Asifa Tirmizi v MRAJ Enter., LLC
2011 NY Slip Op 33999(U)
October 5, 2011
Sup Ct, New York County
Docket Number: 651016/10
Judge: Melvin L. Schweitzer
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER **PART** 45

Index Number : 651016/2010
TIRMIZI, ASIFA
vs
M-RAJ ENTERPRISES, LLC
Sequence Number : 002
DISMISS ACTION

INDEX NO. ____
MOTION DATE ____
MOTION SEQ. NO. 002
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 by plaintiff to dismiss defendant MRAJ Enterprises second and third counterclaims is GRANTED, but is otherwise denied per the attached Decision and Order.

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

Dated: October 5, 2011

[signature]
MELVIN L. SCHWEITZER J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

ASIFA TIRMIZI d/b/a ASI DEVELOPMENT, Plaintiff, -against- MRAJ ENTERPRISES, LLC, Defendant and Third-Party Plaintiff, -against- TIRMIZI CAMPBELL INC., Third-Party Defendant.	Index No. 651016/10 DECISION & ORDER Motion Sequence No. 002 & 003

MELVIN L. SCHWEITZER, J.:

In this action plaintiff Asifa Tirmizi d/b/a ASI Development seeks recovery for the value of her services as a real estate developer. Plaintiff moves, pursuant to CPLR 3211 (b), to dismiss defendant/third-party plaintiff MRAJ Enterprises, LLC's (MRAJ) first, second, tenth and eleventh defenses, under the doctrine of law of the case, claiming that they have already been determined by this court, and moves further, pursuant to CPLR 3211 (a) (7), to dismiss the second and third causes of action in the verified counterclaim, as failing to state a cause of action (mot. seq. no. 002). Third-party defendant Tirmizi Campbell, Inc. (TCI) moves, pursuant to CPLR 3211 (a) (1) (5) and (7), to dismiss the third-party action (mot. seq. no. 003).

The facts of this matter have been sufficiently laid out in this court's former decision, dated February 18, 2011 (February 2011 decision). Familiarity with these facts is presumed.

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A. Plaintiff's Motion to Dismiss

(i) Dismissal of Defendant's Affirmative Defenses

In the February 2011 decision, this court determined that plaintiff had stated a claim for breach of contract, based on allegations of an oral contract which was not barred by the statute of frauds; that plaintiff had stated a cause of action based on equitable estoppel; and that plaintiff had pled valid causes of action, in the alternative to the breach of contract claim, for unjust enrichment and quantum meruit.

Despite the February 2011 decision, MRAJ served an answer with defenses of, among others, failure to state a cause of action (first defense); the bar of statute of frauds (second defense); that equitable estoppel is not a valid claim because plaintiff is seeking monetary damages (tenth defense); and that the unjust enrichment and quantum meruit claims are duplicative of the breach of contract claim (eleventh defense). Plaintiff argues that all of these defenses must fall, as having been dispatched in the February 2011 decision.

Law of the case is a doctrine which "addresses the potentially preclusive effect of judicial determinations made in the course of a single litigation *before* final judgment." *People v Evans*, 94 NY2d 499, 502 (2000). Under that doctrine, "parties or their privies are preclude[d from] relitigating an issue decided in an ongoing action where there previously was a full and fair opportunity to address the issue [internal quotation marks and citations omitted]." *Briggs v Chapman,* 53 AD3d 900, 901 (3d Dept 2000). The legal issues involved must have been "necessarily resolved on the merits in [a] prior decision [internal quotation marks and citation omitted]." *Lehman v North Greenwich Landscaping, LLC*, 65 AD3d 1293, 1294 (2d Dept 2009).

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An answer served in an action in which there has been a motion to dismiss on the merits may contain affirmative defenses addressed in the prior motion, because law of the case is not applicable merely because a court has denied defendant's motion to dismiss the complaint. *See Sivin-Tobin Associates, LLC v Akin Gump Strauss Hauer & Feld LLP*, 68 AD3d 616 (1st Dept 2009). This is because of the procedural limitations inherent in such a motion.

> On a motion to dismiss pursuant to CPLR 3211, we must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory.

Sokoloff v Harriman Estates Development Corp., 96 NY2d 409, 414 (2001); *see also Leon v Martinez*, 84 NY2d 83 (1994).

In light of this rule, law of the case will not apply because "the prior motion to dismiss was based on the facts and law presented by the parties *in that procedural posture*, and no more [emphasis supplied]." *191 Chrystie LLC v Ledoux*, 82 AD3d 681, 682 (1st Dept 2011).

Precedent settles the rule that the law of the case doctrine does not apply to determinations made on a motion to dismiss which are followed, after joinder, by a motion for summary judgment. *See id.*; *see also Thompson v Lamprecht Transport*, 39 AD3d 846 (2d Dept 2007). This is because "the scope of review applicable to each motion is distinct." *Bernard v Grenci*, 48 AD3d 722, 724 (2d Dept 2008). It follows, therefore, that a defendant may maintain defenses in its answer which raise arguments addressed in a prior motion to dismiss, in order to preserve them for a later motion for summary judgment. Therefore, MRAJ's defenses will not be dismissed.

(ii) Dismissal of Second and Third Counterclaim

MRAJ's second counterclaim sounds in fraud, while the third counterclaim alleges conspiracy to commit fraud. Plaintiff moves to dismiss these claims, pursuant to CPLR 3211 (a) (7).

A cause of action for fraud requires a plaintiff to allege "'representation[s] of material fact, falsity, scienter, reliance and injury.'" *U.S. Express Leasing Inc. v Elite Technology* (N.Y.), 87 AD3d 494, 2011 NY Slip Op 06326 *3 (1st Dept 2011), quoting *Small v Lorillard Tobacco Co.*, 94 NY2d 43, 57 (1999). The elements of fraud must be pled "with specificity," pursuant to CPLR 3016 (b). *Brualdi v IBERIA Lineas Aereas España. S.A.*, 79 AD3d 959, 960 (2d Dept 2010). "CPLR 3016 (b) requires only that the misconduct complained of be set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of ... [interior quotation marks and citation omitted]." *P.T. Bank Central Asia v ABN AMRO Bank N.V.*, 301 AD2d 373, 377 (1st Dept 2003). Bare allegations of fraud do not suffice. *See Avery v Pfizer, Inc.*, 68 AD3d 633 (1st Dept 2009).

MRAJ's claim for fraud against plaintiff is based on its claim that the compensation plaintiff now seeks to obtain in this action is based on actions she undertook as a member of third-party defendant TCI, that is, she is seeking a money judgment for the provisions of service for which she has already been compensated, under the Mutual Releases (Mutual Releases Agreement) MRAJ obtained from TCI, upon payment to TCI of $44,375. MRAJ insists that the Mutual Releases Agreement bars any further payment to plaintiff, and that plaintiff is defrauding MRAJ by claiming to have provided services as a developer beyond those services which TCI provided, as architect. MRAJ claims that plaintiff, by wearing "two hats" (Memorandum in

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Opp., at 3), one as developer and agent for MRAJ, and one as a member of TCI, created a conflict of interest which resulted in the collusive contract with TCI (which is also the basis for the conspiracy claim).[1]

The court notes that there is no support for MRAJ's theory that a party working for it in two capacities, both known to MRAJ, necessarily creates a conflict of interest amounting to collusion and fraud. The mere fact that plaintiff provided services under "two hats" is not proof of fraud.

Assuming that MRAJ can validly allege that plaintiff's request for money under her alleged oral contract with MRAJ to perform certain services is a misrepresentation (which is doubtful), MRAJ simply cannot prove that it has been injured. The sum it claims in damages is the sum plaintiff claims is owed her in this action, approximately $880,000. MRAJ has not paid this sum. It is undisputed that TCI was paid $44,375 for the services it performed as architect, and there is no allegation that the Mutual Releases Agreement was obtained by fraud.[2] Bringing an action on a contract for services performed is not a fraud on MRAJ, and, if plaintiff can prove her right to the sum sought on the alleged oral contract, for particular services not performed by TCI, she cannot be liable for fraud. Consequently, the counterclaims for fraud and conspiracy to commit fraud fail, and must be dismissed.

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[1] MRAJ also claims that some of the services plaintiff claims she provided to MRAJ were actually provided by her husband.

[2] MRAJ attempts to distance itself from the Mutual Releases Agreement by indicating that it did not sign the document, which appears to be true. However, MRAJ relied on the Mutual Releases Agreement in its motion to dismiss plaintiff's complaint, and relies on it in its third-party complaint (¶ 9), and cannot here disown its ratification of the document.

C. TCI Motion to Dismiss Third-Party Complaint

(i) Breach of Contract

The only contracts between MRAJ and TCI are the original written contract for the provision of specific architectural services, dated September 2, 2006 (Contract), and the Mutual Releases Agreement, dated January 13, 2010, which purports to release both parties from any further obligation to each other, upon payment of $44,375 to TCI. MRAJ alleges that the Contract was breached because plaintiff seeks, in her present suit, to recover sums for the provision of services under the alleged oral contract to act as developer of the project. MRAJ claims that this provision of services was the same work TCI actually performed, or ought to have performed, under the Contract.

To state a cause of action for breach of contract, a party must allege "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages." *Harris v Seward Park Housing Corp.*, 79 AD3d 425, 426 (1st Dept 2010). In the present action, MRAJ has not alleged a breach by TCI of the Contract. MRAJ has not pointed to anything in the Contract which TCI promised to do that it did not do. MRAJ has also failed to show that it is out-of-pocket for anything TCI failed to do. The fact that plaintiff seeks compensation under another alleged contract does not create a breach of the Contract between MRAJ and TCI. The claim must be dismissed.

(ii) Fraud and Conspiracy

MRAJ's fraud claim against TCI is based on plaintiff's present action. MRAJ alleges, in conclusory form, that the Contract was "collusive" because plaintiff was both MRAJ's agent, as

developer, and a member of TCI, and that plaintiff seeks a recovery for work TCI should have done. MRAJ's damages are, once again, any sum plaintiff might obtain in her action.

MRAJ fails to allege any misrepresentation TCI made that would form the basis for a fraud claim. It fails again to allege any actual damages. No fraud has been alleged against TCI in the second cause of action. As a result, no conspiracy can be alleged, and the third cause of action must be dismissed as well.

(iii) Indemnification and/or Contribution

In MRAJ's fourth cause of action against TCI, MRAJ claims that, should plaintiff recover damages under her alleged oral contract with MRAJ, such damages would be recoverable from TCI, because plaintiff would be recovering for "services which TCI was contractually obligated to perform" for MRAJ. Third-Party Complaint, ¶ 26.

MRAJ's claim for contribution must be denied.

> While two or more entities that 'are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution' from the other (CPLR 1401), a purely economic loss resulting from a breach of contract does not constitute an 'injury to property' within the meaning of CPLR 1401.

Richards Plumbing & Heating Co., Inc. v Washington Group International, Inc., 59 AD3d 311, 312 (1st Dept 2009); *see also Board of Education of Hudson City School District v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21 (1987). Plaintiff's claim is for breach of contract, a pure economic loss, and so, does not support a claim for contribution from TCI.

(iv) Indemnification

MRAJ' fourth cause of action raises the issue of implied indemnification, because there is no contract with an indemnification clause involved here. Implied indemnification is an

equitable principle. *McDermott v City of New York*, 50 NY2d 211 (1980). The Court of Appeals has explained that "a person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity [internal quotation marks and citation omitted]." *Id.* at 217; *see also Morris v Snappy Car Rental, Inc.*, 84 NY2d 21 (1994). "Stated another way, one is entitled to implied indemnification where he or she has committed no wrong but is held vicariously liable for the wrongdoing of another [internal quotation marks and citation omitted]." *Westbank Contracting. Inc. v Rondout Valley Central School District*, 46 AD3d 1187, 1189 (3d Dept 2007).

Should plaintiff recover damages from MRAJ it will be because she can prove that MRAJ owed her a duty under the alleged oral contract for the provision of certain services. That is, MRAJ will be directly liable to plaintiff, not vicariously so. There is no indication that this alleged debt was actually owed to plaintiff by TCI, or that TCI had any duty to MRAJ to pay for any work performed by plaintiff. MRAJ has only conclusorily stated that any work plaintiff may be compensated for in this litigation is work that TCI should have performed. The work TCI should have performed was set forth in its Contract with MRAJ, and settled in the Mutual Releases Agreement. Therefore, MRAJ has no claim for indemnification from TCI.

Accordingly, it is hereby

ORDERED that the motion brought by plaintiff Asifa Tirmizi d/b/a ASI Development is granted solely as to the dismissal of defendant MRAJ Enterprises, LLC's second and third counterclaims (mot. seq. no. 002), and is otherwise denied; and it is further

ORDERED that third-party defendant Tirmizi Campbell, Inc.'s motion to dismiss the third-party complaint is granted (mot. seq. no. 003); and it is further

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ORDERED that the third-party complaint is severed and dismissed, with costs and disbursements granted to Tirmizi Campbell, Inc. as taxed by the Clerk of this court, upon the presentation of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: October 5, 2011

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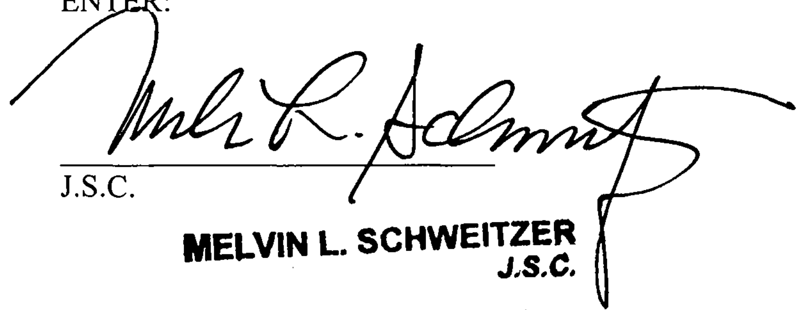

J.S.C.

MELVIN L. SCHWEITZER
J.S.C.