

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: HONORABLE KENNETH A. DAVIS
Justice

TRIAL/IAS, PART 12
NASSAU COUNTY

AVON ELECTRICAL SUPPLIES, INC. on
behalf of themselves, and on behalf
of all others similarly situated and
entitled to share in the funds received
by C. RAIMONDO & SONS CONSTRUCTION CO.,
INC. and CHARLES RAIMONDO,

ACTION No. 1

Plaintiffs,

INDEX No. 30770/98

-against-

MOTION SUBMISSION
DATE: 3/15/01

C.K. ELECTRIC, INC. t/a JTC ELECTRIC
SERVICE, C. RAIMONDO & SONS CONSTRUCTION
CO., INC., WKT ASSOCIATES, INC. and
CHARLES RAIMONDO,

Defendant(s).

SEQ. #5, 6, 7

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

C. RAIMONDO & SONS CONSTRUCTION CO., INC.,

Plaintiff,

ACTION No. 2

-against-

INDEX No. 14624/98
(Suffolk County)

CK ELECTRIC, INC., t/a JTC ELECTRIC SERVICE,
TIMOTHY MACDONALD, CHRISTOPHER WEIR,
JAYNE BUSH and AJV ELECTRICAL CONTRACTORS,
INC.,

Defendants.

Avon v. C.K. Electric
Index No. 30770/98

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

SCHWING ELECTRICAL SUPPLY CORP.,

Plaintiff,

ACTION No. 3

-against-

INDEX No. 31134/98

WKT ASSOCIATES, INC., C. RAIMONDO & SONS
CONSTRUCTION COMPANY, INC., RLI INSURANCE
COMPANY, MELLEN ELECTRICAL CONSTRUCTION
OF L.I. CORP., BROADWAY ELECTRIC CO., INC.,
YALE ELECTRICAL SUPPLY CO., CORP., C.K.
ELECTRIC, INC., d/b/a JTC ELECTRIC SERVICE,
AVON ELECTRIC SUPPLIES, a division of
WESCO DISTRIBUTION CORP., and APOLLO
HVAC CORP.,

Defendants.

CK ELECTRIC, INC. t/a JTC ELECTRIC SERVICE,
TIMOTHY MACDONALD, CHRISTOPHER WEIR,
JAYNE BUSH and AJV ELECTRICAL CONTRACTORS,
INC.,

Third-Party Plaintiffs,

-against-

RLI INSURANCE COMPANY, CHARLES RAIMONDO,
JOHN DOE #1 through #5, said individuals
being unknown to third-party plaintiff and
being shareholders of C. RAIMONDO & SONS
CONSTRUCTION CO., INC.,

Third-Party Defendants

The following papers read on this motion:

Notice of Motion/ Order to Show Cause	X
Answering Affidavits	X
Replying Affidavits	X
Briefs: Plaintiff's/Petitioner's	X
Defendant's/Respondent's	X

Upon the foregoing papers, it is ordered that this motion
by plaintiff Schwing Electrical Supply Corp. (action #3) to strike

the answer interposed by defendant C.K. Electric, Inc., d/b/a JTC Electric Service, to add AJV Electrical Contractors, Inc., Timothy MacDonald, Christopher Weir and Jayne Bush as parties and for leave to serve them with a supplemental summons and amended complaint and for leave to amend the complaint as to C. Raimondo & Sons Construction Co., Inc. to add a cause of action for breach of fiduciary duty is granted. Plaintiff must serve and file a supplemental summons and amended complaint within 45 days from the date of this order.

Motion by C. Raimondo & Sons Construction Co., Inc., W.K.T. Associates, Inc. and Charles Raimondo to dismiss any and all cross-claims asserted against movants by AJV Electrical Contractors Inc., d/b/a JTC Maintenance Electric Service, a/k/a JTC Maintenance in actions #1 and #3, to dismiss the mechanics liens claims asserted against them in actions #1 and #3 by Avon Electrical Supplies, Inc. and Schwing Electrical Supply Corp. respectively and other ancillary relief is denied.

Cross-motion by plaintiff Avon Electrical Supplies, Inc. in action #1 for a default judgment on the first and second causes of action of the amended complaint against AJV Electrical Contractors, Inc., d/b/a JTC Maintenance Electrical Service a/k/a JTC Maintenance is granted, said defendant having failed to answer or move with respect thereto.

The instant actions arise out of construction of the Edward's Super Foodstore located at premises owned by W.K.T. Associates, Inc. at 653 Hillside Avenue, New Hyde Park, New York. Pursuant to an agreement with Giant Food Store, Inc., C. Raimondo & Sons Construction Co., Inc. (Raimondo) acted as general contractor on the project. Raimondo, in turn, subcontracted with JTC Electric Service (JTC) to perform certain electrical work originally valued at \$795,000.00 in accordance with the terms and conditions of the subcontract. It is alleged that AJV Electrical Contractors (AJV) is a related affiliate of JTC with Timothy MacDonald, Christopher Weir and Jayne Bush being the owners, officers and shareholders of JTC and AJV. As previously pointed out by this court in a decision with respect to the Avon action (#1) dated February 2, 2000, confusion exists as to these various corporate entities and their interrelationships.

Both Avon Electrical Supplies, Inc. (Avon) and Schwing Electrical Supply Corp. (Schwing) claim to be materialmen who supplied electrical materials in connection with the project for which they have not yet received payment. In actions #1 and #3 respectively Avon and Schwing seek to foreclose their mechanic's liens for materials supplied to JTC/AJV during the period March 21,

1998 through June 17, 1998 for the agreed sum of \$27,728.26 (Avon) and during the period December 30, 1997 through April 10, 1998 for an agreed price of \$146,968.98 of which the sum of \$93,015.65 remains outstanding (Schwing). According to Raimondo in action #2, JTC abandoned the project and defaulted under the subcontract on or about May 18, 1998, at which time, Raimondo maintains no monies were due and owing JTC for completed work. In that action, Raimondo seeks a judgment against JTC in the amount of \$618,700.55 which represents monies it expended to remediate and complete the work JTC was to have performed under the subcontract.

Several motions are now before the court seeking various relief in each of the three actions. In action #3, that branch of Schwing's motion which seeks to strike the answer interposed by defendant C.K. Electric Inc. d/b/a JTC Electric Service, is unopposed and will be granted. It appears from the record that although two years have passed since in or about April 27, 1999, when Schwing first issued a notice to take the deposition of C.K. Electric, Inc. d/b/a JTC Electric service, no deposition has been scheduled/conducted. JTC failed to appear at a preliminary conference on June 7, 2000 (adjourned from April 25, 2000) for the purpose of scheduling depositions and the exchange of outstanding disclosure. This conduct constitutes deliberate and contumacious default on the part of JTC. (CPLR 3126(c); Rossi v. Lin, 189 A.D.2d 868.)

Pursuant to CPLR 3025(b) leave to amend a pleading rests within the court's discretion and, absent a showing that prejudice to the non-moving party will result or that the amendment plainly lacks merit, leave will be freely granted. (Rahn v. Carkner, 241 A.D.2d 585.)

In its amended complaint, Schwing alleges violations of sections 72 and 79-a of the Lien Law emanating from the alleged diversion and misappropriation of trust fund assets by AJV Electrical Contractors, Inc. (alleged alter ego of and united in interest with JTC) and proposed additional defendants Timothy McDonald, Christopher Weir and Jayne Bush, as officers of JTC and a cause of action against Raimondo for breach of fiduciary duty, as general contractor. Such an action to enforce the trust is a representative action brought for the benefit of all beneficiaries of the trust and may not be maintained more than one year after the completion of the improvement or, in the case of materialmen, after the expiration of one year from the date on which final payment under the claimant's contract became due. [Lien Law section 77(1) and (2).]

"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' (Caristo Constr. Corp. v. Diners Fin. Corp., 21 N.Y.2d 507, 512). " (Canron Corp v. City of NY, 89 N.Y.2d 147, 153.)

Lien Law section 70(1) defines trust asset as:

"funds * * * received by a contractor under or in connection with a contract for an improvement of real property, * * * or received by a subcontractor under or in connection with a subcontract made with a contractor for such improvement of real property * * * and any right of action for any such funds due or earned or to become due or earned * * *."

Improper diversion of trust assets occurs when any such asset is transferred or applied for a non-trust purpose i.e., other than for expenditures authorized in sections 71(2), prior to payment or discharge of all trust claims. [Lien Law section 72(1).] Under this article the contractor/subcontractor is a trustee for the benefit of subcontractors, laborers and materialmen who are beneficiaries of the trust. (AMG Inc. v. A.J. Eckert Co., Inc., 279 A.D.2d 717; Frontier Excavating v. Sovereign Constr., 30 A.D.2d 487, 489.) The officers and directors of a corporate trustee are under a duty to the beneficiaries of a trust administered by the corporation not to cause the corporation to misappropriate trust property and will be personally liable for participation in a breach of trust. (Atlas Building Systems, Inc. v. Rende, 236 A.D.2d 494, 495.)

In the absence of any showing that the amendment herein plainly lacks merit or will result in any prejudice to the proposed additional defendants, Schwing's request for leave to amend the complaint in the form annexed and to add AJV Electrical Contractors, Inc., Timothy MacDonald, Christopher Weir and Jayne Bush as defendants is granted. (Tri-City Elec Co v. People, 96 A.D.2d 146, 151, appeal dismissed 61 N.Y.2d 833.) Although Schwing has not brought the action as a representative action for the benefit of all beneficiaries of the trust, the action need not fail on that ground. Schwing is directed, however, to provide potential trust beneficiaries with notice and an opportunity to come forward.

The relation back-doctrine permits a claim asserted against a defendant in an amended filing to relate back to claims previously asserted against a co-defendant for statute of limitations purposes where 1) both claims arise out of the same conduct, transaction or occurrence; 2) the new party is united in interest with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that it will not be prejudiced in maintaining its defense; and 3) the new party knew or should have known that, but for a mistake by plaintiff as to the identity of the proper parties, the action would have been brought against it as well. (Leylegian v. Federal Paper Board Company, Inc., 251 A.D.2d 60, 61.) Inasmuch as these criteria are met here, Schwing's trust claims are not barred by the one year statute of limitations.

With respect to the motion by Raimondo, the court notes that the relief requested with respect to action #2 is not properly before this court and will not, therefore, be considered. Although action #2 (Suffolk County index #14624/98) was consolidated with actions #1 and #3 for the purposes of joint discovery and joint trial by Order of this court dated August 8, 1999, transfer of the case has not been effectuated and, to date, the court file has not been transferred to this County.

Raimondo seeks summary judgment dismissing the two lien foreclosure actions commenced by Avon and Schwing predicated on the contention that the filing of the liens on August 11, 1998 and June 2, 1998 respectively, post date JTC's default and abandonment of the project in or about May 1998. Raimondo further maintains that JTC was paid all monies due under the subcontract, including change orders and no lien fund existed at the time the Avon and Schwing liens were filed to which they could attach.

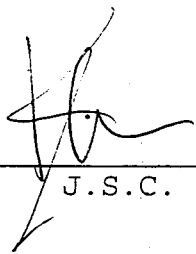
Pursuant to section 4 of the Lien Law suppliers of materials may obtain a mechanic's lien upon an owner's real property and improvements thereon to guarantee payment for services and materials. A party's recovery is restricted to the agreed price "of the labor and materials remaining unpaid". (Davidson Pipe v. Indus. Dev., 85 N.Y.2d 281, 285.) "With respect to material furnished a subcontractor by materialmen, liens filed by such materialmen can only be enforced to the extent of money owed by the contractor to the subcontractor (citation omitted)." (Philan Department of the Borden Company v. Foster Lipkins Corporation, Inc., 39 A.D.2d 633, 633-634, affirmed 33 N.Y.2d 709.) The burden is on the lienor to show that there is a sum due to which its lien could attach as of the time of the filing. Whether there was, in fact, an amount due and owing on JTC's subcontract with general contractor Raimondo at the time the liens in question

were filed and whether Raimondo improperly paid monies to JTC for work which was either not performed or defectively performed while, at the same time, Avon and Schwing remained unpaid, are factual issues which require resolution at trial. Although, Raimondo has established that it made various payments to JTC, additional issues exist with respect to whether, and the date on which, JTC defaulted under the contract and the date of its alleged abandonment of the project and whether Raimondo wrongfully continued to make payments to JTC after the liens of Avon and Schwing were filed. The existence of such issues precludes summary dismissal of the complaints in the Avon and Schwing actions.

According to section 23, Article 2 of the Lien Law "is to be construed liberally to secure the beneficial interests and purposes thereof. A substantial compliance with its several provisions shall be sufficient for the validity of a lien". In the absence of any prejudice due to the mistaken identification of C. Raimondo & Sons Construction, instead of JTC/AJV, as the party, *inter alia*, by whom the lienor was employed and to whom the lienor furnished materials, Avon shall be permitted to amend its notice pursuant to Lien Law section 12-a, *nunc pro tunc*.

As JTC failed to interpose an answer in action #1 and its answer in #3 is stricken by this order, Raimondo's request to dismiss the cross-claims asserted therein by JTC against Raimondo is moot.

Dated: MAY 9 2001



J.S.C.

ENTERED
MAY 11 2001
CLERK OF NASSAU COUNTY