Ideal Supply Co., Inc. v Interstate Fire Protection, Inc.
2020 NY Slip Op 30546(U)
February 25, 2020
Supreme Court, New York County
Docket Number: 652809/2013
Judge: David Benjamin Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

IDEAL SUPPLY CO., INC.,	
Plaintiff,	Index No. 652809/2013
-against-	Motion Sequence Nos. 016, 017, 018 and 019
INTERSTATE FIRE PROTECTION, INC., PETER M. MIRZ, RICHARD W. TULLY, JR., MYRON BELLOVIN, INTERSTATE MECHANICAL SERVICES, INC. and PACE PLUMBING CORP.,	**DECISION AND ORDER**
Defendants.	

DAVID B. COHEN, J.S.C.:

Motions bearing sequence numbers 016, 017, 018 and 019 are consolidated herein for disposition. In its Second Amended Verified Complaint, dated July 4, 2015 (NY St Cts Elec Filing [NYSCEF] Doc No. 102 [complaint]), plaintiff Ideal Supply Co., Inc. asserts that it provided plumbing supplies, materials and fixtures to defendant Interstate Fire Protection, Inc. (IFP) for a series of construction projects that IFP conducted in New York City in 2011 and 2012 (complaint ¶ 13).

Plaintiff maintains that it has not been paid $545,726.88 for materials it provided for IFP's projects. Plaintiff alleges that various general contractors managed these projects and paid IFP in full but IFP and its officers, specifically defendants Peter M. Mirz (Mirz), Richard W. Tully, Jr. (Tully), and Myron Bellovin (Bellovin), diverted these funds for their own use and failed to pay plaintiff for its materials (*id.* ¶ 11).

During the period at issue, Mirz was president of IFP (*id.* ¶ 3), Tully was president of defendant Interstate Mechanical Services, Inc. (IMS) (*id.* ¶ 4), and Bellovin is alleged to have been an officer and/or shareholder of IFP and IMS (*id.* ¶ 5). Bellovin, however, denies holding

such positions (Answer to Second Amended Complaint of IMS, Tully and Bellovin [IMS answer] [NYSCEF Doc No. 166], ¶ 5). IMS and defendant Pace Plumbing Corp. (Pace) are corporate entities that allegedly joined in defendants' scheme to defraud plaintiff and other IFP creditors and to prevent their collection of IFP's lawful debt (complaint ¶¶ 6-7, 207-209).[1]

Plaintiff alleges that IFP, through Mirz, Tully, and Bellovin, defrauded and otherwise violated its duties to plaintiff by transferring assets and contracts to IMS and Pace below fair value (*id.* ¶¶ 205), with the intent to bilk IFP's creditors, including plaintiff (*id.* ¶¶ 206-07).

Plaintiff asserts its first two causes of action, for a trust fund accounting and diversion of trust funds, under article 3-a of New York's Lien Law, against IFP, Mirz, Tully, and Bellovin "(individually and personally), joint and severally" (*id.* ¶¶ 145-76). As its third cause of action, plaintiff repeats its claim for diversion of trust funds against Mirz, Tully and Bellovin "personally" (*id.* ¶¶ 177-79). Plaintiff, however, does not assert a claim against Pace or IMS for alleged "knowing participa[tion] in the diversion" of these trust funds (*see Teman Bros. v New York Plumbers' Specialties Co.*, 109 Misc 2d 197, 200 [Sup Ct, New York County 1981] [citing Lien Law §§ 72 [1] and 77 [3][a][1]).

Plaintiff asserts its fourth and fifth causes of action against IFP, for subcontract balance and breach of contract, respectively (*id.* ¶¶ 180-91).

Plaintiff purports to assert a claim for quantum meruit as its sixth cause of action, and account stated as its seventh cause of action, but page 24 of the complaint, on which the end of the quantum meruit claim and the beginning of the account stated claim were presumably

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[1] Copies of the complaint and IMS's answer are annexed to the affidavit of Pace president Andru Coren, sworn to December 14, 2018 [Coren aff] [NYSCEF Doc No. 387], as exhibits A [NYSCEF Doc No. 308] and D [NYSCEF Doc No. 311], respectively, submitted in support of Pace's motion for summary judgment in motion sequence number 016.

intended to appear, is missing from the pdf copy of the complaint plaintiff filed with NYSCEF (Doc No. 102), and in copies of that pleading filed in these motions (*see* exhibit A to Coren aff [NYSCEF Doc No. 308]).[2] Plaintiff has not sought to correct this omission.

As its eighth cause of action, plaintiff asserts a claim of fraud against all defendants, including Pace (complaint ¶¶ 204-09).

Except for IFP, which has not appeared, each defendant has answered the complaint and has asserted affirmative defenses.[3] Defendants Mirz, Tully, Bellovin and IMS have also asserted cross-claims for contribution, contractual indemnification and common law indemnification. In these cross-claims, Mirz, Tully, Bellovin and IMS assert that both plaintiff and their co-defendants should be held obligated to indemnify them and to contribute to any liability imposed on them. Plaintiff characterizes these cross-claims, insofar as they are directed against plaintiff, as counterclaims and generally denies defendants' allegations.

Discussion

To prevail on a summary judgment motion, the movant must produce evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in its favor (*GTF Mktg. v Colonial Aluminum Sales,* 66 NY2d 965, 967 [1985]; *see also Stonehill Capital Mgt. LLC v*

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[2] The complaint electronically filed as exhibit A to the Coren aff and the hard copy submitted to chambers in support of Pace's summary judgment motion are both missing page 24. In its motion for summary judgment in sequence number 019, plaintiff e-filed its amended verified complaint, dated December 29, 2014 (NYSCEF Doc No. 52), rather than the complaint, dated July 4, 2015 (NYSCEF Doc No. 102), which Justice Ostrager gave plaintiff leave to serve on December 2, 2015 (*see* order dated December 2, 2015 [NYSCEF Doc No. 150]).

[3] In his answer, dated January 21, 2016 (NYCEF Doc No. 165), Mirz notes that paragraphs 195 through 200 were omitted from plaintiff's e-filed complaint. Similarly, the answer of IMS, Tully and Bellovin, dated January 22, 2016 (NYSCEF Doc No. 166), makes a similar observation and provides no answer to the seventh cause of action because it was omitted in its entirety from the e-filing (*id.* ¶ 30). Even though defendants have pointed out this deficiency, plaintiff has taken no action to provide the page missing from its pleading.

Bank of the W., 28 NY3d 439, 448 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [proponent of summary judgment "'must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact'"]). If the moving party fails to make a prima facie showing of its entitlement to summary judgment, the motion must be denied, regardless of the sufficiency of the opposing papers (*William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

Once this showing is made, the burden shifts to the opposing party to submit proof in admissible form sufficient to raise a question of fact requiring a trial (*Kosson v Algaze*, 84 NY2d 1019, 1020 [1995]).

In deciding a motion for summary judgment, the court must view the evidence in the light most favorable to the non-movant (*Branham v Loews Orpheum Cinemas*, 8 NY3d 931, 932 [2007]). Party affidavits and other proof must be examined closely "because summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue" (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978] [citation and internal quotation marks omitted]). Still, "only the existence of a bona fide issue raised by evidentiary facts and not one based on conclusory or irrelevant allegations will suffice to defeat summary judgment" (*id.*).

Pace's Motion for Summary Judgment (Motion Sequence No 016)

Pace moves for summary judgment, pursuant to CPLR 3212, to dismiss the eighth cause of action for fraud, the sole cause of action asserted against it, "on the ground that there are no triable issues of fact" (Pace's Notice of Motion [NYSCEF Doc No. 386]). Pace also seeks to join the motions filed by its codefendants insofar as such motions also seek dismissal of plaintiff's eighth cause of action (*id.*). Plaintiff opposes.

To prevail, Pace must "show. . . that the cause of action. . . has no merit" (CPLR 3212[b]). Pace may meet this burden by establishing "'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact'" (*William J. Jenack Estate Appraisers and Auctioneers, Inc.*, 22 NY3d at 475, quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "This burden is a heavy one and on a motion for summary judgment, 'facts must be viewed in the light most favorable to the non-moving party'" (*William J. Jenack Estate Appraisers and Auctioneers, Inc.*, 22 NY3d at 475 quoting *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [citation and internal quotation marks omitted]).

Paraphrasing Justice Ostrager's November 4, 2016 decision and order, at 9 (NYSCEF Doc No 217), Pace notes that, "in order to state a claim for fraud a plaintiff must allege 'a material misrepresentation of fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by plaintiff and damages'" (reply affirmation of Jeffrey Klarsfeld, Esq., executed January 30, 2019 [Klarsfeld affirmation] [NYSCEF Doc No. 570], ¶ 8, quoting *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]).

Pace asserts that plaintiff's eighth cause of action must fail because it has not alleged the elements of common law fraud, much less adduced facts to support such a claim. Specifically, Pace maintains plaintiff does not allege that Pace made any misrepresentation of fact, or that plaintiff ever relied, justifiably or otherwise, on such misrepresentation. Plaintiff also does not claim that Pace ever intended to induce plaintiff's reliance, or that it otherwise acted with scienter (Klarsfeld affirmation ¶¶ 8-9).

In opposition, plaintiff concedes these points but asserts that Pace employed the wrong standard of review, contending that plaintiff's eighth cause of action is for equitable fraud rather

than common law fraud (*see* affirmation of Albert A. Hatem, Esq., executed January 15, 2019 [Hatem affirmation opposing Pace's motion] [NYSCEF Doc No. 524], ¶ 13).[4] Plaintiff further asserts that Pace's transaction with IFP, to buy "some portion" of its assets, was made at an unfair "low ball" discount, as a means to shift assets to Mirz's new employer and thereby defraud IFP's creditors, with Pace's knowledge (*id.* ¶¶ 20-21).

In its reply, Pace asserts that plaintiff's arguments are an invention, with no basis in fact. Pace denies plaintiff's contention that it bought all or substantially all of Pace's assets, purportedly worth between $1.2 million and $1.4 million, for only $60,000. Pace alleges it bought only certain assets from IFP, worth about $120,000, and that it paid the purchase price by check in the amount of $60,000 and by setting off certain debts it owed to IFP, for the balance.

Equitable fraud does not fit these circumstances. First, the authorities on which plaintiff relies to claim equitable fraud do not involve private parties seeking redress, but instead are civil prosecutions brought by New York's attorney general under the Martin Act (*see* Klarsfeld affirmation, ¶ 10 [discussing *People v Credit Suisse Sec. (USA) LLC*, 31 NY3d 622 [2018], *Matter of Badem Bldgs. v Abrams*, 70 NY2d 45 [1987], and *People v Federated Radio Corp.*, 244 NY 33 [1926]). Of course, there is no private right of action under the Martin Act (*Lex Tenants Corp. v Gramercy N. Assoc.*, 244 AD2d 199, 199 [1st Dept 1997] [citation omitted]). Moreover, plaintiff does not cite any New York decision in which equitable fraud was

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[4] In addition to his affirmation submitted in opposition to Pace's motion for summary judgment [NYSCEF Doc No. 524], Mr. Hatem also submits on plaintiff's behalf an "affirmation in reply" to Pace's motion, executed on January 30, 2019 [NYSCEF Doc No. 545]). Under Rule 14 (c) of the Rules of the Justices of the Supreme Court, Civil Branch, New York County (Local Rules), "[t]he CPLR does not provide for sur-reply papers, however denominated. . .. Material presented in violation of this Rule will not be read." Accordingly, the court has not considered plaintiff's arguments set forth in its "affirmation in reply" in resolving the instant motion.

successfully asserted as a private cause of action in circumstances similar to those presented here. It does not even bother to recite the elements of the cause of action.[5]

Pace, through the Coren aff (NYSCEF Doc No. 387), and the exhibits annexed thereto (NYSCEF Doc Nos. 388-401), established its prima facie defense to plaintiff's allegations of fraud as asserted against Pace, by showing that its purchase transaction with IFP was only for tools, a used vehicle and a computer, and not for the company itself, and that the $120,000 purchase price was fair value (*id.* ¶ 24). Mr. Coren further denied plaintiff's allegations that it purchased any IFP contract rights but instead only agreed to complete certain IFP projects to accommodate a Pace customer named Structure Tone and asserted it did so for a small reasonable fee (*id.* ¶ 26).

In the Hatem affirmation in opposition to Pace's motion (NYSCEF Doc No. 524), plaintiff argues, without citation to any supporting evidence, that Pace's acceptance of $60,000 in cash and agreement to set off the balance against a debt it owed to IFP, was just an artifice used to hide the transfer of all IFP's assets, which were allegedly valued at the time of the transaction between $1,200,000 and $1,400,000 (*id.* ¶ 4).[6]

Plaintiff further alleges, without citation, that Bellovin and Mirz admitted that IFP "engaged in a systematic business practice of paying certain types of trust beneficiaries last and

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[5] A cause of action for equitable fraud differs from common law fraud in that the defendant need not know that the representation at issue is false (30A CJS Equity § 49; *see also Matter of Badem Bldgs*, 70 NY2d at 54 [Martin Act "broad enough to encompass 'equitable fraud' for which scienter is not needed"] [citation omitted]).

[6] Plaintiff claims, without citation, that Tully testified under oath that the transaction transferred IFP assets worth $1,200,000 and $1,400,000 to Pace for a mere $60,000 (*id.* ¶ 3). Plaintiff also claims, citing deposition testimony it fails to attach to its motion papers, that IFP received purchase offers from more than one potential buyer for "over $1,000,000.00 less debts" (*id.* ¶ 15), to support its proposition that, even if it had paid plaintiff in full, IFP would still have been worth about $500,000, significantly more than the $120,000 transaction price.

certain other creditors first" (*id.* ¶ 9). From this, plaintiff draws the legal conclusion that its trust funds were "secreted" to Pace, in violation of the Lien Law (*id.*).

A party answering a motion for summary judgment is put to its proof: it must submit evidence in admissible form sufficient to raise a question of fact requiring trial (*Kosson,* 84 NY2d at 1020). The unsupported and conclusory allegations in plaintiff's attorney's affirmation do nothing to refute Pace's prima facie showing.

Moreover, as admitted by plaintiff in its opposition to the summary judgment motion of IMS, Tully and Bellovin in motion sequence 018, the diversion of trust funds forms the basis for its fraud claims against all defendants (Hatem affirmation, executed January 15, 2019 [Hatem affirmation in opposition to IMS defendants' motion] ¶ 27). Where another form of action provides a remedy, as New York's Lien Law does here, fraud claims are precluded (*see e.g. EVEMeta, LLC v Siemens Convergence Creators Corp.*, 173 AD3d 551, 553 [1st Dept 2019]).[7] Accordingly, Pace's motion for summary judgment, seeking dismissal of plaintiff's cause of action for fraud, as asserted against Pace, is granted.

Mirz's Motion for Summary Judgment (Motion Sequence No 017)

Defendant Mirz moves for summary judgment, seeking dismissal of the first, second, third and eighth causes of action, as asserted against him.

As a threshold matter, Mirz argues that plaintiff cannot maintain its suit because it is a fictitious corporation. Mirz premises this assertion on his search results, which turned up no

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[7] Equitable fraud may be asserted as a cause of action by a private party seeking to impose a constructive trust, for "unjust enrichment flowing from the abuse of a confidential relationship" (*Matter of Wurcel*, 196 Misc 2d 796, 800 [Sur Ct, New York County 2003], citing, *inter alia, Sharp v Kosmalski*, 40 NY2d 119 [1976]; *see also Melenky v Melen*, 233 NY 19, 22 [1922] [Cardozo, J.] ["a court of equity, finding an abuse of confidence, might give relief upon the ground of fraud"] [citations omitted]). In these circumstances, such a claim would be duplicative of plaintiff's statutory claim for trust fund diversion.

corporation named "The Ideal Supply Co., Inc." registered in either New York or New Jersey (Mirz memorandum of law, at 3 [NYSCEF Doc No 407]). Mirz concedes that an entity named "The Ideal Supply Company" is registered with New York's Secretary of State, but the Secretary's records indicate that it is a Delaware corporation, and not a New Jersey corporation as plaintiff alleges in paragraph 1 of its complaint (NYSCEF Doc No 102). Defendants Tully, Bellovin, and IMS support Mirz in this argument.

Plaintiff is not fictitious. It is an existing corporation, but its name and state of incorporation were incorrectly reflected in the complaint. Plaintiff confirms that it is "The Ideal Supply Company" (reply affirmation of Albert A. Hatem, Esq., executed January 30, 2019, ¶ 28 [Hatem affirmation in reply to Mirz's motion] [NYSCEF Doc No. 553]), which Mirz acknowledges to be a Delaware corporation properly registered with the States of New York and New Jersey, and which maintains its principal offices at 445 Communipaw Avenue, Jersey City, New Jersey (*see* affirmation of Lloyd J. Weinstein, Esq., sworn to December 14, 2018, "NYSCEF Doc List" exhibit 29 [NYSCEF Doc No. 421]).

Mirz does not contend that plaintiff has sought or obtained some unfair advantage by misidentifying its state of incorporation or by filing its complaint under a mistaken name. Consequently, plaintiff may be afforded the chance to correct these mistakes (*Bata, Natl. Corp. v Bata Shoe Co.*, 86 NYS2d 587, 588 [Sup Ct, NY County 1949] ["although there has been a misnomer, and there is no doubt that the plaintiff is the party who is suing, an amendment to cure a misdescription will be allowed"], *affd* 276 AD 896 [1st Dept 1950]).

Further, even if plaintiff were not properly registered to do business in New York, as has been incorrectly asserted, lack of capacity to sue is an affirmative defense which Mirz waived by

not asserting it in his answer or a pre-answer motion to dismiss (*Perine Intl. Inc. v Bedford Clothiers, Inc.*, 143 AD3d 491, 492 [1st Dept 2016]).

Plaintiff's First Cause of Action

Citing *Atlas Bldg. Sys. v Rende* (236 AD2d 494, 496 [2d Dept 1977]), Mirz contends that a beneficiary of a trust seeking recovery under Lien Law Article 3-a may only enforce the trust in a representative capacity and so plaintiff's claims, for a trust accounting under its first cause of action, as well as its trust diversion claims under its second and third causes of action, all of which were asserted in an individual capacity, must be dismissed. Defendants Tully, Bellovin, and IMS also support Mirz in this argument.

Mirz's point is well-taken, but plaintiff's error does not warrant dismissal on the merits:

> "[A]rticle 3-A of the Lien Law [] was enacted to create a special remedy that imposes a fiduciary responsibility upon a building entrepreneur who receives money toward work being done by others. It is intended to insure that money paid toward the improvement is equitably shared by those entitled to be paid"

(*Putnins Contr. Corp. v Winston Woods At Dix Hills, Inc.*, 72 Misc 2d 987, 990 [Sup Ct, Nassau County], *affd* 43 AD2d 667 [2d Dept 1973], *affd* 36 NY2d 679 [1975] [citation omitted]; *see also Dittmar Explosives v A. E. Ottaviano, Inc.*, 20 NY2d 498, 502-03 [1967] [in dictum, court notes that "the CPLR provides that an action shall not fail solely because it was not brought in proper form or under the precise pleading" and that, under CPLR 3025 (c), a trial court may allow amendment of complaint "during or even after trial to allege a claim under the trust provisions of the Lien Law"]). Accordingly, Mirz's motion with respect to this issue is granted but plaintiff is granted leave to serve and file an amended complaint, within 30 days after service of this decision and order with notice of entry, in which its first cause of action for a trust fund accounting shall be repleaded as a representative claim, in compliance with Lien Law Section 77 and Article 9 of the CPLR, on behalf of itself and all others similarly situated.

In conjunction with the issue of plaintiff's standing to sue, Mirz also argues that two of the several jobs at issue were completed more than a year before the August 21, 2013 commencement of this action, and so plaintiff's possible recovery should be reduced by the amounts allegedly owed for those two jobs. The relevant statutory provision states that an action to enforce a trust arising under New York's Lien Law:

> "may be maintained at any time during the improvement of real property, or home improvement, or public improvement and successive actions may be maintained from time to time during the improvement provided no other such action is pending at the time of the commencement thereof. No such action shall be maintainable if commenced more than one year after the completion of such improvement or, in the case of subcontractors or materialmen, after the expiration of one year from the date on which final payment under the claimant's contract became due, whichever is later, except an action by the trustee for final settlement of his accounts and for his discharge"

(Lien Law § 77 [2]).

Mirz ignores the second part of the sentence addressing the limitation of actions, which provides that a materialman such as plaintiff [8] may not commence an action more than one year after the improvement is complete, or "after the expiration of one year from the date on which final payment under the claimant's contract became due, whichever is later." Mirz provides no information as to whether payment of plaintiff's contracts for these jobs became due on or after August 21, 2013, and so his motion for summary judgment with respect to this issue must be denied.

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[8] Plaintiff is clearly a "materialman" under Section 2(12) of New York's Lien Law, which defines the term to "mean[] any person who furnishes material or the use of machinery, tools, or equipment, or compressed gases for welding or cutting, or fuel or lubricants for the operation of machinery or motor vehicles, either to an owner, contractor or subcontractor, for, or in the prosecution of such improvement."

Mirz, citing, among other cases, *Dai Mang Kim v Hwak Yung Kim* (118 AD3d 661 [2d Dept 2014], *abrogated by Element E, LLC v Allyson Enters., Inc.*, 167 AD3d 981, 982 [2d Dept 2018]), argues that plaintiff failed to file its note of issue on or before May 9, 2018, as directed by the court in its stipulated order, dated January 21, 2018, and so plaintiff's claims must be dismissed for want of prosecution under CPLR 3216. Defendants Tully, Bellovin, and IMS support this argument.

This court's January 2018 order, however, cannot substitute for the 90-day notice mandated under CPLR 3216 because the order did not state that plaintiff's failure to comply with it "'will serve as the basis for a motion' by the court to dismiss the action for failure to prosecute'" (*Element E, LLC*, 167 AD3d at 982, quoting CPLR 3216[b][3]). Accordingly, Mirz's motion for summary judgment, to dismiss plaintiff's claims, in their entirety, for failing to file its note of issue, must be denied.

Mirz also contends that plaintiff's claims are subject to dismissal because Mr. Manuel Velez, plaintiff's credit manager, signed the complaint's verification in Hudson County, New Jersey, before a New Jersey notary public, without providing the certificate required under CPLR 2309 (c). Defendants Tully, Bellovin, and IMS also support this argument.

The CPLR sets forth only a few instances in which verification of pleadings is necessary, such as Article 78 proceedings (*see* Siegel, NY Prac § 232 [6th ed.]). This case is not one of those instances and defendants do not identify any other possible basis for requiring plaintiff to verify its complaint. Thus, defendants' contention that plaintiff's faulty verification is fatal to its complaint "is a red herring, as the complaint was not required to be verified at all" (*Mamoon v Dot Net Inc.*, 135 AD3d 656, 657 [1st Dept 2016]). Defendants' response to a defective

verification in this circumstance would be to treat the verified complaint as unverified and to serve an unverified answer (Siegel, *supra*, § 235), if appropriate.[9]

Plaintiff's Second and Third Causes of Action

As noted, Mirz asserts plaintiff's second cause of action, for trust fund diversion, and third cause of action, for diversion of trust funds, must be dismissed because plaintiff asserted them in an individual, rather than a representative capacity. Mirz also asserts they must be dismissed because they are duplicative, and because Lien Law 79-a is criminal in nature and so bars plaintiff from asserting a private right of action. Mirz further asserts that these claims must be dismissed because plaintiff has not shown that the trust funds have been diverted by defendants for their personal use, as purportedly required to establish individual liability. Defendants Tully, Bellovin, and IMS support these arguments.

The second cause of action is asserted against all defendants. It alleges that IFP violated Article 3-a of the Lien Law, by diverting trust funds. Plaintiff also asserts this second cause of action against Mirz, Bellovin & Tully, as IFP officers and directors, alleging that they are each personally liable for trust fund diversion under Article 3-a.

Plaintiff asserts its third cause of action only against defendants Mirz, Bellovin & Tully, individually as statutory trustees, for diverting trust funds in violation of their duty to plaintiff as trust fund beneficiary.

A duplicative cause of action, arising from the same facts, is properly dismissed (*see, e.g., Wright v Meyers & Spencer, LLP*, 46 AD3d 805, 805-06 [2d Dept 2007]). In its opposition, plaintiff offers no explanation why it has asserted substantially the same allegations twice,

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[9] While plaintiff's complaint did not need to be verified, verifications were required from those defendants charged by the complaint "with any fraud whatever affecting a right or the property of another" (CPLR 3020 [b] [1]).

against two different sets of defendants. While reducing these two causes of action into one is the proper result, dismissing plaintiff's entire claim for wrongful diversion of trust assets would be a mistake.

Furthermore, defendants' assertion that plaintiff has no private right of action is unfounded. In fact, it goes against the purpose of Article 3-a of the Lien Law, as articulated by *Putnins Contr. Corp.* (72 Misc 2d at 990), which plainly states that the law is intended to give beneficiaries the means to recover their equitable share of what is owed to them from the trust.

In his reply, Mirz, citing *Ippolito v TJC Dev., LLC* (83 AD3d 57, 66-67 [2d Dept 2011]), for the first time suggests that plaintiff's claim to recover diverted trust funds must fail because plaintiff does not offer evidence that those allegedly diverted funds were used for a non-trust purpose. This contention must be rejected because "[a]rguments advanced for the first time in reply papers are entitled to no consideration by a court entertaining a summary judgment motion" (*Lumbermens Mut. Cas. Co. v Morse Shoe Co.*, 218 AD2d 624, 626 [1st Dept 1995]).

Even so, this argument would not have availed Mirz if he had raised it in his moving papers (*see Wildman & Bernhardt Constr. v BPM Assoc., LP*, 273 AD2d 38, 38 [1st Dept 2000] [on motion to dismiss, claims of Lien Law trust beneficiaries were correctly sustained by IAS court against defendants, notwithstanding complaint's failure to allege diversion of trust funds with particularity, since proof of diversion of trust funds is not a condition precedent to an action for an accounting and other relief under Lien Law Article 3-a], citing, *inter alia, Raisler Corp. v Uris 55 Water St. Co.*, 91 Misc 2d 217, 224 [Sup Ct, New York County 1977] [denying defendants' motion for summary judgment, court held proof of diversion of trust assets not a condition precedent to an action for an accounting and other relief under Lien Law Article 3-a]).

Mirz also asserts that, through the deposition testimony of Manuel Velez, plaintiff admits that Mirz is not liable to plaintiff.[10] At his deposition, Mr. Velez, plaintiff's credit and collections manager, testified, among other things, that Mirz, as president of IFP, owes the entire $548,726.88 plaintiff seeks in damages, but he also said that Mirz, as an individual, owes plaintiff nothing (transcript of Velez deposition, dated May 18, 2017, 68:25-70:17). Mr. Velez later clarified his response by asserting that IFP and "Richard Tully, vice president, Peter Mirz president, owes Ideal Supply 545,000 dollars" (*id.*, 81:23-25).

Mr. Velez is not an attorney (*id.*, 9:10-11). He is a layman who had an imperfect grasp of the legal concepts underlying plaintiff's causes of action, insofar as they were premised on the individual defendants' alleged tortious conduct and self-dealing, while acting in their roles as IFP's directors and officers. Furthermore, it was improper to ask Mr. Velez to draw conclusions of law about Mirz's potential liability (*see Milbeck Apts., Inc. v Corby Assoc.*, 285 App Div 83, 85 [1st Dept 1954] ["[a]n examination before trial is not permitted upon conclusions of law or upon argumentative matters"] [citation omitted]). Mirz's motion for summary judgment, insofar as it seeks dismissal of plaintiff's claims based on Mr. Velez's alleged admission, is denied.

Mirz further claims that plaintiff's claims are barred because it has failed to mitigate its losses. Mirz proffers two cases in support of its argument. The authorities on which Mirz relies, however, do not support the proposition that a trust beneficiary has a duty to mitigate damages under the Lien Law. In the first, *Metropolitan Sand & Gravel Corp. v Lipson*, the court discussed a contractor's right to subrogation following the contractor's payments to its materialmen, and its right to bring a representative action on behalf of the materialmen it had paid, premised on the

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[10] Defendants Tully, Bellovin, and IMS do not join Mirz in this argument. In fact, they assert that Mirz controlled IFP's day-to-day operations and allegedly controlled the trust funds and so, if individually liability is found, it must be imposed solely on Mirz.

contractor's acquisition of the materialmen's claims and liens by assignment (4 Misc 2d 216 [Sup Ct, Queens County 1956], *revd on other ground*, 7 AD2d 216 [2d Dept 1959]). In *Tri-Boro Enters., Inc. v Roger & McCay*, the Second Department merely recognized that, "where trust funds are involved," a subcontractor's materialman must use the money it receives from the subcontractor on a job to offset the subcontractor's debt for that job (28 AD2d 860, 860 [2d Dept 1967]). Mirz's motion for summary judgment, insofar as it seeks dismissal of plaintiff's causes of action for failure to mitigate its losses, must be denied.

Accordingly, Mirz's motion for summary judgment, seeking dismissal of plaintiff's claims for diversion of trust funds in plaintiff's second and third causes of action is granted but plaintiff is granted leave to serve and file an amended complaint, within 30 days after service of this decision and order with notice of entry, in which its second cause of action for diversion of trust funds shall be repleaded as a representative claim, in compliance with Lien Law Section 77 and Article 9 of the CPLR, on behalf of itself and all others similarly situated.

Plaintiff's Eighth Cause of Action

Finally, Mirz asserts that plaintiff's fraud cause of action must be dismissed because plaintiff fails to plead fraud with the particularity required by CPLR 3016 (b). Mirz also asserts that plaintiff's claim for fraud must be dismissed as duplicative of its breach of contract claim.

As it did in connection with Pace's summary judgment motion in sequence 016, plaintiff has submitted two affirmations on this motion: the first it identifies as the affirmation of Albert A. Hatem, Esq., to Mirz, dated January 15, 2019, in opposition to Mirz's motion (NYSCEF Doc No. 529). Plaintiff styles the second, improper submission, as the Hatem affirmation in reply to Mirz's motion (NYSCEF Doc No. 553). The affirmation in opposition makes no argument to oppose dismissal of its fraud cause of action with respect to Mirz. The Hatem reply affirmation

opposes its dismissal and repeats plaintiff's argument that its cause of action is not for common law fraud but for equitable fraud.

As noted with respect to its two submissions in response to Pace's motion, in footnote 3 above, plaintiff is *not* permitted to submit sur-reply papers, no matter what label it gives them, and the court cannot consider plaintiff's sur-reply on Mirz's motion. Accordingly, Mirz's motion for summary judgment, insofar as it seeks dismissal of plaintiff's eighth cause of action for fraud, is granted as unopposed.

Summary Judgment Motion of IMS, Tully and Bellovin (Motion Sequence No 018)

IMS, Tully and Bellovin (IMS defendants), by notice dated December 14, 2018, move for summary judgment, seeking to dismiss the complaint as asserted against them. In his affidavit, Tully indicates that only the first, second, third and eighth causes of action were asserted against IMS defendants and so narrows their prayer for relief to dismiss those four causes of action (Tully affidavit, sworn to December 14, 2018 [NYSCEF Doc No. 425], ¶ 2). Plaintiff opposes defendant's motion.

Plaintiff's First Cause of Action

Plaintiff's first cause of action is also asserted against IFP, Bellovin and Tully. IMS defendants maintain that they produced to all parties IFP "Foundation" reports for each relevant project, showing detailed entries for trust assets received, trust accounts payable, trust funds received and payments made with trust assets, as required by Article 3-a of the Lien Law (*see* affidavit of Myron Bellovin in support of the IMS defendants' motion, sworn to December 13, 2018 [Bellovin aff] [NYSCEF Doc No. 426], ¶¶ 4-26).[11] IMS defendants assert that production

[11] Bellovin explained that, as IFP's controller, he used software called Foundation to prepare and maintain accounting reports for each project on which IFP worked. He stated that "[t]he Foundation reports track all direct costs incurred by a project, including labor, subcontractors, materialmen, payroll taxes, sales taxes, employment taxes, benefits and wage

of these documents satisfies the duty of Bellovin and Tully to provide an accounting, and so plaintiff's first cause of action, as asserted against them, must be dismissed.

Plaintiff argues that the Foundation reports are "legally insufficient," claiming that they do not meet the specificity requirements of Lien Law Section 75, and so a full accounting is still needed. Plaintiff, however, does not specify which requirements of the Lien Law were not met, other than to complain that supporting documents underlying the Foundation reports which plaintiff demanded were not produced. Despite the alleged "numerous" deficiencies of the Foundation reports, however, plaintiff claims that it was still able to use them to identify $483,681.10 of the $545,726.88 allegedly owed to plaintiff (*see* affirmation of Albert A. Hatem, Esq., executed January 15, 2019 [Hatem affirmation in opposition to IMS defendants' motion] [NYSCEF Doc No. 534], ¶¶ 9, 12).

In reply, IMS defendants point to the transcript of a June 21, 2016 conference held by Justice Ostrager (NYSCEF Doc No. 180), which their attorney, David Lipari, Esq., annexes to his affirmation submitted in opposition to plaintiff's motion in sequence number 019, dated January 15, 2019 ([NYSCEF Doc No 519] [Lipari affirmation]), as exhibit A (NYSCEF Doc No. 520). At that conference, Justice Ostrager advised plaintiff's counsel that the Foundation records met the requirements of the Lien Law and that counsel could obtain answers to any remaining questions he had about their contents through deposition. To further allay concerns expressed by plaintiff's counsel, Justice Ostrager also directed IMS defendants to produce an affidavit, verifying that the records were accurately maintained in the regular course of business and are the only records regarding the projects at issue in plaintiff's claims (*id.* at 9:2-13:6). Plaintiff's

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supplements surety bonds and insurance premiums relating to the project" (Bellovin aff, ¶ 4). They also "set forth in detail funds received and paid out for each project where plaintiff allegedly provided materials" (*id.* ¶6).

counsel was provided the affidavit ordered by Justice Ostrager (*see* affidavit of Myron Bellovin, sworn to June 29, 2016 [exhibit B to Lipari affirmation] [NYSCEF Doc No. 521]). As IMS defendants met the specificity requirements of Lien Law Section 75, their motion for summary judgment, seeking dismissal of plaintiff's first cause of action as to them, is granted.

Plaintiff's Second and Third Cause of Action

IMS defendants assert that the second and third causes of action must be dismissed as against Tully and Bellovin because plaintiff failed to assert his claims under the Lien Law in a representative capacity, which they stress is a prerequisite that cannot be avoided, citing *Matter of Grosso* (9 BR 815, 823 [Bankr ND NY 1981]).

In opposition, plaintiff contends that its failure to bring its claims in a representative capacity is of no importance because IMS defendants have purportedly admitted that plaintiff is the only possible beneficiary for the projects at issue here, and so is entitled to recover all the funds in the trust. IMS defendants' contention is correct but, as noted in connection with defendant Mirz's motion, the court is loath to grant summary judgment on these trust diversion causes of action, solely because plaintiff asserted them in the wrong capacity.

In addition, IMS defendants contend that, under *Teman Bros.* (109 Misc2d at 202-203), Tully and Bellovin cannot be held liable for diverting trust funds with respect to projects for which plaintiff was allegedly not paid, where those projects lost substantial amounts of money and IFP, through Mirz, treated plaintiff fairly, considering that it was permitted to pay some or all of the trust funds to other trust beneficiaries, in its discretion.

This may well be but it has not been shown that all the trust's funds were paid out to other trust beneficiaries. To avoid liability, IMS defendants would have to identify which, if any, of the projects that lost money involved IFP and/or Mirz and, with respect to such projects, defendants would have to explain how IFP and/or Mirz properly exercised powers as trustee(s)

by expending all available trust funds on beneficiaries other than plaintiff. IMS defendants have failed to show these facts, leaving an issue of material fact to resolve at trial (*Kosson*, 84 NY2d at 1020).

Here, IMS defendants assert that, as shown by the Bellovin aff (NYSCEF Doc No. 426), and the financial records annexed thereto as exhibits A through Q (NYSCEF Docs No. 427 through 443), "almost all" of the project funds that IFP collected were used to pay other trust beneficiaries (IMS defendants' memorandum in support, at 5 [NYSCEF Doc No. 444]). IMS defendants, however, do not specify how much of the project funds they mean by "almost all." They also do not allege the sums that were paid to beneficiaries, and to non-beneficiaries, and do not allege the amount of collected project funds that were left over, if any.

Curiously, IMS defendants assert that, ultimately, Mirz was the person who decided who would be paid funds from plaintiff's trust (*citing* Bellovin aff ¶ 28 and exhibit Q) and that, during period of March to June 2012, Mirz knew IFP owed plaintiff substantial amounts but still issued checks to Pace totaling $891,261.20 (Tully aff ¶ 7).

IMS defendants also assert neither Tully nor Bellovin are personally liable for IFP's trust obligations. First, IMS defendants assert that neither Tully nor Bellovin can be held liable because they were never trustees of IFP's trust. Second, they assert that even if they were trustees, there is no monetary remedy available under Lien Law Section 77(3)(a) against a trustee acting in a corporate capacity, or against a corporation's shareholder or employee. IMS defendants assert there is no caselaw in the First Department holding an employee, shareholder or trustee liable for acting in his or her corporate capacity, where that party did not personally benefit from trust fund diversion.

In opposition, plaintiff claims Mirz, Tully and Bellovin are alter egos of IFP and IMS,[12] because of their commingling of assets and failure to adhere to corporate formalities, and so they should be held liable for diversion of trust funds due and owing plaintiff (Hatem affirmation in opposition to IMS defendants' motion [NYSCEF Doc No. 534], ¶ 20). The court, however, need not delve into a veil piercing and alter ego analysis.

"The penalty for a diversion [is] recovery of the diverted trust assets from knowing transferees, or damages against consenting trustees *or knowing participants in the diversion*" (*Teman Bros.*, 109 Misc 2d at 200, citing Lien Law, §§ 77 [3][a][i] and 72[1] [emphasis added]). Under *Teman Bros.*, mere knowing participation will subject a party to liability, and so non-trustees like Messrs. Tully and Bellovin, no matter their corporate affiliation, may face liability if it can be shown that they knowingly took part in the diversion of trust assets.

Accordingly, IMS defendants' motion for summary judgment, seeking to dismiss plaintiff's second and third causes of action is granted, but plaintiff is granted leave to serve and file an amended complaint, within 30 days after service of this decision and order with notice of entry, in which its second cause of action for a diversion of trust funds shall be repleaded as a representative claim, in compliance with Lien Law Section 77 and Article 9 of the CPLR, on behalf of itself and all others similarly situated.

Plaintiff's Eighth Cause of Action

IMS defendants assert plaintiff fails to make out a prima facie cause of action for an actual fraud claim (citing *Eurycleia Partners, LP*, 12 NY3d at 559 ["The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages"]).

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[12] Plaintiff did not include Pace in its causes of action for diversion of trust funds but it does argue that Pace is an alter ego of IFP and IMS, in the context of its failed equitable fraud claim.

In opposition, plaintiff makes no substantive argument to support its eighth cause of action for fraud. It does, however, admit that diversion of its trust funds is the basis for its fraud claims against all defendants (Hatem affirmation in opposition to IMS defendants' motion [NYSCEF Doc No. 534], ¶ 27). Under New York law, fraud claims are precluded where another action provides a remedy (*see EVEMeta, LLC*, 173 AD3d at 553 [fraud claims properly dismissed as duplicative of breach of contract claim where claims arise from same allegations underlying contract claim]; *Spinosa v Weinstein*, 168 AD2d 32, 42 [2d Dept 1991] [fraud claim must be dismissed where resulting damages are not separate and distinct from damages allegedly caused by defendant's medical malpractice]; *Calabro v Fleishell*, 48 AD3d 206, 207 [1st Dept 2008] [fraud claim cannot duplicate claim for breach of fiduciary duty]; and *Mid-Atlantic Perfusion Assoc., Inc. v Westchester County Health Care Corp.*, 54 AD3d 831, 833 [2d Dept 2008] [fraud claim that essentially reiterates quasi-contract claims properly dismissed]).

Plaintiff's Motion for Summary Judgment (Motion Sequence No 019)

In the 43-page affirmation of Albert A. Hatem, Esq., executed December 13, 2018 (Hatem affirmation in support of summary judgment [NYSCEF Doc No. 446]),[13] plaintiff seeks an order:

> (a) declaring that Mirz, Tully and Bellovin failed to maintain trust fund records in compliance with Lien Law Article 3-a;

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[13] Under Rule 14 of the Local Rules, motion papers are limited in length. Rule 14 (b) states, "[u]nless advance permission otherwise is granted by the court for good cause, memoranda of law *shall not* exceed 30 pages each (exclusive of table of contents and table of authorities) and affidavits/affirmations *shall not* exceed 25 pages each" (*id.* [emphasis added]). No such advance permission was sought and so plaintiff's "briefadavit" violates Rule 14 under either measure.

Moreover, the Uniform Rules for the Supreme Court and the County Court direct attorneys not to include legal argument in affidavits and affirmations (*see* 22 NYCRR § 202.8(c) ["Affidavits shall be for a statement of the relevant facts, and briefs shall be for a statement of the relevant law"]). These submissions are not rejected for violating these rules, but counsel should note that it is within the court's discretion to reject such non-compliant papers *sua sponte*.

(b) holding Mirz, Tully and Bellovin joint and severally liable for diversion of trust funds, in violation of Lien Law Article 3-a, and awarding plaintiff damages against Mirz, Tully and Bellovin, in the principal amount of $545,726.88;

(c) holding IMS, Mirz, Tully and Bellovin liable for $60,000, for failing to comply with Article 3-a trust record-keeping requirements with respect to a $60,000 check Pace issued for the sale of IFP assets;

(d) holding Mirz, Tully and Bellovin liable in the amount of $57,440.15, "in their capacity as officers" of IFP, for not applying a check in that amount which IFP received from a certain general contractor to the debt IFP owes plaintiff but instead disbursed to entities other than plaintiff; and

(e) holding Mirz, Tully, Bellovin and Pace liable, jointly and severally, for fraud, and awarding plaintiff damages against them in the principal amount of $545,726.88

(*see* notice of motion [NYSCEF Doc No 445]).

Most of the points plaintiff raises here have been resolved in defendants' earlier summary judgment motions. For example, plaintiff now acknowledges an action for a trust fund accounting "should be brought on behalf of all trust beneficiaries" (Hatem affirmation in support of summary judgment, ¶ 31, citing *Atlas Bldg. Sys.* [236 AD3d 494]), but fails to note its mistake in bringing its first, second and third causes of action as an individual claimant. This issue is disposed of in connection with defendants' motions for summary judgment.

As to plaintiff's first request for relief, plaintiff's motion for a declaration that trust records were not maintained in compliance with New York's Lien Law must be denied because, during a June 21, 2016 conference (NYSCEF Doc No 180), Justice Ostrager determined that Foundation records produced to plaintiff in discovery met the Lien Law's requirements and, among other things, directed counsel to resolve any remaining questions about their contents through depositions.

In its second request for relief, plaintiff seeks damages against Mirz, Tully and Bellovin of $545,726.88 for diverting plaintiff's trust funds, in violation of the Lien Law. The parties have made conflicting contentions that cannot be resolved on this record and so neither plaintiff nor defendants are entitled to summary judgment.

Plaintiff asserts that it is the sole possible beneficiary of the trust and that it is entitled to the principal amount of $545,726.88, plus interest from July 31, 2012 (affidavit of Manuel Velez, sworn to December 13, 2018 [NYSCEF Doc. 447], ¶ v). In connection with motion sequence number 018, IMS defendants suggest that all or most of the trust corpus has been paid out to other beneficiaries and argue that the maximum amount payable by IFP that was not expended for trust purposes is only $90,801.57 (citing Bellovin aff, ¶¶ 9-26 [NYSCEF Doc No. 426]).

IMS defendants also reiterate that defendant Mirz was the party responsible for issuing $819,261.20 in checks from IFP to Pace during the period from March 27, 2012 to June 20, 2012, in payment of the IFP projects Pace completed at Mirz's direction (affidavit of Myron Bellovin, sworn to January 10, 2019 [NYSCEF Doc No 501], ¶¶ 28-29).

Mirz sidesteps the issue of liability for trust fund diversion by asserting that plaintiff cannot show he is subject to alter ego liability and that the Lien Law is a statute that imposes criminal penalties and offers no private cause of action for individuals. Neither of these arguments are viable (*see Teman Bros.*, 109 Misc 2d at 200 ["[t]he penalty for a diversion [is] recovery of the diverted trust assets from knowing transferees, or damages against consenting trustees *or knowing participants in the diversion*"] [emphasis added] and *Putnins Contr. Corp.*, 72 Misc 2d at 990 [Lien Law Article 3-a "intended to insure that money paid toward the improvement is equitably shared by those entitled to be paid"] [citation omitted]).

"It is axiomatic that summary judgment is a drastic remedy and should not be granted where triable issues of fact are raised and cannot be resolved on conflicting affidavits" (*Mason v Dupont Direct Fin. Holdings*, 302 AD2d 260, 262 [1st Dept 2003], citing *inter alia, Millerton Agway Coop. v Briarcliff Farms,* 17 NY2d 57, 61 [1966]).

As to its third request for relief, plaintiff asks the court to hold IMS, Mirz, Tully and Bellovin liable for $60,000, for failing to comply with Article 3-a trust record-keeping requirements with respect to a $60,000 check Pace issued for the sale of IFP assets. Under the Lien Law, a trust is created when a contractor like IFP receives money intended to facilitate the improvement of real property, to ensure funds remain available to pay subcontractors and materialmen, like plaintiff (*see* Lien Law § 70 [2]). Plaintiff fails to explain how a trust could purportedly arise with respect to money IFP received upon its sale of certain of IFP corporate assets to Pace. There is no evidence these proceeds were ever intended to fund a real estate improvement project or earmarked for payment of plaintiff's invoices, and so fall outside the ambit of Lien Law Article 3-a.

In its fourth request, plaintiff asks the court to hold Mirz, Tully and Bellovin liable in the amount of $57,440.15, "in their capacity as officers" of IFP. Plaintiff alleges Mirz, Tully and Bellovin, through IFP, received a check for $57,440.15 from a certain general contractor and used it, not to pay part of the debt IFP owes plaintiff, but instead to make payments to some party or parties other than plaintiff. This issue is plainly a facet of plaintiff's second request for relief, involving the diversion of trust funds, and so presents the same questions of material fact requiring a trial, such as whether the assets at issue were trust funds payable to plaintiff as beneficiary and, if so, whether the funds were fully expended for the benefit of other trust

beneficiaries or whether they were diverted in violation of the Lien Law. Accordingly, plaintiff's motion for summary judgment with respect to this issue must be denied.

As to its fifth request, plaintiff seeks to hold Mirz, Tully, Bellovin and Pace liable, jointly and severally, for fraud, and an award of damages in the principal amount of $545,726.88. As admitted by plaintiff in its opposition to the summary judgment motion of IMS, Tully and Bellovin in motion sequence 018, the diversion of trust funds forms the basis for its fraud claims against all defendants (Hatem affirmation in opposition to IMS defendants' motion [NYSCEF Doc No 534], ¶ 27). Where another form of action provides a remedy, as New York's Lien Law does here, fraud claims are precluded (*see, e.g., EVEMeta, LLC*, 173 AD3d at 553).

Accordingly, plaintiff's motion for summary judgment is denied, in all respects.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that, in motion sequence number 017, the request for summary judgment of defendant Peter M. Mirz, and in motion sequence number 018, the request for summary judgment of defendants Richard W. Tully, Jr. and Myron Bellovin, seeking to dismiss plaintiff Ideal Supply Co., Inc.'s first cause of action as against them, for a trust fund accounting, and plaintiff's second cause of action, for trust fund diversion, is granted; and it is further

ORDERED that, plaintiff is granted leave to serve and file an amended complaint in which its first cause of action for a trust fund accounting and the second cause of action for trust fund diversion shall be repleaded as representative claims, in compliance with Lien Law Section 77 and Article 9 of the CPLR, within thirty (30) days after service of this decision and order with notice of entry; and it is further

ORDERED that, in motion sequence number 017, the request for summary judgment of

defendant Peter M. Mirz, and in motion sequence number 018, the request for summary judgment of defendants Richard W. Tully, Jr. and Myron Bellovin, seeking to dismiss plaintiff's third cause of action as against them, for diversion of trust funds, is granted, as duplicative; and it is further

ORDERED that, in motion sequence number 016, defendant Pace Plumbing Corp.'s request for summary judgment and, in motion sequence number 017, the request for summary judgment of defendant Peter M. Mirz and, in motion sequence number 018, the request for summary judgment of defendants Richard W. Tully, Jr. and Myron Bellovin, seeking to dismiss plaintiff's eighth cause of action against them, for fraud, is granted; and it is further

ORDERED that, in addition to being granted leave to serve and file an amended complaint, to replead its first and second causes of action as representative claims, in compliance with Lien Law Section 77 and Article 9 of the CPLR, plaintiff is also granted leave to correct to its name and state of incorporation, incorrectly reflected in its current pleading, in said amended complaint.

Dated: February 25, 2020

Hon. David B. Cohen, A.J.S.C.

HON. DAVID B. COHEN
J.S.C.