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Access Plumbing Corp. v 1184 Brighton Dev., LLC
2011 NY Slip Op 50599(U) [31 Misc 3d 1212(A)]
Decided on April 14, 2011
Supreme Court, Kings County
Demarest, J.
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Decided on April 14, 2011

Supreme Court, Kings County

Access Plumbing Corp., on behalf of itself and on behalf of all persons entitled to share in the trust funds received by the, defendants pursuant to lien law 3-A in connection with the construction at 1180-84 brighton beach avenue, brooklyn, new york, Plaintiff,

against

1184 Brighton Development, LLC, et al., Defendants.

34488/08

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Carolyn E. Demarest, J.

Upon the foregoing papers, in this action under Lien Law article 3-A, plaintiff Access Plumbing Corp. (plaintiff) moves for an order: (1) pursuant to CPLR 3025 (b), [*2]granting it leave to amend its complaint, and (2) pursuant to Lien Law § 77 (1) and CPLR 901, waiving the requirement of numerosity and determining that this action may be maintained as a class action, describing the class as set forth in the proposed second amended complaint, and directing the manner of service of the notice on the members of the class pursuant to CPLR 904 (c).

1184 Brighton Development, LLC (Brighton), as owner, entered into a contract with DYA Construction Inc. (DYA), as general contractor, for the improvement of real property known as condominium units 2A, 2C, 2E, 3A, 3C, 3D, 3E, 4A, 4B, 4C, 4D, 5A, 5B, 6B, 6D, 7A, 7B, and 7C, located at 1180-84 Brighton Beach Avenue, in Brooklyn, New York (the premises). On or about June 30, 2005, plaintiff and DYA entered into an agreement, under which plaintiff agreed to provide plumbing and sprinkler work for the premises for the sum of $780,000. From June 1, 2006 to May 28, 2008, DYA requested plaintiff to provide additional work, raising the total agreed upon price. Plaintiff claims that it performed all the work required by the agreement and the extra work required by the modifications to the agreement, but that DYA has refused to pay it $307,803.34 remaining owed to it as the balance due for such work.

The premises were completed on September 16, 2008, when the New York City Department of Buildings issued a final certificate of occupancy for such premises. On November 25, 2008, within eight months after the final performance of the work and furnishing of materials by it, plaintiff filed a notice of mechanic's lien in the sum of $307,803.34 against the premises. Brighton sold several of the condominium units, and received payments for them by the buyers. Such sales included a sale on December 2, 2008 to Roman Polei and Lada Agayeva, in which Brighton received the sum of $650,000 from them as consideration for the conveyance of Units 4C and P7 (the corresponding parking space for the unit) at the premises.

Plaintiff asserts that pursuant to Lien Law § 70 (5), the consideration for the conveyance to Roman Polei and Lada Agayeva constituted trust funds, and that Brighton became a trustee of these trust funds. A payoff letter, HUD-1 form, and partial release of mortgage reflect that Brighton used $596,947.50 of these monies to pay off a first mortgage loan issued to it by Capital One, N.A. (Capital One) prior to paying plaintiff's claim. Plaintiff alleges that pursuant to Lien Law § 70 (5), these monies were trust funds, and that no notice of lending pursuant to Lien Law § 73 (3) was filed nor was it given actual notice of such transfer of funds. Plaintiff asserts that Capital, upon receipt of these funds, became a trustee of the trust funds, and, therefore, had a duty to hold and apply the these trust funds for payment of the cost of improvements pursuant to Lien Law § 71, but, instead, it paid these funds to itself.

On December 26, 2008, plaintiff filed this action against Brighton; Igor Fleyshmakher (who is a member and principal of Brighton); DYA; Capital One; Bay Supply Corp. (Bay Supply), MNP Mechanical Contracting Corp. (MNP), and VIP Fire Sprinkler, Inc. (VIP) (who had also filed mechanic's liens against the premises); Roman [*3]Polei and Lada Agayeva (who, as noted above, are the purchasers of Units 4C and P7 at the premises); JP Morgan Chase Bank, N. A. (Chase) (which provided a mortgage loan to Roman Polei and Lada Agayeva which they used to purchase Units 4C and P7); and John Doe No.1 through John Doe #100 (being fictitious names of entities and/or individuals who have or claim an interest in or lien upon the premises). On February 4, 2009, plaintiff filed an amended complaint.

On March 18, 2009, Platte River Insurance Company (Platte), as surety, executed a Release of Lien Bond to Brighton, as principal, in the penal sum of $338,583.67, pursuant to Lien Law § 19 (4) and § 21 (5), thereby substituting the bond for plaintiff's mechanic's lien. On March 23, 2009, Platte also filed Releases of Lien Bonds for the mechanic's liens filed by Bay Supply, MNP, and VIP. On July 8, 2009, plaintiff filed and served a supplemental summons and second amended complaint, which added Platte as a defendant, based upon the bond issued to discharge its mechanic's lien.

Plaintiff's complaint alleges a first cause of action against DYA for breach of contract, a second cause of action against all defendants for foreclosure of its mechanic's lien (declaring that it has a valid mechanic's lien and granting it a judgment from the bond filed to discharge its mechanic's lien), and third, fourth, and fifth causes of action against Brighton, Igor Fleyshmakher, and Capital One, respectively, pursuant to Lien Law article 3-A, for diversion of trust funds. Plaintiff's third and fifth causes of action seek a judgment: (1) declaring that all monies received by Brighton and Capital One for the conveyances of the units at the premises are trust funds, that Brighton and Capital One are trustees of such funds, that all others who have joined in this action are beneficiaries entitled to share in the trust funds, that any diversion of trust funds should be set aside, and that Brighton and Capital One should account for monies received by them; (2) enjoining Brighton and Capital One from further diversion of the trust funds; and (3) awarding it and all others who have been joined in this action compensatory and punitive damages. Plaintiff's fourth cause of action seeks compensatory and punitive damages against Igor Fleyshmakher based upon his alleged participation in the diversion of trust funds.

Plaintiff, by its motion, requests leave to amend its complaint pursuant to CPLR 3025 (b), and it has annexed a proposed third amended complaint. Plaintiff, by such proposed amendment, seeks to delete the names of Roman Polei, Lada Agayeva, and Chase in the caption as well as any reference to them in the complaint. Plaintiff asserts that since the notice of pendency of this action has been vacated by stipulation of the parties upon the filing of a bond with the Clerk of the court, these defendants are no longer necessary parties to this action. Plaintiff also seeks to amend the status of its mechanic's lien to reflect that the notice of pendency has been discharged upon stipulation and the filing of Platte's bond, and to delete all references to foreclosure of the lien. In addition, plaintiff seeks to remove those defendants identified as "John Doe #1" through "John Doe #2" from the caption since it now believes that there are no other persons who [*4]should be named as a defendant other than those contained in the caption as proposed to be amended. Plaintiff further seeks to delete the names of Bay Supply, MNP, and VIP as defendants since they were named as such only because they were necessary parties under RPAPL 1311 (3)

in order to determine the priority of their liens, and their liens have now been discharged by bonds. Plaintiff additionally seeks to add a demand for reasonable attorney's fees and costs to be awarded to the representatives of the class based on the reasonable value of legal services rendered, and to allow recovery of the amount awarded against defendants pursuant to CPLR 909.

Brighton, DYA, Igor Fleyshmakher, Capital One, and Platte (collectively, defendants), in their opposition papers, do not oppose these proposed amendments. Thus, since it appears that such changes to plaintiff's prior amended complaint are warranted, these amendments should be granted (*see* CPLR 3025 [b]).

Plaintiff also seeks, however, to amend the value of the change orders and the resulting agreement between it and DYA to reflect certain documentary evidence. In support of this proposed amendment, plaintiff has submitted the sworn affidavit of its president, Dmitriy Gorelik, in which he attests that the prior amended complaint contained errors.

Specifically, the amended complaint alleged that from June 1, 2006 to May 28, 2008, DYA requested plaintiff to provide additional work in the sum of $125,174.37, and that the total agreed upon price and value of its services in accordance with the agreement with DYA and the modifications to such agreement was $905,174.37. Dmitriy Gorelik asserts that these sums failed to take into account two invoices which were for the sums of $2,100 and $17,600. Dmitriy Gorelik claims that such invoices were not taken into account in the amended complaint because they were only discovered by him and plaintiff's counsel as they were preparing their discovery responses for defendants. Dmitriy Gorelik also asserts that the same goods and/or services in the sum of $2,500 were included on two different invoices which resulted in this sum being inadvertently billed to defendants twice. Dmitriy Gorellik states that upon subtracting the sum of $2,500 and adding the $2,100 and $17,600 invoices, the amount agreed upon for additional work should be changed from $125,174.37 to $147,374.37, and that the total agreed upon price and value of plaintiff's services should be changed from $905,174.37 to $922,374.37.

Defendants oppose plaintiff's motion insofar as it seeks leave to amend its complaint in this respect so as to increase the agreed upon price and value of the additional work under the contract between DYA and plaintiff based upon the two alleged additional change orders. However, pursuant to CPLR 3025 (b), " [i]n the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit'" (*Pansini Stone Setting, Inc. v Crow & Sutton Assoc.*, Inc., 46 AD3d 784, 786 [2007], quoting *G.K. Alan Assoc., Inc. v Lazzari*, 44 AD3d 95, 99 [2007], *affd* 10 NY3d [*5]941 [2008]; *see also* CPLR 3025 [b]; *Trataros Constr., Inc. v New York City Hous. Auth.*, 34 AD3d 451, 452-453 [2006]; *Old World Custom Homes, Inc. v Crane*, 33 AD3d 600, 600 [2006]; *Melendez v Bernstein*, 29 AD3d 872, 872 [2006]; *Zacher v Oakdale Islandia Ltd. Partnership*, 211 AD2d 712, 714 [1995]; *Hempstead Concrete Corp. v Elite Assoc.*, 203 AD2d 521, 523 [1994]).

Defendants initially argue that although plaintiff asserts that it has annexed copies of these change orders as exhibit 11, there is no exhibit 11 included in the copy of plaintiff's motion papers received by them. In this regard, it is noted that there is also no exhibit 11 attached to the

motion papers submitted by plaintiff to the court. Defendants maintain that due to plaintiff's failure to annex this exhibit, such amendment should be denied.

While this was a significant omission, plaintiff, in response, asserts that this omission was due to an inadvertent error. In any event, defendants were not prejudiced by this omission since they were already in possession of these alleged change orders, which, they assert, were provided to them when plaintiff produced discovery documents. Indeed, defendants have attached the two invoices at issue to their opposition papers, thereby providing them to the court.

Defendants also argue that leave to amend plaintiff's complaint in this respect should be denied because the alleged change orders were dated May 3, 2007 and June 5, 2007, almost a year and a half before plaintiff's original summons and complaint were filed on December 26, 2008. Defendants contend that plaintiff knew or should have known about the change orders at the time that it drafted its original complaint, and could have included them in its complaint at that time, rather than first assert them two years after the commencement of this action. Defendants maintain that to permit plaintiff to amend its complaint for a third time to now include these change orders is prejudicial to them.

Plaintiff, however, is not attempting to increase the amount claimed to be owed by DYA to it, or the amount demanded by it in its complaint. Rather, the total amount which plaintiff claims is owed to it is still $307,803.34, as stated in plaintiff's prior amended complaint. Plaintiff is merely changing the amount which DYA agreed to pay it based upon change orders, and the amount on which the sum remaining owed to it is based. Thus, plaintiff maintains that in calculating the total amount owed to it, it had already included the two invoices in the total damages demanded. Moreover, these invoices were produced by plaintiff in discovery, and defendants were already aware of the amount claimed by plaintiff. Indeed, defendants questioned Dmitriy Gorelik about these invoices at his deposition. In any event, plaintiff will still have to prove its damages at trial in order to recover them. Consequently, defendants have not shown prejudice or surprise resulting from plaintiff's delay (*see First Sealord Sur., Inc. v Vesta 24 LLC,* 55 AD3d 423, 424 [2008]; *Hempstead Concrete Corp.*, 203 AD2d at 523).

Defendants also argue that the alleged change orders are invoices of MNP, who is [*6]a subcontractor that plaintiff hired to perform work at the premises on plaintiff's behalf. Defendants point to the fact that Dmitriy Gorelik testified, at his deposition, that these change orders refer to extra work for gas piping, and that they were produced by one of plaintiff's mechanical subcontractors for that portion of the work. Defendants assert that they were not a party to any agreement between plaintiff and MNP for MNP's services to be provided on plaintiff's behalf at the premises, and, thus, they are not responsible for any outstanding invoices in connection with any services that MNP provided to plaintiff. Defendants contend that plaintiff is attempting to pass off outstanding invoices and balances that it owes its subcontractor as change orders to the contract between DYA and plaintiff.

Defendants' argument is unavailing. While the invoices are addressed as being billed by MNP to plaintiff, this is not dispositive of the issue of whether MNP was performing work for plaintiff, as part of a change order by DYA, which was for work that DYA had requested plaintiff to perform and for which plaintiff was entitled to be paid by DYA. In fact, the May 3, 2007 invoice

states that it is a change order "as per owner request." Thus, the issue of whether these invoices are change orders and are properly billable to defendants is a question of fact to be resolved at trial. Therefore, since the proposed amendment has not been shown to be palpably insufficient or devoid of merit, it must be allowed (*see Trataros Constr., Inc.*, 34 AD3d at 452-453; *Old World Custom Homes, Inc.*, 33 AD3d at 600).

In turning to plaintiff's motion insofar as it seeks class action certification, the court notes that this is an action to enforce a trust under Lien Law § 77. "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 NY3d 324, 328 [2004], quoting *Caristo Constr. Corp. v Diners Fin. Corp.*, 21 NY2d 507, 512 [1968]; *see also* Lien Law §§ 70, 71). "These statutory provisions were intended to insure that funds obtained for financing of an improvement of real property and moneys earned in the performance of a contract for either a privately owned improvement or a public improvement will in fact be used to pay the costs of that improvement'" (*Canron Corp. v City of New York*, 89 NY2d 147, 153-154 [1996], quoting 1959 Report of NY Law Rev Commn, at 209, reprinted in 1959 NY Legis Doc No. 65 [F], at 25; *see also West-Fair Elec. Contrs. v Aetna Cas. & Sur. Co.*, 87 NY2d 148, 157-158 [1995]).

These funds and any rights that the recipient of those funds has to receive other funds in connection with the project constitute assets of a trust held by the recipient as trustee on behalf of the subcontractors and materialmen that perform work on the project (*see* Lien Law § 70). Any failure of the trustee to apply trust funds received for the purpose of paying contractors, subcontractors, or materialmen beneficiaries of the trust or to otherwise apply the trust funds for a proper purpose is a diversion of trust funds (*see* Lien Law § 72). [*7]

In defining trusts, Lien Law § 70 (5) (d) provides that "[t]he assets of the trust of which the owner is trustee [include] the funds received by [it] and [its] rights of action for payment thereof . . . as consideration for a conveyance recorded subsequent to the commencement of the improvement and before the expiration of four months after the completion thereof." As noted above, plaintiff asserts that Brighton is a trustee of the funds received as consideration for conveyance of Units 4C and P7 of the premises, that it diverted these funds by paying them to Capital, that Capital participated in this diversion, and that Igor Fleyshmakher, as a principal of Brighton, also participated in this diversion. Thus, plaintiff has alleged Lien Law article 3-A trust claims, which may be asserted on behalf of the beneficiaries of the trust (*see Edgewater Constr. Co. v 81 & 3 of Watertown*, 1 AD3d 1054, 1057 [2003]; *Atlas Bldg. Sys. v Rende*, 236 AD2d 94, 495 [1997]; *Mike Bldg. & Contr., Inc. v Just Homes, LLC*, 27 Misc 3d 833, 851-853 [2010]; *Trofien Steel & Constr. Inc. v Rybak*, 26 Misc 3d 1223[A], 2010 NY Slip Op 50235[U], *6 [Sup Ct, Kings County 2010]).

Plaintiff, in support of its instant motion insofar as it seeks class action certification, notes that under Lien Law § 77 (1), a trust arising under Lien Law article 3-A must be enforced by the holder of any trust claim "in a representative action brought for the benefit of all beneficiaries of the trust." Lien Law § 77 (1) specifies that in any such action, "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 [CPLR] article nine . . .; provided, however, that in determining

whether the prerequisites of a class action have been satisfied, the provisions of [CPLR 901 (1) (a)] . . . may be waived at the discretion of the court."

Plaintiff asserts that the class should be certified as all persons and/or entities which provided materials and/or services for the improvement of the premises, and whose claim accrued on or before September 16, 2008 (the date of the completion of the premises). Plaintiff states that it has located three other creditors who have filed mechanic's liens against the premises and who are Lien Law article 3-A creditors, namely, Bay Supply, MNP, and VIP. Plaintiff further states that it has also located three additional creditors, who may belong to the class of creditors comprising Lien Law article 3-A creditors, which, it believes, are owed money as a result of having provided labor and/or materials at the premises in connection with the subject improvements at the premises, but who have not filed mechanic's liens. These creditors are Antonov Stone Work Corp. (Antonov), Euro-Tek Floors, Inc. (Euro-Tek), and Polyphase Electrical Contractors, Inc. (Polyphase).

CPLR 901, entitled "Prerequisites to a class action," provides, in subdivision (a), that one or more members of a class may sue as representative parties on behalf of all if the following prerequisites are met:

"1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable; [*8]

2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;

3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;

4. the representative parties will fairly and adequately protect the interests of the class; and

5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

Plaintiff requests that, in accordance with Lien Law § 77 (1), the prerequisite of numerosity set forth in CPLR 901 (a) (1) should be waived. Plaintiff contends that it has met all of the other prerequisites of CPLR 901 (a).

As noted by plaintiff, with respect to the prerequisite of commonality or predominance set forth in CPLR 901 (a) (2), the questions of law raised in this action are identical among the proposed class. Specifically, the legal issues raised are whether trusts were formed, whether the trust funds were diverted, who the trustees are, and whether the class members are beneficiaries of the trusts.

With respect to the prerequisite of typicality set forth in CPLR 901 (a) (3), plaintiff's claims that it performed work on the premises constituting permanent improvements thereto, that the work was not paid for, that it filed a mechanic's lien against the premises which was discharged by the filing of a bond, and that several of the defendants diverted trust funds under Lien Law article 3-

A of which it is a beneficiary, are virtually identical to the claims of the class members. In this regard, plaintiff notes that three of the proposed class members, similarly to it, filed mechanic's liens against the premises for materials supplied and/or work performed at the premises and for non-payment of the work which were also discharged by the filing of bonds, that all of the proposed class members are beneficiaries of any trust formed, and that only the type of work performed and the amount owing to each class member differ.

As to the prerequisite of adequacy set forth in CPLR 901 (a) (4), plaintiff asserts that it will fairly and adequately protect the interests of the proposed class because, as a beneficiary of the trust, it has the largest stake in this action as its claim exceeds $307,803.34. Furthermore, if plaintiff's claim is successful, all creditors who establish valid trust claims will share pro rata in the trust funds which are recovered in this action.

As to the prerequisite of superiority set forth in CPLR 901 (a) (5), as noted above, Lien Law § 77 requires that this action be brought as a class action. Moreover, maintaining this action as a class action is, in accordance with the intent of the Lien Law, superior to other available methods because it eliminates the risk of inconsistent determinations of the claims of the individual members of the class and avoids the unnecessary costs and delays of multiple lawsuits.

Defendants argue that the prerequisite of commonality or predominance set forth in CPLR 901 (a) (2) has not been met in this action because many issues must be [*9]addressed which are not of general concern to the putative class, but would require individual inquiry. Specifically, defendants contend that this action is primarily a breach of contract action, and that the primary issues include whether each class member entered into an agreement to provide services to them, whether the agreements were breached, whether there were legally cognizable damages, what those damages were, and whether each putative class member has standing to bring this action. Defendants assert that these questions, which are particular to each individual putative class member, predominate over common class questions, and that class certification must, therefore, be denied.

In support of this argument, defendants assert that the putative class members, Bay Supply, MNP, and VIP, were plaintiff's subcontractors, who did not have contracts directly with any of them to perform work at the premises. Defendants contend that as a result of this lack of privity of contract, Bay Supply, MNP, and VIP lack standing to bring this Lien Law article 3-A diversion of trust funds action to recover from an owner's trust against Brighton, as the owner and a trustee of the trust, and Igor Fleyshmakher, as Brighton's principal.

It is true that "a subcontractor may not assert a cause of action to recover damages for breach of contract against a party with whom it is not in privity" (*Spectrum Painting Contrs., Inc. v Kreisler Borg Florman Gen. Constr. Co., Inc.*, 64 AD3d 565, 576 [2009], quoting *Perma Pave Contr. Corp. v Paerdegat Boat & Racquet Club*, 156 AD2d 550, 551 [1989]; *see also Delta Elec. v Ingram & Greene*, 123 AD2d 369, 370 [1986]). Thus, while plaintiff asserts a breach of contract claim against DYA in its first cause of action, Bay Supply, MNP, and VIP cannot have a breach of contract claim against DYA due to their lack of privity with it. However, plaintiff's breach of contract claim is only one of the claims asserted by plaintiff in this action, and it cannot be said that this claim predominates over the Lien Law claims asserted by plaintiff. It is

not the intention of the Lien Law to compartmentalize the claims of subcontractors so as to create a multiplicity of lawsuits. Indeed, to adopt defendants' argument that privity is required to grant class action certification in this action would contravene the whole concept of the Lien Law trust, the purpose of which (as noted above) is to ensure that the legitimate obligations of those who provide labor and materials to improve property are paid.

It is noted that with respect to plaintiff's second cause of action to foreclose on its mechanic's lien (which was displaced by the bond), Bay Supply, MNP, and VIP are not required to be in contractual privity with Brighton, as the property owner, in order to file and foreclose on their mechanic's liens, and that they may maintain this claim (*see* Lien Law § 3*; Spectrum Painting Contrs., Inc.*, 64 AD3d at 576; *Kuhn v Kober*, 203 AD2d 536, 536 [1994]; *Rainbow Elec. Co. v Bloom*, 132 AD2d 539, 539 [1987]; *Hartman v Travis*, 81 AD2d 692, 693 [1981]).

As to plaintiff's diversion of trust claims pursuant to Lien Law article 3-A, Lien Law § 71 (3) (a) defines "trust claims," with respect to the trust of which an owner is trustee, as meaning "claims of contractors, subcontractors, architects, engineers, [*10]surveyors, laborers and materialmen arising out of the improvement, for which the owner is obligated," and also as meaning "any obligation of the owner incurred in connection with the improvement for a payment or expenditure defined as cost of improvement." However, while an owner's liability pursuant to Lien Law article 3-A requires the existence of an "obligation" on the part of the owner (*see* Lien Law § 71 [3]; *Avon Elec. Supplies v C.K. Elec.*, 297 AD2d 768, 769 [2002]), "the obligation may be one either imposed by contract or as the result of a mechanic's lien'" (*Spectrum Painting Contrs., Inc.*, 64 AD3d at 576, quoting *Quantum Corporate Funding v L.P.G. Assoc.*, 246 AD2d 320, 322 [1998]; *see also Weber v Welch*, 246 AD2d 782, 784 [1998]; *Innovative Drywall v Crown Plastering Corp.*, 224 AD2d 664 [1996]; *Matter of ABJEN Props. v Crystal Run Sand & Gravel*, 168 AD2d 783, 784 [1990]; *cf. Avon Elec. Supplies*, 297 AD2d at 769). Here, Bay Supply, MNP, and VIP have filed mechanic's liens against the premises, and defendants do not deny that DYA had contracts with the remaining putative class members, namely, Antonov, Euro-Tek, and Polyphase.

Defendants further argue, however, that Antonov, Euro-Tek, and Polyphase do not have claims against them. Igor Fleyshmakher has submitted his sworn affidavit, wherein he attests that while certain sums of money may still be owed to each of these companies, no outstanding balances are overdue and DYA continues to be compliant with any and all repayment commitments. The question of whether these creditors have valid claims against defendants, however, presents triable issues of fact, which cannot be resolved upon this motion. Rather, these creditors must be afforded an opportunity to join in this action in the event that they have claims which they wish to assert against defendants (*see Atlas Bldg. Sys.*, 236 AD2d at 496; *Scriven v Maple Knoll Apts.*, 46 AD2d 210, 215 [1974]).

Defendants also assert that the adequacy of representation prerequisite for a class action set forth in CPLR 901 (a) (4) has not been met due to the fact that three of the seven proposed class members, i.e., Bay Supply, MNP, and VIP were plaintiff's subcontractors. Defendants claim that Bay Supply, MNP, and VIP have separate and distinct diversion of trust funds claims against plaintiff as plaintiff itself is a trustee of the trusts that were formed pursuant to the Lien Law at the time DYA, as the general contractor, transferred funds to plaintiff, as its subcontractor,

pursuant to the contract between them. Defendants contend that as a result, plaintiff's ulterior motive in commencing this action was to suppress the claims of its own subcontractors' diversion of trust funds claims as against it. Defendants argue that, therefore, there is an inherent conflict of interest between plaintiff, as the proposed class representative, and the proposed class members, and that this gives rise to the concern that plaintiff would be likely to place its own interests ahead of those of the other class members, rendering it an inadequate class representative.

This argument must be rejected. While it is true that since plaintiff, as the general contractor to its own subcontractors, could be viewed as potentially an adversary to them [*11]since it receives payment from its general contractor, DYA, and becomes a trustee of such funds, here, there is no allegation by defendants that plaintiff used the funds received by it for any purpose not permitted under the Lien Law, which would constitute a diversion. In fact, there is no pending claim against plaintiff by any of its subcontractors. Thus, there is no evidence that plaintiff would not adequately represent the class members' interests, and since, as noted above, plaintiff has a large stake in recovery from defendants, it appears that plaintiff would adequately represent their interests.

Consequently, the court finds that this action may be maintained as a class action, and the class shall be deemed to consist of all persons and/or entities which provided materials and/or services for the improvement of the premises, and whose claims accrued on or before September 16, 2008. The requirement of numerosity is hereby waived in accordance with Lien Law § 77. Notice must be provided to potential trust beneficiaries and an opportunity provided to them to come forward (*see Atlas Bldg. Sys.*, 236 AD2d at 496; *Scriven*, 46 AD2d at 215; *Higgins-Kieffer, Inc. v State of New York*, 165 Misc 2d 425, 429 [1995]). Thus, the court directs that all prospective class members be sent a copy of the notice, which is annexed as exhibit 8 to plaintiff's motion papers, by certified mail, return receipt requested, not later than 30 days following entry of this decision and order. The court directs that proof of compliance with such distribution of notice must be filed with the Clerk of this court not later than 20 days following the completion of such compliance.

Within 20 days following receipt by plaintiff's attorneys of the last of all documentation that each such prospective class member: (1) has received the notice, (2) has been given the opportunity to receive the notice but has failed to claim the mailing, or (3) has never received the notice, as indicated by the return to the sender of the mailings, plaintiff must report to the court, specifying such status as to each of the prospective class members. Within 20 days after receiving an exclusion request, the Clerk of the court shall docket and file under the index number of this action each such exclusion request received in his office. Not later than 20 days following that date, plaintiff shall duly serve and file notice with the court, based upon the terms of the notice to prospective class members and the record of the Clerk's receipt of exclusion requests, the names and addresses of members of the now-certified class, whereupon the court shall certify all such parties as constituting the entire class, thereby enabling this action to proceed. Plaintiff shall bear the expenses of the preparation and distribution of the proposed notice as described above.

Accordingly, plaintiff's motion for an order, pursuant to CPLR 3025 (b), granting it leave to amend its complaint, and, pursuant to Lien Law § 77 (1) and CPLR 901, waiving the

requirement of numerosity and determining that this action may be maintained as a class action, and directing the manner of service of notice on the members of the class pursuant to CPLR 904 (c), as set forth above, is granted.

The case is adjourned to July 20, 2011. [*12]

This constitutes the decision and order of the court.

E N T E R,

J. S. C.