

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

2015 NY Slip Op 32756(U)

March 24, 2015

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:
January 9, 2015
MOTION SEQUENCE:02
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 Support	2
Affirmation in Opposition	3
Reply Affirmation	4
Sur-Reply	5

In an action to recover damages for, *inter alia*, violation of the Lien Law, the Plaintiffs move for an order pursuant to CPLR 2221(e) “to renew Plaintiffs’ prior motion pursuant to CPLR 901 and 902 and Lien Law § 77(1) for class certification”.

In an order dated October 2, 2014 (DeStefano, J.), this court denied the Plaintiffs’ prior motion seeking, *inter alia*, class certification, on the basis that the Plaintiffs’ submissions in support of class certification were insufficient to sustain Plaintiffs’ burden. The court denied the motion, “without prejudice to renewal, after discovery, on an appropriate showing of facts sufficient to warrant class action treatment” (Ex. “A” to Motion).

Approximately one month later, the Plaintiffs served the instant motion to renew. In support of renewal, the Plaintiffs submit what they described as “substantial documentary evidence”, which they argue satisfies their burden and “support the allegations in the complaint” that Corporate Interiors Contracting, Inc. (“Corporate Interiors”) “received funds from the various owners of the projects relating to unpaid improvements made by its sub-contractors, such as Plaintiffs which it failed to remit to said sub-contractors” (Affirmation in Support at ¶ 23).

The Parties’ Contentions

The evidence submitted in support of the instant motion and which was not contained with the original motion papers includes: Defendants’ Notice to Produce (Ex. “E”); Plaintiffs’ Responses and Document Production in response to Defendants’ Notice to Produce (Ex. “F”)¹; documentation from HQ Global Workplaces, LLC (“HQ”) which purportedly demonstrates that Corporate Interiors “was paid in full on the project located” at 590 Madison Avenue in New York City (Ex. “G”); and documentation from CancerCare which purportedly demonstrates that Corporate Interiors “received trust payments in excess of the sums paid to Plaintiffs” (Ex. “H”) (Affirmation in Support at ¶¶ 9-11).

In opposition to the motion, the Defendants argue that except for those documents concerning CancerCare (Ex. “H”), the documentary evidence submitted with the instant motion were in Plaintiffs’ possession at the time Plaintiffs’ prior motion for class certification was served and Plaintiffs failed to provide a “reasonable justification for the failure to present such facts on the prior motion”.

¹ The Plaintiffs argue that the documents submitted herein establish “that Plaintiffs provided labor and materials at various projects in which Plaintiffs acted pursuant to subcontractor agreements with [Corporate Interiors], Plaintiffs duly demanded payment from [Corporate Interiors], [Corporate Interiors] failed to remit the full amounts demanded by Plaintiffs and that [Corporate Interiors] received sums in excess of the amounts paid to Plaintiffs relating to said projects”.

Defendants also argue that the Plaintiffs merely annexed the additional documentary evidence to their motion but failed to provide any analysis that establishes trust fund diversion on the part of the Defendants; and that the instant application for class certification is not founded upon an evidentiary basis but, rather, on the conclusory allegations of Plaintiffs' counsel which are insufficient to establish the requirements for class certification.

The Plaintiffs offer several grounds for their failure to submit the "substantial documentary evidence" in support of their original motion, namely: 1) with respect to the Article 3-A allegations in the complaint, the Defendants "only deny knowledge or information sufficient to form a belief"; 2) the Defendants' answer was not personally verified but verified by their attorney; 3) Defendants were in receipt of Plaintiffs' document production "which provided Defendants with ample notice that Plaintiffs' claims were not a sham or frivolous"; and 4) Plaintiffs' counsel was under the belief that defense counsel would not oppose the motion because Plaintiffs' counsel "felt said action would be considered frivolous based upon counsel's receipt of Plaintiffs' Document Production". Given these facts "and based upon the case law and statutes", Plaintiffs' counsel "believed that any documentary evidence was not necessary in order for the court to certify the class" (Affirmation in Support at ¶¶ 14-18).

The Court's Determination

A motion for leave to renew is addressed to the sound discretion of the court (*Hamlet at Willow Creek Development Co., LLC v Northeast Land Development Corp.*, 64 AD3d 85 [2d Dept 2009]), and "is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (*Renna v Gullo*, 19 AD3d 472 [2d Dept 2005] [citations omitted]). CPLR 2221(e) states, *inter alia*, that a motion for leave to renew shall be based upon facts not offered on the prior motion that would change the prior determination and shall contain reasonable justification for the failure to present such facts on the prior motion. Reasonable justification is within the discretion of the court (*Rowe v NYCPD*, 85 AD3d 1001, 1003 [2d Dept 2011]).

At bar, most of the documents submitted in support of renewal (except for Exhibit "H"), were documents which Plaintiffs knew existed and were, in fact, in Plaintiffs' possession at the time the prior motion was made. Under these circumstances, no reasonable justification exists for the Plaintiffs' failure to submit these documents in the first instance on the motion for renewal (*see Professional Offshore Opportunity Fund, Ltd v Braider*, 121 AD3d 766 [2d Dept 2014] [leave to renew denied where movant failed to offer a reasonable justification]; *Mount Sinai Hospital v Dust Transit*, 104 AD3d 823 [2d Dept 2013]; *Deutsche Bank Trust Co. v Ghames*, 100 AD3d 585 [2d Dept 2012]; *Rowe v NYCPD*, 85 AD3d at 1003, *supra*). Accordingly, renewal based upon the submission of such documents would be improper.

In any event, even if the court were to grant renewal in consideration of these documents, it would not alter the result previously reached on the prior motion.

Significantly, Exhibit "F" to the motion, which consists of Plaintiffs' document responses and production, does not support Plaintiffs' burden for class certification. In this regard, Exhibit "F" contains purchase orders, statements of amount due Plaintiffs from Corporate Interiors, checks from Corporate Interiors made out to some of the Plaintiffs, subcontractor agreements with Corporate Interiors, and summary sheets from each of the Plaintiffs indicating monies owed to the Plaintiffs on projects/contracts they entered into with Corporate Interiors. However, these submissions alone are insufficient in that Plaintiffs have failed to articulate, with any particularity, the relation between such documents and any lien law violation. Furthermore, it is not the function of the court to analyze such documents, without explication by the party relying on them, to ascertain whether there was a trust fund diversion.

Moreover, except for Exhibit "G", the record is devoid of any evidence that Corporate Interiors was paid in full for any of the projects at which the Plaintiffs were subcontractors. Exhibit "G" is the response from non-party HQ to a subpoena served upon them by Plaintiffs and within it is a letter from HQ indicating that Corporate Interiors was paid in full for the "Regus Project" located at 590 Madison Avenue, Floor 21. However, Plaintiff Four Daughters is the only Plaintiff that has submitted evidence indicating that it is still owed \$7,800 from Corporate Interiors with respect to the Regus Project; such evidence, as noted, was in Plaintiffs' possession prior to the original motion, and concerns a single Plaintiff in this putative class action.

Notwithstanding the foregoing, the court grants leave to renew to the extent that Plaintiffs have submitted Exhibit "H". With respect to Exhibit "H", the Plaintiffs argue that the documents Plaintiffs received in response to a subpoena served upon CancerCare and relating to the project located at 275 Seventh Avenue "includes documentation demonstrating that [Corporate Interiors] received trust payments in excess of the sums paid to Plaintiffs relating thereto" (Affirmation in Support at ¶ 12). In opposition, the Defendants argue that the documents annexed as Exhibit "H" demonstrate that Corporate Interiors was not paid in full for the CancerCare Project (Affirmation in Opposition at ¶ 15).

In reply, the Plaintiffs respond that:

Defendants' counsel also alleges that Exhibit H to the Motion, relating to the CancerCare project does not establish trust diversion as [Corporate Interiors] did not receive full and final payment. Although correct that Exhibit H does not establish [Corporate Interiors] received full and final payment, it is undisputed that [Corporate Interiors] did receive funds from the owner relating to the CancerCare project and *Plaintiffs have presented undisputed documentary evidence that Plaintiff*

*Four Daughters did work on the Cancer Care project for which it received **no** payment.* Therefore, Defendants' counsel is wrong the documentary [evidence] does indeed establish that [Corporate Interiors] is in possession of trust funds which have not been remitted to Four Daughters as required under the Lien Law (Affirmation in Reply at ¶ 21) (emphasis in original).

A review of the documents annexed as exhibit "H" to the motion demonstrate that Corporate Interiors was paid \$45,589.70 for work performed at the premises of Cancer Care Inc. at 275 Seventh Avenue and that the "original contract sum" due Corporate Interiors for the CancerCare project was \$67,352.00. Contrary to the Plaintiffs' contention, Exhibit "H" does not constitute "undisputed documentary evidence that Plaintiff Four Daughters did work on the CancerCare project for which it received no payment" inasmuch as there is no reference to Four Daughters in the exhibit. In this regard, the court notes that the Lien Law allegations by Four Daughters in the complaint do not list the CancerCare project located at 275 Seventh Avenue as a project at which it was to provide labor and materials for improvement.²

Accordingly, upon renewal, the court adheres to its original determination inasmuch as the Plaintiffs failed to meet their burden for class certification.

Conclusion

Based on the foregoing, it is ordered that the Plaintiffs' motion for leave to renew their prior motion for, *inter alia*, class certification is granted to the extent that the movants have submitted Exhibit "H" with the instant motion, and upon such renewal the court adheres to its original determination.

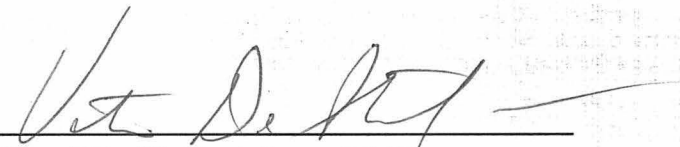
² Four Daughters' allegations in the complaint name seven projects (collectively referred to in the complaint as the "FD Projects") in which they worked and entered into contracts with Corporate Interiors pursuant to which Four Daughters was to provide labor and materials for improvements at the FD Projects. CancerCare was not listed as one of the FD Projects (Complaint at ¶¶ 36, 37).

Also noteworthy is that Plaintiffs C.W. Greene, Inc. and Larsen & Ruggiero Mechanical Corp, each allege they did work at the CancerCare project (Complaint at ¶¶ 22, 43).

The parties are directed to appear for a compliance conference before the undersigned in part 13 on Tuesday, April 28, 2015 at 9:30 a.m.

This constitutes the decision and order of the court.

DATE: March 24, 2015



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

ENTERED

MAR 25 2015

NASSAU COUNTY
COUNTY CLERK'S OFFICE