

A.F. Supply Corp. v FPG Maiden Lane LLC

2024 NY Slip Op 32253(U)

July 5, 2024

Supreme Court, New York County

Docket Number: Index No. 152511/2022

Judge: Paul A. Goetz

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. PAUL A. GOETZ PART 47

Justice

-----X

A.F. SUPPLY CORPORATION,

Plaintiff,

- v -

FPG MAIDEN LANE LLC, RAY BUILDERS INC., JACOB MERMELSTEIN, JOEL KESTENBAUM, And "JOHN DOE No. 1" through "JOHN DOE No. 100," said names being fictitious, true names being those unknown individuals and/or entities with an interest in, or who are liable for the diversion of trust funds pursuant to Article 3-A of the Lien Law of the State of New York in connection with the Improvement of, real property known as 161 Maiden Lane, New York, New York 10038, designated on the tax map as Block 72, Lots 2, 1101, through 1163, 1165, 1167 through 1192 and 1194 through 1198, New York County,

Defendants.

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INDEX NO. 152511/2022
MOTION DATE 05/04/2023,
06/20/2023
MOTION SEQ. NO. 002 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 12, 2, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 122, 123, 125, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 121, 124, 147, 148, 149

were read on this motion to/for DISMISS.

BACKGROUND

Plaintiff alleges that it contracted with defendant Ray Builders Inc. ("RBI") to perform work and provide materials for the development of the property, known as 161 Maiden Lane Condominium, which is owned by defendant FPG Maiden LLC ("FPG") (NYSCEF Doc No. 12 ¶¶ 10-12). Defendant Joel Kestenbaum is allegedly responsible for providing accounting services, receiving payments, and paying contractors at FPG, and defendant Jacob Murlmelstein is allegedly responsible for the same at RBI (*id.* ¶¶ 5, 9). Plaintiff alleges it completed the

contracted work between June 7, 2019, and August 23, 2021, but it was not paid \$1,178,448.59 of \$1,244,432.81 owed for the work due on September 23, 2021 (*id.* ¶¶ 13-14). Plaintiff filed a mechanic's lien on 161 Maiden Lane on August 23, 2021, expressly naming FPG as the owner of the property and RBI as the party that hired plaintiff (NYSCEF Doc No. 2). RBI cross-claimed against FPG for breach of contract, alleging that FPG did not pay its outstanding balance of \$11,546,584.60 to RBI (NYSCEF Doc No 66 ¶¶ 63-83).

In MS #2, Defendants FPG and Kestenbaum move to dismiss the amended complaint as against them, or alternatively, to stay the first cause of action for foreclosure of the mechanics lien. Plaintiff cross-moves to amend its first amended complaint based on FPG's alleged assumption of RBI's liabilities; and to consolidate this action with either *Valley National Bank v FPG Maiden Lane, LLC, et al.*, Sup Ct, NY County, Index No. 657252/2020 ("Valley Case"), *Pizzarotti LLC v FPG Maiden Lane, LLC, et al.*, Sup Ct, NY County, Index Number 651697/2019 ("Pizzarotti Case"), or *FPG Maiden Lane, LLC et al. v Bank Leumi USA et al.*, Sup Ct, NY County, Index Number 653584/2020 ("Leumi Case").¹

In MS #3, defendant FPG moves to dismiss or, alternatively, to stay RBI's crossclaim against it pursuant to CPLR § 3211(a)(1), (4), (7) and (10); RPAPL § 1301; and CPLR § 2201. FPG alleges that RBI's crossclaim seeks relief identical to that which it seeks in a separate action against FPG (*Ray Builders Inc. v FPG Maiden Lane, LLC*, Sup Ct, NY County, Index No. 651219/2023) ("Ray Builders Case"), and that it should not be addressed until the Valley Case is resolved. The Ray Builders Case was stayed on April 19, 2024, pending the resolution of the Valley Case (NYSCEF Doc No 50 [status conference order in *Ray Builders Inc. v FPG Maiden Lane, LLC*, Sup Ct, NY County, Index No. 651219/2023]).

¹ Plaintiff does not state which case this action should be consolidated with, and instead leaves it up to the court.

DISCUSSION

Mot. Seq. No. 2

i. Dismiss Complaint or Stay Mechanic's Lien Cause of Action

When determining if a complaint may be dismissed for failing to state a cause of action pursuant to CPLR § 3211, “the complaint must be liberally construed, the allegations therein taken as true, and all reasonable inferences must be resolved in plaintiff’s favor” (*Gorelik v Mount Sinai Hosp. Ctr.*, 19 AD3d 319, 319 [1st Dept 2006]). The motion “must be denied if from the pleading’s four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*id.* [internal quotations omitted]). However, “factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently or clearly contradicted by documentary evidence are not entitled to such consideration” (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003]).

At the outset, plaintiff’s complaint provides no legal basis for holding Kestenbaum personally liable under any of the stated causes of action. It merely states that Kestenbaum is “the individual at FPG [] responsible for accounting, receiving payments, and paying contractors and/or subcontractors on behalf of defendant FPG” and that he requested the improvements at issue in this action (NYSCEF Doc No 12, ¶¶ 9, 15). None of the causes of action against him state with particularity how he, as opposed to FPG, acted unlawfully. Additionally, while plaintiff notes that it has not yet been able to conduct discovery on this matter, it fails to state any basis for the belief that such discovery would uncover factual support for its claims against Kestenbaum. Accordingly, the complaint will be dismissed as against Kestenbaum, and the causes of action against FPG will be considered for a stay or dismissal.

Turning to plaintiff's claims against FPG, CPLR § 2201 provides that "the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just." Plaintiff argues that a stay "requires a complete identity of the parties, the causes of action and the judgment sought" (*952 Assoc., LLC v Palmer*, 52 AD3d 236, 237 [1st Dept 2008]). However, courts have granted a stay of a mechanic's lien foreclosure action where "substantial identity" exists between two actions, and "neither party will suffer undue detriment or gain undue advantage by having [the prior-commenced action] determined first (*Trinity Prods., Inc. v Burgess Steel LLC*, 18 AD3d 318, 319 [1st Dept 2005]).

As defendants note, the Valley Case includes FPG, RBI, and various other lienors on the same property at issue here, and thus has a substantial identity with the present case. In addition, defendants correctly note that the outcome of the Valley Case—specifically, the lender's cause of action seeking to foreclose on its mortgage lien, which raises priority issues—will have a great impact on the subcontractors' attempts to foreclose on subordinate mechanic's liens. Accordingly, plaintiff's first cause of action to foreclose on the mechanic's lien will be stayed pending the court's determination of the lender's cause of action to foreclose on the mortgage lien in the Valley Case. The remaining causes of action, however, may be addressed.

"[A]n action to enforce a trust pursuant to Lien Law § 77 must be brought as a class action" (*ADCO Elec. Corp. v McMahon*, 38 AD3d 805, 806-07 [2nd Dept 2007]; see also NY CLS Lien § 77 ["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"]). Plaintiff has appealed this court's decision and order dated February 23, 2023 which denied its cross-motion to certify this action as a class action (NYSCEF Doc No 64), but presently, this is not a class action suit. Accordingly, plaintiff's second cause of action for a trust fund violation

pursuant to Lien Law Article 3-A will be dismissed, with leave to re-plead if its appeal for class certification is granted. And, since plaintiff's seventh cause of action for sanctions and attorneys' fees is "based on any found violation of Article 3-A" (NYSCEF Doc No 12 ¶ 48), it will also be dismissed with leave to re-plead under the same conditions.

ii. Amend the Complaint

As noted above, by decision and order dated February 23, 2023, plaintiff's cross-motion on MS #1 to amend and certify this action as a class action was denied (NYSCEF Doc No 60). Plaintiff appealed that decision, and the First Department has not yet decided the appeal (NYSCEF Doc No 64). Plaintiff's cross-motion to MS #2 again seeks to amend the complaint, but this time, "Plaintiff seeks to amend its pleadings based on defendant FPG's agreement to be liable for the contractual obligations of defendant RBI" (NYSCEF Doc No 119).²

"[W]here there has been an inordinate delay in seeking leave [to amend a complaint,] the plaintiff must establish a reasonable excuse for the delay, and submit an affidavit to establish the merits of the proposed amendment" (*Fuentes v City of New York*, 3AD3d 549, 550 [2nd Dept 2004]). Here, plaintiff seeks to amend the complaint more than a year after the original complaint was filed (NYSCEF Doc No 1) based on a letter dated March 26, 2019 from FPG to plaintiff in which FPG stated: "Owner will be legally responsible for all of [RBI]'s contractual obligations to you under your subcontract on the Project" (NYSCEF Doc No 105). Plaintiff offers no explanation for its delay in raising this matter in its complaint, though it appears the letter was in its possession when the action was commenced in 2022. Accordingly, the part of plaintiff's cross-motion seeking to amend the complaint will be denied.

² It is noted, however, that the proposed second amended complaint also includes various changes that seem to be aimed at curing deficiencies in the pleading (NYSCEF Doc No 119).

iii. Consolidation

Plaintiff argues that this case should be consolidated with the Valley Case, or the Pizzarotti Case, or the Leumi Case because they involve common issues of law and fact. Defendants argue, however, that this case does not share sufficient commonality of issues and parties to be consolidated, and in any event, the cases are at markedly different stages of litigation.

The three actions suggested by plaintiff for consolidation were commenced in 2019 and 2020, and in each, the note of issue was filed approximately one year ago, whereas the instant action was commenced in 2022 and a preliminary conference has not yet been held. Since the “actions are at vastly different stages of litigation[,] consolidation would not serve judicial economy or the interest of justice” (*Krembs v NYU Langone Hosps.*, 214 AD3d 453, 455 [1st Dept 2023]); rather, “[c]onsolidation would result in undue delay in the resolution” of any of the three actions with which it was joined (*Barnes v Cathers & Dembrosky*, 5 AD3d 122, 122 [1st Dept 2004]). Accordingly, the part of plaintiff’s cross-motion seeking consolidation will be denied.

Mot. Seq. No. 3

Defendant FPG argues that RBI’s crossclaim in this action—which seeks to recover from FPG the alleged outstanding balance of \$11,546,584.60 for the construction services it rendered on the project—must be dismissed or stayed because, *inter alia*, it is identical to the claims asserted in its complaint against FPG in the Ray Builders Case. FPG is correct; in the Ray Builders Case, RBI seeks the same recovery on the same factual and legal basis. “If this [crossclaim] were permitted to proceed, identical parties would be litigating [an] identical claim[] based on identical [contractual obligations], in two different [courts], presenting a risk of

inconsistent judgments” (*Alvarez & Marshal Valuation Servs., LLC v Solar Eclipse Inv. Fund III, LLC*, 216 AD3d 447, 448 [1st Dept 2023]). Accordingly, RBI’s crossclaim in this action will be dismissed.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendants FPG and Kestenbaum’s motion to dismiss the complaint or stay plaintiff’s first cause of action (MS #2) is granted to the extent that:

- (i) the complaint is dismissed as against Kestenbaum;
- (ii) plaintiff’s first cause of action to foreclose on the mechanic’s lien is stayed pending the court’s determination of the lender’s cause of action to foreclose on the mortgage lien in the Valley Case (Index No 657252/2020); and
- (iii) plaintiff’s second cause of action for a trust fund violation pursuant to Lien Law Article 3-A and seventh cause of action for sanctions and attorneys’ fees are dismissed, with leave to re-plead if its appeal for class certification is granted;

and it is therefore

ORDERED that the caption in this matter is hereby amended as follows:

A.F. SUPPLY CORPORATION,

Plaintiff,

FPG MAIDEN LANE LLC, RAY BUILDERS INC., JACOB MERMELSTEIN, and “JOHN DOE No. 1” through “JOHN DOE No. 100,” said names being fictitious, true names being those unknown individuals and/or entities with an interest in, or who are liable for the diversion of trust funds pursuant to Article 3-A of the Lien Law of the State of New York in connection with the Improvement of, real property known as 161 Maiden Lane, New York, New York 10038, designated on the tax map as Block 72, Lots 2, 1101, through 1163, 1165, 1167 through 1192 and 1194 through 1198, New York County,

Defendants.

And it is further

ORDERED that all papers, pleadings, and proceedings in the above-entitled action be amended in accordance with this change, without prejudice to the proceedings heretofore had herein; and it is further

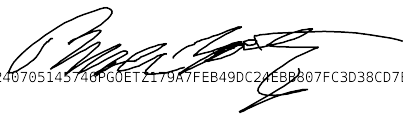
ORDERED that counsel for Kestenbaum shall, within 30 days of entry of this order, serve a copy of this order with notice of entry upon the County Clerk and the Clerk of the General Clerk’s Office, who are directed to mark the court’s records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website); and it is further

ORDERED that the part of plaintiff’s cross-motion seeking to amend the complaint (MS #2) is denied; and it is further

ORDERED that the part of plaintiff’s cross-motion seeking to consolidate this action with one of three related actions (MS #2) is denied; and it is further

ORDERED that defendant FPG’s motion to dismiss RBI’s crossclaim against it (MS #3) is granted, and the crossclaim is dismissed.


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<u>7/5/2024</u> DATE	<hr/> PAUL A. GOETZ, J.S.C.			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE