

**Pryor Cashman, LLP v Ornstein Leyton Co.**

2009 NY Slip Op 32455(U)

October 19, 2009

Supreme Court, New York County

Docket Number: 102009/09

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Ling - Cohen  
Justice

PART 36

Index Number : 102009/2009  
PRYOR CASHMAN LLP  
VS.  
ORNSTEIN LEYTON COMPANY  
SEQUENCE NUMBER : # 001  
DISMISS

INDEX NO. 102009-09  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. #001  
MOTION CAL. NO. \_\_\_\_\_

were read on this motion to/for dismiss cross-motion to amend

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

PAPERS NUMBERED

1, 2

5

3, 4

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion by defendant to dismiss  
a cross-motion by plaintiff to amend the complaint  
are decided in accordance with the attached  
memorandum decision

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

**FILED**  
OCT 23 2009  
COUNTY CLERK'S OFFICE  
NEW YORK  
HON. DORIS LING-COHAN

Dated: 10/19/09

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 36

-----X

PRYOR CASHMAN, LLP,

Plaintiff,

Index No.: 102009/09  
DECISION/ORDER

-against-

Motion Seq. No.: 001

ORNSTEIN LEYTON COMPANY,

Defendant.

-----X

HON. DORIS LING-COHAN, J.S.C.:

In this commercial contract action, defendant moves to dismiss the complaint, and plaintiff cross-moves for leave to amend the complaint (collectively, motion sequence number 001). For the following reasons, defendant's motion is granted in part and denied in part, and plaintiff's cross motion is granted.

BACKGROUND

Plaintiff Pryor Cashman, LLP (Pryor Cashman) is a law firm licensed to do business in New York. See Notice of Motion, Exhibit A (complaint), ¶ 1. The named defendant, Ornstein Leyton Company (OLC), is the "d/b/a" of proposed defendant Ornstein Leyton Realty, Inc. (OL Inc.), a New York State licensed real estate management company. *Id.*; Leyton Affidavit, ¶¶ 8-9; Exhibit E. Pryor Cashman alleges that OL Inc. is a related company of proposed defendant Ornstein Leyton Washington, LLC (OLW), a New York State licensed real estate development company. See Notice of Cross Motion, Radcliff Affidavit, ¶ 4. Pryor Cashman also alleges that proposed defendant Scott Leyton (Leyton), an individual residing in New York State, is an officer of both OL Inc. and OLW. *Id.*; Exhibit C (proposed amended complaint), ¶ 4.

**FILED**  
OCT 23 2009  
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NEW YORK

In November of 2006, Pryor Cashman was retained by the defendant and/or proposed

defendants to perform legal work in connection with a condominium development project (the Washington Avenue development project) that involved a building located at 545 Washington Avenue (the building) in the County of Kings, City and State of New York. *See* Notice of Motion, Leyton Affidavit, ¶¶ 3-5. Pryor Cashman has presented one copy of a retainer agreement, dated November 3, 2006, that is unsigned, but marked “executed” in the upper right corner of the first page, and another copy of the same retainer agreement that was signed by Leyton in his capacity as a “manager” of OLW. *See* Notice of Cross Motion, Exhibits C-1, C-2. Pryor Cashman claims that it performed substantial legal work in connection with the Washington Avenue development project, but that it was never paid for said work. *Id.*; Exhibit C, ¶¶ 15-16

Pryor Cashman originally commenced this action on February 9, 2009, by serving a summons and complaint that named OLC as the sole defendant, and set forth causes of action for breach of contract and unjust enrichment. *See* Notice of Motion, Exhibit A. Rather than submit an answer, OLC served the instant motion to dismiss, which alleges that it was not a party to the retainer agreement between Pryor Cashman and OLW (motion sequence number 001). In response, Pryor Cashman served an order to show cause seeking leave to amend its complaint to name the correct defendants and add additional causes of action. The court declined to sign Pryor Cashman’s application for an order to show cause in a decision, dated April 8, 2009, that found that Pryor Cashman needed to proceed via a notice of motion supported by an affidavit of merits rather than an attorney’s affirmation. *See* Notice of Cross Motion, Exhibit A. Pryor Cashman thereafter served the instant cross motion for leave to amend its complaint. Pryor Cashman’s proposed amended complaint names OLC, OLW and Leyton as defendants, and sets

forth causes of action for 1) breach of contract (against OLC); 2) fraud (against OLC and Leyton); 3) unjust enrichment (against all defendants); and 4) breach of contract (against OLW). *Id.*; Exhibit C.

## DISCUSSION

### Defendant's Motion

When evaluating a defendant's motion to dismiss, pursuant to CPLR 3211 (a), the test “is not whether the plaintiff has artfully drafted the complaint but whether, deeming the complaint to allege whatever can be reasonably implied from its statements, a cause of action can be sustained.” *Jones Lang Wootton USA v LeBoeuf, Lamb, Greene & MacRae*, 243 AD2d 168, 176 (1<sup>st</sup> Dept 1998), quoting *Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46, 48 (1st Dept 1990). To this end, the court must accept all of the facts alleged in the complaint as true, and determine whether they fit within any “cognizable legal theory.” *See e.g. Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P.*, 96 NY2d 300, 303 (2001). The Court of Appeals has held that a “CPLR 3211 (a) (1) motion to dismiss on the ground that the action is barred by documentary evidence, ... may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law.” *Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 (2002), quoting *Leon v Martinez*, 84 NY2d 83, 88 (1994).

As previously mentioned, the first cause of action in Pryor Cashman's complaint alleges breach of contract by OLC. *See* Notice of Motion, Exhibit A, ¶¶ 3-10. The proponent of a breach of contract claim must plead the existence and terms of a valid, binding contract, its breach, and resulting damages. *See e.g. Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435, 436

(1<sup>st</sup> Dept 1988). Here, OL Inc. argues that this cause of action must be dismissed because it was not a party to the contract between Pryor Cashman and OLW. *Id.*; Rose Affirmation, ¶¶ 5-7. Well settled New York State law does indeed hold “that nonparties to an agreement are not bound thereby.” *Manhattan Real Estate Equities Group LLC v Pine Equity NY, Inc.*, 27 AD3d 323, 323 (1<sup>st</sup> Dept 2006). Pryor Cashman nonetheless cites the decision by the Appellate Division, Third Department, in *Siddiqui v Nationwide Mut. Ins. Co.* (255 AD2d 30, 32-33 [3d Dept 1999]) for the proposition that dismissal is improper where there is a dispute about the authenticity of the contract in question. *See* Notice of Cross Motion, Radcliff Affidavit, ¶ 10. OL Inc.’s reply papers assert that there is no dispute, that the documentary evidence discloses that OLC is merely OL Inc.’s d/b/a, and that neither OLC nor OL Inc. is a signatory to the subject retainer agreement. *See* Rose Affirmation in Further Support, ¶¶ 13-16. After reviewing the parties’ submissions, the court agrees. The documents clearly show that OLW was the party with which Pryor Cashman contracted, nor do they show that either OL Inc./OLC or Leyton (as an officer thereof) executed the retainer agreement with Pryor Cashman. Therefore, the court concludes that Pryor Cashman’s first cause of action, for breach of contract by OLC, is barred by said documentary evidence. Accordingly, the court finds that the portion of defendant’s motion that seeks dismissal of this cause of action should be granted.

The second cause of action in Pryor Cashman’s complaint alleges unjust enrichment by OL Inc. *See* Notice of Motion, Exhibit A, ¶¶ 11-14. Although defendant’s motion seeks dismissal of the entire complaint, it does not address any legal argument to this cause of action. Accordingly, the court deems that defendant has abandoned its request to dismiss Pryor Cashman’s second cause of action, and therefore, the portion of defendants’ motion that seeks

such relief is denied.

### Plaintiff's Cross Motion

“It is well established that leave to amend a pleading shall be freely granted absent prejudice or surprise resulting from the delay,” unless “the proposed pleading fails to state a cause of action, or is palpably insufficient as a matter of law [internal citations omitted].” *Davis & Davis, P.C. v Morson*, 286 AD2d 584, 585 (1<sup>st</sup> Dept 2001). Here, three of Pryor Cashman’s four proposed claims may be properly interposed.

As mentioned earlier, Pryor Cashman’s first proposed cause of action alleges breach of contract by OLC. *See* Notice of Cross Motion, Exhibit C, ¶¶ 17-21. However, as was discussed in the preceding portion of this decision, OLC cannot be liable to Pryor Cashman for breach of contract because OLC was not a party to the retainer agreement. Accordingly, Pryor Cashman’s first proposed cause of action is “palpably insufficient as a matter of law,” and the portion of Pryor Cashman’s cross motion which seeks leave to amend its complaint to assert such a cause of action is denied.

Pryor Cashman’s second proposed cause of action alleges fraud by OLC and Leyton. *Id.*, ¶¶ 22-26. The proponent of a claim for fraud “must allege misrepresentation or concealment of a material fact, falsity, scienter by the wrongdoer, justifiable reliance on the deception, and resulting injury.” *Zanett Lombardier, Ltd. v Maslow*, 29 AD3d 495, 495 (1<sup>st</sup> Dept 2006). Here, Pryor Cashman specifically alleges that it “was induced to perform legal services for ... [defendants] based on defendants’ false representation that the blank retainer had been signed, defendants’ false representation that OLC was a partnership and that OLC was the party contracting with plaintiff for legal services.” *See* Notice of Cross Motion, Radcliff Affidavit, ¶

16. Defendants respond with a boilerplate argument that “plaintiff has failed to state with particularity the alleged fraud,” as required by CPLR 3016 (b). *See* Rose Affirmation in Further Support, ¶ 18. The court rejects this argument because, as just noted, Pryor Cashman has delineated three instances of alleged fraud in its papers. Accordingly, Pryor Cashman’s cross motion is granted to the extent of permitting it to serve an amended complaint that includes the second proposed cause of action for fraud.

Pryor Cashman’s third proposed cause of action alleges unjust enrichment against all defendants. *See* Notice of Cross Motion, Exhibit C, ¶¶ 27-31. “The criteria for recovery under a theory of unjust enrichment are: ‘(1) the performance of the services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services.’” *Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 108 (1<sup>st</sup> Dept 2002), quoting *Moors v Hall*, 143 AD2d 336, 337-338 (2d Dept 1988). Pryor Cashman argues that its proposed amended complaint alleges each of the foregoing elements as against defendants. *See* Notice of Cross Motion, Radcliff Affidavit, ¶¶ 17-18. Defendants’ reply papers do not raise any legal argument against this claim or any of its component elements. Accordingly, the court deems that defendants have abandoned their objection thereto, and therefore, Pryor Cashman’s cross motion is granted to the extent of permitting it to serve an amended complaint that includes the third proposed cause of action for unjust enrichment.

The fourth cause of action in Pryor Cashman’s proposed amended complaint alleges breach of contract by OLW. *Id.*, Exhibit C, ¶¶ 32-36. As previously discussed, OLW was a signatory to the subject retainer agreement. The court further notes that - once again - defendants

do not raise any legal argument in opposition to this proposed cause of action in their reply papers. Accordingly, Pryor Cashman's cross motion is granted to the extent of permitting it to serve an amended complaint that includes the fourth proposed cause of action for breach of contract.

As a final matter, the court notes that the bulk of defendants' reply papers are devoted to the argument that, like its original order to show cause, Pryor Cashman's cross motion should be denied because is not supported by an affidavit of merits from a party with actual knowledge of the facts, but by an attorney's affirmation. *See* Rose Affirmation in Further Support, ¶¶ 4-12. This is not accurate. Pryor Cashman's cross motion is supported by an affidavit from an associate at that law firm who states that he has personal knowledge of the facts, and worked on a number of legal matters relating to the Washington Avenue development project. *See* Notice of Cross Motion, Radcliff Affidavit, ¶¶ 1, 5, 7-9. Thus, the ground upon which the court declined to sign Pryor Cashman's original order to show cause is not present here, and the court rejects defendants' reply argument.

#### DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3211, of defendant Ornstein Leyton Company is granted solely to the extent that the first cause of action in the complaint is dismissed, but is otherwise denied; and it is further

ORDERED that the cross motion, pursuant to CPLR 3025 (b), of plaintiff Pryor Cashman, LLP for leave to amend the complaint herein is granted, in part, to the extent that leave shall be granted to add Ornstein Leyton Realty, Inc. d/b/a Ornstein Leyton Company, Ornstein

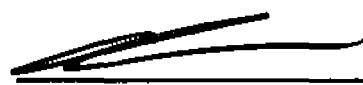
Leyton Washington, LLC and Scott Leyton as defendants in this action, and to amend the second, third and fourth causes of action and to this extent the amended complaint in the form proposed as annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry; and it is further

ORDERED that leave to amend the complaint is denied with respect to the proposed first cause of action and that cause of action is stricken; and it is further

ORDERED that the defendants shall answer the amended complaint within 20 days from the date of said service; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon defendant with notice of entry.

Dated: New York, New York  
October 19, 2009

  
Hon. Doris Ling-Cohan, J.S.C.

J:\Dismiss\pryor.ornstein.lane.wpd

**FILED**  
OCT 23 2009  
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