

MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 6

VANGUARD EQUIPMENT RENTALS, INC., etc.	x	INDEX NO.: 22504/00
- against -		BY: PRICE, J.
CAB ASSOCIATES, et al.		DATED: NOVEMBER 4, 2002

x

Plaintiff Vanguard Equipment Rentals, Inc. has moved for an order, inter alia, directing defendant CAB Associates to produce a verified statement from its books of account containing the information required by Lien Law §75. The defendants have cross-moved for summary judgment dismissing the complaint against them.

In May 1993, The New York State Department of Transportation and defendant CAB Associates entered into a contract whereby the latter obligated itself to construct Beach Lane Bridge over Quantuck Canal in Westhampton, New York. Defendant CAB Associates subcontracted work to Vista Engineering Corp., which rented a crane, trucks, and other equipment from plaintiff Vanguard for use on the project. The plaintiff contends that it is a beneficiary of the trust created by Article 3-A of the Lien Law and that CAB is the trustee of funds that it has received from the Department of Transportation. By complaint dated September 13, 2000, the plaintiff asserted five causes of action against the defendants, including two arising under Article 3-A of

the Lien Law (the first and the third). Defendant CAB moved to dismiss the complaint against it pursuant to CPLR 3211, and the Appellate Division, Second Department, modifying and affirming the order of this court, upheld the dismissal of the second, fourth, and fifth causes of action, which were for punitive damages, breach of contract, and foreclosure of a lien respectively. The Appellate Division permitted the first and third causes of action to stand, holding, inter alia: "the plaintiff has sufficiently stated causes of action as a Materialman under Lien Law § 71(2) entitling it to seek trust assets ***." (Vanquard Equipment Rentals, Inc. v Cab Associates, 288 AD2d 306.)

On or about December 1, 2000, the plaintiff requested a verified statement from defendant CAB pursuant to the Lien Law, but the defendant refused the request. The plaintiff has moved for an order compelling the defendants to produce the verified statement, and the defendants have cross-moved for summary judgment.

Defendant CAB alleges that it paid \$2,285,804.25 to Vista or to creditors of Vista pursuant to its instructions. Nevertheless, on or about August 18, 1998, Vista filed a notice of lien on public improvement, claiming \$145,000 as the amount unpaid to it. By letter dated June 15, 1999, Robert C. Stewart, on behalf of Vista, requested that defendant CAB issue a check payable to Vista and American Steel Erectors in the amount of \$71,086.90 representing "the final payment and closeout" on the project.

According to the defendants, CAB and Vista subsequently reduced the "final payment and closeout" figure to zero because of back charges to Vista, including liquidated damages and engineering charges claimed by the Department of Transportation. Ghusalal L. Patel, the President of Vista, subsequently gave a Satisfaction of Public Improvement Lien dated September 1, 1999, acknowledging that the debt claimed in its notice of lien had been satisfied and consenting to the discharge of the lien.

The defendants contend that the documentary evidence establishes that CAB owes no more money to Vista. On the other hand, plaintiff Vanguard contends that the notice of lien and satisfaction of lien only relate to part of the debt owed by defendant CAB to Vista. Robert Stewart, the plaintiff's president and Vista's construction manager, denies that defendant CAB and Vista reached an agreement on the amount owed and disputes the manner in which CAB took credit for back charges. The plaintiff further contends that the statement it seeks pursuant to the Lien Law would clarify whether defendant CAB paid all of the sums owed to Vista.

"Article 3-A of the Lien Law (Lien Law §§70-79-a) 'create[s] 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 ***.'" (Canron Corp. v City of New York, 89 NY2d 147,

153, quoting Caristo Constr. Corp. v Diners Fin. Corp., 21 NY2d 507, 512.) Materialmen are also beneficiaries of the contractor's trust. (See, Lien Law §71 [2][a].) The contractor must hold and apply trust assets for certain expenditures arising out of the improvement of real property and incurred in the performance of its contract, including the "payment of claims of subcontractors." (Lien Law § 71[2][a]; Canron Corp. v City of New York, supra.) "The subcontractor's claim for payment for work performed on the improvement is thus deemed a 'trust claim' (Lien Law § 71[3][b]), and the subcontractor is designated a 'beneficiary' of the contractor's 'trust' (Lien Law § 71[4]). An improper diversion of the contractor's trust assets occurs when any such trust asset is paid, transferred or applied for a nontrust purpose, that is, for any purpose other than the expenditures authorized in section 71(2), before all of the trust claims have been paid or discharged (Lien Law § 72[1])." (Canron Corp. v City of New York, supra, 154.) Lien Law §77(1) provides in relevant part: "A trust arising under this article may be enforced by the holder of any trust claim *** in a representative action brought for the benefit of all beneficiaries of the trust." (See, In re Elm Ridge Associates, 234 F3d 114.) The holder of a trust claim can enforce his rights only "in a representative action brought for the benefit of all beneficiaries of the trust" and any relief that may be granted "shall be deemed to be for the benefit of the

entire class of trust beneficiaries * * *." (Lien Law § 77[1], [3][b]; Glazer v Alison Homes Corp., 62 Misc2d 1017, affd, 36 AD2d 720; see, M. Gold & Son, Inc. v National Commercial Bank & Trust Co., 63 AD2d 786.) The beneficiary may seek, inter alia, the recovery of damages for breach of trust. (Lien Law §77 [3][a][I].)

That branch of the plaintiff's motion which is for an order pursuant to Lien Law § 76(1) directing the defendants to produce a verified statement setting forth the entries with respect to the subject trust contained in CAB's books and records is granted. The defendants shall produce the verified statement within twenty days after the service of a copy of the order to be entered hereon with notice of entry. Lien Law § 76(1) authorizes "[a]ny beneficiary of the trust holding a trust claim" to examine the trustee's books or receive a verified statement concerning the trustee's books. (See, Innovative Drywall, Inc. v Crown Plastering Corp., 224 AD2d 664; Abjen Properties, L.P. v Crystal Run Sand & Gravel, Inc., 168 AD2d 783.)

The defendants' cross motion for summary judgment is denied without prejudice to renewal after the completion of disclosure. (See, CPLR 3212[f]; Barletta v Lewis, 237 AD2d 238; Welsh v County of Albany, 235 AD2d 820; Wee v City of Rome, 233 AD2d 876.) The plaintiff's contention that the production of the verified statement required by Lien Law § 76(1) will shed light on the relevant issues has merit. On the present state of the

record, the court cannot determine as a matter of law whether defendant CAB has paid all of the debt owed to Vista. The conflicting allegations of the parties have created issues of fact and credibility which are now inappropriate for summary judgment treatment. (See, Dayan v Yurkowski, 238 AD2d 541; T&L Redemption Center Corp. v Phoenix Beverages, Inc., 238 AD2d 504; First New York Realty Co., Inc. v. DeSetto, 237 AD2d 219.) The court notes in regard to the individual defendants that a corporate principal who knowingly participates in the diversion of assets made trust funds by operation of Article 3-A of the Lien Law is individually liable for such conduct. (See, Atlas Building Systems, Inc. v Rende, 236 AD2d 494; South Carolina Steel Corp v Miller, 170 AD2d 592; Scriven v Maple Knoll Apartments, Inc., 46 AD2d 210.) Finally, the court notes that the plaintiff's alleged failure to comply with class action requirements can be cured. (See, Atlas Bldg. Systems, Inc. v Rende, supra.)

_____That branch of the plaintiff's cross motion which is for an order permitting it to serve an amended complaint asserting a cause of action for unjust enrichment is granted. The plaintiff shall serve its amended complaint within twenty days after the service of a copy of this order with notice of entry. "A cause of action for unjust enrichment arises when one party possesses money or obtains a benefit that in equity and good conscience they should not have obtained or possessed because it rightfully belongs to

another ***." (Mente v Wenzel, 178 AD2d 705, 706.) The plaintiff alleges that the defendant CAB possesses money which should rightfully have been paid to it, and the allegation has raised issues of fact which cannot be resolved here. A party will be permitted to amend his pleading where the proposed cause of action is not patently lacking in merit. (See, McKiernan v McKiernan, supra.)____

_____Settle order.

J.S.C.