

Metal Partners Rebar, LLC v ZDG, LLC

2017 NY Slip Op 32464(U)

November 14, 2017

Supreme Court, New York County

Docket Number: 653226/2016

Judge: Nancy M. Bannon

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

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METAL PARTNERS REBAR, LLC, on behalf of
itself and all others similarly situated
as trust fund beneficiaries of Lien Law
Trusts, of which Sullivan Land Services,
Ltd., is trustee

Plaintiffs

Index No. 653226/2016

v

ZDG, LLC, MICHAEL ZAZZA, and JOHN DOE
NO. 1 through JOHN DOE NO. 10

DECISION AND ORDER

Defendants.

MOT SEQ 001

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NANCY M. BANNON, J.:

I. INTRODUCTION

In this action, inter alia, to recover trust fund proceeds pursuant to Lien Law article 3-A, the plaintiff moves pursuant to CPLR 901 and 902 to certify a class of all beneficiaries of the trust fund purportedly maintained by the defendant ZDG, LLC (ZDG), in connection with a construction project at 310 West 40th Street in Manhattan (the project). The plaintiff also moves pursuant to Lien Law § 76(5) to compel the defendants to provide a verified statement setting forth the entries with respect to the trust as contained in the defendants' books or records.

The defendants cross-move pursuant to CPLR 3211(a)(3) to dismiss the complaint on the ground that the plaintiff lacks

capacity to commence the action or represent the members of the class because it is a limited liability company that is not authorized to do business in New York. They also move pursuant to CPLR 3211(a)(1) to dismiss the cause of action to recover trust fund proceeds on the ground that documentary evidence establishes that they complied with Lien Law § 76(1) by providing an itemized statement of all entries respecting receipt of funds and the reasons for any expenditures thereof. The defendants further move pursuant to 22 NYCRR 202.5(e) to compel the plaintiff to redact bank account numbers included in the plaintiff's motion papers.

The motion is granted. The cross motion is granted to the extent that the plaintiff is directed to redact bank account numbers included in documents submitted in support of its motion, and the cross motion is otherwise denied.

II. BACKGROUND

The plaintiff alleges that a limited liability company known as 310 Group, LLC, owned the project site, and entered into a general contract with ZDG for the development thereof. The plaintiff further alleges that it entered into a subcontract with ZDG on March 5, 2015, to provide construction materials for the project, that it provided the materials to ZDG, and that, despite invoicing ZDG for those materials, it was paid only \$112,234.41

of ZDG's total obligation of \$261,232.03, leaving a balance due and owing to it in the sum of \$148,997.92. The plaintiff asserts causes of action to recover for breach of contract against ZDG (first cause of action), in quantum meruit against ZDG (second cause of action), for violation of the prompt payment provisions of General Business Law §§ 756-a, et seq. (third cause of action), on an account stated against ZDG (fourth cause of action), and for wrongful diversion of Lien Law trust fund proceeds against all of the defendants (fifth cause of action). In connection with the fifth cause of action, the plaintiff alleges that ZDG not only holds money due to it, but holds money due to numerous other subcontractors that provided materials or undertook work in connection with the project.

III. DISCUSSION

A. PLAINTIFF'S FAILURE TO REGISTER WITH THE SECRETARY OF STATE

Contrary to the defendants' contention, the fact that the plaintiff is not registered with the Secretary of State to do business in New York does not require dismissal of the complaint.

Although Limited Liability Company Law § 808(a) prohibits a limited liability company that does business in New York without authorization from availing itself of litigating its claims in a New York court, that statute, which tracks the nearly identical Business Corporation Law § 1312, applicable to corporations, is

not a jurisdictional barrier. See Basile v Mulholland, 73 AD3d 597 (1st Dept. 2010); Tri-Terminal Corp. v CTIC Indus., 78 AD2d 609 (1st Dept. 1980). In order for the prohibition to apply, the plaintiff's contacts with New York must be sufficiently systematic, continuous, and regular to warrant registration with the Secretary of State. Digital Ctr., S.L. v Apple Indus., Inc., 94 AD3d 571 (1st Dept. 2012); S & T Bank v. Spectrum Cabinet Sales, 247 AD2d 373 (2nd Dept. 1998). "[T]he solicitation of business and facilitation of the sale and delivery of merchandise incidental to business in interstate and/or international commerce is typically not the type of activity that constitutes doing business in the state within the contemplation of" of these so-called closed door statutes. Digital Ctr., S.L. v Apple Indus., Inc., supra, at 572; see Uribe v Merchants Bank, 266 AD2d 21 (1st Dept. 1999); Sirois Leather v Lea-Suede Corp., 44 AD2d 815 (1st Dept. 1974).

Since the failure to register with the Secretary of State is an affirmative defense (see CPLR 3018[b]), the defendant bears the burden of demonstrating that the plaintiff's contacts with New York require it to register with the Secretary of State in order to gain access to the courts of this State. See McKenzie Banking Co. v Billinson, 79 AD3d 1728 (4th Dept. 2010); Peter Matthews, Ltd. v. Robert Mabey, Inc., 117 AD2d 943 (3rd Dept. 1986); Great White Whale Advertising v First Festival Prods., 81

AD2d 704 (3rd Dept. 1981); Maro Leather Co. v Aerolineas Argentinas, 161 Misc. 2d 920 (App Term, 1st Dept. 1994).

Inasmuch as the defendants did not submit any evidence that the plaintiff did business in New York in a systematic, continuous, and regular fashion, they have not satisfied this burden and, hence, dismissal is not warranted for the plaintiff's failure to register with the Secretary of State.

B. COMPLIANCE WITH LIEN LAW § 76(1)

Lien Law § 70(1) provides that funds

"received by an owner for or in connection with an improvement of real property in this state . . . or received by a contractor under or in connection with a contract for an improvement of real property . . . and any right of action for any such funds due or earned or to become due or earned, shall constitute assets of a trust."

Pursuant to that statute and the other provisions of Lien Law article 3-A, owners and contractors are required to maintain funds in trust in order to provide protection to certain parties involved in the improvement of real property, ensuring that they will be properly compensated for their services. See Anthony DeMarco & Sons Nursery, LLC v Maxim Constr. Serv. Corp., 130 AD3d 1409 (3rd Dept. 2015). A party holding trust funds must comply with Lien Law § 76(1) by providing "a verified statement setting forth the entries with respect to the trust contained in [its] books or records."

The documentary evidence contained in the parties' submissions does not conclusively establish that the defendants complied with Lien Law § 76(1) and, hence, the evidence does not show that the plaintiff's demand for such statement should be vacated or dismissed pursuant to Lien Law § 76(5). Rather, the unverified statement and documents produced by ZDG are limited to a short spread sheet with limited descriptions, cancelled checks, and bank statements, with no explanation as to how the checks or bank statements refer to any specific revenue received by ZDG or expenses paid by ZDG. Any such statement must be verified, and set forth the dates and amounts of the trust assets receivable, trust accounts payable, or trust funds received as required by Lien Law § 75(3)(A)-(C), and must set forth the exact date each payment was made so as to provide a sufficiently detailed breakdown of the total amount of payments made with trust funds. See Anthony DeMarco & Sons Nursery, LLC v Maxim Constr. Serv. Corp., supra.

The documentary evidence is thus insufficient to warrant dismissal of the Lien Law claim. See id. On the contrary, the submissions show that the plaintiff is entitled to a proper verified statement, as it requested in its motion. Hence, that branch of the defendants' cross motion which is to dismiss the fifth cause of action is denied, and that branch of the plaintiff's motion which is to compel the defendants to provide a

proper, verified statement in accordance with Lien Law § 76(1) is granted.

C. CLASS CERTIFICATION

Article 9 of the CPLR is to be "liberally construed" (Beller v William Penn Life Ins. Co. of N.Y., 37 AD3d 747, 748 [2nd Dept. 2007]) in favor of the granting of class certification if all of the prerequisites of CPLR 901(a)(1)-(5) and CPLR 902(1)-(5) are met. See Matter of Colt Indus. Shareholder Litig., 77 NY2d 185 (1991); Ackerman v Price Waterhouse, 252 AD2d 179 (1st Dept. 1998).

The plaintiff satisfied its burden of showing that certification of a class consisting of all beneficiaries of the trust fund proceeds maintained by ZDG is warranted.

"The prerequisites articulated in CPLR 901(a) include proof that the proposed class is so numerous that joinder of all members is impracticable, that common questions of law and fact applicable to the class predominate over questions affecting only individual members, that claims or defenses of the representative parties are typical of the claims or defenses of the class, and that the class action is superior to other available methods for the fair and efficient adjudication of the controversy."

Globe Surgical Supply v GEICO Ins. Co., 59 AD3d 129, 135-136 (2nd Dept. 2008). Lien Law § 77(1) expressly provides that any party with a claim upon a Lien Law trust based on diversion of trust fund assets may maintain a class action to enforce the claim on

behalf of all potential beneficiaries (Callender v Shirell Air, 282 AD2d 564 [2nd Dept. 2001]; Scriven v Maple Knoll Apts., 46 AD2d 210 [3rd Dept. 1974]), and permits the court to waive the requirement that the plaintiff satisfy the numerosity prong of CPLR 901. See Callender v Shirell Air, supra; Cranesville Block Co. v Crisafulli, 116 AD2d 882 (3rd Dept. 1986) (granting class certification where there were only 10 known beneficiaries in the subcontractor class).

Under the circumstances of this case, waiver of that requirement is warranted. Moreover, the putative class members share common questions of fact or law regarding ZDG's failure to pay them for work performed and materials provided. See Kudinov v Kel-Tech Constr. Inc., 65 AD3d 481, 482 (1st Dept. 2009); Callender v Shirell Air, supra. The claims of the class representative are typical of those of the class. The plaintiff has demonstrated that it can fairly and adequately protect the interests of the class, as it has no claims potentially adverse to other class members. The class action procedure appears to be superior to other potential available methods of adjudicating the controversy, since the amount that might be recovered by an individual class member might amount to no more than a few hundred dollars.

The relevant factors articulated in CPLR 902 (1) ("[t]he interest of members of the class in individually controlling the

prosecution or defense of separate actions"), CPLR 902(2) ("[t]he impracticability or inefficiency of prosecuting or defending separate actions") and CPLR 902(3) ("[t]he extent and nature of any litigation concerning the controversy already commenced by or against members of the class") may, under the circumstances of this case, be subsumed under the prerequisite of superiority. See CPLR 901(a)(5); Globe Surgical Supply v GEICO Ins. Co., supra. CPLR 902(4), which requires consideration of "[t]he desirability or undesirability of concentrating the litigation of the claim in the particular forum" is satisfied here, since the concentration of the claims in New York County, where the project was located, and ZDG maintains its offices, is desirable. See Galdamez v Biordi Constr. Corp., 13 Misc 3d 1224(A), 2006 NY Slip Op 51969(U), *5 (Sup Ct, N.Y. County 2006), affd 50 AD3d 357 (1st Dept. 2008). CPLR 902(5) requires consideration of "[t]he difficulties likely to be encountered in the management of a class action." The plaintiff has demonstrated that, in light of the fact that the membership in the class is not overwhelmingly large, and the claims are similar to each other and cover only a limited period of time, "the claims as set forth in the complaint can be efficiently and economically managed by the court on a classwide basis." Globe Surgical Supply, supra, at 136.

Finally, the attorney for the plaintiff has demonstrated that it has the requisite experience and success in litigating

class actions pursuant to Lien Law § 77.

D. REDACTION OF CERTAIN DOCUMENTS

22 NYCRR 202.5(e)(1)(iv) provides, in relevant part, that

"the parties shall omit or redact confidential personal information in papers submitted to the court for filing. For purposes of this rule, confidential personal information ("CPI") means . . . a financial account number, including a credit and/or debit card number, a bank account number, an investment account number, and/or an insurance account number, except the last four digits or letters thereof."

"The court sua sponte or on motion by any person may order a party to remove CPI from papers or to resubmit a paper with such information redacted." 22 NYCRR 202.5(e)(2). Since the papers annexed as Exhibit D to the affirmation of Jose A. Aquino, and filed as Docket Entry No. 15, contain bank account numbers, that branch of the defendants' motion to compel redaction thereof must be granted. See Matter of Afilalo, 139 AD3d 175 (1st Dept. 2016).

IV. CONCLUSION

In light of the foregoing, it is

ORDERED that the branch of the plaintiff's motion which is to certify a class is granted to the extent that a class is certified consisting of all beneficiaries of the trust created by operation of Lien Law article 3-A in connection with a project for the improvement of real estate undertaken at 310 West 40th,

New York, New York, namely, all contractors and subcontractors who remain unpaid by the defendant ZDG, LLC, in connection with that project, for which the defendant ZDG, LLC, served as general contractor; and it is further,

ORDERED that the branch of the plaintiff's motion which is to compel the defendants to provide a proper and complete verified statement setting forth the entries with respect to the trust, as contained in their books or records, is granted, and the defendants are directed to provide the plaintiff with such a verified statement in accordance herewith within 30 days of this order; and it is further,

ORDERED that the defendants' cross motion is granted only to the extent that the bank account numbers set forth in Docket Entry No. 15 shall be redacted, and the cross motion is otherwise denied; and it is further,

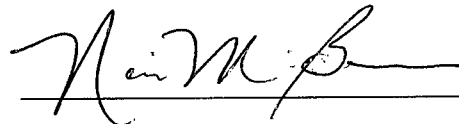
ORDERED that the plaintiff shall, within 10 days of the service of a copy of this order with notice of entry upon it, file with the County Clerk: (1) a copy of this order, and (2) a copy of Docket Entry No. 15, with the bank account information therein redacted, except for the last four numbers of each of such bank account; and it is further,

ORDERED that, upon the plaintiff's compliance with the filing requirements set forth in this order, the County Clerk shall either delete the original document filed under Docket

Entry No. 15, if possible, or restrict access to the original document filed under Docket Entry No. 15 to the parties, their attorneys, and court personnel.

This constitutes the Decision and Order of the court.

Dated: 11/14/17

ENTER: 

J.S.C.

HON. NANCY M. BANNON