

**CFS Enters., Inc. v U.S. Specialty Ins. Co.**

2025 NY Slip Op 33739(U)

September 25, 2025

Supreme Court, Kings County

Docket Number: Index No. 502502/2023

Judge: Richard J. Montelione

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This opinion is uncorrected and not selected for official publication.

At IAS Part 99 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse located at 360 Adams Street, Brooklyn, NY 11201, on the 25<sup>th</sup> day of September 2025.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART 99

**DECISION  
and  
ORDER**

-----X  
CFS ENTERPRISES, INC. d/b/a CFS STEEL COMPANY,

Plaintiffs,

Index No.: 502502/2023  
Mot. Seq. No.: 2 & 4

-against-

U.S. SPECIALTY INSURANCE COMPANY, RISE CONCRETE LLC, M&R CONSTRUCTION GROUP INC., RAW EQUIPMENT CORP., STATESIDE FORMNIG INC., GOTHAM READY MIX LLC, WHITE CAP LP, LLC, TRIBORO CONTRACTORS SUPPLY CORP., SUPER STUCTURE SAFETY NETTING INC., DURANTE RENTALS LLC, ENGINEERED DEVICES CORP., BARRY CALDWELL, TONY VAYSBURD, KRYSTSINA IVANOVA, ECA DEVELOPERS LLC, and "JOHN DOE 1" through "JOHN DOE 10," said parties being lienors who have yet to perfect their liens and being fictitious and unknown to Plaintiff,

Defendants.

-----X  
RISE CONCRETE LLC,

Third-Party Plaintiff,

-against-

SPENCERAN, INC. and JAMES MCENERNEY,

Third-Party Defendants.  
-----x

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KINGS COUNTY CLERK  
FILED

After oral argument, the following papers were read on this motion pursuant to CPLR 2219(a):

Papers	NYSCEF DOC. #
Notice of Motion/Affidavits/Affirmations/Exhibits.....(MS#4)	112-117
Answering Affirmation//Exhibit.....(MS#4)	118-136

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Notice of Motion/Affidavits/Affirmations/Exhibits.....(MS#2)	90-94
Answering Affirmation//Exhibit.....	137-143
Reply.....	107
Other.....	

MONTELIONE, RICHARD J., J.

This action was commenced by filing the summons and complaint on January 25, 2023 (NYSCEF #1), and amended on May 17, 2023 (NYSCEF #12), , together with a notice of pendency (NYSCEF #2), alleging, inter alia, that it provided professional construction services and materials to the defendants at the premises located at 1100 Myrtle Avenue, Brooklyn, New York, 11206, New York and identified by the Tax Maps as Block No. 1586, Lot No. 12 ( Premises). Defendants “Rise, Caldwell, Vaysburd, Ivanova, and ECA” breached their contract with plaintiff; defendant “Rise” owes in excess of \$1,115,943.61; and defendants “Caldwell, Vaysburd, Ivanova, and ECA utilized such dominion and control over the activities of Rise” causing damage to plaintiff. Plaintiff filed a lien to secure the labor and materials on January 19, 2023. Defendant U.S. Specialty Insurance Company (USSIC) is alleged to be the surety providing a mechanic’s lien bond (Bond No. 1001196845) on the construction project.

Issue was joined by defendant-third-party plaintiff Rise Concrete LLC by filing its answer with crossclaims on August 9, 2023 (NYSCEF #19) which was amended on August 24, 2023 (NYCEF #33). Defendant-third-party plaintiff Rise Concrete LLC commenced a third party action against Spenceran, Inc. and James McEnerney and filed a third-party complaint on August 25, 2023 (NYSCEF #37), which was amended on October 20, 2023 (NYSCEF # 43).

Defendant-third-party plaintiff Rise Concrete LLC now moves pursuant to CPLR §§ 901, 902, 3211(a)(1), 3211(a)(7), and New York Lien Law § 77 to dismiss the fourth cause of action as pleaded in the verified amended complaint as against defendant and third-party plaintiff Rise Concrete LLC on the grounds that the fourth cause of action (Article 3-A of Lien Law Violation of Construction Trust Funds) fails to comply with the pleading requirements of Lien Law § 77 and CPLR §§ 901, 902, 3211(a)(1) and CPLR 3211(a)(7). (MS#4).

Plaintiff argues that it is discretionary as to whether the claims are brought as a class action or simply brought whereby each party with a claim is named. Plaintiff’s attorney affirmation states: “What Lien Law § 77 does require, however, is that any action to enforce an Article 3-A trust—whether brought in state or federal court—must proceed for the benefit of all trust beneficiaries.” (NYSCEF #118, ¶ 19). Counsel cites as support *Brooklyn Navy Yard Dev. Corp. v J.M. Dennis Const. Corp.*, 12 AD3d 630, 632[2d Dept 2004], and *Tutor Perini Bldg. Corp. v New York City Reg’l Ctr., LLC*, 525 FSupp 3d 482, 501 (SDNY 2021). However, these cases stand for the exact opposite: “Although 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.” (*emphasis added; citing Atlas Bldg. Sys. v Rende*, 236 AD2d 494, 496 [1997]., *Brooklyn Navy Yard Dev. Corp. v J.M. Dennis Const. Corp.*, 12 AD3d 630, at 632. *Tutor Perini Bldge* references the discretion of the trial court to waive the numerosity requirement but otherwise mandates a class action. *See, Tutor Perini Bldg. Corp. v New York City Regional Ctr., LLC*, 525 F Supp 3d 482, 501 [SDNY 2021]:

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Any action to recover diverted funds under the Lien Law must ‘conform as nearly as may be to the [procedures] in a class action,’ although, under New York law, courts have discretion to waive the numerosity requirement of state law. N.Y. Lien Law § 77(1); *Jorge v. Piola Prop. Mgmt. LLC*, Index No. 603127/17, 2017 WL 2723466, at \*4 (N.Y. Sup. Ct. June 23, 2017) (action to enforce Article 3-A trust ‘must be brought as a class action.’). This requirement is ‘aimed at safeguarding an equitable pro rata distribution of the funds to all suppliers of material and labor who have improved the real property.’ *Quantum Corp. Funding, Inc. v. Bast Hatfield, Inc.*, No. 5:04 Civ. 137 (FJS), 2005 WL 1926610, at \*6 (N.D.N.Y. June 8, 2005) (citation omitted). ‘Since the requirement of a representative action is integral to Article 3-A’s general purpose, before a court can enforce an Article 3-A trust, it must have before it all potential trust beneficiaries.’ *Id.* Moreover, no more than one action to recover the funds of a particular Article 3-A trust may proceed at the same time. *See* N.Y. Lien Law § 77(2). Together, these two procedural requirements serve important goals. They ensure that all claims arising from a project, which may involve a bevy of aggrieved contractors, subcontractors, and other trust beneficiaries, orderly proceed, in a unified fashion, in the same forum. They prevent potentially inconsistent adjudications over the same trust corpus. And they prevent proactive beneficiaries from racing to the courthouse to lay claim to limited funds, while leaving less enterprising beneficiaries without relief.

Moreover, the plaintiffs in *Tutor Perini Bldg. Corp.* proceeded as “Tutor Perini Building Corp., individually and, as to Count I of the Complaint, on behalf of all others similarly situated, pursuant to Article 3-A of the N.Y. Lien Law,” and the court allowed the proceedings to be converted to a class action. Here, plaintiff apparently has named not only defendants who are alleged to have misused the trust fund, but other potential entities which may have been affected by the alleged diversion which is inconsistent with the safeguards in place for the protection of all members of the class and where there are fiduciary obligations to protect the interest of the class. *See Globe Surgical Supply v GEICO Ins. Co.*, 59 AD3d 129 [2d Dept 2008]; *Atlas Bldg. Sys., Inc. v Rende*, 236 AD2d 494 [2d Dept 1997]. The court will not dismiss the plaintiff’s fourth cause of action but will allow plaintiff to seek to convert the action to a class action provided that it notifies each known trust beneficiary, by Order to Show Cause, that it will seek this relief; and provided it meets its burden under CPLR §§901, 902, 3211(a)(1), New York Lien Law §77; and further provided that plaintiff is a representative party that will fairly and adequately protect the interest of the class (*see Yonkers Contr. Co., Inc. v Romano Enterprises of New York, Inc.*, 304 AD2d 657 [2d Dept 2003]). The court will also consider any cross motions seeking this relief. *Ibid.*

The claim within the plaintiff’s complaint that all other liens, “if any, is subsequent and

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subordinate to CFS's lien" is inconsistent with a representative party's fiduciary duties to other lienholders.

Third-party defendant James McEnerney moves pursuant to CPLR §§ 901, 902, 3211 (a)(1) and (a)(7), Lien Law § 77 dismissing the Second Cause of Action as pleaded in the amended third-party complaint as against third-party defendant James McEnerney on the grounds that the second cause of action (Article 3- A of Lien Law Trust Fund Diversion) fails to comply with the pleading requirements of Lien Law § 77 and CPLR §§ 901, 902, 3211 (a)(1) and (a)(7). (MS#2). In light of the court denying defendant-third-party plaintiff's motion to dismiss on this ground, the third-party defendant James McEnerney's motion is denied as academic.

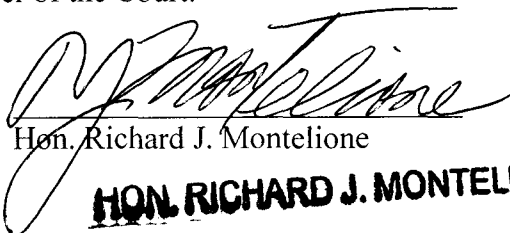
Based on the foregoing, it is

ORDERED that defendant-third-party plaintiff Rise Concrete LLC's motion pursuant to CPLR §§ 901, 902, 3211(a)(1) and 3211(a)(7), New York Lien Law § 77 dismissing the Fourth Cause of Action as pleaded in the Verified Amended Complaint as against Defendant and Third-Party Plaintiff Rise Concrete LLC on the grounds that the Fourth Cause of Action (Article 3-A of Lien Law Violation of Construction Trust Funds) fails to comply with the pleading requirements of Lien Law § 77 and CPLR §§ 901, 902, is DENIED provided that within 60 days plaintiff CFS Enterprises, Inc. d/b/a CFS Steel Company, files a motion by Order to Show Cause, seeking to convert the action to a class action pursuant to CPLR §§ 901, 902, New York Lien Law § 77, and further providing that all known trust beneficiaries are served a copy of such Order along with a copy of this decision and order, and further that plaintiff provide the court with a basis for this application, including but not limited to, plaintiff's ability to diligently protect the interests of the trust beneficiaries (MS#4); and it is further

ORDERED that third-party defendant James McEnerney's motion to dismiss the second cause of action as plead in the amended third-Party complaint is DENIED (MS#2); and it is further

ORDERED that all other requests for relief are DENIED.

This constitutes the decision and order of the Court.

  
Hon. Richard J. Montelione  
**HON. RICHARD J. MONTELIONE**

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KINGS COUNTY CLERK  
FILED