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

PRESENT: HON. [redacted] Justice

PART 56

Dorbuna Construction

- v -

Thatch Reply

INDEX NO. 600983/07

MOTION DATE 2/7/08

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
MAR 11 2009
COUNTY CLERK'S OFFICE
NEW YORK

[redacted] IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION

RECEIVED
MAR 10 2009
IAS MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

RECEIVED
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MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 3/9/09

HON. [redacted] J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

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SORBARA CONSTRUCTION CORPORATION,

Plaintiff,

- against -

Index No. 600983/2007

THATCH RIPLEY & CO., LLC, GREY LINE DEVELOPMENT CO., LLC, GOTHAM GREENWICH CONSTRUCTION COMPANY, LLC, GOTHAM CONSTRUCTION COMPANY, McGRAW HUDSON CONSTRUCTION COMPANY, INTERNATIONAL FIDELITY INSURANCE COMPANY,

Defendants.

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HON. RICHARD B. LOWE, III:

In this action by a contractor to recover monies allegedly owed for labor and materials provided on a construction project, defendants Gotham Greenwich Construction Company, LLC and Gotham Construction Company (either defendant individually, or both defendants collectively, Gotham) move, pursuant to CPLR 3211 (a) (1) and (7) and CPLR 3016 (b), for an order dismissing the complaint as against them.

FACTUAL ALLEGATIONS

Plaintiff Sorbara Construction Corporation (Sorbara), as the "Contractor," and defendant Thatch Ripley & Co., LLC (Thatch Ripley), as the "Owner," executed a contract, dated December 17, 2004 (the Contract), pursuant to which Sorbara agreed to perform certain concrete work, and to furnish certain materials, for a building on a property owned by Thatch Ripley (the Property), located at 310 East 53rd Street, New York, New York. Defendant Grey Line Development Co., LLC (Grey Line; Grey Line and/or Thatch Ripley, hereinafter, the Owner) allegedly succeeded Thatch Ripley, in January 2006, as the owner of the Property.[1]

Sorbara alleges that it provided labor and materials pursuant to the terms of the Contract,

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[1]Defendant McGraw Hudson Construction Company -- which is identified in the Contract as the "Construction Consultant," and which also executed the Contract -- does not appear to be relevant to the instant motion.

between February 2005 and September 2006, which had an "agreed price and value" of $13,290,054.00, of which $935,833.05 has not been paid (Amended Complaint [hereinafter, the Complaint], ¶ 18). Sorbara filed a mechanic's lien against the Property, in the amount of $935,833.05, and the Owner thereafter filed an undertaking -- which was executed by defendant International Fidelity Insurance Company as surety -- to discharge the lien.

Gotham was not a signatory to the Contract, but is identified in the Contract as the "Construction Manager" and as an "agent for Owner."[2] Gotham's responsibilities as the Owner's agent allegedly included negotiating the amounts that the Owner would pay for Sorbara's completed work, accepting Sorbara's work, and interfacing with Sorbara on matters relating to payment for the services that Sorbara provided. According to Sorbara, Gotham made various misrepresentations to Sorbara: between March and November 2006 "that Sorbara would be paid [the] outstanding balance due under" the Contract and any change orders thereto; and between March and September 2006 "regarding the value of the backcharges claimed by [the Owner]" (Complaint, ¶¶ 53, 54).[3] Sorbara allegedly relied upon those misrepresentations, to its detriment, by continuing to perform work and to supply materials when it was owed large amounts of money under the Contract, and when, but for the misrepresentations, it would not have continued to provide such services and materials.

The Complaint asserts six causes of action which allege claims for: (1) relief relating to the mechanic's lien; (2) breach of contract; (3) unjust enrichment; (4) unjust enrichment; (5) negligent misrepresentation; and (6) fraud. Each cause of action seeks compensatory damages in the amount

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[2]The entity which is actually identified in the Contract as the Construction Manager is Gotham Greenwich Construction Company, LLC. Although the Complaint also names an entity identified as Gotham Construction Company as a defendant, Gotham asserts that there is no New York corporation bearing that name, and that Gotham Greenwich Construction Company, LLC is the only "Gotham" entity that was involved in the events from which this action arose (*see* Gotham Def. Mem. of Law, at 2 n 2).

[3]According to Gotham, "backcharges" are amounts which, pursuant to paragraphs 17 and 34 (d) of the Contract, the Owner was authorized to hold back or recoup from Sorbara on account of Sorbara's deficient performance of its obligations under the Contract (*see* Gotham Def. Mem. of Law, at 12 n 7).

of $935,833.05, together with interest, and the sixth cause of action also seeks punitive damages in the amount of $5,000,000.00. Only the third, fourth, fifth and sixth causes of action are asserted against Gotham.

DISCUSSION

Sorbara's claims against Gotham are barred, in the first instance, by paragraph 34 (a) of the Contract, which provides, in relevant part, that:

> [n]otwithstanding anything to the contrary herein contained, Contractor agrees that its recourse hereunder shall be limited to Owner's assets and that in no event shall the general or limited partners of Owner be personally liable to Contractor for the payment or performance of any obligations on the part of Owner to be paid or performed hereunder. All claims of Contractor against Owner arising under this agreement or any default or alleged default on the part of Owner shall be satisfied only out of and to the extent of Owner's assets and in no event shall any claim for damages or other relief be made against any of the general or limited partners of Owner or Construction Manager.

(Gaer Affirm., Ex. 4, Contract, ¶ 34 [a].)

Pursuant to the first quoted sentence, Sorbara agreed that "its recourse" under the Contract would be "limited to [the] Owner's assets." That sentence would arguably preclude Sorbara's claims against Gotham inasmuch as the claims -- although they are asserted against Gotham rather than against the Owner, and are denominated as claims for unjust enrichment, negligent misrepresentation and fraud rather than for breach of the Contract -- essentially seek recourse for the Owner's alleged default upon its payment obligations under the Contract. Pursuant to the end of the first sentence, Sorbara also agreed that the partners of the Owner would not be personally liable to Sorbara for any of the Owner's payment or performance obligations under the Contract. The fact that the end of the sentence addresses potential liabilities of the partners of the Owner -- who were not parties to, and would presumably not be liable upon claims for breach of, the Contract -- suggests that the words "recourse hereunder," in the earlier part of the sentence, should be broadly construed, i.e., as encompassing potential claims other than breach of contract which might be asserted by Sorbara against persons or parties other than the Owner. Such a construction would preclude the claims that Sorbara asserts against Gotham herein.

Insofar as the first quoted sentence might be deemed not to conclusively bar Sorbara's claims against Gotham, the second quoted sentence is comprised of two independent clauses joined by the conjunction "and," each of which clauses would, alone, be sufficient to preclude those claims. The first clause provides broadly that "any default or ***alleged default*** on the part of Owner shall be satisfied only out of and to the extent of Owner's assets" (emphasis added). Yet each of the four causes of action which Sorbara asserts against Gotham seeks to recover precisely the same $935,833.05 in damages which the complaint's second cause of action alleges is attributable to the Owner's breach of the Contract, by reason of its default in paying Sorbara the monies owed to it under the Contract.

The second independent clause provides that "in no event shall any claim for damages or other relief be made against any of the general or limited partners of Owner or Construction Manager." Sorbara asserts that the clause does not bar claims against the Construction Manager, but only against partners of the Construction Manager, because the phrase "any of the general or limited partners of" was intended to apply both to the word "Owner" and also to the words "Construction Manager." However, that reading is strained and implausible. The first quoted sentence and the first of the independent clauses in the second quoted sentence twice designate the Owner's assets as the sole proper target of Sorbara's claims under the Contract, and preclude personal liability on the part of the partners of the Owner. Thus, it is wholly consistent with the preceding part of the paragraph, and expected, that the second independent clause should expressly bar any claim for damages against any of the partners of the Owner.

By contrast, Sorbara's assertion that the second independent clause was intended by the parties to preclude claims by Sorbara against the partners of the Construction Manager, but not against the Construction Manager itself, contravenes logic and common sense. The parties presumably knew when they drafted the Contract that, after the Owner, the Construction Manager would be a more probable secondary target than the partners of the Construction Manager of claims asserted by Sorbara in connection with the Contract. The Contract relates the Construction Manager

directly to the Owner, as the Owner's agent, and assigns various responsibilities to the Construction Manager, in connection with the construction project, which require the Construction Manager to interact with Sorbara. The Construction Manager's partners were related to the Owner only indirectly, through the Construction Manager, and were not assigned responsibilities by the Contract, relating to the construction project, which required them to interact with Sorbara. Accordingly, it would be implausible that the parties would have intended the second independent clause to preclude claims against the partners of the Construction Manager, a relatively less likely target of liability, but not against the Construction Manager, a relatively more likely target of liability. Indeed, the glaring omission of any reference to the Construction Manager, which would be the result of such a strained reading, would operate as an invitation to sue the Construction Manager.

Accordingly, the court finds that the second independent clause, read in conjunction with the remainder of the quoted language from paragraph 34 (a) of the Contract, precludes the claims that are asserted by Sorbara against Gotham in this action. However, even assuming, merely arguendo, that paragraph 34 (a) did not bar those claims, dismissal of the claims would be warranted, in any event, on other grounds.

Sorbara asserts that the complaint's third and fourth causes of action each allege a claim for unjust enrichment, and Sorbara itself does not appear to draw any meaningful distinction between the two claims (*see e.g.* Sorbara Mem. of Law, at 1 [stating that "Sorbara asserts three causes of action against Gotham: unjust enrichment, negligence and fraud"], 21-25 [including the assertion that "Sorbara's third and fourth causes of action for unjust enrichment are properly stated ..."]).

The third cause of action alleges: that Gotham, and other defendants, have retained and enjoyed the benefit of labor and materials provided by Sorbara having a value of $935,833.05; and that those defendants, having failed to pay Sorbara therefor, have been unjustly enriched at Sorbara's expense. The fourth cause of action alleges: that Sorbara rendered labor and services for the benefit of Gotham and other defendants pursuant to the Contract and the change orders; that those defendants directly benefitted from Sorbara's labor and services; and that Sorbara is owed

$935,833.05 therefor.

In order to state a cause of action to recover damages for unjust enrichment, a plaintiff must allege that (1) the defendant was enriched, (2) at the plaintiff's expense, and (3) that it is "against equity and good conscience to permit [the defendant] to retain what is sought to be recovered" (*AHA Sales, Inc. v Creative Bath Prods., Inc.*, 58 AD3d 6, 19 [2d Dept 2008] [citation and internal quotation marks omitted]; *see also Local 798 Realty Corp. v 152 W. Condominium*, 55 AD3d 414, 415 [1st Dept 2008]). However, unjust enrichment is a quasi-contractual claim (*see Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572 [2005]), and "[t]he 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" (*Unisys Corp. v Hercules Inc.*, 224 AD2d 365, 367 [1st Dept 1996] [citation and internal quotation marks omitted]). "This is true whether the contract is one between parties to the lawsuit, or where one party to the lawsuit is not a party to the contract" (*Granite Partners, L.P. v Bear, Stearns & Co.*, 17 F Supp 2d 275, 311 [SD NY 1998] [applying New York law]; *see also Jim Longo, Inc. v Rutigliano*, 294 AD2d 541, 542 [2d Dept 2002] [stating that, "[w]here the terms of a contract govern the matter under dispute, and the plaintiff has chosen not to repudiate the agreement but rather to sue under its terms, it cannot also seek to recover the same damages from another party on a theory of quasi contract"]; *Outrigger Constr. Co. v Bank Leumi Trust Co. of N.Y.*, 240 AD2d 382, 384 [2d Dept 1997]; *Graystone Materials v Pyramid Champlain Co.*, 198 AD2d 740, 741 [3d Dept 1993]).

Sorbara's two unjust enrichment claims are precluded by the Contract, because each of those claims seeks to recover the same amount which Sorbara asserts that it was not paid and is owed under the Contract, and which Sorbara seeks to recover in its claim for breach of the Contract. There does not appear to be any dispute between the parties that the Contract is valid and enforceable, and the Contract governs the issue of whether Sorbara is entitled to recover the amount that it seeks. Indeed, Sorbara's unjust enrichment claims are "internally inconsistent" (*Aviv Constr. v Antiquarium, Ltd.*, 259 AD2d 445, 446-447 [1st Dept 1999]) because they aver -- both by new allegation and by incorporation of the Complaint's prior allegations -- the existence of the Contract,

and that the work and materials for which Sorbara seeks to recover payment were provided pursuant to the Contract, and the change orders which were issued under the Contract (*see* Complaint, ¶¶ 41, 46, 47).[4]

Sorbara's unjust enrichment claims against Gotham fail, additionally, because, in order:

> to recover under a theory of quasi contract, a plaintiff must demonstrate that services were performed ***for the defendant*** resulting in its unjust enrichment. It is not enough that the defendant received a benefit from the activities of the plaintiff; if services were performed at the behest of someone other than the defendant, the plaintiff must look to that person for recovery.

(*Kagan v K-Tel Entertainment*, 172 AD2d 375, 376 [1st Dept 1991] [citations omitted; emphasis in original]; *see also Amana Elevation Corp. v Ydrohoos-Aquarius, Inc.*, 244 AD2d 371, 372 [2d Dept 1997].) Regardless of whether Gotham may have received some benefit from Sorbara's services, those services were performed for and at the behest of the Owner rather than for or at the behest of Gotham.

The fifth and sixth causes of action assert claims for negligent misrepresentation and fraud.[5] Those claims allege that Sorbara suffered damages as a result of its reliance upon false representations made by Gotham: (1) between March and November of 2006 that Sorbara would be "paid for its outstanding balance due under," or for "the services and materials it provided ... pursuant to," the Contract and the change orders issued thereunder; and (2) between March and September 2006 "regarding the value of the backcharges claimed by [the Owner]" (Complaint, ¶¶ 53, 54, 62, 64). Sorbara allegedly relied upon those representations by continuing to perform

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[4]Paragraph 37 of the Contract, labeled "Changes and Extras," clearly indicates that "extra work" and work performed pursuant to change orders were performed under or pursuant to the Contract and not apart from the Contract. That paragraph, after referring to changes in work and "extra work," provides that "[a]ll such work shall be executed under the provisions of this Contract" (Contract, ¶ 37).

[5]The fifth cause of action might seem, upon a first reading, to be a claim for breach of the implied covenant of good faith and fair dealing. However, such a claim would not be viable in view of the absence of any contractual relationship between Sorbara and Gotham (*see e.g. Levine v Yokell*, 258 AD2d 296, 296-297 [1st Dept 1999]). Moreover, and in any event, Sorbara asserts that the fifth cause of action is a claim for negligent misrepresentation (Pl. Mem. of Law, at 4, 5-6).

construction work and to supply materials when large amounts of money were owed to it, and when, but for the misrepresentations, it would not have continued to perform such work or to supply such materials (*see id.*, ¶¶ 58, 67-68).

"A claim for negligent misrepresentation requires [a] plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information" (*J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]). "In order to recover for fraud, [a] plaintiff[] must show a representation of material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable reliance by the plaintiff, and resulting injury" (*Pope v Saget*, 29 AD3d 437, 441 [1st Dept 2006]). Moreover, each of the elements of a claim for negligent misrepresentation or fraud must be supported by factual allegations sufficient to satisfy CPLR 3016 (b), which requires, for either claim, that "the circumstances constituting the wrong shall be stated in detail" (CPLR 3016 [b]; *see e.g. Lipton v Unumprovident Corp.*, 10 AD3d 703, 707 [2d Dept 2004]; *Ambassador Factors v Kandel & Co.*, 215 AD2d 305, 307-308 [1st Dept 1995]).

Sorbara's fraud and negligent misrepresentation claims fail, first, because the only fraud and negligent misrepresentation alleged by those claims relates to an alleged breach of contract (*see e.g. Zachariou v Manios*, 50 AD3d 257, 257 [1st Dept 2008]; *Greenman-Pedersen, Inc. v Levine*, 37 AD3d 250, 250 [1st Dept 2007]; *River Glen Assoc. v Merrill Lynch Credit Corp.*, 295 AD2d 274, 275 [1st Dept 2002]). The first of the two types of purported misrepresentations were merely representations to the effect that the Owner would pay Sorbara the amount that Sorbara was owed under the Contract, such that the Owner's alleged failure to pay Sorbara that amount would be a breach of the Contract. A fraud or negligent misrepresentation claim based upon the second type of purported misrepresentations -- "regarding the value of the backcharges claimed by [the Owner]" -- would also relate to the Owner's alleged breach of the Contract, inasmuch as the Owner's right to hold back or recoup such amounts is provided for in, and would be governed by, the Contract (*see* Contract, ¶¶ 17, 34 [a], [d]). That the only fraud and negligent misrepresentation charged relate to

an alleged breach of contract is further evidenced by the fact that Sorbara's fraud and negligent misrepresentation claims, apart from a demand for punitive damages, seek the same damages as Sorbara's breach of contract claim (*see e.g Coppola v Applied Elec. Corp.*, 288 AD2d 41, 42 [1st Dept 2001]; *Krantz v Chateau Stores of Canada*, 256 AD2d 186, 187 [1st Dept 1998]).

Sorbara argues that its fraud and negligent misrepresentation claims against Gotham are not precluded by its claim for breach of the Contract, because Gotham was not a party to the Contract, and because the breach of contract claim is not asserted against Gotham. However, the principle that "a cause of action to recover damages for fraud will not arise when the only fraud charged relates to a breach of contract" has been applied to dismiss a plaintiff's fraud claim against an agent for a disclosed principal where, as here, the plaintiff asserted a breach of contract claim against the principal, the agent was not a party to the contract which was the basis of that claim, and there was no contractual relationship between the plaintiff and the agent (*Mastropieri v Solmar Constr. Co.*, 159 AD2d 698, 700 [2d Dept 1990]; *cf. Rivas v AmeriMed USA, Inc.*, 34 AD3d 250, 250 [1st Dept 2006]).

Sorbara's fraud and negligent misrepresentation claims are deficient, additionally, in that they fail to satisfy the pleading requirements of CPLR 3016 (b). With regard to the purported representations to the effect that Sorbara would be paid the "outstanding balance due" under the Contract, Sorbara has failed to allege, inter alia, facts indicating: that Gotham ever specified any particular amount that was due to Sorbara under the Contract and which the Owner would pay; that the purported representations were known by Gotham to be false at the time when they were made; or that the purported representations amounted to anything more than a vague and generalized promise that the Owner would perform under the Contract. With regard to the purported misrepresentations "regarding the value of the backcharges claimed by" the Owner, Sorbara has failed to allege even what the substance of those representations was. Sorbara's memorandum of law states that Gotham made representations regarding the backcharges to the effect "that the Owner's claims for back charges were excessive" (Pl. Mem. of Law, at 13). However, that statement, if true, would undermine Sorbara's contention that it reasonably relied upon the

representations by continuing to perform work because it "never knew there was a dispute as to payment" (*id.*).

Indeed, Sorbara has failed to adequately allege the element of reasonable reliance with respect to either its negligent misrepresentation claim or its fraud claim. Those claims appear to be based essentially upon Gotham's representations to the effect: that the Owner would pay amounts to Sorbara under the Contract which the Owner thereafter maintained that it was not obligated to pay; and, with regard to backcharges, either that the amounts which the Owner claimed to be owed for backcharges were excessive, or that the Owner would impose a lesser amount of backcharges upon Sorbara than the Owner did, in fact, eventually seek to impose. However, the Contract specifically authorized the Owner to withhold money from Sorbara for unsound, improper or incomplete work and/or materials, and the Contract provided, further, that no "waiver of any of the conditions or provisions of this Contract or of any of the rights of either of the parties hereunder [would] be effective or binding unless such waiver [was] in writing and signed by the party claimed to have given, consented to or suffered the waiver" (*see* Contract, ¶¶ 17, 34 [a], 34 [d], 42). Thus, Sorbara could not reasonably have relied upon the purported representations by Gotham -- to the effect that the Owner would pay Sorbara amounts which the Owner later maintained that it was not obligated to pay, or that the Owner's claims for backcharges were excessive, or that the Owner would impose a lesser amount of backcharges than the Owner eventually sought to impose -- because such representations would have constituted a waiver by Gotham of the Owner's contractual right to withhold money for various alleged deficiencies of performance by Sorbara, and the Contract barred any such waiver which was not in writing and signed by the Owner.

Reasonable reliance would have been lacking with respect to the purported representations, additionally, because the representations, as alleged, were merely vague and generalized statements of expectation as to future conduct by a party -- i.e., the Owner -- over whom Gotham did not exercise control.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the motion to dismiss is granted and the complaint is severed and dismissed as against defendants Gotham Greenwich Construction Company, LLC and Gotham Construction Company, and the Clerk is directed to enter judgment in favor of those defendants, with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the remainder of the action shall continue.

Dated: March 9, 2009

ENTER:

J.S.C.