

**BAB Mech. Serv. & Maintenance, Inc. v Apex Bldg.
Co., Inc.**

2024 NY Slip Op 35724(U)

October 31, 2024

Supreme Court, Bronx County

Docket Number: Index No. 814252/2022E

Judge: Fidel E. Gomez

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This opinion is uncorrected and not selected for official publication.

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

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**BAB MECHANICAL SERVICE
& MAINTENANCE, INC.,**

Plaintiff,

-against-

DECISION AND ORDER

**APEX BUILDING COMPANY, INC. and
LIBERTY MUTUAL INSURANCE
COMPANY, INC.,**

Index No. 814252/2022E

Defendants.
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Plaintiff BAB Mechanical Service & Maintenance, Inc. (“BAB”) moves for an Order pursuant to CPLR § 1003 and CPLR § 3025, granting leave to join an additional party and to serve an amended summons a complaint.

For the reasons which follow, plaintiff’s motion is denied.

BACKGROUND

The complaint filed in this action alleges causes of action for foreclosure of a bonded mechanics lien against defendants Apex Building Company, Inc. (“Apex”) and Liberty Mutual Insurance Company, Inc. (“Liberty Mutual”) and unjust enrichment against Apex.

The complaint, verified by BAB’s President, alleges the following facts: On November 23, 2020, BAB entered into a subcontractor agreement (the “Subcontract”) with Apex, a general contractor, for work related to the Home Simpson Apartments located at 1210 Simpson Street, New York 10459 (the “Home Simpson Project”). In exchange for BAB’s work on the Home Simpson Project, Apex was to remit payment in the amount of \$310,750.00 to BAB for work completed to date (the “Total Subcontractor Amount”). On October 15, 2021, Apex sent BAB a Three (3) Day Termination by Convenience Notice (the “Termination Notice”) stating it intended to terminate the Subcontract. Apex did not dispute the quality or completeness of the work performed at the Home Simpson Project and has continued to benefit from BAB’s

completed work. Also on October 15, 2021, BAB completed all remaining work on the Home Simpson Project in accordance with the terms of the Subcontract and submitted its final Application and Certification for Payment (the “Application”) requesting that the sum of \$235,750.00, plus 9% interest, be paid by Apex (the “Remaining Amount”).¹ On October 16, 2021, BAB responded to Apex’s Termination Notice and asserted that it, at all times, demonstrated the ability to complete the project and further demanded that Apex pay for the services and materials rendered thus far as required under the Subcontract. Through a series of email exchanges, Mr. Brancato, BAB’s representative, repeatedly requested payment in the amount of \$235,750.00 to be paid as soon as possible. Apex did not address the issue of payment in its email responses. Apex has not remitted payment to BAB for any portion of the \$235,750.00 allegedly due.

The complaint also alleges that, on November 24, 2021, BAB filed a Notice of Mechanics Lien (the “Lien”) with the Clerk of Bronx County, in the amount of \$235,750.00, against the subject property. On December 3, 2021, rather than negotiate with BAB, Apex “bonded off” the Lien pursuant to Lien Law § 19 (the “Bond”), and the Lien was subsequently discharged in a mechanic’s lien discharge action filed in Supreme Court, Bronx County. In the Bond, Liberty Mutual is listed as the surety for Apex, and acknowledges that it is to be “held and firmly bound unto the Clerk of the County of Bronx in the penal sum of \$259,325.00.”²

The complaint further alleges that Apex has retained the benefit of its services without objection and that BAB is entitled to be fully compensated by Apex for the reasonable value of said services, work, labor and materials. Therefore, it is alleged that Apex has been unjustly enriched in the amount of \$235,750.00.

¹The complaint alleges that, on October 15, 2021, Apex had only paid \$75,000.00 of \$310,750.00, the Total Subcontract Amount, to BAB for work performed by BAB and accepted by Apex.

²This amount represents 110% of the \$235,750.00 lien as required under New York Lien Law § 19.

In their answer, defendants denied most of the allegations in the complaint and interposed three counterclaims: (1) breach of contract related to a different subcontract with BAB concerning a different project (the “Balton Commons Project”); (2) fraud related to the Balton Commons Project; and (3) willful exaggeration of the Lien herein. Specifically, defendants’ breach of contract counterclaim alleges that plaintiff breached its subcontract with Apex by delaying the Balton Commons Project, failing to complete its work at the project, performing work in a defective, unacceptable and untimely manner, failing to properly pay its suppliers and vendors, and failing to provide sufficient and proper supervision, manpower and materials at the project. Defendants’ fraud counterclaim alleges that during the course of the Balton Commons Project, plaintiff intentionally and knowingly misrepresented to Apex that all of its suppliers and vendors had been paid all amounts then due, that representation was false when made in that plaintiff had not paid all of its suppliers and vendors in the amounts represented by plaintiff, plaintiff knew those representations were false and made them with the intent to deceive Apex into making payments to plaintiff in connection with the project, Apex justifiably relied on those misrepresentations, and plaintiff’s suppliers and vendors filed mechanic’s liens for amounts unpaid by plaintiff causing further delays of the project. Defendants’ willful exaggeration of mechanic’s lien counterclaim alleges that plaintiff filed a mechanic’s lien against the Home Simpson Project in the amount of \$235,700.00 which contains false and erroneous statements that willfully exaggerate the amount of the lien, at the time plaintiff filed the lien it was fully aware of the agreed upon price of the materials and work furnished under the subcontract, and that plaintiff has been fully paid in connection with the project.

* * * * *

Plaintiff now moves, pursuant to CPLR §§ 1003 and 3025, for leave to add a defendant and to serve an amended complaint which includes a cause of action against Apex and its President and Chairman, Robert Horsford, under Article 3-A of the Lien Law for wrongful diversion of trust funds.

CPLR § 1003 provides, in relevant part, that “[p]arties may be added at any stage of the action by leave of court or by stipulation of all parties who have appeared, or once without leave of court within twenty days after service of the original summons or anytime before the period for responding to that summons expires or within twenty days after service of a pleading responding to it.”

CPLR § 3025(b) provides, in relevant part, that “a party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of the parties.” Applications for leave to amend pleadings under CPLR § 3025(b) should be freely granted unless the proposed amendment (1) would unfairly prejudice or surprise the opposing party, or (2) is palpably insufficient or patently devoid of merit” (*Maldonado v Newport Gardens, Inc.*, 91 AD3d 731, 731-732 [2d Dept 2012]; *Lucido v Mancuso*, 49 AD3d 220, 227 [2d Dept 2008]; *O’Halloran v Metro. Transp. Auth.*, 154 AD3d 83, 86 [1st Dept 2017]). To be sure, “the sufficiency or underlying merit of the proposed amendment is to be examined no further” (*Maldonado* at 732). Significantly, however, leave to amend a complaint will not be granted unless the proposed amendment, as pleaded, establishes a cause of action (*Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005]; *Ancrum v St. Barnabas Hosp.*, 301 AD2d 474, 475 [1st Dept 2003]; *Davis & Davis v Morson*, 286 AD2d 585, 585 [1st Dept 2001]).

Significantly, Lien Law § 77(1) states

1. 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.

Based on the foregoing language, an action to enforce a trust, including an action for improper diversion of trust assets, must be brought as a class action in compliance with Article 9 of the CPLR, however, a court may waive the numerosity requirement of CPLR § 901(a) (*ADCO Electrical Corporation v McMahon*, 38 AD3d 805, 806-807 [2d Dept 2007] [“an action to enforce a trust pursuant to Lien Law § 77 must be brought as a class action”]; *Brooklyn Navy Yard Development Corporation v J.M. Dennis Construction*, 12 AD3d 630, 632 [2d Dept 2004] [“an action to enforce a trust pursuant to Lien Law § 77 must be brought as a class action”]; *West End Interiors, Ltd. v Aim Constr. & Contracting Corp.*, 286 AD2d 250, 253 [1st Dept 2001] [“Section 77(1) of the Lien Law 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.”]; *Atlas Building Systems, Inc. v Rende*, 236 AD2d, 494 [2d Dept 1997][while the record supported “the conclusion that there was an improper diversion of trust assets Nevertheless, the proceedings herein suffer from procedural infirmities which preclude the granting of the relief sought by Atlas. Pursuant to Lien Law § 77(1), an action under Lien Law 3-A should be brought as a representative action for the benefit of all beneficiaries of the trust, and the practice, pleadings, forms and procedures shall conform as nearly as may be to the practice, pleadings, forms and procedure in a class action”] [internal quotation marks and citations omitted]).

Here, the proposed cause of action under Article 3-A of the Lien Law is asserted against Horsford and Apex, and does not assert any claims on behalf of all trust beneficiaries. Notably, plaintiff acknowledges the existence of other trust beneficiaries, i.e., other subcontractors on the project who were not paid in full. As such, it fails to state a cause of action for wrongful diversion of trust funds.

Insofar as the only allegations proposed against Horsford concern plaintiff’s proposed new cause of action for wrongful diversion of trust funds, defendants’ motion to add Horsford as a defendant must be denied.

Accordingly, it is

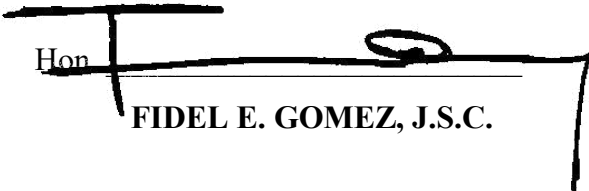
ORDERED that defendants shall serve a copy of this Decision and Order upon Defendants, with Notice of Entry, within thirty (30) days of the date hereof.

This constitutes the Decision and Order of this Court.

Dated: Bronx, New York

October 31 , 2024

Hon


FIDEL E. GOMEZ, J.S.C.