

**GPK 31-19 LLC v L & L Constr. Dev. Inc.**

2018 NY Slip Op 32346(U)

September 17, 2018

Supreme Court, New York County

Docket Number: 650533/2017

Judge: Andrea Masley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: COMMERCIAL PART 48

-----X  
 GPK 31-19 LLC, individually and on behalf of all the lienors,  
 claimants or creditors for wages or materials, pursuant to Lien  
 Law Article 3-A, in connection with the improvement of real  
 property known as 31-19 37<sup>th</sup> Avenue, Long Island City, in the  
 City of New York, County of Queens and State of New York,

Plaintiff,

INDEX NO. 650533/2017

MOTION DATE 03/23/2018

MOTION SEQ. NO. 002

- v -

L & L CONSTRUCTION DEVELOPMENT INC., XIANGBO LI,  
 "JOHN DOE 1" through "JOHN DOE 10", defendants being  
 unknown to plaintiff and having or claiming an interest in or lien  
 upon the private improvements foreclosed herein and "JANE  
 DOE 1" through "JANE DOE 10", being fictitious names, the real  
 names being unknown to the plaintiff at this time, and being  
 intended to designate the individuals, corporations or other legal  
 entities who are or were recipients of funds diverted from the  
 Trust described in the complaint,

Defendants.

**DECISION AND ORDER**

-----X  
 L & L CONSTRUCTION DEVELOPMENT INC.,

Third-Party Plaintiff,

- v -

GP KEYSTAND LLC, and WESTCHESTER FIRE INSURANCE  
 COMPANY,

Third-Party Defendants.

-----X  
**MASLEY, J.:**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 44, 45, 46, 47, 48,  
 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73

were read on this motion to/for

ORDER MAINTAIN CLASS ACTION

Plaintiff GPK 31-19 LLC (GPK) moves, pursuant to CPLR 901 and 902, to  
 maintain the matter as a Lien Law § 77 (1) class action. This case arises out of an  
 agreement between GPK, the developer of property located at 31-19 37<sup>th</sup> Avenue in  
 Long Island City, New York (Property), and defendant L & L Construction Development

Inc. (L&L); under that agreement, L&L would serve as the general contractor for the project of improving the Property (Project).

In its March 27, 2017 amended complaint, GPK alleges three causes of action: (1) trust fund diversion against L&L and its principle, defendant Xiangbo Li, under Article 3-A of the Lien Law; (2) breach of contract against L&L; and (3) a declaration that a mechanics' lien filed by L&L is void. The parties address only GPK's trust fund diversion claim in the papers submitted in connection with this motion.

### **Background**

The following factual allegations are taken from GPK's amended complaint.

GPK alleges that it advanced \$270,804 to L&L and L&L's subcontractors; however, L&L failed to use those funds to pay its subcontractors for work, labor, and materials on the Project (GPK's amended complaint [compl.] ¶¶ 43-49).

One subcontractor, NY Drilling Inc. (NY Drilling), entered an agreement with L&L to provide foundation work and materials for the Project; as alleged, L&L failed to pay NY Drilling for the work and materials it provided under that contract (*id.* ¶¶ 15-17). GPK subsequently paid NY Drilling "at least \$76,666.47" for those services and materials, and NY Drilling assigned its Lien Law Article 3-A rights to GPK (*id.* ¶¶ 20-21).

GPK now moves for an order: (1) declaring the action a class action under CPLR 901 and 902; (2) permitting it to maintain the action as a Lien Law Article 3-A class action on behalf of itself and all similarly situated persons/entities that performed work on the Project; (3) declaring the class to be composed of all prospective beneficiaries of Lien Law Article 3-A trust funds that supplied work, labor, and/or materials for the Project; and (4) authorizing the method of furnishing notice to the class.

### Discussion

Article 3-A of the Lien Law creates trust funds from certain payments to ensure that designated persons and entities, including subcontractors, laborers, and material suppliers, are paid for their work on construction projects (see *Caristo Constr. Corp. v Diners Fin. Corp.*, 21 NY2d 507, 512 [1968]). Under Lien Law § 77 (1), an alleged diversion of Article 3-A trust funds “may be enforced by the holder of any trust claim . . . in a representative action brought for the benefit of all beneficiaries of the trust.” Section 77 (1) further provides that an action to enforce such a trust shall conform “as nearly as may be” to a class action commenced under Article 9 of the CPLR; however, the prerequisites of CPLR 901 (a) “may be waived at the discretion of the court.”

CPLR 901 (a) permits class certification if: (1) “the class is so numerous that joinder of all members . . . is impracticable”; (2) “questions of law or fact common to the class . . . predominate over . . . questions affecting only individual members”; (3) “the claims or defenses of the representative parties are typical of [those] 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.”

Defendants argue only that the action should not be maintained as a Lien Law § 77 (1) class action because the numerosity requirement of CPLR 901 (a) (1) is not satisfied; specifically, they contend that there is only one potential trust fund beneficiary—GPK as subrogee of NY Drilling’s Article 3-A rights—and that no mechanic’s liens have been filed against the Property, demonstrating that there are no other potential trust beneficiaries.

Maintaining the first cause of action for trust fund diversion as a Lien Law § 77 class action is appropriate here because GPK has established, and defendants do not refute, that: (1) there are questions of law or fact common to the potential class which predominate over questions affecting only individual members as the claims of Article 3-A beneficiaries that supplied work, labor, and materials for the Project will be nearly identical in most respects; (2) GPK's trust fund diversion claim is typical of the claims of the proposed class as GPK is the subrogee of NY Drilling, a subcontractor that supplied work and materials for the Project; and (3) GPK will fairly and adequately protect the interests of the class as it is the subrogee of NY Drilling's claim (*see* CPLR 901 [a]; Lien Law § 77 [1]; *ECD NY, Inc. v Britt Realty, LLC*, 47 Misc 3d 923, 927-928 [Sup Ct, Kings County 2015]).

Although GPK does not know the quantity, or the identities, of all potential trust beneficiaries that provided labor, work, or materials to the Project, "[t]he absence of such information is not fatal to [an] application for class certification," and the numerosity prerequisite of CPLR 901 (a) may be waived in an Article 3-A action (*Pinnacle Envtl. Corp. v MDB Dev. Corp.*, 2013 NY Slip Op. 32406[U], \*3 [Sup Ct, New York County 2013]; *see* Lien Law § 77 [1]). Thus, while the only trust fund beneficiary identified in the amended complaint is GPK, as assignee of NY Drilling's Article 3-A rights, the absence of numerosity may be cured GPK furnishing of notice of the trust fund diversion claim to other potential class members (*see ECD NY, Inc.*, 47 Misc 3d at 927).

Defendants' arguments as to numerosity are unpersuasive. The absence of mechanic's liens, filed by unpaid potential trust fund beneficiaries against the Property,

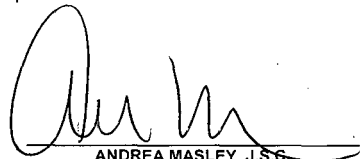
does not preclude GPK from maintaining this claim as a class action; under Lien Law § 71 (4), the existence of a valid lien is not a necessary precondition to commencing an action to recover Article 3-A trust assets (*id.* at 927). None of the other arguments or assertions advanced by defendants require denial of GPK's motion.

The court exercises its discretion to waive the numerosity requirement of CPLR 901 (a). GPK's motion to maintain its first cause of action—diversion of Article 3-A trust funds—as a class action under CPLR 901 and 902 and Lien Law § 77 (1) is granted (*see id.* at 927-928). The class members shall be deemed to consist of all beneficiaries of Article 3-A trust funds received by defendants in connection with the Project.

Notice of the claim and an opportunity to come forward must be provided to all potential class members. GPK does not identify the potential class members or request any specific method of furnishing notice to those trust beneficiaries. Accordingly, within 15 days of this decision, defendants shall provide to GPK verified copies of the books and records for the Project that L&L was required to maintain under Lien Law § 75 (3) (D). The books and records required by Lien Law § 75 (3) (D) (1) contain all payments made with trust assets and include the name and address of each payee; therefore, the potential class members identified in those records will permit GPK to identify and serve notice of the Article 3-A claim upon those persons and entities by certified mail. Notice must be served upon the potential class members within 20 days of GPK's receipt of the books and records L&L was required to maintain under Lien Law § 75 (3) (D). If defendants fail to timely provide those books and records, the court will consider an application to authorize notice to potential class members by an alternative method.

Accordingly, it is

ORDERED that the motion of plaintiff GPK 31-19 LLC is granted; and it is further  
 ORDERED that the first cause of action for trust fund diversion in plaintiff's March  
 27, 2017 amended complaint shall be maintained as a class action; and it is further  
 ORDERED that defendant L & L Construction Development Inc. shall provide to  
 plaintiff verified copies of the books and records required to be maintained under Lien  
 Law § 75 (3) (D) within 15 days.



ANDREA MASLEY, J.S.C.

9/17/2018  
 DATE

|                       |                                     |                            |                                     |                       |
|-----------------------|-------------------------------------|----------------------------|-------------------------------------|-----------------------|
| CHECK ONE:            | <input type="checkbox"/>            | CASE DISPOSED              | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION |
|                       | <input checked="" type="checkbox"/> | GRANTED                    | <input type="checkbox"/>            | GRANTED IN PART       |
|                       | <input type="checkbox"/>            | DENIED                     | <input type="checkbox"/>            | OTHER                 |
| APPLICATION:          | <input type="checkbox"/>            | SETTLE ORDER               | <input type="checkbox"/>            | SUBMIT ORDER          |
| CHECK IF APPROPRIATE: | <input type="checkbox"/>            | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/>            | FIDUCIARY APPOINTMENT |
|                       |                                     |                            | <input type="checkbox"/>            | REFERENCE             |