SCAN

SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 9

C.J.L. CONSTRUCTION, INC.,

Plaintiff,

INDEX NO.: 021501/2008
MOTION DATE: 10/22/2009
MOTION SEQUENCE: 001 and 002

-against-

GALAXY GENERAL CONTRACTING CORP.,

Defendant.

The following papers read on this motion:

Notice of Motion, Affirmation, Affidavit & Exhibits Annexed	1
Notice of Cross-Motion, Affidavit, Affirmation & Exhibits Annexed	2
Plaintiff's Answering Affidavit to Defendant's Motion to Dismiss of Marco P. Ferreira	3
Plaintiff's Answering Affirmation to Defendant's Motion to Dismiss of John J. Meglio & Exhibits Annexed	4
Reply Affidavit of Steve Zervoudis & Attachment	5

Plaintiff, C.J.L. Construction, Inc., moves [Mot. Seq. 001], pursuant to CPLR 3025(b), for an Order of this Court, granting it leave to amend it's complaint so as to make it more definite and certain. Defendant, Galaxy General Contracting Corp., cross moves [Mot. Seq. 002], pursuant to CPLR 3212, for an Order of this Court, granting it summary judgment dismissal of plaintiff's complaint. The motions are determined as follows:

As can best be determined from the papers herein, the undisputed facts are as follows:

Defendant, Galaxy General Contracting Corp. ("Galaxy") is a contractor engaged in the general construction and/or remodeling of buildings and various structures. Plaintiff, C.J.L.

Construction Inc. ("CJL"), is a contractor engaged in the business of excavation. Specifically, CJL erects forms in the excavations to hold concrete in order to create walls and foundations, installs the required re-bar support in the excavation and the forms and ultimately pours concrete into those forms.

It is undisputed that the plaintiff and the defendant had worked on many construction projects in the years past. Defendant Galaxy admits that from time to time, it "got" several excavation jobs for CJL. However, despite their lengthy professional relationship, the parties take issue as to the form of their business agreements for all, including the subject construction project; that is, while plaintiff claims that the harmonious working relationship between the parties was based upon a handshake and an oral agreement, defendant, on the other hand, maintains that it only aided the plaintiff in getting excavation jobs which required the plaintiff and the defendant to enter into written contracts and for plaintiff to provide insurance coverage for it, as well as the owners and developers. Defendant claims that their agreements were simple: if you do the proper work and the owner pays for it, then it would get paid. Galaxy maintains that at no time did it assume the role of guarantor of payment for the job.

The dispute forming the basis for this action revolves around an agreement that the defendant had with the City of Peekskill ("City") to perform work, labor and services in order to erect a commercial/residential building on a site known as the Peekskill Live Work Lofts at 922 Main Street, Peekskill, New York (the "Construction Site"). It is undisputed that there was no written agreement for this job. Plaintiff alleges that in May 2006, at the defendant's request, it went to the Construction Site, and performed the required excavation but that in August 2006, the defendant instructed the plaintiff to stop work at the Site because a dispute arose with the City of Peekskill and the City issued a "Stop Work Order." Plaintiff claims that it was also told by the defendant, not to remove the forms erected in the excavation in spite of the fact that the forms were the personal property of the plaintiff. Ultimately, plaintiff claims that in spite of it's demands for payment, it was never paid for the work, labor and services it performed for the defendant and for the rental value of the forms for the period that they remained at the Construction Site. Plaintiff alleges that it is owed $457,209 for the work that it did which, it admits, is only partially complete.

These allegations form the basis for plaintiff's first cause of action in its verified complaint.

For its second cause of action, plaintiff alleges that Galaxy was unduly enriched by the partial work that it did at the Site. The second cause of action attempts to assert a claim for "unjust enrichment." Plaintiff's third cause of action attempts to create an "account stated" claim wherein plaintiff alleges that while it "on several occasions" presented a bill for the work, labor, services and materials it supplied to the defendant, to which the defendant never objected, defendant never made any payments. Finally, plaintiff's fourth cause of action attempts to state a claim for conversion. Plaintiff alleges that while it demanded that the defendant return to it the forms and forming systems installed at the site, by refusing to return to the plaintiff said forms and forming systems, the defendant has unlawfully converted same.

It is undisputed that the plaintiff never filed a Notice of Claim against the City of Peekskill. Nor did the plaintiff ever file a mechanics lien against the owner/developer. Plaintiff commenced this action on or about December 1, 2008. Defendant, Galaxy, joined issue on March 30, 2009 whereupon it served, *inter alia*, its Answer wherein it denied the allegations of the complaint and asserted nine affirmative defenses including failure to state a cause of action and that all causes of action are in violation of the Statute of Frauds.

Notably, in 2007 (prior to the commencement of this action), Galaxy commenced an action against the City of Peekskill in the Supreme Court Bronx County, Index Number 300625/07 (Galaxy v. City of Peekskill) for damages it sustained.

Upon the instant motion, plaintiff seeks an Order granting it leave to serve a more definite and particular complaint. Plaintiff's motion is granted in part and denied in part.

CPLR 3025(b) provides that leave to amend shall be freely given upon such terms as may be just. While amendment of a pleading should be freely granted (CPLR 3025[b]), it may be denied where the proposed amended cause of action plainly lacks merit (*Lucido v. Mancuso*, 49 AD3d 220, 221-22 [2nd Dept. 2008]; *Kraycar v. Monahan*, 49 AD3d 507, 508 [2nd Dept. 2008]), and where the amendment will not prejudice or surprise the opposing party (*Edenwald Contracting Co. v. City of New York*, 60 NY2d 957, 959 [1983]; *Acuri v. Ramos*, 7 AD3d 741, 741 [2nd Dept. 2004]).

The Second Department in *Lucido v. Mancuso* recently relaxed the proof that is needed to amend a pleading and stated that the proper rule is that a plaintiff's amendment to add a claim should be granted without an automatic inquiry into the merits. While the Second Department in *Lucido*

acknowledged that room does remain for the cursory denial of the motion to amend, said denial ought only be made where, from all of the papers before the court on the motion, including the pleadings, the Court is able to determine that the proposed amendment is either "palpably insufficient" or "patently devoid of merit."

In this case, plaintiff's proposed amended complaint attempts to assert nine causes of action (five more than four causes of action in the original complaint), which are as follows:

FIRST:	Breach of Agreement;
SECOND:	Quantum Meruit;
THIRD:	Unjust Enrichment;
FOURTH:	Conversion - loss of rental value;
FIFTH:	Conversion - loss of value of property;
SIXTH:	Delivery and acceptance of materials at the site;
SEVENTH:	Account Stated;
EIGHTH:	Cost of replacement of converted equipment;
NINTH:	Inspection of concrete forms left at site at direction of Defendant.

Considering the relaxed requirements of CPLR 3025 (b), as enunciated in *Lucido,* supra, the proposed amendments to the pleading will be accepted unless "palpably insufficient or patently devoid of merit." (*Trataros Constr., Inc. v. New York City Hous. Auth.*, 34 A.D.3d 451, 452—453, [2d Dept. 2006]).

To make out a claim for quantum meruit, the claimant must establish (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 (*Geraldi v. Melamid*, 212 AD2d 575, 576 [2nd Dept. 1995]; *Martin H. Bauman Ass. v. H. & M International Transport*, 171 AD2d 479 [1st Dept. 1991]). The plaintiff must also establish that the services were performed at the request or behest of the defendant (*Prestige Caterers v. Kaufman*, 290 AD2d 295 [1st Dept. 2002]; *Lakeville Pace Mechanical, Inc. v. Elmar Realty Corp.*, 276 AD2d 673 [2nd Dept. 2000]). However, where an express agreement exists between the parties, the rights and liabilities, as between them, should be determined based on a contract theory (*Apfel v. Prudential-Bache Sec., Inc.*, 81 NY2d 470, 479 [1993]). Therefore, the performance required by the

terms of an express contract, will preclude recovery in quantum meruit (*Mary Matthews Interiors, Inc. v. Levis*, 208 AD2d 504, 506 [2nd Dept. 1994]).

In its proposed fourth cause of action, plaintiff appears to be making a claim for "unjust enrichment" as well as a claim for "conversion." Plaintiff alleges that "[t]he Defendant assumed possession and control of the [forms and forming systems which it installed at the Construction Site for use in the pouring of concrete foundations and walls] since the Defendant received benefits as the result of leaving them in the Construction Site" and "[t]he Defendant received the benefits of the Plaintiff's work, labor, services and material supplied and delivered to the Site and has enriched itself and benefitted itself thereby."

"[T]o prevail on a claim of unjust enrichment, a Plaintiff must establish that the Defendant benefitted at the Plaintiff's expense and that equity and good conscience require restitution" (*Whitman Group Realty, Inc. v. Galano*, 41 AD3d 590, 593 [2nd Dept. 2007]), *citing Kaye v. Grossman*, 202 F.3d 611, 615-616 [2nd Cir. 2000]); *City of Syracuse v. R.A.C. Holding*, 258 AD2d 905, 906 [4th Dept. 1999]). However, "[r]ecovery for unjust enrichment is barred by a valid and enforceable contract" (*Whitman Group Realty, Inc. v. Galano,* supra, *citing Samiento v. World Yacht Inc.*, 38 AD3d 328, 329 [1st Dept. 2007]); *Start v. City of New York*, 31 AD3d 530, 531 [2nd Dept. 2006]). 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 Distributing Corp. v. State*, 30 NY2d 415, 421 [1972]). The plaintiff "must show 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" (*Cruz v. McAneney*, 31 AD3d 54, 59 [2nd Dept. 2006]). A person receives a benefit "where his debt is satisfied or where he is saved an expense or loss" (*Electric Ins. Co. v. Travelers Ins. Co.*, 124 AD2d 431, 432 [3rd Dept. 1986]).

In this case, Plaintiff pleads a breach of contract in its first cause of action. Plaintiff's claim, to the extent that it sounds in "unjust enrichment" is palpably insufficient. Plaintiff simply has not shown, nor even alleged, how the defendant has been "enriched" and how this purported unjust enrichment was "at the plaintiff's expense." There is no allegation that defendant received a benefit because his debt was satisfied or he was saved any expense or loss (*Electric Ins. Co. v. Travelers Ins.*

Co., supra).

Plaintiff's Fourth cause of action sounds in conversion. A conversion occurs when "someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession" (*Colavito v. New York Organ Donor Network*, 8 NY3d 43, 50 [2006]; *Fiorenti v. Central Emergency Physicians PLLC*, 305 AD2d 453 [2nd Dept. 2003]). A necessary element of conversion is "defendant's dominion over the property or interference with it, in derogation of plaintiff's rights" (*Id*). Based upon the papers submitted to this Court, it is undisputed that the subject construction project was terminated due to a "stop work order" issued by the City of Peekskill. Plaintiff alleges that Defendant precluded them from removing the concrete forms, and subsequently removed them. However, the claim is for damages in the form of the rental value of the converted property, which is not the basis of damage for conversion. Plaintiff has adequately alleged a conversion, but the damages as claimed are patently devoid of merit, and the Fourth Cause of Action is therefore without merit.

In the Fifth cause of action Plaintiff adequately alleges conversion, with damages in the amount of $7,835.00, representing the market value of the concrete forms as of the date of conversion. The motion to include this claim in the amended pleading is granted.

Plaintiff alleges in the Sixth cause of action that materials were delivered to the defendant, which were consumed during the construction process. This claim is subsumed in the First Cause of Action which alleges breach of a contract between the parties. It is insufficient and the application to include it in the amended complaint is denied. The Seventh Cause of Action, alleging an account stated, is neither palpably insufficient or patently devoid of merit. (*Nebraskaland, Inc. V. Best Selections, Inc.*, 303 A.D.2d 662 [2d Dept. 2003]). While it obviously incorporates claims of damage which are not recoverable, such as the $196,720 rental value of the concrete forms, the pleading of this Cause of Action is adequate to survive the pleading stage.

In its Eighth Cause of action, plaintiff seeks to recover the costs it incurred in replacing the forms and the forming systems (which it alleges were improperly converted by the defendant) as well as the costs of sending personnel to the Construction Site to inspect the forms and the forming systems. Damages for conversion are the value of the property at the time of conversion, not the cost of new replacements. (*Express Freight Systems, Inc. v. Walter*, 219 A.D.2d 813 [4th Dept. 1995]).

The Eighth Cause of Action is patently devoid of merit and the application to include it in the amended complaint is denied.

Finally, plaintiff's Ninth cause of action is for the labor costs incurred in inspecting the concrete forms which are alleged to have been converted. To the extent Plaintiff claims damage in connection with the work, labor and services performed at the request of the Defendant, this claim is part and parcel of the breach of contract action in the First Cause of Action. The application to include the Ninth Cause of Action in the amended pleading is denied.

Accordingly, plaintiff's motion, for an Order, granting it leave to amend it's complaint is granted but only with respect to plaintiff's First, Fifth, and Seventh causes of action. The motion is denied in all other respects.

With respect to defendant's cross motion, summary judgment dismissal of plaintiff's complaint (both, as originally claimed and as amended) is denied in accordance with the foregoing.

Galaxy's motion is hinged upon its argument that the causes of action alleged in plaintiff's complaint are in violation of the Statute of Frauds.

It is true that the General Obligations Law § 5-701(a)(1) requires agreements which cannot be performed within one year from the date of their making to be in writing. However, courts have generally been reluctant to place too broad an interpretation to this provision, limiting it to agreements which only by their very terms have absolutely no possibility of being performed within the year (*D&N Boening, Inc. v. Kirsch Beverages*, 63 NY2d 449 [1984]). Thus, "[w]herever an agreement has been found to be susceptible of fulfillment within that time, in whatever manner and however impractical, [the Court of Appeals] has held the one-year provision of the Statute to be inapplicable, a writing unnecessary, and the agreement not barred" (*id.* at 455; *see also, Freedman v. Chem. Constr. Corp.*, 43 NY2d 260 [1977]). Based upon the undisputed allegations contained in plaintiff's original complaint, (or in the proposed amended complaint, *infra*), this Court finds that it is possible for the plaintiff to have completed his work within one year, before the completion date of the project with the State. Accordingly, the plaintiff's purported agreement with the defendant is not barred by General Obligations Law §5-701(a)(1).

Having failed to make a prima facie showing of entitlement to judgment as a matter of law, defendant's cross motion for summary judgment is denied (*Winegrad v. New York Univ. Med. Ctr.*,

64 NY2d 851 [1985]).

A realistic evaluation of this action leads to the inevitable conclusion that this matter does not meet the $100,000 monetary threshold for the Commercial Division in Nassau County. 22 NYCRR § 202.70. What remains of the Complaint is a breach of contract claim for $25,800 in the First cause of action, and the $7,385 value of concrete forms in the Fifth cause of action. To the extent that the Seventh cause of action for an account stated is viable, it cannot include the alleged $196,572 alleged rental value of the concrete forms. The account stated, to the extent that it remains in the complaint, can only be for cognizable damages as set forth in the complaint, which are substantially less than $100,000.

The matter is referred to Differentiated Case Management for assignment to an IAS Part.

This shall constitute the decision and order of this Court.

Dated: November 30, 2009

J.S.C.