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| <b>Integrated Project Delivery Partners, Inc. v Susan L. Schuman Family Trust</b>  |
| 2018 NY Slip Op 32308(U)   |
| September 17, 2018   |
| Supreme Court, New York County   |
| Docket Number: 160102/2016   |
| Judge: Kathryn E. Freed  |
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2**

*Justice*

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**INDEX NO. 160102/2016**

INTEGRATED PROJECT DELIVERY PARTNERS, INC.,

Plaintiff,

**MOTION SEQ. NO. 001**

- v -

SUSAN L. SCHUMAN FAMILY TRUST, ILENE OSHEROW, and  
SUSAN SCHUMAN,

**DECISION AND ORDER**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to/for DISMISSAL

Upon the foregoing documents, it is ordered that the motion is decided as follows.

In this action seeking, inter alia, damages for breach of contract, defendants Susan L. Schuman Family Trust, Ilene Osherow, and Susan Schuman, Inc. move, pursuant to CPLR 3211 (a) (1) and (a) (7), to dismiss the second, third, and fourth causes of action in the complaint of plaintiff Integrated Project Delivery Partners, Inc. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motion is decided as follows.

**FACTUAL AND PROCEDURAL BACKGROUND:**

Defendants Susan L. Schuman Family Trust (“the Trust”), Ilene Osherow, and Susan Schuman (collectively “defendants”) held ownership interests in apartment 4B at 161 Hudson Street, New York, New York (“the premises”), Doc. 15, at pars. 2-4. On or about June 25, 2015, defendants contracted with plaintiff Integrated Project Delivery Partners, Inc. to perform

construction work at the premises including, but not limited to, plumbing, electrical, carpentry, HVAC, and flooring work. Doc. 15, at pars. 5, 9, and 10; Doc. 17.

On or about September 21, 2015, plaintiff filed a mechanic's lien ("the lien") against the premises, claiming that \$48,250.29 was owed by defendants to plaintiff for unpaid labor and materials. Doc. 18. Defendants disputed that plaintiff was owed the amount claimed in the lien and demanded that the lien be withdrawn because plaintiff failed to complete, and negligently performed, its work. Doc. 14. On or about September 19, 2016, plaintiff filed a one year extension of the lien. Doc. 19. However, plaintiff did not file a notice of pendency, as required by Lien Law § 17, within the extended lien period. Doc. 14, at par. 16; Doc. 20.

Plaintiff commenced the captioned action against defendants on December 2, 2016, claiming that, although it properly performed its work pursuant to the contract, defendants failed to pay over \$48,250.29 of the amount they owed plaintiff pursuant to the agreement. Doc. 15, at pars. 12-13. As a first cause of action, plaintiff asserted a claim for breach of contract. Doc. 15, at pars. 9-15. As a second cause of action, plaintiff asserted a claim for unjust enrichment in the amount of \$48,250.29. Doc. 15, at pars. 17-20. As a third cause of action, plaintiff sought to foreclose on the lien it filed against the premises in the amount of \$48,250.29. Doc. 15, at pars. 22-34. As a fourth cause of action, plaintiff alleged that defendants violated sections 79-a and 3A of the Lien Law by misappropriating construction trust funds, resulting in damages to plaintiff of \$48,250.29. Doc. 15, at pars. 36-42. Defendants filed an answer on February 7, 2017. Doc. 3.

On October 3, 2017, defendants filed the instant motion seeking to dismiss the second, third and fourth causes of action pursuant to CPLR 3211 (a) (1) and (a) (7).<sup>1</sup> Docs. 13-25.

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<sup>1</sup> To the extent defendants move pursuant to CPLR 3211 (a) (1), their motion is technically untimely. See CPLR 3211 (e). However, this issue is not raised by plaintiff. In any event, defendants do not rely on documentary evidence in support of their argument that the fourth cause of action must be dismissed.

Plaintiffs do not oppose the motion insofar as it addresses the second and third causes of action, which are hereby dismissed.<sup>2</sup> Thus, this Court's analysis is limited to the fourth cause of action.

#### CONTENTIONS OF THE PARTIES:

Defendants argue that the fourth cause of action for misappropriation of constructive trust funds must be dismissed because they are not trustees of the trust fund which was created to fund the work performed at the premises.

Plaintiff argues that that branch of defendants' motion seeking to dismiss the fourth cause of action should be denied as premature.

#### LEGAL CONCLUSIONS:

On a motion to dismiss pursuant to CPLR 3211, the court must afford the pleadings a liberal construction, must accept the facts as alleged in the complaint as true, and must grant plaintiff the benefit of every favorable inference. *Roni LLC v Arfa*, 18 NY3d 846, 848 (2011); *see also Leon v Martinez*, 84 NY2d 83, 88 (1994). A motion to dismiss will fail if "from [the complaint's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law . . . ." *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977); *see also Rovello v Orofino Realty Co.*, 40 NY2d 633 (1976).

Paragraph 1 of section 70 of article 3-A of the Lien Law provides, in pertinent part, that funds "received by an owner for or in connection with an improvement of real property in this

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<sup>2</sup> *See Cassell v City of New York*, 159 AD3d 603 (1<sup>st</sup> Dept 2018) (claim abandoned where plaintiff did not oppose motion seeking to dismiss the same for failure to state a cause of action).

state \* \* \* shall constitute assets of a trust for the purposes provided in section seventy-one of this chapter." An owner's liability pursuant to article 3-A requires the existence of an obligation on the part of the owner (*see* Lien Law § 71 [3]), which may be one imposed by contract or by a mechanic's lien. *Spectrum Painting Contrs., Inc. v Kreisler Borg Florman Gen. Constr. Co., Inc.*, 64 AD3d 565, 576 (2d Dept 2009). An owner is trustee of funds received by him or her under a building loan contract or mortgage, and the beneficiaries of such a trust, as defined in Lien Law section 71, are "persons having claims for payment of amounts for which the trustee is authorized to use trust assets." *Onondaga Commercial Dry Wall Corp. v Sylvan Glen Co.*, 26 AD2d 130, 133 (4th Dept 1966). Article 3-A trust funds cannot be used for a purpose other than that authorized by the Lien Law. See Lien Law § 72 (1).

Here, plaintiff alleges that defendants "obtained monies and/or financing from entities currently unknown to plaintiff in excess of the monetary amount currently due plaintiff herein, or more specifically, the sum of \$48,250.29 for the [p]remises." Doc. 15, at par. 38. Plaintiff further alleges that "[a] constructive trust was created by statute to the benefit of plaintiff as a contractor under New York Lien Law once said funds were available to defendants for the [p]remises. Doc. 15, at par. 40. Additionally, plaintiff claims that, "upon information and belief, the defendants violated [s]ection 79-a and [article] 3-A of the New York Lien Law by misappropriating said funds received which were to be held in trust for the benefit of contractors, including plaintiff, improving the property of the [p]remises . . ." Doc. 15, at par. 41.<sup>3</sup> As a result, plaintiff sought recovery of the constructive trust in the sum of \$48,250.29. Doc. 15, at par. 42. Plaintiff alleged the existence of an obligation on the part of the owner (the defendants) by alleging the existence of a contract

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<sup>3</sup> Lien Law section 79-a provides penalties for the misappropriation of funds in trusts created pursuant to the Lien Law.

with defendants, as well as the filing of a lien against defendants' premises. This Court finds that plaintiff has sufficiently stated a claim that defendants misappropriated Lien Law trust funds, and, thus, that branch of defendants' motion seeking dismissal of plaintiff's fourth cause of action is denied. *See generally Martirano Constr. Corp. v Briar Contracting Corp.*, 104 AD2d 1028 (2d Dept 1984).

In light of the foregoing, it is hereby:

ORDERED that the defendants' motion to dismiss is granted to the extent that the second and third causes of action in the complaint are dismissed, and the Clerk is directed to enter judgment dismissing those claims; and it is further

ORDERED that the branch of the motion seeking dismissal of the fourth cause of action in the complaint is denied; and it is further


ORDERED that counsel for defendants shall serve a copy of this order with notice of entry within 20 days after this order is filed with NYSCEF; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 280, 80 Centre Street, New York, New York, on October 9, 2018, at 2:30 p.m.; and it is further

ORDERED that this constitutes the decision and order of the court.

9/17/2018  
DATE

  
KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE