

Ideal Supply Co. v Interstate Fire Protection, Inc.

2021 NY Slip Op 31303(U)

April 15, 2021

Supreme Court, New York County

Docket Number: 652809/2013

Judge: David Benjamin Cohen

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN PART IAS MOTION 58EFM

Justice

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THE IDEAL SUPPLY COMPANY, ON BEHALF OF ITSELF
AND ON BEHALF OF ALL OTHERS ENTITLED TO SHARE
IN THE FUNDS RECEIVED INTERSTATE FIRE
PROTECTION, INC. AS TRUSTEE, IN CONNECTION
WITH IMPROVEMENTS OF CERTAIN REAL
PROPERTIES,

Plaintiff,

- v -

INTERSTATE FIRE PROTECTION, INC., PETER MIRZ,
RICHARD TULLY JR, MYRON BELLOVIN, INTERSTATE
MECHANICAL SERVICES, INC., PACE PLUMBING CORP.,

Defendant.

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INDEX NO. 652809/2013
MOTION DATE 12/24/2020, 12/24/2020, 12/24/2020
MOTION SEQ. NO. 020 021 022

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 020) 602, 603, 604, 605, 606, 607, 608, 621, 622, 626, 627, 628, 629, 630, 631, 632, 633, 634, 655, 656, 658, 660

were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 021) 609, 610, 611, 612, 613, 623, 636, 637, 638, 639, 640, 641, 642, 643, 644, 657, 661

were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 022) 614, 615, 616, 617, 618, 619, 624, 646, 647, 648, 649, 650, 651, 652, 653, 654, 659, 662

were read on this motion to/for DISMISSAL

Motions bearing sequence numbers 020, 021 and 022 are consolidated herein for disposition. In sequence number 020, defendants Richard W. Tully, Jr. (Tully), Myron Bellovin (Bellovin), and Interstate Mechanical Services, Inc. (IMS, collectively the IMS Defendants) move to dismiss the third amended verified complaint (third amended complaint [NY St Cts Elec Filing (NYSCEF) Doc No. 606]) as asserted against them by plaintiff The Ideal Supply Company (Ideal). In motion sequence 021, defendant Pace Plumbing Corp. (Pace) seeks dismissal of the third amended complaint as asserted against it and an award of costs and

sanctions against Ideal and its counsel. In sequence number 022, defendant Peter M. Mirz (Mirz) moves to dismiss the third amended complaint as asserted against him. Ideal opposes each of these motions and cross-moves, in each motion sequence, for leave to further amend its pleading, as reflected in its proposed fourth amended verified complaint (fourth amended complaint [NYSCEF Doc No. 629]), submitted with its cross-motion papers.

Background

Ideal provided plumbing supplies, materials and fixtures to defendant Interstate Fire Protection, Inc. (IFP) for several construction projects that IFP conducted in New York City in 2011 and 2012. Ideal alleges that it has not been paid \$545,726.88 for the materials it provided for those projects, despite IFP having been paid in full by the general contractors of those projects, and that IFP and its officers, specifically Mirz, Tully, and Bellovin, diverted these funds for their own use. Ideal also alleges that defendants IMS and Pace facilitated the acts of IFP, Mirz, Tully, and Bellovin in diverting funds rightfully due Ideal, in violation of Article 3-a of New York's Lien Law (*see* decision and order dated February 25, 2020 [February 2020 Order] [NYSCEF Doc No. 584], at 1-2, citing second amended verified complaint [second amended complaint] [NYSCEF Doc No. 102], ¶¶ 6-7, 11, 13, 206-209).¹

¹ IFP has not appeared in this action. During proceedings held on November 24, 2014, Justice Robert R. Reed granted plaintiff's motion for a default judgment against IFP and ordered the clerk of this Court to enter judgment in favor of plaintiff against IFP in the principal amount of \$545,700, together with interest at the statutory rate from July 31, 2012 (*see* so-ordered transcript e-filed on December 4, 2014, at 27:17-24 [NYSCEF Doc No.45]). Justice Reed also ordered that the action with respect to the remaining defendants be severed, pursuant to CPLR 3215 (a). Plaintiff's default judgment against IFP was signed and entered on May 18, 2015 (NYSCEF Doc No. 88). No order of severance, however, appears on this action's NYSCEF document list or in the County Clerk's minutes for this action. As this severance order should have been entered but was not, this oversight is imputable to "ministerial" error and the order correcting this error may be entered *nunc pro tunc* (*see Thrift Credit Corp. v Harmony Playhouse, Inc.*, 46 Misc 2d 385, 387 [Sup Ct, Broome County 1965]).

On February 26, 2020, this Court entered the February 2020 Order with respect to several summary judgment motions. In motion sequence number 016, defendant Pace moved for summary judgment, dismissing plaintiff's eight cause of action for fraud, the only cause of action plaintiff asserted against Pace in the second amended complaint (*see* second amended complaint ¶¶ 204-209). Pace also seeks an award of sanctions against plaintiff for frivolous conduct, pursuant to NY Ct Rules Section 130-1.1.

In motion sequence number 017, defendant Mirz, and, in motion sequence number 018, the IMS Defendants moved for summary judgment, seeking dismissal of plaintiff's first, second, third and eighth causes of action, which were the only remaining causes of action asserted against them. Plaintiff's first two causes of action were for a trust fund accounting and diversion of trust funds under article 3-a of New York's Lien Law, "(individually and personally), joint and severally" (*id.* ¶¶ 145-76). Plaintiff's third cause of action repeats its claims against Mirz, Tully and Bellovin "personally" (*id.* ¶¶ 177-79). Plaintiff also asserted its cause of action for fraud against Mirz and IMS Defendants (*id.* ¶¶ 204-09).

In motion sequence number 019, plaintiff moved for summary judgment in its favor, for, among other things, a declaration that Mirz, Tully and Bellovin failed to maintain trust fund records in accordance with Article 3-a of the Lien Law, an award of damages against Mirz, Tully and Bellovin for diversion trust funds in violation of Article 3-a of the Lien Law, and an award of damages against Mirz, Tully, Bellovin and Pace, for fraud (*see* plaintiff's notice of motion [NYSCEF Doc No. 445]).

In the February 2020 Order, the Court determined, among other things, that plaintiff's first and second causes of action, for a trust accounting and for diversion of trust funds under the Lien Law, could not survive the motions made by Mirz and the IMS Defendants because plaintiff

failed to assert these causes of action as representative claims, in accordance with Section 77 of the Lien Law and Article 9 of the CPLR (February 2020 Order at 10, 19-21).

The Court also reiterated its prior determination that IMS Defendants' production of IFP "Foundation" reports regarding each relevant project satisfied the accounting requirements of Section 75 of the Lien Law, which entitled the IMS Defendants to summary judgment and dismissal of the first cause of action against them on the merits (*id.* at 17-19).

The motions of Mirz and the IMS Defendants for summary judgment with respect to plaintiff's second cause of action were granted, but the Court granted plaintiff leave to serve and file an amended complaint, repleading its first cause of action for a trust accounting against Mirz (*id.* at 10), and its second cause of action for diversion of trust funds against Mirz and the IMS Defendants, as representative claims (*id.* at 21). The second decretal paragraph in the February 2020 Order, however, indicates that plaintiff was granted leave to serve and file an amended complaint repleading the first cause of action for a trust accounting and the second cause of action for diversion of trust funds as representative claims against both Mirz and the IMS Defendants (*id.* at 26). This was incorrect. Plaintiff was granted leave to replead its first cause of action as a representative claim only against Mirz. Therefore, this Court has amended its February 2020 order to replace the second decretal paragraph with a new decretal paragraph directing that the first cause of action for a trust fund accounting survives only against Mirz and the second cause of action for trust fund diversion survives only against Mirz and the trust fund defendants, provided that the plaintiff properly repleads these causes of action as representative claims in accordance with the Lien Law section 77 and Article 9 of the CPLR.

The Court also dismissed the third cause of action for diversion as to both Mirz and the IMS Defendants, on the ground that it was duplicative of the second cause of action for diversion of trust assets (*see id.* at 13-14, 16, 21).

Finally, the Court granted summary judgment to Mirz, the IMS Defendants and Pace with respect to plaintiff's eighth cause of action. The fraud claim against Mirz was dismissed on the ground that plaintiff failed to submit opposition to Mirz's prima facie showing in support of summary judgment and only addressed the issue in a sur-reply, in violation of Rule 14 (c) of the Rules of the Justices of the Supreme Court, Civil Branch, New York County (*id.* at 17). The IMS Defendants were granted summary judgment, dismissing the fraud cause of action as duplicative, inasmuch as plaintiff asserted the same factual allegations and sought the same relief for fraud as it did for diversion of trust funds (*id.* at 21-22). The fraud claim against Pace was dismissed because plaintiff did not allege the elements of common law fraud. Plaintiff conceded this point in opposition and asserted that its claim was instead for equitable fraud, but plaintiff failed to show that it could maintain a private right of action for equitable fraud (*id.* at 5-8).

Plaintiff served and e-filed its third amended verified complaint (third amended complaint [NYSCEF Doc No. 595]) on June 2, 2020. It contains six causes of action, including, as its first cause of action, a reiteration of its claim for a trust fund accounting against IFP, Mirz, Tully and Bellovin and a reiteration of its claim for diversion of trust funds against IFP, Mirz, the IMS Defendants and Pace, as its second cause of action. The third amended complaint asserts these first and second causes of action separately with respect to 16 projects on which plaintiff served as a "Materialman" supplying IFP and its general contractors. As its sixth cause of action, plaintiff reiterates its claim for fraud against IFP, Mirz, Tully, Bellovin and Pace. Plaintiff also asserts a third cause of action for breach of subcontract and a fourth cause of action for quantum

meruit solely against IFP, and a fifth cause of action for account stated against IFP, Mirz, Tully and Bellovin.

In response, Mirz, the IMS Defendants and Pace each move to dismiss plaintiff's third amended complaint for, among other reasons, failing to assert its causes of action under the Lien Law properly as representative claims, reasserting causes of action already decided against plaintiff on the merits, and adding causes of action to its third amended complaint beyond the scope of the leave granted in the February 2020 Order.

Plaintiff opposes defendants' motions and cross-moves for leave to submit a proposed fourth amended complaint, in which it asserts causes of action for trust fund accounting, diversion of trust funds, and conspiracy against IFP, Mirz, the IMS Defendants, and Pace – all the defendants named in this action – as well as “JOHN DOES 1-100,” representing “unknown individuals and/or entities liable for Diversion of Trust Funds.” In doing so, plaintiff effectively concedes dismissal of its third amended complaint, which renders the motions of Mirz, the IMS Defendants and Pace to dismiss the third amended complaint moot.

Mirz, the IMS Defendants and Pace oppose plaintiff's cross motion to amend.

Discussion

Leave to Amend Under CPLR 3025 (b)

New York courts follow a liberal standard in addressing a motion for leave to amend a pleading. CPLR 3025 (b) states:

A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading

(emphasis added).

“It is well settled that ‘[a] request for leave to amend a complaint should be freely given, and denied only if there is prejudice or surprise resulting directly from the delay, or if the proposed amendment is palpably improper or insufficient as a matter of law’” (*LDIR, LLC v DB Structured Prods., Inc.*, 172 AD3d 1, 4 [1st Dept 2019], quoting *CIFG Assur. N. Am., Inc. v J.P. Morgan Sec. LLC*, 146 AD3d 60, 64–65 [1st Dept. 2016]). “A party opposing leave to amend must overcome a heavy presumption of validity in favor of permitting amendment” (*id.*, quoting *McGhee v Odell*, 96 AD3d 449, 450 [1st Dept. 2012] [internal quotation marks and alteration marks omitted]).

Motion for Class Certification

“A class action in this state must satisfy the prerequisites of numerosity, commonality, typicality, adequacy of representation and superiority” (*Weinberg v Hertz Corp.*, 116 AD2d 1, 4 [1st Dept 1986], *affd* 69 NY2d 979 [1987] [citing CPLR 901 [a]).

CPLR 901, entitled “Prerequisites to a class action,” provides in pertinent part:

- “a. One or more members of a class may sue or be sued as representative parties on behalf of all if:
1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;
 2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;
 3. the claims or defenses of the representative parties are typical of the claims or defenses 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.”

A movant seeking class certification must clearly define the putative members of the class and convince the court that “the proposed class is capable of being identified” (*Globe Surgical Supply v GEICO Ins. Co.*, 59 AD3d 129, 137 [2d Dept 2008] [citations omitted]).

“The action may be maintained as a class action only if the court finds that the prerequisites under Section 901 have been satisfied” (CPLR 902). “Among the matters which the court shall consider in determining whether the action may proceed as a class action are:

1. The interest of members of the class in individually controlling the prosecution or defense of separate actions;
2. The impracticability or inefficiency of prosecuting or defending separate actions;
3. The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
4. The desirability or undesirability of concentrating the litigation of the claim in the particular forum; [and]
5. The difficulties likely to be encountered in the management of a class action.”

(*id.*).

“Plaintiff bears the burden of establishing the propriety of certifying a class, and that the factors set forth in CPLR 901 favor class-action certification” (*Brissenden v Time Warner Cable of N.Y. City*, 25 Misc 3d 1084, 1088 [Sup Ct, NY County 2009], citing, *inter alia*, *CLC/CFI Liquidating Trust v Bloomingdale’s, Inc.*, 50 AD3d 446, 447 [1st Dept 2008]). “However, these criteria must be liberally construed in favor of allowing the class action” (*id.*, citing *City of New York v Maul*, 59 AD3d 187, 189 [1st Dept 2009]; *see also Friar v Vanguard Holding Corp.*, 78 AD2d 83, 100 [2d Dept 1980] [“In view of the purposes to be served by the class action device” and the court’s ability to reverse, alter or amend its decision later, “the interests of justice require

that in a doubtful case . . . any error, if there needs to be one, should be committed in favor of allowing the class action”] [internal quotation marks and citation omitted]).

An action under Article 3-a of the Lien Law for an alleged diversion of trust funds “should be brought as a representative action for the benefit of all beneficiaries of the trust and ‘the practice, pleadings, forms and procedure shall conform as nearly as possible to the practice, pleadings, forms and procedure in a class action as provided for in article nine of the civil practice law and rules’, with the proviso that the [numerosity] requirements of CPLR 901 (a) (1) may be waived at the direction of the court” (*Atlas Bldg. Systems, Inc. v Rende*, 236 AD2d 494, 496 [2d Dept 1997], quoting Lien Law § 77 [1]). “In fact, a plaintiff’s failure to identify any similarly situated parties as potential class members is not fatal to a claim and may be cured by furnishing notice of the claim to other potential class members” (*ACS Sys. Assoc., Inc. v Turner Constr. Co.*, 2020 NY Slip Op 33294 [U], **5 [Sup Ct, NY County, Oct 6, 2020], citing, *inter alia*, *ADCO Elec. Corp. v McMahon*, 38 AD3d 805, 807 [2d Dept 2007]).

Although New York law favors amendment, numerous deficiencies in plaintiff’s proposed fourth amended complaint prevent the Court from granting its motion to amend. Plaintiff’s motion to amend its complaint, in the form of its proposed fourth amended complaint, is denied, but defendant is granted leave to file an amended complaint which cures the deficiencies set forth in this decision and order.

Most importantly, in support of the proposed amendment, plaintiff failed to move for class certification, did not provide evidence to support the findings necessary under subsections 2, 3, 4 and 5 of CPLR 901, and did not clearly define or identify the members of the proposed class, even though the IMS Defendants provided a list of other possible trust beneficiaries to plaintiff, naming subcontractors and suppliers who invoiced IFP for goods and services for IFP

projects which also involved plaintiff (*see* reply memorandum in further support of IMS defendants' motion for summary judgment, dated January 30, 2019, at 3-4 [Sequence No. 018] [NYSCEF Doc No. 607]). Furthermore, plaintiff's proposed fourth amended complaint did not clearly show the changes and/or additions being made in the fourth amended complaint versus the second amended complaint, as required by CPLR 3025 (b).

In light of its abandonment of the third amended complaint, any proposed amended complaint plaintiff may submit should satisfy this required showing by comparing such proposed pleading to plaintiff's second amended complaint. Plaintiff also continues to include causes of action against IFP in its pleadings, despite having obtained a default judgment against IFP, and despite the Court's severance order. Any proposed amended complaint that plaintiff may submit shall not contain any cause of action asserted against IFP.

With respect to the first cause of action, plaintiff's only viable claim for a trust fund accounting remains the claim asserted against Mirz. Summary judgment was granted to the IMS Defendants on the merits and the February 2020 order, as amended to correct the second decretal paragraph, as explained above, reflects that no cause of action lies against the IMS defendants for a trust fund accounting.

In its proposed fourth amended complaint, plaintiff adds a claim against Pace to its first cause of action. No such claim lies against Pace. A trust is created under the Lien Law when a property owner or a contractor like IFP receives money intended to facilitate improvement to real property, to ensure that those funds remain available to pay subcontractors and materialmen, like plaintiff (*see* Lien Law § 70 [1]). The initial receipt of money by an owner or contractor creates the trust and makes the receiving parties the trustees of the funds thereafter (*see id.* § 70 [2]). Plaintiff alleges that Pace received trust funds *after* the formation of the trust, from the trustees,

in violation of plaintiff's rights. Accordingly, Pace is not a trustee, and so has no responsibility to maintain trust fund books and records or to account for trust funds under Lien Law Section 75. Plaintiff should not include Pace in its trust accounting cause of action in any proposed amended complaint that it may submit.

As to the second cause of action, Mirz and the IMS Defendants contend that plaintiff has again failed to assert its cause of action for diversion of trust funds properly as a representative claim and has also made a deficient application for leave to amend. Neither of these arguments is sufficient to deny plaintiff an opportunity to amend its complaint, considering the latitude afforded to the amendment of pleadings (*see LDIR, LLC, supra*, 172 AD3d at 4).

Plaintiff also added Pace to its a cause of action for diversion of trust funds for the first time in the third amended complaint, and has repeated this claim against Pace in its proposed fourth amended complaint. In addition to asserting the same arguments against amendment presented by IMS defendants, Pace also alleges that the amendment should not be allowed because it has been granted summary judgment on plaintiff's fraud claim, the sole cause of action previously asserted against it, and so it has been dismissed from this action. It also asserts that leave should be denied because plaintiff exceeded the scope of the leave granted to it in the February 2020 Order, which only allows plaintiff to replead its first and second causes of action as representative claims and to correct its name and state of incorporation. Again, considering the latitude afforded to pleading amendments, these arguments are unavailing.

Pace contends that res judicata and law of the case bar plaintiff from asserting a claim for diversion of trust funds against it. Neither of these doctrines bar plaintiff from asserting a cause of action against Pace for diversion. First, res judicata does not apply because the claim Pace seeks to preclude was not determined in a prior action (*see Josey v Goord*, 9 NY3d 386, 389-90

[2007] [“The doctrine of res judicata precludes a party from litigating a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter”] [internal quotation marks and citation omitted]). Law of the case does not apply either because no prior decision in this action resolves the issue of whether Pace could be held liable for an alleged diversion of trust funds (*see Matter of Hanlon*, 189 AD3d 1405, 1407 [2d Dept 2020] [“The law of the case doctrine applies only to legal determinations that were necessarily resolved on the merits in a prior decision”] [internal quotation marks and citation omitted]). Finally, Pace cannot claim to suffer any surprise or detriment sufficient to deny leave, since the factual allegations plaintiff asserted against Pace in its failed fraud claim are essentially the same factual allegations underlying its cause of action for diversion (*see* February 2020 Order, at 8 [noting plaintiff’s admission in opposition to the IMS Defendants’ summary judgment motion that diversion of trust funds formed factual basis for its fraud claims against all defendants]). Thus, any proposed amended complaint that plaintiff may submit may contain a cause of action asserted against Pace for diversion of trust funds.

Plaintiff’s proposed fourth amended complaint sets forth a third cause of action for conspiracy against Mirz, the IMS defendants and Pace. Defendants argue, among other things, that plaintiff cannot maintain a cause of action for conspiracy as a separate cause of action, citing *Alexander & Alexander of N.Y. v Fritzen* (68 NY2d 968, 969 [1986] [“a mere conspiracy to commit a tort is never of itself a cause of action”] [internal quotation marks, alteration and citation omitted]). Defendants add that “to properly plead a cause of action . . . for civil conspiracy, the plaintiff must allege a cognizable tort, coupled with an agreement between the conspirators regarding the tort, and an overt action in furtherance of the agreement” (*Perez v Lopez*, 97 AD3d 558, 560 [2d Dept 2012]). Plaintiff counters by arguing that it properly pleaded

such a conspiracy and claims that defendants' alleged misconduct violates plaintiff's rights as a creditor under New York's Debtor and Creditor Law and/or the Fraudulent Conveyance Act. Plaintiff, however, asserts no such causes of action on which to predicate its civil conspiracy claims. Accordingly, any proposed amended complaint that plaintiff may submit shall not contain any cause of action for conspiracy asserted against any of the defendants.

Conclusion

For the foregoing reasons, it is hereby

ORDERED that the motions to dismiss plaintiff's third amended complaint by Mirz in motion sequence 020, the IMS Defendants in motion sequence 021, and Pace in motion sequence 022, are denied as moot; and it is further

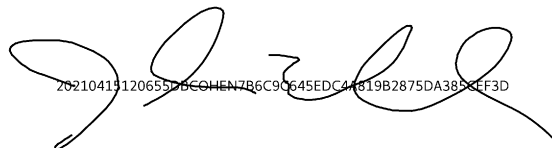
ORDERED that Pace's motion for an award of costs and sanctions against plaintiff for frivolous conduct, pursuant to NY Ct Rules Section 130-1.1, is denied; and it is further

ORDERED that plaintiff's cross motion for leave to serve and file an amended complaint in the form of its proposed fourth amended complaint is denied; and it is further

ORDERED that plaintiff is granted leave to serve and file a motion for class certification, together with a proposed amended complaint which complies with Lien Law Section 77 and Article 9 of the CPLR and the directives of this decision and order, within thirty (30) days after service of this decision and order with notice of entry; and it is further

ORDERED that the Clerk of the Court is directed to sever the above-entitled action with respect to defendant Interstate Fire Protection, Inc. pursuant to CPLR 3215(a), *nunc pro tunc*, and that the plaintiff have leave to proceed with the above-entitled action against defendants Mirz, Tully, Bellovin, Interstate Mechanical Services, Inc. and Pace; and it is further

ORDERED that plaintiff shall submit a list of the names and addresses of potential trust beneficiaries and class members, together with a proposed notice to such class members regarding this action, to be sent by certified mail, providing for an option to opt out of the class, to the Court on notice within fifteen (15) days after service of this decision and order with notice of entry.



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DAVID BENJAMIN COHEN, J.S.C.

4/15/2021
DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE