

**Matter of Hudson Meridian Constr. Group, LLC v 118
E. 59th St. Realty LLC**

2018 NY Slip Op 30067(U)

January 10, 2018

Supreme Court, New York County

Docket Number: 160046/2016

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED
Justice

PART 2

In the Matter of HUDSON MERIDIAN CONSTRUCTION GROUP, LLC

INDEX NO. 160046/2016

Petitioner,

- v -

MOTION SEQ. NO. 001

118 EAST 59TH STREET REALTY LLC,

Respondent.

DECISION, ORDER & JUDGMENT

The following e-filed documents, listed by NYSCEF document number 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27

were read on this motion to/for

MECHANICS LIEN

In this special proceeding pursuant to article 3-A of the Lien Law, commenced by petition and order to show cause, petitioner Hudson Meridian Construction Group, LLC, a general contractor, seeks an order compelling respondent 118 East 59th Street Realty LLC, the owner of real property at the location its name implies and identified as Block 1313, Lot 63, on the Land and Tax Map of the County of New York, to provide a verified statement of its books and records. Respondent opposes and cross-moves for an accounting from petitioner. Upon a review of the papers submitted, as well as the applicable statutes and case law, the petition is granted, and the cross motion is denied.

Article 3-A of the Lien Law, entitled "Definition and Enforcement of Trusts," "creates a statutory trust for funds received by owners 'in connection with an improvement of real property in this state'" (Matter of Bette & Cring, LLC v Brandle Meadows, LLC, 81 AD3d 1152, 1153 [3d Dept 2011], quoting Lien Law § 70 [1]), as well as for funds "received by a contractor under or

in connection with a contract for an improvement of real property” (Lien Law § 70 [1]). Article 3-A and its predecessor were enacted “to ensure that those who have directly expended labor and materials to improve real property or a public improvement at the direction of the owner or a general contractor receive payment for the work actually performed.” (*LeChase Data/Telecom Servs., LLC v Goebert*, 6 NY3d 281, 289 [2006] [internal quotation marks, citation, and brackets omitted].) The statute provides that the trust “shall commence at the time when any asset thereof comes into existence, whether or not there shall be at that time any beneficiary of the trust. The trust of which the owner is trustee shall continue with respect to every asset of the trust until every trust claim arising at any time during the improvement has been paid or discharged, or until all such assets have been applied for the purposes of the trust.” (Lien Law § 70 [3].) The statute expressly applies to funds received “under a building loan contract” or “under a building loan mortgage or a home improvement loan.” (Lien Law § 70 [5] [a], [b].)

Petitioner claims that it is owed \$2,563,072.27 as a result of a construction project that it oversaw. Respondent maintains that petitioner breached their agreement in several important respects. Even if breach of an agreement were a defense to a demand for a verified statement of the use of trust funds – and respondent has not made this Court aware of any law supporting that position – the papers before this Court are inadequate to make a determination that petitioner breached the agreement. The disputed funds were received by respondent in conjunction with a loan between respondent and First Commercial Bank in August 2014. (Doc. No. 17.) Respondent claims that, since the loan agreement with First Commercial Bank provided that the funds could be used for “general corporate purposes” (Doc. No. 17, § 2.1.4), they do not constitute trust funds within the meaning of the Lien Law. Respondent also points to the section of the loan agreement that provides that, “so long as any Obligations shall remain outstanding,

[respondent] shall not use any proceeds of the Loan for Enumerated Restricted Uses, [which include construction], without obtaining prior written consent of [First Commercial Bank].” Respondent claims that this specific restriction in the loan agreement related to construction provides further support that the loan was not intended as a construction loan.

Despite these ostensible restrictions in the loan agreement, the mortgage securing the loan, also dated August 2014, is far less ambiguous. (Doc. No. 4.) Indeed, § 14.03 of the mortgage expressly cites Lien Law § 13 and states that the funds obtained pursuant to the loan agreement constitute “a trust fund to be applied first for the purpose of paying the cost of any improvement and [respondent] shall apply such advances first to the payment of the cost of any such improvements on the Property before using any part of the total of the same for any other purpose.” This provision in the mortgage makes it abundantly clear that the funds constitute trust funds within the meaning of the Lien Law. Respondent’s argument that the funds are not trust funds because they predate its agreement with petitioner is without merit. The trust fund provisions of the Lien Law apply regardless of whether there is a beneficiary in existence when the funds are received. (*See* Lien Law § 70 [3].) The loan and mortgage, read together, indicate that the money received was to be used for construction purposes, and therefore constituted a trust fund within the meaning of the Lien Law that may be enforced by petitioner.

Turning now to respondent’s cross motion, respondent asserts that it is entitled to an accounting from petitioner. Respondent cites not to the Lien Law, but to the contract itself for its right to an accounting. It is improper, within the context of the instant proceeding, for respondent to cross-move for an accounting pursuant to the parties’ contract. Moving for an accounting pursuant to the provisions of the parties’ contract raises significant issues as to

breaches that may have occurred, which cannot be decided within the context of a special proceeding of this limited nature.

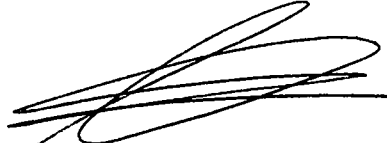
Accordingly, it is hereby:

ADJUDGED that the petition is granted, and respondent is directed to furnish, within 10 days after service of a copy of this judgment with notice of entry, a specific verified statement, subscribed and verified by an officer thereof, setting forth the entries with respect to the trust contained in the books or records kept by respondent pursuant to Section 75 of the Lien Law, and the names and addresses of the person or persons who, on behalf of or as an officer, director or agent of the trustee, made or consented to the making of the payment shown in such statement; and it is further

ADJUDGED that, in the event that respondent fails to provide such statements within 10 days, petitioner may move, by order to show cause, to restore this proceeding to the calendar and for an order declaring that respondent has diverted trust funds; and it is further

ORDERED that the cross motion is denied, without prejudice.

1/10/2018
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
<input type="checkbox"/>	DO NOT POST	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION: _____

CHECK IF APPROPRIATE: _____