SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 55

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COGEN ELECTRICAL SERVICES, INC.,

Plaintiff,

DECISION/ORDER
Index No. 152266/2014

-against-

RGN - NEW YORK IV, LLC, CORPORATE INTERIORS CONTRACTING, INC., JOHN O'BRIEN

Defendants.

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HON. CYNTHIA KERN, J.:

Plaintiff Cogen Electrical Services, Inc. commenced the instant action against defendants RGN - New York IV, LLC ("RGN"), Corporate Interiors Contracting, Inc. ("CIC") and John O'Brien ("O'Brien") to collect certain sums it is allegedly owed for certain work it performed. Plaintiff now moves for an Order (1) pursuant to New York Lien Law ("Lien Law") §§ 71 and 77 determining that this action shall be maintained as a class action; (2) approving the contents of the proposed Notice of Pendency of Class Action and directing the manner of service of said notice on the members of the class; (3) pursuant to CPLR §§ 3025 and 1001 permitting plaintiff to amend the complaint to add certain parties; and (4) pursuant to CPLR § 602 consolidating this action with a separate action pending in the Supreme Court, New York County, entitled *New York Interior Concepts, Inc., et al. v. RGN-NY IV, LLC, et al.*, Index No. 650999/2016 (the "2016 Action"). Defendant RGN has since been dismissed from the case and defendant CIC has not opposed plaintiff's motion. For the reasons set forth below, plaintiff's motion is granted.

The relevant facts are as follows. RGN is a commercial tenant in the building located at 136 Madison Avenue, New York, New York (the "Property"). On or about March 28, 2013, RGN contracted with CIC, as the general contractor, to perform certain work involved in the renovation of RGN's corporate

offices on the fifth floor of the Property, also known as the Regus Business Center (the "Project"). CIC then contracted with plaintiff to perform certain electrical work on the Project. Plaintiff alleges that it fully and completely performed under its contract with CIC but that CIC failed to pay plaintiff. Thus, on January 9, 2014, plaintiff filed a mechanic's lien against "136 Madison Avenue, 5th Floor, Regus Business Center, New York, New York 10016" in the amount of $69,513.00 (the "Lien") which plaintiff alleges is the amount it is owed for its work performed on the Project. On or about February 26, 2014, RGN posted a cash undertaking pursuant to Lien Law § 20 to discharge the Lien against the Property.

Thereafter, plaintiff commenced the instant action alleging causes of action for lien foreclosure, trust diversion in violation of Article 3-A of the Lien Law and breach of contract. Specifically, with regard to plaintiff's trust diversion claim, plaintiff alleges that certain trust funds were misappropriated by defendants CIC and O'Brien in connection with the Project and that plaintiff is a beneficiary of said trust. Plaintiff also alleges that there are other potential beneficiaries to the trust funds at issue, including New York Interior Concepts, Inc. ("NYIC") and D&F Interiors, Inc. ("D&F"), the plaintiffs in the 2016 Action, as a result of having supplied labor and/or materials that were incorporated into the improvement of the Property. Further, plaintiff alleges that it has become aware of several other persons who may be liable for diverting said funds for non-trust purposes, including William Aversa, Carol Aversa and Ricky S. Spike, as trustees of the William Aversa 2012 Family Trust (the "Aversa Trust"). Additionally, the court notes that both NYIC and D&F, the plaintiffs in the 2016 Action have filed an affirmation in support of plaintiff's motion.

The court first turns to that portion of plaintiff's motion for an Order permitting plaintiff to amend the complaint to add certain necessary parties. Pursuant to CPLR § 3025(b), "[m]otions for leave to amend pleadings should be freely granted, absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit." *MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 A.D.3d 499, 499-500 (1st Dept 2010) (internal citations omitted). Moreover, on a motion for leave to amend, the movant is not required to establish the merit of the proposed new allegations "but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit." *Id.* Further, pursuant

to CPLR § 1001(a), "[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants."

Here, plaintiff's motion to amend the complaint to add NYIC and D&F as plaintiffs is granted on the ground that they are necessary parties. Plaintiff asserts that NYIC and D&F must be joined as plaintiffs because they are also beneficiaries of the same trust at issue in this action. Indeed, the 2016 Action was brought by NYIC and D&F to collect funds from the defendants based on work performed on the same Project at the same Property. Thus, if NYIC and D&F are not joined to this action, they might be inequitably affected.

Further, plaintiff's motion to amend the complaint to add William Aversa, Carol Aversa and Ricky S. Spike, as trustees of the Aversa Trust, as defendants, is granted on the ground that such amendment is not palpably insufficient or patently devoid of merit. Plaintiff asserts that said proposed defendants are corporate officers or agents of CIC who are potentially liable for diverting funds received in connection with the Project at the Property for various non-trust purposes. Plaintiff has affirmed that William Aversa was, at the time plaintiff performed work on the Project, the Vice President and Co-Owner of CIC and that Carol Aversa and Ricky S. Spike are the Co-Trustees of the Aversa Trust, which was a trust set up by William Aversa.

The court next turns to that portion of plaintiff's motion for an Order pursuant to CPLR § 602 consolidating this action with the 2016 Action. Pursuant to CPLR § 602(a), "when actions involving a common question of law or fact are pending before a court, the court may, upon motion, order the actions to be tried jointly . . . [or] may order consolidation." Where there are common questions of law and fact, there is a preference for consolidation in the interest of judicial economy and ease of decision-making, unless the party opposing the motion demonstrates that consolidation will prejudice a substantial right. *See Progressive Ins. Co. v. Vasquez*, 10 A.D.3d 518 (1st Dept 2004); *Chinatown Apts, Inc. v. New York City Tr. Auth.*, 100 A.D.2d 824 (1st Dept 1984).

Here, plaintiff's motion to consolidate this action with the 2016 Action is granted on the ground that both actions involve common questions of law and fact, that consolidation is in the interest of judicial economy and that defendant O'Brien, the only party opposing the motion, will not be prejudiced. The 2016 Action was brought by NYIC and D&F, the other potential trust beneficiaries, against the same defendants sued in this action along with William Aversa, Carol Aversa and Ricky S. Spike, as trustees of the Aversa Trust, the defendants plaintiff seeks to add as direct defendants in this action. Specifically, the 2016 Action alleges, *inter alia*, a trust diversion claim pursuant to Article 3-A of the Lien Law based on the assertion that the defendants diverted trust funds they received for non-trust purposes. Additionally, the 2016 Action involves the same Project and the same Property at issue in this action. Further, the actions should be consolidated so that there will not be inconsistent determinations involving the same funds.

O'Brien's assertion that plaintiff's motion to consolidate should be denied on the ground that this action and the 2016 Action are at drastically different stages of litigation is without merit. Although the 2016 Action is still in its early stages, the Preliminary Conference in this action was only recently held in January 2016 and the Note of Issue is not scheduled to be filed until December 2016, nearly six months away. Further, the parties appeared in court for a Compliance Conference in June 2016 at which the court ordered the exchange of outstanding discovery and set another conference date of September 27, 2016. O'Brien's assertion that any outstanding discovery has been waived in this action because it was not exchanged in accordance with the Preliminary Conference order is without merit as this court has not made such a finding.

To the extent O'Brien asserts that the 2016 Action should be dismissed on the ground that it is time-barred pursuant to Lien Law § 77(2), such assertion is without merit as this court cannot make that determination as the 2016 Action is not yet before this court. O'Brien should have moved for dismissal on that ground in the 2016 Action before the Judge presiding over that case or he must move for dismissal once the two actions are actually consolidated.

The court next turns to that portion of plaintiff's motion for an Order pursuant to Lien Law §§ 71 and 77 determining that this action shall be maintained as a class action. Pursuant to Lien Law § 77(1),

> A trust arising under this article may be enforced by the holder of any trust claim...In any such action, except as otherwise provided in this article, 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 article nine of the civil practice law and rules....

It is well-settled that "an action to enforce a trust pursuant to Lien Law § 77 must be brought as a class action." *Callender v. Shirell Air, Inc.*, 282 A.D.2d 564, 565 (2d Dept 2001). "A party seeking class action certification in the context of an action pursuant to Lien Law article 3-A must establish that: (1) there are questions of law or fact common to the class which predominate over any questions affecting only individual members, (2) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (3) the representative parties will fairly and adequately protect the interests of the class." *Yonkers Contracting Co., Inc. v. Romano Enterprises of New York*, 304 A.D.2d 657, 658 (2d Dept 2003). "A class action certification must be founded upon an evidentiary basis" and "conclusory allegations...[are] insufficient to establish that all of the requirements for class certification [are] met." *Id.* at 658-59.

Here, plaintiff's motion for an Order determining that this action shall be maintained as a class action is granted. Initially, it is undisputed that plaintiff has asserted a claim against defendants for trust diversion in violation of Article 3-A of the Lien Law, which must be brought as a class action pursuant to Lien Law § 77(1). Further, plaintiff has established that there are common questions of law and fact common to the class which predominate over any questions affecting only individual members, including, whether the funds allegedly diverted by CIC and the individual defendants are trust funds within the mean of Article 3-A of the Lien Law; whether CIC and the individual defendants withdrew, used or transferred said funds to a third party in contravention of Article 3-A of the Lien Law; whether the alleged transfer of the trust funds by CIC and the individual defendants violated Article 3-A of the Lien Law; and whether CIC and the individual defendants maintained the books and records required of a statutory trustee under Article

3-A of the Lien Law. Additionally, plaintiff has established that its claims, as the representative party, are typical of the claims of the remaining class members as it has affirmed that they are all asserting claims against the identical defendants for trust diversion in violation of Article 3-A of the Lien Law based on the allegation that the defendants received funds which were supposed to be used to pay the plaintiffs for the labor and materials furnished to defendants on the Project at the Property but that instead, the defendants used said funds for non-trust purposes. Plaintiff has also established that it will fairly and adequately protect the interests of the class because as a trust fund beneficiary, plaintiff has an interest in prevailing in the action and if successful, all trust fund beneficiaries who establish valid trust fund claims will share pro rata in the trust funds recovered in the action. Moreover, maintaining this action as a class action is superior to other available methods because it eliminates the risk of inconsistent determinations of the trust fund beneficiaries' claims and will avoid unnecessary costs and delays that would arise from maintaining multiple lawsuits.

O'Brien's assertion that this action should not be maintained as a class action on the ground that plaintiff has failed to establish the numerosity element pursuant to CPLR § 901(a)(1), such assertion is without merit as the court has waived such requirement. Pursuant to Lien Law § 77(1), "in determining whether the prerequisites of a class action have been satisfied, the provisions of paragraph one of subdivision (a) of section nine hundred one of such law and rules may be waived at the discretion of the court."

Accordingly, plaintiff's motion is granted in its entirety. It is hereby

ORDERED that the Amended Complaint, in the form annexed to plaintiff's motion papers, shall be deemed served upon service of a copy of this order with notice of entry upon all parties who have appeared in the action; and it is further

ORDERED that a supplemental summons and the Amended Complaint, in the form annexed to plaintiff's motion papers, shall be served, in accordance with the CPLR, upon the additional parties in this action within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon the Clerk in the General Clerk's Office (Room 119), who is directed to mark the court's records to reflect the additional parties; and it is further

ORDERED that plaintiff's motion for an Order determining that this action shall be maintained as a class action is granted; and it is further

ORDERED that the contents of the proposed Notice of Pendency of Class Action annexed to plaintiff's motion papers is approved and that the manner of service of said notice on the members of the class shall be performed pursuant to said notice not later than thirty (30) days following entry of this decision and order; and it is further

ORDERED that plaintiff's motion to consolidate is granted and the above-captioned action is consolidated in this court with *New York Interior Concepts, Inc., et al. v. RGN-NY IV, LLC, et al.*, Index No. 650999/2016, under Index No. 152266/2014, and the consolidated action shall bear the following caption:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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COGEN ELECTRICAL SERVICES, INC., on behalf of Itself and all others entitled to share in the funds received By CORPORATE INTERIORS CONTRACTING, INC., As Trustee, in connection with the improvement of real Property known as 136 Madison Avenue, New York, New York, designated on the tax map as Block 861, Lot 15,

Index No. 152266/14

Plaintiff,

-against-

CORPORATE INTERIORS CONTRACTING, INC., JOHN JOSEPH O'BRIEN, JR., WILLIAM AVERSA, CAROL AVERSA and RICKY S. SPIKE, as Trustees of The William Aversa 2012 Family Trust, NEW YORK INTERIOR CONCEPTS, INC., D&F INTERIORS, INC. And "JOHN DOE No. 1" through "JOHN DOE No. 100," Said names being fictitious, true names being those Unknown individuals and/or entities liable for the Diversion of trust funds pursuant to Article 3-A of the Lien Law of the State of New York, in connection with the Improvement of real property known as 136 Madison

Avenue, New York, New York, designated on the tax Map as Block 861, Lot 15,

Defendants.

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And it is further

ORDERED that the pleadings in the actions hereby consolidated shall stand as the pleadings in the consolidated action; and it is further

ORDERED that plaintiff is directed to serve a copy of this order with notice of entry on the County Clerk (Room 141B), who shall consolidate the papers in the actions hereby consolidated and shall mark his records to reflect the consolidation; and it is further

ORDERED that plaintiff is directed to serve a copy of this order with notice of entry on the Clerk in the General Clerk's Office (Room 119), who is hereby directed to mark the court's records to reflect the consolidation; and it is further

ORDERED that all parties are directed to appear for a status conference in the consolidated action in Part 55 on September 27, 2016 at 11:00 a.m. This constitutes the decision and order of this court.

DATE : 7/26/16

KERN, CYNTHIA S., JSC

HON. CYNTHIA S. KERN
J.S.C.