

Pavarini McGovern, LLC v HFZ KIK 30th St. Owner, LLC
2023 NY Slip Op 32046(U)
June 20, 2023
Supreme Court, New York County
Docket Number: Index No. 160556/2020
Judge: Lisa S. Headley
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. LISA S. HEADLEY

PART

28M

Justice

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PAVARINI MCGOVERN, LLC,

Plaintiff,

INDEX NO. 160556/2020MOTION DATE 06/03/2022MOTION SEQ. NO. 004

- v -

HFZ KIK 30TH STREET OWNER, LLC, HFZ KIK 30TH STREET, LLC, OTERA CAPITAL INVESTMENTS IX, INC., EMPIRE STATE LAYOUT INC., BSI SERVICES AND SOLUTIONS (NYC) INC., ZIEL FELDMAN, NIR MEIR, JOHN SHANNON, ANTHONY MORRONE, JOHN DOE, RICHARD ROE, XYZ CORP. 1 THROUGH XYZ CORP. 10, BETONS PREFABRIQUES DU LAC INC., 9229-0188 QUEBEC INC., ACHESON DOYLE PARTNERS, ARCHITECTS, P.C., B.I.G. ARCHITECTURE D.P.C., CODE CONSULTANTS PROFESSIONAL ENGINEERS, P.C., DESIMONE CONSULTING ENGINEERING, D.P.C., FABBRICA LLC, GILLMAN CONSULTING INC., KRYPTON ENGINEERING, PLLC, LANGAN ENGINEERING, ENVIRONMENTAL, SURVEYING, LANDSCAPE ARCHITECTURE AND GEOLOGY, D.P.C., LINDEGRIFFITH CONSTRUCTION CO., MG ENGINEERING D.P.C., MGE UNIFIED TECHNOLOGIES CORP., TILLOTSON DESIGN ASSOCIATES, INC., ENVIRONMENTAL WASTE MINIMIZATION, INC., ROSCHMANN STEEL & GLASS CONSTRUCTIONS INC., HOWARD I. SHAPIRO & ASSOCIATES CONSULTING ENGINEERS, P.C., DELTA TESTING, INC., SALTUS LLC, TOP HAT EXTERMINATING CORP., PSI AGENCY INC., VBGO COLLEGIATE TOWER LLC,

Defendants.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 311, 312, 313, 314, 315, 316, 323, 324, 325, 336, 337, 338, 339

were read on this motion to/for

PARTIES - ADD/SUBSTITUTE/INTERVENE

Plaintiff, Pavarini McGovern, LLC, ("Pavarini/Plaintiff") filed this motion pursuant to *CPLR §902*, for an Order to permit a class action and pursuant to *Lien Law § 77(1)*, for an Order to enforce a trust. Defendant HFZ KIK 30th Street Owner, LLC ("KIK Owner") filed opposition and Plaintiff filed a reply.

In this action, plaintiff claims that defendants, HFZ KIK 30th Street Owner LLC and HFZ KIK 30th Street LLC, failed to pay for construction work plaintiff performed at the construction and development project (the "Project") located at 11 West 29th Street, 9 West 29th Street and 3

West 29th Street in New York, New York (Block 831, Lots 28, 29 and 30), (hereinafter the "Subject Property").

PLAINTIFF'S MOTION TO PERMIT CLASS ACTION AND TO ENFORCE TRUST

In support of the motion, plaintiff argues, *inter alia*, that pursuant to *Lien Law* § 70(2), all funds received by an owner and contractor on a public or private improvement in New York constitute assets of a statutory trust for which said owner and contractor are designated as statutory trustees. Plaintiff submits that *Article 3-A* of the *Lien Law* (*Lien Law* §70) establishes a comprehensive series of trusts to ensure that monies coming into the hands of an owner or contractor on a construction project are used to pay various job-site workers.

In addition, plaintiff seeks to enforce statutory rights to pursue a class action under *Article 3-A* of the *Lien Law*, which states in pertinent part:

"[E]xcept as otherwise provided in this article, the 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; provided, however, that in determining whether the prerequisites of a class action have been satisfied, the provisions of [CPLR § 901(a)(1)] may be waived at the discretion of the court."

See, Lien Law § 77(1).

In the fifteenth and sixteenth causes of action in the Amended Complaint, plaintiff seeks a declaration that the money received by defendant, KIK Owner, be declared trust funds, and plaintiff seeks an injunction enjoining defendant KIK Owner from making any further diversions of the sums disbursed or advanced to them, along with damages in the amount of \$14,172,093.23.

Plaintiff argues there are questions of law and fact common to the class that warrant an Order permitting the *Article 3-A* claims to proceed as a class action because the questions of fact, which are common to all parties include the 1) identification and accounting for all trust funds; 2) determination of to whom and for what purposes such trust funds were disbursed; and 3) identification of the companies or individuals who controlled or participated in disbursing or received such funds. Thus, plaintiff contends that pursuant to CPLR §902, the Court should consider determining whether this action should proceed as a class action.

DEFENDANT HFZ KIK 30TH STREET OWNER, LLC'S OPPOSITION

In opposition, defendant KIK Owner argues, *inter alia*, plaintiff's motion for class certification is untimely because CPLR § 902 requires the plaintiff to move for class certification "[w]ithin sixty days after the time to serve a responsive pleading has expired for all persons named as defendants." *See, CPLR* § 902. Defendant KIK Owner also argues that pursuant to CPLR §320, the deadline for all named defendants to respond to the Amended Complaint was July 21, 2021, and plaintiff Pavarini filed the instant motion for class certification on June 3, 2022, which is 317 days after the required period.

In addition, defendant KIK Owner argues plaintiff has failed to establish that class certification is warranted because plaintiff's motion for class certification does not meet the prerequisites pursuant to CPLR §901¹, however, the plaintiff sets forth the factors to support a motion for class certification pursuant to CPLR §902².

¹ CPLR § 901 refers to prerequisites to a class action which has been preempted. *See, Holster v Gatco, Inc.*, 618 F.3d 214, 216 (2d Cir 2010).

² CPLR § 902 refers to orders allowing class action, which is the prevailing law.

Defendant KIK Owner asserts plaintiff's motion is lacking evidentiary support since plaintiff failed to establish the requisite class-certification elements through admissible evidence. Defendant contends plaintiff is not an adequate representative of the class because plaintiff has been sued by other purported class members for its own failure to make required payments and, as a result, plaintiff has a clear conflict of interest with the other class members. Defendant argues that a clear conflict of interest bars plaintiff from representing the interest of each member of the class; therefore, the court should deny plaintiff's motion in its entirety.

PLAINTIFF'S REPLY

In reply, plaintiff asserts there are *res judicata* and collateral estoppel issues. Plaintiff states "defendant KIK Owner is seeking to relitigate its loss in the special proceeding." Plaintiff further argues defendant is seeking that this Court effectively overrule Justice Nervo's decision, dated December 6, 2021, which granted respondent's motion essentially depriving plaintiff Pavarini and the other trust fund claimants of the presumptive finding that defendant KIK Owner diverted statutory trust funds. Additionally, plaintiff argues the timing issue is not fatal because the purpose of the statute is ameliorative in that this action need not fail even if there has not been strict compliance with *Article 9 of the CPLR* pursuant to *Lien Law §23*.

Plaintiff further argues the instant motion has an evidentiary basis because defendant KIK Owner has been judicially presumed to have diverted statutory trust funds (*see, Exhibit A of Plaintiff's Reply, also cite NYSCEF Doc. No. 337*). Plaintiff asserts that the motion should be granted because defendant KIK Owner's submission are conclusory and based solely on their attorneys' affirmations, which have no evidentiary value regarding the facts of the underlying claim.

Lastly, plaintiff argues, *inter alia*, Pavarini, as the general contractor, is an adequate class representative, albeit Pavarini has failed and refused to pay Defendant Linde-Griffith Construction Co. for the unpaid balance due of \$14,664,292.87. Plaintiff contends that co-defendant Linde-Griffith consents to the granting of the motion and submitted papers in support. (See, *NYSCEF Doc Nos. 323-324*).

DISCUSSION

Lien Law § 77(1) permits any party with a trust claim to bring an action to enforce the claim on behalf of all beneficiaries; it requires, however, compliance with the procedural requirements of a class action. A motion for class certification is governed by §902.

CPLR § 902 then provides that the Court shall also consider:

- (1) The interest of members of the class in individually controlling the prosecution or defense of separate actions;
- (2) The impracticability or inefficiency of prosecuting or defending separate actions;
- (3) The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
- (4) The desirability or undesirability of concentrating the litigation of the claim in the particular forum; [and]
- (5) The difficulties likely to be encountered in the management of a class action."

See, CPLR §902.

While the question of "[w]hether a particular lawsuit qualifies as a class action rests within the sound discretion of the trial court, [i]n exercising this discretion, a court must be mindful... that the class certification statute should be liberally construed." *Maor v. Hornblower New York, LLC*, 51 Misc. 3d 1231(A)(N.Y. Sup. Ct. 2016) *quoting, Kudinov v. Kel-Tech Constr., Inc.*, 65 A.D.3d 481, 481 (2009). "The Court of Appeals has explained that the standards for certifying

class actions should be broadly construed not only because of the general command for a liberal construction of all *CPLR* sections, but also because it is apparent that the Legislature intended *Article 9* to be a liberal substitute for the narrow class action legislation which preceded it.” *Maor v. Hornblower New York, LLC*, 51 Misc. 3d 1231(A)[internal quotation marks and citation omitted]; *see also*, *Stecko v. RLI Ins. Co.*, 121 A.D.3d 542, 543-544 (2014).

Pursuant to *CPLR* §902, a motion for class certification must be made within 60 days after the time to serve a responsive pleading has expired. *See*, *CPLR* §902. Although the parties may stipulate to extend the plaintiffs' time to move for class certification and the court may order such an extension, in the absence of an extension, the “deadline set forth is mandatory.” *Shah v. Wilco Sys., Inc.*, 27 A.D.3d 169, 173, 806 N.Y.S.2d 553 (1st Dep’t 2005).

Here, this Court finds plaintiff Pavarini failed to comply with the sixty-day requirement pursuant to *CPLR* §902, because the deadline for all named defendants to respond to the Amended Complaint was July 21, 2021, when plaintiff Pavarini in fact filed the instant motion for class certification on June 3, 2022, which is 317 days beyond the required period. There is no indication that the parties stipulated to extend the plaintiff’s time to move for class certification since there are no stipulations mentioned or uploaded to the motion papers.

Additionally, based on the arguments presented, this Court finds plaintiff Pavarini did not comply with the requisites pursuant to *Lien Law* § 77(1) to enforce a trust. As such, this Court finds, plaintiff motion for an Order allowing class action pursuant to *CPLR* § 902, and for an Order to enforce a trust pursuant to *Lien Law* § 77(1) is denied.

Accordingly, it is hereby

ORDERED that plaintiff Pavarini’s motion for an order allowing a class action pursuant to *CPLR* § 902 is DENIED; and it is further

ORDERED that plaintiff Pavarini’s motion for an order to enforce a trust pursuant to *Lien Law* §77(1) is DENIED; and it is further

ORDERED that any requested relief sought not expressly addressed herein has nonetheless been considered; and it is further

ORDERED that within 30 days of entry, plaintiff Pavarini shall serve a copy of this decision/order upon the parties with notice of entry.

This constitutes the Decision and Order of the Court.

6/20/2023

DATE


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LISA S. HEADLEY, J.S.C.

CHECK ONE:

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CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

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DENIED

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NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

☐

OTHER

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REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: