SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

Index Number : 653031/2011
BAY BRIDGE CONSTRUCTION CORP.
vs
HIRANI CONSTRUCTION
Sequence Number : 001
ORDER MAINTAIN CLASS ACTION

INDEX NO. _____
MOTION DATE 9/24/13
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). ~~001~~ 31-43
Answering Affidavits — Exhibits _____ | No(s). 44 - 60
Replying Affidavits _____ | No(s). 64 - 68

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

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

Dated: 11/27/13

SHIRLEY WERNER KORNREICH J.S.C.
_____, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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BAY BRIDGE CONSTRUCTION CORP., BILTWEL GENERAL CONTRACTOR CORP., on behalf of itself and all others similarly situated,

Index No.: 653031/2011

DECISION & ORDER

Plaintiff,

-against-

HIRANI CONSTRUCTION MANAGEMENT, INC., JITENDRA HIRANI, THE CITY OF NEW YORK, HON. JOHN C. LIU, NEW YORK CITY COMPTROLLER, RAYMOND KELLY, THE COMMISSIONER OF THE NEW YORK CITY POLICE DEPARTMENT,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Plaintiff Biltwel General Contractor Corp. (Biltwel) moves for partial summary judgment on its cause of action for trust fund diversion (CPLR §3212), certification as a class pursuant to CPLR 901(a) and NY Lien Law §77(1), and for an accounting and the posting of security. Defendants Hirani Construction Management Inc. (Hirani) and Jitendra Hirani (the Hirani Defendants) move for partial summary judgment on their counterclaims alleging defective Lien Law Notices. Finally, defendants The City of New York, Hon. John C. Liu, and Raymond Kelly (the City Defendants) move for summary judgment dismissing the Hirani Defendants' cross-claims for indemnification, contribution, compensation for additional work and unjust enrichment. The motions are granted in part and denied in part for the reasons that follow.

I. Procedural History

On October 31, 2011, Biltwel and another subcontractor, Bay Bridge Construction Corp. (Bay Bridge), commenced this action. Biltwel's complaint alleges six causes of action: (1) breach of contract; (2) quantum meruit; (3) unjust enrichment; (4) lien foreclosure; (5) violation

of State Finance Law §137; and (6) trust fund diversion. The Hirani Defendants' amended answer asserts seven counterclaims: (1) breach of contract; (2) indemnification; (3) Biltwel's Notice of Lien was defective under NY Lien Law §5; (4) Biltwel's Notice of Lien was exaggerated pursuant to NY Lien Law §39; (5) Bay Bridge's Notice of Lien was defective under Lien Law §5; (6) Bay Bridge's Notice of Lien was exaggerated pursuant to NY Lien Law §39; (7) plaintiffs' Notices were filed to harass defendants. The Hirani Defendants also filed cross-claims against the City Defendants seeking: (1) indemnification and contribution; (2) contractual damages; and (3) damages for unjust enrichment.

In addition to its motions for class certification and summary judgment, plaintiffs are seeking remedies including an accounting of the trusts controlled by the Hirani Defendants, posting of security by the Hirani Defendants of **$877,688.50**, and limiting the Hirani Defendants' control of the trust.

II. Factual Background

Hirani, as general contractor, entered into an agreement (the contract) with the New York City Police Department (NYPD) to perform construction work at its 47th Precinct in the Bronx. In November 2010, Hirani and Biltwel executed a subcontract whereby Biltwel would complete installation of a new subsurface drainage system and construct a new parking lot at the site. Biltwel executed a separate subcontract with plaintiff Bay Bridge to supply equipment for the completion of the project. Hirani has received some compensation from the NYPD for work associated with this project, the trust funds under New York Lien Law Article 3-A.

On May 3, 2011, Hirani sent Biltwel a notice to cure alleged defects in their performance of the subcontract. There followed a May 12, 2011 notice of termination from Hirani to Biltwel. On June 8, 2011, Biltwel filed and served a Notice of Mechanic's Lien on the Project pursuant to Section 12 of the NY Lien Law with Commissioner Kelly and Comptroller Liu in the amount of $124,258.81. That same day, plaintiff Bay Bridge filed a Notice of Mechnic's Lien in the amount

of $111,569.05. On December 12, 2012, Verdugos General Contractors Corp. (Verdugos) filed a Notice of Mechanic's Lien in the amount of approximately $87,000. There is some dispute over the precise amount of money that Hirani has received from the City and the amount of money that the City currently holds as a stakeholder in this action.

After filing the Notice of Mechanic's Lien, Biltwel requested that Hirani produce a Verified Statement, as required by Lien Law §76, of the entries in the trust accounts. Subsequently, Biltwel filed a Petition seeking an Order compelling production of a Verified Statement, in Supreme Court, Suffolk County. On July 24, 2013, the Suffolk Court directed Hirani to serve a Verified Statement of Lien Law Trust Funds within 10 days of the entry of the order on July 27, 2012. On the date the Decision and Order was issued, Biltwel conducted an on-site inspection of Hirani's books and records related to the trust funds associated with the subcontract and Hirani produced a statement titled Transaction Detail By Account. Biltwel objected to the statement as insufficient.

III. Discussion

A. Class Certification

Lien Law §77 provides:

> 1. A trust arising under this article may be enforced by the holder of any trust claim, including any person subrogated to the right of a beneficiary of the trust holding the trust claim, in a representative action brought for the benefit of all beneficiaries of the trust. An action to enforce the trust may also be maintained by the trustee. In any such action, except as otherwise provided in this article, the practice, pleadings, forms and procedure shall conform as nearly as may be to the practice, pleadings, forms and procedure of a class action...

See Atlas Bldg. Sys. v Rende, 236 AD2d 494, 496 (1997)(every action to enforce Article 3-A trust under Lien Law §77 must be brought as class action).

1. CPLR §901(a)

CPLR §901(a) sets forth the prerequisites to maintaining a class action: 1) numerosity, the class is so numerous that joinder of all members, whether otherwise required of permitted, is impracticable; 2) commonality, there are questions of law or fact common to the class which predominate over any questions affecting only individual members; 3) typicality, the claims or defenses of the representative parties are typical of the claims or defenses of the class; 4) adequacy of representation, the representation will fairly and adequately protect the interests of the class; and 5) superiority, a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

These factors should be broadly and liberally construed in favor of granting class certification. *Friar v Vanguard Holding Corp.*, 78 AD2d 83, 91 (1st Dept 1980). However, whether the facts presented satisfy the statutory criteria is within the sound discretion of the trial court. *Pludeman v Northern Leasing Sys. Inc.*, 73 AD3d 420, 422 (1st Dept 2010).

Numerosity

Although it has been held that "the threshold for impracticability of joinder seems to be around forty" *(Dornberger v Met. Life Ins. Co.*, 182 FRD 72, 77 [SDNY 1999]), "[e]ach case depends upon the particular circumstances surrounding the proposed class and the court should consider the reasonable inferences and commonsense assumptions from the facts before it." *Friar, supra* at 100. Moreover, Lien Law §77(1) explicitly states that the numerosity requirement may be waived at the court's discretion if the remaining procedural requirements have been met. *Callender v Shirell Air, Inc.*, 282 A.D.2d 564, 565 (2d Dept 2001).

Here, Biltwel seeks to define the class for this action as any subcontractors who have not been paid by Hirani. However, in addition to itself and Bay Bridge, Biltwel has only identified a single additional potential class member, Verdugos. Thus, plaintiffs do not meet the numerosity requirement, as even the most liberal construction of this requirement would not apply to just

three plaintiffs. However, as noted earlier, this requirement may be waived if the other requirements are met. *See Callender, id.*

Common Questions of Law or Fact

" Commonality cannot be determined by any 'mechanical test'." *City of New York v Maul,* 14 N.Y.3d 499, 514 (2010). It is predominance rather than unanimity "that is the linchpin of commonality." *Id.* Where legal issues predominate and there are common questions of fact, factual questions specific to individual members of a class are not fatal to certification. *Id.*

Here, the putative class members each seek to recover wages for the same construction project from the same trust fund. They all allege diversion of the trust's funds. Although the termination of Biltwel is unique to Biltwel and the compensation amounts owed, if at all, to the putative class members may differ, these specific individual facts do not defeat commonality. Fundamental questions in the case are common to all of the subcontractors – how much money was paid to the Hirani defendants and did they, as a matter of law, engage in trust diversion. Common questions of law predominate. The differences that may arise between the class members claims once this issue is settled are secondary and should not defeat class certification.

Typicality

In order to qualify as typical, the claims of the representative party must arise from "the same course of conduct as the class members' claims and [be] based on the same cause of action," *Pruitt v. Rockefeller Ctr. Props., Inc.,* 167 AD2d 14, 22, 574 N.Y.S.2d 672 (1st Dept 1991). In the instant case, all of the putative class members' claims arose from the same set of events related to the same project and the same trust assets. Typicality is present.

Adequacy of Representation

"The factors to be considered in determining adequacy of representation are whether any

conflict exists between the representatives and the class members, the representatives' familiarity with the lawsuit, [their] financial resources, and the competence and experience of class counsel." *Ackerman v PriceWaterhouse,* 252 A.D.2d 179, 202 (1st Dept 1998). No conflict or potential for conflict between Biltwel and the other potential class members has been raised.

Although Biltwel has not produced any financial information to show that it has the resources to adequately represent the class in this matter, Biltwel's counsel has agreed to assume responsibility for the expenses associated with the litigation. Plaintiff's personal financial circumstances, therefore, are irrelevant. *Wilder v May Dept. Stores Co.,* AD3d 646, 804 (2d Dept 2005).

Further, "[i]n order to be found adequate in representing the interests of the class, class counsel should have some experience in prosecuting class actions." *Globe Surgical Supply v GEICO Ins. Co.,* 59 A.D.3d 129 (2d Dept 2008). The class action proposed in this case is not the standard massively complex class action regularly contemplated by the adequacy requirement. This class action has to conform to the procedural forms of a class action simply to meet the requirements of Lien Law §77. Biltwel's attorney does not allege to have anything more than a great deal of commercial litigation experience and a knowledge of the procedures of class actions, the court has no doubt that plaintiff's counsel, given its experience, is more than capable of adequately representing the class.

Superiority of Class Action

Finally, plaintiff must demonstrate that a class action is the superior method for adjudicating the claims before the court. Despite the Hirani Defendants' assertion to the contrary, it is clear that a claim under Lien Law Article 3-A must be brought as a representative action and must conform to the forms and procedures of a class action as closely as possible. *See Callender,*

supra, 282 AD2d 565. While it has been held that "such an action need not fail solely because it was not brought in the form of a class action" (*Tri-City Elec. Co. v People*, 96 AD2d 146, 152 [4th Dept 1983], *Scriven v Maple Knolls Apts.*, 46 AD2d 210, 215 [3d Dept 1974]), this statement merely excuses the failure to bring the case as a class action and permits amendment and cure. In sum, since a class action is the only form a lien enforcement proceeding can take under Lien Law §77(1), it is superior to any other form of action here.

2. *Sixty Day Deadline:*

CPLR 902 requires that "[w]ithin sixty days after the time to serve a responsive pleading has expired for all persons named as defendants in an action brought as a class action, the plaintiff shall move for an order to determine whether it is to be so maintained." This deadline is measured from the date on which the defendant's time to file an answer has expired. *Shah v Wilco Sys., Inc.*, 27 AD3d 169 (1st Dept 2005). Pursuant to Business Corporation Law §306(b), service was effected on Hirani on November 2, 2011, and on Jitendra Hirani on November 9, 2011. Under CPLR §3012©, defendants had thirty days from their respective dates of service to answer. Biltwel should have moved for class certification by February 9, 2012. Neither party in this case is claiming that such notice was served by plaintiff in a timely manner, since Biltwel did not move for class certification until February 15, 2013, approximately one year after the deadline. Biltwel now asks that the deadline be extended.

"The CPLR 902 requirement that a motion for class action certification be made no later than sixty days after the time expires for the service of all responsive pleadings is designed to promote an early determination of whether class action relief is appropriate." *Argento v Wal-Mart Stores, Inc.*, 66 AD3d 930, 932 (2d Dept 2009). The court has discretion to extend the sixty day deadline "upon good cause shown." *Id.* Moreover, it is proper for a court to grant an extension

of the deadline if the delay in providing the original notice was "largely the result of defendants' conduct during discovery." *Galdamez v Biordi Constr. Corp.*, 50 AD3d 357 (1st Dept 2008).

Biltwel contends that the Hirani Defendants' delays in providing the Verified Statement of trust accounts as required by Lien Law §75 and ordered by the Suffolk County Court constitute good cause. The Hirani Defendants counter that, even if the court does find that the Hirani Defendant's Transaction Detail By Account is deficient and provides good cause to extend the deadline, Biltwel's motion for class certification would still be untimely. Citing to *Meraner v Albany Med. Ctr.*, 211 A.D.2d 867 (3d Dept 1995), Hirani argues that a plaintiff who alleges that a defendant has provided insufficient information to support its motion for class certification has available to it only the remedy of expeditiously moving for an extension of time. In *Meraner*, the Court denied class certification where necessary documents were not provided four months before plaintiff moved for class certification. *Meraner* is distinguishable due to its unique circumstances. While the plaintiff's motion in *Meraner* was delayed by the defendant's inadequate response to requests for information, it was not with respect to the sixty day deadline that the certification motion was untimely. Rather, plaintiff violated a specific thirty day deadline to respond that was earlier imposed by the Appellate Division. Such was not the case here. Rather, here, the Hirani Defendants promised that a new Verified Statement would be produced and, in the end, produced the same insufficient document. Consequently, the Hirani Defendants' actions during discovery caused delay and provided good cause for extending the statutory deadline. Plaintiff's motion for class certification is granted.

B. Summary Judgment Motions

Summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving

party to make a prima facie showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York,* 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.,* 46 NY2d 1065, 1067 (1979). Failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio, 81 NY2d 1062, 1063 (1993).* If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact. *Alvarez, supra* at 324; *Zuckerman, supra* at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs,* 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman, supra.* Upon completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos,* 46 NY2d 223, 231 (1978).

1. Biltwel's Motion

Biltwel moves for summary judgment on its sixth cause of action, trust fund diversion. While there is some dispute over the precise amount of money that is held in trust for each of the plaintiffs and other subcontractors, the determination of Biltwel's motion will depend on whether or not the trust fund documentation provided by Hirani to Biltwel and known as the Transaction Detail By Account complies with the record keeping requirements of Lien Law §75(3). Section 75(3) ensures that a trustee does not ignore its trust duties by using trust assets in other business transactions as though they were fungible monies. *Caristo Const. Corp. v Diners Financial Corp.,* 21 N.Y.2d 507, 515 (1968). Lien Law §75(3) is specific as to the requirements

of a Verified Statement. Five categories of information must be included: (1) Trust assets receivable; (2) Trust accounts payable; (3) Trust funds received; (4) Trust payments made with trust assets; and (5) Transfers in repayment of or to secure advances made pursuant to a "Notice of Lending". Additionally, **upon request** of a trust beneficiary, a Verified Statement must be provided within ten days. Lien Law §76(4).

The failure of a trustee to keep books and records that meet the standards of Section 75(3), "shall be presumptive evidence that the trustee has applied or consented to the application of trust funds actually received by him as money or an instrument for the payment of money for purposes other than a purpose of the trust." Lien Law §75(4). "A trustee unable to account for use of trust funds is presumed to have used them improperly." *In re Waskew,* 191 B.R. 34, 38 (SDNY 1985). The role of the court in determining whether or not a trustee has engaged in asset diversion, be it actual diversion or presumed diversion under Section 75(4), is to protect a defendant trustee from undue harassment while also ensuring it fulfills its obligations as trustee. *Frontier Excavating v Sovereign Constr. Co. of N. J.,* 30 A.D.2d 487, 492 (4th Dept 1968).

Biltwel contends that the Transaction Detail By Account produced by Hirani is inadequate and fails to meet the requirements of Section 75(3). Biltwel notes that Hirani's account summary is recorded on an accrual basis, not a cash basis which would have reflected actual money coming in and going out of the trust accounts. Furthermore, Biltwel argues that the Transaction Detail By Account is deficient in that it fails to fully record the identities of the beneficiaries, the basis for their trust claims, and the work that they did on the project to qualify as trust beneficiaries.

Hirani counters that during Biltwel's on-site inspection of the records relating to the Project on July 24, 2012, Hirani provided Biltwel with every record that it had pertaining to the

Project, that these records conformed to the requirements of the Lien Law, and that Biltwel chose not to make copies of these records. Hirani further asserts that even if its documents were less than complete, its good faith efforts to comply with the Lien Law requirements should be taken into consideration and it should have the opportunity to cure any defects in its records.

Good faith efforts at record keeping, however, are inadequate under the Lien Law. The plain language of Section 75(3) makes clear that records will either comply with the requirements or not. Then too, the only document before the court purporting to fulfill the obligations of the Verified Statement is Hirani's Transaction Detail By Account. While Hirani claims that fuller records exist, these records have not been produced. "[T]he mere assertion that such books and records were kept [is] insufficient to avoid the statutory presumption." *Medco Plumbing, Inc. v. Sparrow Const. Corp.*, 22 A.D.3d 647, 648 (2d Dept 2005).

The Transaction Detail By Account provided by Hirani in July 2012 and again in January 2013 does not comply with the requirements of Lien Law §75(3). While summaries of the full books and records relating to the trust are acceptable, this particular summary fails to meet the specific elements that are essential to a satisfactory Verified Statement. The summary contains bare line items that meet only some of the requirements of the Lien Law. Moreover, it fails to provide any supporting documentation to verify the account figures. Lien Law §75(3) requires a "complete accounting of trust fund," not a simple listing of funds in and out of the trust. *GMCK Realty, LLC v Mihalatos,* 95 A.D.3d 947, 949 (2d Dept 2012).[1]

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[1] In *GMCK Realty,* the defendant provided the plaintiff with "copies of hundreds of checks, computer-printed tables of vendors, and various financial spreadsheets, as well as a 'verification statement ... attesting to the truth of the documentation which was produced." While the Appellate Division ruled that this was sufficient to protect the defendant from a charge of civil contempt for failure to comply stipulation to provide an accounting, it was clear that even this rather voluminous documentation did not meet the accounting requirements of the Lien Law.

The Hirani Defendants ask that, if the Transaction Detail By Account is insufficient to fulfil their obligations under the Lien Law, they be given an opportunity to cure this defect by providing documentation that does comply. This cannot be done. "Because the right of examination or to receive a Verified Statement is a continuing one over the life of the trust, noncompliance with one such demand is not cured by compliance with a later one." *Bette & Cring, LLC v Brandle Meadows, LLC,* 81 AD3d 1152, 1154 (3d Dept 2011). Since the insufficient Transaction Detail By Account is the only accounting of trust assets before the court, the statutory presumption of trust fund diversion runs against Hirani, and plaintiff's motion for summary judgment on trust fund diversion against Hirani is granted.

Liability for trust fund diversion, however, cannot be imposed on individual officers and agents of a company simply because they performed these roles at the time of the conversion of trust assets. *Ace Hardwood Flooring Co. v Glazer,* 74 AD2d 912 (2d Dept 1980). The standard for officers and agents is "whether [they] were actively participating in the wrong of the corporation or had knowledge of use of trust monies in the corporate business." *Schwadron v Freund,* 69 Misc2d 342, 349 (Sup Ct, Rockland County 1972). Plaintiff's allege that Mr. Hirani, as President of the company, both had knowledge of, and actively participated in, trust fund diversion because he admitted to reviewing and approving payment related documents. This is not enough to extend the presumption of diversion to Mr. Hirani. In *Schwadron*, only one of several defendants was presumed to have diverted assets and that defendant did not deny knowledge of payment from commingled trust accounts. Other defendants, who denied knowledge of such wrongdoing, were not presumed to have engaged in diversion, where there

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Id.

were insufficient facts to measure their participation in the diversion. Similarly, Biltwel's accusations against Mr. Hirani are not conclusive and provide no specific facts pertaining to his knowledge or participation. Even if Mr. Hirani had acknowledged that Hirani Construction engaged in unauthorized use of trust funds, plaintiff's allegations would be insufficient to extend the presumption, as "without the benefit of the presumption, no conclusive case of [defendant's] liability for the diversion of trust funds was made out." *Forest Elec. Corp. v Karco-Davis, Inc.*, 259 AD2d 303 (1st Dept 1999). In the absence of specific evidence of Mr. Hirani's knowledge or participation, a question of material fact exists as to his role in the alleged diversion.

1. Hirani Defendants' Motion

The Hirani defendants cross-move for summary judgment on their third through seventh counterclaims, alleging defective and exaggerated Notices of Lien and harassment.

Lien Law §12 requires that a notice of mechanic's lien include the amount claimed to be due under the lien, a description of the labor performed and materials provided, and the dates that the work was done. If a lienor fails to substantially comply with the requirements set forth in Section 12, his public improvement lien may be summarily discharged pursuant to Lien Law §21. *Matter of Ferran Concrete Co. v Avon Elec. Supplies Corp.*, 128 A.D.2d 527 (2d Dept 1987). The lien may be discharged only "[w]here it appears from the face of the notice of lien that the claimant has no valid lien by reason of the character of the labor or materials furnished and for which a lien is claimed." Lien Law §21(7).

According to the Hirani defendants, plaintiffs' lien notices are facially defective because there is inconsistency between the lien notice and several other documents as to the final date that Biltwel performed labor on the Project. The lien notice has the final date of labor as May 10, 2011, while other documents related to the Project indicate that Biltwel continued to work

between May 16 and May 31, 2011. The same is true for the lien notice provided by plaintiff Bay Bridge. Also, Hirani claims that Biltwel's lien notice is defective because it states that the amount claimed under the lien is $124,258.81 while the plaintiffs' complaint states that Biltwel is still owed $333,630 for unpaid labor, materials, and services.

If a lienor fails to accurately include at least two material elements of a lien notice, it cannot be deemed to have achieved substantial compliance with the requirements of Section 12. *Sullivan Contr., Inc. v Turner Constr. Co.,* 60 AD3d 1315 (4th Dept 2009). In *Sullivan,* however, the elements the plaintiff failed to set forth, indeed, were material – the labor performed or materials furnished and the agreed to price or the value thereof. *Id.* The plaintiffs' alleged misstatements do not rise to the level of those in Sullivan. At most, they raise issues of fact and do not support a summary discharge of the lien notice. *Pontos Renovation v Kitano Arms Corp.,* 204 AD2d 87 (1st Dept 1994) ("in the absence of a defect upon the face of the notice of lien, any dispute regarding the validity of the lien must await trial").

3. City Defendants' Motion

The City Defendants seek summary judgment dismissing the three cross-claims asserted against them by the Hirani Defendants: (1) indemnification; (2) breach of contract; and (3) unjust enrichment. For the following reasons, summary judgment is granted and the cross-claims are dismissed.

Indemnification and/or Contribution

The Hirani Defendants claim that if they are found liable under the complaint, they are entitled to contractual or common law indemnification and/or contribution from the municipal defendants. The court disagrees.

The sole mention of indemnification in the contract between Hirani and the City Defendants

is Article 7.4. Article 7.4 provides that, "[t]o the fullest extent permitted by law, the Contractor [Hirani] shall indemnify, defend and hold the City, its employees and agents harmless against any and all claims," including any claims asserted by subcontractors. Hence, the only contractual obligation to indemnify runs from Hirani to the City Defendants, not vice versa. Hirani's claim for indemnification is dismissed.

"Common law indemnification is generally 'available in favor of one who is held responsible solely by operation of law because of his relation to the actual wrongdoer.'" *McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 375 (2011). It is an equitable concept based on fairness. *Id.* "[T]he key element of a common-law cause of action for indemnification is a duty owed from the indemnitor to the indemnitee arising from the principle that every one is responsible for the consequences of his own negligence, and if another person has been compelled ... to pay the damages which ought to have been paid by the wrongdoer, they may be recovered from him." [quotations omitted]. *Nelson v Chelsea GCA Realty, Inc.*, 18 AD3d 838, 840 (2d Dept 2005).

The Courts of Appeals has held that in order for a claim of indemnification to exist outside of an express contractual obligation, two separate requirements must be met. First, both parties must have breached a duty to the plaintiff. Secondly, some duty to indemnify must exist between the parties. *Rosado v Proctor & Schwartz*, 66 NY2d 21, 24 (1985); *Garrett v Holiday Inns*, 86 AD2d 469 (4th Dept 1982). In cases where a subcontractor sues a general contractor, and the general contractor attempts to receive indemnification from the owner of the project courts will require that the project owner have an independent or equal duty to the subcontractor. *Kemron Envtl. Servs. v Envtl. Compliance*, 184 A.D.2d 755, 756 (2d Dept 1992). Where, as in this case, there is no direct relationship between the owner and the subcontractor, this duty does not exist and implied indemnification claim must be dismissed. Furthermore, implied indemnification cannot

exist in the presence of a contract wherein contractual indemnification only flows in the opposite direction. *Serv. Sign Erectors Co. v Allied Outdoor Adv.*, 175 AD2d 761, 763 (1st Dept 1991) ("[w]ith the subject of indemnification clearly contemplated and expressly addressed by [the contract], any reciprocal obligation is extinguished").

The Hirani defendants claim for contribution is equally misplaced. CPLR 1401 provides for contribution among tortfeasors when they are "subject to liability for damages for the same personal injury, injury to property or wrongful death." Purely economic loss arising out of a breach of contract claim does no fall within CPLR 1401. Permitting contribution in a case where damages arise out of a breach of contract, "would not only be at odds with the statute's legislative history, but also do violence to settled principles of contract law." *Bd. of Ed. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21, 28 (1987). Here, where Hirani's indemnification and contribution claims are grounded in contract, Hirani cannot assert a claim for contribution. The Hirani defendants' first cross-claim is dismissed.

Breach of Contract

Hirani's second cross-claim alleges that the municipal defendants breached the contract by failing to compensate Hirani in the amount of $111,569.05 for additional work allegedly outside the scope of the contract. The municipal defendants do not dispute the substance of Hirani's cross-claim, but rather assert that it should be dismissed for lack of subject matter jurisdiction because the exclusive mechanism for adjudicating any disputes arising from the provisions of the contract was the dispute resolution process provided for under Article 27 of the contract. Article 27 reads:

> All disputes between the **City** and the **Contractor**...that arise under, or by virtue of, this **Contract**, shall be finally resolved in accordance with the provisions of this article... This procedure for resolving all disputes of the kind delineated herein shall be the exclusive means of resolving any such disputes.

The contract provides that Article 27 applies, among other things, to disputes concerning the scope of work. Pursuant to the express provisions of the Article, when a dispute arises, a Notice of Dispute is to be submitted to the Police Commissioner within thirty days for adjudication.

Failure to abide by the contract's procedures for dispute resolution is ground for dismissal. Indeed, contract clauses enforcing dispute resolution are not against public policy, and "decisions have reflected no hesitation to enforce non-judicial resolution of contract disputes when the contracting parties have clearly agreed to do so." *Laquila Constr. v New York City Tr. Auth.*, 282 AD2d 331, 332 (1st Dept 2001).

The Hirani defendants contend that Article 27 is inapplicable here because the City Defendants have waived alternative dispute resolution by engaging in this litigation. The Hirani defendants note that more than 450 days passed between the commencement of litigation and this summary judgment motion. In that time, the City Defendants have answered and engaged in discovery without reserving the right to adjudicate this claim under Article 27.

While public policy favors the use of alternative dispute resolution whenever practical, it is possible for parties to waive or abandon this right. *Sherrill v Grayco Bldrs.*, 64 NY2d 261, 264 (1982).The Court of appeals had long held that when a party's participation in the judicial system is "clearly inconsistent" with it seeking arbitration or alternative dispute resolution, a court appropriately may conclude that the party has waived its right to demand such dispute resolution. *Stark v Molod Spitz DeSantis & Stark, P.C.*, 9 NY3d 59, 66 (2007); *Matter of Zimmerman (Cohen)*, 236 NY 15, 19 (1923). To determine waiver of the right, the court will look to three factors: (1) the time elapsed from the commencement of the litigation; (2) the amount of litigation that has taken place (including motions and discovery); and (3) proof of prejudice. *PPG Indus. Inc. v Webster Auto Parts, Inc.*, 128 F3d 103 (2d Cir 1997).

While a significant amount of time has passed since the commencement of the litigation and substantial discovery has taken place, the City Defendants' role in the litigation has not been substantial and has not evinced behavior that is "clearly inconsistent" with seeking arbitration. The purpose of the waiver rule is to discourage forum shopping, and waiver is not to be lightly inferred. *Id.* at 107. Here, the only discovery in which the City Defendants have engaged is by responding to other parties' requests. They have made no requests of their own and declined to ask question at Mr. Hirani's deposition. Even availing oneself of discovery in excess of what would have occurred during arbitration does not rise to the level of waiver. *Brownstone Inv. Group, LLC v Levey,* 514 FSupp2d 536, 544 (SDNY 2007); *Nolan v DynCorp Intl. LLC,* 108 AD3d 436 (1st Dept 2013). Nonetheless, the Hirani Defendants argue prejudice by their future inability to depose the City. However, if Hirani should desire to depose City witnesses on relevant issues, it could still do so in the absence of its cross-claims. As to the expense that Hirani would suffer, "pretrial expense and delay - unfortunately inherent in litigation - without more, do not constitute prejudice sufficient to support a finding of waiver." *Leadertex, Inc. v Morganton Dyeing & Finishing Corp.,* 67 F3d 20, 26 (2d Cir 1995).

Unjust Enrichment

The Hirani Defendants third and final cross-claim alleges unjust enrichment. However, a contract exists here. The Hirani Defendants cannot seek damages in unjust enrichment, a quasi contract claim, where a valid written agreement exists and covers the dispute at issue. *See Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 (1987); *Soviero Bros. Contr. Corp. v City of New York*, 286 AD435 (1st Dept 1955).

C. Accounting and Posting Security

Lien Law §76(6) gives a court the power to order examination of the books of a trust in any action brought pursuant to Lien Law §77, an action to enforce a trust arising under the Lien Law. *Frontier Excavating, Inc. V Sovereign Constr. Co.*, 30 AD2d 487, 490 (4th Dept 1968), *appeal dismissed* 24 NY2d 991 (1969). *Accord Wildman & Bernhardt Constr., Inc. V BPM Assocs., LP*, 273 AD2d 38 (1st Dept 2000). Plaintiffs' request for such an accounting, therefore, is granted.

Lien Law §77(3)(a)(v) provides that in an action to enforce a trust, the court may order "the trustee to give security to ensure the proper distribution of the trust assets...if there is danger that such assets or asset will be dissipated before judgment or diverted from trust purposes." Here, where the court has granted summary judgment on the diversion of trust funds cause of action, there is a danger of dissipation of such funds and security will be required. Accordingly, it is

ORDERED that partial summary judgment is granted in favor of plaintiff Biltwel General Contracting Corporation on its sixth cause of action against defendant Hirani Construction Management, Inc., and denied as to defendant Jitendra Hirani; and it is further

ORDERED that class action certification is granted on behalf of Biltwel General Contractor Corporation, Biltwel is authorized to represent such class, Hirani Construction Management Inc. is directed to provide a list of all Lien Law 3-A trust beneficiaries sand their last known addresses to Biltwel within 20 days of entry of this decision, and Biltwel is to submit a copy of the proposed notice to the class members to the court within 30 days, which notice is to be mailed to the class members' last known address by certified mail; and it is further

ORDERED that Hirani Construction Management Inc.'s counterclaims asserting that plaintiffs' Notice of Mechanic's Liens were defective are dismissed; and it is further

ORDERED that Hirani Construction Management Inc.'s cross-claims against The City of New York, Honorable John C. Liu and the Commissioner of the New York City Police Department are dismissed; and it is further

ORDERED that an independent accountant be hired at Hirani Construction Management Inc.'s expense to complete a full audit of Hirani Construction Management Inc.'s books and records pertaining to the trust funds relating to the project; and it is further

ORDERED that Hirani Construction Management Inc. post security with the Court in the amount of $322,827.86; and it is further

ORDERED that the parties are to appear for a status conference before the court on January 7, 2014, at 11:30 a.m.

Dated: November 27, 2013

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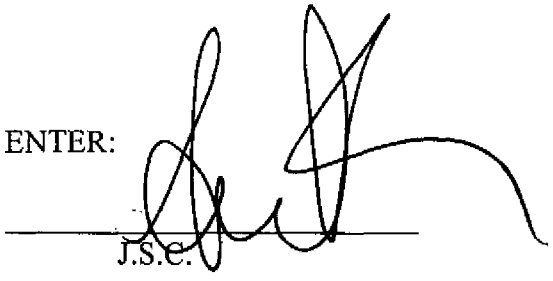

J.S.C.