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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

Kornreich, J.

PART 54

0600304/2003

ALTERNATIVE RESOURCES, INC.

VS

NEW ARBOR TECHNOLOGIES, LLC

INDEX NO. 600304/03

MOTION DATE 6/19/03

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

SEQ 1

DEFAULT JUDGMENT

SCANNED

OCT 15 2003

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2-3
Replying Affidavits	4

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Decision and Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 9/30/03

SHIRLEY WERNER KORNREICH
J.S.C.

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

..... X

ALTERNATIVE RESOURCES, INC.,

Plaintiff,

Index No.: 600304/03

-against-

DECISION and ORDER

NEW ARBOR TECHNOLOGIES, LLC.,
BLAKE HOLDEN and EDWARD HARRIS,

Defendants.

..... X

KORNREICH, SHIRLEY WERNER, J.:

Before the Court is the cross-motion[1] by individual defendants Blake Holden ("Holden") and Edward Harris ("Harris") (collectively "the individual defendants") (i) to dismiss the complaint herein insofar as asserted against them for failure to state a cause of action under CPLR 3211(a)(7), (ii) to dismiss the complaint insofar as asserted against them for lack of personal jurisdiction under CPLR 3211(a)(8), due to lack of proper service, (iii) to dismiss all causes of action except the first and eighth, and (iv) for sanctions as a penalty for imposing "frivolous claims" against the individual defendants.

In 1998, plaintiff Alternative Resources, Inc. ("ARI" or "plaintiff") entered into a contract ("the contract") with defendant New Arbor Technologies, LLC ("NAT"), a New York limited liability company, according to whose terms plaintiff agreed to provide an engineering feasibility study relative to a paper recycling plant in Ypsilanti, Michigan. NAT intended to manage and operate the plant. The contract was originally a "proposal" drafted by ARI, which the parties

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'Plaintiff has withdrawn its motion in chief for a default judgment against New Arbor Technologies, LLC.

adopted as their agreement on August 10, 1998, with Holden signing the accompanying "Consulting Agreement" in his capacity as a "member" of NAT. On page 9 of the "proposal"/contract, ARI estimated that the cost of its work would be $30,000-$60,000.

According to the complaint, plaintiff began its contracted-for studies in August 1998, and submitted its report in March 1999. Plaintiff then billed and was paid $146,338.80. Thereafter NAT asked ARI to make certain revisions to its report, which ARI did. In June 2000, plaintiff billed NAT for an additional $62,829.71. NAT refused to pay, objecting, inter alia, that the new charges were beyond the scope of the original contract, that the excess work had resulted from ARI's failure to properly perform its job, and that NAT had been using too many inexperienced personnel on the subject project, essentially training its employees at NAT's expense.

In April 2002, ARI commenced an action in Supreme Court, New York County against the instant defendants under Index No. 108380/02. By order entered on September 30,2002, the Court (Lebedeff, J.) Dismissed the action for plaintiff's failure to serve the defendants within 120 days of filing the summons and complaint.

Plaintiff commenced the instant action on January 29, 2003. In its eight causes of action, each of which is asserted against all three defendants, plaintiff demands $62,829.71 ($53,967.81 plus 10% interest as of February 28, 2002), under the following theories: (1) breach of a written contract; (2) breach of an oral contract; (3) breach of an implied-in-law contract; (4) breach of an implied-in-fact contract; (5) promissory estoppel; (6) quantum meruit; (7) unjust enrichment; and (8) account stated.

A. Whether the individual defendants may be held personally liable under the Limited Liability Company Law ("LLCL"):

Section 609(a) of the LLCL provides:

> Neither a member of a limited liability company, a manager of a limited liability company managed by a manager or managers nor an agent of a limited liability company (including a person having more than one such capacity) is liable for any debts, obligations or liabilities of the limited liability company or each other, whether arising in tort, contract or otherwise, solely by reason of being such member, manager or agent or acting (or omitting to act) in such capacities or participating (as an employee, consultant, contractor or otherwise) in the conduct of the business of the limited liability company.

The Code of the State of Delaware, where NAT was organized, contains a similar provision in Title 6, §18-303.

In its opposition to the individual defendants' cross-motion, plaintiff argues that the Court should pierce NAT's "corporate veil" to reach the individual defendants, who have allegedly "acted in a manner to create liability upon themselves."

Although it is not altogether clear that the "veil" of a limited liability company can be "pierced" in the same way that a corporation's can, the Court assumes that the same rules apply because of the wording of LLCL 609, which does not permit liability to lie "solely by reason of [an individual's] being [a company] member, manager or agent." The phrasing invites the conclusion that liability could be imposed if something more than simple "status" is involved – e.g., if the "member" controlled the company and used his "alter ego" status to perpetrate a fraud on the defendant.

It is well established that

> [t]hose seeking to pierce a corporate veil ... bear a heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences .... Evidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance ....

TNS Holdings, Inc. **V.** MKI Securities Corp., 92 N.Y.2d 335,339 (1998); see also Matter of Morris v. New York State Department of Taxation and Finance, 82 N.Y.2d 35 (1993); Old Republic National Title Insurance Co. v. Moskowitz, 297 A.D.2d 724,725 (2d Dept. 2002); Collins v. E-Magine, LLC, 291 A.D.2d 350,351 (1st Dept. 2002), lv. den. 98 N.Y.2d 605 (2002).

Notwithstanding plaintiff's very recent allegations to the contrary, it did not allege in its complaint that the individual defendants dominated NAT and used their authority to commit a wrong against the plaintiff with respect to the transaction at issue here. Indeed, on its face the complaint alleges only that defendant NAT at some point stopped paying plaintiff for "extra" work, alleged by plaintiff to be part of the parties' contract, but claimed by defendants to be outside its scope. There is nothing in the record to suggest that the individual defendants were the alter egos of NAT, that they perpetrated a fraud against plaintiff, or that any of the contracts entered into by NAT were guaranteed by the individual plaintiffs. In addition, it is nowhere alleged in the complaint that plaintiff entered into the contract with any party but NAT, or that plaintiff ever thought it was contracting with any entity other than NAT. See TNS Holdings v. MKI, supra at 340. Plaintiff's belated allegations of domination and fraud in its Affidavit in Opposition to defendants' cross-motion do not suffice to justify a piercing of the corporate veil. See Collins v. E-Magine, LLC, supra at 351.

Because the action must be dismissed insofar as asserted against the individual defendants, the Court declines to address the issue of personal jurisdiction.

B. Whether plaintiff can maintain its second through sixth causes of action:

1. Quasi-contract claims:

The law in New York is well settled that

> the existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter.... A 'quasi contract' only applies in the absence of an express agreement, and is not really a contract at all, but rather a legal obligation imposed in order to prevent a party's unjust enrichment.... '...Briefly stated, a quasi-contractual obligation is one imposed by law *where there has been no agreement* ***or*** *expression of assent, by word* ***or*** *act, on the part of either party involved.* The law creates it, regardless of the intention of the parties, to assure a just and equitable result...'

Clark-Fitzpatrick, Inc. v. Long Island Railroad Co., 70 N.Y.2d 382, 388-389 (1987). However, a party may assert causes of action in both breach of contract and quasi-contract where there is a bona fide disagreement concerning existence of a contract, or concerning whether the contract covers the dispute in issue, or where one party has wrongfully prevented the other from performing the contract. See Randall v. Guido, 238 A.D.2d 164 (1st Dept. 1997). Here there is a bona fide disagreement between the parties regarding whether the written contract covers the sum sued upon.

a. Contract "implied in law":

In its third cause of action, plaintiff pleads a contract implied-in-law. ***An*** "implied in law" contract exists "where one party, without any expression of assent from the other, obtains or retains possession of money or other property that actually belongs to the latter, by oppression, extortion, deceit or similar means. Such a 'contract' is not grounded in an implied promise to pay, but in a duty that arises, independent of any promise, to restore property to its rightful owner." Rosefsky v. State of New York, 205 A.D.2d 120, 123-124 (3d Dept. 1994); see also Parsa v. State of New York, 64 N.Y.2d 143, 147 (1984). This theory is inapplicable to the instant case because ARI did agree to perform services for NAT, and there is no allegation in the complaint that NAT coerced this assent by oppression, extortion, deceit or similar means.

b. Quantum meruit

To state a claim for quantum meruit, a plaintiff must show that it conferred a benefit for the amount claimed on defendant, that defendant accepted the benefit, that plaintiff reasonably expected compensation for the benefit, and that "the reasonable value" of the benefit is the amount sued for. See Joan Hansen & Co. v. Everlast World's Boxing Headquarters Corp., 296 A.D.2d 103, 108 (1st Dept. 2002); Landcom, Inc. v. Galen-Lyons Joint Landfill Commission, 259 A.D.2d 967,968 (4th Dept. 1999).

"The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." Clark-Fitzuatrick, Inc. v. Long Is. R.R. Co., 70 N.Y.2d 382, 388 (1987); see also Randall v. Guido, 238 A.D.2d 164 (1st Dept. 1997); Heller v. Kurz, suura. However, it is not the law in New York "that a claim in contract and one in quasi contract are mutually exclusive in all events and under all circumstances." Joseph Sternberg, Inc. v. Walber 36th St. Assoc., 187 A.D.2d 225,227-228 (1st Dept. 1993). Where there is a bona fide dispute as to whether the contract covers the controversy in issue, "a plaintiff may proceed upon a theory of quantum meruit as well as contract, and will not be required to elect his or her remedies." Sforza v. Health Ins. Plan of Greater N.Y., 210 A.D.2d 214,215 (2d Dept. 1994); see also Fisher v. A.W. Miller Technical Sales, Inc., 306 A.D.2d 829 (4th Dept. 2003); Randall, supra, at 164,655 N.Y.S.2d 527; Joseuh Sternberg, Inc., suura, at 228.

Here, it is not clear whether the work performed by ARI after it submitted its first report was or was not covered by the parties' original agreement. See, e.g., First Frontier Pro Rodeo Circuit Finals v. PRCA First Frontier Circuit, 291 A.D.2d 645, 646 (3d Dept. 2002) [written

contract not intended to govern dispute]; Douglas Constr. of Fulton County v. Marcais, 239 A.D.2d 803, 804 (3rd Dept. 1997) [parties mutually abandoned contract, so the plaintiff entitled to recover on theory of quantum meruit for services and labor thereafter provided]. In any event, notwithstanding NAT's insistence on this application that the parties were bound by ARI's initial $30,000-$60,000 estimate, some changes clearly had been made in that early understanding, since NAT actually paid ARI $146,338.80. Moreover, although it appears that "extra work" was then done by plaintiff at defendants' request, the contract makes no provision for "extra work," and it cannot be told from the record before the Court whether the extra work was in the nature of remediation of certain defects in the original report, or was an independent project.

Under the circumstances, plaintiffs sixth cause of action, for quantum meruit, is viable.

c. Unjust enrichment:

To recover under a theory of unjust enrichment, a claimant must show "that it conferred a benefit upon the defendant, and that the defendant will obtain such benefit without adequately compensating plaintiff therefor." Smith v. Chase Manhattan Bank, 293 A.D.2d 598,600 (2d Dept. 2002); Nakamura v. Fujii, 253 A.D.2d 387,390 (1st Dept. 1998). "The essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered." Paramount Film Distrib. Corp. v. State of New York, 30 N.Y.2d 415,421 (1972), cert. den. 414 U.S. 829 (1973). Once again, a contract cannot usually be implied in fact where there is an express contract covering the subject matter involved. See Julien J. Studley v. New York News, Inc., 70 N.Y.2d 628,629 (1987). However, where as here there is a bona fide dispute as to whether the express contract governs the matter sued upon, this equitable claim may be pleaded as well as a claim for breach of an

express written contract.

d. Implied in fact contract

In the absence of an express written contract between the parties, "it is well settled that a contract may be implied in fact where inferences may be drawn from the facts and circumstances of the case and the intention of the parties as indicated by their conduct." Matter of Boice v. Justice Resource Institute, Inc., 226 A.D.2d 908,910 (3rd Dept. 1996); see also Zimmer v. Town of Brookhaven, 247 A.D.2d 109, 114 (2d Dept. 1998) ("... a contract implied-in-fact contemplates not assurances or promises but conduct"). Normally "[a] contract cannot be implied in fact where there is an express contract covering the subject matter involved." Julien J. Studley v. New York News, Inc., 70 N.Y.2d 628,629 (1987), reare. den. 70 N.Y.2d 748 (1987), citing Miller v. Schloss, 218 N.Y. 400,406- 407 (1916). However, plaintiffs fourth cause of action is subject to the same exception enunciated above, where the issue of whether the transaction referenced by the lawsuit is subject to the parties' written agreement.[2]

2. Oral contract/modification:

a. Oral contract:

The general rule is that where there is a conflict between an express provision in a written contract and an alleged oral agreement, the oral agreement is unenforceable. See Braten v. Bankers Trust Co., 60 N.Y.2d 155, 162 (1983), reare. den. 61 N.Y.2d 670 (1983). Here,

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[2]It should be noted that theories of "quantum meruit," "unjust enrichment" and "contract implied in fact" are interrelated. As the Court noted in Heller v. Kurz, supra, at 263: "[T]he term 'quantum meruit' is ambiguous in customary use: 'it may mean (1) that there is a contract 'implied in fact' to pay the reasonable value of the services, or (2) that, to prevent unjust enrichment, the claimant may recover on a quasi-contract (an 'as if' contract) for that reasonable value'" (citations omitted).

defendants cite as a "conflict" the written contract's proposal of a $30,000-$60,000 price for plaintiff's services, versus the actual final bill of $146,338.80 plus $53,967.81 compounded by 10% interest. However, the instant contract was not integrated, and was clearly modified at some point – whether orally or in writing is not clear – because defendant has already paid plaintiff far more than was originally estimated. Moreover, the "Standard Terms and Conditions" provisions in the original contract provided for a 10% annual surcharge on late payments, so this penalty does not represent a "conflict" either. Since either a new oral contract or an oral modification of the original contract is possible in the circumstances presented here relative to the work performed by plaintiff for defendants in May-June 2000, plaintiff's cause of action alleging breach of an oral contract is maintainable. See Hopkinson v. Redwing Construction Co., 301 A.D.2d 837 (3d Dept. 2003) ["factual issues exist regarding whether the parties orally entered into a new or modified contract"].

b. Promissory estoppel

The elements of promissory estoppel are: "a clear and unambiguous promise; a reasonable and foreseeable reliance by the party to whom the promise is made; and an injury sustained by the party asserting the estoppel by reason of his reliance." Ripple's of Clearview, Inc. v. Le Havre Assocs., 88 A.D.2d 120,122 (2d Dept. 1982) lv denied 57 N.Y.2d 609 (1982); see also R.G. Group, Inc. v. Horn & Hardart Co., 751 F2d 69, 78 (2d Cir. 1984). As alleged in plaintiff's fifth cause of action, defendants orally represented to plaintiff that it would be paid for the "extra work" that it was asked to perform in May-June 2000. Plaintiff has adequately asserted a claim for promissory estoppel.

Accordingly, it is

ORDERED that that branch of the defendants' cross-motion which was to dismiss the complaint insofar as asserted against the individual defendants is granted, and the Clerk shall enter judgment accordingly; and it is further

ORDERED that the case against the remaining defendant is severed and continued; and it is further

ORDERED that that branch of the defendants' cross-motion which was to dismiss plaintiffs second through seventh causes of action is granted to the extent that the third cause of action is dismissed, but is otherwise denied; and it is further

ORDERED that defendants' demand for sanctions is denied.

The foregoing constitutes the Decision and Order of the Court.

Dated: September 30, 2003
New York, New York

SHIRLEY WERNER KORNREICH