

**Brooklyn Carpet Exch., Inc. v Corporate Interiors
Contr., Inc.**

2014 NY Slip Op 33927(U)

October 2, 2014

Supreme Court, Nassau County

Docket Number: 600265-14

Judge: Vito M. DeStefano

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 14
NASSAU COUNTY

BROOKLYN CARPET EXCHANGE, INC., C.W. GREENE, INC., CHAPMAN & CHAPMAN ELECTRICAL CONTRACTORS, INC., FOUR DAUGHTERS, LLC, LARSEN & RUGGIERO MECHANICAL CORP., PREMIER WOOD CONCEPTS, INC., PRIORITY NY, INC., on behalf of itself and as a representative for all others who may be deemed beneficiaries of a certain Trust Created Pursuant to Lien Law Article 3-A,

Plaintiffs,

-against-

CORPORATE INTERIORS CONTRACTING, INC., JOHN OBRIEN a/k/a JOHN JOSEPH OBRIEN, JR., WILLIAM AVERSA a/k/a WILLIAM F. AVERSA, and CAROL AVERSA and RICKY S. SPIKE, as TRUSTEES OF THE WILLIAM AVERSA 2012 FAMILY TRUST,

Defendants.

Decision and Order

**MOTION SUBMITTED:
July 21, 2014
MOTION SEQUENCE:01
INDEX NO.:600265-14**

The following papers and the attachments and exhibits thereto have been read on this motion:

Notice of Motion	1
Affirmation in Opposition	2
Reply Affirmation	3

In an action to recover damages for, *inter alia*, breach of contract and unjust enrichment, the Plaintiffs move for an order pursuant to CPLR 901, 902 and Lien Law § 77(1) seeking the following relief: “waiving the requirement of numerosity and determining that the above entitled action may be maintained as a class action; “defining the class as all beneficiaries of Lien Law Article 3-A trust funds received by Defendants in conjunction with the [P]rojects”; “directing Defendants to provide a list of all Lien Law Article 3-A trust beneficiaries to Plaintiff; and “determining the method of notice to the members of the class pursuant to CPLR § 904(c), upon the ground that the within action is a Trust Diversion Action within the meaning of Article 3-A of the Lien Law and that pursuant to Lien Law § 77(1) a trust diversion action must be commenced in the form of a class action and upon the ground that, with the exception of numerosity, the requirements of CPLR § 901 have been met.”

Background

The Plaintiffs are subcontractors who entered into various contracts with general contractor Defendant Corporate Interiors Contracting, Inc. (“Corporate Interiors”) for labor and materials for the improvement of real property located throughout New York City (the “Projects”).

Defendants John O’Brien and William Aversa are allegedly the sole and/or controlling shareholders of Corporate Interiors. Defendants Carol Aversa and Ricky Spike are co-trustees of the William Aversa 2012 Family Trust.

On January 17, 2014, the Plaintiffs commenced the instant action pursuant to Article 3-A of the Lien Law upon funds which were received by Corporate Interiors for the work performed at the Projects. According to the complaint, Corporate Interiors directly contracted with each of the Plaintiffs to perform improvements at the Projects. Corporate Interiors received monies “which amount is a sum of money greater than the amount due to [Plaintiffs] and sufficient to pay the claims of [Plaintiffs]” for the work performed at the Projects (Ex. “A” to Motion at ¶ 61).¹ The amount of \$1,038,411.10 remains unpaid.

The Plaintiffs served the instant motion pursuant to CPLR 901 and 902 and Lien Law § 77(1).

For the reasons that follow, the motion is denied.

¹ The court notes that this allegation is identical for all Plaintiffs.

The Court's Determination

In support of the instant motion, Plaintiffs note that under Lien Law § 77(1), a trust arising under Lien Law article 3–A must be enforced by the holder of any trust claim “in a representative action brought for the benefit of all beneficiaries of the trust.” Lien Law § 77(1) specifies that in any such action, “the practice, pleadings, forms and procedure shall conform as nearly as may be to the practice, pleadings, forms and procedure in a class action as provided in [CPLR] article nine . . . ; provided, however, that in determining whether the prerequisites of a class action have been satisfied, the provisions of [CPLR 901(a)(1)] [which requires a demonstration of numerosity]. . . may be waived at the discretion of the court.”

CPLR 901, entitled “Prerequisites to a class action,” provides that one or more members of a class may sue as representative parties on behalf of all if the following prerequisites are met: 1) the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable; 2) there are questions of law or fact common to the class which predominate over any questions affecting only individual members; 3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; 4) the representative parties will fairly and adequately protect the interests of the class; and 5) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Plaintiffs have the burden of proving the requirements for class certification. While the factors enumerated in CPLR 901(a) should be broadly and liberally construed in favor of granting class certification (*Friar v Vanguard Holding Corp.*, 78 AD2d 83, 91 [1st Dept 1980]), whether the facts presented satisfy the statutory criteria is nevertheless within the sound discretion of the trial court (*City of New York v Maul*, 14 NY3d 499, 509 [2010]; *Pludeman v Northern Leasing System, Inc.*, 73 AD3d 420, 422 [1st Dept 2010]).

Here, the Plaintiffs request that, in accordance with Lien Law § 77(1), the prerequisite of numerosity set forth in CPLR 901(a)(1) should be waived because Plaintiffs have met all of the other prerequisites of CPLR 901(a). More specifically, Plaintiffs argue that:

[a]ll questions of law are identical among the class, in that the issues are whether the trust was formed, whether the Trust Funds were diverted, who the trustees are, and whether the class members are beneficiaries of the Trust Funds.

Plaintiffs claim that they performed work on the Projects constituting permanent improvements thereto, that the work was not paid for, and that Defendants diverted the Trust Funds under Lien Law Art. 3-A of which Plaintiffs were a beneficiary, are virtually identical to the claims of the class members, who acted as sub-contractors to CIC relating to the Projects and were not fully paid for materials supplied and/or

work performed relating thereto and all of whom are beneficiaries of any trust formed herein, are not only typical of the class, but are identical thereto, with only the type of work performed and the amount owed differing.

Plaintiffs will fairly and adequately protect the interests of the proposed class because, as beneficiaries of the Trust Funds, Plaintiffs have a large stake in this lawsuit in that [their] claim exceeds \$1,038,411.10.

If Plaintiffs' claim is successful, as a matter of law, all creditors who establish valid trust claims will share pro-rata in the Trust Funds which are recovered in this action.

In addition to the provisions of Lien Law § 77 which require that this action be brought as a class action notwithstanding the limited number of members of the class, maintaining this action as a class action is superior to other available methods because it eliminates the risk of inconsistent determination of the claims of the individual members of the class and maintaining this action as a class action will also avoid the unnecessary costs and delays of multiple suits.
(Affirmation in Support of Motion at ¶¶ 24-28).

A class action certification must be founded upon an evidentiary basis (*Matros Automated Elec. Const. Corp. v Libman*, 37 AD3d 313 [1st Dept 2007]). General or conclusory allegations in an affirmation and pleadings, as were made here, are insufficient to sustain Plaintiffs' burden (*Rallis v City of New York*, 3 AD3d 525 [2d Dept 2004]; *Yonkers Construction Co. v Romano Enterprises. of NY*, 304 AD2d 657 [2d Dept 2003]; *Katz v NVF Company, APL*, 100 AD2d 470 [1st Dept 1984]).²

Conclusion

Based on the foregoing, it is hereby

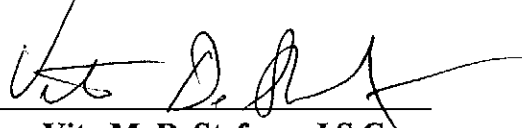
Ordered that the motion of the Plaintiffs is denied, without prejudice to renewal, after

² The court rejects Plaintiffs' improper attempt to rely on evidence submitted for the first time in reply papers (*GJF Const. Corp. v Cosmopolitan Decorating Co., Inc.*, 35 AD3d 535 [2d Dept 2006]).

discovery, on an appropriate showing of facts sufficient to warrant class action treatment.

This constitutes the decision and order of the court.

Dated: October 2, 2014



Hon. Vito M. DeStefano, J.S.C.

ENTERED
OCT 07 2014
NASSAU COUNTY
COUNTY CLERK'S OFFICE