

Inter Connection EI., Inc. v Helix Partners LLC
2014 NY Slip Op 31711(U)
June 14, 2014
Supreme Court, New York County
Docket Number: 102985/2012
Judge: Lucy Billings
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

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 -

DECISION AND ORDER

HELIX PARTNERS LLC, HELIX GROUP, INC.,
HP BUILDERS LLC, WILLIAM LOZITO,
JOSEPH LOZITO, and MATTHEW BROWN,

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. It and an alleged affiliate, defendant Helix Partners LLC, and their alleged principal owners, defendants William Lozito, Joseph Lozito, and Matthew Brown, moved to dismiss seven claims in plaintiff's original complaint. Plaintiff cross-moved to join Helix Group, Inc., another alleged affiliate, as a defendant and to amend the complaint to substitute three claims for the eight original claims and discontinued the other five claims. The three substituted claims for breach of contract, unlawful diversion of statutory trust funds under New York Lien Law § 77, and violation of the Prompt Payment Act, N.Y. Gen. Bus. Law § 756-a, which the court permitted in the amended complaint, are identical to three of the claims in the original complaint that defendants other than Helix Group previously moved to dismiss.

Plaintiff's second claim, for diversion of statutory trust funds applicable to the construction, alleges that the one year statute of limitations on a trust funds diversion claim, N.Y. Lien Law § 77(2), was tolled because defendants failed to satisfy the contractual conditions for completion of the construction. Those unsatisfied conditions included delivering to the owner of the premises under construction (1) certificates and other documentary clearances and approvals from governmental agencies and (2) mechanic's lien releases and waivers from contractors and subcontractors on the project. Plaintiff claims that it never provided defendants its own releases of filed mechanic's liens or waivers of future liens that were necessary for defendants to achieve completion.

To support defendants' prior motion to dismiss this claim, defendants presented an affidavit by Donald Landau, the construction manager of the owner's managing agent for the building under construction. Landau alleged that two years before plaintiff commenced this action work on the project was accomplished, any contractual completion requirements that the owner insisted on were met, and final payments under the general contractor HP Builders' contracts with the owner were made. The court found, however, that defendants failed (1) to show defendants submitted to the owner all documents required by the contractual conditions for completion or (2) to present evidence from the owner itself that it waived unmet requirements, leaving a factual issue whether the construction project was completed,

to trigger the one year statute of limitations. N.Y. Lien Law § 77(2).

II. DEFENDANTS' REPEATED MOTIONS TO DISMISS THE SAME CLAIM

In that previous decision the court permitted plaintiff to substitute in an amended complaint three claims substantively identical to claims in the original complaint and denied defendants' motion to dismiss those three claims under C.P.L.R. § 3211(a)(1), (5), and (7). Defendants now move again to dismiss the amended complaint's second claim, for diversion of statutory trust funds, as time-barred, C.P.L.R. § 3211(a)(5), despite defendants' prior motion to dismiss the original complaint's same claim on the same statute of limitations ground that the court already applied to the substituted claim in determining whether to permit it. Defendants now add another ground for dismissal of this claim, C.P.L.R. § 3211(a)(7), a ground equally applicable to the same claim in the original complaint: that plaintiff failed to bring the claim in a representative capacity as required by Lien Law § 77(1).

To prevent repetitive motions or subsequent motions on alternative grounds, C.P.L.R. § 3211(e) allows only one motion to dismiss a claim based on C.P.L.R. § 3211(a). Ultrama Energy v. Chase Manhattan Bank, 191 A.D.2d 86, 88 (1st Dep't 1993). Since the amended complaint included no new claims, but merely realleged and renumbered three of the original complaint's claims, the amended complaint affords defendants no basis for circumventing the single motion rule. C.P.L.R. § 3211(e); Swift

v. New York Med. Coll., 48 A.D.3d 671, 671 (2d Dep't 2008);
B.S.L. One Owners Corp. v. Kay Intl. Mfg., 225 A.D.2d 643, 644
(2d Dep't 1996). See Kocourek v. Booz Allen Hamilton Inc., 114
A.D.3d 567, 569 (1st Dep't 2014); Barbarito v. Zahavi, 107 A.D.3d
416, 420 (1st Dep't 2013); 767 Third Ave. LLC. v. Greble &
Finger, LLP, 8 A.D.3d 75, 75 (1st Dep't 2004).

III. DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT'S SECOND
CLAIM BASED ON C.P.L.R. § 3211(a)(5)

To support the new motion to dismiss plaintiff's second claim, for diversion of statutory trust funds, as time-barred, C.P.L.R. § 3211(a)(5), defendants present a new affidavit by Landau providing information that was missing from his prior affidavit in support of defendants' first motion. He identifies contractual requirements for completion that do not apply to defendants, including the release of mechanic's liens, which other contractors and subcontractors must satisfy. Aff. of Donald A. Landau ¶ 14. He never attests, however, that all project contractors and subcontractors satisfied this requirement or that the owner did not require defendants to provide contractors' and subcontractors' lien releases, whereas he does attest that the owner did not require their lien waivers. Id. ¶ 15. While Landau also alleges that no mechanic's liens were "on file" when the owner made its final payment to HP Builders, he never specifies what "file," whether the owner's, the managing agent's, the general contractor HP Builders', the County Clerk's, or another file, or that Landau personally searched this file. Id. ¶ 14(e). Nor does he address the status of mechanic's liens

when final payments were due or paid to other potential claimants: other contractors or subcontractors. See N.Y. Lien Law § 77(2).

Even if defendants have eliminated any question that they satisfied the contractual requirements for delivery of lien releases and waivers, their evidence that they delivered the requisite certificates and other documentary clearances and approvals from governmental agencies continues to fall short. Landau simply alleges that defendant general contractor HP Builders complied with all contractual requirements for completion by "a) providing governmental clearances, sign-offs, inspections and approvals required in connection with HP's work . . . ; b) delivering final sign-offs, certificates and approvals required . . . ; and c) completing all punch list items." Id. ¶ 13. Again, defendants never show what documents defendants provided to the owner; or give even a hearsay recitation describing what "governmental clearances, sign-offs, inspections and approvals," or "certificates" they submitted; or present any evidence from the owner itself that it received all the required documents. Id. Landau does not attest that he received them on the owner's behalf. Nor do defendants identify the "punch list items" that the general contractor completed. Id.

It is indeed curious, if defendants in fact provided to the owner all the different governmental documents, "clearances, sign-offs, inspections and approvals," and "certificates," defendants never indicate what governmental entity or official

issued any of these documents or what the governmental entity or official cleared, signed off on, inspected, approved, or certified. Id. Nor do defendants present a single copy of any such document. They do nothing more than regurgitate the contract's requirements that they previously presented in their first motion and conclude that they complied, without supporting evidentiary facts.

Thus, even assuming defendants' motion on this ground is not repetitive, and defendants "merely took [their] cue" to supply the evidence, documentary or otherwise, "missing on the first motion," they have not done so. Ultrama Energy v. Chase Manhattan Bank, 191 A.D.2d at 88. Assuming, too, that C.P.L.R. § 3211(e) does not prohibit the newly joined defendant Helix Group from moving a first time to dismiss plaintiff's second claim based on C.P.L.R. § 3211(a), see Barbarito v. Zahavi, 107 A.D.3d at 420, Landau's unspecific, unsubstantiated, conclusory allegations fail to meet defendants' burden under C.P.L.R. § 3211(a)(5) to eliminate any factual issue whether the statute of limitations has expired. Education Resources Inst., Inc. v. Hawkins, 88 A.D.3d 484, 485 (1st Dep't 2011); Benn v. Benn, 82 A.D.3d 548, 549 (1st Dep't 2011); Constructamax, Inc. v. Weber, 109 A.D.3d 574, 576 (2d Dep't 2013). Helix Group, too, along with the other moving defendants, has not "merely responded to and cured" the evidentiary gap, documentary or otherwise, that the court has identified. Ultrama Energy v. Chase Manhattan Bank, 191 A.D.2d at 88.

IV. DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT'S SECOND CLAIM BASED ON C.P.L.R. § 3211(a)(7)

Defendants' motion to dismiss plaintiff's claim for diversion of statutory trust funds on the ground that plaintiff failed to allege a class action pursuant to Lien Law § 77(1) is not even an attempt to respond to an identified evidentiary gap and supply evidence missing from defendants' first motion.

Ultrama Energy v. Chase Manhattan Bank, 191 A.D.2d at 88.

Defendants other than Helix Group unquestionably are barred from moving to dismiss plaintiff's second claim on this ground under C.P.L.R. § 3211(a)(7), because it is an alternative ground never raised by defendants' first motion to dismiss the identical claim, which the court decided on its merits. C.P.L.R. § 3211(e); Ultrama Energy v. Chase Manhattan Bank, 191 A.D.2d at 88. See Kocourek v. Booz Allen Hamilton Inc., 114 A.D.3d at 569; Barbarito v. Zahavi, 107 A.D.3d at 420; Rivera v. Board of Educ. of the City of N.Y., 82 A.D.3d 614, 614 (1st Dep't 2011); 767 Third Ave. LLC v. Greble & Finger, LLP, 8 A.D.3d at 75.

To maintain an action to enforce Lien Law § 77, § 77(1) requires plaintiff to conform to the pleadings and procedure required for a class action pursuant to C.P.L.R. Article 9. ADCO Elec. Corp. v. McMahon, 38 A.D.3d 805, 806-807 (2d Dep't 2007); Atlas Bldg. Sys. v. Rende, 236 A.D.2d 494, 496 (2d Dep't 1997). The amended complaint alleges that plaintiff brings this action "on behalf of Plaintiff and on behalf of all other Lien Law trust beneficiaries." Aff. of Jill Levi Ex. A ¶ 23. Although plaintiff, as a member of a class, may sue as a representative

party on behalf of all class members only if plaintiff meets the prerequisites specified in C.P.L.R. § 901(a), nothing in Article 9 requires these prerequisites to be pleaded. When seeking class certification, plaintiff bears the burden to present evidence establishing these criteria. Kudinov v. Kel-Tech Constr. Inc., 65 A.D.3d 481, 481 (1st Dep't 2009). Unless the complaint and affidavits at this early stage establish the absence of any basis for class action relief "as a matter of law," dismissal of class action claims is premature before defendants serve their answer. Downing v. First Lenox Terrace Assoc., 107 A.D.3d 86, 91 (1st Dep't 2013). See C.P.L.R. § 902; Pludeman v. Northern Leasing Sys., Inc., 40 A.D.3d 366, 369 (1st Dep't 2007); Bernstein v. Kelso & Co., 231 A.D.2d 314, 323-24 (1st Dep't 1997); ADCO Elec. Corp. v. McMahon, 38 A.D.3d at 806-807. Since Lien Law § 77(1) expressly requires that an action to enforce the statute proceed as a class action, as long as the claim under this statute otherwise survives, there is a basis for class action relief in the statute itself.

Even if plaintiff's failure to allege all the prerequisites under C.P.L.R. § 901(a) or to request a judgment for class members, see C.P.L.R. § 905, amounted to noncompliance with Lien Law § 77(1), such noncompliance is not fatal to plaintiff's claim. ADCO Elec. Corp. v. McMahon, 38 A.D.3d at 806-807; Brooklyn Navy Yard Dev, Corp. v. J.M. Dennis Constr. Corp., 12 A.D.3d 630, 632 (2d Dep't 2004); Atlas Bldg. Sys. v. Rende, 236 A.D.2d at 496. Plaintiff may move to amend its complaint to

allege the class action prerequisites or to request a judgment for class members. C.P.L.R. §§ 901(a), 905, 3025(b); ADCO Elec. Corp. v. McMahon, 38 A.D.3d at 806-807; Brooklyn Navy Yard Dev. Corp. v. J.M. Dennis Constr. Corp., 12 A.D.3d at 632. See, e.g., Ferguson v. Barrios-Paoli, 279 A.D.2d 396, 398-99 (1st Dep't 2001); Mittelman v. GE Capital Mtge. Servs., 265 A.D.2d 311 (2d Dep't 1999).

Consequently, the court denies defendants' motion to dismiss plaintiff's second claim on the ground that plaintiff failed to allege a class action, C.P.L.R. § 3211(a)(7), N.Y. Lien Law § 77(1), by Helix Group as well as the other defendants. Defendants may advance their defense predicated on plaintiff's failure to state a class action at a later stage in opposition to a motion for class certification, C.P.L.R. § 902, or in the form of a motion for summary judgment. C.P.L.R. § 3212(b). E.g., McLearn v. Cowen & Co., 60 N.Y.2d 686, 689 (1983); Miller v. Schreyer, 257 A.D.2d 358, 361 (1st Dep't 1999).

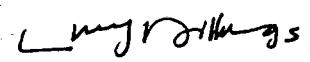
V. DISPOSITION

For the reasons explained above, the court denies defendants' motion to dismiss plaintiff's second claim in its amended complaint. C.P.L.R. § 3211(a)(5) and (7) and (e). As defendants' motion to dismiss plaintiff's second claim in the amended complaint pursuant to C.P.L.R. § 3211(a)(5) has not waived their statute of limitations defense, defendants still may raise that affirmative defense in their answer. Kocourek v. Booz Allen Hamilton Inc., 114 A.D.3d at 568-69. They shall serve any

answer within 10 days after service of this order with notice of entry unless the parties stipulate otherwise. C.P.L.R. § 3211(f).

This decision constitutes the court's order. The court will mail copies to the parties' attorneys.

DATED: June 14, 2014



LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.