

**DevCon Partners, LLC v 985 Park Realty, LLC**

2007 NY Slip Op 30477(U)

March 22, 2007

Supreme Court, New York County

Docket Number: 0603595/2005

Judge: Barbara R. Kapnick

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

PRESENT: Hon. **BARBARA R. KAPNICK** PART 12  
*Justice*

DEVCON  
- v -  
985 Park-Realty

INDEX NO. 603595/05  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH  
ACCOMPANYING MEMORANDUM DECISION**

**FILED**

APR 02 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO  
JUSTICE  
DATED: \_\_\_\_\_ J.S.C.

Dated: 3/27/07

**BARBARA R. KAPNICK**  
NON-FINAL DISPOSITION

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION [\*1]

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 12

-----X  
DEVCON PARTNERS, LLC,

Plaintiff,

- against -

985 PARK REALTY, LLC,

Defendant.  
-----X

BARBARA R. KAPNICK, J.:

DECISION/ORDER  
Index No. 603595/05  
Motion Seq. No. 001

**FILED**  
APR 02 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

This lawsuit involves a claim for monetary and equitable relief arising out of a contract for development consulting services entered into on or about October 11, 2004. Plaintiff DevCon Partners, LLC ("DevCon") now moves, pursuant to CPLR § 3212, for partial summary judgment (1) striking, barring or dismissing defendant 985 Park Realty, LLC's ("985 Park") second, third and fifth defenses and first, second and third counterclaims on the ground that they may not be interposed in this action as a matter of law; (2) dismissing 985 Park's fourth counterclaim for fraud on the ground that it was improperly pled under CPLR §3016 (b); (3) granting partial summary judgment to DevCon in the amounts unpaid under the Agreement between the parties of \$65,538.01, plus the termination fee described in the Agreement in the amount of \$100,000; (4) directing 985 Park to amend its Operating Agreement to make DevCon a Member and granting DevCon a 5% interest in the cash flow distribution of 985 Park, as

set forth in their Agreement and (5) for the costs and fees of this motion.

#### **BACKGROUND**

DevCon is a development and construction consultant that provides management and owner's representation services to clients, such as advising them on retaining the various professionals and companies necessary to develop and construct a building project. Since forming the company in November of 2003, Charles Fino ("Fino") and Robert Quaco ("Quaco") have been co-members of DevCon, and together they have more than 50 years of experience in the real estate industry. In addition to principals Fino and Quaco, DevCon has five employees that work primarily on project management and the financial analysis of projects.

Quaco stated in his affidavit that prior to forming DevCon, he was a partner and Executive Vice President of The Athena Group, LLC, a New York-based development and investment company. For the past three years, Quaco has also been an adjunct professor at Columbia University in the graduate School of Architecture Planning and Preservation, where he lectures as part of a required graduate course in real estate development. Quaco also stated that Fino has been in the real estate development and construction business since the mid-1960's, and has held the position of Executive Vice

President and Chief Operating Officer of a subsidiary of Fisher Brothers.

In late July of 2004, 985 Park's principals contacted DevCon with regard to developing a building located at 985 Park Avenue. After meeting with 985 Park's principals several times, the parties entered into an Agreement on October 11, 2004 which provided that DevCon was to provide development consulting services to 985 Park in connection with developing the premises.

According to the Agreement, DevCon was to be compensated in a combination of monthly cash payments, a membership stake in the Owner Limited Liability Company and an equity share in the project's cash distribution. In order to avoid financially overburdening 985 Park during the early stages of the project, DevCon was to be compensated at the flat rate of \$15,000 per month for its services during the first phase of the project, or "Pre-Construction" phase, which was anticipated to take six to eight months to complete.

Once the Pre-Construction phase of the project was completed and financing for the project was procured, the second phase of the project, or "Construction and Development" phase, would begin, and accordingly, DevCon's payments would significantly increase.

During this phase, DevCon was to receive a "Development Fee," which was based upon a percentage of the "aggregate hard and soft costs" of the construction, subject to adjustment from time to time based on the budget. The development fee was to be paid to DevCon by 985 Park on a monthly basis, in equal installments over the anticipated duration of the construction project. Invoices for DevCon's services were to be submitted to 985 Park monthly. In addition to these services, DevCon was also to be compensated by 985 Park for any reimbursable expenses incurred for the benefit of the project.

Section 7.5 of the Agreement ("Amendment to Owner's Operating Agreement") provided that 985 Park and DevCon "will endeavor to modify the Operating Agreement to admit the Development Consultant as a Member." To this effect, DevCon was to receive an "Incentive Promote," wherein DevCon would share in the profit yielded by the project. This "Incentive Promote" would equal 5% of the cash for distributions from the project, at market rates, after 985 Park received a return of its invested capital.

The termination provision in the Agreement (Art. 4.1) provided as follows:

"Owner may terminate this Agreement if Development Consultant defaults on its obligations set forth in this Agreement. In such case, Owner shall deliver to Development Consultant at its principal place of business a written Notice of Default specifically identifying the default. Development Consultant will have thirty (30)

days to remedy such default to Owner's reasonable satisfaction (the 'Cure Period'). In the event that Development Consultant fails to cure such default within the Cure Period, this Agreement shall immediately terminate and Owner will pay to Development Consultant a termination fee of \$50,000; in exchange for which Development Consultant shall provide Owner with a final general release of all claims with regard to this Agreement. In the event that Owner terminates Development Consultant without cause, Owner will pay to Development Consultant a termination fee of \$100,000. The Development Consultant shall be compensated for services performed prior to termination, together with Reimbursable Expenses then due or accruing to that point."

Quaco states in his Affidavit that immediately after plaintiff was retained by 985 Park, DevCon sent out requests for proposals from eight architectural firms, and, along with 985 Park, conducted interviews of the architects. DevCon also attended weekly meetings with 985 Park and various architects, engineers, contractors and other personnel who were to be involved in the development of the project.

During May and June of 2005, DevCon updated budgets and assisted 985 Park in procuring financing for the project, such as preparing the loan request and reviewing the loan documents. Quaco also noted that from mid-October 2004 to June 2005; DevCon billed 985 Park monthly in the amount of \$15,000 for its pre-construction services, plus reimbursable expenses, and, for those eight and a half months, 985 Park paid DevCon, as set forth in the Agreement.

Quaco also states that 985 Park was approved for a construction loan, which closed on or about June 28, 2005. Quaco asserts that the Pre-Construction phase of the project was completed by June of 2005, and that July and August of 2005 were the first two months of the Construction and Development phase of the project. Thus, for the months of July and August of 2005, DevCon sent invoices to 985 Park, numbers 1094 and 1100, for the amounts due as a development fee of \$65,538.01. 985 Park never paid these invoices.

Quaco asserts that in July of 2005, 985 Park began to attempt to renegotiate the terms of the Agreement, first by reducing and capping the overall development fee, and then by proposing that DevCon reduce the scope of its services and its fee by fifty percent. DevCon refused to cut its fee so drastically.

In contrast, Michael Miller, a member of 985 Park, asserts in his Affidavit that the project was still in the Pre-Construction phase during July and August of 2005, and, in fact, the project was in the process of being demolished during these months. Miller notes that it was because of DevCon's mismanagement during the demolition that DevCon was terminated.

Finally, 985 Park terminated DevCon via a letter from its attorneys dated August, 31, 2005 (termination letter). The termination letter stated, in pertinent part, as follows:

It is my understanding that DevCon Partners, LLC ('DevCon') and 985 have experienced numerous problems and issues relating to DevCon's performance of its contract with 985, dated October 11, 2004, including but not limited to, DevCon's failure to comply with the scope of the work contained in the contract, DevCon's failure to create the required website for 985, DevCon's numerous acts of mismanagement, DevCon's failure to coordinate with the architect, DevCon's failure to supply complete drawings and to obtain proper permits from the City of New York and DevCon's failure to properly coordinate the demolition work at the project site .... Accordingly, 985 wishes to invoke the termination clause contained in the parties contract (Article 4).

Therefore, effective immediately, 985 is declaring DevCon in default and DevCon is instructed to immediately stop all work under the contract and to immediately quit the project. Our client has deposited \$100,000 (the termination fee agreed upon in the parties contract) into our escrow account, which we will forward to you upon receipt of a signed General Release .... Along with the \$100,000 check, we will also forward to you a signed General Release from 985, agreeing to not take any actions against DevCon regarding the project.

DevCon maintains that at the time of the termination letter, it had performed all services called for under the Agreement for more than ten months. DevCon notes that 985 Park continues to use the same financing, architects, and contractors procured with DevCon's assistance for work on the project.

The Complaint sets forth a cause of action for breach of contract for defendant's failure to make timely periodic payments

of \$65,538.01, [first cause of action]; breach of contract for defendant's failure to amend the Operating Agreement to make plaintiff a Member of defendant 985 Park and granting plaintiff a 5% interest in the cash flow distribution of 985 Park [second cause of action]; an account stated for the \$65,538.01 [third cause of action]; for "Breach of Implied Covenant and Good Faith and Fair Dealing" [fourth cause of action]; and foreclosure of a mechanic's lien upon defendant's property at 985 Park Avenue in the amount of \$65,538.01 [fifth cause of action].

Defendant in its Answer asserts that the plaintiff has failed to state a cause of action [first defense]; the plaintiff has violated one or more provisions of its contract with defendant and, therefore, is not entitled to any additional compensation [second defense]; plaintiff has been paid in full for all work performed under the contract [third defense]; plaintiff has not properly pled an account stated cause of action [fourth defense]; plaintiff's claim is barred by the doctrine of unclean hands, laches and/or waiver [fifth defense]; and plaintiff's mechanic's lien has been willfully exaggerated and, therefore, the lien must be discharged of record [sixth defense].

Defendant also alleges that plaintiff breached the contract by failing to provide certain services as required under the contract which has damaged the defendant in the amount of \$3,000,000

[seventh defense, first setoff and first counterclaim]; and plaintiff acted negligently by incorrectly figuring the construction costs, failing to properly coordinate the project schedule with "the various trades", mismanaging the project, failing to complete drawings and failing to create and maintain a proper budget, causing them to be damaged in an amount not less than \$3,000,000 [eighth defense, second setoff and second counterclaim]. Further, defendant claims that plaintiff's miscalculation of the actual construction costs and other acts of negligence constitute an act of malpractice and has caused the defendant to suffer damages of at least \$3,000,000 [ninth defense, third setoff and third counterclaim]; that plaintiff held itself out to defendant as an expert in its field, defendant relied on this representation and as a result of plaintiff's fraud, defendant has been damaged monetarily in an amount of at least \$3,000,000 [tenth defense, third setoff and fourth counterclaim].

#### **DISCUSSION**

DevCon argues that 985 Park's defenses and counterclaims must be stricken as a matter of law since when one party terminates the other without cause pursuant to their agreement for services, it may not later impose counterclaims alleging negligence or breach of contract arising under the agreement to offset its claims, except in the case of fraud or mistake. See, Tishman Constr. Corp. v City

of New York, 228 A.D.2d 292 (1st Dept 1996); Nasuf Constr. Corp. v State of New York, 185 A.D.2d 305 (2nd Dept 1992); Fruin-Colnon Corp. v Niagara Frontier Transp. Auth., 180 A.D.2d 222 (4<sup>th</sup> Dept 1992).

Here, although it is true that 985 Park's termination letter of August 31, 2005 sets forth various alleged problems and issues relating to DevCon's performance, and even declares DevCon "in default", when considered in its entirety, it is clear that 985 Park terminated DevCon for convenience (i.e., without cause).

First of all, in its termination letter, 985 Park stated that it was invoking the termination clause contained in the parties' contract and instructed DevCon to "immediately stop all work under the contract and to immediately quit the project." As such, DevCon was not permitted the opportunity to remedy or cure the alleged default within the 30-day "cure period", as required by the Agreement in the event of a termination for cause.<sup>1</sup>

In addition, the termination letter indicates that 985 Park deposited "the termination fee agreed upon in the parties contract" in the amount of \$100,000 in an escrow account, which was to be forwarded to DevCon upon the receipt of a signed general release.

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<sup>1</sup> Moreover, no Notice of Default was delivered by 985 Park to DevCon, as required under the Agreement to start the running of the "cure period".

According to the Agreement, the amount of \$100,000 was to be paid in the event that the Agreement was terminated without cause, as opposed to \$50,000 which would be paid in the event DevCon failed to cure the alleged default within the 30-day cure period.

Further, 985 Park's assertion that the general release language in the termination letter is evidence that the Agreement was terminated for cause is without merit. To this effect, 985 Park notes that the language in the termination letter indicates that the termination fee of \$100,000 was to be forwarded to DevCon upon receipt of a signed general release from DevCon agreeing not to take any action against 985 Park regarding the project, as required by the Agreement in the event of a termination for cause.

Although 985 Park now asserts that the \$100,000 amount referred to in the termination letter was merely an offer of settlement, the language in the termination letter refers to the \$100,000 amount as "the termination fee agreed upon in the parties [sic] contract," clearly indicating that the \$100,000 amount was intended as a termination fee and not as a settlement offer. It is well settled that "when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms" (W.W.W. Assoc., Inc. v Giancontieri, 77 N.Y.2d 157, 162 [1990]; see also, Vermont Teddy Bear Co. v 538 Madison Realty Co., 1 N.Y.3d 470, 475 [2004]). Thus, having chosen to terminate for convenience, 985 Park is now

precluded from seeking to recover any damages arising out of DevCon's performance under the Agreement, except under its claim of fraud.

In an action to recover damages for fraud, the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury.

Lama Holding Co. v Smith Barney Inc., 88 N.Y.2d 413, 421 (1996); see also, Swersky v Dreyer and Traub, 219 A.D.2d 321, 326 (1<sup>st</sup> Dept 1996) app. wdn. 89 N.Y.2d 983 (1997).

Further, where a cause of action or defense is based upon misrepresentation or fraud, the circumstances constituting the wrong must be stated with particularity (CPLR 3016[b]); see Brown v Wolf Group Integrated Communications, Ltd., 23 A.D.3d 239 (1<sup>st</sup> Dept 2005); Giant Group, Ltd. v Arthur Anderson, LLP, 2 A.D.3d 189, 190 (1<sup>st</sup> Dept 2003).

Here, 985 Park's fourth counterclaim for fraud merely alleges that "[p]laintiff held itself out to Defendant as a company expert, proficient in the areas of construction financing, project development, and construction" and that as a result of plaintiff's fraud in so doing, 985 Park was damaged in an undetermined amount of not less than \$3,000,000.

This allegation is not sufficient pursuant to CPLR § 3016(b). Thus, it is dismissed with leave to replead with more particularity within 30 days of entry of this Order.

DevCon also asserts that it is entitled to partial summary judgment directing 985 Park to pay the amount of \$65,538.01 for unpaid invoices for work performed in July and August of 2005, plus the termination fee of \$100,000, as set forth in the Agreement and promised to DevCon in the termination letter.

However, DevCon has not set forth sufficient evidence to demonstrate that there are no triable issues of fact regarding whether it is entitled to the amount of \$65,538.01 for the unpaid invoices at issue. In the first instance, plaintiff has failed to provide copies of the invoices which were allegedly not paid. Moreover, Devcon has failed to put forth evidence that the project was no longer in the Pre-Construction phase, nor has it demonstrated how it calculated the amount that it was to be paid for July and August of 2005. Thus, DevCon is not entitled to partial summary judgment on this issue.

Regarding DevCon's request that 985 Park pay it the \$100,000 termination fee at issue, it should be noted that DevCon did not request this relief in its complaint. DevCon may, however, if it deems appropriate, seek leave to amend its complaint to seek this

relief by making a proper motion to this court pursuant to CPLR § 3025 (b).

Finally, DevCon asserts that it is entitled to partial summary judgment for specific performance, directing 985 Park to amend its Operating Agreement to make DevCon a member, and granting DevCon a 5% interest in the cash flow distribution of 985 Park, as set forth in the equity provision of the Agreement.

However, the termination provision in the Agreement provides that, in the event of termination, DevCon would only be entitled to a termination fee of either \$50,000 or \$100,000, depending on whether the Agreement was terminated with or without cause, in addition to compensation for services performed prior to termination, together with any reimbursable expenses then due or accruing to that point. Since this Court has already determined that the Agreement was terminated without cause, DevCon is not entitled to the specific performance remedy set forth in the equity provision of the Agreement. Thus, DevCon is not entitled to partial summary judgment on this issue.<sup>2</sup>

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<sup>2</sup> It should be noted that because the equity provision was not triggered, the court need not address the other issues raised as to its enforceability, such as vagueness or the appropriateness of specific performance as a remedy pursuant to this provision.

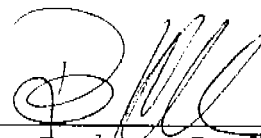
That portion of plaintiff's motion seeking costs and fees is also denied, in the discretion of this Court.

The remainder of the action is severed and continued.

Counsel for both parties are directed to appear for a preliminary conference in IA Part 12, 60 Centre Street, Room 341 on May 16, 2007, at 9:30 a.m.

This constitutes the decision and order of this Court.

Date: March 22 2007



Barbara R. Kapnick  
J.S.C.

**BARBARA R. KAPNICK  
J.S.C.**

**FILED**  
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