Flintlock Constr. Servs., LLC v HPH Servs., Inc.
2022 NY Slip Op 34096(U)
December 2, 2022
Supreme Court, New York County
Docket Number: Index No. 653920/2012
Judge: Melissa A. Crane

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MELISSA A. CRANE PART 60M
Justice

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FLINTLOCK CONSTRUCTION SERVICES, LLC,

Plaintiff,

- v -

HPH SERVICES, INC.,MORRIS MILLER, SHALLAN HADDAD, JOHN DOE, LAW OFFICES OF WEINER & WEINER LLC

Defendant.

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INDEX NO. 653920/2012

DECISION AFTER BENCH TRIAL

INTRODUCTION

This case arises out of HPH Services, Inc. ("HPH") and Shallan Haddad's ("Mr. Haddad") (collectively, "Defendants") alleged diversion of funds that Plaintiff Flintlock Construction Services, LLC ("Plaintiff" or "Flintlock") provided to pay for equipment for construction of a hotel. Between August 22, 2022 and August 23, 2022, this court held a bench trial on the only causes of action remaining before the court: diversion of trust assets, fraud, and negligent misrepresentation against HPH and Haddad. This decision contains the court's credibility determinations, findings of fact, and conclusions of law following that bench trial.

CREDIBILITY DETERMINATIONS AND FINDINGS OF FACT

In advance of the trial, the court received direct testimony by affidavit from Andrew Weiss, the managing member of Flintlock, and senior director of construction at Flintlock, Ray Dar ("Dar"). At trial, Plaintiff called Mr. Haddad, secretary at HPH, as an adverse witness, and Weiss. Defendants did not call any witnesses.

The court finds no reason to question the credibility of Weiss's or Dar's testimony. However, Mr. Haddad's testimony lacked credibility because of significant inconsistencies between his trial testimony and previous statements that he made in an affidavit and at his deposition. At trial, Mr. Haddad testified that **no** items in Requisition 8 were related to any long lead item materials (NYSCEF Doc. No. 343, pp. 45-46 [emphasis added]) despite testifying at his deposition that the $451,325.56 amount in Requisition 8 "would be for materials, equipment and

OTHER ORDER – NON-MOTION

supplies for the project" (Plaintiff's Ex. 1060, p. 129). Additionally, at trial, Mr. Haddad claimed not to know if a $480,000.00 check was a payment against Requisition 8 (NYSCEF Doc. No. 343, p. 53) even though he acknowledged at his deposition that he was paid $480,000.00 "for requisition number 8" (Plaintiff's Ex. 1060, p. 129). The dual questions of: (1) whether or not Requisition 8 involved deposits for equipment and (2) whether or not Flintlock sent HPH its $480,000.00 check in connection with Requisition 8 are fundamental to determine liability in this case. Mr. Haddad's shifting stories on these fundamental questions raise serious doubts as to his credibility as a witness.

However, the inconsistencies in Mr. Haddad's testimony do not stop there. At trial, Mr. Haddad denied having been involved with the "handling of the receipt of payments . . . and the payment of vendors and material men" despite testifying at his deposition that he was the **only** one at HPH with the authority to issue checks and wire transfers to suppliers and material men (NYSCEF Doc. No. 343, p. 27; Plaintiff's Ex. 1060, pp. 116-117 [emphasis added]). Mr. Haddad also testified at trial that he had no recollection of his office forwarding invoices from manufacturers to Flintlock in the summer of 2012 (NYSCEF Doc. No. 343, p. 47), even though in his affidavit in support of summary judgment—signed in **April 2022**—he stated that "at Flintlock's request, HPH provided written price quotes and/or deposit invoices for various items of HVAC and mechanical equipment" (Plaintiff's Ex. 1049 [emphasis added]). It is implausible that, a mere four months after signing this affidavit, Mr. Haddad no longer recalled whether or not he sent invoices for equipment to Flintlock. In light of these deep inconsistencies on critical issues, the court disregards Mr. Haddad's testimony in its entirety pursuant to the doctrine of *in falsus uno, in falsus omnibus*. Finally, if the inconsistencies were not enough, the fact remains that, despite knowing Plaintiff claimed the monies for the vendors per requisition 8, Mr. Haddad evidently had contested funds, that were being held in escrow, transferred to his lawyer-wife's escrow account and then disbursed to HPH. He did not continue to hold the disputed funds in escrow. This self-dealing reflects poorly on his credibility.

Notwithstanding the lack of credible testimony by a representative of HPH, the court gleans a complete picture of the relevant facts from the testimonies of Weiss and Dar as well as documentary evidence in the record. Between January 1, 2012 and July 21, 2012, HPH submitted seven payment requisitions to Flintlock related to the Project, and Flintlock paid HPH a total of

$583,900.00 on those requisitions (NYSCEF Doc. No. 340, ¶ 29; Plaintiff's Exs. 1003-1009, 1012).

In August of 2012, Weiss and Dar personally met with Mr. Haddad at Flintlock's office. At that meeting, Mr. Haddad stated that "in order to move the Project along, he needed deposit money for the equipment he ordered for the Project" (NYSCEF Doc. No. 340, ¶ 33). Weiss and Dar indicated to Mr. Haddad that Flintlock would pay most of the deposit money "directly to the vendors and suppliers as was customarily done by the company" (NYSCEF Doc. No. 340, ¶ 33). However, Mr. Haddad "strenuously" objected to Flintlock paying the vendors and suppliers directly. Weiss and Dar "ultimately agreed, due to Haddad's persuasion, that Flintlock would pay HPH direct for the deposits and that [Mr. Haddad] could then pay [] for the equipment deposits directly through HPH" (NYSCEF Doc. No. 340, ¶ 35). HPH then submitted to Flintlock Requisition 8, dated August 21, 2012, for the amount of $583,685.77 (Plaintiff's Ex. 1010). This document allocated for equipment deposits and payments in the total amount of $451,326.00 (NYSCEF Doc. No. 340, ¶¶ 37, 47; Plaintiff's Ex. 1010). This is particularly clear based on an email chain from September to October of 2012 between Flintlock and a Haddad Plumbing and Heating employee, which contains multiple references to "deposits" for HPH (Plaintiff's Ex. 1020). The email references "deposits" for "Cooling Tower, Chiller," "Boilers," "HVAC Pumps," "Fan Coil and AHU," "Storage Tank and Controls," and "Fire Pump and Controller" for the precise amounts that appear for those items on Requisition 8 (Plaintiff's Ex. 1010; Plaintiff's Ex. 1020).

Notably, Requisition 8 contains separate line items for equipment and the labor to install that equipment. For example, Requisition 8 contains line items for "Cooling tower, chiller, HX, filters" **and** for "Cooling tower, chiller, HX, filters – installation" (Plaintiff's Ex. 1010, p. 2). Requisition 8 also contains a specific reference to "Fuel Oil **Equipment**" (Plaintiff's Ex. 1010, p. 2 [emphasis added]). These facts negate Defendants' suggestion that none of Requisition 8 was for equipment deposits.[1]

[1] Additionally, the court finds Defendants' claim that Requisition 8 entries were related to labor rather than long-lead items to be highly implausible. Weiss testified, for example, that the cooling tower, chiller, HX and filters referenced in Item 1 of Requisition 8 (Plaintiff's Ex. 1010, p. 2) are located at the top of the building "which had not been poured yet" (NYSCEF Doc. No. 344, p. 212). The court can confidently conclude that Item 1 relates to a deposit for equipment to be provided in the future rather than labor provided in the past because it "would be physically impossible to do work on something that, one, hadn't been delivered to the site. And two, would be in the middle of the air" (NYSCEF Doc. No. 344, p. 212).

In addition to providing Requisition 8 to Flintlock, HPH sent Flintlock a series of price quotes, invoices, and purchase orders for particular items related to Requisition 8, some dated before Requisition 8 and others dated after (NYSCEF Doc. No. 340, ¶¶ 38-45). A number of examples clearly show that items in the referenced quotes, invoices, and purchase orders related to specific line items within Requisition 8:

Requisition 8 Item	Quote/Invoice/Purchase Order Item
"Cooling tower, chiller, HX, filters"	• "Certified induced draft counterflow cooling tower" (Plaintiff's Ex. 1053) • "Item C Electric Chiller" (Plaintiff's Ex. 1054)
"Boilers"	• "HYDROTHERM KN30 BOILER NAT GAS" (Plaintiff's Ex. 1050)
"Pumps"	• "Federal Duplex Sewage ejector two pumps" (Plaintiff's Ex. 1029)
"Fan Coil and Air handling units"	• "Aaon Air Handling Units" (Plaintiff's Ex. 1033)
"Water Treatment"	• "filtration/pump system with automatic external (City Water)" (Plaintiff's Ex. 1031)
"Storage Tank & Control"	• "Two 11,250 cedar roof tanks" (Plaintiff's Ex. 1032)

All told, the price quotes, invoices, and purchase orders that Weiss testified related to Requisition 8 amounted to a total of $586,410.01 (NYSCEF Doc. No. 340, ¶ 48; Plaintiff's Exs. 1029, 1031, 1032, 1033, 1050, 1053, and 1054).

Flintlock approved payment on September 21, 2012 and issued a check to HPH in the amount of $480,000.00 (NYSCEF Doc. No. 340, ¶ 49; Plaintiff's Ex. 1012). Of that amount, Weiss testified that $451,326.00 was to cover equipment deposits (NYSCEF Doc. No. 340, ¶ 49; *see also* NYSCEF Doc. No. 346, p. 19).

Soon after receiving the check for Requisition 8, on October 13, 2012, HPH demobilized the site and abandoned the Project (NYSCEF Doc. No. 340, ¶ 58). Weiss called Mr. Haddad, who falsely denied that he was demobilizing the site, but rather was there to "swap out materials and equipment" (NYSCEF Doc. No. 340, ¶ 60). Despite this assurance, HPH terminated the subcontract with Flintlock soon thereafter, on October 25, 2012 (NYSCEF Doc. No. 340, ¶ 62).

Later, Flintlock learned that HPH had not paid the vendors, suppliers and manufacturers (NYSCEF Doc. No. 340, ¶ 62). Weiss testified that Mr. Haddad even admitted that he "never paid

a single penny to any of the vendors, suppliers, and manufacturers" from the money that he was paid (NYSCEF Doc. No. 340, ¶¶ 64, 66).

On October 23, 2012, Flintlock sent a letter to Mr. Haddad stating that it appeared that "funds, paid to HPH in trust as deposits against various pieces of specially fabricated equipment, ha[d] in fact been diverted and not paid to the suppliers of said equipment" in relation to requests set forth in Requisition 8 in the total amount of $407,936[2] (Plaintiff's Ex. 1016). After Flintlock demanded the return of the deposit, HPH agreed to deposit $350,000.00 into the escrow account of HPH's prior attorney, Paul I. Weiner on November 8, 2012 (NYSCEF Doc. No. 340, ¶¶ 66-67; Plaintiff's Ex. 1017).

The parties engaged in settlement discussions. However, on November 13, 2012, Weiner wrote a letter to counsel for Flintlock stating that he had "established an escrow account for the purpose of settlement only" and that "unless [they] are able to settle this matter by the close of business Friday November 16th **[his] client** ha[d] instructed [him] to close the account and return the funds to HPH Services" (Plaintiff's Ex. 1017 [emphasis added]). Weiss testified that on November 14, 2012, Weiner indicated in an email to Flintlock's counsel that he had decided to turn the escrow funds over to the Law Offices of Joann S. Haddad LLC, Mr. Haddad's wife's law firm, and that Joann Haddad then released the escrow accounts to Shallan Haddad's companies (NYSCEF Doc. No. 340, ¶ 68).

After one of the vendors, Dolphin Equipment Corporation, filed a mechanic's lien against the property (NYSCEF Doc. No. 340, ¶ 69; Plaintiff's Ex. 1058), Flintlock determined that they "would have no choice but to pay the same vendors, suppliers, and manufacturers (again)" (NYSCEF Doc. No. 340, ¶¶ 70-71). Flintlock then obtained a series of assignments of claim from the various vendors, suppliers, and manufacturers and ultimately paid them over $600,000.00 (NYSCEF Doc. No. 340, ¶ 73-74; Plaintiff's Exs. 1027, 1029, 1030, 1031, 1032, 1033, and 1034).[3]

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[2] This amount appears to be in error, as no checks listed on Flintlock's accounts payable check register are for $407,936.00. Rather, there is a check for $480,000.00 listed on the accounts payable check register (Plaintiff's Ex. 1012).

[3] It appears that there may be discrepancies between the total amount of money reflected under the assignments of claims and the amount of money that Weiss testified to paying the vendors, suppliers, and manufacturers, $669,654.44. For example, Weiss testified that AAON assigned its claim to Flintlock in the amount of $80,785.35 (NYSCEF Doc. No. 340, ¶ 73[k]) but the actual assignment of claim references an amount of $78,985.35 (Plaintiff's Ex. 1033). The court calculates the total reflected in the assignments of claims as $642,854.44 (Plaintiff's Exs. 1027, 1029, 1030, 1031, 1032, 1033, and 1034). Regardless of whether the total is $669,654.44 or $642,854.44, it is abundantly clear that Plaintiff paid directly to the vendors, suppliers, and manufacturers significantly more than the $480,000.00 check

Defendants failed to produce to Plaintiff or the court the books and records that it was indisputably required to keep pursuant to Lien Law § 75. Defendants have claimed that they were unable to produce those records because many of them were destroyed due to water damage resulting from Superstorm Sandy (Plaintiff's Ex. 1048, ¶ 2). Defendants also claim that HPH's Controller Qussai Haddadeen—whose job included maintaining files relating to HPH's projects—left HPH in 2012, that many of HPH's files went missing at the time he left, and that Mr. Haddad has been unable to contact him because, upon information and belief, he had left the country (Plaintiff's Ex. 1048, ¶ 4).

In summation, the court finds that HPH requested that Flintlock pay $451,326.00 to satisfy equipment deposits due under Requisition 8. HPH provided Flintlock with quotes, invoices, and purchase orders that substantiated those costs. Mr. Haddad personally requested that Flintlock pay those equipment deposits to HPH and represented that HPH would then pay the vendors, suppliers, and manufacturers. Flintlock paid HPH $480,000.00, of which $451,326.00 was to cover Requisition 8's equipment costs. Contrary to what Mr. Haddad had represented, HPH did not pay the vendors, suppliers, and manufacturers. Rather, HPH ultimately diverted those funds to itself and then walked off of the Project. As a result, Flintlock was forced to pay the vendors, suppliers, and manufacturers for the same items that it already had paid HPH. Thus, ultimately, Plaintiff paid the same costs twice. Flintlock first paid Defendants, who were supposed to pay the vendors with Flintlock's money, and then was forced to pay the vendors directly after Defendants pocketed the money instead.

CONCLUSIONS OF LAW

The court finds both Defendants liable for Lien Law Article 3-A trust diversion.

1. Lien Law Article 3-A Trust Diversion

Flintlock argues that both HPH and Mr. Haddad are liable under Lien Law Article 3-A for trust diversion. Under Lien Law § 72, "[a]ny transaction by which any trust asset is paid, transferred or applied for any purpose other than a purpose of the trust . . . before payment or discharge of all trust claims with respect to the trust, is a diversion of trust assets."

a. Presumption of Diversion Based on Failure to Keep Books and Records

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it sent to HPH, $451,326.00 of which was for equipment deposits. This is sufficient to support Flintlock's claim that it paid the equipment deposits twice.

The "[f]ailure of the trustee to keep the books or records required by this section 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]; *Forest Elec. Corp. v Karco-Davis, Inc.*, 259 AD2d 303, 303 [1st Dept 1999]; *In re Kofsky*, 351 BR 123, 126 [SDNY Sept 19, 2006]). However, the court may not apply this presumption if the party that allegedly failed to keep books and records provides a "reasonable excuse" for the failure to do so (*Medco Plumbing, Inc. v Sparrow Const. Corp.*, 22 AD3d 647, 648 [2d Dept 2005]). A court will not find a purported excuse reasonable if it is "conclusory and vague" or if the party fails to "demonstrate that they made any attempt to regain possession" of the records (*see id.*).

Here, Defendants do not dispute that they have failed to produce the books and records that they were required to keep relating to the Project. However, Defendants argue that they are excused from the application of the presumption based on the reasonable excuse that relevant documents were destroyed as a result of Superstorm Sandy. In particular, Mr. Haddad stated in an affidavit, dated May 19, 2016, regarding the missing books and records that HPH was "unable to produce all invoices relating to the Citizen M Hotel project . . . because the premises where HPH's documents relating to the Project were located sustained water damage as a result of Superstorm Sandy" (Plaintiff's Ex. 1048, ¶ 2). As a result, "many of the invoices relating to the Project were destroyed" (Plaintiff's Ex. 1048, ¶ 3). Mr. Haddad testified the same at trial, stating that the documents referenced in that affidavit would have been located on the second floor of his office in Newark, New Jersey, that they happened to be redoing the roof of the building at the time of the storm, and that as a result of the storm, there was water damage to the entire office, including records relating to the Project (NYSCEF Doc. No. 343, pp. 79-82, 90).

In addition to the excuse that documents were destroyed during Superstorm Sandy, Mr. Haddad stated in his affidavit that HPH's controller at the time of the Project, Qussai Haddadeen, left HPH in late 2012 (Plaintiff's Ex. 1048, ¶ 4). According to Mr. Haddad's affidavit, "[a]t the time Mr. Haddadeen left HPH, many of HPH's files relating to the Project . . . were missing" and Mr. Haddad was unable to contact him because "upon information and belief, he ha[d] left the country" (Plaintiff's Ex. 1048, ¶ 4).

However, Mr. Haddad testified at trial that he did not "remember the exact records or what was damaged" by Superstorm Sandy (NYSCEF Doc. No. 343, p. 82). He also admitted that, after

the records were destroyed, he could have searched for banking records online to recover them and did not recall doing so (NYSCEF Doc. No. 343, pp. 82-83). Nor did Mr. Haddad recall reaching out to any vendors or parties relating to invoices for the Project to request replacement documents (NYSCEF Doc. No. 343, p. 89). Further, Mr. Haddad testified that he did not report any alleged theft of records to the police and stated that he did not actually think Haddadeen stole the records (NYSCEF Doc. No. 343, p. 85).

The purported excuse that Haddadeen may have taken records upon his departure from HPH does not constitute a reasonable excuse. Mr. Haddad only vaguely implied in his May 2016 affidavit that Haddadeen may have taken records, stating that when Haddadeen left HPH, "many of HPH's files relating to the Project . . . were missing" (Plaintiff's Ex. 1048, ¶ 4). The affidavit did not describe the records that went missing and did not actually claim that the records were missing **because** Haddadeen took them. Furthermore, at trial, Mr. Haddad explicitly denied knowing if Haddadeen took the records at all and even stated, "I don't think he stole them" (NYSCEF Doc. No. 343, p. 85). It is not remotely clear to the court what role, if any, Mr. Haddad is claiming Haddadeen had in the disappearance of the records. In any event, Mr. Haddad's claim in his affidavit constitutes precisely the type of "conclusory and vague" excuse that is not sufficient to negate the presumption of trust diversion based on failure to produce books and records (*see Medco Plumbing, Inc. v Sparrow Const. Corp.*, 22 AD3d 647, 648 [2d Dept 2005] [finding no reasonable excuse based on "conclusory and vague assertions . . . as to what books and records were taken by the Manhattan District Attorneys Office, as well as their failure to demonstrate that they made any attempt to regain possession thereof"]).

Nor does Defendants' vague allusion to the destruction of documents in Superstorm Sandy constitute a reasonable excuse. Defendants failed to set forth what records specifically were destroyed or that they made any effort whatsoever to retrieve replacement copies of invoices from vendors. Moreover, Defendants' purported excuse rings hollow because Mr. Haddad testified that Defendants were redoing the roof of the building and nevertheless kept the relevant documents on the second floor (NYSCEF Doc. No. 343, p. 90), despite the approach of a dangerous storm. Mr. Haddad's failure to move these documents to protect them from the obvious risk of damage from the storm was utterly reckless. In light of Mr. Haddad's overall lack of credibility and reckless conduct, the court holds the destruction of records is not a reasonable excuse.

b. Application of Lien Law Article 3-A Notwithstanding Presumption

Regardless of whether or not Defendants had any reasonable excuse for their failure to produce records, both HPH and Mr. Haddad are liable under Lien Law Article 3-A. Under Lien Law § 72(1), "any other use of contract funds before payment or discharge of all trust claims" is an "improper diversion of trust assets, regardless of the propriety of the trustee's intentions" (*LeChase Data/Telecom Services, LLC v Goebert*, 6 NY3d 281, 289 [2006] [citation and internal quotation marks omitted]). Pursuant to Lien Law § 77, a trust beneficiary may "recover trust assets from anyone to whom they have been diverted with notice of their trust status" (*id.*). The primary purpose of Lien Law Article 3-A is to "ensure that those who have expended labor and materials to improve real property at the direction of an owner or a general contractor receive payment for the work actually performed" (*Langston v Triboro Contracting, Inc.*, 44 AD3d 365, 365 [1st Dept 2007]). The main issue in determining whether there has been a diversion of trust funds is "whether the funds have actually been used to pay subcontractors, suppliers and laborers" (*id.*; *see also Canron Corp. v City of New York*, 214 AD2d 115, 120 [1st Dept 1995]).

Here, Flintlock established clearly that the equipment deposits it paid Defendants, totaling $451,326.00, were trust funds as defined under Lien Law § 70(1). Under Lien Law § 70(1), funds "received by a contractor under or in connection with a contract for an improvement of real property" constitute trust assets (*Land-Site Contracting Corp. v Marine Midland Bank*, N.A., 177 AD2d 413, 414 [1st Dept 1991] [internal quotation marks omitted]). Weiss testified credibly that in connection with Requisition 8, Flintlock paid HPH $480,000.00 by a check on September 24, 2012 in order to cover equipment deposits (NYSCEF Doc. No. 340, ¶¶ 49-50). Flintlock provided extensive documentary evidence, including the actual Requisition 8 document and accompanying invoices and purchase orders. However, while Flintlock met its burden to establish that the $451,326.00 in equipment deposits were trust assets, Flintlock failed to establish that the remaining $28,674.00 were trust assets. It is unclear why Plaintiff paid $28,674.00 over the amount that Plaintiff admits was for equipment deposits. To the extent that amount was for retainage or other non-equipment related expenses, Plaintiff has not carried its burden to prove this was for funds held in trust.

Additionally, Flintlock has met its burden to establish that Defendants diverted these trust assets for non-trust purposes in violation of Lien Law Article 3-A. Plaintiff's testimony and documentary evidence establish that HPH failed to pay any of the $451,326.00 associated with Requisition 8 to the vendors, suppliers, and manufacturers. Weiss testified that around the time

that HPH terminated the subcontract on October 25, 2012, Weiss "discovered that HPH had not paid a dime to any of the intended recipients" (NYSCEF Doc. No. 340, ¶ 62). Flintlock supported this claim through providing purchase orders and invoices from the vendors, suppliers, and manufacturers for the same equipment referenced in Requisition 8 (*see* NYSCEF Doc. No. 340, ¶ 47) as well as assignments of the claims to Flintlock by those vendors, suppliers, and manufacturers (*see* Plaintiff's Exs. 1027, 1029-1034). That these vendors, suppliers, and manufacturers entered into these assignments strongly supports Weiss's testimony that HPH failed to pay them the equipment deposits they were owed and that Flintlock, to avoid delays in the Project, paid again for the exact same equipment deposits (NYSCEF Doc. No. 340, ¶¶ 71-72).

Flintlock further established that Defendants diverted these trust assets to their own businesses. During the settlement negotiations that precipitated this litigation, prior counsel for Defendants specifically stated that "[his] client" had instructed him to close the $350,000.00 escrow account and "return the funds to HPH Services" if the parties did not settle by November 16, 2012 (Plaintiff's Ex. 1017). Subsequently, counsel for Defendants transferred the escrow funds to the Law Offices of Joann S. Haddad LLC—the spouse of Mr. Haddad—who Weiss testified released the money to "one or more of her husband Shallan Haddad's companies" (NYSCEF Doc. No. 340, ¶ 68). In short, at the direction of Defendants, counsel released $350,000.00 of the money in dispute to the spouse of Mr. Haddad, who then released it for Defendants' own use. This is diversion of trust assets plain and simple.

Moreover, Mr. Haddad is personally liable for trust fund diversion. Defendants argued at trial and in their post-trial briefing that even if the statutory presumption of diversion based on failure to keep books and records (*see* Lien Law § 75[4]) applies to HPH, the same presumption is not applied against Mr. Haddad personally (*see Forest Elec. Corp. v Karco-Davis, Inc.*, 259 AD2d 303, 303 [1st Dept 1999]). Plaintiff does not dispute this point but argues that the trust fund diversion occurred "with Haddad's knowledge and personal involvement," arguing that Mr. Haddad knowingly participated in HPH's scheme to "bait Flintlock into advancing trust funds" and then abandon the Project (NYSCEF Doc. No. 346, p. 13).

While Defendants are correct that the books and records presumption does not apply to hold an individual liable (*see Forest Elec. Corp. v Karco-Davis, Inc.*, 259 AD2d 303, 303 [1st Dept 1999]), where the individual defendant "knowingly and wrongfully participated in the diversion of trust funds by the corporation" the individual defendant may be held personally liable

under the Lien Law (*Medco Plumbing, Inc. v Sparrow Constr. Corp.*, 22 AD3d 647, 648-649 [2d Dept 2005]; *see also Ippolito v TJC Development, LLC*, 83 AD3d 57, 70-71 [2d Dept 2011]; *Holt Const. Corp. v Grand Palais, LLC*, 108 AD3d 593, 597 [2d Dept 2013]). Here, Mr. Haddad was personally involved in the diversion of trust funds. Weiss testified credibly that he met with Dar and Mr. Haddad in August 2012, where Mr. Haddad requested deposit money for equipment for the Project (NYSCEF Doc. No. 340, ¶ 33). At that meeting, Mr. Haddad "strenuously objected" to Flintlock paying the vendors, suppliers, and manufacturers directly and, at Mr. Haddad's insistence, Weiss agreed to pay HPH so that HPH could pay the vendors (NYSCEF Doc. No. 340, ¶ 35).

Soon after Flintlock sent the $480,000.00 check to HPH, Defendants demobilized the site, without having forwarded payment to the vendors (NYSCEF Doc. No. 340, ¶¶ 58, 61-63). Weiss testified further that Mr. Haddad "eventually admitted that he never paid a single penny to any of the vendors, suppliers, and manufacturers from the money he was paid" (NYSCEF Doc. No. 340, ¶ 64). Moreover, it strains all credulity to suggest that Mr. Haddad was not personally involved in the diversion of trust assets when that diversion was affected through his own spouse's law firm's trust account. Thus, the court finds that Mr. Haddad knowingly participated in the diversion of trust funds.

2. Fraud

To the extent Plaintiff seeks to recover the $451,326.00 under a fraud theory, the fraud cause of action duplicates the cause of action for trust fund diversion. To the extent Plaintiff seeks additional funds, the fraud cause of action duplicates the breach of contract cause of action that Plaintiff settled long ago. Any additional recovery would be subsumed in that settlement. Defendants had no duty separate from its contractual duty that could support a claim of fraud (*see Beta Holdings, Inc. v Goldsmith*, 120 AD3d 1022, 1023 [1st Dept 2014]; *see also Delta Dallas Omega Corp. v Wair Assoc.*, 189 AD2d 701, 702 [1st Dept 1993] [finding that purported fraud claim, to the extent it was based on failure to "keep [] promises as represented prior to execution of the written contract" and failure to pay subcontractors, related to breach of contract rather than fraud]).

3. Negligent Misrepresentation

Similarly, the negligent misrepresentation cause of action is duplicative of the breach of contract cause of action and the cause of action for trust fund diversion (*see Soames v 2LS*

Consulting Engineering, D.P.C., 187 AD3d 490, 491 [1st Dept 2020] [finding negligent misrepresentation cause of action duplicative because of failure to "allege breach of a duty independent from the parties' agreements"]).

4. Punitive Damages

By their post-trial briefing, Plaintiff requested $2,000,000.00 in punitive damages but provided no argument whatsoever in support of that claim. In any event, punitive damages are only available for Lien Law Article 3-A trust diversion claims where the plaintiff establishes "the necessary mens rea to establish the crime of larceny pursuant to Lien Law § 79-a" (*see ARA Plumbing & Heating Corp. v. Abcon Associates, Inc.*, 44 AD3d 598, 598-599 [2d Dept 2007]), something that Plaintiff has not established beyond a reasonable doubt. As Plaintiff has not satisfied that burden, the demand for punitive damages is denied.

Accordingly, it is

ORDERED that the court conforms the pleadings to the proof and awards judgment in favor of Plaintiff Flintlock Construction Services, LLC and against HPH Services, LLC and Shallan Haddad in the amount of $451,326.00 with statutory interest pursuant to Lien Law § 77(3)(a)(i) from October 13, 2012[4] until entry of judgment, as calculated by the clerk of the court upon proof provided by Plaintiff of the correct statutory interest rate under Lien Law § 77(3)(a)(i); and it is further

ORDERED that the clerk is directed to enter judgment accordingly; and it is further

ORDERED the causes of action for fraud and negligent misrepresentation are dismissed; and it is further

ORDERED that the parties upload all trial exhibits to NYSCEF within ten days of this order; and it is further

ORDERED that the clerk mark this matter disposed.

DATE: 12/2/2022

MELISSA A. CRANE, JSC

Check One: [x] **Case Disposed** [ ] **Non-Final Disposition**

Check if Appropriate: [ ] **Other (Specify** _____ **)**

[4] Pursuant to Lien Law § 77(3)(a)(i), interest is calculated from the "time of the diversion." Here, the time of diversion is October 13, 2012, when Defendants demobilized the work site (NYSCEF Doc. No. 340, ¶¶ 58, 61).