

**Hunter Roberts Constr. Group, LLC v Vector  
Structural Preserv. Corp.**

2023 NY Slip Op 32562(U)

July 25, 2023

Supreme Court, New York County

Docket Number: Index No. 653847/2019

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 42

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HUNTER ROBERTS CONSTRUCTION GROUP,  
LLC,

Plaintiff,

- against -

VECTOR STRUCTURAL PRESERVATION CORP.,  
and BILL HANDAKAS a/ka/ WILLIAM  
HANDAKAS, VASSILIOS HANDAKAS and/or  
KONSTANTINOS HANDAKAS,

Defendants.

**INDEX NO.** 653847/2019

**MOTION DATE** 06/14/2022

**MOTION SEQ. NO.** 006 007

**DECISION + ORDER ON MOTION**

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VECTOR STRUCTURAL PRESERVATION CORP.,  
individually and on its own behalf and representatively  
on behalf of all others similarly situated,

Counterclaim Plaintiff,

- against -

HUNTER ROBERTS CONSTRUCTION GROUP LLC  
and LIBERTY MUTUAL INSURANCE COMPANY,

Counterclaim Defendants.

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HON. NANCY M. BANNON:

The following e-filed documents, listed by NYSCEF document number (Motion 006) 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 272, 273, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 330, 331, 332, 333, 334, 335

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 321, 322, 323, 324, 325, 326, 327, 328, 329

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

## I. Introduction

This action arises out of work at a construction project located at Garvies Point, 63 Herb Hill Road, Glen Cove, New York (the “Project”). Plaintiff Hunter Roberts Construction Group LLC (“Hunter Roberts”), the construction manager on the Project, brings this action against one of its subcontractors, Vector Structural Preservation Corp. (“Vector”), and the subcontractor’s president, Bill Handakas a/k/a William Handakas, Vassilios Handakas, and/or Konstantinos Handakas (“Handakas,” and, together with Vector, “defendants” or the “Vector Defendants”). Hunter Roberts asserts seven causes of action, numbered here as in the amended complaint: (1)-(4) breach of the four subcontracts between the parties; (5) trust fund diversion in violation of Lien Law Article 3-A; (6) contractual indemnification; and (7) fraud in the inducement. All claims are asserted against Vector, but only the fraudulent inducement claim is asserted against Handakas in his individual capacity, the claim being based on his alleged failure to reveal a criminal conviction and other lawsuits (see Doc. No. 151)<sup>1</sup>. Defendants filed an answer with counterclaims.

Hunter Roberts now moves for partial summary judgment on its fifth cause of action (MOT SEQ 006). Defendants oppose the motion and separately move for partial summary judgment dismissing the fifth and seventh causes of action (MOT SEQ 007), which motion is in turn opposed by Hunter Roberts.<sup>2</sup> On MOT SEQ 006, the plaintiff’s motion is denied and the cross-motion is granted. On MOT SEQ 007, the motion is granted in part.

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<sup>1</sup> Citations to “Doc. No(s).” herein refer to documents filed on the docket for this matter on the New York State Courts Electronic Filing (“NYSCEF”) system.

<sup>2</sup> In addition to seeking summary judgment dismissing the fifth cause of action under motion sequence 007, defendants also cross-move for the same relief under motion sequence 006.

## II. Factual and Procedural History<sup>3</sup>

In early 2017, Hunter Roberts and RXR Realty LLC, the Project's owner, entered into an agreement (the "RXR Agreement") for Hunter Roberts to be the Project's construction manager (Doc. Nos. 274, 322, ¶ 8). The RXR Agreement provides, in pertinent part, as follows:

**14.1** If, at any time prior to the Final Completion of the Work and final payment to the Construction Manager hereunder, there is filed of record a lien of any kind whatsoever for work or materials furnished in the performance of the Work or in connection with the Project for which payment has previously been made by Owner which, if established, would become an obligation for which the Owner might become liable, and, thereafter, unless such lien has been discharged of record by payment, bond or otherwise at the Construction Manager's sole cost and expense and at no cost to the Owner, the Owner shall have the right to retain out of any payment then due or thereafter becoming due to the Construction Manager under the terms of this Agreement an amount sufficient to indemnify the Owner fully for any and all costs and expenses, including, without limitation, reasonable attorneys' fees and disbursements, which it might incur by reason of such lien, but in no event in a sum greater than 150% of the amount of the lien. . . . The Construction Manager shall also promptly discharge or bond over in a manner and with a surety company satisfactory to the Owner any liens placed upon the Owner's property arising out of any Sub Claims provided payment of undisputed amounts have previously been made by Owner to Construction Manager on such Subcontractor's account. All of the foregoing obligations and actions of the Construction Manager shall be undertaken diligently and at its sole cost and expense.

**14.2** The Construction Manager agrees that if any Subcontractor performing work or furnishing materials, supplies or equipment in connection with the Project, or any sub-Subcontractor or other person or entity claiming under or through such Subcontractor shall suffer, permit, file or cause to be filed any lien against the Project or any portion thereof, for which payment has previously been made by Owner, the Construction Manager, at its sole cost and expense, shall within fifteen business (15) days after written notice from the Owner, cause such lien to be canceled and discharged of record by payment, bond or otherwise. If such lien is not canceled and discharged by the Construction Manager as aforesaid, the Owner shall have the right to cause such lien to be canceled and discharged and, in such event, all costs and expenses incurred by the Owner in connection therewith, including, without limitation, premiums for any bond furnished in connection with

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<sup>3</sup> The facts are taken from the parties' statements and counterstatements of material facts, and the responses thereto (see Doc. Nos. 231, 269, 274, 278, 302, 303, 322, 328, 329, 334).

such cancellation and discharge and attorneys' fees and disbursements, shall be paid by the Construction Manager to the Owner on demand, or, at the option of the Owner, shall be deducted from any payment then due or thereafter becoming due to the Construction Manager under the terms of this Agreement. Notwithstanding the foregoing, if the lien arises by reason of any unpaid obligation of the Owner to the Construction Manager for Work performed in accordance with the Contract Documents as to which no dispute exists, the Owner shall have no right to retain any monies otherwise due and owing to the Construction Manager.

(Doc. No. 325, Mullahy 08/08/2022 Aff., Exhibit A [RXR Agreement], §§ 14.1, 14.2).

Hunter Roberts solicited scopes of work from trade contractors, including Vector, for the purpose of awarding subcontracts (Doc. Nos. 274, 322, ¶ 9). According to Hunter Roberts, as part of the vetting process, it requested that Vector complete its standard "Subcontractor/Vendor Prequalification Statement" (the "Prequalification Statement") and a pre-qualification form created by TradeTapp (the "TradeTapp Form"), a new application that Hunter Roberts was using (Doc. No. 232, Mullahy 06/03/2022 Aff., ¶ 9).

According to Handakas, he received the Prequalification Statement in May 2017 and completed it that July (Doc. No. 255, Handakas Aff., ¶ 9 & Exhibit A [Doc. No. 256, Prequalification Statement]). The Prequalification Statement states, in pertinent part, that Handakas is Vector's president and that none of Vector's "[o]wners, officers or major stockholders" have "ever been indicted or convicted of any felony or other criminal conduct" (Doc. No. 256, Prequalification Statement, at 1, 4). In addition, "Yes" is marked in response to whether "[Vector] or any of its owners, officers or major shareholders [were] currently involved in any arbitration or litigation" (*id.* at 4). Although the Prequalification Statement requests that a statement be attached in case of a "yes" response, Handakas did not attach a statement providing details (*see id.*; Doc. No. 255, Handakas Aff., ¶ 11).

On September 15, 2017, Vector and Hunter Roberts entered into two masonry subcontracts (Doc. Nos. 269, 278, ¶ 30). Handakas executed the subcontracts on behalf of

Vector (see Doc. Nos. 99, 100). It is undisputed that Handakas filled out and submitted the Prequalification Statement prior to the execution of these subcontracts (see Doc. Nos. 269, 278, ¶¶ 24-25, 30).

According to Handakas, in October 2017 he received an e-mail from TradeTapp, asking him to fill out an online form. He states that he found “no record of [him] responding to the TradeTapp email or filling out a TradeTapp questionnaire in October or November 2017” and that, “[u]pon information and belief, [he] did not respond” (Doc. No. 255, Handakas Aff., ¶ 15).

Darran Mullahy (“Mullahy”), the vice president of Hunter Roberts, states that he was the senior project manager on the Project and the “point-person in reviewing and, ultimately, awarding Vector subcontract work” (Doc. No. 275, Mullahy 07/13/2022 Aff., ¶¶ 2, 4).

According to Mullahy, Handakas completed both the Prequalification Statement and the TradeTapp Form (*id.*, ¶¶ 10-12). Although he does not specify when Vector submitted the TradeTapp Form, Mullahy claims that Vector made the following representations on the form:

(1) the only other company (besides Vector) with which Handakas was ever affiliated was Axion Construction and Development, (2) none of the owners, principals, officers, affiliated or major shareholders/stockholders of Vector had been investigated, indicted, or convicted of any felony or other criminal conduct, and (3) when prompted to identify all litigation and arbitrations in which Vector was then involved, Vector listed only two cases “for lien law diversion.”

(*id.*, ¶ 14).

While the parties dispute whether Vector completed the TradeTapp Form, it is undisputed that the TradeTapp Form was not completed prior to September 15, 2017 (Doc. Nos. 269, 278, ¶ 31). At his deposition, Hunter Roberts’ counsel provided a copy of the purported TradeTapp Form to Handakas. Defendants now submit that form in support of their motion for summary judgment, pointing out that it states, “Submission as of: April 26, 2019” (Doc. Nos. 269 ¶ 44,

278 ¶ 45; see Doc. No. 257, TradeTapp Form).<sup>4</sup> Notably, Handakas claims not to recognize the document (Doc. No. 255, Handakas Aff., ¶ 29).

On November 2, 2017, Vector and Hunter Roberts entered into two additional subcontracts for roofing and siding (together with the subcontracts executed on September 15, 2017, the “Subcontracts”) (Doc. Nos. 269, 278, ¶ 33). Handakas also executed these subcontracts on behalf of Vector (see Doc. Nos. 101, 102).

Vector commenced work in February 2018 (Doc. Nos. 269, 278, ¶ 42). Hunter Roberts terminated Vector in June/July 2019 (Doc. Nos. 269 ¶ 42(a), 278 ¶ 43), purportedly for cause after repeated defaults under the Subcontracts (Doc. No. 278 ¶ 43).

Mullahy states that after the termination Hunter Roberts discovered that: (1) “Handakas was the founder, President, CEO and shareholder of Astro Waterproofing and Restoration (‘Astro’) before 2003” (Doc. No. 275, Mullahy 07/13/2022 Aff., ¶ 19); (2) “Handakas was indicted, convicted, and imprisoned for felonies” arising from “tax and other frauds related to construction work that Astro and he performed for the School Construction Authority” (*id.* ¶ 20); and (3) “at the time of Defendants’ responses to the questionnaire, Vector was [involved in lawsuits brought] by multiple suppliers, vendors and sub-subcontractors, . . . [but] none of these lawsuits were identified on the questionnaire” (*id.* ¶ 21). Mullahy states that, had Hunter Roberts known of Handakas’s criminal conviction and Vector’s ongoing lawsuits, it would not have awarded the Subcontracts to Vector (*id.* ¶¶ 22-24).

The fact of Handakas’s conviction is not in dispute (see Doc. No. 250, Vector’s responses to plaintiff’s interrogatories, ¶ 22 [admitting that “[a] criminal conviction was originally entered

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<sup>4</sup> Defendants’ statement of material facts in support of their motion for summary judgment contains two paragraphs labeled “42” (see Doc. No. 269 at 6). For clarity, this decision cites to the second paragraph 42 as paragraph 42(a). All subsequent paragraphs are cited according to the paragraph numbers as they appear in the document.

against Handakas in the Eastern District of New York in 1998” and that the conviction was partially overturned in 2002]). However, Handakas claims that his statements on the prequalification questionnaires concerning the criminal history of Vector’s officers and owners were true (Doc. No. 255, Handakas Aff., ¶ 29). He states that “[his] father, Konstantinos Handakas, purchased one hundred percent of Vector and became Vector’s sole shareholder and CEO” in 2007, while he “was the General Manager and had the title of President . . . from 2007 through the date of Vector’s termination by Hunter [Roberts] in 2019” (*id.* ¶ 3). According to Handakas, he was not “an officer, principal, director or shareholder in Vector[,]” but merely “manag[ed] the day-to-day operations of Vector under the direct guidance of the CEO,” who “had final decision-making authority” and “was never investigated, indicted or convicted of a felony or other criminal conduct” (*id.*).

Hunter Roberts commenced this action on July 3, 2019 (Doc. No. 1).

On August 21, 2019, Beacon Sales Acquisition Inc. d/b/a Allied Building Products (“Allied”), which had supplied building materials to Vector for the Project, filed a mechanic’s lien against the Project in the amount of \$175,196.56. Hunter Roberts and Liberty Mutual Insurance Company (“Liberty Mutual”), as its surety, discharged the lien on or about September 2, 2019, pursuant to Lien Law § 19(4), by posting a lien discharge bond with the Nassau County Clerk (see Index No. 452127/2020, Doc. Nos. 2, 3).

Hunter Roberts also claims that it paid various vendors that Vector had failed to pay for products ordered for the Project (see Doc. No. 232, Mullahy 06/03/2022 Aff., ¶ 18). Carolina Stone is among these. Mullahy claims that Hunter Roberts “paid Carolina Stone a total of \$26,675 for its work at the Project” (*id.* ¶ 19), and that these “payments to Carolina Stone are supported by . . . cancelled checks, agreements, purchase orders, releases, and [his] own personal

knowledge” (*id.* ¶ 20). However, none of the supporting documents referenced are annexed to Mullahy’s affidavit. Mullahy also states, in a separate affidavit, that “Hunter Roberts paid approximately \$39,750.00 to . . . Carolina Stone for its work on the Project in 2019” and that “[t]hese payments are evidenced by the approved check requests attached [to his affidavit]” (Doc. No. 325, Mullahy 08/08/2022 Aff., ¶ 7). The two approved check requests annexed to his affidavit, however, both indicate an “[a]mount to be charged” of \$13,075, for a total payment of \$26,150 (*id.* at 104-05 [Exhibit B]). Hunter Roberts does not explain these discrepancies.<sup>5</sup>

On January 6, 2020, Allied commenced an action in Supreme Court, Nassau County, under Index No. 600196/2020, captioned *Beacon Sales Acquisition Inc. d/b/a Allied Building Products v Vector Structural Preservation Corp., et al.* (the “Allied Action”), against the Vector Defendants as well as Hunter Roberts and Liberty Mutual, seeking to recover, among other things, payment for building materials that it provided to Vector in the amount of \$175,196.56 (see Index No. 452127/2020, Doc. No. 1).

On February 14, 2020, Vector moved to consolidate the instant action with the Allied Action (Doc. No. 55). On March 4, 2020, Vector also moved to dismiss the complaint in the instant action (Doc. No. 62). Hunter Roberts cross-moved for leave to serve an amended complaint (Doc. No. 83). The court granted Vector’s motion for consolidation and removed the Allied Action from Nassau County (Doc. No. 90).<sup>6</sup> Pursuant to the parties’ stipulation (Doc. No. 89), the court permitted Vector to withdraw its motion to dismiss and granted Hunter Roberts’ cross-motion to amend the complaint, adding Handakas as a defendant (Doc. No. 91). The

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<sup>5</sup> Hunter Roberts also claims that “Vector had failed to pay [its] employees/workers’ wages in the approximate amount of \$52,126” (Doc. No. 232, Mullahy 06/03/2022 Aff., ¶ 22). However, Hunter Roberts does not present any evidence of Vector’s failure to pay wages, nor does it claim to have paid those amounts.

<sup>6</sup> Upon transfer from Nassau County, the Allied Action was assigned Index No. 452127/2020 (see Index No. 452127/2020, Doc. No. 49).

amended complaint asserted all of Hunter Roberts' claims—for breach of the Subcontracts, violation of Lien Law Article 3-A, contractual indemnification and fraudulent inducement—against both defendants.

Defendants moved to dismiss the complaint as against Handakas and to dismiss the fifth and seventh causes of action as against Vector (Doc. No. 104). In support of its motion to dismiss the fifth cause of action for diversion of article 3-A trust funds, Vector argued that “Hunter Roberts [was] neither a beneficiary nor a trustee under the Lien Law and, therefore, lack[ed] standing to maintain the fifth cause of action. Hunter Roberts respond[ed] that it ha[d] adequately pled a claim under the Lien Law as a subrogee of Vector’s vendors” (Doc. No. 151 at 11). As concerns the seventh cause of action for fraudulent inducement, defendants argued that: “Hunter Roberts failed to plead that the misrepresentations caused its losses”; the damages were identical to those sought under the breach of contract claims; and Hunter Roberts’ reliance was unreasonable (*see id.* at 14).

By decision and order dated February 9, 2021 (the “February 2021 Decision”), the court granted defendants’ motion to the extent of dismissing the first through sixth causes of action as against Handakas, and otherwise denied the motion (Doc. No. 151).<sup>7</sup>

The court determined, in pertinent part, that “Hunter Roberts’ standing to assert [the Article 3-A] claim depend[ed] upon its status as a subrogee” (*id.* at 12). While “[c]lose examination of the complaint reveal[ed] that Hunter Roberts ha[d] not identified any of Vector’s employees, subcontractors or suppliers on this Project who ha[d] not been paid or the amounts due to them,” the court nevertheless determined that, “affording the complaint every favorable

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<sup>7</sup> In addition, as relevant here, the court granted Allied’s motion to amend the caption to reflect the consolidation of this action and the Allied Action (Doc. No. 151).

inference, Hunter Roberts ha[d] adequately pled that it is a subrogee.” The court based its decision on the allegations “that after terminating the Subcontracts, Hunter Roberts ‘was forced to pay the vendors outstanding amounts owed by Vector to secure delivery of time-sensitive materials needed for the Project site’” and “that Vector ha[d] refused to pay at least one mechanic’s lien” (*id.* at 13, citing Doc. No. 98, amended complaint, ¶¶ 61, 131).

With respect to the fraudulent inducement claim, the court held that Hunter Roberts had sufficiently pled the claim and Handakas’s participation in the alleged fraud. The court deemed “[t]he Vector Defendants’ argument that Hunter Roberts’ fraud damages are duplicative of its contract damages . . . unconvincing” because, “[a]lthough Hunter Roberts has pled identical damages clauses on the contract and fraudulent inducement causes of action, it has also alleged that it sustained losses associated with trying to resolve the issues with Vector’s performance.” Accordingly, the court found that, “[a]t this procedural stage of the action, Hunter Roberts ha[d] sufficiently pled damages for fraudulent inducement that are distinct from its contract damages” (*id.* at 18-19, citing Doc. No. 98, amended complaint, ¶ 162.)

On April 9, 2021, the defendants filed an answer with counterclaims in response to the amended complaint (Doc. No. 156). In pertinent part, the answer’s second affirmative defense states as follows:

156. Hunter failed to allege facts the [sic] support its claim that it is a subrogee of a creditor of Vector under each of the four Subcontracts, including the name of the creditor and the particulars of the debt that Hunter allegedly paid.

157. Hunter’s Fifth Cause of Action fails to state a claim upon which relief may be granted.

158. Hunter lacks standing [sic] maintain an action under Article 3-A of the Lien Law under one or more of the four Subcontracts.

(*id.* ¶¶ 156-58).

Hunter Roberts replied to defendants' counterclaims (Doc. No. 177) and then moved for partial summary judgment on its fifth cause of action for trust fund diversion under the Lien Law (MOT SEQ 005). The court denied the motion without prejudice (see Doc. No. 221).

Meanwhile, Hunter Roberts and Allied "agree[d] to settle that portion of the Allied [Action] related to Hunter Roberts, Liberty Mutual and the [Project] for the sum of \$80,000.00" (Doc. No. 325, Mullahy 08/08/2022 Aff., at 139 [Exhibit D]). Pursuant to a stipulation of partial discontinuance, filed on September 28, 2021, Allied discontinued, with prejudice, its claims against Hunter Roberts and Liberty Mutual, while continuing its claims against the Vector Defendants (Doc. No. 218).

Discovery was proceeding at this time and Handakas was deposed. He was asked about Vector's "accounting protocols related to Article 3A trust funds" in 2017 through 2019 (Doc. No. 248, Handakas 07/22/2021 Tr. at 265:16-19). Handakas responded that his practice consisted of "paying all invoices of all vendors" in the month that they were due (*id.* at 265:20-266:19). Handakas explained that he received e-mailed invoices and paid them "with Amex," which was "the extent of the accounting." According to Handakas, except in some instances, like Carolina Stone, which initially required payment by check, "most everything was on the Amex" (Doc. No. 249, Handakas 07/21/2021 Tr. at 86:5-22). To the extent that there are spreadsheets, identifying the various American Express payments that Vector purportedly made in connection with the Project, Handakas testified that these documents were not maintained in the regular course of business, but were created in connection with discovery, to make the produced credit card statement easier to understand (*id.* at 86:25-87:18).

Handakas also admitted that Vector did not keep independent records of the money it was paid in connection with the Project, explaining that "everything was on Textura" (Doc. No. 253,

Handakas 07/23/2021 Tr. at 353:18-22), which was a software system that Hunter Roberts required Vector “to procure and use in connection with Vector’s submission of its invoices” (Doc. No. 255, Handakas Aff., ¶ 37). To ascertain the specific payments made to Vector, Handakas stated he would have “to make a claim to the bank and wait for them to respond” (Doc. No. 253, Handakas 07/23/2021 Tr. at 357:8-25).

However, Handakas avers that “Vector’s records . . . show payments made by Vector in excess of \$4,227,452.67, that exceed the \$3.1 Mil which Vector received in payments from Hunter by over \$1 Mil” (Doc. No. 255, Handakas Aff., ¶ 44). Defendants do not submit any of these records on the instant motions, but instead rely on schedules, prepared by Handakas for this litigation, which summarize “the monies Vector received and . . . spent” (*id.*, ¶ 37 & Exhibit C [Doc. No. 258]) and its American Express payments (*id.* ¶ 41 & Exhibit D [Doc. No. 259]).

By order dated March 24, 2022, the court directed the parties to file the note of issue by April 15, 2022, and to file all dispositive motions within 60 days thereafter (Doc. No. 225). Hunter Roberts filed its note of issue on April 15, 2022 (Doc. No. 227). Hunter Roberts and defendants filed their motions for partial summary judgment (MOT SEQ 006 and 007, respectively) on June 14, 2022 (Doc. Nos. 230, 254). Defendants filed their cross-motion (MOT SEQ 006) on July 14, 2022 (Doc. No. 301).

### III. Legal Standard

Pursuant to CPLR 3212(b), “[t]o obtain summary judgment, the movant ‘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’” (Madeline D’Anthony Enters., Inc. v Sokolowsky, 101 AD3d 606, 607 [1st Dept. 2012], quoting Alvarez v Prospect Hosp., 68 NY2d

320, 324 [1986]). “Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers” (Alvarez, 68 NY2d at 324). Once the movant satisfies its burden, the opposing party must ““produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action”” (Madeline D’Anthony Enters., Inc., 101 AD3d at 607, quoting Alvarez, 68 NY2d at 324). “Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . on a motion for summary judgment . . . .” (Forrest v Jewish Guild for the Blind, 3 NY3d 295, 315 [2004] [internal quotation marks and citation omitted]).

#### **IV. Discussion**

##### **A. Fifth Cause of Action**

Hunter Roberts argues that it is entitled to summary judgment on its trust fund diversion claim because Vector failed to maintain trust fund records in compliance with the Lien Law, which creates a presumption of diversion for non-trust purposes.

Defendants respond that the motion should be denied because Hunter Roberts fails to make a *prima facie* demonstration of its right to proceed as a subrogee of Vector’s vendors. Moreover, defendants argue they are entitled to summary judgment dismissing the fifth cause of action, because: (1) Hunter Roberts cannot establish that its payments to Vector’s vendors were necessary rather than voluntary; and (2) Vector has a complete defense to the claim, in that it expended more funds on the Project than it received from Hunter Roberts.<sup>8</sup>

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<sup>8</sup> Notably, while defendants raise both arguments in support of their cross-motion under motion sequence number 006, only the latter argument is raised in support of defendants’ motion under motion sequence number 007. In motion sequence number 006, defendants incorporate by reference the supporting papers filed in connection with motion sequence number 007 (see Doc. No. 304 at 3).

Hunter Roberts replies that because defendants failed to challenge its subrogee status in their pre-answer motion to dismiss, they waived the standing defense. It also argues that it would be prejudiced should the court consider the defense, because it was deprived of the opportunity to conduct relevant discovery. In any event, Hunter Roberts contends it has standing because it made payments to Vector's vendors to comply with the RXR Agreement. Additionally, Hunter Roberts claims the court already determined it has standing as a subrogee in the February 2021 Decision. Finally, Hunter Roberts argues that irrefutable evidence, including Handakas's own statements, create the statutory presumption that Vector diverted trust funds in violation of the Lien Law, and that Vector's records to the contrary have little to no evidentiary value.

The parties also dispute whether the court may consider the arguments raised in defendants' untimely cross-motion, which was filed more than 60 days after the filing of the note of issue (see Doc. Nos. 225, 227, 301).

As a preliminary matter, the court may consider the cross-motion, despite its untimeliness. The merits of an untimely cross-motion for summary judgment are properly reached to the extent the cross-motion is based on issues "nearly identical to those raised in [a] timely motion[]" (Royland v McGovern & Co., LLC, 203 AD3d 677, 678 [1st Dept. 2022] [internal quotation marks and citation omitted]). Here, to be entitled to summary judgment on the trust fund diversion claim as a subrogee, Hunter Roberts must demonstrate, *prima facie*, that it is, in fact, a subrogee (see Broadway Houston Mack Dev., LLC v Kohl, 71 AD3d 937, 938 [2d Dept. 2010] [explaining that "the plaintiff failed to establish its *prima facie* entitlement to judgment as a matter of law" on its Lien Law claim, where it failed to establish an element of subrogation]). Indeed, Hunter Roberts begins the argument section of its brief with the following

heading: “HUNTER ROBERTS HAS SATISFIED THE CLAIMS OF SEVERAL ARTICLE 3A TRUST FUND BENEFICIARIES, AND, AS A RESULT, IS A BENEFICIARY OF VECTOR’S ARTICLE 3A TRUST FUNDS BY VIRTUE OF SUBROGATION” (see Doc. No. 230 at 9).<sup>9</sup> As such, it is appropriate to consider the cross-motion, which challenges this assertion.

Additionally, Hunter Roberts’ argument that Vector waived the standing defense is without merit. The defense of lack of standing is not waived if raised in a pre-answer motion to dismiss or the answer (see CPLR 3211[e]). Here, in their pre-answer motion to dismiss, defendants argued that “Hunter Roberts [was] neither a beneficiary nor a trustee under the Lien Law, and therefore, Hunter Roberts lack[ed] standing” (see Doc. No. 151 at 11). The court denied the motion only because, under the applicable standard of review, it accepted Hunter Roberts’ argument that it adequately pled its subrogee status with respect to Vector’s vendors (see Doc. No. 151 at 11-13). Defendants then answered the amended complaint, specifically raising the issue of Hunter Roberts’ lack of standing in their second affirmative defense (Doc. No. 156, answer to the amended complaint, ¶¶ 156-58). Accordingly, defendants did not waive the standing defense (see CPLR 3211[e]).

Similarly, Hunter Roberts’ argument that it would be prejudiced should the court consider defendants’ standing argument is disingenuous. Hunter Roberts has been on notice that its standing was in dispute since the motion to dismiss the amended complaint. Additionally, the answer to the amended complaint, which was filed more than a year before Hunter Roberts filed the note of issue (see Doc. Nos. 156, 227), squarely challenges Hunter Roberts’ status as a

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<sup>9</sup> Hunter Roberts does not submit a clearly labeled memorandum of law in support of its motion for summary judgment. Instead, appended to its notice of motion is a “Motion for Summary Judgment,” which bears all the hallmarks of a memorandum of law, except that its paragraphs are individually numbered (see Doc. No. 230).

subrogee (Doc. No. 156 ¶¶ 156-58). As such, Hunter Roberts had ample notice of the issue and opportunity to conduct necessary discovery. Furthermore, as all of the relevant information (*e.g.*, payments that Hunter Roberts made to vendors and what necessitated such payments) is within Hunter Roberts' control, it is unclear what it would have gained from "explor[ing] this defense at the depositions of Handakas or other Vector employees" (Doc. No. 324 at 5). To the extent it claims that its "inability to produce [the RXR Agreement] during the discovery phase of this litigation severely prejudices its ability to now rely upon it to defend against Defendants' lack of standing claim" (Doc. No. 324 at 5 n.3), the argument is equally disingenuous. First, it could have produced this document at any time. Second, while defendants note that the RXR Agreement was not produced until "August 10, 2022, one day before Hunter [Roberts] filed its opposition to Vector's cross motion" (Doc. No. 331 ¶ 20), they neither claim that this violated a discovery request or order, nor make any objection to its use. Instead, defendants respond to Hunter Roberts' claim that the RXR Agreement necessitated its payment to Vector's vendors (*see* Doc. No. 330 at 10-12).

For the foregoing reasons, the issue of Hunter Roberts' status as a subrogee is properly considered on the instant motions.

"Article 3-A of the Lien Law creates trust funds out of certain construction payments or funds to assure payment of subcontractors, suppliers, architects, engineers, laborers, as well as specified taxes and expenses of construction" (Aspro Mech. Contr. v Fleet Bank, 1 NY3d 324, 328 [2004] [internal quotation marks and citations omitted]). Its primary purpose 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.* [internal quotation marks and citations omitted]).

The trust comes into existence “when any asset thereof comes into existence” and continues “until every trust claim . . . has been paid or discharged, or until all such assets have been applied for the purposes of the trust” (Lien Law § 70[3]). “The trust assets of which a contractor or subcontractor is trustee” are to be applied to, among other enumerated expenditures, the “payment of claims of subcontractors, architects, engineers, surveyors, laborers and materialmen” (*id.* § 71[2]). A diversion of trust assets occurs when any trust asset is paid for any purpose other than those set forth in the Lien Law (*id.* § 72[1]).

Every trustee is required to “keep books or records with respect to each trust” (*id.* § 75[2]). These must contain detailed entries with respect to, among other things, trust assets receivable, trust accounts payable, trust funds received, and trust payments made with trust assets (*id.* § 75[3][A]-[E]). The trustee’s failure to keep the required books or records creates a statutory presumption that the trustee diverted trust funds for impermissible purposes (see *id.* § 75[4]). This statutory presumption may be rebutted by evidence that the trustee “did not divest the trust funds” (Medco Plumbing, Inc. v Sparrow Constr. Corp., 22 AD3d 647, 648 [2d Dept. 2005]; see Anthony DeMarco & Sons Nursery, LLC v Maxim Constr. Serv. Corp., 130 AD3d 1409, 1412 [3d Dept. 2015] [affirming summary judgment for plaintiff where defendant “failed to overcome the statutory presumption of an improper diversion of trust assets” because its verified statement did not contain details required by Lien Law § 75(3)(A)-(D)]).

Under Lien Law § 71(4), trust beneficiaries are any “[p]ersons having claims for payment of amounts for which the trustee is authorized to use trust assets.” Further, “[a] trust arising under [the Lien Law] may be enforced by the holder of any trust claim, including any person subrogated to the right of a beneficiary” (Lien Law § 77[1]).

To proceed as a subrogee, a party must demonstrate that it actually paid on a claim brought by a trust beneficiary (see Broadway Houston Mack Dev., LLC, 71 AD3d at 937; J. Petrocelli Constr., Inc. v Realm Elec. Contrs., Inc., 15 AD3d 444, 446 [2d Dept. 2005] [finding that plaintiff stated a claim under the Lien Law because it was proceeding as a subrogee after paying “a number of [defendants’] vendors and subcontractors who were beneficiaries of the trust”]). In addition, “[e]quitable subrogation requires that the debt be paid in full” (Hong Leong Fin. Ltd. [Singapore] v Morgan Stanley, 44 Misc 3d 1231[A], 2014 NY Slip Op 51396[U], at \*10 [Sup. Ct. NY Cty. 2014], aff’d 131 AD3d 418 [1st Dept. 2015]; see Federal Ins. Co. v Arthur Andersen & Co., 75 NY2d 366, 374 [1990] [explaining that “subrogation . . . should in no way impair the creditor’s interest in the security for the debt or its right to proceed against the debtor” and that the creditor retains his interest until “the debt is paid in full”]). Lastly, equitable subrogation “is applicable to cases where a party is compelled to pay the debt of a third person to protect his own rights, or to save his own property. . . . [I]t cannot be invoked where the payments sought to be recovered are voluntary” (Broadway Houston Mack Dev., LLC, 71 AD3d at 937 [internal quotation marks and citations omitted]).

Here, Hunter Roberts fails to demonstrate its *prima facie* entitlement to judgment as a matter of law on its Lien Law claim. Hunter Roberts attempts to treat its status as a subrogee as an established fact. However, the court never “determin[ed] that Hunter Roberts . . . ha[d] standing to bring its claim under Article 3-A of the Lien Law” (Doc. No. 324 at 3 n.1). The February 2021 Decision merely held that “Hunter Roberts . . . adequately *pled* that it [was] a subrogee” (Doc. No. 151 at 13 [emphasis added]). Now, faced with the burden of producing evidence to substantiate its allegations, Hunter Roberts fails both to establish its payments of Vector’s debts and to demonstrate that any such payments were necessary rather than voluntary.

In the case of Carolina Stone, it is unclear from Hunter Roberts' submissions what amount was owed and what, if anything, was paid. Mullahy initially stated that Hunter Roberts "paid Carolina Stone a total of \$26,675 for its work at the Project" (Doc. No. 232, Mullahy 06/03/2022 Aff., ¶ 19), but subsequently claimed that it "paid approximately \$39,750.00" (Doc. No. 325, Mullahy 08/08/2022 Aff., ¶ 7). Hunter Roberts neither explains this discrepancy nor submits any of the documents that purportedly substantiate its payments to Carolina Stone (*i.e.*, "cancelled checks, agreements, purchase orders, [and] releases" [Doc. No. 232, ¶ 20]). Instead of providing proof of payment, Hunter Roberts submits two approved check requests (see Doc. No. 325, Mullahy 08/08/2022 Aff., ¶ 7 & Exhibit B). Notably, though, each check request indicates that the "[a]mount to be charged" is \$13,075 (*id.* at 104-105 [Exhibit B]). This, of course, does not add up to \$26,675 or \$39,750.00. Again, this discrepancy is not explained. Having failed to demonstrate what amount was owed to Carolina Stone or what, if anything, was paid, Hunter Roberts fails to demonstrate, *prima facie*, its right to proceed as a subrogee of Carolina Stone.

As concerns Hunter Roberts' \$80,000 payment to Allied, this, too, is inadequate to establish, *prima facie*, its right to proceed as Allied's subrogee. Allied sought payment in the amount of \$175,196.56 for the building materials it provided to Vector (see Doc. No. 332, complaint in the Allied Action). Hunter Roberts paid only a portion of that claimed amount to procure its own release in the Allied Action (see Doc. No. 325, Mullahy 08/08/2022 Aff., at 138-39 [Exhibit D]). Allied continues to pursue its claim against the Vector Defendants (see Doc. No. 218). As such, this payment does not give rise to subrogation (see *Federal Ins. Co.*, 75 NY2d at 374).

In any event, Hunter Roberts cannot proceed as a subrogee because the evidence establishes that its payments to Vector's vendors were voluntary. Hunter Roberts claims that the RXR Agreement compelled these payments but fails to point to any provision that supports this contention. The provisions it relies upon require that, where a lien is filed against the Project, Hunter Roberts discharge the lien "by payment, bond or otherwise" (Doc. No. 325, Exhibit A [RXR Agreement], §§ 14.1, 14.2). Should Hunter Roberts fail to do so, the agreement permits the owner to either "retain out of any payment . . . due to the Construction Manager . . . an amount sufficient to indemnify the Owner" (*id.* § 14.1) or to discharge the lien and require Hunter Roberts to indemnify it for "all costs and expenses incurred by the Owner in connection therewith" (*id.* § 14.2). These provisions do not "demonstrate[] an obligation or compulsion to pay the [vendors] in full. Rather, [they] merely obligated plaintiff to bond or discharge any liens filed within a specified time period or hold the [Owner] harmless from any damages arising therefrom" (Broadway Houston Mack Dev., LLC, 22 Misc 3d 1001, 1010 [Sup. Ct. Suffolk Cty. 2008], aff'd 71 AD3d 937 [2d Dept. 2010] [considering similar contractual language and finding that the plaintiff owner, who sought to recover under the Lien Law against the general contractor after it paid the full amounts owed to the subcontractors, did not have standing as a subrogee]). Moreover, Hunter Roberts "could have bonded [any] liens as the agreement provides . . . and remained in compliance" (*id.* at 1009). Accordingly, its payment to Allied was voluntary (see Broadway Houston Mack Dev., LLC, 71 AD3d at 937-38).

Similarly, with respect to Carolina Stone, in addition to the deficiencies already discussed above, it is difficult to discern how Hunter Roberts' payments to that vendor were in any way compelled by the RXR Agreement given that the vendor had not filed a lien against the Project.

For the foregoing reasons, Hunter Roberts has failed to demonstrate that its payments to Vector's vendors "were necessary to protect its legal or economic interests" and has accordingly "failed to establish its prima facie entitlement to judgment as a matter of law" on its Lien Law claim (*id.* at 938).

Hunter Roberts' attempts to distinguish this matter from Broadway Houston Mack Dev., LLC (22 Misc 3d at 1010, aff'd 71 AD3d 937) are unavailing. First, it points out that the owner in that case had no contractual privity with the subcontractors, whereas here, upon terminating Vector for cause, under the terms of the Subcontracts, Hunter Roberts stepped into Vector's shoes to resolve subcontractors' claims (see Doc. No. 324 at 8 n.4; Doc. Nos. 99, 100, 101, 102, Subcontracts, § 13.2 [providing that, in the event of default, "Hunter Roberts, at its option, at any time may: . . . (e) Make any payments to satisfy the Subcontractor's obligations relating to the Work for labor, materials, equipment, or insurance or other items"]]). However, the fact that Hunter Roberts exercised its option to pay Vector's vendors only reinforces the view that these payments were voluntary. Second, Hunter Roberts claims that, "in sharp contrast to the court's concerns in *Broadway Houston* regarding the possibility of double payment, there is no legitimate concern that any of Vector's suppliers and vendors would be paid twice inasmuch as, per Handakas, Vector is no longer in business" (Doc. No. 324 at 9). This argument misconstrues Broadway Houston Mack Dev., LLC. There, the court expressed no concern regarding double payment. Instead, it observed that the plaintiff knowingly assumed the risk of double payment when, after paying the general contractor, it made the business decision to pay the subcontractors rather than "avail itself of the various remedies available to discharge or bond mechanic's liens to keep the job moving" (Broadway Houston Mack Dev., LLC, 22 Misc 3d at 1010-11). Here, Hunter Roberts made the same business decision.

For the foregoing reasons, Hunter Roberts' motion for partial summary judgment on its fifth cause of action for trust fund diversion in violation of Lien Law Article 3-A is denied. Conversely, because Hunter Roberts' payments to Vector's vendors were voluntary, defendants are entitled to summary judgment dismissing the fifth cause of action (see Broadway Houston Mack Dev., LLC, 22 Misc 3d at 1011 [dismissing Lien Law claims based on finding that "plaintiff is neither a beneficiary, nor subrogated to the rights of the subcontractor beneficiaries" and therefore lacked standing to maintain the claims]).

Having determined that Hunter Roberts lacks standing to pursue the trust fund diversion claim, its remaining argument, concerning Vector's recordkeeping, is moot and, accordingly, is not addressed. There is likewise no need to dwell on defendants' additional argument that the fifth cause of action should be dismissed because Vector spent more on the Project than Hunter Roberts paid, except to note that the argument fails due to defendants' inadequate evidence of expenditures.

For the foregoing reasons, Hunter Roberts' motion for summary judgment (MOT SEQ 006) is denied and defendants' cross-motion for summary judgment dismissing the fifth cause of action (MOT SEQ 006) is granted. To the extent that defendants' separate motion for summary judgment (MOT SEQ 007) also seeks dismissal of the fifth cause of action, that branch of the motion is denied because it is premised solely on defendants' inadequate evidence of expenditures on the Project.

#### **B. Seventh Cause of Action**

Defendants contend they are entitled to summary judgment dismissing the seventh cause of action for fraudulent inducement because Hunter Roberts fails to state when it received the responses to its questionnaires, whether and by whom those responses were reviewed, and

whether Hunter Roberts relied on the TradeTapp Form when it entered into the Subcontracts. In addition, defendants argue the claim should be dismissed because the statement that none of Vector's owners, principals or officers had ever been investigated, indicted or convicted of a felony or other criminal conduct, was true. Lastly, defendants argue the claim should be dismissed as duplicative because Hunter Roberts cannot identify any damages that are not also covered by its contractual indemnification claim.

Hunter Roberts responds that the court has already concluded that this claim is adequately pled and that, at best, defendants raise issues of fact concerning the prequalification process that cannot be resolved on a motion for summary judgment. It also points out that, because Handakas was convicted of a crime and has repeatedly admitted that he was Vector's president, his statements in the prequalification questionnaires are false. Additionally, Hunter Roberts claims it has suffered damages as a result of the alleged fraud, including, but not limited to, the costs associated with dealing with unpaid vendors, completing the Project, bonding off liens, and settling litigation brought by Allied. In any event, it argues, "the mere fact that a fraud claim seeks damages that may also be . . . recoverable for breach of contract does not subject the fraud claim to dismissal unless it is also based on 'identical circumstances,' rather than an independent duty or collateral misrepresentation" (Doc. No. 277 at 13). Finally, Hunter Roberts contends that the claim cannot be duplicative as against Handakas because he was not a party to the Subcontracts.

"In order to prevail on a claim for common-law fraudulent inducement, a plaintiff must establish the misrepresentation of a material fact, which was known by the defendant to be false and intended to be relied on when made, and that there was justifiable reliance and resulting

injury” (Ventur Group, LLC v Finnerty, 68 AD3d 638, 639 [1st Dept. 2009] [internal quotation marks and citation omitted]). Additionally,

Causes of action for breach of contract and fraud based on the breach of a duty separate from the breach of the contract are designed to provide remedies for different species of damages: the damages recoverable for a breach of contract are meant to place the nonbreaching party in as good a position as it would have been had the contract been performed; the damages recoverable for being fraudulently induced to enter a contract are meant to indemnify for the loss suffered through that inducement, e.g., damages for foregone opportunities.

(Mañas v VMS Assoc., LLC, 53 AD3d 451, 454 [1st Dept. 2008] [internal quotation marks and citations omitted]). As such, where the plaintiff fails to allege “any damages that would not be recoverable under [a] breach of contract cause of action,” the fraud-based cause of action must be dismissed as duplicative (*id.*; see Demurjian v Demurjian, 190 AD3d 410, 411 [1st Dept. 2021] [dismissing fraud claim that sought “identical quanta and measures of damages” as the contract claim]; see also Empire Outlet Bldrs. LLC v Construction Resources Corp. of NY, 170 AD3d 582, 582-83 [1st Dept. 2019] [holding that, “(r)egardless of whether plaintiff sufficiently alleged breach of a duty independent of the (contract), the fraud claim (was) duplicative because plaintiff (would) be fully compensated via the contract claim”] [internal citation omitted]).

Here, to the extent that defendants seek dismissal of the fraudulent inducement claim based on Hunter Roberts’ failure to specify when it received the completed TradeTapp Form, defendants fail to demonstrate their *prima facie* entitlement to summary judgment. It is undisputed that the TradeTapp Form was not submitted before Hunter Roberts and Vector executed the first two subcontracts (Doc. Nos. 269, 278, ¶ 31). However, nothing in the record demonstrates that Vector’s responses on the TradeTapp Form did not induce Hunter Roberts to enter into the latter two, November 2, 2017 subcontracts. All that defendants offer in support of their argument is: (1) Handakas’s statement, “[u]pon information and belief,” that “[he] did not

respond” to the e-mail from TradeTapp asking him to fill out an online form (Doc. No. 255 , Handakas Aff., ¶ 15); and (2) a copy of the completed TradeTapp Form, which Handakas claims not to recognize (*id.* ¶ 29), stating “Submission as of: April 26, 2019” (Doc. No. 257), without anything in the record to explain what this “submission” date pertains to.

In any event, Handakas also represented that none of Vector’s “[o]wners, officers or major stockholders” had “ever been indicted or convicted of any felony or other criminal conduct” on the Prequalification Statement (Doc. No. 256, Prequalification Statement, at 4). It is undisputed that Vector submitted this document before the first subcontracts were executed on September 15, 2017 (Doc. Nos. 269, 278, ¶¶ 24, 25, 30). Therefore, even without the TradeTapp Form, a basis for the fraudulent inducement claim remains.

To the extent that defendants argue the statement regarding the criminal history of Vector’s officers was true, the argument is without merit. In the same breath that he denies being “an officer, principal, director or shareholder in Vector,” Handakas admits that he “was the General Manager and had the title of President” (Doc. No. 255, Handakas Aff., ¶ 3). He also executed the Subcontracts as Vector’s president (see Doc. Nos. 99-102) and identified himself as the president on the Prequalification Statement (Doc. No. 256 at 1). A president is undeniably a corporate officer (see Business Corporation Law § 715[a]). Consequently, having himself been convicted of a crime (see Doc. No. 250, Vector’s Responses to Plaintiff’s Interrogatories, ¶ 22), Handakas’s statement to the contrary was irrefutably false.

Nonetheless, defendants are entitled to summary judgment dismissing the seventh cause of action as against Vector. Hunter Roberts is unable to point to any damages that are not

recoverable under its cause of action for contractual indemnification.<sup>10</sup> In its counterstatement of material facts, submitted in opposition to the instant motion (MOT SEQ 007), Hunter Roberts expands on its damages, explaining that:

Hunter Roberts ha[s] suffered damages resulting from the fraud, including, *inter alia*, costs involving completing the Project by hiring [a new subcontractor] to complete the masonry, siding, and roofing work . . . , costs involved in this litigation, including attorneys' fees, costs involved in bonding off Vector's and Vector's sub-subcontractors' and suppliers' mechanics' liens, and costs in settling litigation brought by Allied for product supplied to Vector.

(Doc. No. 274, ¶ 47).

However, Hunter Roberts seeks identical damages in its sixth cause of action for contractual indemnification pursuant to section 13.4 of the Subcontracts (see Doc. No. 98, ¶¶ 129, 130]). Indeed, section 13.4 of the Subcontracts covers all the categories of damages that Hunter Roberts seeks under its fraud claim. Specifically, it requires Vector to indemnify Hunter Roberts for:

[A]ll costs, losses, damages and expenses, including, without limitation, all attorneys' fees (collectively, the "Costs") incurred by Hunter Roberts or the Owner in connection with or as a result of any default by the Subcontractor or the exercise of any right or remedy upon the Subcontractor's default, including without limitation attorneys' fees and court costs incurred in enforcing this Article. . . [and] the full amount of Costs incurred and obligations assumed by Hunter Roberts or the Owner in good faith under the reasonable belief that such Costs or obligations were necessary or required, whether actually necessary or required or not, (a) in protecting and completing the Work and providing labor, materials, equipment, supplies and other items in connection therewith or in recontracting the Work, and (b) in settlement, discharge or compromise of any claims, demands, suits and judgments pertaining to or arising out of the Work.

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<sup>10</sup> This court previously rejected defendant's argument that the fraud damages were duplicative of the contract claim damages (see Doc. No. 151 at 18, citing Doc. No. 98 ¶ 162). However, in so deciding, the court did not consider whether the fraud damages were identical to those sought under the contractual indemnification cause of action.

(Doc. Nos. 99-102, § 13.4). Accordingly, the fraudulent inducement claim against Vector is duplicative of the contractual indemnification claim and must be dismissed (see Demurjian, 190 AD3d at 411; Empire Outlet Bldrs. LLC, 170 AD3d at 582-83; Mañas, 53 AD3d at 454).

However, to the extent that defendants seek dismissal of the fraudulent inducement claim as against Handakas, the motion must be denied. Handakas was not a party to the Subcontracts in his individual capacity and “a fraud claim may be dismissed as *duplicative* only as against a defendant against whom the related contract claim is viable . . .” (Richbell Info. Servs. v Jupiter Partners, 309 AD2d 288, 305 [1st Dept. 2003] [internal citation omitted]; see U.S. Tsubaki Holdings, Inc. v Estes, 194 AD3d 590, 592 [1st Dept. 2021] [finding fraud claims were not duplicative of breach of contract claims where, among other things, “the fraud claims (were) asserted against a distinct set of defendants from the contract claims”]; Allenby, LLC v Credit Suisse, AG, 134 AD3d 577, 581 [1st Dept. 2015] [explaining that because, “the fraud claim (was) asserted against all three defendants but a contract claim (was) asserted against only (one), the fraud claim (could not) be *duplicative* as to (the other two defendants)”] [internal citation omitted]).

For the foregoing reasons, the branch of defendants’ motion for summary judgment seeking the dismissal of the seventh cause of action (MOT SEQ 007) is granted as to Vector only.

## V. Conclusion

Accordingly, it is

ORDERED that the plaintiff’s motion for partial summary judgment (MOT SEQ 006) is denied; and it is further

ORDERED that the defendants' cross-motion for partial summary judgment dismissing the fifth cause of action (MOT SEQ 006) is granted, and the fifth cause of action is dismissed; and it is further

ORDERED that defendants' motion for partial summary judgment (MOT SEQ 007) is granted to the extent of dismissing the seventh cause of action as against Vector Structural Preservation Corp., and the balance of the motion is otherwise denied; and it is further

ORDERED that the action shall continue as to the remaining causes of action.

This constitutes the Decision and Order of the Court.

*Nancy M. Bannon*  
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7/25/2023  
DATE

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NANCY M. BANNON, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: