

**Vantage Burglar Alarm Corp. v EMI (Electrical  
Maintenance & Installations), Inc.**

2011 NY Slip Op 31096(U)

April 13, 2011

Sup Ct, Nassau County

Docket Number: 16547/10

Judge: Antonio I. Brandveen

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

Present: ANTONIO I. BRANDVEEN  
J. S. C.

VANTAGE BURGLAR ALARM CORP.,  
Individually and on behalf of all other Lienors,  
Claimants or Creditors for work and/or material  
due and owing in connection with the construction  
and improvement of certain real property  
described herein,  
  
Plaintiff,

TRIAL / IAS PART 30  
NASSAU COUNTY  
  
Index No. 16547/10  
  
Motion Sequence No. 001, 002

- against -

EMI (ELECTRICAL MAINTENANCE &  
INSTALLATIONS), INC., DOUGLAS TRIPODO,  
  
Defendant.

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits .....	<u>1</u>
Answering Affidavits .....	<u>2</u>
Replying Affidavits .....	<u>3</u>
Briefs: Plaintiff's / Petitioner's .....	_____
Defendant's / Respondent's .....	_____

The defendants move to vacate the plaintiff's demand for a verified statement, to discharge the plaintiff's mechanic's lien on a public improvement and to dismiss the defendant Doug Tripodo as a defendant in this action for breach of contract, an accounting and diversion of trust funds under Lien Law Article 3-A because all of the actions taken by Tripodo were as an officer of the defendant EMI (Electrical Maintenance & Installations), Inc., and not for his personal benefit nor gain. The plaintiff opposes the defense motion, and cross moves to direct the defendants to comply with the plaintiff's demand for a

verified statement, and to grant pursuant to Lien Law § 77 summary judgment of an accounting. The defense opposes the plaintiff's cross motion.

The defense attorney points, in a December 23, 2010 affirmation, to Tripodo's November 24, 2010 affidavit which details the factual history between the plaintiff and the defendants. The defense attorney states the plaintiff does not have valid trust claims against the defendants. The defense attorney asserts the notice of lien is improper, defective, and should be discharged pursuant to Lien Law § 21 (7). The defense attorney avers Tripodo is not a proper party to this action because he did not personally receive any payments for services rendered by the defendant corporation at the Medical Center. The defense attorney maintains the defendants are entitled to recover consequential damages, including reasonable attorneys' fees, costs and disbursements incurred as a result of the plaintiff's wrongful conduct pursuant to 22 NYCRR § 130-1.1 which should be determined at trial. The defense attorney states there was a previous application for the relief requested here, and that application to vacate the demand for a verified statement was denied without prejudice in an October 20, 2010 court order to raise the same issues in the instant action.

The plaintiff corporation indicates, in a December 13, 2010 affidavit by its president, EMI (Electrical Maintenance & Installations), Inc. employed the plaintiff as a subcontractor to perform labor and furnish materials for the improvement of James J. Peters Medical Center, in the Bronx. The corporate president states the real property improvement was the furnishing and installing of a permanent outdoor security system consisting of pole mounted closed circuit television camera and related fixtures and equipment. The corporate president indicates the work consisted of the erection and alteration of structures upon the

real property. The plaintiff's attorney states, in a December 13, 2010 memorandum of law, the material provided and the work performed qualify as an improvement within the meaning of Lien Law §§ 2 (4) and 70 (1), and the defendants are trustees as that term is defined by the Lien Law with the plaintiff as a beneficiary of the trust under Lien Law Article 3-A. The plaintiff's attorney maintains the plaintiff is entitled to an accounting pursuant to Lien Law § 77, and points out the defendants admit the plaintiff furnished labor and materials on this building project, they received trust funds within the meaning of Lien Law Article 3-A. The plaintiff's attorney avers the defense allegations of nonperformance and negligent performance should not bar the plaintiff's right to an accounting of those trust funds. The plaintiff's attorney asserts the defense request to vacate the notice of lien is misplaced because the plaintiff did not file a lien for this public improvement, and the defense seeks to discharge a non-existent lien. The plaintiff's attorney states Tripodo is a proper party since the law holds contractors personally liable for failure to pay trust money to its beneficiaries, to wit material suppliers and subcontractors. The plaintiff's attorney indicates that liability attaches regardless of whether the contractor conducts business as a corporation, limited liability company or any other entity to limit the liability of the business principals.

The defense attorney reiterates, in a February 11, 2011 affirmation, the defendants' contentions. The defense attorney adds the plaintiff failed to show grounds for its entitlement to a verified statement. The defense attorney states the plaintiff is not entitled to an accounting pursuant to Lien Law § 77. The defense attorney asserts the plaintiff failed to proffer evidence showing Tripodo is a proper party under Lien Law Article 3-A. The

defense attorney avers the notice of lien should be vacated.

The plaintiff's attorney replies, in a February 17, 2011 affirmation, in opposition to the defense contentions. The plaintiff's attorney contends the defense assertions are belied by the prevailing law. The plaintiff's attorney asserts Tripodo's November 24, 2010 affidavit does not refute the real property improvement was the furnishing and installing of a permanent outdoor security system consisting of pole mounted closed circuit television camera and related fixtures and equipment. The plaintiff's attorney also avers Tripodo's November 24, 2010 affidavit does not refute the work consisted of the erection and alteration of structures upon the real property. The plaintiff's attorney argues the defense assertion the plaintiff's work does not constitute an improvement under the Lien Law is wholly unsupported by the evidence. The plaintiff's attorney maintains Tripodo is a proper party; the plaintiff is entitled to an accounting; and mechanic's lien should not be vacated

This Court has carefully reviewed and considered all of the parties' papers submitted with respect to these motions. The Second Department holds:

Lien Law article 3-A creates a statutory trust for funds received by owners, contractors, or subcontractors "in connection with an improvement of real property in this state" (Lien Law § 70 [1]). The trust's aim is to ensure that "certain parties involved in [such] improvement . . . will be properly compensated for their services" (*Sabol & Rice v Poughkeepsie Galleria Co.*, 175 AD2d 555, 556 [1991]). The installation of modular workstations provided by the appellant does not qualify as an "improvement" within the meaning of Lien Law § 2 (4) and § 70 (1). The appellant did not demolish, erect, or alter any structure, nor did it perform work or furnish materials for its permanent improvement (*see* Lien Law § 2 [4]) *Negvesky v. United Interior Resources, Inc.*, 32 A.D.3d 530, 531, 821 N.Y.S.2d 107 [2<sup>nd</sup> Dept, 2006].

The Second Department also holds:

In view of the strong public policy of the State, which favors early and liberal disclosure as to the existence and status of any trust arising under Lien Law article 3A, any doubts that might exist as to the validity of a particular subcontractor's claim must be resolved in favor of permitting the claim (*see, Conforti & Eisele v. R. Salzstein & Co.*, 56 A.D.2d 292, 392 N.Y.S.2d 430; *Matter of Allerton Constr. Corp. v. Fairway Apts. Corp.*, 26 A.D.2d 636, 272 N.Y.S.2d 867)

*P.M. Excavating, Inc. v. Matthews Indus. Piping Co., Inc.*, 115 A.D.2d 464, 495 N.Y.S.2d 902 [2<sup>nd</sup> Dept, 1985].

Here, the plaintiff supplied materials and labor to the defendants, and this Court holds they are trustees as that term is defined by the Lien Law. The Court finds Tripodo is a proper party with respect to the inquiry, and an accounting is necessary concerning the money to be paid to the plaintiff (*see Fentron Architectural Metals Corp. v. Solow*, 48 A.D.2d 820, 370 N.Y.S.2d 58 [1<sup>st</sup> Dept, 1975]). Moreover, the Court determines the defense request to vacate the notice of lien is misplaced under Lien Law § 71 (4), and the plaintiff is entitled to a verified statement from the defendants:

Accordingly, the defense motion is denied, and the plaintiff's cross motion is granted.

So ordered.

Dated: April 13, 2011

ENTER:



J. S. C.

FINAL DISPOSITION

NON FINAL DISPOSITION XXX

**ENTERED**  
APR 15 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE