

**Clearcell Power, Inc. v Guth Deconzo Constr. Mgt.,  
Inc.**

2024 NY Slip Op 32612(U)

July 29, 2024

Supreme Court, New York County

Docket Number: Index No. 653266/2023

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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CLEARCELL POWER, INC.,

Plaintiff,

- v -

GUTH DECONZO CONSTRUCTION MANAGEMENT,  
INC.,

Defendant.

INDEX NO. 653266/2023

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 002

**DECISION + ORDER ON  
MOTION**

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GUTH DECONZO CONSTRUCTION MANAGEMENT, INC.,

Plaintiff,

-against-

ALINA MEZHIBOVSKY, VICTOR MEZHIBOVSKY, and VM  
POWER INC

Defendants.

Third-Party  
Index No. 595111/2024

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103

were read on this motion to/for ENFORCEMENT.

In motion seq. no. 002, plaintiff moves, pursuant to CPLR 2104, to enforce the settlement agreement entered into by the parties in this action. Defendant cross-moves, pursuant to CPLR 2104, to enforce the settlement agreement with the additional terms of a newly proposed stipulation of settlement and order<sup>1</sup> (see NYSCEF 86), compel plaintiff to release \$1,969,296.06 from its escrow account pursuant to the settlement agreement's terms, dismiss all claims in this action, discharge defendant

<sup>1</sup> Plaintiff does not agree to the terms of the proposed stipulation and seeks to enforce the April 5, 2024 executed settlement agreement as is.

from any further duties as the representative of the class of Trust Fund Beneficiaries pursuant to Article 3-A of the Lien Law, modify the court's January 28, 2024 decision on mot. seq. no. 001 (NYSCEF 72), reducing the required bond from \$5,832,882 to \$4,372,155.10 (credit for settlement payment), and provide nonparties HYAxiom and RCMT thirty days to enter an appearance in this action regarding their claims as potential trust fund beneficiaries.

Plaintiff commenced this action in July 2023, alleging that defendant breached its contract with plaintiff by stopping work on the Metrotech 4 Project and publishing confidential information. (NYSCEF 2, Complaint.) In its answer, defendant asserts counterclaims for breach of contract for a failure to pay monies owed under the contract, breach of the implied covenant of good faith and fair dealing, quantum meruit, unjust enrichment, estoppel, violation of the New York Prompt Payment Act, violation of the New Jersey Prompt Payment Act, violation of the Delaware Prompt Payment Act, and trust fund diversion pursuant to New York Lien Law. (NYSCEF 7, Answer with Counterclaims.) On January 30, 2024, defendant filed an amended answer with counterclaims and a third-party complaint against Alina Mezhibovsky, Victor Mezhibovsky, for trust fund diversion, breach of fiduciary duty, fraudulent inducement, and fraudulent conveyance<sup>2</sup> and VM Power Inc. for fraudulent conveyance. (NYSCEF 74, Amended Answer with Counterclaims and Third-Party Complaint.) On April 5, 2024, these parties executed a settlement agreement (Settlement Agreement). (NYSCEF 81, Settlement Agreement.)

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<sup>2</sup> Defendant also added the claims for breach of fiduciary duty, fraudulent inducement, and fraudulent conveyance against plaintiff/counterclaim defendant.

Defendant's main concern with the Settlement Agreement involves its role as the representative of the class of Trust Fund Beneficiaries.

In February 2024, defendant sent notices to all potential trust fund beneficiaries listed on plaintiff's verified statement pursuant to Lien Law § 75 (NYSCEF 91 & 92) and received responses from nonparties HyAxiom, Inc. (HyAxiom), claiming it is owed \$1,993,485.39, and RCM Technologies, Inc. (RCMT), claiming it is owed \$112,703.14. (NYSCEF 93 & 94, Notice Responses.) With knowledge of these claims, the parties to this action executed the Settlement Agreement. The Section 1.1 of Settlement Agreement provides that

"This Settlement Agreement ... is a settlement of any and all claims by Guth and/or its subcontractors and suppliers only and is not a negotiated settlement on behalf of any other third-party, potential trust fund beneficiary. By entering into this Settlement Agreement, Guth does so on behalf of itself and/or its subcontractors and suppliers only and is not acting on behalf of, nor should it be construed to be acting on behalf of, any other potential trust fund beneficiary or putative class." (NYSCEF 81, Settlement Agreement at 4-5.)

Section 1.3 provides that if a potential trust fund beneficiary asserts a claim, it does not prevent the Settlement Agreement from taking effect, including the release of settlement funds to defendant unless the claim is made by one of defendants' subcontractors or suppliers. (*Id.* at 5.) Section 1.4 provides that any new claim by a potential trust fund beneficiary "shall be carved out" and independently handled. (*Id.*) Finally, Section 9.0 provides that plaintiff shall indemnify and defend defendant from any future claim made by any purported trust beneficiary related to defendant acting as the class representative. (*Id.* at 8.)

Defendant now seeks to modify the Settlement Agreement's terms to require plaintiff to pay the partial settlement amount owed to defendant and continue to defend

the claims made by HyAxiom and RCMT. Defendant asserts that it cannot agree to dismiss HyAxiom and RCMT's claims.

Lien Law § 77 (1) provides that

“[a] trust arising under this article may be enforced by the holder of any trust claim, including any person subrogated to the right of a beneficiary of the trust holding a trust claim, in a representative action brought for the benefit of all beneficiaries of the trust. An action to enforce the trust may also be maintained by the trustee. In any such action, except 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 paragraph one of subdivision (a) of section nine hundred one of such law and rules may be waived at the discretion of the court.”

While Lien Law § 77 “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.” (*W. End Interiors, Ltd. v Aim Constr. & Contr. Corp.*, 286 AD2d 250, 253 [1st Dept 2001].) There has been no such compliance with CPLR 902, requiring an application for certification “within 60 days after the expiration of the time to serve a responsive pleading.” (*Id.*, citing CPLR 902.) Thus, defendant's concern with HyAxiom and RCMT's claims in light of the settlement between plaintiff, defendant, and third-party defendants is misplaced as it is too late as the Article 3-A claim would be dismissed for a failure to comply with CPLR 902.<sup>3</sup> Defendant was well aware of HyAxiom and RCMT's claims and executed the settlement agreement nevertheless.

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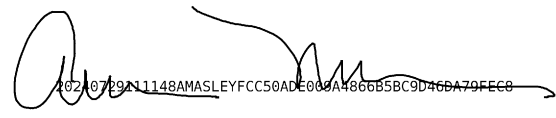
<sup>3</sup> The court acknowledges that “[a]lthough an action to enforce a trust pursuant to Lien Law § 77 must be brought as a class action, the plaintiff's failure to comply with this provision was not fatal and can be cured.” (*Brooklyn Navy Yard Dev. Corp. v J.M. Dennis Constr. Corp.*, 12 AD3d 630, 632 [2d Dept 2004] [citation omitted].) However, 653266/2023 CLEARCELL POWER, INC. vs. GUTH DECONZO CONSTRUCTION MANAGEMENT, INC. Motion No. 002 Page 4 of 5

Accordingly, it is

ORDERED that plaintiff's motion to enforce the settlement agreement is granted; and it is further

ORDERED that defendant's cross-motion to enforce a modified settlement agreement is denied.

Action discontinued.



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7/29/2024

DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED  
 GRANTED  DENIED

NON-FINAL DISPOSITION  
 GRANTED IN PART  OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT  REFERENCE

the motions before the court are to enforce the settlement agreement between the parties. Even in its cross-motion to enforce a modified settlement agreement, defendant makes no attempt to cure its failure to comply with CPLR 902 or demonstrate the merit of an alleged class-wide claim pursuant to CPLR 901.