To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
COMMERCIAL DIVISION

Present: HON. ALAN D. SCHEINKMAN,
Justice.

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BERGASSI GROUP LLC, N.Y. MATERIALS LLC AND MVM CONSTRUCTION LLC,

Plaintiffs,

-against-

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Defendant.

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Index No. 56860/2012

Motion Seq. # 002
Motion Date: 10/12/12

DECISION & ORDER

Scheinkman, J:

Defendant Consolidated Edison Company of New York, Inc. ("Con Ed" or "Defendant") moves pursuant to CPLR 3211(a)(1), 3211(a)(7) and 3016 to dismiss the Amended Complaint in its entirety. Plaintiffs Bergassi Group LLC ("Bergassi"), N.Y. Materials LLC ("NY Materials") and MVM Construction LLC ("MVM") ("Plaintiffs") oppose the motion.

FACTUAL AND PROCEDURAL HISTORY

This action was initiated with Plaintiffs' filing of their Summons and Complaint in this Court's efiling system ("NYSCEF") on April 27, 2012. According to Plaintiffs, the dispute arising out of non-payment for Plaintiffs' performance of asphalt, paving and bonding services on behalf of a general contractor – Qualcon Construction LLC ("Qualcon") (an entity that filed for bankruptcy protection) in connection with its contract with Con Ed to make improvements to certain public streets – Tuckahoe Road

in Yonkers and 108th and 188th Streets in the Bronx. It is Plaintiffs' contention that Con Ed wrongfully paid Qualcon monies that were the subject of mechanic's liens filed by Plaintiffs concerning the services they provided on these projects.

Defendants moved to dismiss the Complaint and the Court held a conference on June 28, 2012 to determine whether discovery would proceed pending the motion to dismiss or if it would be stayed. At the conclusion of the conference, the Court advised that discovery would be stayed pending the motion to dismiss and then set the motion schedule.

On July 30, 2012, Plaintiffs filed an amended complaint and Defendants withdrew the prior motion and replaced it with the present one.

ALLEGATIONS OF THE AMENDED COMPLAINT

Based on the allegations of the Amended Complaint, which the Court must deem as true for purposes of this motion, Plaintiff MVM is a general contractor specializing in asphalt paving, concrete and commercial construction that subcontracted with Qualcon on July 20, 2010 to work on certain aspects of a Con Ed project located at Tuckahoe Road, Yonkers, New York (Amended Complaint at ¶¶1, 15). Plaintiffs contend that Qualcon failed to pay Plaintiffs causing Plaintiffs to file mechanic's liens pursuant to New York's Lien Law ("Lien Law") § 12, which permits for the filing of a lien up to 30 days after the completion and acceptance of a public improvement project. It is Plaintiffs' position that the time for the filing of these liens has not run because the projects are not yet completed (*id.* at ¶14).

MVM was a subcontractor to Qualcon providing paving services in connection with the Con Ed project. It is alleged that on October 14, 2011, MVM served upon Con Ed "a Mechanic's Lien for Public Improvement for the supply of materials and labor to QUALCON ... in the amount of $55,750.40" (*id.* at ¶16). Plaintiffs allege that this lien remains unpaid (*id.* at ¶17).

Plaintiff NY Materials is a manufacturer of cold patch asphalt used on roadways (*id.* at ¶3) and it is alleged that on October 14, 2011, NY Materials "served upon CONED a Mechanic's Lien for Public Improvement by [NY Materials} for the supply of cold patch asphalt to QUALCON from October 5, 2009, through February 11, 2011, for the purpose of paying/patching 188th Street and 108th street in the Bronx in the amount of approximately $43,339.90" (*id.* at ¶18).

Plaintiff Bergassi is the construction bond agency that provided a surety bond on behalf of the "trenching and other work related to supporting the repair and overall improvement of CONED's steam distribution system located under various New York City streets" (Amended Complaint at ¶ 21). It is alleged that on November 7, 2011,

Bergassi served upon Con Ed "a mechanic's lien for bond premiums owed by QUALCON in the amount of approximately $128,075.00" (*id.* at ¶20) and that the "surety bond is intrinsic requirement to the labor performed by QUALCON" (*id.* at ¶22).

Plaintiffs contend that the "amounts owed to Plaintiffs are trust assets subject to the rights of trust beneficiaries under New York Lien Law, Art. 3-A" (*id.* at ¶27).

According to Plaintiffs, at the time they filed their liens, the amount Con Ed owed to Qualcon was in excess of $480,000.00 (*id.* at ¶24). Plaintiffs contend that it is Con Ed's policy to require its contractors to discharge any lien filed by a subcontractor or materialsman within 5 days and that Con Ed withholds from the contractor 200% of any unbonded or unsatisfied lien (*id.* at ¶¶25-26). Plaintiffs further contend, on information and belief, that one of Con Ed's standard terms under its construction contracts with general contractors is that Con Ed is authorized to pay subcontractors and materialsmen directly instead of paying the general contractor (*id.* at ¶ 28).

Because Con Ed received a number of liens arising from Qualcon's failure to pay subcontractors, on October 24, 2011, Con Ed filed a petition pursuant to CPLR 5239, which sought to deposit the funds Con Ed owed Qualcon in the Supreme Court, Bronx County pending the outcome of the disputes relating to such funds (*id.* at ¶ 29). However, Con Ed is alleged to have precipitously released the retained funds and discharged the mechanic's liens based on fraudulent lien discharge bonds that Qualcon had presented to Con Ed by Oceanic Indemnity Ltd. (a Bahamian company outside this court's jurisdiction). These discharge bonds are said to be fraudulent in that surety companies must be licensed to do business in New York. Plaintiffs allege "on information and belief" that Oceanic was not licensed to do business in New York (*id.* at ¶ 32). Plaintiffs further contend that the bonds "were defective on their face because they lacked a current corporate financial statement of the surety, a certificate of qualification as required by Insurance Law Section 1111, and a power of attorney" (*id.* at ¶34).

Plaintiffs allege that Con Ed "has an internal risk management department to review the validity, financial wherewithal and sufficiency of any insurance company issuing bonds seeking to discharge a mechanic's lien on a CONED project" yet "neglected to follow its internal procedures to ascertain the validity and sufficiency of the bonds presented to it by QUALCON" (*id.* at ¶39). Within three weeks of procuring the fraudulent bonds and obtaining the retained funds from Con Ed, Qualcon filed for Chapter 11 Bankruptcy protection.

Plaintiffs' First Cause of Action is for breach of fiduciary duty. It alleges that Con Ed's contract with Qualcon allowed it to pay subcontractors and vendors directly and Con Ed's internal policy is to withhold funds when a claim for payment is

made by a subcontractor or vendor to Con Ed. Plaintiffs contend that they "relied on CONED's withholding of payments to QUALCON, and negotiated with CONED for release of funds directly to them for payment" (*id.* at ¶45). The fiduciary relationship is established, say Plaintiffs, as a result of Con Ed's "actions and standard procedures" and Con Ed's "failure to protect the claims of Plaintiff was a breach of said fiduciary duty and caused Plaintiffs to lose the retained funds" (*id.* at ¶47).

The Second Cause of Action is for negligence and it asserts that Con Ed had a duty to protect Plaintiffs' claims when Con Ed received the mechanic's liens and notice that Qualcon had not been paid. Plaintiffs allege that Con Ed "breached that duty by failing to investigate the validity of the bonds produced by QUALCON ... [and its] negligent release of the retained funds have caused substantial loss of revenue to Plaintiffs ...." (*id.* at ¶53).

Plaintiffs assert a claim of conversion as their Third Cause of Action and allege that the "retained funds held by CONED were the de facto property of Plaintiffs, and the release of said retainage by CONED to QUALCON was a conversion" (*id.* at ¶55).

Plaintiffs' Fourth Cause of Action asserts that Con Ed violated Article 3A of the Lien Law by "divert[ing] the funds held in trust for the Plaintiffs to QUALCON" (*id.* at ¶58).

The Fifth Cause of Action seeks the imposition of a constructive trust and asserts that (1) Con Ed had a fiduciary relationship with Plaintiffs, (2) Con Ed promised to withhold funds pending resolution of the competing claims, (3) Plaintiffs relied upon Con Ed's retention of funds to protect its claims, which reliance is evidenced by the fact that Plaintiffs rejected Qualcon's settlement offer of an immediate partial payment with a six month payment plan as a result of their reliance on "Con Ed's assurances that Plaintiffs would be paid in full from the proceeds of the retained funds" (*id.* at ¶ 62), and (4) following such assurances, and without notice to Plaintiffs, Con Ed "withdrew the Petition and released the retained funds to Qualcon, defeating the purpose of the Plaintiffs' liens" (*id.* at ¶63). According to Plaintiffs, Con Ed's transfer of the retained funds breached the common law constructive trust on the funds which had been created by Con Ed's actions and its dealings with Plaintiffs.

Plaintiffs' Sixth and final Cause of Action is for prima facie tort. It states in sum and substance

> CONED's release of the funds to QUALCON was done with the knowledge that Plaintiffs were claiming the right to those funds ... CONED's release of the funds to QUALCON caused Plaintiffs economic harm as QUALCON is insolvent and is being reorganized on the Bankruptcy Court ... CONED's actions damaged Plaintiffs in the amount of

$227,165.30 with interest, plus attorneys fees (*id.* at ¶ 68).

A. Defendants' Contentions in Support of Motion

In support of its motion, Con Ed submits an affirmation from its counsel and a memorandum of law.

In his affirmation, S. Dean Kim, Esq., asserts, without providing the basis for his knowledge, that Con Ed is "a regulated utility that provides electric, gas, and steam services in the five boroughs and Westchester County" (Affirmation of S. Dean Kim, Esq. dated August 24, 2012 ["Kim Aff."] at ¶ 3). Based on a printout from the New York State Department of State, Kim affirms that Con Ed "is a for-profit, domestic business corporation" (*id.*).

Based on the contents of the mechanic's liens which Mr. Kim attaches as Exhibit C to his affirmation, he contends that although Plaintiffs allege that these liens were served within 8 months of the last date Plaintiffs provided work or materials, a reading of these mechanic's liens refutes this contention. Thus, with regard to the MVM mechanic's lien, the lien states that the amount sought "was due on August 28, 2010, but the lien was served on October 14, 2011, more than 13 months later" (*id.* at ¶6). Similarly, the NY Materials' lien reveals that "the amount sought by the lien was due on January 16, 2011, but the lien was served on October 14, 2011, almost nine months later" (*id.*). Con Ed points out that the Bergassi lien provides that "the amount sought by the lien was due on August 27, 2010, but the lien was served on November 7, 2011, more than 14 months later" (*id.*).

Again relying on the copies of the mechanic's liens attached to his affirmation, Mr. Kim asserts that while Con Ed requested copies of the liens that were stamped by the County Clerk, the liens received had no such stamp to indicate that they had been filed with the County Clerk and the Amended Complaint does not allege that the liens were filed with the County Clerk (*id.* at ¶¶ 7-9).

With regard to the discharge bonds Qualcon obtained from Oceanic dated October 25, 2011, which had the effect of discharging the MVM and NY Materials mechanic's liens, Kim submits the discharge bonds as Exhibit E to his affirmation and states, again without providing the basis for his knowledge, that these bonds were not filed with the County Clerk because the mechanic's liens had not been filed with the County Clerk (*id.* at 11). The Court cannot credit Mr. Kim's statement that the bonds were not filed and cannot credit his assertion as to the reasons why the bonds were allegedly not filed.

In any event, Mr. Kim asserts that "the discharge bonds' statement (in the second paragraph) that the mechanic's liens had been filed with the Queens county clerk is incorrect" (*id.* at ¶ 11).

In response to the allegations of the Amended Complaint to the effect that Con Ed released the retainage to Qualcon on or about November 1, 2011 based on these bonds without investigating their validity, Kim refutes these allegations and contends

> Based on the records of Con Edison's Law Department, which handles issues concerning mechanic's liens, Con Edison released the funds to Qualcon because MVM and NY Materials's mechanic's liens were defective. Among other reasons, these mechanic's liens had not been filed with the county clerk. Con Edison could not justify withholding money from Qualcon based on MVM and NY Materials's liens because these liens were never filed with the county clerk and, accordingly, a valid and enforceable lien was never created against Con Edison's real property ... Absent a valid and enforceable mechanic's lien, Con Edison was contractually obligated to pay Qualcon for the construction work Qualcon had provided, and so released the funds that Qualcon had earned ... Bergassi's mechanic's lien was not considered at the time of the payment because Bergassi did not serve its lien until November 7, 2011 ... (*id.* at ¶ 14-17). [1]

Mr. Kim explains the gravamen of Con Ed's motion, which is that because the mechanic's liens were defective based on Plaintiffs' failure to file them with the County Clerk, "plaintiffs can never show that any conduct by Con Edison was the proximate cause of their inability to enforce their liens" (*id.* at ¶ 18).[2]

In addition, Con Ed argues that the First Cause of Action for breach of

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[1]Con Ed has not submitted copies of whatever "records" of its Law Department Mr. Kim relied upon as authority for his statement. Moreover, it is doubtful that such records qualify as "documentary evidence" for purposes of a motion under CPLR 3211(a)(1).

[2]The Court observes an inconsistency in Con Ed's position. On the one hand, it argues that, in order to have any validity, the liens would have be viewed as private improvement liens and, as such, would need to be filed with the County Clerk. On the other hand, as Con Ed itself acknowledges in its Memorandum of Law (at 14-15), under Section 19 of the Lien Law, a lien discharge bond is only effective when it is filed with the County Clerk. Thus, Con Ed seems to be contending that the failure to file the mechanic's liens renders them invalid while simultaneously asserting that it had no choice but to honor the lien discharge bonds notwithstanding that same had not been filed.

fiduciary duty must be dismissed because Plaintiffs have not alleged any facts to demonstrate a fiduciary relationship between Con Ed and Plaintiffs. The Second Cause of Action for negligence is, according to Con Ed, defective "because a subcontractor may not assert a direct claim against the owner of a project, either in contract, quasi-contract, or tort ... [and] Con Edison did not have a duty, in negligence or otherwise, to investigate the allegedly fraudulent discharge bonds, as plaintiff's claim" (*id.* at ¶ 20).

It is Con Ed's contention that the Third Cause of Action "for conversion must be dismissed because plaintiff's right to seek payment through their mechanic's liens, if any, cannot form the basis of a claim for conversion" (*id.* at ¶ 21). According to Con Ed, Plaintiffs' claim for trust fund diversion fails "because plaintiffs have failed to allege – and plaintiffs have no good faith basis to allege – that any trust funds existed; the plaintiffs are beneficiaries of any trust funds, or that the release of funds to Qualcon constitutes a diversion" (*id.* at ¶ 22). The claim for constructive trust must be dismissed because it "simply does not apply to the circumstances of this action" (*id.* at ¶ 23). Finally, Mr. Kim asserts that the claim for prima facie tort is deficient in that Plaintiffs do not allege that Con Ed "acted with 'disinterested malevolence'" (*id.* at ¶ 24).

In its memorandum of law, Con Ed explains that, in its view, this action is an attempt by Plaintiffs to do an end run around the Lien Law because Plaintiffs' mechanic's liens were defective in that they: (1) were not filed with the county clerk as required by Lien Law section 3, 10(1) and therefore, did not become an encumbrance on Con Ed's real property; (2) they were served more than eight months from the date of the last work; (3) they did not contain all the information required by section 9 of the Lien Law; (4) they were not duly served as required by the Lien Law §§ 11 and 11-b and are therefore, void; (5) Plaintiffs have no standing to recover against a lien discharge bond because they have not commenced a lien foreclosure action and have not obtained a judgment; and (6) Bergassi's mechanic's lien is void because the Lien Law does not permit a mechanic's lien to be filed for premiums for a construction bond (Def's Mem. at 1, 4).

In further support of its position that the mechanic's liens would have had to have been filed with the County Clerk to be valid, Defendant argues that "Lien Law § 3 applies to an 'improvement of real property.' And Lien Law § 2(8) defines 'improvement of real property' as 'any improvement of real property not belonging to the state or a public corporation'" (*id.* at 5). Defendant argues that it is neither the state nor a public corporation. Instead, it is a for-profit, domestic business corporation, as reflected by the corporate records of the New York State Department of State (*id.*).

At this juncture, the Court notes that the predicate upon which Plaintiffs' claim rests is that Plaintiffs' liens were filed as "public improvement liens" (Amended Complaint, ¶14; *see also* ¶¶6-11). Con Ed has not submitted copies of its contracts with Qualcon nor copies of any contracts, agreements, or permits between Con Ed and the City of New York (for the Bronx street paving/patching contract) and any Westchester

municipalities (for the Yonkers street paving contract).

On the issue of the untimeliness of the liens, Con Ed reiterates the points made by Kim in his affirmation. It further points out that the timeliness is measured from the date the liens were filed and here, because they were never filed (only issued and served), and "[s]ince the eight-month limitations period to file a lien has long-since expired, plaintiffs cannot cure their untimely liens by re-filing their liens now" (*id.* at 7).

In further support of the liens' defectiveness due to the failure to include all the required information, Con Ed argues that the liens fail to contain:

> (1)"the 'name of the owner of the real property against whose interest therein a lien is claims'" (*id., quoting* Lien Law § 9[2]);
> (2) "the 'interest of the owner [in the real property]'" (*id., quoting* Lien Law § 9[6]);
> (3) "the 'time when the first and last items of work were performed and materials were furnished'" (*id., quoting* Lien Law § 9[7]);
> (4) "the 'property subject to the lien, with a description thereof sufficient for identification'" (*id., quoting* Lien Law § 9[7]); and
> (5) a verification "'by the lienor or his agent'" (*id., quoting* Lien Law § 9[7]).

Con Ed argues the failure to include such information renders the lien facially defective.

With regard to Plaintiffs' failure to properly serve the liens, Con Ed quotes from Lien Law §§ 11 and 11-b and argues (without providing any evidentiary proof of same through an affidavit of someone with personal knowledge of the facts): (1) "Plaintiffs failed to file proof of service of their mechanic's liens within thirty-five days after their liens were filed" in accordance with Lien Law § 11 and the failure to file such proof means that the notice of the liens terminated; (2) Plaintiffs failed to serve a copy of their mechanic's liens on Qualcon as required by Lien Law § 11-b; and (3) Plaintiffs failed to file proof of service of their mechanic's liens on Qualcon within thirty-five days after liens were filed, which causes the notice of such service to terminate. Con Ed argues that the failure to comply with the service requirements is fatal to the lien.

In support of the branch of their motion that seeks to dismiss based on Plaintiffs' failure to commence a lien foreclosure action and obtain a judgment of foreclosure, Con Ed argues that in order for Plaintiffs to invoke the remedy provided by a lien discharge bond, they must first prove their entitlement to payment. Accordingly, their failure to do so means that they cannot "claim that they were harmed by the issuance of the allegedly fraudulent bonds — or by Con Edison's alleged release of funds in reliance of the fraudulent bonds" (*id.* at 9-10).

According to Con Ed, Bergassi's lien is defective because the lien seeks payment of its premiums for a construction bond it issued, which is not properly the subject of a mechanic's lien because Lien Law § 3 only allows a lien to be filed "for one

who 'performs labor' or 'furnishes materials' for the 'improvement' of real property." As such, Bergassi may not file a lien for such payments since it "neither performed 'labor' nor furnished 'materials' for the 'improvement' of real property" (*id.* at 10).

In support of the dismissal of the breach of fiduciary duty cause of action, Con Ed argues that the particularity requirements (CPLR 3016[b]) apply and Plaintiffs have failed to allege any facts that would take this relationship out of the typical arms length business relationship between an owner and a subcontractor. Thus, "[n]othing in the Lien Law or the fact that Con Edison was served with a mechanic's lien imposes upon Con Edison a higher level of trust and duty towards the plaintiffs. Nor would it be reasonable for plaintiffs to believe that Con Edison would act in the plaintiffs' best interests with respect to plaintiffs' lien rights" (*id.* at 12). Instead of a fiduciary relationship, Con Ed explains their relationship is actually adversarial since to the extent Con Ed had problems with Qualcon's work, Con Ed and Plaintiffs would be making a claim against the same funds. Furthermore, Con Ed and Plaintiffs would be adversaries in a lien foreclosure action (*id.* at 13).

With regard to Plaintiffs' Second Cause of Action for negligence, Con Ed recites the well settled rule that a subcontractor may not recover against an owner based on either contract, quasi contract or tort theories. Moreover, Con Ed asserts that "[n]o court has recognized the existence of a common law duty to perform obligations imposed by the Lien Law" (*id.* at 14). Therefore, Con Ed did not have a duty to investigate the validity of Qualcon's lien discharge bonds. Alternatively, Con Ed argues that even if the Lien Law created a duty, (1) the duty never arose because Plaintiffs never filed valid and enforceable mechanic's liens, and/or (2) such duty "did not impose a duty on Con Edison to investigate the validity of Qualcon's bonds. Lien Law § 19(4) – which sets forth the requirements and procedures for discharging a mechanic's lien through a bond – contains no requirement that a project owner investigate the bond. Nor is the project owner's approval of the bond a condition – or even a factor – in whether a bond is effective to discharge a lien" (*id.* at 14). Thus, under Lien Law § 19(4)(a), a discharge bond is sufficient if executed by "'any fidelity or surety company authorized by the laws of this state to transact business'" and it "'is effective' when it is 'filed with the clerk of the county' and 'served upon the adverse party'" (*id.* at 15). Thus, "once a county clerk accepts the bond for filing, Con Edison has no grounds to dispute that the bond is 'effective.' At that point, Con Ed is contractually obligated to release any funds it may have been holding because of the mechanic's lien" (*id.* at 15, n.4). It is Con Ed's position that any party may raise an objection to a discharge bond and the party with the greatest incentive to do so would have been Plaintiffs. As such, if they believed the discharge bonds were fraudulent, they should have objected by following the procedures set forth in Lien Law § 19(4)(a).

Con Ed argues that Plaintiffs' claim for conversion (Third Cause of Action) is defective in that "a plaintiff cannot resort to conversion to recover funds that the plaintiff has a right of action to recover" because plaintiff cannot prove that "it has 'an immediate right of possession of the funds it claim[s]" nor the defendant's exercise of

'unauthorized dominion' over such funds" because the funds properly belonged to Con Ed (*id.* at 16-17).

In support of the dismissal of the Fourth Cause of Action for diversion of trust funds, Con Ed asserts three grounds for its dismissal. First, Con Ed argues that the Amended Complaint fails to allege that Con Ed received funds from any of the seven sources specifically enumerated in Lien Law § 70(5). According to Con Ed, "[f]unds that do not come from one of these seven, expressly enumerated sources do not constitute trust funds" (*id.* at 18). Thus, it was not sufficient that Plaintiffs allege (incorrectly) that the "funds for Con Edison's construction came from money 'raised ... in the public markets,' from the State of New York, and/or from the City of New York" (*id.* at 18). Con Ed further argues that since it uses it own funds to perform construction work, "even if plaintiffs were granted leave to amend, [they] could not allege in good faith that Con Edison used funds from one of the seven sources' for the subject construction projects'" (*id.* at 19).

Con Ed argues that even if these were trust funds, the Article 3-A claim still fails because Plaintiffs are not beneficiaries of trust funds in Con Ed's hands. Con Ed asserts that the only avenues for a subcontractor to make claims "against an owner's trust fund is if the owner became legally obligated to pay the subcontractor, either through an affirmative undertaking of an enforceable obligation to pay the subcontractor or through a valid mechanic's lien" (*id.* at 19-20). Here, because Con Ed neither undertook some affirmative obligation to pay Plaintiffs nor are Plaintiffs' mechanic's liens valid, Plaintiffs are not beneficiaries of the trust funds that were in Con Ed's hands (*id.*). Con Ed contends that Plaintiffs would nevertheless be beneficiaries of the trust assets received by the contractor and, therefore, Plaintiffs could assert such Article 3-A claims against Qualcon.

Con Ed contends that even if Plaintiffs established (1) that these were trust funds, and (2) that they were beneficiaries *vis a vis* Con Ed, their claim still fails because Con Ed's release of the funds to Qualcon was not a diversion of trust funds. According to Con Ed, an owner is permitted to use trust funds for the cost of improvement, which "includes 'expenditures incurred by the owner in paying the claims of a contractor, an architect, engineer or surveyor, a subcontractor, laborer and materialman, arising out of the improvement'" (*id.* at 20, *quoting* Lien Law § 2[5]). Accordingly, since its release of funds to Qualcon was a payment for the cost of improvement, there can be no claim for trust fund diversion.

According to Con Ed, the Fifth Cause of Action for a constructive trust must be dismissed because (1) there is no fiduciary relationship between Con Ed and Plaintiffs; (2) Con Ed is not holding any property over which a constructive trust may be imposed (i.e., Con Ed no longer holds the funds it paid over to Qualcon); (3) a constructive trust is a remedy for a fraud or other unconscionable conduct and no such conduct is alleged against Con Ed; (4) Plaintiffs have not alleged a transfer in reliance

of a promise[3] as Plaintiffs were not induced to transfer any property to Con Ed in reliance on any promise; and (5) there is no unjust enrichment because although Con Ed received the value of the project work it paid fair consideration for the work (*id.* at 23).

As its last point, Con Ed argues that the cause of action for prima facie tort must be dismissed because Plaintiffs have not alleged that Defendant acted with disinterested malevolence – and Plaintiffs could not in good faith allege this element, particularly in light of the fact that Plaintiffs acknowledge that Con Ed released the funds in reliance on the discharge bonds presented (*id.* at 24, *citing* Amended Complaint at ¶¶ 33, 39). Thus, since there are no allegations that refute that the monies were paid by Con Ed based on its contractual obligation to pay Qualcon for the work performed and Plaintiffs have not alleged facts to support the notion that Con Ed acted out of disinterested malevolence, the Sixth Cause of Action must be dismissed.

B. Plaintiffs' Contentions in Opposition

In opposition, Plaintiffs submit (1) affidavits from Gino Secchiano (Managing Member MVM), Edmund J. Bergassi (Managing Member, Bergassi), and Charles J. Loccarelli (Managing Member, NY Materials); (2) an affirmation from Plaintiffs' counsel, Andrew J. Maggio, and (3) a memorandum of law.

In his affidavit, Mr. Secchiano states that in July 2010, MVM worked as a subcontractor with respect to asphalt paving of Tuckahoe Road, Yonkers, New York, which is a public road (Affidavit of Gino Secchiano, sworn to July 30, 2012 at ¶ 2). At the time MVM filed its public improvement mechanic's lien on October 14, 2011, "the Tuckahoe Road project was still under construction and, upon information and belief, the Tuckahoe Road project is still under construction and unfinished as of the date of this affidavit" (*id.* at ¶ 3).

In his affidavit, Mr. Luccarelli avers that during the period "[f]rom October 5, 2009 through February 11, 2011, numerous Qualcon dump trucks came to N.Y. Materials' facility at 7 Edison Avenue, Mt. Vernon, New York, and were loaded with cold patch asphalt for a public road in the Bronx, N.Y." (Affidavit of Charles J. Luccarelli, sworn to July 27, 2012 at ¶ 3). He avers that it is NY Materials' policy that the truck driver reports to the dispatcher the location to which the cold patch is being brought and

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[3] Con Ed argues that Plaintiffs' allegation that "Con Ed 'promised to withhold the funds pending resolution of competing claims'" is completely undermined by the other allegations of the Amended Complaint that Con Ed commenced an interpleader so as to be able to deposit the funds in court and since in an interpleader, the funds would be subject to competing claims by various entities, there would be no guarantee that Plaintiffs would be entitled to the funds. Further, Con Ed asserts that it withheld the funds for its own benefit to protect itself against Plaintiffs' claims (Defs' Mem. at 22-23).

NY Materials' records indicate that the Qualcon loads went to pave and patch 108th Street and 188th Street in the Bronx for a Con Ed job. He states when NY Materials was not paid for the cold patch asphalt, it filed a Notice of Mechanic's Lien for Public Improvement with Con Ed in October 2011 (*id.* at ¶ 5).

In his affidavit, Edmund Bergassi avers that he has been a licensed surety bond broker since 1978 and from 1995 to 1998, he served as a Commissioner of the New York State Insurance Fund (Affidavit of Edmund J. Bergassi, sworn to July 29, 2012 at ¶ 2). He states that he is fully familiar with construction bonds and that he specializes in public work contractors and commercial builders and developers (*id.* at ¶ 3). According to Mr. Bergassi, Bergassi was hired by Qualcon to acquire a construction bond for Qualcon to insure payment of labor and materials with respect to Qualcon's work on public streets in New York City – specifically, "trenching and other work related to supporting the repair and overall improvement of ConEd's steam distribution system located under various New York City streets" (*id.* at ¶ 5). He contends that under New York law, "the surety bond is intrinsic requirement to the labor performed by Qualcon" (*id.* at ¶ 5). Bergassi states "upon information and belief" that Con Ed received monies from New York state agencies and New York City agencies to underwrite the construction. According to Bergassi, Qualcon and Con Ed received the construction bond and Bergassi is owed the bond premium of $128,075.00, which was never paid (*id.* at ¶ 10). He contends that the premium is protected by New York's Lien Law, Article 3-A, but because the work performed was on a public street and was a public improvement, no filing was required with the County Clerk. Instead, Bergassi filed a Public Improvement Mechanic's Lien with Con Ed "the quasi-public company responsible for the construction" and with the New York Public Service Commission (*id.* at ¶ 12).

He explains that he contacted Timothy C. Idoni, Westchester County Clerk, after Con Ed raised its objection that the mechanic's liens were defective based on Plaintiffs' failure to file with the Westchester County Clerk, and he attaches a copy of their email exchange wherein Idoni confirms that public improvement liens are not to be filed with the County Clerk (*id.* at ¶ 14 and Ex. B thereto).

With regard to the discharge bond provided by Oceanic, he avers that based on an investigation he conducted on Oceanic, it is not licensed to do business in New York nor is it a legitimate company. As evidence, Bergassi contends that it is not listed in AM BEST, a trade publication that rates insurance/bonding companies (Bergassi Aff. at ¶ 18). According to Bergassi, given that Con Ed has a risk analysis officer whose job it is to review surety bonds and that its own risk analysis protocols would have required that it consult AM BEST before releasing the funds, it is clear that Con Ed violated its own policy by releasing the retained funds based on the fraudulent discharge bonds. He further asserts that based on his examination of the bonds issued by Oceanic, they are "defective on their face because they lacked a current corporate financial statement of the surety, a certificate of qualification as required by Insurance

Law Section 1111, and a power of attorney" (*id.* at ¶ 17). He states on information and belief that the funds were released even though Con Ed was aware of the bonds defects.

In counsel's affirmation, Mr. Maggio states that Qualcon acted as general contractor on numerous public improvement projects for Con Ed and Plaintiffs acted as subcontractors by providing material, labor or bonding services to Qualcon. When Qualcon did not pay Plaintiffs for their services, starting on October 11, 2011, he had numerous phone and email communications with Con Ed's counsel, Peter A. Hagan, Esq. regarding amounts due. According to Mr. Maggio, Mr. Hagan advised Mr. Maggio that Con Ed had placed funds due to Qualcon on hold and was going to move to deposit the funds it owed Qualcon because the liens against Qualcon exceeded what Con Ed owed Qualcon (Affirmation of Andrew J. Maggio, Esq. dated September 24, 2012 at ¶ 5, and Ex. 1 thereto). Mr. Maggio states that in a conference call, Mr. Hagan advised Mr. Maggio to file public improvement liens for the amounts owed. Mr. Maggio states that based on that advice, on or about October 17, 2011, he served Notices of Mechanic's Lien for Public Improvement on behalf of NY Materials and MVM by certified mail, return receipt requested and by facsimile based on an email from Hagan requesting that they be faxed to him and providing the facsimile number (Maggio Aff. at ¶ 7, and Exs. 2 and 3 thereto). According to Mr. Maggio, during a follow up phone conversation, Mr. Hagan acknowledged receipt and validity of MVM's and NY Materials' mechanic's liens for public improvement, stated that there were ample funds in the retainage to cover the liens and that Con Ed would be depositing the funds with the Bronx County Supreme Court and after an appearance, Mr. Maggio's clients would be paid. Mr. Maggio then attaches a settlement offer from Qualcon's attorney on October 19, 2011 offering to an immediate partial payment and a nine-month payment plan for the balance (*id.* at ¶ 9 and Ex. 4 thereto).[4]

Mr. Maggio attaches the petition and amended petition for judicial disbursement of the funds that Con Ed filed in Bronx County Supreme Court and explains that MVM and NY Materials were named respondents in the petition and their mechanic's liens were set forth in the petition and were annexed as exhibits. He states that MVM and NY Materials rejected Qualcon's settlement offer in reliance of Con Ed's assurances that they would be paid in full. He asserts that he subsequently learned in

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[4]In the email, Qualcon's counsel states that the offer is based on the fact that there would be litigation over the effectiveness of the mechanic's liens Plaintiffs filed (Maggio Aff., Ex. 4). The Court notes that Con Ed finds it "highly unlikely" that an Con Ed attorney would make the statements attributed to Mr. Hagen by Mr. Maggio (Con Ed Reply Mem. at 12 n10). The Court agrees with Con Ed that Mr. Maggio cannot both be a fact witness as to material disputed facts and an advocate (*see* NY Rules of Professional Conduct, §3.7). Thus, if Plaintiffs intend to offer this testimony, Mr. Maggio should consider withdrawing from Plaintiffs' representation or face the prospect that he might be compelled to do so.

an email from Con Ed's counsel dated October 31, 2011, that Con Ed had released the retained funds based on lien discharge bonds that had been produced and that Con Ed was withdrawing its petition. Mr. Maggio responded by requesting copies of the discharge bonds, which were provided to him on November 3, 2011 (*id.* at ¶ 14 and Ex. 7 thereto). Con Ed then served Mr. Maggio with a copy of its application to withdraw the petition, which stated that the need for judicial intervention was moot because Con Ed had released the funds to Qualcon based on a discharge bond that had been provided (*id.* at ¶ 15, and Ex. 8 thereto).

Mr. Maggio affirms that Bergassi served Con Ed with the Mechanic's Lien for Public Improvement for the supply of a surety bond to Qualcon on or around November 7, 2011 (*id.* at ¶ 15, and Ex. 9 thereto). On November 22, 2011, Qualcon filed for Chapter 11 bankruptcy protection and Maggio attaches a copy of the bankruptcy petition (*id.* at ¶ 17, and Ex. 10 thereto). According to Mr. Maggio, on December 12, 2011, Con Ed served Bergassi with a demand for a verified statement pursuant to Section 38 of the Lien law, which Bergassi answered on December 15, 2011. Copies of the demand and answer are attached as Exs. 11 and 12, respectively.

Mr. Maggio describes the investigation he undertook concerning Oceanic, which included, *inter alia*, his discovery that there "was no record of Oceanic with the New York State Department of Financial Services, which is the responsible for the licensing of surety and insurance companies within the State of New York" (*id.* at ¶ 21 and Ex. 13 thereto). Further, he contends that these fraudulent bonds are currently under investigation by the NYS Insurance Frauds Bureau (*id.* at ¶¶ 22, 23). He also learned that "the 'attorney in fact' for Oceanic who signed the Qualcon bonds, Martin Weisberg, recently pleaded guilty to money laundering and conspiracy to commit securities fraud" (*id.* at ¶ 26).

The crux of Plaintiffs' legal argument is that Con Ed's current stance, that the retainage was released because Plaintiffs' bonds were somehow defective, is a newly created defense and belied by the affirmation submitted by Con Ed's attorney in the interpleader action filed in the Bronx wherein he stated that the retained funds had been released based on Con Ed's receipt of discharge bonds. It is further refuted by Maggio's affirmation wherein he provides evidence of Con Ed's acknowledgment of the mechanic's liens' validity, its receipt of same and its assurances to Plaintiffs that the retainage of $500,000 was more than enough to cover the amounts owed. Alternatively, it is Plaintiffs' position that Con Ed's new defense is without merit since these liens were for public improvements pursuant to Section 12 of the Lien Law, and therefore, did not require filing with the County Clerk.

Plaintiffs contend that the services and materials they provided were in connection with the repair of public streets were done in connection with a public improvement, which is "'an improvement to real property belonging to the state or a public corporation'" (Pltfs' Opp. Mem. at 8, *quoting* Lien Law § 2 [emphasis added]).

Plaintiffs explain that because public property is inalienable and cannot be foreclosed upon, "the purpose of a public improvement lien is purely a notice and claim against funds" (*id.*). Thus, there are different filing requirements for public versus private projects and the filing requirements for public improvement projects do not require filing with the County Clerk's office (*id.* at 9). According to Plaintiffs, simply because Con Ed, a private institution performed the project, "does not defeat the public nature of the improvements" (*id.*). Plaintiffs go a step further and argue that even if the project had been performed on Con Ed's property, "the improvements would still be public as Con Ed has been adjudicated to be a quasi-public company" since it "carries on a quasi-public function and acts as an agent of the state" (*id.* at 9).

Responding to the timeliness of the liens, Plaintiffs assert that Defendant improperly relies on the provisions of the private lien law when it is the public improvement lien law that controls the timeliness of the liens. In this regard, Plaintiffs contend that Lien Law § 12 provides that a lien may be filed "'any time before the construction ... is completed or accepted by the state or by the public corporation, and within thirty days after such completion and acceptance ....'" (*id.* at 10). Accordingly, because the projects at issue "are still in progress today or were still active at the time Plaintiffs served their liens ...." Plaintiffs' liens were timely filed (*id., citing* Amended Complaint at ¶ 14, Secchiano Aff. at ¶ 3).

Rebutting Con Ed's contention that the liens were not properly served, Plaintiffs contend that the controlling provision is Lien Law § 11-c and both Con Ed and Qualcon were timely served with Plaintiffs' notices of mechanic's liens. Further, even if service was not proper, both were adequately notified of the liens and Qualcon contacted Plaintiffs' counsel within a few days of their filing to attempt to settle their claims. In any event, Plaintiffs have met the requirement of substantial compliance. Further, Con Ed received notice that the subcontractors were not being paid by Qualcon even before the liens were served (*id.* at 11).

With regard to the information required on the lien, Plaintiffs again assert that Defendant is improperly relying on the private lien law when the proper provision concerning public improvement projects is Lien Law § 12. Accordingly, Plaintiffs' mechanics liens complied with Lien Law § 12 because they provided: the name and residence of the lienor, the name of the contractor or subcontractor for whom the work was performed, the amount due and when it was due, a description of the public improvement, the materials expended and the labor performed and a description of the contract pursuant to which the work was performed or materials provided (*id.* at 11-12). Plaintiffs further point out that (1) Defendants do not specify the information that was supposedly missing, and (2) Bergassi did provide additional information requested by Con Ed pursuant to Lien Law § 38.

In response to Con Ed's contention that Plaintiffs needed a judgment to collect on any bonds and were therefore not harmed by Qualcon's fraudulent bonds,

Plaintiffs argue that the issue is not whether they could have successfully obtained a judgment, "but rather that Plaintiffs were never given the opportunity to obtain a judgment, and were wrongfully denied a surety (bond and retainage) against which to execute a future judgment" since the whole purpose of the lien law is to put a party on notice of a potential judgment and freeze available assets until there is a final resolution of the dispute (*id.* at 12).

Plaintiffs argue, *inter alia,* that Bergassi has the right to file a lien with regard to its bond premiums since Lien Law § 71(2)(e) expressly provides that it applies to payments made of "'premiums on a surety bond ... accrued during the making of the ... public improvement'" (*id.* at 13, *quoting* Lien Law § 71[2][e]).

With regard to Con Ed's contention that Plaintiffs' liens were defective and could be disregarded, Plaintiffs argue that the onus was on Con Ed to seek a discharge of the liens of record pursuant to Lien Law § 21(7).

According to Plaintiffs, they have adequately alleged a breach of fiduciary duty by alleging that Con Ed had policies in place to protect subcontractors and vendors in the event of the general contractor's nonpayment (*i.e.,* that it would withhold payment until written statements/releases from the Subcontractors are received, Maggio Opp. Aff., Ex. 16) and that these facts provide a reasonable inference that a fiduciary relationship existed (*id.* at 15). Plaintiffs assert this contractual and policy statement "is a voluntary assumption of trust obligations" and "puts ConEd in a position of ensuring that subcontractors are paid for their services by ... allowing for direct payment from ConEd to an unpaid subcontractor" (*id.* at 15) and causes subcontractors to rely upon this contractual/policy statement. Because there was a fiduciary relationship between Plaintiffs and Con Ed, when Con Ed received notice from Plaintiffs of nonpayment, Con Ed "had a duty to withhold the retainage on hand until the nonpayment was either resolved by mutual agreement or by adjudication" (*id.* at 16). Plaintiffs argue that Con Ed and Plaintiffs were not in an adversarial relationship and, indeed, Con Ed told Plaintiffs they would be paid from the funds it was withholding.

With regard to the viability of Plaintiffs' negligence claim, Plaintiffs distinguish the cases cited by Defendant as involving claims of breach of contract and not negligence and unlike here, the owners in those cases did not take any actions that compromised the ability of the subcontractor to recover payment.

Plaintiffs refute Con Ed's contention that it owed Plaintiffs no duty by relying on Lien Law § 19(4)(a), CPLR 2502 and Insurance Law § 1102, which all require that a lien discharge bond be issued by an insurance company authorized to transact business in New York state. Further, Lien Law § 19(4)(a) and Insurance Law § 1111 require that the discharge bond be accompanied by a certificate of qualification. In this regard, Con Ed has provided no proof that the surety was authorized in New York because it wasn't. Further, the bonds did not contain a certificate of qualification. It is Plaintiffs' contention that Con Ed was required to investigate the sufficiency of the lien

discharge bonds and it breached that duty by failing to do so. Finally, Plaintiffs state that they had no opportunity to object to the discharge bonds because Con Ed accepted the bonds with no notice to Plaintiffs or an opportunity to inspect and Plaintiffs only received them after the retainage had already been released.

In support of their claim for conversion, Plaintiffs claim they had a possessory right to the retained funds because their work had been completed without objection, the debt was justly owed and they had a *de facto* ownership interest in the funds. Further, that Con Ed, after receiving notice of Plaintiffs' liens, exercised unauthorized dominion over the funds in violation of their duty to pay Plaintiffs.

Plaintiffs rebut Defendant's arguments in support of the dismissal of the diversion of trust funds claim by arguing first that Defendant's argument has a faulty premise – *i.e.*, that Plaintiffs' claims arise out of the owner's trust fund. Rather, their claim is premised on their position as beneficiaries of Qualcon's trust funds that Con Ed improperly transferred to Qualcon before Plaintiffs' claims were paid. Reviewing the statutory language and relevant case law, Plaintiffs argue that (1) the payments withheld by Con Ed are trust funds protected by Article 3-A of the Lien Law, (2) Plaintiffs are beneficiaries of such trust based on their claims and this is so regardless of whether they filed a lien; and (3) the payment to Qualcon was an improper diversion because at the time, Plaintiffs had not been paid in full and therefore, the transfer to Qualcon was improper – *i.e.,* it was a payment made for other than a purpose of the trust.

In support of their claim for breach of a constructive trust, Plaintiffs argue that they have adequately alleged the elements since they have alleged (1) a fiduciary duty, (2) Con Ed's promise to protect Plaintiffs' right to the retainage based on its communications with Plaintiffs' counsel and its interpleader action; and (3) reliance by Plaintiffs insofar as while they did not transfer any property, they did rely on the promise that the retainage would be withheld and even rejected Qualcon's settlement offer based on this reliance. They contend that Con Ed's wrongful transfer was unconscionable as it violated its own policies, either ignored or failed to utilize its risk manager, abandoned its petition in the Bronx County Supreme Court, and violated the promises it made through its counsel that Plaintiffs' liens were timely and adequate and Con Ed's suspect involvement with a racketeer run construction company.

Finally, in further support of the sufficiency of its claim of prima facie tort, relying on the unconscionable conduct by Con Ed alleged in the Amended Complaint, Plaintiffs contend that such conduct is indicative of its will and intent to harm Plaintiffs. Indeed, its release to Qualcon without notice after Con Ed knew that Plaintiffs were making a claim to the retainage was "wrought with malice" (*id.* at 25).

C. Con Ed's Reply

In further support of its motion, Con Ed submits a reply memorandum of law. In it Con Ed states that it disputes the factual accuracy of the facts contained in the Maggio affirmation and the Bergassi affidavit, but is not providing evidence to dispute these allegations since the motion should be granted "irrespective of the truth of plaintiff's allegations" (Def's Reply at 1, n.1).

Con Ed points out that Plaintiffs do not dispute that the liens are defective if measured against the requirements under the private improvement lien provisions. Thus, Plaintiffs have placed all of their eggs in the proverbial basket that they had a right to file public improvement liens for the services provided. According to Con Ed, Plaintiffs could not file public improvement liens here because to be entitled to such a right under Lien Law § 5, (1) "the general contractor to whom the lienor provided labor or materials must have had a contract 'with the state or a public corporation'; and (2) there must be some 'moneys of the state or of such corporation applicable to the construction' against which the lien could attach" (*id.* at 3, *quoting* Lien Law § 5).

With regard to the first requirement, "a 'public corporation' is defined as 'a municipal corporation or a district corporation or a public benefit corporation as such corporations are defined in section three of the general corporation law'" (*id.* at 4, *quoting* Lien Law § 2[6]).

According to Defendant, a municipal corporation is defined as "'a county, city, town, village and school district'" (*id.* at 4, *quoting* General Construction Law § 66[2]). A district corporation is "any territorial division of the state, other than a municipal corporation" (*id.* at 4, *quoting* General Construction Law § 66[2]). A public benefit corporation is "'a corporation organized to construct or operate a public improvement wholly or partly within the state, the profits from which inure to the benefit of this or other states, or to the people thereof'" (*id.* at 4, *quoting* General Construction Law § 66[4]). Thus, because Con Ed is not the state, not a municipal corporation, not a county, city, town, village or school district, not a district corporation and not a public benefit corporation, it is not a public corporation and Plaintiffs cannot file a public improvement lien for the work performed, even though it was performed on city streets.

Con Ed further rejects Plaintiffs' alternative argument that their public improvement liens were proper because Con Ed is a quasi public entity by arguing the case upon which Plaintiffs' rely (*Bronson v Consolidated Edison of New York, Inc.*, 350 F Supp 443 [SD NY 1972]) is not only factually distinguishable, it has been overruled *sub silentio* by the United States Supreme Court, the Second Circuit, a subsequent federal district court case out of the Southern District of New York and the First Department (affirmed by the Court of Appeals). Con Ed points out that those courts found that Con Ed's conduct was not state action and there is no authority for finding Con Ed to be a quasi public entity against whom a public improvement lien may be

filed.

With regard to the second requirement that public monies had to have been used, Con Ed relies on the Kim affidavit wherein Kim avers that the monies used to construct these projects were Con Ed's monies and did not belong to the state or a public corporation. Further, even according Plaintiffs' allegations that Con Ed raised the monies used by agencies of the State or City, "once those funds are in Con Edison's hands, they are no longer 'public funds' for the purposes of the Lien Law" (*id.* at 8).

Con Ed argues in a footnote that, even if Plaintiffs could have filed a public improvement lien, that the liens are defective since Plaintiffs have not complied with all the requirements for filing and service under Lien Law §§ 11-c and 12.

Con Ed reiterates its proximate cause argument – *i.e.,* because Plaintiffs have not obtained a judgment in a lien foreclosure action showing that their liens were valid and enforceable, they cannot establish that Con Ed's actions were the proximate cause of their injury.

With regard to Bergassi's argument that it was entitled to file a lien for its bond premiums, Con Ed argues that the applicable provision is Lien Law § 2 (*i.e.,* the provision controlling which services are lienable) – not Lien Law § 71(2), since that provision merely lists that costs for which a contractor may properly be paid.

Con Ed refutes Plaintiffs' contention that it needed to bring a proceeding to obtain a judicial discharge of the liens under either Lien Law § 21(7) or Lien Law § 19(6) since those provisions are not mandatory. Further, given that Con Ed viewed Plaintiffs' liens as a nullity, it had no cause to seek such a judicial determination.

In further support of its position that it had no fiduciary obligations to Plaintiffs, Con Ed points out that its contractual provision with general contractors is there to protect Con Ed's interest in the event a lien is filed against its property by a subcontractor's claims; it is not there to make the subcontractor an intended beneficiary of the negotiated contractual right. Such an incidental benefit to a subcontractor "cannot be construed to be an objective manifestation of Con Edison's intent to transform a non-existent relationship with a subcontractor into a fiduciary relationship with a heightened level of trust" (*id.* at 13).

With regard to Con Ed's counsel's alleged statements to Plaintiffs' counsel advising Plaintiffs to file public improvement liens, Con Ed argues that it cannot create a breach of a fiduciary duty that did not already exist. Moreover, says Con Ed, it was unreasonable for Mr. Maggio to rely on opposing counsel's legal advice.

Con Ed repeats its arguments concerning the insufficiency of the Plaintiffs' negligence claim and points out that although Plaintiffs state that Con Ed had a statutory duty to ensure Qualcon's bonds were "'legitimate and issued by a company

authorized in New York State" they fail to identify this statutory duty "because there is none" (*id.* at 14). Indeed, Lien Law § 19 contradicts Plaintiffs' position since a project owner has no control over the filing of a discharge bond and does not have to be consulted before a discharge bond is filed and deemed effective under the statute.

According to Con Ed, Plaintiffs' opposition to the branch of its motion which seeks to dismiss the diversion of trust funds claim is consistent with Con Ed's argument because Plaintiffs recognize they are only the beneficiaries of the contractor's trust fund – not the owners. Therefore, to assert their rights against the contractor's trust fund, Plaintiffs "must bring those claims against an entity who has a fiduciary duty with respect to the contractor's trust fund – which in this case is Qualcon" since there is no fiduciary duty on an owner with respect to a contractor's trust fund (*id.* at 15) . Thus, Plaintiffs should be suing Qualcon or its officers or an assignee of the trustee or the transferee to whom the funds were transferred.

Con Ed reiterates its arguments previously made with regard to the insufficiency of the conversion, constructive trust and prima facie tort claims and points out that Plaintiff has provided no legal authority in support of the viability of these claims.

THE LEGAL STANDARDS ON A MOTION TO DISMISS

The legal standards to be applied in evaluating a motion to dismiss are well-settled. In determining whether a complaint is sufficient to withstand a motion to dismiss pursuant to CPLR 3211(a)(7), the sole criterion is whether the pleading states a cause of action (*Cooper v 620 Prop. Assoc.*, 242 AD2d 359 [2d Dept 1997], *citing Weiss v Cuddy & Feder*, 200 AD2d 665 [2d Dept 1994]). If from the four corners of the complaint factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, a motion to dismiss will fail (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Cooper, supra*, 242 AD2d at 360). The court's function is to "'accept ... each and every allegation forwarded by the plaintiff without expressing any opinion as to the plaintiff's ability ultimately to establish the truth of these averments before the trier of the facts'" (*id., quoting 219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). The pleading is to be liberally construed and the pleader afforded the benefit of every possible favorable inference (*511 West 232nd Owners Corp., supra).*

Where, as here, the plaintiff submits evidentiary material, the Court is required to determine whether the proponent of the pleading has a cause of action, not whether he or she has stated one (*Leon v Martinez*, 84 NY2d 83 [1994]; *Simmons v Edelstein,* 32 AD3d 464 [2d Dept 2006]; *Hartman v Morganstern,* 28 AD3d 423 [2d

Dept 2006]; *Meyer v Guinta*, 262 AD2d 463 [2d Dept 1999]).[5] Affidavits may be used to preserve inartfully pleaded, but potentially meritorious claims; however, absent conversion of the motion to a motion for summary judgment, affidavits are not to be examined in order to determine whether there is evidentiary support for the pleading (*Rovello, supra; Pace v Perk*, 81 AD2d 444, 449-450 [2d Dept 1981]; *see Kempf, supra*; *Tsimerman v Janoff*, 40 AD3d 242 [1st Dept 2007]). Affidavits may be properly considered where they conclusively establish that the plaintiff has no cause of action (*Taylor v Pulvers, Pulvers, Thompson & Kuttner, P.C.*, 1 AD3d 128 [1st Dept 2003]; *M & L Provisions, Inc. v Dominick's Italian Delights, Inc.*, 141 AD2d 616 [2d Dept 1988]; *Fields v Leeponis*, 95 AD2d 822 [2d Dept 1983]).

To the extent that Plaintiff's claims turn on a contract, the actual provisions of the contract – rather than Plaintiff's characterization of the terms in her pleading – are controlling (*see 805 Third Ave. Co. v M.W. Realty Assoc.*, 58 NY2d 447, 451 [1983]; *Marosu Realty Corp. v Community Preserv. Corp.*, 26 AD3d 74, 82 [1st Dept 2005]). Therefore, "[w]here a written contract ... unambiguously contradicts the allegations supporting the breach of contract, the contract itself constitutes the documentary evidence warranting the dismissal of the complaint under CPLR 3211(a)(1)" (*150 Broadway N.Y. Assocs. L.P. v Bodner*, 14 AD3d 1 [1st Dept 2004]; *see also Taussig v Clipper Group, L.P.*, 13 AD3d 166, 167 [1st Dept 2004], *lv denied* 4 NY3d 707 [2005] [on a CPLR 3211(a)(1) motion to dismiss, "[t]he interpretation of an unambiguous contract is a question of law for the court, and the provisions of a contract addressing the rights of the parties will prevail over the allegations in a complaint"]).

To succeed on a motion to dismiss pursuant to CPLR 3211(a)(1), the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim (*AG Cap. Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582, 590-591 [2005]; *511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Held v Kaufman*, 91 NY2d 425, 430-431 [1998]; *Leon v Martinez*, 84 NY2d 83, 88 [1994]; *Fontanetta v Doe*, 73 AD3d 78 [2d Dept 2010]); *Cohen v Nassau Educators Fed. Credit Union*, 37 AD3d 751 [2d Dept 2007]; *Sheridan v Town of Orangetown*, 21 AD3d 365 [2d Dept 2005]; *Teitler v Max J. Pollack & Sons*, 288 AD2d 302 [2d Dept 2001]; *Museum Trading Co. v Bantry*, 281 AD2d 524 [2d Dept 2001]; *Jaslow v Pep Boys – Manny, Moe & Jack*, 279 AD2d 611 [2d Dept 2001]; *Brunot v Joe Eisenberger & Co.*, 266 AD2d 421 [2d Dept 1999]). To qualify as "documentary", the evidence relied

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[5]On the other hand, a plaintiff may rest upon the matter asserted within the four corners of the complaint and need not make an evidentiary showing by submitting affidavits in support of the complaint. A plaintiff is at liberty to stand on the pleading alone and, if the allegations are sufficient to state all of the necessary elements of a cognizable cause of action, will not be penalized for not making an evidentiary showing in support of the complaint (*Kempf v Magida*, 37 AD3d 763 [2d Dept 2007]; *see also Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]).

upon must be unambiguous and undeniable, such as judicial records and documents reflecting out-of-court transactions such as mortgages, deeds, and contracts. Letters, affidavits, notes, and deposition transcripts are generally not documentary (*Fontanetta v Doe, supra*).

If the documentary evidence disproves an essential allegation of the complaint, dismissal is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action (*Snyder v Voris, Martini & Moore, LLC,* 52 AD3d 811 [2d Dept 2008]; *Peter F. Gaito Architecture, LLC v Simone Dev. Corp.*, 46 AD3d 530 [2d Dept 2007]).

THE VALIDITY OF PLAINTIFFS' LIENS

The essence of Con Ed's argument is that the liens filed by Plaintiffs were a nullity because this was not a public improvement project and the liens filed were not filed in accordance with the private improvement provisions of the Lien Law because, *inter alia,* they were not timely filed and were not filed with the County Clerk. In opposition, Plaintiffs concede that the liens were not filed in accordance with the Lien Law's requirements concerning private liens but because this was a public improvement project, Plaintiffs only had to comply with the provisions governing public improvement liens.

The provisions of the Lien Law governing the filing of public improvement liens are Sections 5 and 12. Lien Law § 5 ("Liens under contracts for public improvements") provides:

> A person performing labor for or furnishing materials to a contractor, his or her subcontractor or legal representative, for the construction or demolition of a **public improvement pursuant to a contract by such contractor with the state or a public corporation** ... shall have a lien for the principal and interest of the value or agreed price of such labor, including benefits and wage supplements due or payable for the benefit of any person performing labor, or materials **upon the moneys of the state or of such corporation applicable to the construction or demolition of such improvement, to the extent of the amount due or to become due on such contract** ... upon filing a notice of lien as prescribed in this article, except as hereinafter in this article provided .... (Lien Law § 5 [emphasis added]).

A public corporation is defined under Lien Law § 2(6) as "a municipal corporation or a district corporation or a public benefit corporation ...." and a public

improvement is defined under Lien Law §2(7) as "an improvement of any real property belonging to the state or a public corporation ...."

Lien Law § 12 ("Notice of lien on account of public improvements") provides

> At any time before the construction or demolition of a public improvement is completed and accepted by the state or by the public corporation, and within thirty days after such completion and acceptance, a person performing work for or furnishing materials to a contractor, his subcontractor, assignee or legal representative, may file a notice of lien with the head of the department or bureau having charge of such construction or demolition and with the comptroller of the state or with the financial officer of the public corporation, or other officer or person charged with the custody and disbursements of the state or corporate funds applicable to the contract under which the claim is made. The notice shall state the name and residence of the lienor, the name of the contractor or subcontractor for whom the labor was performed or materials furnished, the amount claimed to be due or to become due, the date when due, a description of the public improvement upon which the labor was performed and materials expended, the kind of labor performed and materials furnished, and materials actually manufactured for but not delivered to such public improvement, and give a general description of the contract pursuant to which such public improvement was constructed or demolished. If the lienor is a partnership or a corporation, the notice shall state the business address of such partnership or a corporation, its principal place of business within the state. If the name of the contractor or subcontractor is not known to the lienor, it may be so stated in the notice, and a failure to state correctly the name of the contractor or subcontractor shall not affect the validity of the lien. The notice must be verified by the lienor or his agent, to the effect that the statements therein contained are true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

In accordance with Lien Law § 5 "in order that **one furnishing labor or materials upon public work** shall have a valid lien therefor, the labor and materials must have been furnished pursuant to a **contract 'with the state or a municipal**

corporation'" (*Adirondack Core & Plug Co. v New York Cent. R. Co.*, 238 AD 346, 347 [4th Dept 1933], *affd* 264 NY 439 [1934] [emphasis added]).

Here, giving Plaintiffs' Amended Complaint the liberal reading to which it is entitled in the context of a motion to dismiss, the predicate for Plaintiffs' claims is that their liens are public improvement liens. The Court has no difficulty in concluding that Con Ed is not the state and is not a public corporation.[6] However, the matter does not end there.

Certainly, if Con Ed did not contract with either the state or a public corporation to perform the work in question, the liens could not have been filed in accordance with the public improvement lien provisions and no private lien may be placed on a public road (*see, e.g., EMC Iron Works v City of New York*, 294 AD2d 173 [1st Dept 2002]; *Intercounty Supply, Inc. v TAP Plumbing & Heating, Inc.*, 60 AD3d 907 [2d Dept 2009]; *Sette-Juliano Contr., Inc/Halyon Constr. Corp. v Aetna Cas. and Surety Co.*, 246 AD2d 142 [1st Dept 1998]; *Matter of T.F. Demilo Corp.*, 187 AD2d 404 [1st Dept 1992]; *Petition of Palumbo*, 225 NYS2d 98 [Sup Ct Westchester County 1962]; *Application of Edgerton Estates, Inc.*, 78 Misc 2d 961 [Sup Ct Onondaga County 1974]). As explained by the Appellate Division, First Department, "City-owned properties are inalienable under City Charter § 383 ... an entity desiring to secure an interest thereupon must file a 'public improvement lien' not a 'mechanic's lien,' which EMC filed here. A public improvement lien does not attach to the City's property; instead it secures a creditor's interest 'upon the moneys of the state or of such [public] corporation applicable to the construction or demolition of such improvement[s]'" (*EMC Iron Works, supra,* 294 AD2d at 174, *quoting* Lien Law § 5).[7]

The difficulty here is that Con Ed has not cited any case for the proposition that Plaintiffs were required, in order to state a cause of action, to affirmatively plead that Con Ed had a contract with the state or a public corporation to perform the work in question, though, as above noted, Plaintiffs certainly will have to

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[6]The Court does not agree that it may find Con Ed to be a public corporation under the decision in *Bronson v Consolidated Edison Co. of N.Y.* (350 F Supp 443 [SD NY 1972]).

[7]"[T]he most basic difference between a public and a private lien is that the mechanic's lien for a private improvement is a specific lien on real property, although in the case of a public improvement, where it would be intolerable to have public property encumbered with liens in favor of contractors and others, the lien does not attach to the land involved, but attaches only to the public fund appropriated ... [R]eal property owned by a public corporation is, as a rule, immune from mechanics' liens and once it is determined that the property in question is owned by a public agency, regardless of its use, a mechanic's lien cannot be filed against the property itself" (16 Carmody-Wait 2d § 97.26).

prove that such is the case. Moreover, even if it is assumed that Plaintiffs do have an obligation to make such an affirmative allegation, it seems appropriate to allow Plaintiffs the opportunity to pursue discovery on this question.

There is an implied assumption in Con Ed's papers that the work in repairing the streets in question was undertaken in order to restore the streets to proper condition following work performed by Con Ed (or on its behalf) on its subsurface equipment. By not producing its contracts with Qualcon and any contracts, agreements, licenses or permits with the relevant municipalities governing the project locations in question, Con Ed has not provided documentary evidence that would conclusively rebut that the work in question was performed for the exclusive purpose of bettering the streets at the instance of the government, as distinguished from the purpose of simply restoring an opening in the street that Con Ed had created in order to access its subsurface equipment. If the Cities of New York or Yonkers or the County of Westchester had contracts with Con Ed for the performance of this work such that the utility and paving work performed by Qualcon and Plaintiffs was performed pursuant to those contracts and a lien could be placed "upon the moneys of the state or of such corporation applicable to the construction or demolition of such improvement, to the extent of the amount due or to become due on such contract" (Lien Law § 5), then Plaintiffs NY Materials and MVM would have had the right to pursue the assertion of public improvement liens. Whether there was or was not such a contract should be a matter readily resolvable with discovery.

The Court observes that Mr. Bergassi's affidavit states that Qualcon's work was related to trenching for steam pipes and the surety bond issued by Plaintiff Bergassi describes the project as trenching and other work related to making steam leak repairs and system improvement. However, the surety bond was for $1,000,000 and references a $7,000,000 purchase order for the entire project. Thus, while Mr. Bergassi's affidavit comes close to ruling out Bergassi's claim to have a valid public improvement lien, it does not do so conclusively since it remains possible that this particular aspect of the work was performed by Con Ed under agreement with a municipality.[8] Even though Plaintiffs have a common counsel, it does not appear that Mr. Bergassi's statement would bind the NY Materials or MVM. Con Ed does not argue to the contrary.

This being said, the Court concludes that Bergassi's lien, even if assumed to have validly attached as a public improvement lien, is nevertheless invalid for a different reason. The governing statute permits the assertion of a lien on account of public improvements by a person "performing work or furnishing materials" (Lien Law, §12). This terminology refers to the performance of physical work or labor and the

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[8]It is not implausible that a municipality, learning that Con Ed was doing work on a street, may have requested, ordered, or agreed that Con Ed do additional work on that street for the City's benefit.

furnishing of physical materials (*see* Lien Law, §2 [subds. 11, 12]). The provision of a surety bond is not directly connected to the improvement itself and a surety has ample other means at hand, before issuing a bond, to protect itself from the risk that its insured will fail to pay a premium (*see Travelers' Ins. Co v Village of Ilion*, 126 Misc 275 [Sup Ct Herkimer County 1925]; *Matter of John J. O'Rourke, Inc.*, 152 Misc 575 [Sup Ct Onondaga County 1934]).

Even though the public improvement liens filed by Bergassi are invalid, and even if the public improvement liens of the other two Plaintiffs turn out to be invalid, this does not end the inquiry since if it is determined that Plaintiffs were the beneficiaries of a trust held by Con Ed (*i.e.,* the funds being retained by Con Ed and for which Con Ed petitioned the Bronx County Supreme Court to allow it to deposit with the court), Plaintiffs have presented claims for, *inter alia,* diversion of trust funds under Lien Law Article 3-A, breach of fiduciary duty, conversion, negligence and breach of constructive trust.

The Court now turns to the viability of these claims.

PLAINTIFFS ARE BENEFICIARIES OF THE TRUST CREATED BY CON ED'S ACTS AND PLAINTIFFS HAVE SUFFICIENTLY STATED A CLAIM FOR TRUST FUND DIVERSION UNDER ARTICLE 3-A OF THE LIEN LAW

The essence of Plaintiffs' claims is that Con Ed, by (1) entering into agreements which allowed it to retain funds based on the filing of mechanic's liens, and (2) corresponding with Plaintiffs' counsel and making representations that not only acknowledged the validity of the public improvement liens filed by Plaintiffs MVM and NY Materials, but also evidenced its intent to retain the funds and start the interpleader action so that the competing claims to the funds due Qualcon could be resolved, Con Ed owed Plaintiffs a duty to investigate the validity of the lien discharge bonds before releasing the funds to Qualcon.

Plaintiffs also rely on Con Ed's sophistication (*i.e.*, an internal risk management department that reviews the validity, financial wherewithal and sufficiency of any insurance company issuing bonds seeking to discharge a mechanic's lien [Amended Complaint at ¶ 36]) to support the legal duty Plaintiffs contend Con Ed had with regard to investigating the validity of the lien discharge bonds that were presented to it.

Plaintiffs assert that, without prior notice to them and without their having even been served with a copy of the lien discharge bonds as required by Lien Law §

19(4)(a),[9] Con Ed released to Qualcon the outstanding funds due in derogation of Plaintiffs' rights. These actions have allegedly damaged Plaintiffs because (1) Qualcon has since filed for bankruptcy protection, and (2) the lien discharge bonds are worthless (fraudulent) because they were issued by a Oceanic Indemnity, an entity that (i) is not authorized to transact business in New York as required by Lien Law § 19(4)(a), and (ii) failed to provide a certificate of qualification issued by the Superintendent of Insurance as required by Lien Law § 19(4)(a). Thus, Plaintiffs allege, given that Con Ed knew that MVM and NY Materials were relying on it to retain the funds until their mechanic's liens had been resolved, Con Ed's failure to investigate the bona fides of Oceanic, or at a minimum, confirm that the lien discharge bonds met the requirements of Lien Law § 19(a)(4),[10] renders it liable to Plaintiffs.[11]

As evidence supporting their claims, Plaintiffs have presented copies of the lien discharge bonds themselves. These documents are devoid of any indiction that Oceanic Indemnity was authorized to transact business in New York and did not have appended to them any certificate of qualification pursuant to Insurance Law § 1111 (b), (c) and (d) (Bergassi Opp. Aff. at ¶ 17, and Ex. 7 thereto). Plaintiffs have countered Con Ed's contention that they had the obligation to object to these lien discharge bonds by presenting evidence that they had no such opportunity as the "bonds were accepted by ConEd with no notice to Plaintiffs or an opportunity to inspect" and Plaintiffs only received copies of the bonds after Con Ed had released the retainage to Qualcon (Pltfs' Opp. Mem. at 18). On this point, the Court notes that while these lien discharge bonds were required to have been served on MVM and NY Materials pursuant to Lien Law § 19(4)(a), Plaintiffs have presented evidence that they were not served on them.

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[9]The Court is relying on Lien Law § 19(4)(a) because (1) that is the statute referenced in the lien discharge bonds, and (2) Con Ed is contending that Plaintiffs could not file public improvement liens and, therefore, the lien discharge bonds would have had to have complied with the lien discharge bond requirements concerning private improvements (Lien Law § 19) rather than the lien discharge bond requirements applicable to public improvement liens (Lien Law § 21[5][a]). However, with regard to the requirements at issue (*i.e.,* the requirement that the surety be authorized to transact business in New York and the requirement that the lien discharge bond be accompanied by a certificate of qualification) the provisions are identical in substance so any reference to Lien Law § 19 (4)(a) is equally applicable to Lien Law § 21 (5)(a).

[10]Those requirements are that (1) the insurance company be licensed to transact business in New York State (Lien Law § 19[4][a]) and (2) that the discharge bond be accompanied by a certificate of qualification (*id.*)

[11]Plaintiffs contend that the bonds "lacked a current corporate financial statement of the surety, a power of attorney and a certificate of qualification issued by the NYS Insurance Department (Ptfs' Opp. Mem. at 5-6, *citing* Amended Complaint at ¶ 34 and Bergassi Opp. Aff. ¶ 17).

But even if Plaintiffs MVM and NY Materials had been served, the statutory 10 pay period to make an exception runs from the lienor's receipt of the documents and it appears, on this record, that Con Ed released the funds without inquiry as to whether any of these two purported lienors (of which Con Ed had notice and had named in its interpleader action) had received the discharge bonds. Moreover, Con Ed concedes that the discharge bonds were not filed with the County Clerk, though it acknowledges that the discharge bonds are not effective until such filing. Further, since the discharge bonds are dated October 25, 2011, it is impossible for the 10 day period to have lapsed, even if they had been filed and received by the lienors on the day of issuance.[12] Thus, NY Materials and MVM were deprived of their opportunity to take an exception to the lien discharge bonds based on their failure to include a certificate of qualification (Lien Law § 19[4][a]). Therefore, Con Ed's suggestion that Plaintiffs were at fault for not taking an exception is belied by their own actions in releasing the funds prior to the expiration of such 10 day period.

Con Ed's primary point is that its release of the funds was not the proximate cause of Plaintiffs' injury since Plaintiffs' liens were fatally defective. Con Ed contends that it was the invalidity of Plaintiffs' liens that caused Plaintiffs' injury and Con Ed is without fault. Con Ed's secondary argument is that even if the liens were valid, Plaintiffs' claims must fail because Con Ed owed no duty to Plaintiffs, as Plaintiffs were not the beneficiaries of any trust fund held by Con Ed. The Court disagrees, as to Plaintiffs NY Materials and MVM.

The viability (or lack thereof) of these Plaintiffs' liens does not "strip[] plaintiffs of the statutory protection afforded most subcontractors, does not deprive them of the protection afforded by Article 3-A of the Lien Law, which mandates that funds received by contractors be placed in a trust fund for the benefit of the subcontractors who actually performed the contract work" (*Fred Geller Elec., Inc. v Batter Park City Auth.*, 2002 NY Slip Op 50273[U], 2002 WL 1677667 at *4 [Sup Ct NY County 2002]).[13] "'Section 77(1) of the Lien Law permits any party with a trust claim to

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[12]MVM and NY Materials filed their liens on or about October 14, 2011 (Bergassi filed its lien on or about November 7, 2011). Con Ed started its interpleader action on or about October 26, 2011. Thereafter, by email dated October 31, 2011, Con Ed's counsel advised Plaintiffs' counsel that it had released the monies based on the lien discharge bonds Qualcon had served on Con Ed (Maggio Opp. Aff., Ex. 6). Con Ed also stated that it had released the funds based on the fact that Plaintiffs' liens had not been recorded.

[13]This comports with Lien Law § 71(4) which provides that "Persons having claims for payment of amounts for which the trustee is authorized to use trust assets as provided in this section are beneficiaries of the trust whether or not they have filed or had the right to file a notice of lien as provided in article two of this chapter or shall have recovered a judgment therefor. Where an owner becomes obligated to incur an

bring an action to enforce the claim on behalf of all beneficiaries' provided such the action is timely asserted as a class action in accordance with CPLR 902" (*id.*). It is the claim that is protected.

In *Fred Geller Elec., Inc.*, the court, in the initial proceeding, had discharged the mechanic's liens filed by contractors with regard to their work performed on state owned property leased to a private entity. The court explained that to fall within the ambit of a public improvement project, "the improvement itself must be must be for the public benefit; it is not enough that the land be owned by a governmental entity" (*Fred Geller Elec., Inc.*, 2002 NY Slip Op 50273[U] at *3). Thus, "[a] 'valid public improvement lien c[annot] be filed against the project [if] the commercial improvement [i]s constructed by a private entity, rather than a State or public agency, on publicly owned real property'" (*id., quoting Spring Sheet Metal & Roofing Co. v County of Monroe Indus. Dev. Agency,* 226 AD2d 1064, 1066 [4th Dept 1996]). However, despite having discharged the public improvement liens in the prior proceeding, the court in *Fred Geller Elec., Inc.* nevertheless denied the branches of a motion which sought to dismiss the breach of fiduciary duty and trust diversion claims on behalf of the contractor/trust beneficiaries (*id., citing Canron Corp. v City of NY*, 89 NY2d 147, 157-58 [1996] ["the contractors-trustee holds the trust assets in a fiduciary capacity akin to that of the trustee of an express trust"]).[14]

The court in *Blendex Indus. Corp. v Mount Sinai Yacht Club, Inc.* (2005 WL 6061351 [Sup Ct Suffolk County 2005], *affd* 31 AD3d 680 [2d Dept 2006]) made a similar determination. In *Blendex*, plaintiff contractor filed mechanic's lien on real property that was leased by a municipality to a private yacht club. While noting that such lien was ineffective as there was a prohibition against bringing a mechanic's lien against real property leased from a government municipality, the court denied defendant owner's motion to dismiss plaintiff's Article 3-A claim holding

> Lien Law Article 3A governs the enforcement of statutory trusts for the benefit of laborers and materialmen who have not been paid from money specifically earmarked for the improvement ... The beneficiaries of the trust are all those

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expenditure as part of the cost of improvement, any person to whom he is obligated is a beneficiary" (Lien Law § 71 [4]). As such, it has been noted that "[i]t is clear that the existence of a valid mechanic's lien or the right to file such a lien is not a condition precedent to the institution of an action to enforce a trust under N.Y. Lien Law art. 3-A, given that a trust beneficiary does not have to have a lien or be a lienor; and that he or she becomes a beneficiary of a trust when one comes into being by virtue of a trust created by law" (16 Carmody-Wait 2d § 97.198).

[14]The court did grant the claims to foreclose on the mechanic's liens based on the court's discharge of these liens in a prior proceeding.

> having claims for payments for the costs of improvements whether or not they have a filed mechanic's [lien] ... or have or had a right to file a mechanic's lien" (*Blendex,* 2005 WL 6061351 at 3; *see also Ciavarella v People*, 32 Misc 2d 680 [Sup Ct NY County 1961], *affd* 16 AD2d 291 [3d Dept 1962]).

Accordingly, Con Ed's arguments concerning the defects in the MVM and NY Materials liens (including the arguments concerning the untimeliness and invalidity of the Bergassi lien) are irrelevant to whether or not Plaintiffs have stated claims for trust fund diversion, conversion, breach of fiduciary duty, negligence and breach of a constructive trust.

The Court now turns to Con Ed's secondary argument, which is that regardless of the validity of the liens, Plaintiffs are not the beneficiaries of any Article 3-A trust held by Con Ed as owner and the only relief Plaintiffs may seek under Article 3-A is against Qualcon, the contractor on these projects.

As pronounced by the New York Court of Appeals in *Aspro Mech. Contr., Inc. v Fleet Bank, N.A.* (1 NY3d 324 [2004]):

> Article 3-A of the Lien Law creates "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 Contr. Corp. v. Diners Fin. Corp.,* 21 N.Y.2d 507, 512, 289 N.Y.S.2d 175, 236 N.E.2d 461 [1968]; see Lien Law §§ 70, 71). We have repeatedly recognized that the "primary purpose of article 3-A and its predecessors [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'" (*Aspro Mech. Contr., Inc.*, 1 NY3d at 328, *quoting Matter of RLI Ins. Co. v New York State Dept. of Labor*, 97 NY2d 256, 264 [2002], *quoting Canron Corp., supra*, 89 NY2d at 155).

"Chief among the evils sought to be eradicated was that of 'pyramiding,' a practice whereby owners or contractors use money advanced in the course of one project, as loans or contract payments, to commence or complete another project" (*Aquilino v U.S.*, 10 NY2d 271, 275 [1961]). To this end, funds received by a general contractor in performance of a ... contract, and the rights to receive those funds, are held by the contractor in trust for the benefit of his subcontractors and suppliers. "An article 3-A trust commences 'when any asset thereof comes into existence' and continues until all

trust claims have been paid or discharged, or all assets have been applied for trust purposes" (*RLI Ins. Co.*, 97 NY2d at 262).

"Although an owner's liability pursuant to Lien Law article 3-A requires the existence of an obligation on the part of the owner (see Lien Law § 71[3]), the obligation may be one either imposed by contract 'or as the result of a mechanic's lien'" (*Spectrum Painting Contr., Inc. v Kreisler Borg Florman Gen. Constr. Co.*, 64 AD3d 565, 576 [2d Dept 2009], *quoting Quantum Corp. Funding v L.P.G. Assoc., Inc.*, 246 AD2d 320 [1st Dept 1995], *lv denied* 91 NY2d 814 [1998]).[15] As noted by one commentator, "since an owner who has notice of a[] subcontractor's mechanic's lien may be required to pay twice if he makes payment to the prime contractor after the lien is filed, the filing of a lien frequently stops the flow of cash from the owner and can therefore operate as a significant pressure device even before litigation is commenced" (4C NY Prac., Com. Litig. in NY State Courts § 104:20 [3d ed]). A subcontractors or materialsman's lien is restricted to the amount owed to the general contractor by the owner (*Central Valley Concrete Corp. v Montgomery Ward & Co.*, 34 AD2d 860 [3d Dept 1970]). Thus, "[t]he law is well settled that the rights granted to a materialman by notice of its mechanic's lien are derivative of those of the general contractor to the extent monies are due and owing from the owner to the general contractor ... The lien of the materialman rests upon a theory of subrogation, such that the lienor may be characterized as a statutory assignee or subrogee of the contractor's cause of action ... but is also a statutory right which, by express terms, gives a lien upon the amount due ... Under the procedure, a subcontractor is allowed to claim to the extent of its debt, what the contractor would otherwise be entitled to claim under his contract directly, nothing more. The Lien Law, under these circumstances, specifically imposes liability upon the owner to the lienor and, thereby, authorizes the owner to use trust assets, if any, to satisfy the claim of the lienor ..." (*Lighting Horizons, Inc. v Solomon R. Guggenheim Foundation*, 1992 WL 12665466 [Sup Ct NY County 1992]).

It is Con Ed's position that Plaintiffs have no trust diversion claim and Con Ed owed Plaintiffs no duty because Plaintiffs are not the beneficiaries of any trust monies held by Con Ed. According to Con Ed, "while a subcontractor that has not received payment for work performed or materials supplied to a contractor 'is clearly a beneficiary of the trust assets received by the contractor' ... the statute does not make the owner 'a guarantor of payment to the creditors of the contractor'" (*Quantum Corp. Funding Ltd., supra*, 246 AD2d at 322, *quoting Onondaga Commercial Dry Wall Corp. v Sylvan Glen Co.*, 26 AD2d 130, 133 [4th Dept 1966], *affd* 21 NY2d 739 [1968]). Thus, an owner is only a trustee with regard to funds it has received pursuant to Lien Law §

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[15]This comports with Lien Law § 4 which provides that "[i]n no case shall the owner be liable to pay by reason of all liens created pursuant to this article a sum greater than the value or agreed price of the labor and materials remaining unpaid, at the time of filing the notices of such liens" (Lien Law § 4).

70(5),[16] and there are numerous decisions dismissing claims of, *inter alia*, trust fund

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[16]Although there is a separate provision of the Lien Law dealing with an owner's trust fund, Plaintiffs concede in their opposition papers that they are not relying on an owner's trust fund to establish their beneficiary status, nor could they, since that provision, Lien Law § 70(5), provides:

> The assets of the trust of which the owner is a trustee are the funds received by him and his rights of action for payment thereof
>
> (a) under a building loan contract;
>
> (b) under a building loan mortgage or a home improvement loan;
>
> (c) under a mortgage recorded subsequent to the commencement of the improvement and before the expiration of four months after the completion of the improvement;
>
> (d) as consideration for a conveyance recorded subsequent to the commencement of the improvement and before the expiration of four months after the completion thereof;
>
> (e) as consideration for, or advances secured by, an assignment of rents due or to become due under an existing or future lease or tenancy of the premises that are the subject of the improvement, or of any part of such premises, if the assignment is executed subsequent to the commencement of the improvement and before the expiration of four months after the completion of the improvement or if it is executed before the commencement of the improvement and an express promise to make an improvement, or an express representation that an improvement will be made, is contained in the assignment or given in the transaction in which the assignment is made;
>
> (f) as proceeds of any insurance payable because of the destruction of the improvement or its removal by fire or other casualty, except that the amount thereof required to reimburse the owner for premiums paid by him out of funds other than trust funds shall not be deemed part of the trust assets;
>
> (g) under an executory contract for the sale of real property and the improvement thereof by the construction of a building thereon (Lien Law § 70[5]).

diversion by subcontractors against owners for this very reason. Here, Con Ed argues that since it paid the $500,000 it had retained over to Qualcon after receipt of the lien discharge bonds, it did not divert any trust funds because the payment it made was for the improvement done by Qualcon.

By contrast, Plaintiffs argue that Con Ed owed them the duty of retaining the outstanding funds owed Qualcon under the contract but being retained by Con Ed as a result of its receipt of various tax liens and MVM's and NY Materials' lien notices (regardless of their efficacy). Thus, under the Lien Law a subcontractor is allowed to claim against the owner the amount still remaining to be paid the contractor under the contract and the Lien Law specifically imposes liability upon an owner to this extent such that the owner may use the outstanding contract balance to satisfy the claim of the lienor (Lien Law § 71; *Abdjen Prop., L.P. v Crystal Run Sand & Gravel, Inc.*, 168 AD2d 783 [3d Dept 1990]; *see also Spectrum Painting Contr., Inc. v Kreisler Borg Florman General Constr. Co.*, 64 AD3d 565, 576 [2d Dept 2009] ["Although an owner's liability pursuant to Lien Law article 3-A requires the existence of an obligation on the part of the owner (*see* Lien Law § 71[3]), the obligation may be one either imposed by contract 'or as the result of a mechanic's lien'"]). According to Plaintiffs, Qualcon had no right to these funds since a contractor "'does not have a sufficient beneficial interest in the moneys, *due or to become due from the owner under the contract*, to give him a property right in them, except insofar as there is a balance remaining after all subcontractors and other statutory beneficiaries have been paid'" (*Canron Corp., supra*, 89 NY2d at 157-158 [emphasis in original], *quoting Aquilino v U.S.*, 10 NY2d 271, 282 [1961]).

> Article 3–A of the Lien Law provides that funds
>
> 1. "received by an owner for or in connection with an improvement of real property in this state, including a home improvement loan, or received by a contractor under or in connection with a contract for an improvement of real property, or home improvement, or a contract for a public improvement in this state, or received by a subcontractor under or in connection with a subcontract made with the contractor for such improvement of real property including a home improvement contract or public improvement or made with any subcontractor under any such contract, and any right of action for any such funds due or earned or to

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"It is settled law that only funds originating from one of the seven sources enumerated in Lien Law § 70(5) qualify as owner trust funds" (*Matter of Andrew Velez Constr., Inc.*, 373 BR 262, 280 [Bankr SD NY 2007]).

> become due or earned, shall constitute assets of a trust for the purposes provided in section [71]" (Lien Law §70[1]).

There are various obligations imposed on the holder of such Article 3-A trust funds as noted by the Court of Appeals:

> Section 71(1) provides that trust assets held by an owner "shall be held and applied for payment of the cost of improvement." Trust assets held by a contractor or subcontractor "shall be held and applied for [certain specified] expenditures" including "payment of claims of subcontractors, architects, engineers, surveyors, laborers and materialmen" who are trust beneficiaries; payment of payroll and other project-related taxes; payment of project-related benefits, wage supplements and surety bond premiums; and payments to which the owner is entitled (*see id.* § 71[2][a]–[f]; [5]). Pursuant to section 72 any transfer or application of funds to a purpose other than those specified in section 71(1) and (2) is a diversion of trust assets.[17] Such misappropriation constitutes larceny (*id.* § 79-a) (*Mount Vernon City School Dist. v Nova Cas. Co.*, 19 NY3d 28, 34 n.2 [2012]).

Thus, Plaintiffs are correct in asserting that Qualcon had no right to these funds because until all outstanding claims of trust beneficiaries are paid or discharged, an Article 3-A trustee acquires no property rights in trust assets it receives (*Matter of RLI Ins., supra*, 97 NY2d at 263; *see also Canron, supra, Aquilino, supra*). .

Con Ed is correct that as a general proposition, an owner holding funds due a contractor does not become liable as an Article 3-A trustee to subcontractors. However, the Court finds that Con Ed's institution of the interpleader action and its communications with Plaintiffs' counsel concerning the liens filed by NY Materials and MVM in which Con Ed seemed to acknowledge the validity of the liens and made assurances to Plaintiffs that the funds were being retained, caused a trust to be set up with Plaintiffs NY Materials and MVM as the beneficiaries (*City of New York v Cross Bay Contr. Corp.*, 93 NY2d 14, 19 [1999]).

In *City of New York*, New York City had awarded a contract to Cross Bay

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[17]"The use of trust assets for a nontrust purpose– that is, a purpose outside the scope of the cost of improvement– is deemed 'a diversion of trust assets, whether or not there are trust claims in existence at the time of the transaction, and if the diversion occurs by the voluntary act of the trustee or by his consent such act or consent is a breach of trust'" (*Aspro Mech. Contr., Inc., supra*, 1 NY3d at 328).

Contracting for work to be performed on a landfill. In the contract with Cross Bay (like the contract with Qualcon here), the City was permitted to deduct amounts due Cross Bay by the sums due or owing from the contractor to the subcontractors. The City subsequently terminated Cross Bay and Cross Bay defaulted on payments due various suppliers of labor and materials. Colonia Insurance Co., the surety, made payments to these subcontractors and then Colonia and Cross Bay started a special proceeding against the City to compel the payment of the funds withheld. The City, Colonia and Cross Bay thereafter entered into settlement whereby the City would pay over to Colonia the funds that had been approved for payment to Cross Bay ($171,917.38) following evidence of the satisfaction of all liens or levies that had been filed with the City's Department of Finance which had a superior right to the funds over Colonia. The City then started an interpleader action and paid the $171,917.38 into court and named Cross Bay, Colonia and the IRS. That amount was subsequently reduced to $71,917.38 based on $100,000 in funds due to workers unpaid pursuant to Labor Law § 220-b. The lower court granted Colonia's motion for summary judgment permitting the release of the remaining $71,917.38 and the IRS appealed. The issue framed on appeal was

> whether any of the funds at issue constitute an Article 3-A trust fund. The IRS claims that the contract fund in this action qualifies as an Article 3-A trust fund to which the IRS should be granted statutory ... priority over Colonia, the surety on the payment bond. Colonia counters that an Article 3-A trust fund never arose ... because Cross Bay, as contractor, never received or had the right to receive the contested funds. Colonia states that by paying the outstanding claims of laborers and materialmen, it became equitably subrogated to the rights of the City. Because the City was entitled to withhold the funds pursuant to the contract, Colonia urges that it became entitled to similarly withhold funds in order to reimburse itself for its expenditures as surety. As a result, ... Cross Bay never became entitled to receive the funds at issue so a trust never attached to the funds (*City of New York*, 93 NY2d at 18-19).

The Court of Appeals disagreed and held that through the institution of the interpleader action, "the City, in effect, seeks to pay out contract funds, and an Article 3-A trust protects those funds. The classification of the interpleaded funds as a trust arises by operation of law pursuant to statute" (*id.* at 19) and Colonia did "'not have a sufficient beneficial interest in the moneys, due or to become due from the owner under the contract, to give [Colonia] a property right in them, except insofar as there is a balance remaining after all subcontractors and other statutory beneficiaries have been paid'" (*City of New York* , 93 NY2d at 20, *quoting Canron Corp., supra*, 89 NY2d at 157-158).

Even without the finding of a statutory trust having been created by Con Ed's withholding of the monies due Qualcon and its initiation of the interpleader action, given Con Ed's direct dealings with Plaintiffs' counsel and the assurances it made to him, the Court would find that Plaintiffs MVM and NY Materials have articulated a claim for trust fund diversion against Con Ed (*see Land-Site Contr. Corp. v Marine Midland Bank, N.A.* (177 AD2d 413 [1st Dept 1991]).

In *Land-Site Contr. Corp.*, Land-Site entered into a silent joint venture agreement with Becom Real Inc. concerning a construction project at JFK International Airport. The Agreement provided that all monies contributed by the parties to the project and all payments received would be treated as trust funds and neither party would transfer any of these funds without the prior written consent of the other. Becom's Vice President sent a copy of the joint venture agreement to Marine Midland Bank, N.A. in connection with the parties' opening up of a joint project account with Marine. On February 2, 1989, an account entitled "Becom Real, Inc. JFK Special Account" was opened at Marine. The parties further executed a corporate banking resolution that required the President and Vice President/Treasurer respectively and Project Manager of the two entities to draw orders for the payment of money from the account. When Land-Site learned that $1,029,000 had been withdrawn from the account without its consent, it sued Marine for negligence, breach of contract and unauthorized diversion of trust funds. The lower court granted Marine's motion to dismiss because Land-Site had not signed the corporate banking resolution in its own name; therefore, it had no contractual relationship with Marine and no basis to sue either for breach of contract, negligence or diversion of trust funds under Lien Law § 72.

The Appellate Division, First Department, reversed finding a claim for diversion of trust funds had been stated

> There is no disputing that Land-Site, which was responsible for directing and performing the work on the JFK project, had claims for payment out of the funds that Becom received from the Port Authority. Land-Site was accordingly a beneficiary of the statutory trust created pursuant to Article 3-A of the New York Lien Law ... Moreover, Marine had actual knowledge that the monies held in the account were specifically denominated trust funds by the parties in their January 19, 1989 agreement, which Marine received from Becom less than two weeks before the account was opened ... In our view the conduct of the parties and the surrounding circumstances of this case are sufficient to establish a contractual relationship between Land-Site and Marine, particularly as we are dealing with a CPLR 3211 motion, wherein we accept the allegations in the complaint as true, and we "resolve all inferences which reasonably flow therefrom in favor of the pleader" (*Land-Site Contr. Corp.,*

supra, 177 AD2d at 414, *quoting Sanders v Winship*, 57 NY2d 391, 394 [1982]).

Based on the foregoing, the cases cited by Con Ed for the proposition that an owner does not hold trust funds on behalf of a subcontractor are *inapposite*[18] to the present fact pattern wherein Con Ed undertook to retain funds based on the notices of liens and then instituted an interpleader action so that all the lien holders could fight over whose liens had priority.[19]

Thus, by alleging that subsequent to Plaintiffs' filing of their public improvement liens and subsequent to Con Ed's filing of its interpleader action, Con Ed released the funds being retained to Qualcon based on fraudulently issued lien discharge bonds, the Court finds that Plaintiffs MVM and NY Materials have adequately alleged a claim of trust fund diversion against Con Ed. However, an action to enforce a trust pursuant to Section 77 of the Lien Law must be brought as a class action. The failure to bring the action as a class action is not fatal and may be cured (*Adco Electrical Corp. v McMahon*, 38 AD2d 805 [2d Dept 2007]; *Stern v H. DiMarzo, Inc.*, 2008 NY Slip Op 51163[U], 19 Misc 3d 1144[A] [Sup Ct Westchester County 2008]). Accordingly, the Court will afford Plaintiffs the opportunity to amend their pleading so as to assert it as a class action and will further afford Plaintiffs to seek class certification pursuant to Lien Law, §77 (subd. 1) and CPLR Article 9 (*see id.*).

The Court concludes, however, that this theory does not apply to Bergassi. Bergassi stands on a different footing because it did not file its lien prior to Con Ed's filing of the interpleader action and none of the communications between Con Ed and Plaintiffs' counsel involved any claims to the retained funds by Bergassi. Further, the lien discharge bonds were filed long before Bergassi filed its lien; indeed, it was not until at least a week after Con Ed released the funds at the end of October that Bergassi filed its lien on November 7, 2012. While Bergassi could possibly be viewed

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[18]*Innovative Drywall, Inc. v Crown Plastering Corp.*, 224 AD2d 664 [2d Dept 1996], *lv denied* 88 NY2d 1016 [1996]; *Abjen Prop., L.P. v Crystal Run Sand & Gravel, Inc.*, 168 AD2d 783 [3d Dept 1990]; *Onondaga Commercial Dry Wall Corp. v Sylvan Glen Co.*, 26 AD2d 130 [4th Dept 1966], *affd* 21 NY2d 739 [1968]; *Select Constr. Corp. v 502 Old Country Road LLC*, 2006 NY Slip Op 50609[U], 11 Misc 3d 1078[A] [Sup Ct Nassau County 2006]; *237 Constr. Corp. v St. Stanislaus Roman Catholic Church in Borrough of Queens,* 30 Misc 2d 567 [Sup Ct Queens County 1961]).

[19]Also *inapposite* are the cases standing for the proposition that a subcontractor has no claims for contract or quasi contract as against an owner is there is no privity between them (*see Mariacher Contr. Co. v Kirst Constr. Inc.*, 187 AD2d 986 [4th Dept 1992]; *Perma Pave Contr. Corp. v Paerdegat Boat and Racquet Club, Inc.*, 156 AD2d 550 [2d Dept 1989]; *Berto Constr. Inc. v Pergament Mall of Staten Island LLC*, 2008 NY Slip Op 32064[U], 2008 WL 2882051 [Sup Ct Richmond County 2008]).

as a beneficiary of the trust fund held by Qualcon (*see* 34 NY Pract. Mechanics' Liens in New York § 2:2), the Court finds no basis to hold Con Ed responsible for its release of the retained funds *vis a vis* Bergassi based on the foregoing undisputed and documentary facts. Accordingly, the claims by Bergassi must be dismissed.

Having found that Plaintiffs MVM and NY Materials have adequately alleged a claim of trust fund diversion against Con Ed based on its release of the retained funds to Qualcon provided that Plaintiffs amend their Fourth Cause of Action to assert it as a class action, the Court next turns to the viability of Plaintiffs' remaining claims.

PLAINTIFFS HAVE STATED A CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY

To plead a cause of action for breach of fiduciary duty, Plaintiffs must allege, in accordance with the particularity requirements of CPLR 3016(b) "(1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages that were directly caused by the defendant's misconduct" (*Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 807-808 [2d Dept 2011]; *Kurtzman v Bergstol*, 40 AD3d 588, 590 [2d Dept 2007]). "A fiduciary duty arises under New York law wherever 'one person is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation'" (*American Tissue, Inc., supra*, 351 F Supp 2d at 101; *see also EBIC I, Inc., supra*, 5 NY3d at 19). "Once ... [a] fiduciary duty is established the relationship ... imposes "'a duty to act with care and loyalty independent of the terms of the contract'" (*Pension Committee of the University of Montreal Pension Plan v Banc of Am. Sec., LLC*, 716 F Supp 2d 236, 242 [SD NY 2010], *quoting Bullmore v Banc of Am. Sec., LLC,* 485 F Supp 2d 464, 471, n.26 [SD NY 2007]).

The crux of Con Ed's argument is that it simply had an arms-length dealings with Plaintiffs and "[a]n arms length contractual relationship between parties to a contract generally does not give rise to a fiduciary relationship" (*Cuomo v Mahpac Natl. Bank*, 5 AD3d 621, 622 [2d Dept 2004], *lv denied* 3 NY3d 607 [2004]; *AHA Sales, Inc. v Creative Bath Prods., Inc.*, 58 AD3d 6, 21 [2d Dept 2008]). Con Ed further relies on the fact that courts frequently dismiss breach of fiduciary duty claims by contractors against owners (*Rakus, Inc. v 3 Red G, LLC*, 2010 NY Slip Op 50003[U], 26 Misc 3d 1206[A] [Sup Ct Kings County 2010]).

A fiduciary relationship exists when one party "reposes confidence in another and relies on the other's superior expertise or knowledge" (*WIT Holding Corp. v Klein*, 282 AD2d 527, 529 [2d Dept 2001]). Arms length business transactions do not fall within the fiduciary duty category. However, a trustee is a fiduciary (*Matter of Heller*, 23 AD3d 61 [2d Dept 2005], *affd* 6 NY3d 649 [2006]). Trustees of statutory trusts under

the Lien Law have a fiduciary duty to the beneficiaries of the trust (*Aspro Mech. Contr. Inc., supra*; *Hylan Elec. Contr., Inc. v MasTec N.A., Inc.*, 74 AD3d 1148 [2d Dept 2010]; *Atlas Building Sys., Inc. v Rende*, 236 AD2d 494 [2d Dept 1997]). Any transfer of funds without fulfilling their statutory trust duties may constitute a breach of that fiduciary relationship (*Aspro Mech., supra*, 1 NY3d at 330). However, only a beneficiary of a trust may assert a breach of fiduciary duty (*DeNatalie v Mazza*, 145 AD2d 404 [2d Dept 1988]).

Thus, for the reasons that Plaintiffs MVM and NY Materials have adequately stated a cause of action for trust fund diversion, the Court finds these Plaintiffs have also adequately alleged a claim for breach of fiduciary duty based on these same acts (*see National Envtl. Co. v Shabbir*, 2011 NY Slip Op 33241[U], 2011 WL 6738691 at * 4 [Sup Ct Queens County 2011]). Accordingly, the branch of Con Ed's motion seeking to dismiss the First Cause of Action shall be denied, except as to Plaintiff Bergassi, which are dismissed for the reasons stated above.

PLAINTIFFS HAVE STATED A VALID CAUSE OF ACTION FOR CONVERSION

A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession. Two key elements of this tort are: (1) plaintiff's possessory right or interest in the property; and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]).

Based on the foregoing, Plaintiffs MVM and NY Materials have alleged that they had a possessory interest in the funds being retained by Con Ed and that Qualcon, as the defaulting contractor, had no right to such funds. Plaintiffs have also alleged their demand to Con Ed that the funds be withheld from Qualcon yet Con Ed, in derogation of Plaintiffs' rights to these trust funds, turned them over to Qualcon. The Court finds that Plaintiffs have alleged an adequate claim for conversion. Accordingly, the Court shall deny the branch of Con Ed's motion seeking to dismiss the Third Cause of Action for Conversion, except as to Plaintiff Bergassi, which claims are dismissed for the same reasons articulated previously.

PLAINTIFFS HAVE STATED A VALID CLAIM FOR BREACH OF CONSTRUCTIVE TRUST

Generally, to impose a constructive trust, the following four factors must be present: "(1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment" (*Marini v Lombardo*, 79 AD3d 932, 933 [2d

Dept 2010], *lv denied* 17 NY3d 705 [2011]). And to show unjust enrichment, "a party must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" (*id.* at 934).

"[T]he lack of a fiduciary relationship does not automatically defeat a claim of a constructive trust ... '[T]he absence of any one factor will not itself defeat the imposition of a constructive trust when otherwise required by equity' ... The key factor is unjust enrichment" (*Revankar v Tzabar*, 2007 NY Slip Op 51590[U], 16 Misc 3d 1127[A] at *7-*8 [Sup Ct Kings County 2007] [citations omitted]). Thus, "[t]he purpose of a constructive trust is to restore a particular asset to the plaintiff, and it may be used to recover misappropriated assets and any property into which misappropriated assets have been converted ... 'A transferee receiving corporate assets with knowledge of the diversion is liable as a constructive trustee" (*id.* at *8 [citations omitted]).

In *Trofien Steel & Constr., Inc. v Rybak* (2010 NY Slip Op 50235[U], 26 Misc 3d 1223[A] [Sup Ct Kings County 2010]), subcontractor Trofien Steel & Construction, Inc. performed the structural steel work in connection with a project in which Ryback acted as general contractor. Trofien filed a mechanic's lien naming 390 Kings as owner, 20 Highlawn submitted a certified copy of the deed showing that it was owner. 20 Highlawn moved to dismiss the claim to foreclose on the mechanic's lien and Ryback cross moved to dismiss, *inter alia,* the breach of constructive trust claim. The court granted 20 Highlawn's motion to dismiss since, *inter alia*, there was no money due Ryback at the time the notice of the mechanic's lien was filed. The court, however, denied Rybeck's motion to dismiss the breach of constructive trust claim under Lien Law § 79-a because the "complaint sufficiently allege[d] that a constructive trust was created for Trofien's benefit, Rybak obtained funds for Trofien's benefit on the project at issue, and Rybak violated Article 3-A of the Lien Law by misappropriating the funds. Accordingly, a legally sufficient cause of action for a breach of constructive trust ha[d] been asserted" (*Trofien Steel, supra* 2010 NY Slip Op 50235[U] at *4). The same holds true here and the Court finds that Plaintiffs have adequately alleged a claim for breach of constructive trust. Accordingly, the Court shall deny the branch of Con Ed's motion seeking to dismiss the Fifth Cause of Action for breach of a constructive trust, except as to Plaintiff Bergassi, whose claims are dismissed for the reasons stated above.

PLAINTIFFS' NEGLIGENCE CLAIM IS SUFFICIENT

Con Ed argues because it had no duty (either a common law duty or a statutory duty) to investigate the validity of the lien discharge bonds, it cannot be liable in negligence. According to Con Ed, under Lien Law § 19, "the project owner has no control or influence over the filing of a discharge bond. In fact, the project owner doesn't even have to be consulted before a discharge bond is filed and deemed 'effective' under the statute" (Def's Reply at 14).

To state a negligence cause of action, a plaintiff must allege: (1) the existence of a duty, (2) a breach of that duty, and (3) that damages were proximately caused by defendant's breach of duty (*Marasco v C.D.R. Elec. Sec. & Surveillance Sys. Co.*, 1 AD3d 578 [2d Dept 2003]). It is axiomatic that "absent a duty of care, there is no breach and no liability" (*Marasco*, 1 AD3d at 580 [2d Dept 2003]). Here, given that Con Ed stood in a fiduciary relationship to Plaintiffs MVM and NY Materials based on the fact that they were holding trust funds as trustee on behalf of the trust beneficiaries, there is a duty outside of a contractual duty that Con Ed owed to these Plaintiffs. Further, Plaintiffs have alleged a failure by Con Ed to exercise reasonable care in ensuring that the lien discharge bonds at least satisfied the requirements of Lien Law § 19(4)(a) (*i.e.*, that they were accompanied by a Certificate of Qualification) prior to releasing the funds. Accordingly, the Court finds that Plaintiffs have adequately alleged a claim for negligence and the Court shall deny the branch of Defendant's motion seeking to dismiss the Second Cause of Action for negligence, except as to Plaintiff Bergassi whose claim is dismissed for the reasons stated previously.

PLAINTIFFS' CLAIM FOR PRIMA FACIE TORT MUST BE DISMISSED

The elements for a cause of action for prima facie tort are:(1) intentional infliction of harm; (2) resulting in special damages; (3) without excuse or justification; (4) by an act or series of acts which are otherwise legal (*Del Vecchio v Nelson*, 300 AD2d 277 [2d Dept 2002]). In addition, "[t]o make out a claim sounding in prima facie tort, 'the plaintiff [must] allege that disinterested malevolence was the sole motivation for the conduct of which [he or she] complain[s]'" (*Epifani v Johnson*, 65 AD3d 224, 232 [2d Dept 2009], *quoting R.I. Is. House, LLC v North Town Phase II Houses, Inc.*, 51 AD3d 890 [2d Dept 2008]; *see also Havell v Islam*, 292 AD2d 210 [1st Dept 2002]). Furthermore, as the Appellate Division, Second Department has noted, "'Prima facie tort was designed to provide a remedy for intentional and malicious actions that cause harm and for which no traditional tort provides a remedy, and not to provide a 'catch all' alternative for every cause of action which cannot stand on its legs'" (*Lancaster v Town of East Hampton*, 54 AD3d 906, 908 [2d Dept 2008], *quoting Bassim v Hassett*, 184 AD2d 908, 910 [3d Dept 1992]). Here, there are no allegations that Con Ed acted out of disinterested malevolence. Instead, the reasons for its action as alleged by Plaintiffs was simply its belief that it had to release the funds upon being presented with the lien discharge bonds.[20] Accordingly, the Court shall grant the branch of Con Ed's motion which seeks to dismiss the Sixth Cause of Action for Prima Facie Tort.

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[20]Of course, it is Con Ed's position that the monies were released based on the invalidity of the bonds as public improvement bonds.

CONCLUSION

The Court has considered the following papers in connection with these motions:

1) Notice of Motion to Dismiss dated August 24, 2012; Affirmation of S. Dean Kim, dated August 24, 2012, together with the exhibits annexed thereto, submitted with proof of due service;

2) Memorandum of Law in Support of Defendant's Motion to Dismiss the Amended Complaint dated August 24, 2012, submitted with proof of due service;

3) Affirmation of Andrew J. Maggio, Esq. dated September 24, 2012 submitted with proof of due service;

4) Reply Memorandum of Law in Support of Motion to Dismiss the Amended Complaint dated October 11, 2012, submitted with proof of due service; and

Based upon the foregoing papers, and for the reasons set forth above, it is hereby

ORDERED that the motion of Consolidated Edison Company of New York to dismiss the Amended Complaint of Plaintiffs Bergassi Group LLC, N.Y. Materials LLC, and MVM Construction LLC, is granted in part and denied in part; and it is further

ORDERED that all causes of action are dismissed to the extent asserted on behalf of Plaintiff Bergassi Group LLC; and it is further

ORDERED that the branch of the motion which seeks to dismiss the Third Cause of Action for diversion of trust funds under Article 3-A of the New York Lien Law is granted unless, within 20 days of the date of this Decision and Order, Plaintiffs MVM Construction LLC and N.Y. Materials LLC amend their Amended Complaint to assert this cause of action as a class action in which event said branch of said motion is denied; and it is further

ORDERED that the branch of the motion which seeks to dismiss the Sixth Cause of Action is granted and the Sixth Cause of Action is hereby dismissed as against Plaintiffs N.Y. Materials LLC and MVM Construction LLC; and it is further

ORDERED that in all other respects, the motion to dismiss is denied; and it is further

ORDERED that the parties shall appear for a preliminary conference on January 18, 2013 at 9:30 a.m., which conference shall not be adjourned without the prior written consent of this Court.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
January 3, 2013

ENTER:

ALAN D. SCHEINKMAN
Justice of the Supreme Court

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