

**Yeshiva of Far Rockaway v Real Estate Ventures
Unlimited LLC**

2010 NY Slip Op 30831(U)

March 23, 2010

Supreme Court, Queens County

Docket Number: 17757/07

Judge: Orin R. Kitzes

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Short Form Order

NEW YORK SUPREME COURT -QUEENS COUNTY

PRESENT: ORIN R. KITZES

PART 17

Justice

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YESHIVA OF FAR ROCKAWAY,

Plaintiff,

Index No.: 17757/07

Motion Date: 3/17/10

-against-

Motion Cal. No.: 63

REAL ESTATE VENTURES UNLIMITED LLC

and JAY DEUTCHMAN,

Defendants.

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The following papers numbered 1 to 11 read on this motion by defendants **REAL ESTATE VENTURES UNLIMITED LLC** (“REVU”) and **JAY DEUTCHMAN**, to dismiss the complaint pursuant to CPLR 3211 and 3212.

	PAPERS NUMBERED
Notice of Motion-Affirmations-Exhibits.....	1-4
Memorandum of Law.....	5-6
Affirmation in Opposition-Exhibits.....	7-9
Reply Affirmation.....	10-11

Upon the foregoing papers it is ordered that the motion by defendants REVU and Deutchman to dismiss the complaint against Deutchman pursuant to CPLR 3212 and to dismiss the first and third causes of action against REVU pursuant to CPLR 3211 is granted for the following reasons:

According to the complaint, on or about April 13, 2005, Jay Deutchman on behalf of himself and REVU entered into a contract with plaintiff Yeshiva of Far Rockaway (“Yeshiva”) to construct a gymnasium and office, as per architectural plans. Plaintiff paid defendants more than \$1,700,000 for the completion of this work, however, defendants failed to complete the work, having abandoned the job. Thereafter, plaintiff brought this action and seeks recovery on three causes of action; repudiation, breach of contract, and unjust enrichment. Defendants now seek to dismiss the entire complaint against Deutchman and the first and third causes of action against REVU. Plaintiff opposes this motion.

The branch of the motion seeking dismissal of the complaint against Deutchman, pursuant to CPLR 3212 is granted. Defendants claim that Deutchman did not personally enter into the Contract or any agreement with plaintiff, nor did he personally guarantee REVU’s

performance of any agreement it has with plaintiff. Accordingly, Deutchman cannot be held to be personally liable for the debts and obligations of REVU and the action should be dismissed as against Deutchman. In support of these claims, defendants have submitted a copy of the April 13, 2005 agreement, which is written on REVU stationery and states that the contract is between plaintiff and defendant REVU, and is signed by Jay Deutchman, with his name printed above Real Estate Ventures Unlimited LLC. They have also submitted an affidavit of Jay Deutchman wherein he states he is a member of REVU and its Articles of Organization (which are also submitted with this motion) do not provide that its members are personally liable for the debts and obligations of REVU. He also states that he never agreed to being personally liable for REVU's debts and obligations and never entered into any agreement, in his personal capacity, with plaintiff relating to the subject project. Defendants have also submitted the deposition transcripts of Rabbi Kohn, the Executive Director of plaintiff, wherein he stated that the April 13 agreement was the only agreement in which plaintiff entered into regarding the subject project.

Plaintiff claims that the motion is premature as discovery has not been completed and additional facts need to be developed. Plaintiff claims Deutchman needs to be deposed so plaintiff can investigate the exact nature and relationship between REVU and Deutchman. Plaintiff also claims additional discovery is needed to examine the operating agreement of REVU and if Deutchman signed other contracts for REVU the same way he signed the contract with plaintiff. As to the merits, plaintiff claims Deutchman signed the contract without indicating he was doing so as a member of the REVU limited liability company and that plaintiff hired Deutchman to do the work based on his reputation, not based on any information about REVU.

It is axiomatic that the Summary Judgment remedy is drastic and harsh and should be used sparingly. The motion is granted only when a party establishes, on papers alone, that there are no material issues and the facts presented require judgment in its favor. It must also be clear that the other side's papers do not suggest any issue exists. Moreover, on this motion, the court's duty is not to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist. *See, Barr v. County of Albany*, 50 NY2d 247 (1980); *Miceli v. Purex*, 84 AD2d 562 (2d Dept. 1981); *Bronson v March*, 127 AD2d 810 (2d Dept. 1987.) Finally, as stated by the court in *Daliendo v Johnson*, 147 AD2d 312,317 (2d Dept. 1989), "Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied."

Initially, the Court finds that there is no basis to postpone its decision on the instant motion to enable plaintiff to conduct additional discovery. Although determination of a summary judgment or dismissal motion may be delayed to allow for further discovery where

evidence necessary to oppose the motion is unavailable to the opponent (*see* CPLR 3211 [d] & 3212 [f]), a determination of summary judgment or dismissal motion “cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence” (Ruttura & Sons Constr. v Petrocelli Constr., 257 AD2d 614, 615 [2d Dept 1999].) A party's mere hope that further discovery will reveal the existence of triable issues of fact is insufficient to delay determination on the issue of summary judgment or dismissal. Lambert v. Bracco, 18 A.D.3d 619 (2d Dep't 2005) Here, plaintiff was present during the relevant events surrounding the signing of the contract, has a copy of the contract, and has the deposition testimony of its Executive Director, and has submitted his affidavit. Moreover, Deutchman has submitted his affidavit that is fairly detailed in explaining REVU's procedures and his rendition is supported by REVU's Articles of Organization. Accordingly, plaintiff has failed to demonstrate an evidentiary basis to suggest that additional disclosure might lead to relevant evidence.

Regarding the merits of Deutchman's claim, it is well established that a corporate officer is not personally liable for the obligations of the corporation when he/she enters into a contract unless "there is a clear and explicit evidence" of his/her intention to do so. Worthy v. New York City Housing Auth., 21 AD3d 284, 286 (1st Dept. 2005). *See also*, Metropolitan Switch Board Co., Inc. v. Amici Assoc., Inc., 20 AD3d 455, 799 N.Y.S.2d 531 (2nd Dept. 2005); and Gordon v. Teramo & Co., Inc., 308 AD2d 432, 764 N.Y.S.2d 144 (2nd Dept. 2004). Thus, where the other party is aware that the officer was acting for the corporation and there is no explicit evidence of the officer's intention to be personally liable under the contract, the officer cannot be held liable in his or her individual capacity. Metropolitan Switch Bd. Co., Inc., *supra*. Here, a review of defendants' evidence shows that Deutchman's dealings with plaintiff were not in his personal capacity, and that he never signed any document in which he agreed to be personally liable for REVU's obligations. Nor has any document been proffered that would suggest otherwise and given the evidence that there was only one agreement between the parties, defendants have established that Deutchman did not enter into the agreement with plaintiff in his personal capacity or agree to be personally liable thereunder. Khiyayev v MikeSad Enters., Inc., 66 AD3d 845 (2d Dep't 2009.) *See also*, Kopec v Hempstead Gardens, Inc., 264 AD2d 714 (2d Dept 1999.)

In opposition, plaintiff has failed to raise an issue of fact as to whether defendant Deutchman is personally liable for REVU's debts or obligations. As indicated above, contrary to plaintiff's assertion, the contract is clear that Deutchman was signing on behalf of REVU and there is no agreement that Deutchman would be liable for REVU's debts and obligations. Accordingly, the branch of the motion by defendants for summary judgment in their favor and dismissal of the complaint as against Deutchman is granted and the complaint is dismissed as against him.

The Court shall now address the branch of the motion seeking dismissal pursuant to CPLR 3211 (a) (7). "It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference. (Jacobs v Macy's East, Inc., 262 AD2d 607, 608; Leon v Martinez, 84 NY2d 83.) The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (see, Stukuls v State of New York, 42 NY2d 272; Jacobs v Macy's East Inc., supra), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading. (See, Rovello v Orofino Realty Co., Inc., 40 NY2d 633.) The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint. (See, Rovello v Orofino Realty Co., Inc., supra; Kenneth R. v Roman Catholic Diocese of Brooklyn, 229 AD2d 159.) In determining a motion brought pursuant to CPLR 3211(a)(7), the court "must afford the complaint a liberal construction, accept as true the allegations contained therein, accord the plaintiff the benefit of every favorable inference and determine only whether the facts alleged fit within any cognizable legal theory ." (1455 Washington Ave. Assocs. v Rose & Kiernan, supra, 770-771; Esposito-Hilder v SFX Broadcasting Inc., 236 AD2d 186.) However, where the moving party offers evidentiary material, the court is required to determine whether the proponent of the pleading has a cause of action, not whether he or she has stated one . Columbo v. Chase Manhattan Auto. Fin. Corp., 297 A.D.2d 327 (2d Dep't 2002)

The First Cause of Action alleges that defendants repudiated the contract and refused to continue to perform the conditions required of them under the contract. Plaintiff claims up until such repudiation, plaintiff was ready willing and able to perform its obligations under the contract and informed defendants of such. Plaintiff claims such repudiation caused it damages of at least \$1,700,000.00. Defendants claim this cause of action must be dismissed since there is a valid agreement between the parties that precludes any "quasi contract" recovery and a party's repudiation is not a cause of action in itself. Plaintiff claims this action is separate from the breach of contract action.

The claim of repudiation is identical to the claims set forth in plaintiff's second cause of action which is for a breach of contract. Accordingly, the first cause of action is dismissed as duplicative of the second cause of action. Moreover, under the circumstances alleged, plaintiff was entitled to consider defendant's abandoning of the project an anticipatory repudiation of the contract and immediately elect to rescind the contract or to treat the repudiation as a breach, as it did, and bring an action, as it did. Smith v. Tenshore Realty, Ltd., 31 AD3d 741(2d Dep't 2006.) Plaintiff is not entitled to bring a separate action for the repudiation of the contract, which is in essence nothing more than the basis of the breach of contract. See, Norcon Power

Partners, L.P. v. Niagara Mohawk Power Corp., 92 N.Y.2d 458 (N.Y. 1998.) Accordingly, the First Cause of Action is dismissed as against defendant REVU.

The Third Cause of Action alleges that “defendant was benefitted by the monies that Plaintiff provided them (sic). The value of the benefit that was bestowed upon the defendants would be measured by the terms of the agreement between the parties. . . . greater than \$1,700,000.00.” Defendants claim this cause of action should be dismissed since the existence of a valid enforceable written contract governing this claim’s subject matter, precludes recovery in unjust enrichment for matters arising from the same subject matter. Plaintiff claims this action is separate from the breach of contract action.

To 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. Spector v. Wendy, 63 A.D.3d 820 (2d Dep’t 2009) This cause of action is pursuant to a quasi contract theory, and 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. *See*, Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382, 388 (1987.) When, as here, there is no dispute as to the existence of a contract and the contract covers the dispute between the parties, the plaintiff may not proceed upon a theory of quantum meruit as well as seek to recover damages for breach of contract. *See*, Alamo Contract Builders v CTF Hotel Co., 242 AD2d 643 (2d Dept 1997.) The logic behind this is that the contract itself and its alleged breach provide the basis for full recovery and the other quasi contract claims are unnecessary and duplicative. Accordingly, the branch of this motion to dismiss the Third Cause of Action is granted. *Id.*

For all of the reasons set forth above, the motion by defendants for dismissal of the complaint pursuant to CPLR 3211 and 3212 is granted to the extent that the complaint against Deutchman is dismissed pursuant to CPLR 3212, and the First and Third causes of Action are dismissed as against REVU.

Dated: March 23, 2010

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ORIN R. KITZES, J.S.C.