

The following papers numbered 1 to 12 read on this motion by the defendants/counterclaim plaintiffs for, inter alia, partial summary judgment on their first, second, third, fourth, and fifth counterclaims

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1-3
Answering Affidavits - Exhibits	4 - 8
Reply Affidavits	9
Memoranda of Law	10-12

Upon the foregoing papers it is ordered that those branches of the motion which are for summary judgment are denied. That branch of the motion which seeks an order directing the plaintiff to respond to interrogatory questions 36 and 39- 44 is granted. The plaintiff shall respond within twenty days of the service of a copy of this order with notice of entry. That branch of the motion which seeks an order directing the plaintiff to respond to the defendants’ documentary demands is denied without prejudice to the service of documentary demands properly limited in scope.

I. The Allegations of the Complaint:

Plaintiff MJM Construction Services, LLC acted as the general contractor on two construction projects, the first, a commercial and residential mixed use building located at 40 Gold Street, New York, New York and the second, a hotel at 11-01 43rd Avenue, Long Island City, New York. On July 28, 2008, plaintiff MJM signed two documents submitted to it by defendant Richard Sosa and/or defendant Flatiron Construction Corp. (collectively Flatiron for the purposes of the complaint) which called for Flatiron to act as a construction manager on the two projects. In August, 2008, Flatiron began its work at the projects, and it hired defendant Chris Caro as a subcontractor or employee.

MJM promised to reimburse Flatiron for certain project-related expenses and to pay compensation to their construction management personnel. Flatiron submitted invoices to MJM which included improper charges such as for all of its cell phone bills and gasoline usage while off the job. Flatiron failed to perform its duties as a construction manager adequately, thereby causing delays in the progress of the Gold street project and expenses to correct deficient work. Flatiron wrongly told plumbers “not to plumb for icemakers in the apartments at 40 Gold Street, ” requiring MJM to break walls to “plumb for icemakers.” Flatiron instructed electricians to wire incorrectly and instructed carpenters to use incorrect elevations on doors.

In August, 2010, MJM held a meeting with Flatiron and requested the latter to put more effort into its work. “In response,” Flatiron “virtually disappeared from the projects.” Flatiron delegated all of its responsibilities to Caro, but he “lacked the requisite experience to adequately advance the projects.” Flatiron sent an invoice to MJM purporting to be for Sosa’s payroll taxes and medical insurance, but when MJM demanded documentation, Flatiron responded by sending a letter to MJM and the owners of the project charging the general contractor with “wrongdoing.”

On or about November 16, 2010, MJM delivered a letter to Flatiron demanding that the construction manager cure its breaches under the parties’ agreements, and when Flatiron failed to do so, on November 23, 2010, MJM delivered another letter to Flatiron ending their agreements. MJM has also demanded the payment of a \$135,000 loan made to Flatiron on or about November 27, 2009, but Flatiron has failed to make the payment.

II. The Allegations of the Counterclaims:

On or about June 19, 2008, MJM entered into a contract whereby it obligated itself to act as the general contractor on the Gold Street project, and on or about August 13, 2008, MJM entered into a contract whereby it obligated itself to act as the general contractor on the hotel project.

Richard Sosa, the founder and sole owner of Flatiron Construction Corporation, and Manuel Herrera, the founder of MJM, negotiated and signed agreements “resemb[ing] a construction management as contractor arrangement” whereby Flatiron would “take complete control of all construction management and administration of the Projects.” Flatiron’s duties included negotiating with subcontractors, supervising their work, and preparing payment requisitions for MJM to submit to the project owners.

MJM agreed to pay monthly compensation to Flatiron as follows: “(i) reimbursement from MJM for all actual construction costs and reimbursables incurred by Flatiron (which included wages or salaries for laborers, supervisors and laborers employed by Flatiron for the projects, costs incurred for transportation, taxes, insurance, contributions, assessments, and benefits and the costs of materials, equipment, and temporary facilities supplied by Flatiron) and (ii) a fee equal to fifteen (15%) percent of each Project’s monthly profit.”

From in or about August, 2008 through October, 2010, Flatiron performed all of its duties on the Gold Street project and the hotel project, except where MJM frustrated its performance, but MJM failed to pay Flatiron all of its fees as measured by 15% of the projects’ monthly profit. MJM owes Flatiron at least \$537,018 in monthly fees on the Gold

Street project plus at least \$75,751 in job cost expenditures and owes Flatiron at least \$172,272 in monthly fees on the hotel project plus at least \$50,501 in job cost expenditures.

MJM failed to cooperate with Flatiron's attempt to calculate its monthly fee by providing only "partial and inconsistent job cost records" without meaningful "backup" documentation such as invoices and cancelled checks and by providing job cost records that were "oversimplified" and "fabricated." MJM and/or its principals have ownership interests in Masonry Services, Inc. and Brooklyn Erectors, Inc., and they recorded false information pertaining to those companies in order to "inflate" the costs of the projects.

MJM breached its agreements with Flatiron, by, inter alia, failing to make payments owed to the latter and wrongfully declaring the latter to be in default.

III. Discussion

A. Summary Judgment:

Flatiron's motion primarily seeks partial summary judgment on its counterclaims on the theory that there are no issues of fact pertaining to its right to recover at least \$311,267.46 in fees allegedly owed on the Gold Street project and \$7,449.62 in fees owed on the hotel project. According to the affirmation of Gregory J. Spaun, Esq., the attorney for Flatiron, "Flatiron readily concedes that there are numerous questions of fact as to whether MJM's books and records have been altered, or whether payments have been made to other entities in which MJM's principals have an interest so as to obscure the true amount of profits actually received by MJM (which necessarily would alter the amount due to Flatiron). However, as set forth below, MJM's own books and records evidence a 'base level' of profits realized from both jobs. Accordingly, there is no issue of fact as to the bare minimum amount which is due and owing to Flatiron and this motion seeks summary judgment only in that amount."

The motion has no merit insofar as it concerns the alleged "bare minimum amount" owed to Flatiron. First, summary judgment is not warranted where, as in the case at bar, there is a genuine issue of fact which must be tried. (*See, Alvarez v. Prospect Hospital*, 68 NY2d 320.) MJM made an evidentiary showing on this motion which raises issues of fact pertaining to whether its performance is excused because Flatiron materially breached the agreements between the parties by failing to discharge its contractual duties, billing MJM for false expenses, and abandoning the projects. (*See, J. Petrocelli Const., Inc. v. Realm Elec. Contractors, Inc.*, 15 AD3d 444 [genuine issue of material fact as to whether either party breached subcontract precluded summary judgment on general contractor's breach of contract claim and subcontractor's breach of contract counterclaim].) A party is excused from

complying with his contractual obligations where the other party has committed a material breach. (*See, Grace v. Nappa*, 46 NY2d 560; *130-164 Ravine Ave. Inc. v. Ravine Associates*, 139 AD2d 716; *In re Lavigne*, 114 F3d 379 .) Flatiron cannot recover any damages, including for a “bare minimum amount,” without first establishing that MJM is liable for breach of contract. The conflicting affidavits of the parties also raise an issue of fact pertaining to whether the compensation owed to Flatiron as a percentage of profits was due monthly during the course of construction or at the completion of construction. There are also issues of fact pertaining to the “bare minimum amount” raised by the conflicting affidavits of the accounting experts retained by the parties. Second, the causes of action asserted in the complaint and the counterclaims are inextricably intertwined. "When a viable counterclaim arises from the same underlying transaction as is involved in the main action and is inseparable from or inextricably intertwined with that transaction, summary judgment should be denied." (*Yoi-Lee Realty Corp. v. 177th Street Realty Associates*, 208 AD2d 185, 189; *see, Alsheimer v. Evarts*, 289 AD2d 1004.) Third, Flatiron has prematurely moved for summary judgment for a “bare minimum amount” before MJM has had the opportunity to take the depositions of necessary witnesses. (*See, Cardone v Poidamani*, 73 AD3d 828.)

Insofar as plaintiff’s third cause of action is concerned, summary judgment is precluded by issues of fact pertaining to whether MJM made a loan in the amount of \$135,000 to Sosa in November, 2009 which MJM could count as an offset against any profit due to him or Flatiron at the completion of the projects.

In regard to the eleventh counterclaim, the defendants seek to compel MJM to render an accounting on the two projects. "The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest ***." (*Palazzo v. Palazzo*, 121 AD2d 261, 265; *see, Adam v. Cutner & Rathkopf*, 238 AD2d 234.) In the case at bar, despite language in the agreements between the parties which reads “The Construction Manager accepts the relationship of trust and confidence established with the General Contractor,” there is an issue of fact concerning whether the parties stood in anything more than an ordinary commercial relationship with no right to demand an accounting. (*See, e.g., Akkaya v. Prime Time Transp., Inc.*, 45 AD3d 616; *Roslyn Sav. Bank v. National Westminster Bank USA*, 266 AD2d 272.) The court notes that “[a]n employer-employee relationship providing for the division of profits will not give rise to a fiduciary obligation on the part of the employer absent an agreement to also share losses ***.” (*Vitale v. Steinberg*, 307 AD2d 107, 108.) In any event, one of the elements of a cause of action for an accounting is the failure to comply with a demand for an accounting or a refusal of the demand. (*See, NAB Const. Corp. v. New York City Paper Mill, Inc.*, 265 AD2d 312) In the case at bar, there is an issue of fact pertaining to whether MJM has

provided the defendants with the information sought by an accounting through compliance with the defendants' demands for discovery and demands made pursuant to the Lien Law.

B. Disclosure:

CPLR 3101, "Scope of disclosure," provides in relevant part: "(a) Generally. There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof ***." (*See, Spectrum Systems Intern. Corp. v. Chemical Bank*, 78 NY2d 371; *Allen v. Crowell-Collier Pub. Co.*, 21 NY2d 403.) "The words, 'material and necessary', are *** to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason***." (*Allen v. Crowell-Collier Pub. Co.*, *supra*, 406; *Andon v. 302-304 Mott Street Associates*, 94 NY2d 740; *Marten v. Eden Park Health Services Inc.*, 250 AD2d 44.) Interrogatory questions 36 and 39-44, which seek information pertaining to, inter alia, the alleged interrelationship between MJM and Masonry Services, Inc. and Brooklyn Erectors, Inc. and the labor, materials, etc. furnished by the latter two companies on the Gold Street project and hotel project, are proper in scope. However, the documentary demands dated November 1st, 2011 and served by the defendants are overly broad since they concern projects other than the two which are the subject of this action.

Dated: April 26, 2012

J.S.C.