

Singer Equip. Co., Inc. v Chapin Sch., Ltd
2018 NY Slip Op 32595(U)
October 10, 2018
Supreme Court, New York County
Docket Number: 654538/2017
Judge: O. Peter Sherwood
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. O. PETER SHERWOOD PART IAS MOTION 49EFM

Justice

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SINGER EQUIPMENT COMPANY, INC.,
Plaintiff,

- v -

THE CHAPIN SCHOOL, LTD, IBEX CONSTRUCTION COMPANY,
LLC, ANDY FRANKL

Defendant.

INDEX NO. 654538/2017

MOTION DATE 06/08/2018

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36

were read on this motion to/for Class certification and cross motion to dismiss

Plaintiff moves for the certification of a class of plaintiffs who are beneficiaries of Lien Law Article 3-A trust funds received by the Chapin School, LTD (Chapin) and IBEX Construction Company (Ibex) in connection with a renovation and construction project (the Project) at 100 East End Avenue, New York City (the Premises). Defendant Chapin opposes and cross-moves to dismiss the two claims against it. The Complaint in this action (NYSCEF Doc No. 002) first alleges that Chapin has withheld approximately \$1,793,793 from funds earned by Ibex and its subcontractors in connection with the Project and those funds should be an asset of the contractor’s trust and held for the benefit of Ibex subcontractors and suppliers (Complaint at 6-7). The second claim asserts that funds received by Chapin from municipal bonds should be deemed assets of an owner’s trust and held for the benefit of Ibex and its subcontractors and suppliers. (*id.* at 7). Chapin cross-moves based on documentary evidence and plaintiff’s alleged failure to state a claim, arguing that any funds held by Chapin for the Project are not contractor or owner trust funds within the meaning of New York Lien Law (Opp at 2).

On a motion to dismiss a plaintiff’s claim pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see*,

Campaign for Fiscal Equity v State, 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). Rather, the court is required to “afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss” (*EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The court’s role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]).

Chapin argues that the second claim, which asserts funds received by Chapin from municipal bonds should be deemed assets of an owner’s trust and held for the benefit of Ibex and its subcontractors and suppliers, fails to state a claim because the Complaint fails to allege the funds come from one of the sources listed in Lien Law section 70(5) (Memo at 5). Singer points to allegations in the Complaint that “Chapin obtained financing in connection with the Project thru [sic] tax-exempt bond financing” with the bonds secured by a mortgage on the property (Complaint at 4). Accordingly, the portion of the cross-motion to dismiss made pursuant to CPLR 3211(a)(7) fails.

Chapin then argues the claim, as well as the first cause of action, should be dismissed pursuant to CPLR § 3211 (a) (1). For that argument to prevail the documentary evidence submitted that forms the basis of Chapin’s defense must resolve all factual issues and definitively dispose of the plaintiff’s claims (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180, 182 [1st Dept 2006]). A motion to dismiss pursuant to CPLR § 3211 (a) (1) “may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*McCully v. Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept. 2009]). The facts as alleged in the complaint are regarded as true, and the plaintiff is afforded the benefit of every favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (*see e.g. Nisari v Ramjohn*, 85 AD3d 987, 989 [2nd Dept 2011]).

CPLR § 3211 (a) (1) does not explicitly define “documentary evidence.” As used in this statutory provision, “‘documentary evidence’ is a ‘fuzzy term’, and what is documentary evidence for one purpose, might not be documentary evidence for another” (*Fontanetta v John Doe 1*, 73 AD3d 78, 84 [2nd Dept 2010]). “[T]o be considered ‘documentary,’ evidence must be unambiguous and of undisputed authenticity” (*id.* at 86, citing Siegel, Practice Commentaries, McKinney’s Cons. Laws of N.Y., Book 7B, CPLR 3211:10, at 21-22). Typically that means “judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are ‘essentially undeniable,’ ” (*id.* at 84-85). Here, the documentary evidence presented is the affidavit of Marc Bogursky, the affirmation of Jose Aquino, and the attached exhibits (Memo at 1). The affidavit and affirmation are not the type of evidence generally considered essentially undeniable, as required to qualify as documentary evidence.

Chapin points to the letter from First American Title Insurance Company National Commercial Services (NYSCEF Doc. No. 23), which states that, as of May 3, 2018, there were no mortgages recorded against the premises at the Premises. However, that document notes it “may not be used or relied upon by any . . . person” other than the one requesting it, among other disclaimers (*id.*). Accordingly, this court will not rely upon it. Chapin also points to the Revolving Credit Agreement dated June 21, 2015, the Official Statement of Build New York Resource Corporation Revenue Bonds Series 2016, and the Loan Agreement between bond issuer and Chapin dated August 1, 2016 (attached as Exhibits 1-3 to Bogursky aff, NYSCEF Docs. No. 28-30). Chapin fails, however, to cite any specific language which utterly refutes plaintiff’s factual allegations or conclusively establishes a defense to the second cause of action as a matter of law.

As to the first cause of action, regarding the existence of a contractor’s trust, Chapin argues it cannot be a trustee of a contractor’s trust, as contemplated by Lien Law section 70 (1-2), because it is not a contractor (Surreply at 1). However, the Court of Appeals of New York has held that money owed to a contractor but held by the one hiring the contractor (there, the City of New York) may be the subject of an Article 3-A trust fund (*City of New York v Cross Bay Contr. Corp.*, 93 NY2d 14, 21 [1999]). Therefore, Chapin’s argument that the first cause of action should be dismissed because Chapin is not a contractor fails. That claim will also survive.

Accordingly, the cross-motion to dismiss the complaint is DENIED and the motion for class certification is GRANTED. It is hereby

ORDERED that this action may be maintained as a class action, with the class defined as all beneficiaries of Lien Law Article 3-A trust funds received by Chapin and Ibex in connection with a multi-phase renovation and construction project located at 100 East End Avenue, New York, New York 10028, and it is further

ORDERED that defendants Chapin and Ibex shall furnish plaintiff with a verified statement pursuant to Lien Law sections 75 and 76 within ten (10) days from the entry of this order, and it is further

ORDERED that defendants Chapin and Ibex shall provide a list of all Lien Law Article 3-A trust beneficiaries to Singer, and it is further

ORDERED that plaintiff Singer shall propose a method of notice to members of the class to the court within twenty (20) days from the entry of this order.

10/10/2018

DATE

O.P. Sherwood
O. PETER SHERWOOD, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE