

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, ALLAN B. WEISS IAS PART 2
Justice

MORGAN VERTICAL CONSULTANTS, INC. f/k/a
ROBERT ELEVATOR COMPANY, INC.

Plaintiff,

-against-

ARCO WENTWORTH MGMT.

Defendant

Index No: 8610/06

Motion Date: 2/21/07

Motion Cal. No.: 25

Motion Seq. No.: 1

The following papers numbered 1 to 9 read on this motion by defendant to dismiss the complaint pursuant to CPLR 3211(a) (1)

	<u>PAPERS</u> <u>NUMBERED</u>
Notice of Motion-Affidavits-Exhibits	1 - 4
Answering Affidavits-Exhibits.....	5 - 7
Replying Affidavits.....	8 - 9

Upon the foregoing papers it is ordered that this motion is granted and the complaint is dismissed.

This is an action to recover \$128,833.33, for goods, labor, and services plaintiff provided pursuant to contracts with several separate cooperative corporations to provide elevator maintenance and repairs at 16 separate buildings owned by the respective cooperative corporations. Plaintiff commenced this action against the defendant, ARCO WENTWORTH MGMT, the managing agent for the cooperative corporations, asserting causes of action for goods sold and delivered, account stated and unjust enrichment. Defendant moves to dismiss all three causes of action in the complaint pursuant to CPLR 3211(1)and(7) on the ground that the documentary evidence conclusively establishes that defendant is not a party to any of the contracts and, thus, cannot be held liable.

On a motion to dismiss pursuant to CPLR 3211 the court must construe the complaint liberally and accept the facts alleged as true, afford the plaintiff the benefit of every favor able

inference and determine only whether the facts as alleged fit within any cognizable legal theory (Leon v. Martinez, 84 NY2d 83, 87-88 [2004]; Morone v. Morone, 50 NY2d 481, 484 [1980]; Guggenheimer v. Ginzburg, 43 NY2d 268, 275 [1977]; Rovello v. Orofino Realty Co., 40 NY2d 633, 634 [1976]). However, where, as here, the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration (Mark Hampton, Inc. v. Bergreen, 173 AD2d 220 [1991], lv. denied 80 NY2d 788 [1992] citing, inter alia, Roberts v. Pollack, 92 AD2d 440, 444 [1983]).

Obligations arising out of the contract are usually limited to the parties and only parties to a contract are liable for its breach (see Seaver v. Ransom, 224 NY 233 [1918]; National Survival Game, Inc. v NSG of LI Corp., 169 AD2d 760 [1991]; Perma Pave Contracting Corp. v. Paerdegat Boat and Racquet Club, Inc., 156 AD2d 550 [1989]; Blitman Constr. Corp. v Kent Village Housing Co., 91 AD2d 173 [1983]). When an agent acts on behalf of a disclosed principal, the agent will not be personally liable for a breach of contract unless there is clear and explicit evidence of the agent's intention to be personally bound (see Savoy Record Co. v. Cardinal Export Corp., 15 NY2d 1, 4 [1964]).

In support of its motion the defendant submitted copies of 13 separate contracts between the plaintiff and the respective cooperative corporations, executed by an officer or director of the respective cooperative corporation, bills and invoices prepared and addressed and sent by plaintiff to the cooperatives c/o ARCO regarding the work, labor and materials provided at the various buildings owned by the cooperative corporations. The documentary evidence submitted demonstrates that the essential factual allegations in the complaint are false.

The plaintiff in this action has not asserted a cause of action for breach of contract. Instead, plaintiff attempts to circumvent the lack of any contract between the parties, which is undisputed, by asserting causes of action for goods sold and delivered, an account stated, and unjust enrichment. However, an account stated assumes the existence of some indebtedness between the parties. It cannot be used to create liability where none otherwise exists (see, Gurney, Becker & Bourne v. Benderson Dev. Co., 47 NY2d 995, 996 [1979]; M. Paladino, Inc. v. J. Lucchese & Son Contracting Corp., 247 AD2d 515 [1998]). The affidavit of Di Pietro submitted in opposition, demonstrates that the plaintiff was aware that ARCO was acting in its capacity as the cooperatives' managing agent and the complaint does not allege that the defendant either expressly consented to, or in any other way assumed, an obligation of the cooperatives to pay the plaintiff (see, Prestige Caterers v. Kaufman, 290 AD2d 295[2002];

Sybelle Carpet & Linoleum of Southampton v. East End Collaborative, 167 AD2d 535, 536 [1990]; Perma Pave Contr. Corp. v. Paerdegat Boat & Racquet Club, supra).

Nor may the plaintiff seek to recover on its claims of goods sold and delivered or unjust enrichment. To state a cause of action for unjust enrichment, a plaintiff must allege that it conferred a benefit upon the defendant, at the plaintiff's expense and that it is against equity and good conscience to allow the defendant to retain such benefit without adequately compensating plaintiff (see Paramount Film Distrib. Corp. v State of New York, 30 NY2d 415, 421 [1972], cert denied 414 US 829 [1973]; Nakamura v. Fujii, 253 AD2d 387, 390 [1998]; see Wolf v. National Council of Young Israel, 264 AD2d 416, 417 [1999]). The invoices prepared by the plaintiff, demonstrate that the goods and services were provided on account of the cooperatives at the various cooperative apartment buildings and not obtained, received or used by the defendant.

It is plaintiff's position that the defendant should be estopped from asserting lack of privity of contract as a defense. However, for estoppel to apply, the plaintiff must sufficiently allege that the defendant made statements or engaged in conduct with the intent to induce the plaintiff to act to its detriment (see Bender v. New York City Health and Hosps. Corp., 38 NY2d 662 [1976]; Health Loom Corp. v. Soho Plaza Corp. 272 AD2d 179, 181 [2000]). In addition, the plaintiff must also allege its own lack of knowledge of the true facts, justifiable reliance upon the conduct of the defendant and a prejudicial change in position (River Seafoods, Inc. v. JPMorgan Chase, 19 AD3d 120, 122[2005], lv. granted 5 NY3d 715). The plaintiff has failed to identify any representations or conduct of the defendant which caused the plaintiff to act to its detriment. The affidavit of Di Pietro merely states that because the plaintiff always dealt with ARCO, and never dealt with the cooperative boards, plaintiff relied on ARCO to make sure that the cooperative boards had adequately budgeted for elevator maintenance. In the absence of any alleged affirmative act or representation by the defendant, the plaintiff's subjective belief and reliance thereon is insufficient to warrant application of the doctrine.

Dated: March 13, 2007
D# 30

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J.S.C.