

**Skycom SRL v FA & Partners, Inc.**

2016 NY Slip Op 31621(U)

August 22, 2016

Supreme Court, New York County

Docket Number: 152035/2014

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 55

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SKYCOM SRL,

Plaintiff,

-against-

FA & PARTNERS, INC. and DOMENICO ALESSIO,

Defendants.

-----X  
HON. CYNTHIA KERN, J.:

**DECISION/ORDER**  
**Index No. 152035/2014**

Plaintiff Skycom SRL commenced the instant action to recover sums allegedly due and owing by defendants FA & Partners, Inc. ("FA") and Domenico Alessio ("Alessio") in connection with three separate construction projects based on defendants' alleged diversion of trust assets pursuant to Lien Law Article 3-A. Plaintiff now moves for an Order pursuant to CPLR § 3212 granting it partial summary judgment against defendants on its first, second and third causes of action for diversion of trust assets with regard to the three construction projects. For the reasons set forth below, plaintiff's motion is denied.

The relevant facts are as follows. Plaintiff is a manufacturer of glass walls and windows, typically for use in high-rise buildings. FA is a subcontractor that contracted with plaintiff with regard to three construction projects and Alessio is FA's principal. In or around June 2012, plaintiff and FA entered into an agreement for plaintiff to design, manufacture and install windows in a building located at 3710 Webster Avenue, Bronx, New York (the "Webster Avenue Project"). Plaintiff and FA entered into an agreement for plaintiff to design, manufacture and install windows in a building located at 218 West 50th Street, New York, New York (the "50th Street Project") in or around October 2012. In or around November 2012, plaintiff and FA entered into an agreement for plaintiff to design, manufacture and install windows in a building located at 136 West 42nd Street, New York, New York (the "42nd Street Project"). Plaintiff claims that FA, as a subcontractor, received funds from the general contractors on these three projects

required to be held in trust pursuant to Lien Law Article 3-A. However, plaintiff claims that this money was knowingly diverted by defendants and that it was never paid the full sums it was owed pursuant to the three agreements.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

Plaintiff moves for summary judgment on the ground that defendants have failed to furnish an adequate verified statement of lien as required by Lien Law § 76 and are therefore presumptively liable for diverting trust assets. *See Anthony DeMarco & Sons Nursery, LLC v. Maxim Constr. Serv. Corp.*, 130 A.D.3d 1409, 1410 (3<sup>rd</sup> Dept 2015). However, the court cannot grant plaintiff summary judgment on this ground as the court finds that there is a material issue of fact as to whether plaintiff is entitled to payments pursuant to its agreements with FA, which is a fact plaintiff first must establish to recover on its causes of action for diversion of trust assets.

Article 3-A of the Lien Law creates "trust funds out of certain construction payments or funds to assure payment of [the claims of] subcontractors, suppliers, architects, engineers, laborers, as well as specified taxes and expenses of construction." *Aspro Mech. Contr. v. Fleet Bank*, 1 N.Y.3d 324, 328 (2004). The purpose of Article 3-A 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." *Id.* The use of trust assets for a nontrust purpose is deemed a diversion of trust assets. *Id.*

A plaintiff is only entitled to recover on a cause of action for a subcontractor trustee's diversion of trust assets if the trustee is actually obligated, as through a contract or a mechanic' lien, to pay the plaintiff's claim. See *Quantum Corporate Funding v. L.P.G. Assoc.*, 246 A.D.2d 320, 322-23 (1<sup>st</sup> Dept 1998); *J.H. Elec. Of New York, Inc. v. Anchor Const., Inc.*, 291 A.D.2d 241, 241 (1<sup>st</sup> Dept 2002). Thus, a plaintiff must establish that it is entitled to payment for the work it performed to recover from a trustee that allegedly diverted trust assets. See *Canron Corp. v. City of New York*, 89 N.Y.2d 147, 158 (1996) (holding that the plaintiff established its entitlement to summary judgment on its claim for trust asset diversion as it was undisputed that plaintiff was due sums upon completion of the repairs, that the amount due was outstanding and that assets were diverted from the trust fund).

In the present case, plaintiff's motion for summary judgment must be denied on the ground that there is a material issue of fact as to whether plaintiff is entitled to payments pursuant to its agreements with FA. Although plaintiff has made a *prima facie* showing that it is entitled to payments pursuant to its agreements with FA through its submission of the affidavit of its representative, Tullia Barbuto, who states that plaintiff is owed certain sums from defendants, defendants have raised an issue of fact as to whether plaintiff is entitled to payments through their submission of Alessio's affidavit. Alessio states in his affidavit that the only materials supplied by plaintiff for the 42<sup>nd</sup> Street Project failed laboratory testing requirements, that plaintiff failed to supply some materials and supplied defective or late materials for the 50<sup>th</sup> Street Project and that plaintiff failed to supply some materials and supplied defective or late materials for the Webster Avenue Project. Alessio further states in his affidavit that FA was forced to pay for alternate manufacturers and express shipping to replace or repair plaintiff's defective, missing or late materials on all three projects.

Accordingly, plaintiff's motion for partial summary judgment on its first, second and third causes of action for diversion of trust assets against defendants is denied. This constitutes the decision and order of the court.

DATE: 8/22/16

  
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KERN, CYNTHIA S., JSC