

514 W. 24th Owner LLC v Pryor
2019 NY Slip Op 31300(U)
May 7, 2019
Supreme Court, New York County
Docket Number: 654827/2018
Judge: Barry Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 61EFM

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514 WEST 24TH OWNER LLC and SUNRISE CONSTRUCTION,
LLC

INDEX NO. 654827/2018

Plaintiffs,

MOTION DATE April 30, 2019

- v -

MOTION SEQ. NO. 001

SAMUEL PRYOR, J.S. BENSON WOODWORKING & DESIGN,
LLC, CONNOR HOMES, LLC, and CONNOR BUILDING
COMPANY

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15,
17, 18, 23, 24

were read on this motion to/for

DISMISS

HON. BARRY R. OSTRAGER:

Plaintiffs 514 West 24th Owner LLC (“Owner”) and Sunrise Construction LLC
 (“Sunrise”) commenced this action against three corporate entities—J.S. Benson Woodworking
& Design LLC (“J.S. Benson”), Connor Homes LLC (“Connor Homes”), and Connor Building
 Company (“Connor Building”)—hereinafter referred to as the Corporate Defendants, and
 Samuel F. Pryor IV (“Pryor”), the principal of the Corporate Defendants. Pending before the
 Court is Defendant Pryor’s motion to dismiss the amended complaint. For the reasons stated
 herein, the motion to dismiss is granted.

Background

In 2015, Owner contacted J.S. Benson to purchase custom windows and doors for
 Owner’s real estate development project at 514 West 24th Street, New York, New York. After
 visiting the Corporate Defendants’ facility, meeting with the Corporate Defendants’ principal,

Defendant Pryor, and allegedly relying on Pryor's representations about Defendants' ability to perform, Owner, through its agent, executed a purchase order for custom windows and doors at a price of \$1,878,422. The Purchase Order allegedly contains a structured payment schedule based on work in progress in the manufacturing process.

Plaintiffs made several timely payments to Defendants and Defendants belatedly began production of the custom windows and doors. However, after receiving over \$1 million in scheduled payments, Defendants informed Plaintiffs that they would not be able to complete production. Defendant Pryor represented that his businesses had been facing financial difficulty for at least a year and that the Defendants would be unable to meet their production obligations under the Purchase Order.

Plaintiffs thus allege that Pryor fraudulently induced them to enter into the Purchase Order by misrepresenting Defendants' ability to perform and by concealing the Defendants' financial struggles. Plaintiffs also allege that Defendants improperly diverted Lien Law trust funds, converted Plaintiffs' funds, breached the Purchase Order, and were unjustly enriched. Currently pending before the Court is Pryor's motion to dismiss the claims sounding in fraud, diversion of trust funds, accounting, and conversion.

Discussion

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction." *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994). "We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Id.* at 87-88. "At the same time, however, allegations consisting of bare legal conclusions ... are not entitled to any such consideration." *Connaughton v. Chipotle Mexican Grill, Inc.*, 29 N.Y.3d 137, 141

(2017). “Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery.” *Id.* at 142.

Following oral argument on the motion, the Court dismissed Plaintiffs’ fraudulent inducement claim against Pryor and reserved decision on the remaining claims.

Plaintiffs allege that Pryor, at the time he executed the Purchase Order on behalf of the Corporate Defendants, knew that the businesses were failing and knew that the Corporate Defendants could not meet their obligations under the contract.

However, “[g]eneral allegations that defendant entered into a contract while lacking the intent to perform it are insufficient to support the [fraud] claim.” *New York Univ. v. Continental Ins. Co.*, 87 N.Y.2d 308, 318 (1995).

Here, Pryor was under no duty to disclose the financial difficulties of his businesses to the Plaintiffs before entering into the Purchase Order. Further, it cannot even be inferred that Pryor had no intention of performing based on Plaintiffs’ own allegation that Defendants completed several steps in production before informing Plaintiffs that the businesses were failing and production would soon cease. At a minimum, these facts suggest that Defendants intended to perform at the time the Purchase Order was entered. In any event, an intention not to perform a contract gives rise to a claim for breach of contract—not a claim for fraud. Thus, the Court granted dismissal of Plaintiffs’ claim against Pryor for fraudulent inducement.

Plaintiffs also allege that Pryor converted the funds that Plaintiffs paid the Corporate Defendants pursuant to the Purchase Order. “A cause of action for conversion cannot be predicated on a mere breach of contract.” *Fesseha v. TD Waterhouse Investor Services, Inc.*, 305 A.D.2d 268, 269 (1st Dep’t 2003). Here, Plaintiffs allege that they entered into a Purchase Order

with the Corporate Defendants, Plaintiffs paid the Corporate Defendants, and the Corporate Defendants failed to perform their obligations under the Purchase Order. This conduct may give rise to a breach of contract claim against one or more Corporate Defendants, but it does not give rise to a conversion claim against Pryor who is not even alleged to have possessed the funds or exercised any control over the funds. Thus, Plaintiffs' claim for conversion against Pryor must be dismissed.

Finally, Plaintiffs allege that Defendants improperly diverted trust assets under the New York Lien Law. Plaintiffs assert that because the funds were trust assets that were received by a contractor in connection with a contract for an improvement to property, the funds could only be used for Plaintiffs' property and could not be diverted to expenditures unrelated to the project. Pryor purportedly represented that one of Plaintiffs' payments to Defendants was used to pay Defendants' overhead and debts unrelated to Plaintiffs' project. Plaintiffs argue that they are beneficiaries under the Lien Law and thus Defendants' conduct amounts to an improper diversion of funds.

Defendant Pryor argues that Plaintiffs, as real property owners, are not beneficiaries of any trust under the Lien Law and thus do not have standing to enforce the provisions of the Lien Law. Principally, Defendant asserts that Article 3-A of the Lien Law was enacted to help ensure payment to subcontractors who perform work on real property for general contractors and that owners of real property—such as Plaintiffs—are not beneficiaries under Article 3-A and do not have standing to assert a claim under the statute.

Defendant Pryor is correct. Article 3-A of the Lien Law establishes a comprehensive series of trusts to ensure that monies an owner or contractor receives for a construction project are used to pay contractors and subcontractors. A statutory trust is created for funds received in

connection with improvements to real property and either the owner of property or the general contractor on the project is a fiduciary over this statutory trust. Subcontractors, as beneficiaries of the statutory trust, may make claims against the trust for work performed. If, prior to payment of all claims brought by subcontractors against the trust, funds are used for purposes unrelated to the project, there is a diversion of trust funds and a corresponding breach of fiduciary duty. For example, where subcontractors have not been paid for their work they may assert a cause of action against an owner or general contractor for diversion of Lien Law trust funds.

Thus, “Article 3-A of the Lien Law creates trust funds out of certain construction payments or funds to assure payment of subcontractors, suppliers, architects, engineers, laborers, as well as specified taxes and expenses of construction.” *Aspro Mech. Contr. v. Fleet Bank*, 1 N.Y.3d 324, 328 (2004). “We have repeatedly recognized that the primary purpose of article 3-A and its predecessors is to ensure that those who have 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.” *Id.*

As the Lien Law makes clear, the purpose of the Lien Law was to ensure that *subcontractors* get paid for their work without necessarily having to resort to the filing of a mechanic’s lien on the real property. Thus, beneficiaries of the Lien Law are primarily subcontractors who have not been paid by owners or general contractors for work done on real property.

Plaintiffs seek to flip the purpose of the Lien Law on its head by claiming that they, as real property owners, are beneficiaries under the Lien Law. However, Lien Law § 71 identifies those considered trust beneficiaries, and owners of property are not included as beneficiaries under the statute. The only potentially applicable exception to this rule provides that owners who

enter into a “home improvement contract” with a “home improvement contractor” can be trust beneficiaries. *See* §§ 71(2)(f); 71-a. This is clearly not the case where, as here, Plaintiffs are owners of a large, multi-unit condominium development. *See Ippolito v. TJC Development, LLC*, 83 A.D.3d 57, 68-69 (2d Dep’t 2011) (finding the purpose of Lien Law § 71(2) “was to protect consumers and homeowners” and the “protection of the public against widespread home improvement fraud”).

Plaintiffs also assert that they have standing to enforce the Lien Law provisions as subrogees. Real property owners, such as Plaintiffs, that are not trust beneficiaries under the Lien Law, may nevertheless enforce trust provisions if they make payments directly to a subcontractor on behalf of a general contractor to avoid the subcontractor filing a mechanic’s lien on the owner’s property. *See* Lien Law § 77(1). Here, Plaintiffs have not alleged that they made any payments to subcontractors such that Plaintiffs have standing to maintain the cause of action as entities subrogated to the rights of a beneficiary subcontractor. Plaintiffs do not even allege the existence of any subcontractors on this project. Thus, Plaintiffs do not have standing as a subrogee to enforce the provisions of the Lien Law.

In sum, owners of real property are not generally beneficiaries under the Lien Law. The exception to that general rule for home improvement contracts is clearly inapplicable to the large development project at issue here. Further, Plaintiffs do not allege that they made any payments to subcontractors—Plaintiffs do not even allege the existence of subcontractors—and thus Plaintiffs do not have standing to enforce the provisions of the Lien Laws as subrogees. *See Broadway Houston Mack Devl. LLC v. Kohl*, 870 N.Y.S.2d 748, 754 (N.Y. Sup. Ct. 2008) (stating that “[a]n owner is not a beneficiary enumerated under Lien Law § 71(2)” and, absent subrogation, is not entitled to recover trust funds), *aff’d*, 71 A.D.3d 937 (2d Dep’t 2010). For

these reasons, Plaintiffs are not beneficiaries under the Lien Laws and do not have standing to assert a violation of the Lien Laws or seek an accounting of any purported trust assets. Plaintiffs' claims for diversion of trust funds and an accounting are dismissed.

Accordingly, it is hereby

ORDERED that Defendant Pryor's motion to dismiss is granted in its entirety. The Clerk is directed to dismiss and sever Defendant Samuel F. Pryor IV from the action; and it is further

ORDERED that the remaining parties in the action appear for a compliance conference on June 4, 2019 at 9:30 a.m.

5/7/2019

DATE

CHECK ONE:

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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


BARRY R. OSTRAGER, J.S.C.