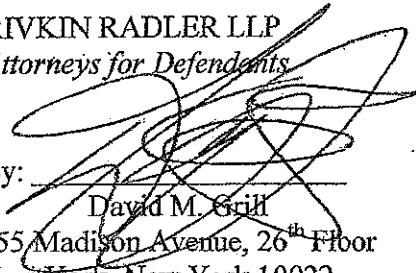


SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

_____ X	:	
JEFFREY ALTMAN,	:	
on behalf of himself and all others	:	Index No.: 109839/11
similarly situated,	:	
	:	<u>ORDER WITH</u>
	:	<u>NOTICE OF ENTRY</u>
Plaintiff,	:	
	:	
- against -	:	
	:	
HEEA DEVELOPMENT, LLC, JEFF	:	
SPIRATOS and KLEMENS GASSER,	:	
	:	
Defendants.	:	
_____ X	:	

PLEASE TAKE NOTICE, that the within is a true copy of an Order of the Honorable Shirley Werner Kornreich, dated January 19, 2012, duly made and entered in the Office of the County Clerk, New York County on or about January 20, 2012, along with the hearing record referred to in the Order, dated January 19, 2012, duly made and entered in the Office of the County Clerk, New York County on or about January 27, 2012.

Dated: New York, New York
January 31, 2012

RIVKIN RADLER LLP
Attorneys for Defendants

By: _____
David M. Grill
555 Madison Avenue, 26th Floor
New York, New York 10022
(212) 455-9555

TO: CORNICELLO, TENDLER
& BAUMEL-CORNICELLO, LLP
Attorneys for Plaintiff
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New York, New York 10005
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH

PART 54

Justice

Index Number : 109839/2011
ALTMAN, JEFFREY
vs.
HEEA DEVELOPMENT, LLC
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____

No(s). _____

Answering Affidavits — Exhibits _____

No(s). _____

Replying Affidavits _____

No(s). _____

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

dismissed since this is not a case properly brought under the used Lien Law, Article 3-A, as per the January 19, 2012 hearing record.

FOR THE FOLLOWING REASON(S):

Dated: 1/19/12

JUSTICE SHIRLEY WERNER KORNREICH
J.S.C.

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

1
 2 SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK : CIVIL TERM PART 54
 3 -----X
 JEFFREY ALTMAN,
 4 on behalf of himself and all others
 similarly situated,
 5
 Plaintiff,
 6
 -against- Index No.
 7 HEEA DEVELOPMENT, LLC, JEFF 139835/2011
 8 SPIRATOS and KLEWENS GASSER,
 9 Defendants.
 10 -----X
 60 Centre Street
 New York, New York, 10007
 January 19, 2012

12 B E F O R E: HON. SHIRLEY WERNER KORNRICH, Justice.

13 A P P E A R A N C E S:
 14 CORNICELLO, FENDLER & DANIEL-CORNICELLO, LLP
 Attorneys for Plaintiff
 Two Wall Street 20th Floor
 New York, New York 10005
 16 BY: TODD DRUMMER, ESQ., ESQ.
 17 RIVKIN RADLER LLP
 Attorneys for Defendants
 555 Madison Avenue
 New York, New York 10022-0926
 19 BY: DAVID M. GRILL, ESQ.
 20 HARVEY & HACKETT
 420 Lexington Avenue
 New York, New York 10170

MARY BURROFATO, SENIOR COURT REPORTER

Mary Burrofato - Senior Court Reporter

PROCEEDINGS

1 THE COURT: The laborers, are they part of this
2 action? The ones who did the construction work.

3 MR. GRILL: They are not. And just to clarify that
 4 point, because this is an unusual way of doing things, but
 5 on or about November 6, 2007, HEEA, as sponsor, entered into
 6 a contract of sale to sell the penthouse unit to the
 7 plaintiff for a sum in excess of \$10 million. Pursuant to
 8 that contract of sale, there was a contract deposit -- and
 9 this is a critical point -- separate and apart from the
 10 contract of sale, the parties, plaintiff as owner, HEEA as
 11 contractor, entered into a construction contract, pursuant
 12 to the construction contract there was a contract deposit.

13 These are two separate and distinction funds. This
 14 was not construction funds that were paid from the contract
 15 of sale or the deposit under the contract of sale. This was
 16 a separate fund at issue here, a separate fund dealing only
 17 with the construction contract. And you should know that
 18 the plaintiff has commenced, previously commenced an action
 19 before the AG, Attorney General, relative to the contract of
 20 sale; the AG denied the complaint and ostensibly said you
 21 need to commence a plenary action, which the plaintiff has
 22 done, relative to the contract of sale and that contract
 23 deposit, which is in escrow. So they are -- the plaintiff
 24 is pursuing his recourse and remedies pursuant to the
 25 contract of sale.
 26

Mary Burrofato - Senior Court Reporter

PROCEEDINGS

1 THE COURT: This action is brought under the New
 2 York State Lien Law and there is a motion to dismiss by the
 3 defendants in this case and I believe this involves a
 4 condominium or co-op.
 5 MR. GRILL: Condo.

6 THE COURT: And the motion to dismiss, basically,
 7 is based upon statute of limitation grounds, lack of
 8 standing, that the action is barred by the Lien Law and the
 9 CPLR and the contract itself. I will hear from the moving
 10 party.
 11

12 MR. GRILL: Thank you, your Honor. Your Honor, as
 13 you know, the defendant HEEA, is developer for a condominium
 14 located at 524 West 19th Street, New York, New York. The
 15 individual defendants are the principals of HEEA. In this
 16 action, as you noted, there is only one claim asserted and
 17 that claim is that the defendants, in violation of Article
 18 3(a) of the Lien Law, violated -- diverted trust funds in
 19 contravention to a construction contract between the
 20 plaintiff as owner and HEEA as contractor.

21 THE COURT: Now, is -- HEEA is the GC?

22 MR. GRILL: HEEA was the sponsor of the
 23 condominium, but there was a purchase agreement. Let me
 24 explain this --

25 THE COURT: Well, let me ask you this.

26 MR. GRILL: Right.

Mary Burrofato - Senior Court Reporter

PROCEEDINGS

1 THE COURT: Is there another action in regard to
 2 the contract of sale?
 3

4 MR. GRILL: Yes. It was just recently commenced in
5 the Supreme Court because initially --

6 THE COURT: I understand, the AG --

7 MR. GRILL: Yes.

8 THE COURT: So that has not been sent to any judge.
 9 I assume I will be the happy recipient.

10 MR. DRUMMER: The attorney for that action is
 11 sitting next to me, Mr. Tom Harvey.

12 THE COURT: It's a related action, so it will
 13 probably wind up here.

14 MR. HARVEY: Yes.

15 THE COURT: Is there an RJI?

16 MR. HARVEY: No. The problem is, in the commercial
 17 part, you can't mark it. It's a foreign system as related.

18 THE COURT: You can't?

19 MR. HARVEY: No.

20 THE COURT: Well, I suggest you tell them.

21 MR. HARVEY: We did.

22 MR. GRILL: As you know, there are four -- we
 23 believe there are four separate and distinct reasons why
 24 this particular action must be dismissed at this juncture
 25 and each of them independently mandate the dismissal of this
 26 claim.

Mary Burrofato - Senior Court Reporter

PROCEEDINGS

1 The first, we believe and assert, that the claim is
2 barred by the relevant statute of limitations. Lien Law
3 section 1772 clearly provides that there is a one-year
4 statute of limitation for this type of claim commencing from
5 the completion of the project.

6 The construction contract at issue specifically
7 provides that the completion is measured by issuance of the
8 TCO. The TCO for that unit was issued on May 19th of 2010.
9 This lawsuit was filed on August 25th of 2011. And the
10 relevant provisions of the contract which provide when
11 completion was measured by is Article 3, which is -- which
12 specifically cites what I just said, and it's complemented
13 by Article 13.3, which specifically provides that the
14 contractor will complete the items necessary to obtain TCO.
15 So that's what the contract says. It's unusual for a
16 construction contract to measure completion from that date,
17 but in this case, in an arm's length transaction, the
18 parties agreed to that

19 THE COURT: Let me ask you this, the standing
20 issue, which is an interesting issue --

21 MR. GRILL: Right. It is an interesting issue. I
22 think both parties have conceded that the Lien Law
23 specifically says that you must be a defined beneficiary
24 under the Lien Law to assert a Lien Law trust fund diversion
25 claim. I don't believe that that general premise is in

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PROCEEDINGS

1 purely a construction contract, that portion of the statute
2 does not apply.

3 MR. GRILL: Absolutely, because --

4 THE COURT: I understand. And they previously
5 agreed for "X" dollars this work would be done; so a
6 contract is a contract.

7 MR. GRILL: That's right.

8 THE COURT: Okay. Let's move on. Anything else?

9 MR. GRILL: I just want to mention also, on that
10 point, plaintiff can't provide and has not provided any case
11 law or authority to the contrary because the Lien Law is
12 absolutely clear.

13 THE COURT: Next.

14 MR. GRILL: Next. I also want to note that there
15 is a prior pending action -- proceeding, I should say.
16 Pursuant to the contract, there is a mandatory arbitration
17 proceeding and the plaintiff exercised its rights pursuant
18 to the contract and commenced an arbitration, wherein they
19 asserted three claims: Breach of contract; breach of
20 fiduciary duty and what they call conversion of trust.

21 Now, a conversion of trust, diversion of trust, in
22 my opinion, is the same thing and involves the same level of
23 proof. It's the identical claim --

24 THE COURT: As the previous -- the one where you
25 said there's no standing.

Mary Burrofato - Senior Court Reporter

PROCEEDINGS

1 dispute, and the Lien Law generally defines beneficiaries as
2 those who perform work, labor and services on a project and
3 those who have performed -- entitled to payment for that
4 work, labor and services. For example, subcontractors,
5 suppliers, contractors --

6 THE COURT: Right. Material men.

7 MR. GRILL: Material men. The owner is not a
8 beneficiary under the Lien Law. What the plaintiff is
9 asserting is that there is a special exception that allows a
10 contract then be to be of beneficiary under the Lien Law.
11 But that's why I go back to the initial point of making it
12 very, very clear that there are two separate and distinct
13 contracts; that there was a contract of sale with a separate
14 contracted deposit, which is totally in escrow, which the
15 parties are litigating about, and this construction
16 contract, because the Lien Law, with respect to that section
17 is pretty clear. It says -- and it's section 71(a). This
18 exception specifically says and the statute is clear,
19 "Advances made by or on behalf of a vendee of real property
20 to the owner under or pursuant to a contract of sale."

21 There are many times when you have a contract of
22 sale and the parties agree that the contract deposit may be
23 used and disbursed to facilitate the construction on the
24 unit. That is not what happened here.

25 THE COURT: So you're saying because this was

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PROCEEDINGS

1 MR. GRILL: I'm sorry?

2 THE COURT: Conversion of trust is the same one as
3 what?

4 MR. GRILL: As what they are trying to allege here.
5 Because this is --

6 THE COURT: I understand.

7 MR. GRILL: This is totally separate and
8 discontinuing. So they are already litigating that claim in
9 the arbitration proceeding.

10 Lien Law section 772 actually says that, if there
11 is a prior pending proceeding relative to the same trust,
12 that there can't be another one commenced. There can't be
13 two competing actions. And then, obviously, the CPLR
14 3211(a)(4) provides if there's a prior pending action or
15 proceeding that the second action should be dismissed. This
16 is substantial identity of the parties; same subject matter;
17 same claims for relief.

18 And, finally, there is an arbitration provision in
19 the contract which says that any and all disputes should go
20 and be heard in arbitration.

21 THE COURT: You were asking that it be dismissed in
22 favor of the arbitration?

23 MR. GRILL: Right.

24 THE COURT: Would that apply to the other case as
25 well?

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PROCEEDINGS

1
 2 MR. GRILL: No, it wouldn't.
 3 THE COURT: Only your contract.
 4 MR. GRILL: This is the construction contract.
 5 THE COURT: Okay.
 6 MR. GRILL: And the final point I want to make is
 7 just, simply, from an equitable standpoint, there is no harm
 8 to the plaintiff here by the dismissal of this case because
 9 they are pursuing their rights pursuant to the separate
 10 purchase agreement. They went to the AG; now they are in
 11 Supreme Court and they have an arbitration proceeding
 12 pending relative to the construction contract. I believe
 13 it's scheduled to actually go to hearing in February.
 14 Counsel, can you confirm?
 15 MR. HARVEY: Yes.
 16 MR. GRILL: So they are pursuing any and all
 17 recourse but this case must be dismissed as a matter of law.
 18 THE COURT: Let me hear from the other side.
 19 MR. DRUMMER: Okay. Thank you, your Honor.
 20 THE COURT: Number one, the statute.
 21 MR. DRUMMER: The statute of limitations has not
 22 run.
 23 THE COURT: Why not?
 24 MR. DRUMMER: Well, because it's based upon the --
 25 MR. HARVEY: Judge, if I may. The TCO that they
 26 got does not cover the unit. You heard counsel say, quite

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PROCEEDINGS

1 clearly, he said it, the TCO for the unit. There are --
 2 THE COURT: And you're saying that the statute of
 3 limitations did not begin to run when they said it began to
 4 run.
 5 MR. HARVEY: Still has not run.
 6 THE COURT: So you're saying it hasn't accrued.
 7 That's your statute of limitations argument. The second
 8 argument as to standing.
 9 MR. DRUMMER: There hasn't been a completion of the
 10 project because they have not gotten the TCO for the
 11 penthouse unit. The penthouse unit includes the 10th, 11th
 12 floor and a portion of the roof. They only got a TCO for
 13 the 10th floor and the 11th floor. They did not get it for
 14 the roof portion of the penthouse unit.
 15 Now, as far as the standing is concerned, we have
 16 standing as a lien law --
 17 THE COURT: Why?
 18 MR. DRUMMER: Under 71(a)(2) because we advanced
 19 funds, as a contract vendee, in connection with, under or
 20 pursuant to the purchase agreement. The two agreements are
 21 intertwined and they are dependent upon one another. In
 22 order to close pursuant to the purchase agreement, a TCO had
 23 to be obtained pursuant to the construction agreement. It
 24 was a condition precedent through the closing. The closing
 25 and the TCO is referenced in the construction agreement. I

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PROCEEDINGS

1 believe it's in section 13.3 --
 2 THE COURT: You're saying that the two agreements
 3 give you standing, you have to read the two agreements
 4 together.
 5 MR. HARVEY: Judge --
 6 THE COURT: Wait. Only one person at a time.
 7 MR. DRUMMER: All you have to do, your Honor, is if
 8 you look to section 13.3 of the construction agreement, it
 9 states that the closing for the penthouse is expected to
 10 occur around July 15, 2009. Contractor, HEEA, will complete
 11 the items necessary to obtain temporary certificate of
 12 occupancy, TCO, egress kitchen, bath, et cetera, to allow
 13 for closing of the unit. In order to close on the unit,
 14 pursuant to the purchase agreement --
 15 THE COURT: That seems, to me, to be a purchase
 16 agreement issue, not a construction issue. I have never
 17 seen --
 18 MR. DRUMMER: Well, it's intertwined --
 19 THE COURT: I have never seen a Lien Law case
 20 dealing with the person who's going to buy. It always
 21 involves the contractors, subcontractors, the material men.
 22 I have -- how could --
 23 MR. DRUMMER: Under section 71-A --
 24 THE COURT: The statute was not created for the
 25 purpose you're trying to use it for.

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PROCEEDINGS

1 MR. DRUMMER: It was amended to include section
 2 71-A to protect contract vendees in this specific instance.
 3 THE COURT: But you have a separate contract to
 4 protect you.
 5 MR. DRUMMER: We have a construction agreement.
 6 THE COURT: You also have a separate contract.
 7 MR. DRUMMER: We advanced monies to the owner and
 8 the contractor, the same party, to perform construction.
 9 They did not maintain that money. They, upon information
 10 and belief, diverted that money. The individuals --
 11 THE COURT: Wait a second. Wait a second. Which
 12 contract are you talking --
 13 MR. DRUMMER: Construction agreement.
 14 THE COURT: The construction agreement is like any
 15 other construction agreement. I will pay "X" dollars to do
 16 "Y." The person who is going to buy, or who decides to do
 17 the construction, can sue and say you did this improperly,
 18 whatever, but that's not a 3(a)Lien Law action. The 3(a)
 19 action is a trust that's created to protect laborers and
 20 material men. You are neither. And only -- I mean, I don't
 21 get it. You agree to pay "X" dollars to do "Y."
 22 MR. DRUMMER: We are protected under section 71-A
 23 of the Lien Law. There is a specific -- and it was amended,
 24 I'm not quite sure when, but it was amended to protect
 25 contract vendees who advance monies under or pursuant to a

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PROCEEDINGS

1 contract of sale. In this case the contract of sale --
 2 THE COURT: But this is isn't pursuant to a
 3 contract of sale. It wasn't like you gave them the -- it
 4 was almost \$2 million, I believe, under the deposit -- which
 5 was a separate contract -- and that money, parts of that
 6 money were used to do construction. There was a different
 7 amount of money under the construction contract, not the
 8 \$1.9 million. And, in fact, that \$1.9 million, under the
 9 deposit, is a separate lawsuit and a separate contract.

10 That has nothing to do with this. This was a contract
 11 purely for construction. I will pay "X" amount of dollars
 12 for the construction. You've paid "X" amount of dollars.
 13 The construction was done. If you're unhappy with the
 14 construction, you bring an action to -- saying you didn't do
 15 what you promised to do. You don't bring a 3(a) case.

16 MR. DRUMMER: It was monies advanced to perform
 17 construction and that money is defined as trust monies under
 18 71-A of the Lien Law because they were advanced by a
 19 contract vendee.

20 THE COURT: Do you have a copy of -- I don't have
 21 it with me -- the statute?

22 MR. GRILL: It's very clear, your Honor. It
 23 says --

24 THE COURT: Let me just look at it. Under the
 25 contract, these monies put forward -- were they called

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PROCEEDINGS

1 we performed all of the base building scope. And in fact, I
 2 think there is no issue with respect to this standing issue.
 3 However, even with respect to statute of limitations, you
 4 should note that the documents which are generally recited
 5 as saying the -- roof terrace is part of the penthouse unit,
 6 don't even say that. Clearly, they are defined as common
 7 elements in the condominium documents, explicitly.

8 THE COURT: At this point, let's just get back to
 9 the other argument.

10 MR. GRILL: I'm sorry.

11 MR. DRUMMER: Your Honor, if I may, also, counsel
 12 referred to the AIA portion. But there's also a rider which
 13 says that the contract sum is being paid in full upon
 14 execution of this agreement and contractor acknowledges and
 15 agrees that such sum will be deemed held in trust for owner
 16 and any subcontractors engaged to perform any portions of
 17 the work. So I just wanted add that to the argument.

18 Now -- so, again, I submit that, in fact, we are an
 19 Article 3(a) under 71-A Lien Law trust beneficiary and we
 20 are entitled to have this action go forward.

21 As far as the argument that there is a prior
 22 pending action under 32(a)(4) and under 77(2) -- those
 23 sections are not applicable. Those sections speak about
 24 prior actions. In this case, there is no prior action; it's
 25 a prior arbitration, which is a proceeding. Defendants have

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PROCEEDINGS

1 advances or did the contract provide that this was the
 2 amount of money it would take to do the construction?

3 MR. DRUMMER: It was a down payment, which under --

4 THE COURT: I'm not talking about the down payment.
 5 I'm talking about the construction contract.

6 MR. DRUMMER: There were monies to perform work to
 7 obtain a TCO so that they can close upon the contract --

8 THE COURT: They were not advances of any sort
 9 which were part --

10 MR. DRUMMER: No, there were advances, your Honor.

11 THE COURT: They were advances? Or was there a sum
 12 certain for the work that was to be done and the C of O?

13 MR. DRUMMER: It was monies that were advanced,
 14 that were put in trust.

15 THE COURT: What does the contract say?

16 MR. GRILL: I have it open and, by the way, this is
 17 a standard AIA construction form --

18 THE COURT: Contract.

19 MR. GRILL: Yes. Under contract sum, "The owner
 20 shall pay the contract the contract sum and current funds
 21 for the contractor's performance of the contract. The
 22 contract sum shall be \$1,495,487. Subject to additions and
 23 deletions as provided in the contract for the base building
 24 scope."

25 By the way, your Honor, we allege and contend that

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PROCEEDINGS

1 not pointed to any case law to the contrary.

2 THE COURT: What about the arbitration?

3 MR. DRUMMER: What about the arbitration, your
 4 Honor?

5 THE COURT: Why doesn't the arbitration cover all
 6 of this?

7 MR. DRUMMER: I'll tell you why. Because all the
 8 -- first of all, they aren't the same parties. The
 9 individual defendants are not a part of the arbitration.

10 There is no agreement for them to be a part of arbitration.
 11 The construction agreement was only between the HEEA
 12 development and the plaintiff. It didn't include --

13 THE COURT: So why are the individual defendants
 14 here at all?

15 MR. DRUMMER: Because under the Lien Law, when you
 16 bring a trust diversion, you name the individual officers,
 17 principals and members. They are party defendants to a Lien
 18 Law trust --

19 THE COURT: Let me just -- and going back to the
 20 standing issue, under the 71-A, 2(a), it says: "Advances
 21 made by or on behalf of a vendee -- and this is what you're
 22 saying, this gives you the right --

23 MR. DRUMMER: Correct.

24 THE COURT: -- of real property to the owner, under
 25 or pursuant to a contract of sale." This wasn't a contract

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of sale.

MR. DRUMMER: But it was a construction contract which actually references the contract of sale when it talks about getting the TCO -- excuse me, when it talks about performing the work to obtain a TCO for the penthouse unit to be able to close on the unit. It's intertwined.

THE COURT: But you have a separate contract of sale and a separate deposit.

MR. DRUMMER: I understand that. I submit they are intertwined and they are dependent upon each other. Why we can't bring this in the arbitration is two- or three-fold. First of all, you don't have the same parties like I just said. You don't have the proposed class members; you don't have the proposed class members of this class action and, as your Honor knows, a Lien Law trust must be brought as a class action. So you do not have the individual defendants and you don't have the proposed class members in the arbitration.

THE COURT: What proposed class members?

MR. DRUMMER: Any and all parties who were entitled to get paid.

THE COURT: But there are no allegations that you didn't get paid in that way. There is no allegations that there is a material person or a laborer who has not been paid.

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PROCEEDINGS

so we haven't brought the same cause of action in the arbitration. We can't bring it because the arbitrator told us we shouldn't bring it. They actually said that to Mr. Harvey and the other attorney for the defendant in the arbitration which was substantiated by an e-mail which I have annexed as exhibit L.

THE COURT: Okay. Just one last word.

MR. GRILL: My one last word would be relative to the standing issue because it's such a tortured interpretation because the statute is explicit. It's clear it says, "under or pursuant to contract of sale," and they are totally -- that is designed to protect the purchaser with a deposit under a contract of sale that those monies are diverted. It's a very limited exception. That contract of sale, that contract deposit, is sitting in escrow totally protected. The exception to the Lien Law was not designed for a standard and separate and distinct construction agreement, as is the case. This is a regular --

THE COURT: At this point, I am dismissing this case. I do not believe this is a Lien Law Article 7(a) case. I believe the section cited specifically deals with the contract of sale. This was a regular construction contract. This action is not brought on behalf of any of the beneficiaries or those people who were to be protected under the trust, under the Lien Law trust. And I think

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PROCEEDINGS

MR. DRUMMER: We don't know that, your Honor.

THE COURT: This is not supposed to be a fishing expedition.

MR. DRUMMER: Lien Law trust diversion cases are brought when money, upon information and belief, has been diverted and, in this case, we believe it has been diverted. And we don't know --

THE COURT: Based upon nothing.

MR. DRUMMER: And we don't know how many parties may or may not have been paid. In addition, the -- well, I want to get back to the arbitration issue.

THE COURT: Yes.

MR. DRUMMER: The arbitrators have specifically stated that they will not hear Lien Law trust diversion cases, Lien Law causes of action. Any and all Lien Law causes of action should be brought in the court of law and that any case in which -- which arise under the construction contract, should be brought in the arbitration. So we can't even bring this case in the arbitration. The arbitration does not deal with a Lien Law trust; it does not deal with a trust diversion. It deals with a breach of contract. It just so happens that the actual breach was that they failed to help them on a trust because, pursuant to the construction agreement, they were to hold the money in trust, under section two of their rider. So there isn't --

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PROCEEDINGS

there really is no standing of the plaintiff to bring this kind of action.

If the plaintiff is unhappy with the construction, they can bring a regular breach of contract action and there is, in fact, an action based upon the purchase agreement which, apparently, has been filed. There were two different deposits here. This is not a Lien Law action and it is improperly brought. I therefore am granting the motion to dismiss.

MR. GRILL: Thank you.

THE COURT: This shall constitute the decision and order of the Court.

MR. HARVEY: Just, procedurally, with respect to the other case, I would still -- there is another case being --

THE COURT: That doesn't have to come to me now, since I no longer have this case.

MR. HARVEY: Thank you, Judge.

MARY BURROFATO, Senior Court Reporter, in and for the State of New York, does hereby certify that the foregoing transcript is true and accurate to the best of my knowledge, skill and ability.

(Certification is valid only when signed in blue ink.)

M. Burrofato
MARY BURROFATO
SENIOR COURT REPORTER

Mary Burrofato - Senior Court Reporter

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) SS.:
COUNTY OF NASSAU)

I, Nicole Politi being sworn, say:

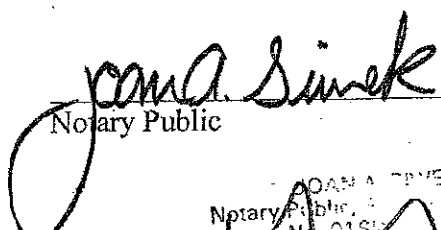
I am not a party to the action, am over 18 years of age and reside in Nassau County, New York.

On January 31, 2012, I served the within ORDER WITH NOTICE OF ENTRY by depositing a true copy thereof, enclosed in a wrapper addressed as shown below, into the custody of Federal Express for overnight delivery, prior to the latest time designated by that service for overnight delivery.

CORNICELLO, TENDLER
& BAUMELO-CORNICELLO, LLP
Attorney for Plaintiffs
Two Wall Street, 20th Floor
New York, New York 10005
212-994-0260


Nicole Politi

Sworn to before me this
31st day of January, 2012


Notary Public

JOANA SIWEK
Notary Public, State of New York
No. 01SI4776727
Qualified in Suffolk County
Commission Expires June 30, 2014

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Notary Public, State of New York
No. 01SI4776727
Qualified in Suffolk County
Commission Expires June 30, 2014

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

JEFFREY ALTMAN, on behalf of himself and all others similarly situated,

Plaintiff(s),

-against-

HEEA DEVELOPMENT, LLC, JEFF SPIRATOS and KLEMENS GASSER,

Defendant(s).

ORDER WITH NOTICE OF ENTRY

RIVKIN RADLER LLP

Attorneys for Defendants

555 MADISON AVENUE, 26th FLOOR
NEW YORK, NEW YORK 10022-3338
(212) 455-9555

FILE# 004037 00001 /

To:

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated:

.....
Attorney(s) for.

PLEASE TAKE NOTICE

Check Applicable Box

that the within is a (certified) true copy of a
NOTICE OF ENTRY entered in the office of the clerk of the within named Court on

20

that an Order of which the within is a true copy will be presented for settlement to the Hon.
NOTICE OF SETTLEMENT at one of the judges of the within named Court,

on 20 , at M.

Dated:

RIVKIN RADLER LLP

Attorneys for

555 MADISON AVENUE, 26th FLOOR
NEW YORK, NEW YORK 10022-3338

To:

FILE# _____ /

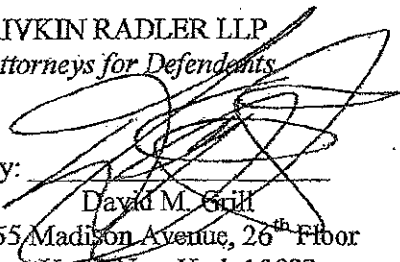
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

_____	X	
JEFFREY ALTMAN,	:	
on behalf of himself and all others	:	Index No.: 109839/11
similarly situated,	:	
	:	
	:	<u>ORDER WITH</u>
Plaintiff,	:	<u>NOTICE OF ENTRY</u>
	:	
- against -	:	
	:	
HEEA DEVELOPMENT, LLC, JEFF	:	
SPIRATOS and KLEMENS GASSER,	:	
	:	
Defendants.	:	
_____	X	

PLEASE TAKE NOTICE, that the within is a true copy of an Order of the Honorable Shirley Werner Kornreich, dated January 19, 2012, duly made and entered in the Office of the County Clerk, New York County on or about January 20, 2012, along with the hearing record referred to in the Order, dated January 19, 2012, duly made and entered in the Office of the County Clerk, New York County on or about January 27, 2012.

Dated: New York, New York
January 31, 2012

RIVKIN RADLER LLP
Attorneys for Defendants



By: _____
David M. Gail
555 Madison Avenue, 26th Floor
New York, New York 10022
(212) 455-9555

TO: CORNICELLO, TENDLER
& BAUMEL-CORNICELLO, LLP
Attorneys for Plaintiff
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH

PART 54

Index Number : 109839/2011
ALTMAN, JEFFREY
vs.
HEEA DEVELOPMENT, LLC
SEQUENCE NUMBER : 001
DISMISS

Justice

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s) _____
Answering Affidavits — Exhibits _____ No(s) _____
Replying Affidavits _____ No(s) _____

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

dismissed since this is not a case properly brought under the used Lien Law, Article 3-A of the January 19, 2012 laws.

FOR THE FOLLOWING REASON(S):

Dated: 1/19/12

JUSTICE SHIRLEY WERNER KORNREICH
J.S.C.

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

1
2 SUPREME COURT OF THE STATE OF NEW YORK
3 COUNTY OF NEW YORK; CIVIL TERM PART 54
4 JEFFREY ARMAN, -X
5 on behalf of himself and all others
6 similarly situated,
7 Plaintiff,
8 -against- Index No.
9 HEEA DEVELOPMENT, LLC, JEFF 139829/2011
10 SPIRITOS and MLEMENS CASSEB,
11 Defendants. -X
12 60 Centre Street
13 New York, New York, 10007
14 January 19, 2012
15 B E F O R E: HON. SKIRLEY WERNER KORSRICH, Justice.
16 A P P E A R A N C E S:
17 CORNICELLO, TANDLER & BANNEL-CORNICELLO, LLP
18 Attorneys for Plaintiff
19 Two Wall Street 20th Floor
20 New York, New York 10005
21 BY: TUDO DRUMMER, ESQ., ESQ.
22 RIVKIN RADLER LLP
23 Attorneys for Defendants
24 555 Madison Avenue
25 New York, New York 10022-6926
26 BY: DAVID M. GRILL, ESQ.
27 HARVEY & MAGNETT
28 420 Lexington Avenue
29 New York, New York 10170
30 MARY BURROFATO,
31 SENIOR COURT REPORTER
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Mary Burrofato - Senior Court Reporter

PROCEEDINGS

1
2 THE COURT: The laborers, are they part of this
3 action? The ones who did the construction work.
4 MR. GRILL: They are not. And just to clarify that
5 point, because this is an unusual way of doing things, but
6 on or about November 6, 2007, HEEA, as sponsor, entered into
7 a contract of sale to sell the penthouse unit to the
8 plaintiff for a sum in excess of \$10 million. Pursuant to
9 that contract of sale, there was a contract deposit -- and
10 this is a critical point -- separate and apart from the
11 contract of sale, the parties, plaintiff as owner, HEEA as
12 contractor, entered into a construction contract, pursuant
13 to the construction contract there was a contract deposit.
14 These are two separate and distinction funds. This
15 was not construction funds that were paid from the contract
16 of sale or the deposit under the contract of sale. This was
17 a separate fund at issue here, a separate fund dealing only
18 with the construction contract. And you should know that
19 the plaintiff has commenced, previously commenced an action
20 before the AG, Attorney General, relative to the contract of
21 sale; the AG denied the complaint and ostensibly said you
22 need to commence a plenary action, which the plaintiff has
23 done, relative to the contract of sale and that contract
24 deposit, which is in escrow. So they are -- the plaintiff
25 is pursuing his recourse and remedies pursuant to the
26 contract of sale.

Mary Burrofato - Senior Court Reporter

PROCEEDINGS

1
2 THE COURT: This action is brought under the New
3 York State Lien Law and there is a motion to dismiss by the
4 defendants in this case and I believe this involves a
5 condominium or co-op.
6 MR. GRILL: Condo.
7 THE COURT: And the motion to dismiss, basically,
8 is based upon statute of limitation grounds, lack of
9 standing, that the action is barred by the Lien Law and the
10 CPLR and the contract itself, I will hear from the moving
11 party.
12 MR. GRILL: Thank you, your Honor. Your Honor, as
13 you know, the defendant HEEA, is developer for a condominium
14 located at 524 West 19th Street, New York, New York. The
15 individual defendants are the principals of HEEA. In this
16 action, as you noted, there is only one claim asserted and
17 that claim is that the defendants, in violation of Article
18 3(a) of the Lien Law, violated -- diverted trust funds in
19 contravention to a construction contract between the
20 plaintiff as owner and HEEA as contractor.
21 THE COURT: Now, is -- HEEA is the GC?
22 MR. GRILL: HEEA was the sponsor of the
23 condominium, but there was a purchase agreement. Let me
24 explain this --
25 THE COURT: Well, let me ask you this.
26 MR. GRILL: Right.

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PROCEEDINGS

1
2 THE COURT: Is there another action in regard to
3 the contract of sale?
4 MR. GRILL: Yes. It was just recently commenced in
5 the Supreme Court because initially --
6 THE COURT: I understand, the AG --
7 MR. GRILL: Yes.
8 THE COURT: So that has not been sent to any judge.
9 I assume I will be the happy recipient.
10 MR. DRUMMER: The attorney for that action is
11 sitting next to me, Mr. Tom Harvey.
12 THE COURT: It's a related action, so it will
13 probably wind up here.
14 MR. HARVEY: Yes.
15 THE COURT: Is there an RJI?
16 MR. HARVEY: No. The problem is, in the commercial
17 part, you can't mark it. It's a foreign system as related.
18 THE COURT: You can't?
19 MR. HARVEY: No.
20 THE COURT: Well, I suggest you tell them.
21 MR. HARVEY: We did.
22 MR. GRILL: As you know, there are four -- we
23 believe there are four separate and distinct reasons why
24 this particular action must be dismissed at this juncture
25 and each of them independently mandate the dismissal of this
26 claim.

Mary Burrofato - Senior Court Reporter

PROCEEDINGS

1 The first, we believe and assert, that the claim is
2 barred by the relevant statute of limitations. Lien Law
3 section 1772 clearly provides that there is a one-year
4 statute of limitation for this type of claim commencing from
5 the completion of the project.

6 The construction contract at issue specifically
7 provides that the completion is measured by issuance of the
8 TCO. The TCO for that unit was issued on May 19th of 2010.
9 This lawsuit was filed on August 25th of 2011. And the
10 relevant provisions of the contract which provide when
11 completion was measured by is Article 3, which is -- which
12 specifically cites what I just said, and it's complemented
13 by Article 13.3, which specifically provides that the
14 contractor will complete the items necessary to obtain TCO.
15 So that's what the contract says. It's unusual for a
16 construction contract to measure completion from that date,
17 but in this case, in an arm's length transaction, the
18 parties agreed to that

19 THE COURT: Let me ask you this, the standing
20 issue, which is an interesting issue --

21 MR. GRILL: Right. It is an interesting issue. I
22 think both parties have conceded that the Lien Law
23 specifically says that you must be a defined beneficiary
24 under the Lien Law to assert a Lien Law trust fund diversion
25 claim. I don't believe that that general premise is in

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PROCEEDINGS

1 purely a construction contract, that portion of the statute
2 does not apply.

3 MR. GRILL: Absolutely, because --

4 THE COURT: I understand. And they previously
5 agreed for "X" dollars this work would be done; so a
6 contract is a contract.

7 MR. GRILL: That's right.

8 THE COURT: Okay. Let's move on. Anything else?

9 MR. GRILL: I just want to mention also, on that
10 point, plaintiff can't provide and has not provided any case
11 law or authority to the contrary because the Lien Law is
12 absolutely clear.

13 THE COURT: Next.

14 MR. GRILL: Next. I also want to note that there
15 is a prior pending action -- proceeding, I should say.
16 Pursuant to the contract, there is a mandatory arbitration
17 proceeding and the plaintiff exercised its rights pursuant
18 to the contract and commenced an arbitration, wherein they
19 asserted three claims: Breach of contract; breach of
20 fiduciary duty and what they call conversion of trust.

21 Now, a conversion of trust, diversion of trust, in
22 my opinion, is the same thing and involves the same level of
23 proof. It's the identical claim --

24 THE COURT: As the previous -- the one where you
25 said there's no standing.

Mary Burrofato - Senior Court Reporter

PROCEEDINGS

1 dispute, and the Lien Law generally defines beneficiaries as
2 those who perform work, labor and services on a project and
3 those who have performed -- entitled to payment for that
4 work, labor and services. For example, subcontractors,
5 suppliers, contracts --

6 THE COURT: Right. Material men.

7 MR. GRILL: Material men. The owner is not a
8 beneficiary under the Lien Law. What the plaintiff is
9 asserting is that there is a special exception that allows a
10 contract then be to be of beneficiary under the Lien Law.
11 But that's why I go back to the initial point of making it
12 very, very clear that there are two separate and distinct
13 contracts; that there was a contract of sale with a separate
14 contracted deposit, which is totally in escrow, which the
15 parties are litigating about, and this construction
16 contract, because the Lien Law, with respect to that section
17 is pretty clear. It says -- and it's section 71(a). This
18 exception specifically says and the statute is clear,
19 "Advances made by or on behalf of a vendee of real property
20 to the owner under or pursuant to a contract of sale."

21 There are many times when you have a contract of
22 sale and the parties agree that the contract deposit may be
23 used and disbursed to facilitate the construction on the
24 unit. That is not what happened here.

25 THE COURT: So you're saying because this was

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PROCEEDINGS

1 MR. GRILL: I'm sorry?

2 THE COURT: Conversion of trust is the same one as
3 what?

4 MR. GRILL: As what they are trying to allege here.
5 Because this is --

6 THE COURT: I understand.

7 MR. GRILL: This is totally separate and
8 discontinuing. So they are already litigating that claim in
9 the arbitration proceeding.

10 Lien Law section 772 actually says that, if there
11 is a prior pending proceeding relative to the same trust,
12 that there can't be another one commenced. There can't be
13 two competing actions. And then, obviously, the CPLR
14 3211(a)(4) provides if there's a prior pending action or
15 proceeding that the second action should be dismissed. This
16 is substantial identity of the parties; same subject matter;
17 same claims for relief.

18 And, finally, there is an arbitration provision in
19 the contract which says that any and all disputes should go
20 and be heard in arbitration.

21 THE COURT: You were asking that it be dismissed in
22 favor of the arbitration?

23 MR. GRILL: Right.

24 THE COURT: Would that apply to the other case as
25 well?

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PROCEEDINGS

1 MR. GRILL: No, it wouldn't.
 2 THE COURT: Only your contract.
 3 MR. GRILL: This is the construction contract.
 4 THE COURT: Okay.
 5 MR. GRILL: And the final point I want to make is
 6 just, simply, from an equitable standpoint, there is no harm
 7 to the plaintiff here by the dismissal of this case because
 8 they are pursuing their rights pursuant to the separate
 9 purchase agreement. They went to the AG; now they are in
 10 Supreme Court and they have an arbitration proceeding
 11 pending relative to the construction contract. I believe
 12 it's scheduled to actually go to hearing in February.

13 Counsel, can you confirm?

14 MR. HARVEY: Yes.

15 MR. GRILL: So they are pursuing any and all
16 recourse but this case must be dismissed as a matter of law.

17 THE COURT: Let me hear from the other side.

18 MR. DRUMMER: Okay. Thank you, your Honor.

19 THE COURT: Number one, the statute.

20 MR. DRUMMER: The statute of limitations has not
21 run.

22 THE COURT: Why not?

23 MR. DRUMMER: Well, because it's based upon the --

24 MR. HARVEY: Judge, if I may. The TCO that they
25 got does not cover the unit. You heard counsel say, quite

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PROCEEDINGS

1 believe it's in section 13.3 --
 2 THE COURT: You're saying that the two agreements
 3 give you standing, you have to read the two agreements
 4 together.
 5 MR. HARVEY: Judge --

6 THE COURT: Wait. Only one person at a time.

7 MR. DRUMMER: All you have to do, your Honor, is if
 8 you look to section 13.3 of the construction agreement, it
 9 states that the closing for the penthouse is expected to
 10 occur around July 15, 2009. Contractor, HEEA, will complete
 11 the items necessary to obtain temporary certificate of
 12 occupancy, TCO, egress kitchen, bath, et cetera, to allow
 13 for closing of the unit. In order to close on the unit,
 14 pursuant to the purchase agreement --

15 THE COURT: That seems, to me, to be a purchase
 16 agreement issue, not a construction issue. I have never
 17 seen --

18 MR. DRUMMER: Well, it's intertwined --

19 THE COURT: I have never seen a Lien Law case
 20 dealing with the person who's going to buy. It always
 21 involves the contractors, subcontractors, the material men.
 22 I have -- how could --

23 MR. DRUMMER: Under section 71-A --

24 THE COURT: The statute was not created for the
 25 purpose you're trying to use it for.

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PROCEEDINGS

1 clearly, he said it, the TCO for the unit. There are --
 2 THE COURT: And you're saying that the statute of
 3 limitations did not begin to run when they said it began to
 4 run.

5 MR. HARVEY: Still has not run.

6 THE COURT: So you're saying it hasn't accrued.
 7 That's your statute of limitations argument. The second
 8 argument, as to standing.

9 MR. DRUMMER: There hasn't been a completion of the
 10 project because they have not gotten the TCO for the
 11 penthouse unit. The penthouse unit includes the 10th, 11th
 12 floor and a portion of the roof. They only got a TCO for
 13 the 10th floor and the 11th floor. They did not get it for
 14 the roof portion of the penthouse unit.

15 Now, as far as the standing is concerned, we have
16 standing as a lien law --

17 THE COURT: Why?

18 MR. DRUMMER: Under 71(a)(2) because we advanced
 19 funds, as a contract vendee, in connection with, under or
 20 pursuant to the purchase agreement. The two agreements are
 21 intertwined and they are dependent upon one another. In
 22 order to close pursuant to the purchase agreement, a TCO had
 23 to be obtained pursuant to the construction agreement. It
 24 was a condition precedent through the closing. The closing
 25 and the TCO is referenced in the construction agreement. I

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PROCEEDINGS

1 MR. DRUMMER: It was amended to include section
 2 71-A to protect contract vendees in this specific instance.

3 THE COURT: But you have a separate contract to
 4 protect you.

5 MR. DRUMMER: We have a construction agreement.

6 THE COURT: You also have a separate contract.

7 MR. DRUMMER: We advanced monies to the owner and
 8 the contractor, the same party, to perform construction.
 9 They did not maintain that money. They, upon information
 10 and belief, diverted that money. The individuals --

11 THE COURT: Wait a second. Wait a second. Which
 12 contract are you talking --

13 MR. DRUMMER: Construction agreement.

14 THE COURT: The construction agreement is like any
 15 other construction agreement. I will pay "X" dollars to do
 16 "Y." The person who is going to buy, or who decides to do
 17 the construction, can sue and say you did this improperly,
 18 whatever, but that's not a 3(a) Lien Law action. The 3(a)
 19 action is a trust that's created to protect laborers and
 20 material men. You are neither. And only -- I mean, I don't
 21 get it. You agree to pay "X" dollars to do "Y."

22 MR. DRUMMER: We are protected under section 71-A
 23 of the Lien Law. There is a specific -- and it was amended,
 24 I'm not quite sure when, but it was amended to protect
 25 contract vendees who advance monies under or pursuant to a

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PROCEEDINGS

1 contract of sale. In this case the contract of sale --

2 THE COURT: But this is isn't pursuant to a
3 contract of sale. It wasn't like you gave them the -- it
4 was almost \$2 million, I believe, under the deposit -- which
5 was a separate contract -- and that money, parts of that
6 money were used to do construction. There was a different
7 amount of money under the construction contract, not the
8 \$1.9 million. And, in fact, that \$1.9 million, under the
9 deposit, is a separate lawsuit and a separate contract.

10 That has nothing to do with this. This was a contract
11 purely for construction. I will pay "X" amount of dollars
12 for the construction. You've paid "X" amount of dollars.
13 The construction was done. If you're unhappy with the
14 construction, you bring an action to -- saying you didn't do
15 what you promised to do. You don't bring a 3(a) case.

16 MR. DRUMMER: It was monies advanced to perform
17 construction and that money is defined as trust monies under
18 71-A of the Lien Law because they were advanced by a
19 contract vendee.

20 THE COURT: Do you have a copy of -- I don't have
21 it with me -- the statute?

22 MR. GRILL: It's very clear, your Honor. It
23 says --

24 THE COURT: Let me just look at it. Under the
25 contract, these monies put forward -- were they called

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PROCEEDINGS

1 we performed all of the base building scope. And in fact, I
2 think there is no issue with respect to this standing issue.
3 However, even with respect to statute of limitations, you
4 should note that the documents which are generally recited
5 as saying the -- roof terrace is part of the penthouse unit,
6 don't even say that. Clearly, they are defined as common
7 elements in the condominium documents, explicitly.

8 THE COURT: At this point, let's just get back to
9 the other argument.

10 MR. GRILL: I'm sorry.

11 MR. DRUMMER: Your Honor, if I may, also, counsel
12 referred to the AIA portion. But there's also a rider which
13 says that the contract sum is being paid in full upon
14 execution of this agreement and contractor acknowledges and
15 agrees that such sum will be deemed held in trust for owner
16 and any subcontractors engaged to perform any portions of
17 the work. So I just wanted add that to the argument.

18 Now -- so, again, I submit that, in fact, we are an
19 Article 3(a) under 71-A Lien Law trust beneficiary and we
20 are entitled to have this action go forward.

21 As far as the argument that there is a prior
22 pending action under 32(a)(4) and under 77(2) -- those
23 sections are not applicable. Those sections speak about
24 prior actions. In this case, there is no prior action; it's
25 a prior arbitration, which is a proceeding. Defendants have

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PROCEEDINGS

1 advances or did the contract provide that this was the
2 amount of money it would take to do the construction?

3 MR. DRUMMER: It was a down payment, which under --

4 THE COURT: I'm not talking about the down payment.
5 I'm talking about the construction contract.

6 MR. DRUMMER: There were monies to perform work to
7 obtain a TCO so that they can close upon the contract --

8 THE COURT: They were not advances of any sort
9 which were part --

10 MR. DRUMMER: No, there were advances, your Honor.

11 THE COURT: They were advances? Or was there a sum
12 certain for the work that was to be done and the C of O?

13 MR. DRUMMER: It was monies that were advanced,
14 that were put in trust.

15 THE COURT: What does the contract say?

16 MR. GRILL: I have it open and, by the way, this is
17 a standard AIA construction form --

18 THE COURT: Contract.

19 MR. GRILL: Yes. Under contract sum, "The owner
20 shall pay the contract the contract sum and current funds
21 for the contractor's performance of the contract. The
22 contract sum shall be \$1,495,487. Subject to additions and
23 deletions as provided in the contract for the base building
24 scope."

25 By the way, your Honor, we allege and contend that

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PROCEEDINGS

1 not pointed to any case law to the contrary.

2 THE COURT: What about the arbitration?

3 MR. DRUMMER: What about the arbitration, your
4 Honor?

5 THE COURT: Why doesn't the arbitration cover all
6 of this?

7 MR. DRUMMER: I'll tell you why. Because all the
8 -- first of all, they aren't the same parties. The
9 individual defendants are not a part of the arbitration.

10 There is no agreement for them to be a part of arbitration.
11 The construction agreement was only between the HEFA
12 development and the plaintiff. It didn't include --

13 THE COURT: So why are the individual defendants
14 here at all?

15 MR. DRUMMER: Because under the Lien Law, when you
16 bring a trust diversion, you name the individual officers,
17 principals and members. They are party defendants to a Lien
18 Law trust --

19 THE COURT: Let me just -- and going back to the
20 standing issue, under the 71-A, 2(a), it says: "Advances
21 made by or on behalf of a vendee -- and this is what you're
22 saying, this gives you the right --

23 MR. DRUMMER: Correct.

24 THE COURT: -- of real property to the owner, under
25 or pursuant to a contract of sale." This wasn't a contract

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PROCEEDINGS

of sale.

MR. DRUMMER: But it was a construction contract which actually references the contract of sale when it talks about getting the TCO -- excuse me, when it talks about performing the work to obtain a TCO for the penthouse unit to be able to close on the unit. It's intertwined.

THE COURT: But you have a separate contract of sale and a separate deposit.

MR. DRUMMER: I understand that. I submit they are intertwined and they are dependent upon each other. Why we can't bring this in the arbitration is two- or three-fold. First of all, you don't have the same parties like I just said. You don't have the proposed class members; you don't have the proposed class members of this class action and, as your Honor knows, a Lien Law trust must be brought as a class action. So you do not have the individual defendants and you don't have the proposed class members in the arbitration.

THE COURT: What proposed class members?

MR. DRUMMER: Any and all parties who were entitled to get paid.

THE COURT: But there are no allegations that you didn't get paid in that way. There is no allegations that there is a material person or a laborer who has not been paid.

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PROCEEDINGS

so we haven't brought the same cause of action in the arbitration. We can't bring it because the arbitrator told us we shouldn't bring it. They actually said that to Mr. Harvey and the other attorney for the defendant in the arbitration which was substantiated by an e-mail which I have annexed as exhibit L.

THE COURT: Okay. Just one last word.

MR. GRILL: My one last word would be relative to the standing issue because it's such a tortured interpretation because the statute is explicit. It's clear it says, "under or pursuant to contract of sale," and they are totally -- that is designed to protect the purchaser with a deposit under a contract of sale that those monies are diverted. It's a very limited exception. That contract of sale, that contract deposit, is sitting in escrow totally protected. The exception to the Lien Law was not designed for a standard and separate and distinct construction agreement, as is the case. This is a regular --

THE COURT: At this point, I am dismissing this case. I do not believe this is a Lien Law Article 7(a) case. I believe the section cited specifically deals with the contract of sale. This was a regular construction contract. This action is not brought on behalf of any of the beneficiaries or those people who were to be protected under the trust, under the Lien Law trust. And I think

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PROCEEDINGS

MR. DRUMMER: We don't know that, your Honor.

THE COURT: This is not supposed to be a fishing expedition.

MR. DRUMMER: Lien Law trust diversion cases are brought when money, upon information and belief, has been diverted and, in this case, we believe it has been diverted. And we don't know --

THE COURT: Based upon nothing.

MR. DRUMMER: And we don't know how many parties may or may not have been paid. In addition, the -- well, I want to get back to the arbitration issue.

THE COURT: Yes.

MR. DRUMMER: The arbitrators have specifically stated that they will not hear Lien Law trust diversion cases, Lien Law causes of action. Any and all Lien Law causes of action should be brought in the court of law and that any case in which -- which arise under the construction contract, should be brought in the arbitration. So we can't even bring this case in the arbitration. The arbitration does not deal with a Lien Law trust; it does not deal with a trust diversion. It deals with a breach of contract. It just so happens that the actual breach was that they failed to help them on a trust because, pursuant to the construction agreement, they were to hold the money in trust, under section two of their rider. So there isn't --

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PROCEEDINGS

There really is no standing of the plaintiff to bring this kind of action.

If the plaintiff is unhappy with the construction, they can bring a regular breach of contract action and there is, in fact, an action based upon the purchase agreement which, apparently, has been filed. There were two different deposits here. This is not a Lien Law action and it is improperly brought. I therefore am granting the motion to dismiss.

MR. GRILL: Thank you.

THE COURT: Tax shall constitute the decision and order of the Court.

MR. HARVEY: Just, procedurally, with respect to the other case, I would still -- there is another case being --

THE COURT: That doesn't have to come to me now, since I no longer have this case.

MR. HARVEY: Thank you, Judge.

MARY BURROFATO, Senior Court Reporter, is and for the State of New York, does hereby certify that the foregoing transcript is true and accurate to the best of my knowledge, skill and ability.

(Certification is valid only when signed in blue ink.)

Mary Burrofato
MARY BURROFATO
SENIOR COURT REPORTER

Mary Burrofato - Senior Court Reporter

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) SS.:
COUNTY OF NASSAU)

I, Nicole Politi being sworn, say:


I am not a party to the action, am over 18 years of age and reside in Nassau County, New York.

On January 31, 2012, I served the within ORDER WITH NOTICE OF ENTRY by depositing a true copy thereof, enclosed in a wrapper addressed as shown below, into the custody of Federal Express for overnight delivery, prior to the latest time designated by that service for overnight delivery.

CORNICELLO, TENDLER
& BAUMELO-CORNICELLO, LLP
Attorney for Plaintiffs
Two Wall Street, 20th Floor
New York, New York 10005
212-994-0260


Nicole Politi

Sworn to before me this
31st day of January, 2012.


Notary Public

JOAN A. SIWEK
Notary Public, State of New York
No. 01514776727
Qualified in Suffolk County
Commission Expires June 30, 2014

JOAN A. SIWEK
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