

**Valverde Constr. Corp. v SDS Great Jones LLC**

2013 NY Slip Op 32121(U)

September 3, 2013

Sup Ct, New York County

Docket Number: 650813/2012

Judge: Ellen Coin

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY**  
**PRESENT: HON. ELLEN M. COIN** **PART 63**  
*A.J.S.C.*

\_\_\_\_\_  
Valverde Construction Corp. INDEX NO. 650813/2012  
MOTION DATE 09/03/2013  
MOTION SEQ. NO. 001  
E-FILED

-v-

SDS Great Jones LLC , SDS Builders LLC  
and Louis V. Greco Jr.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for.

<u>Papers</u>	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause - Affidavits - Exhibits	<u>1</u>
Answering Affidavits - Exhibits	<u>2</u>
Reply Affidavits	<u>3</u>
Cross-Motion: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	

Defendants move pursuant to CPLR 3211(a)(1) and (7) to dismiss the second and third causes of action. SDS Great Jones LLC is the owner of 25 Great Jones Street and undertook a construction project to renovate the building located at that property (the Project). SDS Builders LLC was the general contractor on the Project and plaintiff Valverde Construction Corp. (Valverde) is a subcontractor that provided concrete and metal work. Greco is the Manager of SDS Great Jones.

The second and third causes of action seek \$1,250,000.00 for Valverde's work on the Project and allege that defendants were liable for failing to maintain trust funds to pay Valverde. The second cause of action alleges violations of Lien Law Article 3-A, in that defendants did not deposit funds into a "required" escrow account, but instead improperly diverted the funds to their own use.

The third cause of action also alleges that defendants converted trust funds of Valverde in the sum of \$1,250,000.00.

Defendants now move to dismiss the second and third causes of action on the ground that documentation which sets forth each expenditure made from the Trust Funds, including the date, amount and purpose, wholly undermines Valverde's allegations.

In opposition, plaintiff argues that the records do not fully resolve the issue of whether any of the payments made were "appropriate for the specific items or whether they should have been used to pay the Plaintiff for the monies due for their services." Plaintiff does not identify any specific "gaps" in defendants' submissions or list any missing documents that it would require in discovery.

After oral argument, the Court notified both sides that pursuant to CPLR 3211(c), it would convert this motion to dismiss into one for summary judgment and afforded both sides an opportunity to make additional submissions on or before September 3, 2013. Both sides, however, elected to rely on their original papers.

Under CPLR 3212(b), summary judgment "shall be granted if, upon all papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." To warrant a court's directing judgment as a matter of law, it must clearly appear that no material issue is presented for trial. (*Epstein v Scally*, 99

AD2d 713 [1<sup>st</sup> Dept 1984]). When a party has made a prima facie showing to entitle it to summary judgment, the burden shifts to the opposing party to show by evidentiary facts that there is a material issue of fact for trial. (*Indig v Finkelstein*, 23 NY2d 728 [1968]); see also *Vogel v Blade Contr. Inc.*, 293 AD2d 376, 377 [1<sup>st</sup> Dep't 2002]). Conclusory allegations or denials are insufficient to either warrant or defeat summary judgment. (*McGahee v Kennedy*, 48 NY2d 832, 834 [1979]).

"Article 3-A of the Lien Law creates 'trust funds out of certain construction payments or funds to assure payment of subcontractors, suppliers, architects, engineers, laborers, as well as specified taxes and expenses of construction'" (*Aspro Mech. Contr. v Fleet Bank*, 1 NY3d 324, 328 [2004][internal citations omitted]).

Thus, the purpose of Article 3-A is to ensure that subcontractors "who have directly expended labor and materials to improve real property [or a public improvement] at the direction of the owner or a general contractor receive payment for the work actually performed." (*Id.* [internal citations and quotation marks omitted]).

Pursuant to Lien Law §72(1), the diversion of trust funds occurs when there is "[a]ny transaction by which any trust asset is paid, transferred or applied for any purpose other than a purpose of the trust as stated in subdivision one or subdivision two of section

seventy-one, before payment or discharge of all trust claims with respect to the trust...."

Defendants established their *prima facie* entitlement to summary judgment upon submission of the trust fund records indicating legitimate expenses pursuant to Lien Law §71(2)(a). (*Viola v Giordano*, 82 AD3d 755, 757 [2<sup>nd</sup> Dept 2011]). In opposition, plaintiff failed to submit any documents raising an issue of fact or casting doubt on authenticity of any documents that defendants submitted. Nor has plaintiff argued that it required any discovery in order to oppose the motion. Therefore, the Court must grant defendants' motion. Furthermore, because the only remaining cause of action against the individual defendant, the fourth cause of action for attorney's fees, is predicated on the second and third causes of action, the action as against the individual defendant must be dismissed in its entirety.

In accordance with the foregoing, it is hereby

ORDERED that defendants' motion is granted, and the second and third causes of action of the complaint are dismissed; and it is further

ORDERED that the Clerk of Court shall sever and dismiss with prejudice the complaint as against defendant Louis V. Greco, Jr., individually, and the remainder of the action shall continue; and it is further

ORDERED that defendants shall answer the complaint within 20 days of the date of service of a copy of this order with notice of entry; and it is further

ORDERED that the parties shall appear for a preliminary conference in Room 311, 71 Thomas Street on October 30, 2013 at 2:00 p.m.

**This constitutes the decision and order of the Court.**

Dated: 9/2/13

*Em*  
Ellen M. Coin, A.J.S.C.

Check One:

CASE DISPOSED

X NON-FINAL DISPOSITION