

SHORT FORM ORDER

INDEX
NO.: 607796/2022

**SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY**

PRESENT: Honorable John J. Andrews

_____ x
MEN OF STEEL ENTERPRISES, LLC,
individually and on behalf of all others who may
be deemed to be beneficiaries of a certain trust
created pursuant to New York Lien Law Article
3-A,

Plaintiff,

-against-

YAPHANK BUILDING SUPPLY CORP.,
CONCRETE COURSES CORP., CONCRETE
COURSES CONCEPTS CORP., and LUIS M.
PEREIRA,

Defendants.

_____ x

MOTION DATE: 1/1/23
SUBMITTED: 1/11/24
MOTION NO. 007 MD

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Upon the following papers read on this motion for class certification; Notice of Motion and supporting papers by plaintiff, filed October 6, 2023; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers by defendants, filed October 20, 2023; Replying Affidavits and supporting papers by plaintiff, filed November 2, 2023; it is

ORDERED that this motion by plaintiff for an order pursuant to CPLR 902 allowing them to maintain its first and second causes of action as a class action is denied as untimely.

Plaintiff commenced this action by filing a summons and complaint on April 22, 2022, whereby it alleges, inter alia, that it contracted with defendants to furnish and provide certain quantities of steel rebar in connection with two construction projects that defendants were engaged in. Plaintiff alleges, among other things, that it provided the rebar to defendants under the contract terms, but that defendants breached by failing to fully pay the balance due. Relevant

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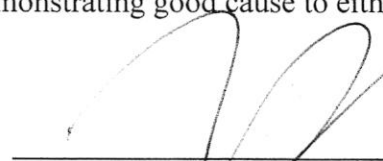
to the instant motion, plaintiff's first and second causes of action are to enforce a trust pursuant to Lien Law 77 in connection with projects referred to in its complaint as 625 Driggs and 658 Driggs, respectively. Plaintiff asserts these two claims in its complaint as a class action on behalf of any beneficiaries of trusts created pursuant to Article 3-A of the New York Lien Law. Plaintiff's third and fourth causes of action allege the aforementioned breach of contract claims relating to the 625 Driggs and 658 Driggs projects, respectively

Plaintiff now moves this Court by notice of motion dated October 6, 2023, for, among other things, an order pursuant to CPLR 902 allowing them to maintain its first and second causes of action as a class action. In support of its motion, plaintiff submits, inter alia, the pleadings, document demands, contracts, and business records.

Lien Law 77 (1) permits the holder of any trust claim under the Lien Law to enforce such claim by way of a representative action on behalf of all beneficiaries of the trust. CPLR 902 states in relevant part that "[w]ithin sixty days after the time to serve a responsive pleading has expired for all persons named as defendants in an action brought as a class action, the plaintiff shall move for an order to determine whether it is to be so maintained." The Court, in its discretion, is empowered to extend this sixty-day deadline upon a showing of good cause (*see* CPLR 2004; *Argento v Wal-Mart Stores, Inc.*, 66 AD3d 930, 888 NYS2d 117 [2d Dept 2009]). However, because pre-certification discovery does not act as an automatic stay of this mandatory filing deadline it is incumbent upon a plaintiff to make some effort to extend it prior to its expiration by either moving under CPLR 2004 for an order granting an extension of time, or by entering into a stipulation with opposing counsel agreeing to extend the deadline (*see Shultz v Cambridge Dev., L.L.C.*, 200 AD3d 624, 160 NYS3d 226 [1st Dept 2021]; *Chavarria v Crest Hollow Country Club at Woodbury, Inc.*, 109 AD3d 634, 970 NYS2d 884 [2d Dept 2013]).

The time to serve responsive pleadings expired for all defendants by May 27, 2022, which rendered a motion pursuant to CPLR 902 due on or before July 26, 2022 (*see* CPLR 3012; BCL 306; CPLR 902). Plaintiff's motion pursuant to CPLR 902 was filed one year, four months, and nine days beyond the statutory deadline, thereby rendering it untimely (*see* CPLR 902; *Hernandez v Gateway Demolition Corp.*, 263 AD2d 467, 691 NYS2d 915[2d Dept 1999]). Plaintiff failed to move under CPLR 2004 for an extension of time to file its motion in its several prior motions to the Court and in the instant papers. Furthermore, plaintiff's affirmation in support does not acknowledge the untimely nature of its motion, and fails to provide any explanation as to why it did not move to extend the filing deadline, or seek a stipulation of extension from opposing counsel, since it expired in July of 2022. Plaintiff's "good cause" arguments in defense of its untimely filing are improperly raised for the first time in its reply papers, and therefore will not be considered (*Carmen Rivera v Zouzias*, 190 AD3d 994, 136 NYS3d 778 [2d Dept 2021][and the cases cited therein]). Accordingly, the Court, in its discretion, finds that plaintiff did not meet its burden of demonstrating good cause to either extend the filing deadline or permit its untimely motion.

Dated: February 6, 2024



J.S.C.

HON. JOHN J. ANDREWS