SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **61M**

Justice

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ATLAS TECHNOLOGY GROUP LLC,

Plaintiff,

- v -

SOLUNA MC LLC, SOLUNA COMPUTING INC. and SOLUNA HOLDINGS INC.

Defendants.

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INDEX NO. 654676/2023

MOTION DATE 4-16-24

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 21

were read on this motion to/for DISMISS.

In this action arising from an alleged breach of a services agreement to house and operate cryptocurrency mining equipment, a profit split agreement and subsequent amendments (the "contract"), the complaint includes four causes of action – breach of contract, breach of the duty of good faith and fair dealing, unjust enrichment and conversion. The plaintiff essentially alleges that the defendants unilaterally terminated the contract, requested that the plaintiff remove its equipment and refused to refund pre-paid fees. The defendants maintain that they rightfully terminated the contract because the plaintiff materially breached the agreement by failing to maintain the equipment, pay timely and generate profits. The defendants now move, pre-answer, to dismiss the complaint pursuant to CPLR 3211(a)(1), (3) and (7). The plaintiff opposes the motion. The motion is granted in part.

The defendants rely upon the parties' contract in seeking dismissal under CPLR 3211(a)(1). Under CPLR 3211(a)(1), dismissal is warranted when the documentary evidence submitted "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." Fortis Financial Services, LLC v Fimat Futures USA, 290 AD2d 383, 383 (1st Dept. 2002); see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc., 120 AD3d 431, 433 (1st Dept. 2014); Fontanetta v John Doe 1, 73 AD3d 78 (2nd Dept. 2010). A particular paper will qualify as "documentary evidence" only if it satisfies the following criteria: (1) it is

"unambiguous"; (2) it is of "undisputed authenticity"; and (3) its contents are "essentially undeniable." See VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC, 171 AD3d 189 (1st Dept. 2019) (quoting Fontanetta v John Doe 1, supra).

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court's role is "to determine whether [the] pleadings state a cause of action." 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-152 (2002). To determine whether a claim adequately states a cause of action, the court must "liberally construe" it, accept the facts alleged in it as true, accord it "the benefit of every possible favorable inference" (id. at 152: see Romanello v Intesa Sanpaolo, S.p.A., 22 NY3d 881 [2013]; Simkin v Blank, 19 NY3d 46 [2012]), and determine only whether the facts, as alleged, fit within any cognizable legal theory. See Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994).

Applying these standards, the court grants the motion to the extent that the second, third and fourth causes of action are dismissed. The motion is denied as to the breach of contract cause of action. The plaintiff sufficiently alleges a breach of contract. That is, it alleges that a valid contract existed, the plaintiff performed thereunder, the defendant failed to perform, and resulting damages. See Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445 (1st Dept. 2016); Harris v Seward Park Hous. Corp., 79 AD3d 425, 426 (1st Dept. 2010). The defendants assert no persuasive argument to the contrary.

In the second cause of action, the plaintiff alleges that the defendants breached their duty of good faith and fair dealing by terminating the contract. In New York, "[i]mplicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance" (Dalton v Educational Testing Serv., 87 NY2d 384, 389 [1995]). "While the duties of good faith and fair dealing do not imply obligations inconsistent with other terms of the contractual relationship, they do encompass any promises which a reasonable person in the position of the promisee would be justified in understanding were included" (511 W. 232nd Owners Corp. v Jennifer Realty Corp., 98 NY2d 144, 153 [2002] [internal citations and quotation marks omitted]). Here, the allegations of the complaint do not support such a claim. The plaintiff alleges no implied promises beyond the terms of the contract or any conduct not encompassed in the breach of contract cause of action.

As a general rule, where a plaintiff seeks to recover under an express agreement, no cause of action lies to recover for unjust enrichment. See Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382 (1987); JDF Realty, Inc. v Sartiano, 93 AD3d 410 (1st Dept. 2012). However, where the validity or scope of the contract is in dispute, a plaintiff may plead a claim for unjust enrichment in the alternative. See Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., supra; Henry Loheac, P.C. v Children's Corner Learning Center, 51 AD3d 476 (1st Dept. 2008); ME Corp. S.A. v Cohen Brothers LLC, 292 AD2d 183 (1st Dept. 2002). That is, "where there is a bona fide dispute as to the existence of a contract or where the contract does not cover the dispute in issue, plaintiff may proceed upon a theory of [unjust enrichment] and will not be required to elect his or her remedies (Joseph Sternberg, Inc. v Wolber 36th St. Assocs., 187 AD2d 225)." American Telephone & Utility Consultants, Inc. v Beth Israel Med. Ctr., 307 AD2d 834, 835 (1st Dept. 2003). Here, the cause of action for unjust enrichment relies upon the same facts and seeks the same damages as the breach of contract claim. The parties do not dispute the validity or scope of the contract. Nor does the plaintiff allege any dispute not covered by the contract. Therefore, the third cause of action is dismissed.

The fourth cause of action, for conversion, is also dismissed. To state a cause of action for conversion, a tort, the complaint must plead the plaintiff's possessory right or interest in the property and defendant's dominion over the property or interference with it in derogation of plaintiff's rights. Pappas v Tzolis, 20 NY3d 228, 234 (2012). "An action for conversion of money may be made out 'where there is a specific, identifiable fund and an obligation to return or otherwise treat in a particular manner the specific fund in question.'" Thys v Fortis Securities LLC, 74 AD3d 546, 547 (1st Dept. 2010) (quoting Manufacturers Hanover Trust Co. v Chemical Bank, 160 AD2d 113, 124 [1st Dept. 1990]). As damages, the plaintiff seeks the return of approximately $464,000 it alleges is being wrongfully withheld by the defendants. However, the sum is the estimated balance of fees the plaintiff had prepaid over time and on an ongoing basis to the defendants under the parties' contract and the plaintiff does not establish an obligation to return that particular amount as damages. Moreover, where, as here, damages are merely being sought for breach of contract, an action for conversion is duplicative and cannot be validly maintained. See Peters Griffin Woodward, Inc. v WCSC, Inc., 88 AD2d 883 (1st Dept. 1982); Coughlan v Jachney, 473 F Supp 3d 166 (EDNY 2020). "A simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated." Id. Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., supra at 389; see Superior Officers Council Health & Welfare Fund v Empire HealthChoice Assur., Inc., 85 AD3d 680 (1st Dept. 2011).

Finally, the defendants seek relief under CPLR 3211(a)(3), alleging that the complaint must be dismissed as to defendants Soluna Computing Inc. and Soluna Holdings Inc., as they are not proper parties since they were not signatories on the contract between the plaintiff and Soluna MC LLC (f/k/a EcoChain Block LLC). The defendant also correctly observes that that the parties services agreement expressly provides, in Section 9, "Limitation of Liability", that "any disputes arising from this agreement shall be limited only to EcoChain and not to its affiliates." However, neither the parties' agreement nor the defendants' submissions on the motion demonstrate that "affiliates" is intended to include defendants Soluna Computing Inc. and Soluna Holdings Inc., as they are not expressly mentioned therein and, indeed, may not have existed at that time. Furthermore, the defendants do not dispute the plaintiff's allegations that defendant Soluna MC LLC is a 100% subsidiary of defendant Soluna Computing, Inc. which, in turn, is a 100% subsidiary of Soluna Holdings Inc., that the Soluna MC LLC entity was formed by the other two solely for purposes of the subject contract, that the three Soluna entities share common principals with whom the plaintiff negotiated and corresponded and that the plaintiff was contractually required to send payments to Soluna Computing, Inc. Thus, although defendants Soluna Computing Inc. and Soluna Holdings Inc. may not ultimately be liable for any breach that may be established, the complaint is not dismissed as against them at this juncture.

Accordingly, upon the foregoing papers and after oral argument, it is

ORDERED that the defendants' motion to dismiss the complaint is granted to the extent that the second, third and fourth causes of action are dismissed, and the motion is otherwise denied, and it is further

ORDERED that the defendants shall file an answer to the remaining cause of action of the complaint within 20 days of the date of this order, and it is further

ORDERED that the parties shall comply with any Commercial Division ADR Referral Order issued by the court, and it is further

ORDERED that the preliminary conference scheduled for May 30, 2024, is rescheduled to July 25, 2024, at 11:30 a.m., and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.

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4/16/2024
DATE

NANCY M. BANNON, J.S.C.

CHECK ONE: [ ] CASE DISPOSED [X] NON-FINAL DISPOSITION

[ ] GRANTED [ ] DENIED [X] GRANTED IN PART [ ] OTHER