

Treskas v Style & Care, Inc.

2021 NY Slip Op 34248(U)

October 8, 2021

Supreme Court, Queens County

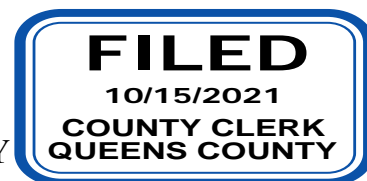
Docket Number: Index No. 709446/18

Judge: Timothy J. Dufficy

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This opinion is uncorrected and not selected for official publication.

Short Form Order



NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY
Justice

PART 35

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OMORFOULA TRESKAS and MARIA TRESKAS,

Plaintiffs,

-against-

Index No.: 709446/18
Mot. Date: 6/22/21
Mot. Cal. No.: 10

**STYLE & CARE, INC., PAUL OULOUPIS a/k/a
POLYCARPOS OULOUPIS, STELLIOS OULOUPIS,
SOPHIA OULOUPIS, MIRIAM DELGADO, CHRIS
GRAMMATAS, GABRIEL J. RODRIGUEZ, CSPN
BUILDERS, INC., a/k/a CSPN BUILDERS, CORP.,
CSPN PALIURAS CONSTRUCTION CORP.,
SPIRODON PALIURAS, a/k/a SPIRO PALIURAS,
SPIROS PALIURAS, SPIRODON PALIURA and
SPYRIDON PALIURA, PERSI CONTRACTING
CORP., MICHAEL PERSICHILLI, JOHN STACOM
ARCHITECTURAL DESIGN P.C., JOHN PATRICK
STACOM, R.A., JOHN WILLIAM STACOM, R.A.,
CALIBER CONTROL INSPECTION, INC., ANTHONY
JOHN STACOM, INC., R.A., P.E.I. ENGINEERING, P.C.,
and HERMAN SILVERBERG, P.E. a/k/a HERMAN J.
SILVERMAN, P.E.**

Defendants

-----X
**CSPN BUILDERS INC a/k/a CSPN BUILDERS,
CORP., CSPN PALIURAS CONSTRUCTION
CORP, and SPIRO PALIURAS,**

Third-Party Plaintiffs,

-against-

**JOHN STACOM, ARCHITECTURAL DESIGN
P.C., JOHN STACOM JR., and JOHN STACOM SR.,**

Third-Party Defendants.

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The following papers were read on this motion by defendants Persi Contracting Corp. (Persi), and Michael Persichilli (together referred to herein as “the Persi defendants”) to dismiss the Second Amended Complaint, pursuant to CPLR 3211[a][7].

	<u>PAPERS NUMBERED</u>
Notice of Motion - Affidavits - Exhibits.....	EF261-275
Answering Affidavits - Exhibits.....	EF322-332
Reply Affidavits	EF352

Upon the foregoing papers it is ordered that the motion by defendants Persi Contracting Corp. (Persi), and Michael Persichilli (together referred to herein as “the Persi defendants”) to dismiss the Second Amended Complaint, pursuant to CPLR 3211[a][7].

the motion to dismiss the Second Amended Complaint, as pertaining to Persi and Persichilli, is denied.

This is an action for, *inter alia*, breach of contract, fraud, negligence, conversion, and violations of NY Lien Law Article 3-A (illegal diversion of construction trust funds), regarding a home improvement project, allegedly resulting from the conduct of the various contractors and design professionals.

Plaintiff¹ alleges that the defendants, collectively, took payments without completing performance of the work, failed to follow the approved plans, over-demolished portions of the property, failed to properly support the property during demolition, had the plaintiff issue blank checks, some of which were eventually made payable to people with nothing to do with the project, provided defective and/or incomplete construction drawings, failed to conduct special inspections, self-certified plans that did not conform with the NYC Building Code, failed to work in a workmanlike manner, the combination of which all led to the NYC Department of Building (NYC DOB) to issue a full Stop Work Order which has yet to be fully rescinded, leaving the house as an abandoned shell. Plaintiff further alleges that this conduct all led the NYC DOB, which had originally approved the plans for the project as “an alteration” after inspection of the work, to officially change the project to a “new

¹The court previously held that plaintiff Maria Treskas lacked standing to be a plaintiff in this action.

construction.” This change would require the plaintiff to begin the project from scratch, having to file a completely new set of plans for a “new construction” rather than an alteration, which the plaintiff allegedly can no longer afford due to the contractor defendants refusing to return the monies they were paid for defective and unfinished work.

After the NYC DOB issued a stop work order requiring the plaintiff to file a new set of plans for a “new construction,” rather than “an alteration,” upon information and belief, Defendants Herman Silverberg, P.E. and John Patrick Stacom, P.E. discussed trying and/or tried to get the NYC DOB to change their minds, but they were unsuccessful. Thereafter, Silverberg and Stacom, instead of preparing a new set of plans, at their sole expense, for a “new construction,” the plaintiff submits that Silverberg and Stacom, along with all the other defendants, simply abandoned the plaintiff, refused to return the unearned portions of the moneys paid to them on their contracts and did not properly protect the abandoned project from the elements, by properly covering it with a tarp, etc., causing the plaintiffs’ property to continue decay over time and become infested with mold and pests. The contractor and subcontractor defendants, despite allegedly being overpaid, never returned to fix the construction fence when it collapsed from the weather.

As pertinent to the instant motion, on August 21, 2017, the plaintiff entered into a contract with CSPN Builders; and, on August 25, 2017, CSPN Builders entered into a contract with Persi, a company owned by Michael Persichilli. On December 6, 2017, the NYC DOB issued a Stop Work Order for the Premises.

This action was commenced, on or about June 19, 2018, by the filing of a *Pro Se* Complaint. Answers to the *Pro Se* Complaint of June 19, 2018, were subsequently filed, on or about July 9, 2018, and July 13, 2018. On or about August 31, 2018, subsequent to the plaintiff retaining counsel to represent her interests in this action, a Stipulation was entered into for the plaintiff to amend the previously filed *Pro Se* Complaint and file an Amended Complaint. A Supplemental Summons and Amended Verified Complaint was filed, on or about September 7, 2018.

In the Second Amended Complaint, plaintiff alleges the following:

“Subsequent to receiving the Stop Work Orders, CSPN and its subcontractors, including but not limited to Persi, stopped work and have not returned to the Project. Prior to the time CSPN,

Paliuras, and their subcontractors, including but not limited to Persi, stopped work at the Project, they negligently and improperly damaged, cracked, broke, and/or removed structural elements of the Premises, as well as exterior and interior finishes in excess of the demolition work shown on the plans and thereby permanently damaged the structure and essential systems of the house, in violation of the approved plans and the NYC Building Code.

Plaintiff further alleges in the Second Amended Complaint that:

CSPN and Paliuras, and their subcontractors, including but not limited to Persi and Persichilli, failed to follow safe construction and demolition practices in a reasonable and responsible manner; and that at the time CSPN, Paliuras, and their subcontractors, including but not limited to Persi, stopped work at the Project, Plaintiff Omorfoula Treskas had already made payments to CSPN in the amount of approximately \$186,000 (35% of the total sum of the August 23, 2017 contract). Plaintiff alleges further, upon information and belief, that out of the \$186,000 paid to CSPN and Paliuras, \$54,350 was paid to Persi for some of the same work that was to be conducted by CSPN and Paliuras, as a subcontractor for the Project, and Persi diverted said funds in violation of Lien Law Article 3-A, in part by not returning the funds that Persi took for unfinished work and for their defective work. At the time CSPN, Paliuras, and their subcontractors, including but not limited to Persi, stopped work at the Project, the shoring and excavation was only about 40% complete.

Finally, the plaintiff also alleges in the Second Amended Complaint that:

CSPN, Paliuras, and their subcontractors, including but not limited to Persi, performed foundation work in a defective manner and foundation work was only about 50% complete when they stopped work at the Project; and that at the time CSPN, Paliuras, and their subcontractors, including but not limited to Persi, stopped work at the Project, they failed to provide any weather protection and the floor framing was only about 25% complete, and therefore it became damaged by rainwater penetration due to a lack of weather protection. That CSPN, Paliuras, and Persi, did not even cover Plaintiff's house (which was already damaged due to Defendants'

defective, negligent, and incomplete work) with a tarp or waterproof it in any way, or did not properly and completely cover and waterproof Plaintiff's house, to keep out the rain and snow after they caused the work at the Project to stop, which failure caused additional damages and deterioration to Plaintiff's house. That CSPN, Paliuras, and Persi's failure cover Plaintiff's house (which was already damaged due to Defendants' defective, negligent, and incomplete work) with a tarp or water proof it in any way, or their failure to properly and completely cover and waterproof Plaintiff's house, to keep out the rain and snow after they caused the work at the Project to stop, was negligent; That upon information and belief, Defendants, CSPN, Paliuras, Persi, and Persichilli, have diverted at least the total combined amount of \$186,000 of said Trust Funds to themselves in violation of the Contracts and the New York Lien Law. That upon information and belief, each Defendant, including Persichilli, who is named in his personal capacity, participated in the breach of the trust.

As relevant to the instant motion, the Persi defendants move to dismiss the Second Amended Complaint. Plaintiff opposes the motion.

In determining whether a complaint is sufficient to withstand a motion to dismiss pursuant to CPLR 3211(a)(7), the sole criterion is whether the pleading states a cause of action (*Cooper v 620 Props. Assocs.*, 242 AD2d 359 [2d Dept. 1997], citing *Weiss v Cuddy & Feder*, 200 AD2d 665 [2d Dept 1994]). If from the four corners of the complaint factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, a motion to dismiss will fail (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Cooper, supra*, 242 AD2d at 360. The court's function is to "accept ... each and every allegation forwarded by the plaintiff without expressing any opinion as to the plaintiff's ability ultimately to establish the truth of these averments before the trier of the facts" (*id.*, quoting *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). The pleading is to be liberally construed and the pleader afforded the benefit of every possible favorable inference (*511 West 232nd Owners Corp., supra.*).

Lien Law §§ 70 and 71-a [4] (a) create an Article 3A trust with respect to all payments received from an owner by a home improvement contractor. Pursuant to Lien Law § 71-a [4] d, such trust funds remain the property of the owner until (I) the proper payment, transfer or application of such deposits to the purposes of the home improvement contract under the

schedule of payments provided therein; or ii) the default or breach of the owner4... or iii) substantial performance of the contract.

In *Ippolito v TJC Dev., LLC*, 83 AD3d 57, 59 [2d Dept 2011], the Second Department specifically held that homeowners who entered into a contract for home improvements “were beneficiaries of the trust created by operation of Lien Law § 70, and they had standing to assert a cause of action pursuant to Lien Law article 3-A against [the entity contractor], or its officers or agents, alleging that the funds they paid to [the entity contractor] were improperly diverted within the meaning of Lien Law § 72.” In *Ippolito*, the arguments advanced by the Persi defendants here were squarely laid to rest. The *Ippolito* opinion lays out the statutory history and the remedial purpose of protecting homeowners from home improvement contractors:

Article 3-A of the Lien Law was amended by Laws of 1987 (ch 421), applying to contracts entered into after March 1, 1988, to protect consumers who contract for home improvements. The amendment requires contractors who receive money in advance for the construction of home improvements to place the money in a bank account and hold the money as the property of the owner until the money is paid for the purposes of the home improvement (Lien Law § 71-a [4]). Lien Law § 71 (2) was amended to add a new paragraph (f), which added another purpose for which trust assets are to be held: ‘payment to which the owner is entitled’ under the trust provisions relating to advance payments made to contractors for home improvements.

Thus, under the 1987 amendment, ‘trust claims’ were extended to include claims of owners to funds advanced by them to contractors for the construction of home improvements. “Consequently, where a home improvement contract is entered into.....a home owner has a valid trust claim against the moneys advanced by the owner for a home improvement” *Ippolito, supra*, at 69, citing *Stern v H. DiMarzo, Inc.*, 19 Misc 3d 1144[A], and specifically pointing out that *Stern* “contains an extensive and persuasive discussion of the applicability of Lien Law article 3-A to an action such as this, including a discussion of standing. The discussion concerning standing emphasizes the amendment of the Lien Law “to protect consumers who contract for home improvements””. Thus, the Second Department specifically held that “homeowners who entered into a contract for home improvements were beneficiaries of the trust created by operation of Lien Law § 70, and they have standing to

assert a cause of action pursuant to Lien Law article 3-A against [the entity contractor], or its officers or agents, alleging that the funds they paid to [TJC] were improperly diverted within the meaning of Lien Law § 72” (*Id.* at 59) [emphasis added]. Defendants there alternatively asserted that the contractor entity, and not its officers, would be the only statutory trustee of funds received from the plaintiffs under the Lien Law. Defendants contended that there could be no claim against the entity principals for participating in the diversion of the funds without proof that the corporation received and misapplied trust funds. Accordingly, the defendants asserted that the plaintiffs had no claim without proving that the entity failed to apply the full amount of money received to its expenses in performing the work for which the money was paid (*Id.* at 61-62). These arguments were also refuted by the Second Department panel.

As set forth above, money paid by the plaintiff to the Persi defendants constituted trust funds at all times herein pertinent, because substantial completion was never reached. The Second Amended Complaint alleges that to the extent that Persi still has these funds in escrow, they should be turned over, or, if they were never placed in escrow or they were diverted, then the plaintiff has a cause of action against the individual defendant. The basis for the information and belief allegation of diversion is the gross disparity between the percentage completion of the work and the percentage of the total contract price paid. It is further alleged that Persichilli is the controlling member of Persi, that he owned all the beneficial interest, that he made substantially all of the decisions in the day to day management of Persi as a going concern, writing substantially all of the checks and controlling substantially all of the debits against the account(s) in which the funds the plaintiff paid to Persi were deposited; that Persichilli had final say over all of the foregoing matters, and that all diversion of trust funds were the result of his voluntary actions, or with his consent. It is also alleged that Persichilli diverted such funds for his own personal use and benefit, or alternatively, that he has knowingly diverted the funds for purposes other than application to the subject job. Thus, to the extent that the Second Department has held that the individual officers of a corporate trustee may be held personally liable pursuant to Lien Law Article 3-A for knowingly participating in a diversion of trust assets (*Holt Constr. Corp. v Grand Palais, LLC*, 108 AD3d 593 [2d Dept 2013], citing *Ippolito supra*, the branch of the motion which seeks to dismiss the cause of action against Persichilli, individually, is also

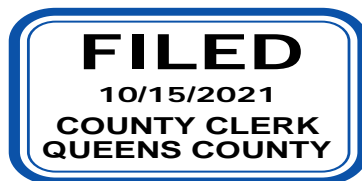
denied (*see also Atlas Bldg. Sys. v Rende*, 236 AD2d 494 [2d Dept 1997]; *South Carolina Steel Corp. v Miller*, 170 AD2d 592 [2d Dept 1991]).

As the plaintiff has sufficiently pleaded causes of action under the Lien Law, and for breach of trust (*see Ippolito v TJC Dev., LLC, supra*), the motion to dismiss the Second Amended Complaint, as pertaining to Persi and Persichilli, is denied.

Accordingly, it is

ORDERED that the motion by defendants Persi Contracting Corp. (Persi), and Michael Persichilli (Petichilli) to dismiss the Second Amended Complaint, pursuant to CPLR 3211[a][7], as pertaining to Persi and Persichilli, is denied.

Dated: October 8, 2021



A handwritten signature in black ink, appearing to read "T. Dufficy".

TIMOTHY J. DUFFICY, J.S.C.