

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D27321  
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Submitted - April 16, 2010

WILLIAM F. MASTRO, J.P.  
JOSEPH COVELLO  
RANDALL T. ENG  
ARIEL E. BELEN, JJ.

2009-01280  
2009-01283

DECISION & ORDER

L.D. Wenger Construction Co., Inc., respondent, v  
UnBuildIt, Inc., et al., appellants.

(Index No. 9840/06)

Marshall M. Stern, P.C., Huntington Station, N.Y. (Judith Donnenfeld of counsel),  
for appellants.

Milber Makris Plousadis & Seiden, Woodbury, N.Y. (Joseph J. Cooke of counsel),  
for respondent.

In an action, inter alia, to enforce a trust pursuant to Lien Law article 3-A, the defendants appeal from (1) a judgment of the Supreme Court, Suffolk County (R. Doyle, J.), entered April 29, 2008, which, upon so much of an order of the same court dated April 15, 2008, as, in effect, granted that branch of the plaintiff's motion which was for summary judgment on the cause of action to enforce a trust pursuant to Lien Law article 3-A, is in favor of the plaintiff and against them in the principal sum of \$38,147, and (2) an order of the same court dated December 3, 2008.

ORDERED that the appeal from the order dated December 3, 2008, is dismissed as abandoned; and it is further,

ORDERED that judgment is affirmed; and it is further,

ORDERED that one bill of costs is awarded to the plaintiff.

May 11, 2010

L.D. WENGER CONSTRUCTION CO., INC. v UNBUILDIT, INC.

Page 1.

In moving for summary judgment on its cause of action to enforce a trust pursuant to Lien Law article 3-A, the plaintiff, the subrogee of the sole trust beneficiary's trust claim (*see* Lien Law § 77[1]), demonstrated its entitlement to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). The plaintiff established, prima facie, that the defendant UnBuildIt, Inc. (hereinafter UnBuildIt), improperly diverted trust assets, in that it paid, transferred, or applied trust assets for non-trust purposes before paying the trust claim (*see* Lien Law § 72[1]; *see also* Lien Law § 75[4]; *People v Rosano*, 50 NY2d 1013, 1016). The plaintiff also established, prima facie, that the defendant Charles Fraser, who owned and controlled UnBuildIt, participated in that breach of trust (*see* Lien Law § 77[3][a][i]; *South Carolina Steel Corp. v Miller*, 170 AD2d 592, 594-595; *cf. Medco Plumbing, Inc. v Sparrow Constr. Corp.*, 22 AD3d 647, 648-649). Since, in opposition, UnBuildIt and Fraser failed to raise a triable issue of fact, the Supreme Court properly granted that branch of the plaintiff's motion which was for summary judgment on the cause of action to enforce a trust pursuant to Lien Law article 3-A (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324).

Since UnBuildIt and Fraser advance no argument in their brief regarding their appeal from the order dated December 3, 2008, we must dismiss the appeal from that order as abandoned (*see Matter of Level 3 Communication, LLC v DeBellis*, 72 AD3d 164; *Cambry v Lincoln Gardens*, 50 AD3d 1081, 1084; *Ellner v Schwed*, 48 AD3d 739; *DiCarlo v City of New York*, 286 AD2d 363, 365).

MASTRO, J.P., COVELLO, ENG and BELEN, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court