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

PRESENT: MARCY S. FRIEDMAN **PART** 60
Justice

FLINTLOCK CONSTRUCTION SERVICES, LLC, as subrogee on behalf of all those persons who are beneficiaries of New York Lien Law Article 3-A trust funds arising from a subcontract for labor and materials supplied for the project at 218-222 West 50th Street, New York, New York,

Plaintiff,

-against-

HPH SERVICES, INC., MORRIS MILLER, SHALLAN HADDARD, JOHN DOE No. 1 through 5, being fictitious names representing persons participating in or causing the diversion of trust assets, and LAW OFFICES OF WEINER & WEINER, LLC, as escrowee,

Defendants.

Index No. 653920/2012

Motion Date _____

Motion Seq. No. 001

Motion Cal. No. _____

The following papers, numbered 1 to _____ were read on this motion for a preliminary injunction.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that these motions are decided in accordance with the accompanying decision/order dated January 18, 2013.

Dated: January 18, 2013

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

☐ DO NOT POST [ ] REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

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DECISION/ORDER

This is an action brought under New York Lien Law Article 3-A to enjoin diversion and to direct distribution of a trust fund. Plaintiff Flintlock Construction Services, LLC (Flintlock), the general contractor of a private improvement project, seeks a preliminary injunction enjoining its subcontractor, defendant HPH Services, Inc. (HPH), defendants Miller and Haddad, HPH's principals, and defendant Weiner & Weiner, LLC, defendants' escrow agent, from, among other things, disbursing monies that are currently held in escrow pursuant to an agreement between the parties.

Flintlock initially moved for an order directing distribution of the trust fund to six identified vendors, claiming that it made payments to HPH for deposits to these vendors for

goods to be specially manufactured, and that HPH did not pay these deposits to the vendors. In the course of litigating this motion, Flintlock acknowledged that an interim accounting is necessary to identify all money received to date by HPH from FCS and to identify all trust fund beneficiaries that are currently owed payment from HPH. (Flintlock Reply Memo of Law at 1; Nov. 21, 2012 Oral Argument Transcript [Tr.] at 15-16.)

It is undisputed that, over the course of the ongoing construction project, Flintlock advanced funds to HPH pursuant to requisitions prepared by HPH. (Aff. of Andrew Weiss, dated Nov. 13, 2012 [Weiss Aff.], ¶ 9; Aff. of Shallan Haddad, dated Nov. 19, 2012 [Haddad Aff.], ¶¶ 8-9.) For the period ending August 31, 2012, HPH submitted a requisition to Flintlock in the amount of $583,685.77. (Weiss Aff., ¶ 11; Haddad Aff., ¶ 8.) The owner of the project reviewed the requisition and reduced the payment to HPH to $480,000. (Weiss Aff., ¶ 11; Haddad Aff., ¶ 10.)

The parties sharply dispute whether the requisitioned money was for specific vendors and the line items set forth in the Weiss Affidavit at paragraph 12. Flintlock argues that $435,803.00 of the $480,000 was to be used to pay deposits on items with "long leads" and/or that were being manufactured for the construction project and that, in fact, none of those vendors has been paid. (Weiss Aff., ¶¶ 11, 24-25.) HPH contends that the $480,000 was a partial "payment on account and not attributable to any specific items of work." (Haddad Aff., ¶ 10.) Both parties agree that HPH is no longer a subcontractor for Flintlock and is no longer working on the project. (Weiss Aff., ¶ 28; Haddad Aff., ¶ 21.)

During settlement negotiations, the parties agreed to hold $350,000 in escrow. (Weiss Aff., ¶ 32; Haddad Aff., ¶ 23.) Those funds are the focus of the current dispute.

It is well settled that a preliminary injunction is a drastic remedy which will be granted "only where the movant shows a likelihood of success on the merits, the potential for irreparable injury if the injunction is not granted and a balance of equities in the movant's favor (Grant Co. v Srogi, 52 NY2d 496, 517; McLaughlin, Piven, Vogel, Inc. v Nolan & Co., 114 AD2d 165, 172, lv denied 67 NY2d 606)." (Chernoff Diamond & Co. v Fitzmaurice, Inc., 234 AD2d 200, 201 [1st Dept 1996].) "The movant has the burden of establishing a right to this equitable remedy." (McLaughlin, Piven, Vogel, 114 AD2d at 172.)

Flintlock asserts that the standards for grant of a preliminary injunction pursuant to CPLR 6301 do not apply to a motion for a preliminary injunction pursuant to Lien Law § 77(3)(a)(x), which provides that, in an action to enforce a trust, the court may award "[a]ny provisional or ancillary relief incident to any of such relief" set forth in the statute. (See P.'s Reply Memo. of Law at 2.) Flintlock cites no legal authority for this proposition. This is not a case in which the statute sets forth a different standard than that set forth in CPLR 6301, in which event the standard set forth in the statute would govern. (See Weinstein, Korn & Miller, New York Civil Practice, § 6301.06[4].) Indeed, CPLR 6301 standards have repeatedly been applied to provisional relief sought under the Lien Law. (See e.g. Frontier Excavating, Inc. v. Sovereign Const. Co., Ltd., 45 AD2d 926 [4th Dept 1974] [applying CPLR 6301 and 6312 to preliminary injunction sought under Lien Law Article 3-A]; Michaels Elec. Supply Corp. v Trott Elec. Inc., 231 AD2d 695 [2d Dept 1996] [affirming denial of order of attachment pursuant to CPLR 6201[3] where "the plaintiff had failed to demonstrate a likelihood of success on its underlying claims predicated upon Lien Law article 3-A"]; see also Interel Envtl. Tech., Inc. v. United Jersey Bank, 894 F Supp 623, 632-35 [ED NY 1995] [applying federal standard for preliminary

injunction in subcontractor's action as Lien Law Article 3–A trust beneficiary on behalf of itself and other subcontractors to enjoin defendant from withdrawing monies from a fund it argued was an Article 3-A trust].) Absent any authority to the contrary, Flintlock must satisfy the CPLR 6301 standards.

With respect to Flintlock's likelihood of success on the merits, HPH argues that Flintlock does not have standing to bring this action because it is neither a beneficiary of the trust nor a subrogee. Initially, Flintlock appeared to contend that it attained the status of a subrogee without having made an involuntary payment to a trust beneficiary. At oral argument, Flintlock agreed that an involuntary payment to a trust beneficiary was required to confer standing upon it to maintain this action. (Nov. 21, 2012 Tr. at 10.) After Flintlock initiated this action by Summons with Notice, filed on November 14, 2012, Flintlock paid $5,000 to Ferguson, one of the vendors that Flintlock alleges HPH should have paid from the monies Flintlock remitted to HPH. (Reply Aff. of Andrew Weiss, dated Nov. 29, 2012 [Weiss Reply Aff.], Ex. Q.) Prior to the $5,000 payment, Ferguson was owed $55,998.31. (Weiss Reply Aff., Ex. R.) Based on this $5,000 payment alone, Flintlock contends that it is a subrogee and has standing to pursue the instant action on behalf of all trust beneficiaries. (Flintlock Reply Memo. of Law at 2-3.)

Article 3–A of the Lien Law provides that all funds paid to a contractor in connection with the improvement of real property constitute assets of a statutory trust for the benefit of subcontractors, laborers, materialmen, tax claimants and their subrogees. (Lien Law §§ 70[1], [2]; 71[2][a], [b].) "[O]nce a trust comes into existence, its funds may not be diverted for non-trust purposes [and] [u]se of trust assets for any purpose other than the expenditures authorized [by statute] ... constitutes an improper diversion of trust assets, regardless of the

propriety of the trustee's intentions." (Mount Vernon City Sch. Dist. v Nova Cas. Co., 19 NY3d 28, 37 [2012] [internal quotation marks and citations omitted].) "Certainly money paid by the owner to anyone in satisfaction of the contract would be impressed with this broadly inclusive trust." (City of New York v Cross Bay Contr. Corp., 93 NY2d 14, 19 [1999] [internal quotation marks and citation omitted].) Sections 77(1) and (3) of the Lien Law provide that trust beneficiaries may maintain a cause of action, among other things, to enforce the trust, for an accounting, to set aside diversions of trust assets, and to recover money damages.

"The equitable doctrine of subrogation 'is applicable to cases where a party is compelled to pay the debt of a third person to protect his own rights, or to save his own property.'" (Broadway Houston Mack Dev., LLC v Kohl, 71 AD3d 937 [2d Dept 2010] [quoting Gerseta Corp. v. Equitable Trust Co. of N.Y., 241 NY 418, 426 (1926)] [other internal citations omitted].) Although subrogation is a "broad" doctrine, "it cannot be invoked where the payments sought to be recovered are voluntary." (Id.) The involuntary nature of payment can be established by the party seeking subrogation "either by pointing to a contractual obligation or to the need to protect its own legal or economic interests. When invoking the latter ground, however, the party seeking subrogation must show that the act is not merely helpful but necessary to the protection of its interests." (Id.)

Flintlock has failed to carry its burden of demonstrating that its $5,000 payment to Ferguson was a "contractual obligation" or was made "to protect its own legal or economic interests." Although Flintlock asserts that the $5,000 payment "was made to protect [its] interest as general contractor in the project and to avoid the inevitable mechanic's liens and payment bond claims that will be filed against [Flintlock] and/or the property owner due to HPH's non-

payment of its vendors" (Reply Memo. of Law at 3), Flintlock has failed to demonstrate how the payment of $5,000 on an admitted claim of $55,998.31 of just one vendor will protect its interests against that vendor or any other vendors.

Rather, Flintlock merely asserts that the funds currently held in escrow must be disbursed to subcontractors so that Flintlock will not be subject to potential liens on its payment bonds in the future. (Nov. 21, 2012 Tr. at 12-13.) Subrogation, however, applies where the payment or performance has already been made to protect an economic interest and the paying party is seeking relief for that payment or performance. (Mount Vernon City Sch. Dist.,19 NY3d at 37-38 [holding that surety was not subrogee of contractor and could not assert claims as trust beneficiary where surety did not undertake to complete construction work that insured abandoned]; Broadway Houston Mack Dev., LLC, 71 AD3d at 937-38 [holding, where plaintiff ground lessee "elected to pay subcontractors directly despite the fact that it had paid [bankrupt general contractor] in full," that "plaintiff pointed to interests which were furthered by its payments to [the] subcontractors, [but] it failed to demonstrate that those payments were necessary to protect its legal or economic interests"]; J. Petrocelli Constr., Inc. v Realm Electric Contrs., Inc., 15 AD3d 444, 446 [2d Dept 2005] [holding that plaintiff general contractor could maintain action under Lien Law article 3-A as a subrogee where it "was required to make payments totaling $687,066.81" to its subcontractor's vendors after terminating its contract with subcontractor].)

Flintlock's reliance on case law allowing procedural defects in pleadings to be corrected in order to avoid dismissal is misplaced. (Reply Memo. of Law at 3.) Standing is a threshold issue and cannot be cured through repleading. There is authority that "[s]tanding goes to the

jurisdictional basis of a court's authority to adjudicate a dispute." (Stark v Goldberg, 297 AD2d 203, 204 [1st Dept 2002] [internal quotation marks and citations omitted]. See also Rudder v Pataki, 246 AD2d 183, 185 [3d Dept 1998], affd on other grounds, 93 NY2d 273 [1999] [holding that standing "must be determined at the outset of any litigation since standing is a threshold determination and a litigant must establish standing in order to seek judicial review, with the burden of establishing standing being on the party seeking review"]; but see Wells Fargo Bank Minn., N.A. v Mastropaolo, 42 AD3d 239 [2d Dept 2007] [standing can be waived]; McHale v Anthony, 70 AD3d 463 [1st Dept 2010], lv denied 15 NY3d 710 [same].) There is no need to reach this issue, however, as the $5,000 payment is insufficient to confer standing.

In addition, with respect to five of the vendors that Flintlock contends should be paid from the monies it paid to HPH, Flintlock fails to meet its burden of establishing that they are Article 3-A trust beneficiaries of HPH. The "primary purpose of the Lien Law is to ensure that 'those who have directly expended labor and materials to improve real property [or a public improvement] at the direction of the owner or a general contractor' receive payment for the work actually performed." (Canron Corp. v City of New York, 89 NY2d 147, 155 [1996] [quoting West-Fair Elec. Contrs. v Aetna Cas. & Sur. Co., 87 NY2d 148, 157 [1995]].) Yet, in moving for the preliminary injunction, Flintlock identifies the monies it seeks on behalf of the vendors as "deposits."[1] (Weiss Aff., ¶¶ 23-25; Ex. C [request of Ferguson for a $100,000 deposit to begin work].) An Article 3-A trust is "broadly inclusive" and consists of "even unmatured rights to future payment as trust assets." (Matter of RLI Insurance Co. v New York State Dept. of Labor,

[1]At the oral argument, Flintlock indicated that it did not know whether the monies sought to be disbursed were deposits for work to be commenced in the future or for work that had already been performed. (Nov. 21, 2012 Tr. at 29-30.)

97 NY2d 256, 262-63 [2002].) However, Flintlock offers no authority that specifically addresses its contention that trust funds are properly disbursed for deposits to secure future work.

The court finds that Flintlock has failed to meet its burden of demonstrating a likelihood of success on the merits based on its claim standing. Flintlock has also failed to establish that it would be irreparably harmed. Flintlock has not represented to this court that the construction contract cannot be completed without payment to these vendors or that it cannot be made whole through money damages.

The court has considered Flintlock's remaining contentions and finds them to be without merit.

Nothing in this decision and order shall be construed as determining whether the defendants are required to continue to hold funds in escrow based on the parties' stipulation.

Accordingly, it is hereby

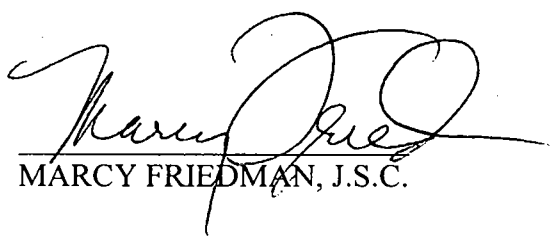
ORDERED that Flintlock's motion for a preliminary injunction is denied; and it is further

ORDERED that the temporary restraining order imposed by this court on November 15, 2012 is hereby vacated; and it is further

ORDERED that the parties shall appear for a preliminary conference in Part 60, Room 248, 60 Centre Street, New York, New York on March 21, 2013 at 2:30 p.m.

This constitutes the decision and order of the court.

Dated: New York, New York
January 18, 2013



MARCY FRIEDMAN, J.S.C.