(a), 3025(d).

This decision constitutes the court's order. The court will mail copies to the parties' attorneys appearing for this motion and cross-motion.

DATED: June 28, 2013



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LUCY BILLINGS, J.S.C.

**LUCY BILLINGS**  
**J.S.C.**