

Matter of DCG N.Y. Inc. v 244 E 52 Owner LLC

2023 NY Slip Op 30576(U)

February 27, 2023

Supreme Court, New York County

Docket Number: Index No. 158964/2022

Judge: Judy H. Kim

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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. JUDY H. KIM PART 05RCP

Justice

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In the Matter of the Application of
DCG NEW YORK INC.,

Petitioner,

- v -

244 E 52 OWNER LLC,

Respondent.

-----X

INDEX NO. 158964/2022
MOTION DATE 10/19/2022
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 5, 6, 7
were read on this motion for VERIFIED STATEMENT.

Upon the foregoing papers, petitioner’s application for an order, pursuant to Lien Law §76,
directing respondent 244 E 52 Owner LLC to furnish a verified statement is denied without
prejudice.

In its petition, verified only by counsel, petitioner DCG New York Inc. (“DCG”) alleges
that

Upon information and belief, Respondent 244 E 52 Owner LLC ("244 E 52
Owner") is a domestic limited liability company ... [and] was the owner of property
known and described as 244 East 52nd Street, New York, New York ... On or about
September 12, 2019, 244 E 52 Owner, as owner, entered into a written contract
with DCG, as construction manager (the “Contract”), pursuant to which DCG
agreed to provide, inter alia, supervision, work and materials relating to support of
excavation, secant wall, tangent wall, structural piles, substructure, superstructure,
concrete masonry, and electrical, plumbing, and construction supervision in
connection with the construction of a development at the Premises (the “Project”).
The agreed price and value of the labor and materials furnished by DCG was
\$12,626,193.00.

DCG duly and timely commenced performance under the Contract and fully performed all of the terms and conditions under the Contract.

Upon information and belief, pursuant to the terms of the Contract, 244 E 52 Owner was obligated to pay to DCG the aggregate sum of \$12,626,193.00 for the performance of its work on the Project. However, 244 E 52 Owner only paid the sum of \$11,074,133.39, leaving a balance of \$1,552,059.61 still due and owing to DCG for its work on the Project. Additional monies are also owed to DCG. To date, despite repeated demands, no part of the outstanding monies has been paid to DCG.

(NYSCEF Doc. No. 1 [Petition at ¶¶2-6] [emphasis added]).

On or about September 28, 2022, petitioner served respondent with a Demand for Verified Statement directing respondent to provide, pursuant to Article 3-A of the Lien Law, “a verified statement setting forth the entries contained in your books and records with respect to the Lien Law Trust established by Law for the Project” (NYSCEF Doc. No. 3 [Demand for Verified Statement]). Petitioner maintains that respondent failed to provide this verified statement (NYSCEF Doc. No. 1 [Petition at ¶9]).

On October 19, 2022, petitioner commenced this special proceeding seeking an order directing respondent to comply with the Demand for Verified Statement. Petitioner also requests that, in the event a verified statement is not timely furnished, the Court issue an order declaring that respondent unlawfully diverted trust funds from the Project.

DISCUSSION

Under Article 3-A of the Lien Law, when an owner of real property receives funds in connection with a contract for the improvement of that real property—i.e., building loans, home improvement loans, real property contract sale payments, insurance proceeds from destruction of property, or consideration for assignment of rents (See Lien Law §70[5])—these funds become assets of a trust which the property owner must use to pay the expenses and claims of any contractor, architect, engineer, surveyor, subcontractor, laborer, or materialman it has hired to

perform the construction work (See Lien Law §§71[1] and [2][a]). 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” (Aspro Mech. Contr., Inc. v Fleet Bank, N.A., 1 NY3d 324, 328 [2004] [internal citations and quotations omitted]). Should the owner-trustee use trust assets for any other purpose, the beneficiaries of the trust may bring an action against the owner-trustee for breaching its fiduciary duties as statutory trustee (Id. at 328-329). In anticipation of such an action, a “beneficiary of the trust holding a trust claim” may demand that the owner-trustee produce “a verified statement setting forth the entries with respect to the trust contains in such books or records” after which the owner-trustee has ten days to produce such a verified statement (Lien Law §76[1], [4]). If the owner-trustee fails to comply, the beneficiary may move the court for an order directing compliance with the demand, and “[s]uch application ... may be determined summarily upon affidavits of the parties” (Lien Law §76[5] [emphasis added]).

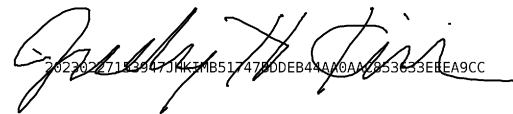
On the record before the Court, petitioner has not demonstrated that it is a trust beneficiary entitled to invoke the provisions of a Lien Law §76. Petitioner has not submitted proof that respondent is obligated to petitioner, either by contract or mechanic’s lien (See Innovative Drywall, Inc. v Crown Plastering Corp., 224 AD2d 664 [2d Dept 1996] lv to appeal denied 88 NY2d 1016 [1996]; see also Matter of Abjen Properties, L.P. v Crystal Run Sand & Gravel, Inc., 168 AD2d 783, 784 [3d Dept 1990] [without a contract in the record, court could not “say that petitioner is obligated to respondent contractually”]). Petitioner fails to include an affidavit from the petitioner attesting to its relationship with respondent, as required by Lien Law §76(5) (See Isadore Rosen & Sons, Inc. v Conforti & Eisele, Inc., 40 AD2d 794, 794 [1st Dept 1972]) but instead relies solely upon its petition. However, as this petition is verified only by

counsel it is of no probative value (See e.g., Vance v Parkside Const. Builders Corp., 2021 NY Slip Op 32441[U], 4 [Sup Ct, NY County 2021] [petition verified only by counsel insufficient to establish petitioner’s entitlement to funds forfeited to New York State Insurance Fund by parties that allegedly owed petitioners money for ready-mix concrete supplied in connection with certain construction projects]).

Accordingly, it is

ORDERED that petitioner’s application is denied without prejudice.

This constitutes the decision and order of the Court.



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2/27/2023

DATE

HON. JUDY H. KIM, J.S.C.

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