

Matter of Scorpion Fitness Inc.
2020 NY Slip Op 30516(U)
February 24, 2020
Supreme Court, New York County
Docket Number: 161719/2019
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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In the Matter of the Application of

SCORPION FITNESS INC.,

Index No.
161719/2019

requiring IDDC, LLC, to provide a verified statement
in writing setting forth the entries contained in the
books and records that were maintained for a certain
project pursuant to Lien Law 76,

**DECISION AND
ORDER**

Mot. Seq. 1

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HON. EILEEN A. RAKOWER, J.S.C.

On December 4, 2019, Petitioner Scorpion Fitness Inc. (“Scorpion”) commenced this special proceeding pursuant to Lien Law § 76 against Respondent IDDC, LLC (“IDDC”). Presently before the Court is Scorpion’s Order to Show Cause for an Order compelling IDDC to comply with Scorpion’s Demand for a Verified Statement.

IDDC cross moves for an Order dismissing the Petition. IDDC asserts that Scorpion is not a beneficiary under New York Law Lien and therefore has no standing to bring this proceeding. IDDC also asserts that it was never properly served.

The initial return date of the Order to Show Cause was January 21, 2020. On that date, the parties appeared and were heard by the Court. The Court gave Scorpion another opportunity to serve IDDC and adjourned the Order to Show Cause to February 18, 2020.

On January 29, 2020, Scorpion filed an Affidavit of Service attesting to service on IDDC on January 28, 2020, by delivery to “Sue Zouky, a person authorized by the New York Secretary of State to accept service of process, with 2 copies of the above described papers and the statutory fee of \$40.00 pursuant to section 303 of the NY LIMITED LIABILITY COMPANY LAW.”

Background

Scorpion entered into an agreement with IDDC for IDDC to provide commercial construction renovation at 220 Fifth Avenue, New York, New York 10001 (“the Premises”). Scorpion is a tenant of the Premises. Scorpion argues that IDDC failed to provide work at the Premises or properly utilize trust funds received from Scorpion.

Scorpion served a Demand Pursuant to Lien Law 76 upon IDDC to obtain an accounting of the fees already paid to IDDC under the parties’ agreement. Scorpion states that to date, IDDC has failed and refused to respond to the Demand, including the books and records associated with the project.

Parties’ Contentions

Scorpion argues that “IDDC has not complied with Lien Law §76 and has made no effort to provide a response to the Demand.”

IDCC argues that “at the very best Petitioner could be considered an owner with respect to the premises, but even in that case, he would not qualify as a beneficiary under the New York Lien Law, as neither lessee nor owner are beneficiaries under the statutes’ enumerated list of beneficiaries.” IDCC states that the exceptions to the general rule that owners are not beneficiaries under the Lien Law is: (1) owners who enter home improvement contracts with a home improvement contractor; and (2) owners who have standing as a subrogee as a result of paying the contractor’s subcontractors directly.” IDDC states that these exceptions do not apply: the home improvement contract exception does not apply and Scorpion has not made any payments to any of IDDC’s subcontractors that would give it standing to maintain the cause of action as if it were subrogated to the rights of a beneficiary subcontractor.

Scorpion takes the position “that the intent of N.Y. Lien Law § 76 was to allow all those who are beneficiaries of the trust created with funds specified for a particular project, including those who are offering and/or paying for said construction work, to have access to a verified statement relating to the income and expenditures on the project.”

Legal Standards

“Article 3-A of the Lien Law creates ‘trust funds out of certain construction payments or funds to assure payment of subcontractors . . .’ (*Aspro Mechanical Contracting, Inc. v Fleet Bank, N.A.*, 1 NY3d 324, 328 [2004]). The “primary purpose of article 3-A and its predecessors [is] to ensure that ‘those who have directly expended labor and materials to improve real property . . . at the direction of the owner or a general contractor’ [i.e., subcontractors] receive payment for the work actually performed.” (*id.*). “[T]he Lien Law establishes that designated funds received by . . . contractors . . . in connection with improvements of real property are trust assets . . .” (*id.*).

“Lien Law § 71 identifies those considered trust beneficiaries, and owners of property are not included as beneficiaries under the statute. The only potentially applicable exception to this rule provides that owners who enter into a ‘home improvement contract’ with a ‘home improvement contractor’ can be trust beneficiaries. *See* §§ 71(2)(f); 71-a.” (*514 W. 24th Owner LLC v Pryor*, 2019 N.Y. Slip Op. 31300[U], 5-6 [N.Y. Sup Ct, New York County 2019]). “Real property owners . . . that are not trust beneficiaries under the Lien Law, may nevertheless enforce trust provisions if they make payments directly to a subcontractor on behalf of a general contractor to avoid the subcontractor filing a mechanic’s lien on the owner’s property. *See* Lien Law § 77(1).” (*Id.*)

Lien Law § 76 (1) specifically provides that “Any beneficiary of the trust holding a trust claim shall be entitled, upon request, after the expiration of thirty days from the date his trust claim became payable . . . to receive a verified statement setting forth the entries with respect to the trust contained in such books or records.”

Discussion

The exceptions to the general rule that owners of real property are not beneficiaries under the Lien Law do not apply here: this is not a case involving a home improvement contract and Scorpion does not allege it made any direct payments to subcontractors. As such, Scorpion is not a beneficiary under the Lien Laws and does not have standing to assert a violation of the Lien Laws or to seek an accounting of any trust assets. (*514 W. 24th Owner LLC*, 2019 N.Y. Slip Op. 31300[U], 5-6).

Wherefore, it is hereby,

ORDERED that the Petition is denied and the proceeding is dismissed and the Clerk shall enter judgment accordingly.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: FEBRUARY 24, 2020



EILEEN A. RAKOWER, J.S.C.