

DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS & ST. JOHN

**HARVEY M. HOFFMAN &
JANICE E. HOFFMAN, as Trustees of
the HOFFMAN REVOCABLE TRUST,**

Plaintiffs,

v.

**HAMMERHEAD CONSTRUCTION, LLC,
STEPHEN RIVERA, and
JENNIFER FIRESTONE,**

Defendants.

3:21-cv-00046-RAM-EAH

**TO: A. Jeffrey Weiss, Esq.
Ryan C. Meade, Esq.**

REPORT & RECOMMENDATION

THIS MATTER comes before the Court on an Order referring all pending and future dispositive motions to the undersigned for a Report & Recommendation. Dkt. No. 264. In that regard, the Motion for Partial Summary Judgment (the “Motion”), Dkt. No. 227, filed by Plaintiffs Harvey M. Hoffman and Janice E. Hoffman, as Trustees of the Hoffman Revocable Trust (the “Hoffmans”) is pending and awaiting disposition. Defendants Hammerhead Construction, LLC and Stephen Rivera (the “Defendants”) filed an opposition, Dkt. No. 240, and the Hoffmans filed a reply, Dkt. No. 243. After briefing on the Motion was completed, the District Judge issued a Memorandum Opinion and Order, Dkt. Nos. 248, 249, granting in part and denying in part Defendants’ Motion to Dismiss. Two of the claims upon which Plaintiffs based their Motion for Partial Summary Judgment—Count I, Breach of Contract (seeking the remedy of piercing the corporate veil), and Count II, Breach of Implied Warranty of Proper Workmanship & Fitness for Purpose—are no longer extant. For the reasons that follow, the Court recommends denying Plaintiffs’ Motion.

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BACKGROUND

In May 2021, the Hoffmans filed their initial Complaint against Hammerhead Construction, LLC and Stephen Rivera “to remedy construction defects and problems with workmanship” at the real property owned by the Hoffman Revocable Trust on St. Thomas. Dkt. No. 1, ¶ 1. Plaintiffs eventually filed a 51-page Second Amended Complaint (“SAC”) in October 2023 against Hammerhead, Rivera, and Jennifer Firestone (Rivera’s wife and Hammerhead’s bookkeeper). Dkt. No. 179. The allegations generally focused on Hammerhead and Rivera’s failure to complete all of the work contracted for on the property and asserted that the work they did do was “of poor quality, defective and did not comply with Code.” *Id.* ¶ 30. The Court’s Memorandum Opinion that granted in part and denied in part the Defendants’ Motion to Dismiss provided a succinct overview of the SAC’s allegations:

The Hoffmans allege that, in May 2017, based on Defendants’ representations that they are licensed general contractors, engaged Defendants to perform certain work at their property in St. Thomas. The Hoffmans paid the May 4, May 17, and August 9, 2017 invoices, but Defendants failed to complete the work prior to September 6, 2017, when Hurricane Irma struck St. Thomas causing significant damage to the Hoffmans’ property. Thereafter, the Hoffmans and Defendants agreed that Defendants would undertake debris removal, hurricane repair, and restoration work for \$521,378, as itemized on the October 23, 2018 schedule for Revised Hurricane Rebuild Fee. Between March 14, 2017, and December 20, 2018, the Hoffmans paid Defendants \$475,000. On November 15, 2019, the Hoffmans set up the Trust. They deeded their property to the Trust in December 2019. As Defendants failed to complete the work timely, damaged the Hoffmans’ property, and provided defective services, the Hoffmans, on January 19, 2021, informed Defendants to stop work on the property. On January 29, 2021, Defendant Rivera caused a Notice of Claim of Construction Lien to be recorded against the Hoffmans’ property claiming an unpaid balance of \$92,589.

The Hoffmans commenced this action on May 21, 2021. During discovery in this action, the Hoffmans learned that Defendants were not licensed

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contractors, they used unlicensed sub-contractors for plumbing and electrical work, and failed to secure the necessary permits for the reconstruction work they were doing, as well as to ensure appropriate inspections and compliance with various codes. The Hoffmans allege that [Hammerhead] is Rivera's alter ego and assert the following causes of action: Breach of Contract (Count I), Breach of Implied Warranty of Proper Workmanship & Fitness for Purpose (Count II), Fraud and Misrepresentation (Count III), Unjust Enrichment (Count IV), Debt (Count V), False and Overstated Construction Lien (Count VI), Slander of Title (Count VII), Defamation (Count VIII), Discharge of Lien (Count IX), and Negligence and Negligence Per Se (Count X). Plaintiffs seek damages and a declaration that: (i) the January 29, 2021 Notice of Claim of Construction Lien was false and fraudulent and filed by Defendants in bad faith and in retaliation for Plaintiffs' termination of the contract; (ii) the January 29, 2021 Notice of Claim of Construction Lien expired and must be stricken and removed from the record and chain of title to Plaintiffs' property; and (iii) [Hammerhead] is Rivera's alter ego for the purpose of piercing a corporate veil.

Dkt. No. 248 at 2-3.

The SAC contained a significant section entitled "Evidence of Defendant Hammerhead as the Alter Ego of Rivera." Dkt. No. 179, ¶¶ 57-76. In it, Plaintiffs alleged numerous instances where they believed Rivera had "siphoned off" money from Hammerhead to pay personal expenses and Hammerhead overbilled the Hoffmans. *Id.* They asserted that the Defendants did not show that the company paid dividends or had any officers, and it appeared to be a paper shell. *Id.* ¶¶ 66, 69. Plaintiffs folded these allegations into Count I of the SAC, the Breach of Contract claim, where they explicitly contended that the disregard of company formalities and siphoning off thousands of dollars from the company for personal expenses supported piercing the corporate veil such that Rivera personally and Hammerhead are jointly and severally liable for all compensatory and consequential damages required to repair the property and complete the contracted scope of work. *Id.* ¶ 104.

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As to Count VI, False and Overstated Construction Lien, the SAC alleged that, in that Notice of Lien filed on January 29, 2021, Rivera falsely stated the contract price was \$567,589 and \$92,589 remained unpaid, which Rivera knew was false. *Id.* ¶ 156. In addition to the total amount due being false, Plaintiffs alleged that specific charges were falsely claimed, as they were included in the Revised Hurricane Rebuild scope of work and had been previously paid for, or were for work not done or done incorrectly, or were for a boat trip that Rivera invited Mrs. Hoffman on without charge. *Id.* ¶ 160. The allegations related to Count VI did not set forth any alter ego/piercing the corporate veil remedy, but sought general damages and punitive damages. *Id.* ¶¶ 156-63.

Defendants Hammerhead and Rivera filed a Motion to Dismiss the SAC for Failure to State a Claim. Dkt. Nos. 193, 194. They also filed a Counterclaim, Dkt. No. 195, and Plaintiffs filed a Motion to Dismiss the Counterclaim, Dkt. No. 219.

A. Plaintiffs' Motion for Partial Summary Judgment

On February 5, 2024, Plaintiffs filed a "Motion for Partial Summary Judgment to Pierce the Hammerhead Construction Company['s] Veil and for Summary Judgment on Counts II of the Second Amended Complaint for Breach of Implied Warranties and on Count VI for False and Overstated Construction Lien." Dkt. No. 227. They also filed a Plaintiffs' Statement of Uncontested Material Facts ("PSUMF") in support, that contained 51 exhibits, some of which were filed under seal. Dkt. No. 228.

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The District Judge subsequently granted Defendants' Motion to Dismiss Count I, Breach of Contract, that sought, inter alia, to pierce the corporate veil as a remedy,¹ and Count II, Breach of Implied Warranties and Fitness of Purpose. *See* Dkt. No. 248, 249. Accordingly, the Court will not summarize the argument and facts related to the piercing the corporate veil remedy sought in Count I and the Breach of Implied Warranties and Fitness of Purpose claim, Count II, raised in Plaintiffs' Motion, because those Counts have already been dismissed. Accordingly, the only part of Plaintiffs' Motion still pending before the Court is Count VI concerning the False and Overstated Construction Lien.

¹ "Piercing the corporate veil 'is an equitable *remedy* whereby a court disregards the existence of the corporation to make the corporation's individual principals and their personal assets liable for the debts of the corporation.'" *Donastorg v. Daily News Publ'g Co.*, No. ST-02-cv-117, 63 V.I. 196, 331, 2015 WL 5399263, at *66 (V.I. Super. Aug. 19, 2015) (quoting *Matheson v. V.I. Cmty. Bank Corp.*, 297 F. Supp. 2d 819, 833 (D.V.I. App. Div. 2003)(emphasis added)); *cf. Seven Springs Mountain Resort, Inc. on behalf of Sikirica v. Hess*, No. 21-cv-6, 2022 WL 1004178, at *10 (W.D. Pa. Apr. 4, 2022) (interpreting Pennsylvania law and opining that piercing the corporate veil "is a means of imposing liability established in an underlying cause of action and not a cause of action on its own) (citation modified); *Linus Holding Corp. v. Mark Line Indus., LLC*, 376 F. Supp. 3d 417, 425 (D.N.J. 2019)) ("piercing the corporate veil is not a mechanism by which legal liability is imposed per se, but rather an equitable remedy designed to remedy a fundamental unfairness perpetrated under the guise of the corporate form."); *Balbo Corp. v. Enighed Condos., LLC*, No. ST-09-cv-399, 2011 WL 4703024, at *2 n. 11 (V.I. Super. Feb. 7, 2011) ("Piercing the corporate veil is not a claim, it is a remedy encompassed within a claim.") (citation modified). Plaintiffs' piercing the corporate veil remedy was explicitly encompassed in its Breach of Contract claim. Dkt. No. 179, ¶ 104. As a result of the dismissal of the claim to which it was associated, the veil piercing remedy is no longer extant. Plaintiffs did not include any veil piercing or alter ego language when setting out their False and Overstated Construction Lien claim. Dkt. No. 179, ¶¶ 154-63. The fact that Plaintiffs mentioned it in passing in the "Judgment" paragraphs of the SAC, *id.* at 47—without mentioning it in the actual text of Count VI and without arguing in their brief that they were seeking to pierce the corporate veil should the court grant their Motion for Partial Summary Judgment on Count VI, *see* Dkt. No. 227-1 at 19—does not suffice to raise this remedy as an issue related to Count VI, and the Court concludes it is not applicable to Count VI.

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As to that remaining issue, Plaintiffs argue that “it cannot be disputed” that Hammerhead and Rivera recorded a “false and overstated construction lien against plaintiffs’ property, claiming the existence of a contract for \$567,589 and that \$92,589 remained unpaid.” Dkt. No. 227-1 at 17. The work performed by Rivera and Hammerhead was substandard, resulting in Defendants owing Plaintiffs over \$1,000,000 in damages. *Id.* They assert that “it is also undisputed” that the Defendants were not licensed general construction contractors, electrical contractors, plumbing contractors, master electricians, master plumbers, or mechanical contractors, and 28 V.I.C. § 254(d) precluded Defendants from asserting or recording a construction lien against property. *Id.*

Plaintiffs refer to a document Defendants produced with their general ledgers and tax documents that “establishes” that over a year after the litigation commenced in March 2022, Rivera and Hammerhead reported they were owed only \$55,052 by the Hoffmans, not \$92,589, as claimed in their January 29, 2021 Construction Lien. *Id.* at 17-18 (comparing Dkt. No. 228-4, Construction Lien, with Dkt. No. 228-12, Hammerhead 12/31/21 Aging Summary); *see also* PUSMF, Dkt. No. 228 ¶ 83. The Construction Lien contained a four-page attachment: three of the pages show outstanding balances to finish particular jobs associated with repair/renovation of the property, such as cleaning the cistern, while a separate page lists 33 “additional services” performed. The items on all four pages add up to the \$92,589.70 amount included on the Construction Lien. Dkt. No. 228-4.

Plaintiffs further argue that the unpaid balance on the construction project was \$46,378, not \$92,589. *Id.* at 18. They contend that no change orders were signed or approved

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by the parties, and Rivera and Hammerhead have not provided any document setting forth an agreed upon price increase to the fixed price contract. *Id.*, generally citing Dkt. No. 228-5 (Hammerhead Responses to Requests for Admissions), Dkt. No. 228-6 (43-page Rivera deposition), and Dkt. No. 228-8 (16-page Harvey Hoffman Affidavit). In the PSUMF, Plaintiffs point to Rivera claiming under oath that an additional \$3,000 was due for pool equipment, plumbing and electrical, although that was included within the scope of the Revised Hurricane Rebuild fee. Dkt. No. 228 ¶ 84. They assert that there was never any agreement to pay Rivera or Hammerhead for a three-day boat trip to Puerto Rico included in the Construction Lien, or to pay him \$170.00/month for pool maintenance or as a property manager, or for a 25% markup on amounts paid to subcontractors, as listed in the Lien. *Id.* at 18-19; Dkt. No. 228, ¶¶ 87 (citing Janice Hoffman Deposition, Dkt. No. 228-7).

They conclude that the Lien was fraudulent and overstated when filed, that it was recorded “in bad faith in retaliation for being terminated on Jan. 19, 2021,” and request a declaration that the Lien is void and that it be removed of record; that they be awarded “the amount of the lien as punitive statutory damages,” and reasonable attorney’s fees and costs. *Id.* at 19. The brief does not seek an alter ego remedy on Count VI.

B. Defendants’ Opposition

In their opposition, the Defendants argue that material disputes of fact exist giving rise to the amount due to Hammerhead and whether additional work, outside the original scope, was authorized by the Hoffmans prior to the stop work order. Dkt. No. 240 at 11. They refer to a March 2020 email where the Hoffmans acknowledged that rebuilding a house is

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“always a work in progress and changes are made on the fly.” *Id.* There are questions whether those changes were included in the original quote or would have resulted in additional costs or credits. *Id.* citing Dkt. No. 240-6. In March 2020, the Hoffmans were presented with an invoice for the balance of the work to be performed; the invoice was revised based on additional charges/credits agreed to by the parties and was included in the Lien filing. *Id.* citing Dkt. No. 228-4; Dkt. No. 240-18. None of the information on the Lien filing was inaccurate or fraudulent, and material questions of fact remain. *Id.* at 11-12.

Defendants disputed most of Plaintiffs’ facts related to Count VI set out in the PSUMF. Dkt. No. 240-1. They assert that Hammerhead and Rivera included in the Lien all costs associated with additional services Mrs. Hoffman requested verbally and through text messages that were complete and never paid. *Id.* ¶ 83, citing Dkt. Nos. 240-2, 240-3, 240-4. Hammerhead charged an additional \$3,000 for pool plumbing and electrical work, not equipment. *Id.* ¶ 84, citing Dkt. Nos. 240-2, 240-3. As to the trip to Puerto Rico, Mrs. Hoffman asked Rivera to take her there as she was overwhelmed with the idea of not knowing her way around and confirmed that she would include his time and travel as part of rebuilding the house. *Id.* ¶ 87, citing Dkt. Nos. 240-2, 240-3, 240-5 (8/28/18 email from Mrs. Hoffman asking Rivera to go with her to Puerto Rico, as she was “overwhelmed with the idea of navigating, shopping” there since she “did not know [her] way around” and noting “We would include your time and travel as part of rebuilding the house.”).

Defendants added their own Statement of Additional Facts at the end of their Response to Plaintiffs’ Statement of Uncontested Material Facts. Dkt. No. 240-1 at 31-33.

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C. Plaintiffs' Reply

In their reply, Plaintiffs argue that Defendants cannot create disputes of material fact with “sham affidavits” that contest their prior testimony. Dkt. No. 243 at 2-3. With regard to the Defendants’ responses to the PSUMF related to the Construction Lien (as well as most of the other responses), Plaintiffs complain that Defendants cite Rivera’s and Firestone’s “self-serving” affidavits without pointing to the precise paragraphs that support each disputed material fact, in violation of LRCi 56.1(b). *Id.* at 5, 6. Otherwise, Plaintiffs do not dispute Defendants’ Responses to paragraphs 83 to 87 concerning Count VI (other than asserting that Defendants “left . . . non-code compliant work at the property,” Dkt. No. 243 at 19).

Plaintiffs also filed a Response to Defendants’ Statement of Additional Facts, Dkt. No. 244. Here, too, they “dispute” Defendants’ references to Exhibit 1 (Mr. Rivera’s 15-page affidavit) as not complying with the obligations under LRCi 56.1(b) and assert Defendants’ responses should be disregarded. *Id.* at 3-16.²

D. Memorandum Opinion & Order on Motion to Dismiss

On September 18, 2024, the District Judge issued a Memorandum Opinion and Order that granted in part and denied in part Hammerhead’s and Rivera’s Motion to Dismiss. Dkt.

² The Court declines Plaintiffs’ invitation to strike Defendants’ Responses because they were not compliant with LRCi 56.1(b), that requires the respondent to agree whether a fact is disputed or not and, if disputed, cite the precise portions of the record relied on as evidence for each disputed fact. While it is true that Defendants should have pinpointed, in their Response, the paragraphs of Rivera’s and Firestone’s affidavits that disputed the PSUMF, the Plaintiffs’ argument would have been much stronger if they had not been guilty of the same infraction. *See, e.g.* PSUMF, Dkt. No. 228 at ¶¶ 12, 24, 26 (citing multi-page exhibits without specifying provisions relied upon, in violation of LRCi 56.1(a)).

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No. 248, 249. The District Judge held that “neither the Trust nor the Hoffmans as Trustees possess the rights sought to be enforced, and neither the Trust nor the Trustees suffered an injury in fact” with respect to Counts I, II, III (except fraud with respect to the January 29, 2021 Notice of Claim of Construction Lien), IV, V, and X.” Dkt. No. 248 at 5. The Court concluded that the Hoffmans as Trustees “failed to establish the prudential exception to the injury-in-fact requirement that would permit third-party standing” on those Counts. *Id.* at 6.

The District Judge rejected the Defendants’ argument that their expired January 29, 2021 Notice of Claim of Construction Lien that no longer encumbered the property mooted the causes of action for False & Overstated Construction Lien, Slander of Title, and Defamation because the statute contained no language making the remedy contingent on any time period or occurrence. *Id.* at 7. As to Count IX, Discharge of Lien, the Court declined to find it moot because there was no indication the Lien had been removed from the records of the Office of Recorder of Deeds. *Id.* As to declaratory judgment sought by Plaintiffs, the District Judge noted that neither the Supreme Court nor Third Circuit has held that the Declaratory Judgment Act did not apply to the District Court of the Virgin Islands. *Id.* at 8. Given the remedial nature of declaratory relief, dismissing the Hoffmans’ request for such relief was not warranted. *Id.* The Order dismissed Counts I, II, III, IV, V, and X for lack of standing, and denied the motion to dismiss Counts VI, VII, VIII, and IX. Dkt. No. 249.

E. Other Rulings by the District Judge

The District Judge (1) granted Plaintiffs’ Motion to Dismiss Defendant Firestone’s Counterclaim, Dkt. No. 250; (2) denied Plaintiffs’ Motion to Disregard and Strike Defendants’

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Untimely Response to the Motion for Partial Summary Judgment, Dkt. No. 261; (3) overruled Plaintiffs' Objection to this Court's Order denying Plaintiffs' Motion to Amend their Complaint, Dkt. No. 262; and (4) denied Plaintiffs' Motion for a Determination of Plaintiffs' Unopposed Motion for Partial Summary Judgment, Dkt. No. 263.

DISCUSSION

I. Legal Standard: Motion for Summary Judgment

Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute is "genuine" if there is a sufficient evidentiary basis on which a reasonable factfinder could find for the non-moving party. *Kaucher v. County of Bucks*, 455 F.3d 418, 423 (3d Cir. 2006). A factual dispute is "material" if it might affect the outcome under governing law, *Doe v. Luzerne County*, 660 F.3d 169, 175 (3d Cir. 2011), and is determined by the substantive law defining the claims. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

"When the *moving* party has the burden of proof at trial, that party must show *affirmatively* the absence of a genuine issue of material fact: it must show that, on *all the essential elements of its case on which it bears the burden of proof at trial*, no reasonable jury could find for the non-moving party." *In re Bressman*, 327 F.3d 229, 238 (3d Cir. 2003) (quoting *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1438 (11th Cir. 1991)); *see also Seldon v. Wetzels*, No. 1:19-CV-90, 2020 WL 1517061, at *1 (W.D. Pa. Mar. 11, 2020), *report and recommendation adopted*, 2020 WL 1493547 (W.D. Pa. Mar. 27, 2020) ("[A]s the Court of Appeals for the Third Circuit has explained, this burden applies to every element of

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each of the plaintiff's claims where the plaintiff, who bears the burden of proof, moves for summary judgment.") (citing *Bressman*, 327 F.3d at 238).

A court's task on summary judgment is not to resolve disputes, but to determine whether there exist factual disputes to be tried. *Id.* In doing so, the court should "draw all reasonable inferences in favor of the nonmoving party." *Downey v. Pa. Dep't of Corr.*, 968 F.3d 299, 304 (3d Cir. 2020) (citation modified). "[I]n considering a motion for summary judgment, a district court may not make credibility determinations or engage in any weighing of the evidence." *Marino v. Indus. Crating Co.*, 358 F.3d 241, 247 (3d Cir. 2004).

II. Application

As indicated above, Count I, Breach of Contract, to which the piercing the corporate veil remedy was attached, and Count II, Breach of Implied Warranty of Proper Workmanship & Fitness for Purpose, were dismissed by the District Judge after the briefing on the Motion for Summary Judgment had been submitted. Dkt. No. 248, 249. Thus, the Court recommends that Plaintiffs' Motion for Partial Summary Judgment, based on those causes of action, should be denied as moot. The only remaining claim to be adjudicated is Count VI, False and Overstated Construction Lien.

Although Plaintiffs' Second Amended Complaint generally referred to the alleged "false and fraudulent" Notice of Claim of Construction Lien, neither the SAC nor their brief in support of their Motion cited the provision(s) of the Virgin Islands Code under which they were bringing their claim. Dkt. No. 179, ¶¶ 154-63, Dkt. No. 227-1 at 17-19. Nor did their

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brief cite any case law stating what the elements of such a claim are to show that there was no genuine dispute of material fact to support the court granting their Motion on this claim.³

The Virgin Islands Construction Lien Act, enacted at Title 28, Chapter 12 of the Virgin Islands Code

represents a clear declaration by the Legislature of a public policy to protect subcontractors from the risk of nonpayment. It also provides protection to prime contractors, who are defined as contractors who enter into real estate improvement contracts directly with real property owners. 28 V.I.C. §§ 252(a)(1), (b)(1).

Construction lien statutes seek to balance two important competing interests: 1) securing payment to contractors and subcontractors who provide materials and/or services to improve an owner's property; and 2) protecting property owners from abusive lien practices and the risk of double payment. Construction lien statutes are in derogation of the common law, which usually requires a strict construction of the law, but also are remedial in nature, which typically necessitates a liberal construction. 3 *Norman J. Singer and J.D. Shamle Singer, Sutherland Statutory Construction* § 60:2 (7th Ed. 2008). In order to harmonize these seemingly adverse interests, courts strictly construe the procedural requirements of construction lien statutes, but, once those requirements are met by a claimant, said statutes are liberally interpreted in order to give effect to their remedial nature.

³ The Court has found three cases, *Harbison v. Auto Depot, LLC*, No. ST-16-cv-146, 2017 WL 2267000, at *3 (V.I. Super. May 24, 2017), *Heavy Materials, LLC v. Daniel's Construction Co., Inc.*, No. ST-13-cv-222, 2016 WL 4223995, at *4 (V.I. Super. July 27, 2016), and *Globe Electric Inc. v. Chandi*, No. ST-07-cv-648, 2011 WL 13389179, at *3 (V.I. Super. Apr. 8, 2011), that considered “false allegations” in a construction or auto lien as part of a slander of title claim. Another case, *Smith Bay Center Corp. v. Jackman*, No. ST-00-cv-15, 2009 WL 10742401, at *6 (V.I. Super. Sept. 21, 2009), also addressed a slander of title claim. The court concluded that the defendant had a good faith belief he was due additional money. Despite the amount of the construction lien being “overstated,” the court ruled that the slander of title claim failed because the plaintiff failed to sustain its burden of proof on the elements of falsity of the statement and intent to cause harm. *Id.*

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H.I. Const., LLC v. Bay Isles Assocs., LLP, No. ST-09-cv-427, 2010 WL 2035591, at *3-4 (V.I. Super. May 14, 2010) (citation modified). Title 28, Section 253, “Existence of a construction lien”⁴ sets out when a construction lien may be filed, and subsequent Code provisions set forth what is excluded from a lien, limitations on a lien, procedural and other matters. Section 275, entitled “Wrongful conduct under this chapter; remedies,” provides, in pertinent part: “If a claimant in bad faith overstates the amount for which he is entitled to a lien,” the court may declare the lien void, award the owner or other injured person actual damages, and “award the owner punitive damages in an amount not exceeding the difference between the amount claimed as a lien and the amount which the claimant was actually entitled to claim as a lien.” 28 U.S.C. § 275(b)(1)-(3). In their SAC, as well as in their brief, Plaintiffs are seeking both actual and punitive damages—although they seek punitive damages in the total amount of the Lien (which indicates that they view the entire Lien as fraudulent, despite references to \$46,378 and \$55,052 being owed, Dkt. No. 227-1 at 17-18), rather than any difference between the amount claimed and the amount to which the claimant was actually entitled. Dkt. No. 179 at ¶¶ 158, 163; Dkt. No. 227-1 at 19.

Case law provides that, in order to be awarded punitive damages for an overstated construction lien, there has to be a showing that the claimant (Hammerhead) acted in bad

⁴ Section 253 provides, in pertinent part:

Except as provided in section 254 of this title, even though the owner has not made an agreement giving a real estate security interest, a prime contractor, subcontractor or subsubcontractor, upon compliance with section 264 of this title has to the extent provided in this chapter a lien to secure payment of the contract price on the contracting owner's real estate which is being improved.

28 V.I.C. § 253.

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faith. *See Cannon v. Fulcrum Const., LLC*, No. ST-23-cv-146, 2023 WL 8683504, at *13 (V.I. Super. Dec. 12, 2023) (“While there is strong disagreement between the parties on the propriety of Fulcrum’s recorded construction lien, there is insufficient evidence for the Court to conclude that Fulcrum acted in bad faith. In fact, the existing record shows no evidence of bad faith”); *see id.* at *13 n.103 (“The requirement for the grant of relief under 28 V.I.C. § 275 . . . is a finding of bad faith actions taken by the claimant. ‘Bad faith is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity, . . . it contemplates a state of mind affirmatively operating with furtive design or ill will.’”) (quoting *H.I. Constr., LLC*, 2010 WL 2035591, at *10).

As indicated above, Plaintiffs’ brief did not set out the elements of a “False and Overstated Construction Lien.” In order to be awarded damages for a false and fraudulent construction lien, including “punitive statutory damages,” Dkt. No. 227-1 at 19, the movant has to show bad faith on the part of the claimant. *Cannon*, 2023 WL 8683504, at *13 & n. 103. The record is bare of any such evidentiary showing. Plaintiffs have not shown, for summary judgment purposes, the absence of a genuine issue of material fact as to bad faith. In their brief, Plaintiffs argued, in passing, that Defendants “recorded the lien in bad faith in retaliation for being terminated on Jan. 19, 2021,” and that it was “false, fraudulent and overstated when filed and defendants knew that it was overstated and it was filed for an improper motive, in bad faith, in retaliation for being terminated 10 days earlier.” *Id.* at 19. But these statements are completely conclusory: the Plaintiffs do not define “bad faith,” or apply that definition to the circumstances here. They do not explain how the lien was filed in

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“bad faith” and “in retaliation,” much less show that these are undisputed material facts, and how the defendants “knew” the lien was overstated. Their assumption appears to be that retaliation equates to bad faith (and retaliation must have been at play if Defendants filed the Construction Lien ten days after the Stop Work Order), but they provide no factual or legal support for these conclusions. “[I]n deciding summary judgment motions, unsubstantiated arguments made in briefs. . . do not constitute evidence for purposes of consideration.” *In re Fabrizio*, 369 B.R. 238, 246–47 (Bankr. W.D. Pa. 2007) (citing, inter alia, *Versarge v. Township of Clinton N.J.*, 984 F.2d 1359, 1370 (3d Cir. 1993) (“[W]e have repeatedly held that unsubstantiated arguments made in briefs or at oral argument are not evidence to be considered by this Court”). Because Plaintiffs have not *affirmatively* shown the absence of a genuine issue of material fact on Count VI, *In re Bressman*, 327 F.3d at 238, the Court concludes that Plaintiffs have not carried their burden to be awarded summary judgment. This Court therefore recommends that Plaintiffs’ Motion for Partial Summary Judgment be denied on this claim.⁵

⁵ Even if the Court considered piercing the corporate veil as a remedy on this claim—which it does not for the reasons set forth above—such a remedy would fail with the recommended denial of the motion for partial summary judgment on Count VI. Further, even if the Court did assess the evidence on Count VI, it would conclude that genuine disputes of material fact exist, precluding judgment as a matter of law. Fed. R. Civ. P. 56(a). For instance, in the list of “Additional Services” attached to the Construction Lien, Dkt. No. 228-4, \$3,740 in costs associated with a shopping trip to Puerto Rico (car rental, hotel, boat round trip, marina fees, and labor) were included. The PSUMF states that Rivera “fraudulently attempted to bill plaintiffs for a boat trip to Puerto Rico where he invited Janice Hoffman to accompany him and his wife. . . and never suggested that he would be billing for his time and for the vessel charges incurred.” Dkt. No. 228 ¶ 87. They cite, inter alia, Mrs. Hoffman’s deposition, Dkt. No. 228-7, where she stated that Rivera invited her as his guest, and she was not told before she went to Puerto Rico that he was going to charge her for the trip and the related charges

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CONCLUSION

Accordingly, the Court **RECOMMENDS** that Plaintiffs' "Motion for Partial Summary Judgment to Pierce the Hammerhead Construction Company['s] Veil and for Summary Judgment on Counts II of the Second Amended Complaint for Breach of Implied Warranties and on Count VI for False and Overstated Construction Lien," Dkt. No. 227, be **DENIED**.

Any objections to this Report and Recommendation must be filed in writing within fourteen (14) days of receipt of this notice, 28 U.S.C. § 636(b)(1), and must "specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis of such objection." LRCi 72.3. Failure to file objections within the specified time shall bar the aggrieved party from attacking such Report and Recommendation before the assigned District Court Judge. *See, e.g., Thomas v. Arn*, 474 U.S. 140 (1985).

ENTER:

Dated: January 23, 2026

/s/ Emile A. Henderson III
EMILE A. HENDERSON III
U.S. MAGISTRATE JUDGE

included in the Lien. Defendants counter by pointing to an August 28, 2018 email from Mrs. Hoffman to Rivera in which she asked Rivera to go with her to Puerto Rico, as she was "overwhelmed with the idea of navigating, shopping, etc." since she did not know her way around, and added that "[w]e would include your time and travel as part of rebuilding the house." Dkt. No. 240-1 ¶ 87, citing Dkt No. 240-5. Defendants also generally point to Rivera's and Firestone's affidavits in support. Dkt. No. 240-1 ¶ 87, citing Dkt. No. 240-2, 240-3. There is thus a genuine issue of material fact as to the provenance of these charges—what was agreed to and what was not—to determine whether these charges were false and fraudulent. As a classic "he said/she said," resolution of the issue would have to be addressed by a jury.