

**World Alliance Fin. Corp. v Guardian First Funding  
Group, LLC**

2010 NY Slip Op 33231(U)

November 12, 2010

Supreme Court, Suffolk County

Docket Number: 11196-2010

Judge: Emily Pines

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SHORT FORM ORDER

Index Number: 11196-2010

**SUPREME COURT - STATE OF NEW YORK**  
**COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY**

***Present:*** **HON. EMILY PINES**  
 J. S. C.

Original Motion Date: 07-21-2010; 09-16-2010  
 Motion Submit Date: 09-21-2010  
 Motion Sequence : 001 MD  
 002 MD

[ ] FINAL DISP  
 [ x ] NON - FINAL DISP

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**WORLD ALLIANCE FINANCIAL CORP., d/b/a**  
**LENDER LEAD SOLUTIONS,**

**Plaintiff,**

**-against-**

**GUARDIAN FIRST FUNDING GROUP, LLC,**

**Defendant.**

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Attorney for Plaintiff

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Attorney for Defendant

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**ORDERED**, that the defendant's motion (motion sequence no. 001) to dismiss the Complaint pursuant to CPLR §3211(a)(5) and (a)(7) is denied; and it is further

**ORDERED**, that the defendant's motion (motion sequence no. 002) to dismiss the Amended Complaint pursuant to CPLR §3211(a)(5) and (a)(7) is also denied; and it is further

**ORDERED**, that a preliminary conference is scheduled for January 25, 2011 at 9:30 a.m. before the undersigned.

Plaintiff commenced this action against defendant seeking damages for breach of contract and unjust enrichment by the filing of a Summons and Verified Complaint on March 25, 2010. Defendant, by Notice of Motion dated June 10, 2010, moved to

dismiss the Complaint pursuant to CPLR §3211(a)(5) and (a)(7). Thereafter, on or about July 14, 2010, plaintiff filed and served an Amended Complaint and defendant has moved to dismiss the Amended Complaint, pursuant to the same grounds as set forth in the initial motion. The Court has reviewed both the initial and Amended Complaint and notes that they set forth identical causes of action with the only significant difference being that the Amended Complaint annexes copies of the purported agreements which form the basis for the breach of contract claims.

Initially, before addressing the substantive merits of the motions to dismiss, the Court must address certain procedural arguments raised by defendant in the motion to dismiss the Amended Complaint. Defendant argues that plaintiff's filing of an Amended Complaint was untimely and required leave of the Court pursuant to CPLR §3025, because it was filed more than twenty (20) days after the service of the original motion to dismiss. This argument is wholly without merit. CPLR §3025(a) provides that "A party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it." Where a defendant moves to dismiss a complaint, its time to answer is extended, thus extending the time in which plaintiff can amend its complaint as of right. *STS Management v. New York State Department of Taxation and Finance*, 254 A.D.2d 409, 678 N.Y.S.2d 772 (2d Dept. 1998). *See also, Johnson v. Spence*, 286 A.D.2d 481, 730 N.Y.S.2d 334 (2d Dept. 2001). Therefore, plaintiff's service of the Amended Complaint was timely.

Additionally, defendant argues that even if the Court finds that the Amended Complaint was timely filed, the Court must still consider the motion to dismiss the initial Complaint. Here, the Court does agree with defendant, that the law in the Second Department is that the service of an Amended Complaint does not render academic the motion to dismiss, addressed to the merits, of the initial Complaint. *Terrano v. Fine*, 17 A.D.3d 449, 793 N.Y.S.2d 451 (2d Dept. 2005); *Livadiotakis v. Tzitzikalakis*, 302 A.D.2d 369, 753 N.Y.S.2d 898 (2d Dept. 2003). Thus, the Court must consider both the motion to dismiss the Complaint and the motion to dismiss the Amended Complaint.

Both the Complaint and Amended Complaint allege four causes of action: the first and second causes of action sounding in breach of contract and the third and fourth causes of action based upon a theory of unjust enrichment. According to the

Complaint<sup>1</sup>, plaintiff is in the business of advertising and marketing educational videos with regard to reverse mortgages and also markets such reverse mortgages and defendant is a mortgage provider. Plaintiff alleges that the parties entered into agreements pursuant to which plaintiff would deliver to each customer who received its educational video, a letter from defendant, indicating that it (defendant) was a mortgage company that provided reverse mortgage loans. Also pursuant to the agreements, plaintiff provided defendant with a list of leads of customer inquiries and allowed defendant access to its database of customers who received the educational video. In the first cause of action, plaintiff alleges that it performed under the parties' agreements but defendant failed to make the required payments in the amount of \$148,81.13 for lead fees and media costs, despite demands for such payment.

In the second cause of action, plaintiff alleges that the parties entered into an oral contract to permit defendant to use plaintiff's telephone switching capabilities in exchange for payment of \$3,500.00 per month. Plaintiff alleges that it permitted defendant to utilize its telephone switching capabilities but that defendant failed to pay for its services for four (4) months and owes defendant \$14,000.00.

In the third and fourth causes of action, plaintiff pleads under the alternative, equitable theory of unjust enrichment based upon the same facts as the first and second causes of action. Defendant moves to dismiss the Complaint and Amended Complaint and argues that the pleadings fail to state a cause of action for breach of contract. With regard to the Amended Complaint, defendant argues that plaintiff has annexed unsigned agreements which are not between the parties to this action, but rather "Guardian First" and "Mortgage Warehouse", a non-party. Defendant further notes that the "Lead Sales Agreement" does not contain a price and the terms are not definite. Since the agreements do not contain definite and material terms, they cannot serve as the basis for a breach of contract claim. Likewise, plaintiff has failed to set forth the definite terms of the alleged oral agreement, which defendant also argues must fail because it does not comply with the statute of frauds. Specifically, defendant argues that the second cause of action seeks an "oral finder's fee", which is barred by General Obligations Law §5-701(a)(10). Further, the claims for attorneys' fees contained in the first and

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<sup>1</sup>Since the allegations of the Complaint and Amended Complaint are essentially identical, they will be referred to herein collectively as the "Complaint" unless a specific reference is made to either pleading.

second causes of action must also fail since there is no agreement, statutory authorization or court rule providing for the payment of counsel fees. Finally, defendant argues that plaintiff has failed to sufficiently plead a cause of action sounding in unjust enrichment. Based on the foregoing, defendant requests that the Court dismiss the Complaint and Amended Complaints in their entirety.

Plaintiff opposes the motions and argues that the pleadings demonstrate that it has a cause of action against defendant for breach of contract. The Complaint and Amended Complaint allege that the parties entered into agreements, plaintiff performed its obligations under the agreements and defendant has breached by failing to pay. Thus, the motion to dismiss for failure to state a cause of action must be denied. Likewise, the argument that the purported oral agreement violates the statute of frauds must be rejected because the telephone switching agreement could be performed within one (1) year. Furthermore, plaintiff asserts that defendant executed all of the agreements between the parties and as such, they are enforceable against plaintiff and all the terms are contained therein. With regard specifically to the telephone switching agreement, plaintiff argues that by its terms it could be performed within one year, and the parties performed pursuant to the agreement. Therefore, it is not barred by the Statute of Frauds.

Lastly, plaintiff argues that it is permitted to plead claims for unjust enrichment as alternative theories, in the event the Court finds no valid contracts between the parties. Thus, plaintiff urges the Court to deny the motions to dismiss in their entirety.

In reply, defendant reiterates that the motions to dismiss should be granted and the action dismissed.

It is well settled that in “reviewing a motion to dismiss under CPLR 3211(a)(7) for failure

to state a cause of action, the allegations of the complaint are deemed to be true. The pleading will be deemed to allege whatever may be implied from its statements by reasonable intendment and the court must give the pleader the benefit of all favorable inferences that may be drawn from the complaint...”. *Dunn v. Gelardi*, 59 A.D.3d 385, 872 N.Y.S.2d 528 (2d Dept. 2009)(internal quotations omitted). *See also, Peterec-Tolino v. Harap*, 68 A.D.3d 1083, 892 N.Y.S.2d 154 (2d Dept. 2009). When evidentiary material is submitted in support of a motion to dismiss for failure

to state a cause of action, the Court must determine whether the proponent of the pleading has a cause of action, not whether the proponent has stated a cause of action. *Peter F. Gaito Architecture, LLC v. Simone Development Corp.*, 46 A.D.3d 530, 846 N.Y.S.2d 368 (2d Dept. 2007).

A complaint adequately states a cause of action for breach of contract when it alleges (1) the existence of a contract; (2) the plaintiff's performance under the contract; (3) the defendant's breach of that contract; and (4) damages as a result of the breach. *JP Morgan Chase v. J.H. Electric*, 69 A.D.3d 802, 893 N.Y.S.2d 237 (2d Dept. 2010). The elements of a cause of action sounding in unjust enrichment are allegations that the defendant was enriched at the plaintiff's expense and that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. *Anastasia Assoc. of Mount Kisco v. Northern Westchester Hospital Center*, 59 A.D.3d 473, 873 N.Y.S.2d 679 (2d Dept. 2009).

In the case at bar, a review of the Complaint establishes sufficiently the elements of a case of action for breach of contract. The Complaint alleges that plaintiff entered into agreements with defendant to provide it certain customer lists and access to its database and defendant failed to pay in accordance with the terms of the agreements. Plaintiff further alleges it entered into an oral agreement with defendant with regard to the use of its telephone switching capabilities and defendant also failed to pay the fee for such use. Although defendant asserts that any purported oral agreement would be unenforceable under the statute of frauds, plaintiff alleges both that the agreement could be performed within one year and that there was partial performance of the agreement such as to fall outside the prohibitions of the statute of frauds. While ultimately such claim may not survive, at this early juncture in this litigation, the Court will not dismiss the second cause of action.

Likewise, the Complaint also sets forth causes of action sounding in unjust enrichment and will not be dismissed. Where, as here, there is a bona fide dispute as to the existence of a contract, plaintiff may proceed upon a theory of quasi contract and breach of contract and will not be required to elect his remedies. *Plumitallo v. Hudson Atlantic Land Company, LLC*, 74 A.D.3d 1038, 903 N.Y.S.2d 127 (2d Dept. 2010); *AHA Sales, Inc., v. Creative Bath Products, Inc.*, 58 A.D.3d 6, 867 N.Y.S.2d 169 (2d Dept. 2008). Thus, since defendant challenges the existence of the agreements with plaintiff, it may properly plead both contractual and quasi-contract claims against defendant. Moreover, it is well settled that a plaintiff may

plead both breach of contract and unjust enrichment claims in the alternative. *See, e.g., Auguston v. Spry*, 282 A.D.2d 489, 723 N.Y.S.2d 103 (2d Dept. 2001).

Based on the foregoing, defendant's motions to dismiss are denied.

Defendant shall serve a Verified Answer to the Amended Complaint within twenty (20) days of service of a copy of this Order with Notice of Entry.

A preliminary conference is scheduled for January 25, 2011 at 9:30 a.m. before the undersigned.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: November 12, 2010  
Riverhead, New York

  
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EMILY PINES  
J. S. C.

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