| **Hailey Insulation Corp. v Turner Constr. Co.** |
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| 2021 NY Slip Op 31479(U) |
| April 29, 2021 |
| Supreme Court, New York County |
| Docket Number: 654169/2020 |
| Judge: Frank P. Nervo |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART IV
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HAILEY INSULATION CORPORATION,

Plaintiff,

-against-

TURNER CONSTRUCTION COMPANY, FLIGHT CENTER HOTELS LLC,

Defendants.
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DECISION AND ORDER

Index Number
654169/2020

Mot. seq. 001 & 002

NERVO, J.:

Defendant Flight Center Hotel LLC (hereinafter "Flight Center") moves to dismiss plaintiff's fourth cause of action as against it. Plaintiff opposes and cross-moves to consolidate this matter with a purported related matter also pending in this county. Defendant Turner Construction (hereinafter "Turner") opposes dismissal to the extent that same is predicated upon Article 3 of the Lien Law and opposes Plaintiff's cross-motion to consolidate.

## MOTION SEQUENCE 001 – DISMISS

As with all motions to dismiss under CPLR § 3211, the complaint should be liberally construed, the facts presumed to be true, and the pleading accorded the benefit of every possible favorable inference (*see e.g. Leon v. Martinez*, 84 NY2d 83 [1994]). "Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*id.*; citing *Heaney v. Purdy*, 29 NY2d 157 [1971]).

To the extent that Flight Center's motion may be deemed one seeking dismissal under § 3211(a)(7), it is likewise afforded the benefits of liberal construction, a presumption of truth, and any favorable inference (*id.*; *Anderson v. Edmiston & Co.*, 131 AD3d 416, 417 [1st Dept 2015]; *Askin v. Department of Educ. of City of N.Y.*, 110 AD3d 621, 622 [1st Dept 2013]). The motion must be denied if from the four corners of the pleadings "factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Polonetsky v. Better Homes Depot*, 97 NY2d 46, 54 [2001]). A complaint should not be dismissed so long as, "when the plaintiff's allegations are given the benefit of every possible inference, a cause of action exists," and a plaintiff may cure potential deficiencies in its pleading through affidavits and other evidence (*R.H. Sanbar Proj., Inc. v. Gruzen Partnership*, 148 AD2d 316, 318 [1st Dept 1989]). However, bare legal conclusions and factual allegations which are inherently incredible or contradicted by documentary evidence are not presumed to be true (*Mark Hampton, Inc. v. Bergreen*, 173 AD2d 220 [1st Dept 1991]).

Flight Center contends that under the Lien Law, it is not an "owner" or "trustee" and, accordingly, plaintiff's Article 3 claims against it must fail. Briefly stated, under the Lien Law, a trust is created from the funds received by or due a contractor in connection with improvement of real property (Lien Law §§ 70 & 71). Those due payment from these funds are beneficiaries of the trust (*id.*). The primary purpose of an Article 3 trust is to ensure payment to those who have performed worked or expended materials in improving the property (*Aspro Mech. Contr., Inc., v. Fleet Bank, N.A.*, 1 NY3d 321 [2004]). Flight Center contends that because § 2(8) of the Lien Law defines "improvement of real property" to mean property not belonging to the state or public

corporation, John F. Kennedy Airport, the site of the subject construction project, is outside the scope of the Lien Law, as publicly-held land of the Port Authority. Flight Center cites *Matter of George Washington Bridge Bus Sta. Dev. Venture, LLC v. Associated Specialty Contr.,Inc.*, in support of this position (149 AD3d 525 [1st Dept 2017]).

However, *George Washington Bridge* stands for the proposition that a private mechanic's lien may not attach to privately leased public lands under Article 2 of the Lien Law (id.). A trust beneficiary need not have the right to acquire a mechanic's lien; "the statute setting up the trust status expressly provides that persons coming within its definitions are 'beneficiaries of the trust' and this results 'whether or not they have filed or had the right to file a notice of lien' (*Harman v. Fairview Assoc.*, 25 NY2d 101 [1969]). Put differently, a mechanic's lien, or the right to acquire same, is wholly irrelevant to the determination of whether an Article 3 trust has been created.

Here, Flight Center entered into an agreement with the Port Authority, whereby it undertook the development of the TWA Flight Center hotel and received construction funding in developing same. Accordingly, Flight Center is both a contractor and owner for the purposes of Article 3-A of the Lien Law (*see OTG JFK T5 Venture, LLC v. IBEX Const., LLC*, 901 NYS2d 901 [Sup. Ct. NY County, Figueroa, J.; *see also Gilbane Building Co., v. New York Wheel LLC*, 120 NYS 723 [Sup. Ct. Richmond County, McMahon, J.]). As such, it is also an Article 3 trustee.

An Article 3-a trust may be "enforced by the holder of any trust claim, including any person subrogated to the right of a beneficiary of the trust holding a trust claim" (Lien Law § 77[1]). "[I]t is well-settled that if a party is a subrogee of a trust beneficiary, it may assert a claim pursuant to Article 3-A of the Lien Law for trust fund division, even if it is not itself a beneficiary of the trust" (*Vanguard Const. & Dev. Co., Inc. v. B.A.B. Mech. Servs., Inc.*, 2015 NY Slip Op 31794(U) [N.Y. Sup. Ct, Kern, J.]). This liability extends to corporate officers when trust funds are applied to personal or non-trust uses with the knowledge of the officers (*South Carolina Steel Cop. v. Miller*, 170 AD2d 592 [2d Dept 1991]). Therefore, plaintiff has alleged a cause of action cognizable at law sufficient to defeat defendants' motion and defendant Flight Center has failed to establish a defense as a matter of law.

MOTION SEQUENCE 002 – CONSOLIDATION

Consolidation rests within the discretion of the Court and is appropriate where two actions involve "a common question of law or fact" (CPLR § 602[a]); the burden is on a party resisting consolidation to show that consolidation would be prejudicial. (*Vigo S. S. Corp. v. Marship Cop.*, 26 NY2d 157 [1970]). Courts are inclined to award consolidation where it promotes efficiency and judicial economy. (*Amcan Holdings, Inc. v. Torys LLP*, 32 AD3d 337 [1st Dept 2006]). Where consolidation would be inappropriate due to a party's role as both a plaintiff and defendant in the proposed consolidated action, but the claims underlying the actions arise from the same facts or occurrence, joint trial is appropriate (*Bass v. France, 70 AD2d 849* [1st Dept 1979]).

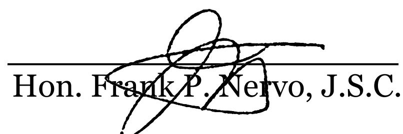
Here, consolidation is inappropriate as it would result in Hailey Insulation Corp.'s role as both plaintiff and defendant. Notwithstanding, the instant action arises from the same construction project as the proposed second action. As such, there are common questions of fact which may warrant joint discovery and trial. Furthermore, joining the discovery and trial appears warranted to avoid the possibility of inconsistent verdicts (*Melendez v. Presto Leasing*, 161 AD2d 501 [1st Dept 1990]). Defendants, as the parties resisting consolidation, have not identified any prejudice to joining the matters for trial, other than their generalized resistance. Notwithstanding, this Court cannot join the pending Commercial Division matter with this matter.

ORDERED that the motion to dismiss is denied; and it is further

ORDERED that the cross-motion to consolidate or join for trial is denied without prejudice to seeking similar relief in the Commercial Division *in Turner Construction Corp v. Flight Center Hotel* under index number 651527/2020.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: April 29, 2021 ENTER:



Hon. Frank P. Nervo, J.S.C.