

**Long Is. Concrete, Inc. v Richter & Ratner Contr.  
Corp.**

2022 NY Slip Op 30458(U)

February 10, 2022

Supreme Court, New York County

Docket Number: Index No. 651405/2019

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. LOUIS L. NOCK PART 38M

*Justice*

-----X

LONG ISLAND CONCRETE, INC.,

Plaintiff,

- v -

RICHTER & RATNER CONTRACTING CORP.,

Defendant.

-----X

INDEX NO. 651405/2019

MOTION DATE 12/18/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, and 24

were read on this motion to

AMEND CAPTION/PLEADINGS

LOUIS L. NOCK, J.

Upon the foregoing documents, it is hereby ordered that plaintiff's motion to amend the complaint is granted, based upon the following memorandum decision.

**Background**

In this action for breach of contract, plaintiff Long Island Concrete, Inc. ("plaintiff") alleges breaches of two construction subcontracts entered into with defendant Richter & Ratner Contracting Corp. ("defendant"), as well as alternative claims for unjust enrichment and account stated. Plaintiff now moves to amend its complaint to add Marc Heiman, defendant's owner and sole shareholder as a defendant pursuant to CPLR 1003, as well as additional causes of action for unjust enrichment, fraud, and trust fund diversion pursuant to Article 3-A of the Lien Law pursuant to CPLR 3025(b). Defendant does not oppose that branch of the motion that seeks to add a fraud cause of action against both it and Mr. Heiman, and the motion is granted in that respect.

Plaintiff commenced this action by filing a summons and complaint on March 8, 2019 (NYSCEF Doc. No. 1). Defendant appeared and answered the complaint on March 26, 2019 (NYSCEF Doc. No. 3). A preliminary conference order setting a discovery schedule was entered shortly before the onset of the coronavirus pandemic, and the parties have conducted limited discovery prior to plaintiff's filing of the instant motion.

### **Standards of Review**

“Leave [to amend] shall be freely given upon such terms as may be just” (CPLR 3025[b]). Absent undue delay, prejudice, or surprise, and provided the proposed amendment arises from the same transactions and occurrences as the original complaint, the motion should be granted (*Fellner v Morimoto*, 52 AD3d 352, 353 [1st Dept 2008]). “A party opposing leave to amend must overcome a heavy presumption of validity in favor of permitting amendment” (*McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012] [internal quotation marks and citations omitted]).

When a proposed additional cause of action would otherwise be time-barred, the original pleading must “give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading” (CPLR 203[f]). “[T]he salient inquiry in deciding whether an otherwise untimely claim in an amended pleading relates back to a timely commenced action is . . . whether . . . the original pleading gives notice of the transactions or occurrences . . . to be proved pursuant to the amended pleading” (*O'Halloran v Metro. Transp. Auth.*, 154 AD3d 83, 86 [1st Dept 2017] [internal quotation marks and citations omitted]).

Leave to amend a new party may be done by leave of the Court (CPLR 1003), and is based on the same standards as a motion to amend pursuant to CPLR 3025(b) (*Munoz Trucking*

*Corp. v Darcon Const., Inc.*, 153 AD3d 838, 839 [2d Dept 2017]). Where a claim against a new defendant would otherwise be time-barred, it will only relate back where:

“(1) both claims arose out of same conduct, transaction or occurrence, (2) the new party is 'united in interest' with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits and (3) the new party knew or should have known that, but for an excusable mistake by plaintiff as to the identity of the proper parties, the action would have been brought against him as well.”

(*Buran v Coupal*, 87 NY2d 173, 178 [1995].) “[E]xcusability of the mistake is not an absolute requirement under New York law” (*id.* at 179).

### **Discussion**

In opposition to the motion, defendants do not materially allege any undue delay, prejudice, or surprise. Instead, defendant makes two arguments as to the sufficiency of plaintiff’s proposed new claims for unjust enrichment and trust fund diversion. First, defendant alleges that the proposed unjust enrichment claim, which, as set forth in the proposed amended complaint, relates to plaintiff’s construction of a set of concrete steps, is covered by an enforceable contract. “The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter” (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]). Plaintiff alleges, however, that there is a dispute as to whether the concrete steps were covered by a contract, and it is well established that parties may plead unjust enrichment in the alternative to a breach of contract claim (*Henry Loheac, P.C. v Children's Corner Learning Ctr.*, 51 AD3d 476 [1st Dept 2008]).

Second, defendant, without opining as to their underlining merit, challenges the timeliness of plaintiff’s proposed trust fund diversion claims pursuant to Lien Law §§ 77, 79.

The Lien Law provides that an action under these sections may not be maintained “if commenced more than one year after the completion of such improvement or, in the case of subcontractors or materialmen, after the expiration of one year from the date on which final payment under the claimant's contract became due, whichever is later” (Lien Law § 77[2]). The parties do not dispute that monies were due and owing to plaintiff as of December 2018, making any claim for trust fund diversion untimely if made after December 2019. Thus, it is necessary to determine whether the claims for trust fund diversion relate back to the original complaint such that defendant and Mr. Heiman have notice of the transactions and occurrences intended to be proved (CPLR 203[f]).

The original complaint alleges, broadly speaking, that plaintiff entered into two subcontracts and accompanying change orders with defendant, pursuant to which plaintiff provided labor, services, and materials as part of defendant’s construction project, and that defendant has failed to make payment accordingly. In its proposed amended complaint, plaintiff makes the additional allegation that certain of these change orders were fabricated, duplicated, or submitted to the project owner without plaintiff’s knowledge, with the goal of reducing the amounts owed to plaintiff, siphoning off funds owed to plaintiff, and diverting trust funds and assets pursuant to the Lien Law, in the form of monies paid to defendant and Heiman to fund change orders and pay requisitions from subcontractors that defendant and Heiman kept for their own use (NYSECF Doc. No. 14, ¶¶ 53-54, 57-61, 64, 67, 69, 72). Thus, both the original and amended complaints arise out of the same construction project involving the same parties.

“[T]he linchpin of the relation back doctrine [is] notice to the defendant within the applicable limitations period . . . the primary question of whether the new party had actual notice of the claim” (*Buran*, 87 NY2d at 180). Neither defendant can say that they were not on notice of

the transactions or occurrences to be proved by the amended complaint and thus actual notice of the claim (*Top Shelf Elec. Corp. v Legacy Builders/Developers Corp*, 2016 WL 1717559, 2016 NY Slip Op 30789[U], \*4-5 [Sup Ct, NY County 2016] [“Indeed, the foreclosure of the Lien cause of action and the allegations in the Original Complaint gave notice to Legacy of the transactions and occurrences to be proven . . . [and] the diversion of trust funds cause of action arises out of the same transaction set forth in the Original Complaint”). Moreover, as is plain from Heiman’s status as owner and sole shareholder of defendant, defendant and Heiman are united in interest (*Matter of Murphy v Kirkland*, 88 AD3d 267, 277 [2d Dept 2011]).

Accordingly, it is hereby

ORDERED that the plaintiff’s motion for leave to amend the complaint is granted; and it is further

ORDERED that the amended complaint, in the form annexed to the motion papers, shall be deemed served upon service of a copy of this order with notice of entry upon all parties who have appeared in the action; and it is further

ORDERED that a supplemental summons and amended complaint, in the form annexed to the motion papers, shall be served, in accordance with the Civil Practice Law and Rules, upon the additional parties in this action within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the full caption shall read:

“-----X

LONG ISLAND CONCRETE, INC., on behalf of itself and on behalf of all persons entitled to share in the funds received by Richter & Ratner Contracting Corp. and Marc Heiman, in connection with a project identified as the Bow Tie Building, 1530 Broadway, New York, New York,

Plaintiff,

-v-

RICHTER & RATNER CONTRACTING CORP., MARC HEIMAN, and “JANE DOE NO. 1” through “JANE DOE NO. 10,” defendants being fictitious and unknown to plaintiff but intended to be parties liable for the diversion of trust funds pursuant to Article 3-A of the Lien Law,

Defendants.

-----X”; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who are directed to mark the court’s records to reflect the parties being added pursuant hereto; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address ([www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh))).

This constitutes the Decision and Order of the Court.

ENTER:

*Louis L. Nock*

<u>2/10/2022</u>			<u>LOUIS L. NOCK, J.S.C.</u>
DATE			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> GRANTED IN PART
		<input type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE