

Ideal Supply Co. v Interstate Fire Protection, Inc.

2022 NY Slip Op 30462(U)

February 9, 2022

Supreme Court, New York County

Docket Number: Index No. 652809/2013

Judge: David B. Cohen

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID B. COHEN PART 58

Justice

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INDEX NO. 652809/2013

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,

MOTION SEQ. NO. 023

Plaintiff,

- v -

INTERSTATE FIRE PROTECTION, INC., PETER MIRZ, RICHARD TULLY JR, MYRON BELLOVIN, INTERSTATE MECHANICAL SERVICES, INC., PACE PLUMBING CORP., JOHN DOE NO. 1 THROUGH JOHN DOE NO. 100, SAID NAMES BEING FICTITIOUS, TRUE NAMES BEING THOSE UNKNOWN INDIVIDUALS AND OR ENTITIES LIABLE FOR THE DIVERSION OF TRUST FUNDS PURSUANT TO ARTICLE 3A OF THE LIEN LAW OF THE STATE OF NEW YORK, IN CONNECTION WITH CERTAIN CONSTRUCTION PROJECTS.

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 023) 680, 681, 682, 683, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717

were read on this motion to/for MISCELLANEOUS

In this contract action, The Ideal Supply Company ("Plaintiff") moves for an order (i) directing certification of this matter as a class action; (ii) defining the class as all beneficiaries of the Lien Law Article 3-A Trust Funds received by Interstate Fire Protection, Inc. ("IFP"),¹ Peter M. Mirz ("Mirz"), Richard W. Tully ("Tully"), Myron Bellovin ("Bellovin"), and Pace Plumbing Corp. ("Pace") in connection with thirteen private construction projects in the state of New York ("the Projects"), for which the proposed class members "provided labor and materials" as

¹ IFP has defaulted as a defendant in this action (see Doc 693).

defined under the Lien Law; (iii) waiving the requirements of CPLR § 901 (1) (a) pursuant to the provisions of Lien Law § 77; and (iv) directing Mirz, Tully, Bellovin and Pace to provide a list of all Lien Law Article 3-A Trust Fund beneficiaries to Plaintiff in the event that they have not already done so.

Interstate Mechanical Services, Inc. (“IMS”), Bellovin, and Tully (collectively “the IMS Defendants”) oppose Plaintiff’s motion and also cross-move, pursuant to CPLR 3211(a), for an order dismissing the proposed Fourth Amended Complaint (“the complaint”) as against them all or, in the alternative, for an order dismissing the complaint only as against IMS. Pace joins in the cross motions by the IMS Defendants. Mirz separately opposes Plaintiff’s motion and also cross-moves for an order dismissing the complaint as against him.

I. Factual and Procedural Background

In the complaint,² Plaintiff asserts a first cause of action for an accounting only against Mirz, seeking to have him account for and disclose the disposition of all monies and proceeds received in connection with the Projects. Plaintiff’s second cause of action is for trust fund diversion against the IMS Defendants, Mirz, and Pace (Doc 684). Plaintiff asserts that it supplied plumbing materials to IFP, which was a subcontractor, for a series of construction or renovation projects in New York City in 2011 and 2012 (“the Projects”). IFP was unable to complete the Projects because of a severe economic downturn. However, IFP, through its officers and shareholders Mirz, Tully, and Bellovin, and with the assistance of IMS, a corporate entity, and Pace, a subcontractor, allegedly received the money for the completion of the Projects and failed to pay Plaintiff (id. ¶¶ 16, 44, 45, ¶¶ 2, 3, 16, 28-42, 44-45).

² See *infra* Section III(A).

By decision and order dated February 25, 2020, this Court dismissed Plaintiff's first and second causes of action for trust fund diversion and trust fund accounting, and granted Plaintiff leave to serve a third amended complaint solely to the extent of re-pleading these causes of action as representative claims, and dismissed Plaintiff's eighth cause of action for fraud in its entirety (Doc 583). In the 2020 Decision, this Court also granted Plaintiff leave to amend the complaint to correct its name and state of incorporation (id.).

In its decision dated April 15, 2021 ("the 2021 Decision"), this Court granted Plaintiff's motion for leave to file a fourth amended complaint, provided it cured "the deficiencies set forth in [that] decision and order[.]" noting that Plaintiff had, inter alia, "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" ("the deficiencies") (Doc 672). In the 2021 Decision, the Court noted that "any proposed amended complaint [P]laintiff may submit should satisfy [the] required showing [pursuant to CPLR 3025(b)] by comparing such proposed pleading to [P]laintiff's second amended complaint" (id. at 10). Further, the Court held that "[a]ny proposed amended complaint that [P]laintiff may submit shall not contain any cause of action asserted against IFP [due to the default judgment against IFP and the Court's severance order]" (id.).

II. The Parties' Contentions

Plaintiff argues that it has corrected the deficiencies identified in the 2021 Decision by, inter alia, filing the instant motion for class certification, providing a list of the names and addresses of the potential trust beneficiaries and class members, together with a proposed notice to such class members regarding the action (see Doc 682), which was sent via certified mail and provided with the opportunity to opt out of the class pursuant to CPLR 901 and 902 and NY Lien

Law § 77 and submitting a fourth amended complaint with changes clearly delineated pursuant to CPLR 3025(b).

In their cross motion to dismiss the complaint, the IMS Defendants argue that Plaintiff (1) is improperly attempting to litigate the interests of 13 separate and distinct trusts and 17 separate potential beneficiaries under one trust fund action; (2) fails to provide admissible evidence in support of class certification; (3) undisputed accounting records for the projects reflect that at almost all of the subject projects the funds were used to pay proper project costs; and (4) the action must be dismissed against IMS since the only cause of action alleged against it, fraud, was dismissed (Motion Seq. No. 18) and that IMS is not an alter ego of IFP since the latter was formed before IMS.

In its cross motion to dismiss the complaint, Pace argues, inter alia, that, although Plaintiff engaged in extensive document discovery and depositions, it fails to submit any admissible evidence to support its claim for class certification (Doc 699).

In his cross motion to dismiss the complaint, Mirz argues that Plaintiff “did not file the claims as a representative action, did not correct its name, did not correct its state of incorporation and in fact predominantly refiled the entirety of its prior complaint, including those claims that had already been disposed by the [Decision] and even adding in new claims[,]” did not meet the prerequisites for class certification and therefore the second and third causes of action (recovery for diversion) must be dismissed as against Mirz (Doc 697). Mirz argues that the complaint went beyond the scope of the permitted amendment authorized by this Court and therefore must be dismissed with prejudice. Mirz further argues that “more importantly, Plaintiff lumps together all of the proposed beneficiaries under one lawsuit, even though the same are not part of the same jobs/funds” (Doc 697 at 6).

In opposition to the cross motions, Plaintiff argues that (i) it is in full compliance with the 2021 Decision; (ii) its most recent complaint properly pleads a Lien Law 3-A claim in a representative capacity and sets forth separate and independent causes of action for each identified trust fund; and (iii) its pending motion for class certification properly addresses the requirements of CPLR 901 and 902. Additionally, Plaintiff's papers in opposition to all cross motions provide as follows:

"If it is 'evidence' of Trust Fund Diversion, the Docket of this case is filled with such 'evidence', [sic] which would be determined as 'admissible' by the Trier [sic] of fact at the appropriate time. Some of these documents 'evidencing' the questionable conduct of Defendants' dealing with Trust Funds consist of:

- a) the decision to redirect a Trust Funds [sic] in the possession of IFP/IMS' attorneys [sic] escrow account of his attorney after the filing of the within action and payment of non-Project specific expenses (citing check for \$57,000-00 and Tully e-mail(s) to his attorneys, together with disbursement records annexed as Exhibit 5-a, Doc 711),
- b) a Pace check in the amount of \$60,000.00 made payable to IFP allegedly under the Sales Agreement, Exhibit 2, but endorsed by Mirz only annexed as Exhibit 5-b, Doc 711,
- c) the IMS/IFP Foundation Report for the Newtown Creek Project managed by the General Contract WDF, wherein the checks payable to IFP, produced by WDF, exceed the amount claims by IFP/IMS as having been received on that Project annexed as Exhibit 5-c, Doc 711,
- d) Statement of IFP checks, produced by IFP/IMS; dated after March 6 2021, totaling over \$812,281.20, payable to PACE; annexed as Exhibit 5-d, Doc 711, representing nearly every penny collected and washed through a 'defunct IFP' after IFP 'ceased'"

(Doc 702 at 13; see also the same at Doc 704; Doc 706).

In further support of their cross motions, IMS Defendants argue that, by failing to file a separate action for each trust as required by Lien Law §§ 70, 71, and 77, Plaintiff fails to meet the requirements of commonality, typicality, and superiority as mandated by CPLR 901(a) and that Plaintiff fails to submit admissible evidence for the CPLR 902 factors.

In further support of its cross motion, Pace argues that Plaintiff fails to present this Court with any admissible factual support for its motion for class certification and that it cannot seek to remedy this defect in its reply papers. Pace further argues that Plaintiff improperly attempts to consolidate thirteen separate and distinct trusts from thirteen different projects with seventeen separate potential beneficiaries under one single trust fund action (Doc 717).

Mirz does not submit reply papers in support of his cross motion.

III. Legal Conclusions

A. Scope of the Leave to Amend

In the 2021 Decision, this Court granted Plaintiff leave to amend its complaint because the failure to enforce a trust pursuant to Lien Law § 77 as a class action “is not fatal, and may be cured” (Doc 672 at 9, citing *ADCO Elec. Corp. v McMahon*, 38 AD3d 805, 807 [2d Dept 2007]). This Court now finds, in its discretion, that the complaint was properly amended in accordance with the 2021 Decision.

Mirz argues that Plaintiff exceeded the scope of the leave granted to it by incorrectly stating its name and state of incorporation, which argument was rendered unavailing by this Court “considering the latitude afforded to pleading amendments” (Doc 672 at 11, citing *LDIR, LLC v DB Structured Prods., Inc.*, 172 AD3d 1, 4 [1st Dept 2019]). Mirz next argues that the amendment prejudices him because discovery has been completed; however although the Note of Issue was filed on June 30, 2017, Mirz himself moved to compel and supplement discovery from Plaintiff on August 15, and September 5, 2017, and on March 2, 2018 (see, e.g., Doc 279; Doc 307; Doc 362). The remaining defendants do not argue that the complaint is prejudicial, surprising, or wholly devoid of merit.

B. Class Certification

“Article 3-A of the Lien Law creates trust funds out of certain construction payments or funds to assure payment of subcontractors, suppliers, architects, engineers, laborers, as well as specified taxes and expenses of construction” (*Aspro Mech. Contr., Inc. v Fleet Bank, N.A.*, 1 NY3d 324, 328 [2004] [internal quotations and citations omitted]). The primary purpose of Article 3-A is “to ensure that ‘those who have directly expended labor and materials to improve real property [or a public improvement] at the direction of the owner or a general contractor’ receive payment for the work actually performed” (*Matter of RLI Ins. Co. v New York State Dept. of Labor*, 97 NY2d 256, 264 [2002] [internal citations omitted]).

“[P]ursuant to Lien Law § 77 (1), [an] action under Lien Law article 3-A should be brought as [a] representative action for benefit of all beneficiaries of [a] trust, and practice, pleadings, forms and procedure shall conform as nearly as may be to the practice, pleadings, forms and procedure in a class action as provided in article nine of the civil practice law and rules” (*Atlas Bldg. Sys., Inc. v Rende*, 236 AD2d 494 [2d Dept 1997]; see also *W. End Interiors, Ltd. v Aim Const. & Contr. Corp.*, 286 AD2d 250, 253 [1st Dept 2001]; *ADCO Elec. Corp. v McMahan*, 38 AD3d 805, 806-07 [2d Dept 2007]).

Pursuant to CPLR 901(a), a court, in its discretion, may certify a proposed class action upon a showing that: (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 (*Kudinov v Kel-Tech Const. Inc.*, 65 AD3d 481, 481 [1st Dept 2009]). In exercising this discretion, a court must liberally construe these prerequisites (*id.*) and, in accordance with Lien Law § 77(1), may waive the numerosity prerequisite. Lastly, class certification requires an “evidentiary basis” (*Chimenti v Am. Express Co.*, 97 AD2d 351, 352 [1st Dept 1983]), and “[g]eneral or conclusory allegations in the pleadings or affidavits are insufficient to sustain this burden” (*Rallis v City of New York*, 3 AD3d 525, 526 [2d Dept 2004]).

Here, Plaintiff, based on the pleadings and its counsel’s affirmation and memorandum of law, moves under CPLR 901 and 902 to convert this case into a class action suit for the benefit of all members of the class of beneficiaries seeking to recover funds from the Article 3-A Trust.

The pleadings allege that “[t]he potential Class consists of all contractors and subcontractors who [sic] performed work on the Projects” (Doc 684 ¶ 16). The pleadings specifically allege that “IFP and/or Pace, under Mirz’ supervision, was a subcontractor” for each of the Projects (Doc 684). Further, in a memorandum of law in support of the class certification motion, Plaintiff’s counsel argues that commonality, typicality, adequacy, and superiority requirements are met (Doc 683). Plaintiff’s counsel further alleges that “IFP, Mirz, Tully, Bellovin and Pace were all recipients of Trust Fund monies from which [Plaintiff] and other members of the proposed class were to have been paid for work, labor and materials supplied for the Projects, but ... these [d]efendants each knowingly participated in the diversion of said funds” (*id.* at 3).

However, the above-mentioned pleadings and attorney’s memorandum of law are insufficient to sustain the evidentiary basis for class certification (*Rallis*, 3 AD3d at 526; *Chimenti*, 97 AD2d at 352). Plaintiff’s argument that “Defendants have failed to support the Verified Trust Fund Statements with ... any contracts, any purchase orders, any invoices, any

cancelled checks ... from [itself] or any of the potential Trust Fund Beneficiaries” (Doc 702 at 13) is unavailing given that this matter has been litigated for almost ten years, and extensive discovery, including depositions, has been conducted.

Plaintiff’s counsel references five exhibits (Doc 711) as evidentiary basis of Plaintiff’s motion. However, a motion supported only by an attorney’s affirmation and the exhibits attached to it is insufficient to sustain plaintiff’s burden to comply with the statutory requirements for class action certification (*Weitzenberg v Nassau County Dept. of Recreation and Parks*, 29 AD3d 682, 683 [2d Dept 2006]; see also *Brownyard v County of Suffolk*, 2018 N.Y. Slip Op. 31622[U], 3 [N.Y. Sup Ct, Suffolk County 2018]). Additionally, Doc 711 is submitted for the first time in Plaintiff’s reply papers. Therefore, this Court cannot and does not consider Doc 711³ and need not decide whether Plaintiff must seek class certification regarding each trust separately pursuant to Lien Law § 77. Accordingly, Plaintiff fails to meet its evidentiary burden of establishing compliance with the statutory requirements for class action certification. Therefore, Plaintiff’s motion for class certification is denied without prejudice to renew upon proper papers (*Globe Surgical Supply v GEICO Ins. Co.*, 59 AD3d 129, 147 [2d Dept 2008]).

³ Even if this Court were to consider the submitted invoices and checks (Doc 711), Plaintiff would still fail to show how the thirteen different trust diversion claims on thirteen unrelated contracts and projects, owned by different owners, meet the requirements of commonality, typicality, and superiority as required by CPLR 901(a)(2), (3), and (5) (*Win-Vent Architectural Windows v NGU, Inc.*, 161 AD3d 702, 703 [1st Dept 2018] [affirming the denial of class certification given that the plaintiff “failed to show how the 15 different trust diversion claims on 15 unrelated contracts and projects, owned by 15 different owners, meet the requirements of commonality, typicality, and superiority”]; see also *Matros Automated Elec. Const. Corp. v Kenneth Libman, LWC Inc.*, 2005 N.Y. Slip Op. 30211[U] [N.Y. Sup Ct, New York County 2005] [denying class certification given that the action involved “different construction projects, financing owners, leasehold interests, sub-contractors, secondary sub-contractors and suppliers], *affd sub nom. Matros Automated Elec. Const. Corp. v Libman*, 2007 N.Y. Slip Op. 01414 [1st Dept 2007]). Here, assuming the facts of the complaint are true, although NYU, JT Magen, Structure Tone, Hunter Roberts, and Vanguard worked in several of the Projects, none of those projects shared the same general contractor and/or owner. Further, it is alleged that only two of the named defendants were allegedly involved in all of the projects.

The remaining branch of Plaintiff's motion directing Mirz, Tully, Bellovin and Pace, pursuant to Lien Law § 76, to provide a list of all Lien Law Article 3-A Trust Fund beneficiaries to Plaintiff is denied since Plaintiff fails to show, inter alia, whether it requested a verified statement or requested to examine the books or records previously (see Lien Law § 76; *Matter of Bette & Cring, LLC v Brandle Meadows, LLC*, 81 AD3d 1152, 1154 [3d Dept 2011]; *Isadore Rosen & Sons, Inc. v Conforti & Eisele, Inc.*, 40 AD2d 794 [1st Dept 1972]; *Hansen Excavating Co. v Comet Const. Corp.*, 14 AD2d 911, 911 [2d Dept 1961]).

C. Cross Motions to Dismiss

In their cross motions, IMS and Pace argue that Plaintiff was not granted leave to replead the trust diversion claim against them. Although this Court's decision dated February 25, 2020 dismissed the fraud cause of action, it granted leave to replead the diversion of trust claims against all the defendants, acknowledging that "the diversion of trust funds form[ed] the basis for [the] fraud claims against all defendants" (Doc 585 at 8, 13, 19-21). In its decision dated April 15, 2021, this Court confirmed that Plaintiff had leave to amend its complaint to assert a cause of action for the diversion of trust funds against Pace (Doc 672 at 12).

In their cross motion, the IMS Defendants move, in effect, to dismiss the complaint pursuant to CPLR 3211(a)(7) (Doc 686). "In the context of a motion to dismiss pursuant to CPLR 3211, the court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005] [internal citations omitted]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*id.* at 19).

Although the IMS Defendants' only support for the dismissal of the action is that Plaintiff failed to satisfy class certification requirements, "the action need not fail on that ground" (*Atlas Bldg. Sys., Inc. v Rende*, 236 AD2d 494, 496 [2d Dept 1997]). Plaintiff satisfies its burden of stating a cause of action for diversion of trust assets against these defendants under CPLR 3013 and the Article 3-A of the Lien Law (*Aquilino v United States*, 10 NY2d 271, 276 [1961]; *Sabol & Rice, Inc. v Poughkeepsie Galleria Co.*, 147 Misc 2d 641, 642 [Sup Ct 1990], *affd*, 175 AD2d 555 [3d Dept 1991]). In the complaint, Plaintiff alleges that its "claims arise from the failure and refusal of IFP to pay for goods, labor and materials that [it] (and other potential class members) provided to IFP, which were incorporated into [the Projects] ... and [from] the resultant unlawful diversion of said trust fund monies for non-trust purposes" (Doc 684 ¶ 11). Plaintiff further alleges that IMS Defendants, Mirz, and Pace "were all recipients of Trust Fund monies from which [it] and members of the proposed class were to have been paid but that they each knowingly participated in the diversion of said funds in violation of the Lien Law" (*id.*). Plaintiff also alleges disbursement of \$1,000,000 in trust assets to Pace at the direction of Mirz while the claims of contractors, subcontractors and suppliers remained unsatisfied (*id.* ¶ 36).

In his cross motion, Mirz argues that Plaintiff failed to plead the second cause of action for diversion of trust funds with specificity. However, this argument is unavailing since, unlike the cases cited by Mirz (Doc 697 at 9-10, citing *Colony at Holbrook Inc. v Strata G. C., Inc.*, 928 F Supp 1224, 1231 [ED NY 1996]; *AVA Acupuncture P.C. v Atlasman*, 2006 NY Slip Op 30750[U], *10-11 [Sup Ct, NY County 2006]), here, Plaintiff does not allege mail and wire fraud or racketeering activity in the complaint.

Mirz also cross-moves, in effect, to dismiss, pursuant to CPLR 3211(a)(7), the first cause of action for a trust fund accounting as against him, arguing, inter alia, that "[g]iven that

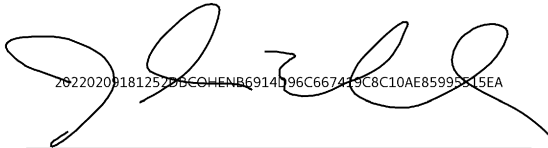
[Plaintiff] has already received the accounting from the IMS Defendants, the cause of action for an accounting from [him] – who does not have access to the accounting records – must be dismissed” (Doc 697 at 6). He contends that he was “frozen from any control or knowledge of operations of IFP since March 2012, his email account having been terminated by Tully as Tully made all of the day-to-day operational decisions, including the determination to redirect a check to the escrow account of his attorney subsequent to the filing of the within action” (id. at 3). The issue of whether Mirz is in possession of the accounting records presents a factual dispute that is inappropriate for resolution on a motion to dismiss. Plaintiff sufficiently alleges a cause of action for an accounting. Specifically, Plaintiff alleges that pursuant to Lien Law § 75, Mirz “failed to maintain sufficient and proper accounting records, evidencing the establishment of the Trust Funds” and meets the definition of a “trustee” pursuant to Lien Law § 70 (Doc 684 ¶¶ 23-27; see also *Stern v H. Dimarzo, Inc.*, 19 Misc 3d 1144(A) [NY Sup 2008]).

This Court finds the parties’ remaining arguments unavailing.

Accordingly, it is hereby:

ORDERED that the motion by Plaintiff The Ideal Supply Company for class certification is denied with leave to renew; and it is further

ORDERED that the cross motions by Interstate Mechanical Services, Inc., Myron Bellovin, Richard W. Tully, Pace Plumbing Corp., and Peter M. Mirz are denied.



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DAVID B. COHEN, J.S.C.

2/9/2022
DATE

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input checked="" 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