544 W. 157th St. Hous. Dev. Fund Corp. v Alliance Prop. Mgt. & Dev., Inc.
2013 NY Slip Op 33429(U)
November 22, 2013
Supreme Court, New York County
Docket Number: 104203/2012
Judge: Lucy Billings
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LUCY BILLINGS J.S.C. PART 46

Justice

Index Number : 104203/2012
544 WEST 157TH STREET HOUSING
vs.
ALLIANCE PROPERTY MANAGEMENT
SEQUENCE NUMBER : 001
DISMISS DEFENSE

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 4, were read on this motion to/for dismiss defenses and a counterclaim

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1-2
Answering Affidavits — Exhibits _____ | No(s). 3
Replying Affidavits _____ | No(s). 4

Upon the foregoing papers, it is ordered that this motion is

The court grants plaintiff's motion to dismiss defendant's affirmative defenses to the extent set forth, grants defendant's cross-motion to amend its answer to the extent set forth, and otherwise denies plaintiff's motion and defendant's cross-motion, pursuant to the accompanying decision. C.P.L.R. §§ 3025(b), 3211(a)(7) and (b).

IN ACCORDANCE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 11/22/13

Lucy Billings, J.S.C.
LUCY BILLINGS J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☑ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 46
----------X

544 WEST 157th STREET HOUSING DEVELOPMENT FUND CORPORATION,

Plaintiff

- against -

ALLIANCE PROPERTY MANAGEMENT AND DEVELOPMENT, INC.,

Defendant

----------X

Index No. 104203/2012

DECISION AND ORDER

LUCY BILLINGS, J.:

I. BACKGROUND

Plaintiff and defendant entered a Management Agreement under which defendant was to perform services as a managing agent for plaintiff's building. In this action for breach of that contract, breach of defendant's fiduciary duty as a managing agent, an accounting, and delivery of plaintiff's documents and other, unspecified personal property, plaintiff moves to dismiss defendant's affirmative defenses and counterclaim, based on their failure to state a defense or claim. C.P.L.R. § 3211(a)(7) and (b). Defendant cross-moves to amend its answer to include further factual allegations supporting its affirmative defenses and further counterclaims based on breach of contract, an account stated, services performed, quantum meruit, and unjust enrichment, in addition to its original counterclaim for attorneys' fees. C.P.L.R. § 3025(b).

II. APPLICABLE STANDARDS

C.P.L.R. § 3025(b) permits amendments to an answer as long as they do not unfairly surprise or otherwise substantially prejudice plaintiff, McGhee v. Odell, 96 A.D.3d 449, 450 (1st Dep't 2012); Kocourek v. Booz Allen Hamilton Inc., 85 A.D.3d 502, 504 (1st Dep't 2011); Jacobson v. McNeil Consumer & Specialty Pharms., 68 A.D.3d 652, 655 (1st Dep't 2009); Thompson v. Cooper, 24 A.D.3d 203, 205 (1st Dep't 2005), and the proposed answer and counterclaims, as alleged, are meritorious. A.L. Eastmond & Sons, Inc. v. Keevily, Spero-Whitelaw, Inc., 107 A.D.3d 503 (1st Dep't 2013); McGhee v. Odell, 96 A.D.3d at 450; Humphreys & Harding, Inc. v. Universal Bonding Ins. Co., 52 A.D.3d 324, 326 (1st Dep't 2008); Shulte, Roth & Zabel, LLP v. Kassover, 28 A.D.3d 404, 405 (1st Dep't 2006). Defendant bears the burden to demonstrate the merits of the proposed amendments through admissible evidence. Greentech Research LLC v. Wissman, 104 A.D.3d 540, 541 (1st Dep't 2013); MBIA Ins. Corp. v. Greystone & Co., Inc., 74 A.D.3d 499, 500 (1st Dep't 2010); Humphreys & Harding, Inc. v. Universal Bonding Ins. Co., 52 A.D.3d at 326; Shulte, Roth & Zabel, LLP v. Kassover, 28 A.D.3d at 405.

The court may dismiss affirmative defenses already pleaded if they are without merit. C.P.L.R. § 3211(a)(7) and (b). Upon plaintiff's motion to dismiss defendant's affirmative defenses, however, it is not defendant's burden to establish its defenses by admissible evidence, but plaintiff's burden to establish that the defenses are legally inapplicable. 534 E. 11th St. Hous.

Dev. Fund Corp. v. Hendrick, 90 A.D.3d 541, 542 (1st Dep't 2011); Rosenzweig v. Givens, 62 A.D.3d 1, 7 (1st Dep't), aff'd, 13 N.Y.3d 774, 775-76 (2009); Vita v. New York Waste Servs., LLC, 34 A.D.3d 559 (2d Dep't 2006); Santilli v. Allstate Ins. Co., 19 A.D.3d 1031, 1032 (4th Dep't 2005). To defeat plaintiff's motion to dismiss affirmative defenses, defendant only need allege the factual elements of its defenses, whether in its answer or verified proposed amended answer or as supplemented by affidavits or other admissible evidence. 534 E. 11th St. Hous. Dev. Fund Corp. v. Hendrick, 90 A.D.3d at 542; Willett v. Lincolnshire Mgt., 302 A.D.2d 271 (1st Dep't 2003); 49-50 Assoc. v. Free-Tan Corp., 248 A.D.2d 128, 129 (1st Dep't 1998); Vita v. New York Waste Servs., LLC, 34 A.D.3d at 559-60.

III. THE MERITS OF DEFENDANT'S PROPOSED AMENDED AFFIRMATIVE DEFENSES

Defendant's original answer included six affirmative defenses. First, plaintiff fails to state a claim. Second, an unnamed party caused plaintiff's damages. Third, plaintiff's laches, unclean hands, waiver, and estoppel bar its claims. Fourth, defendant disputes the amount plaintiff claims. Fifth, plaintiff breached its duty of good faith and fair dealing. Sixth, plaintiff failed to mitigate damages. No factual allegations in the original answer support these defenses.

Defendant's proposed amended answer verified by its president, however, specifically alleges that plaintiff breached the parties' Management Agreement, which plaintiff's president authenticates, when plaintiff terminated the agreement without

cause, even after defendant complied with plaintiff's notice to cure a claimed breach. Defendant further claims that plaintiff's breach caused defendant to incur damages, including expenses defendant already had paid for services to be performed under the contract, had plaintiff not terminated the contract. Defendant separately alleges that plaintiff failed to retrieve its personal property from defendant despite its attempt to return the property to plaintiff.

A. First and Fourth Affirmative Defenses

These factual allegations provide a basis for defendant's first and fourth affirmative defenses that plaintiff fails to state a claim and that defendant disputes the amount plaintiff claims and thus support those defenses' merits. C.P.L.R. § 3025(b); McGhee v. Odell, 96 A.D.3d at 450; MBIA Ins. Corp. v. Greystone & Co., Inc., 74 A.D.3d at 500; Pier 59 Studios, L.P v. Chelsea Piers, L.P., 40 A.D.3d 363, 366 (1st Dep't 2007); Thompson v. Cooper, 24 A.D.3d at 205. See Bernstein v. Freudman, 136 A.D.2d 490, 492-93 (1st Dep't 1988). As plaintiff concedes, the first affirmative defense, that plaintiff fails to state a claim, whether for breach of contract, breach of fiduciary duty, an accounting, or delivery of personal property, remains viable until all other defenses fail or plaintiff prevails on its claims. Id. See, e.g., Rosenzweig v. Givens, 62 A.D.3d at 7, aff'd, 13 N.Y.3d at 775-76; Cromwell v. Le Sannom Bldg. Corp., 177 A.D.2d 372 (1st Dep't 1991); Smith v. Kinsey, 50 A.D.3d 1456, 1457 (4th Dep't 2008); Santilli v. Allstate Ins. Co., 19 A.D.3d

at 1032.

B. Sixth Affirmative Defense

The factual allegations supporting plaintiff's failure to mitigate damages, however, relate only to plaintiff's claim for delivery of its personal property, which seeks only injunctive relief and not damages. Plaintiff's duty to mitigate damages is to make efforts to diminish the monetary losses plaintiff claims from defendant's breach of the Management Agreement or breach of any fiduciary duty. E.g., Assouline Ritz1 LLC v. Edward I. Mills & Assoc., Architects, PC, 91 A.D.3d 473, 474 (1st Dep't 2012); LaSalle Bank N.A. v. Nomura Asset Capital Corp., 47 A.D.3d 103, 107-108 (1st Dep't 2007). Plaintiff's failure to retrieve its personal property despite defendant's attempt to return the property to plaintiff is unrelated to the claimed breach of contract or fiduciary duty. Therefore defendant's sixth affirmative defense that plaintiff failed to mitigate damages, as alleged, is inapplicable.

C. Second Affirmative Defense

Defendant's second affirmative defense in its proposed amended answer lacks merit because no factual allegations identify the nonparty or culpable conduct beyond defendant's control that caused plaintiff's claimed damages. 170 W. Vil. Assoc. v. G & E Realty, Inc., 56 A.D.3d 372, 373 (1st Dep't 2008); 49-50 Assoc. v. Free-Tan Corp., 248 A.D.2d at 129; Robbins v. Growney, 229 A.D.2d 356, 358 (1st Dep't 1996); Plemmenou v. Arvanitakis, 39 A.D.3d 612, 613 (2d Dep't 2007). See Humphreys &

Harding, Inc. v. Universal Bonding Ins. Co., 52 A.D.3d at 326; Shulte, Roth & Zabel, LLP v. Kassover, 28 A.D.3d at 405; Cardona v. Cruz, 271 A.D.2d 221, 222 (1st Dep't 2000). As plaintiff points out, such a person or entity would have usurped defendant's position as the managing agent.

D. Third Affirmative Defense

Despite defendant's minimal burden, its third affirmative defense is likewise bereft of any evidentiary detail. This defense merely relies on defendant's letter to plaintiff dated June 5, 2012, which claimed compliance with plaintiff's Notice to Cure, and to which plaintiff never responded, without delineating the cure or any contractual or other requirement that plaintiff respond to defendant's correspondence. Absent any facts specifying either party's act or omission, how it met or failed to meet the party's obligations, or how it worked to defendant's detriment, defendant fails to support any part of defendant's third affirmative defense: laches, unclean hands, waiver, or estoppel. 49-50 Assoc. v. Free-Tan Corp., 248 A.D.2d at 129; Robbins v. Growney, 229 A.D.2d at 358. See A.L. Eastmond & Sons, Inc. v. Keevily, Spero-Whitelaw, Inc., 107 A.D.3d 503; Sabo v. Alan B. Brill, P.C., 25 A.D.3d 420, 421 (1st Dep't 2006); Cardona v. Cruz, 271 A.D.2d at 222.

First, any damages defendant may have incurred were due to plaintiff's wrongful termination of the parties' contract and therefore would be recoverable under the contract, as defendant alleges in its proposed counterclaim for breach of contract.

Plaintiff's failure to respond to defendant's correspondence is just part of that alleged breach, to which the equitable defenses of laches, unclean hands, and estoppel do not apply. Garber v. Stevens, 94 A.D.3d 426, 427-28 (1st Dep't 2012); Benjamin v. Madison Med. Bldg. Condominium Bd. of Mgrs, 66 A.D.3d 510, 511-12 (1st Dep't 2009).

Second, even if an equitable defense were applicable, defendant has not pointed to, nor does the court discern, a single factual allegation of any element of laches, unclean hands, estoppel, or waiver in defendant's answer, its proposed amended answer, or its president's affidavit. Willett v. Lincolnshire Mgt., 302 A.D.2d 271; 49-50 Assoc. v. Free-Tan Corp., 248 A.D.2d at 129; Robbins v. Growney, 229 A.D.2d at 358. See 170 W. Vil. Assoc. v. G & E Realty, Inc., 56 A.D.3d at 372-73; Plemmenou v. Arvanitakis, 39 A.D.3d at 613; Petracca v. Petracca, 305 A.D.2d 556, 567 (2d Dep't 2003). From the few facts recited, the implication closest to laches is that plaintiff unreasonably delayed by never responding to defendant's cure claimed June 5, 2012. Yet plaintiff terminated the parties' contract June 20, 2012, as defendant acknowledges; commenced this action less than five months later; and thus did not unreasonably or inexcusably delay in initiating plaintiff's claims. Nassau County v. Metro. Transp. Auth., 99 A.D.3d 617 (1st Dep't 2012); EMF Gen. Contr. Corp. v. Bisbee, 6 A.D.3d 45, 54-55 (1st Dep't 2004); Robbins v. Growney, 229 A.D.2d at 358; Cohen v. Krantz, 227 A.D.2d 581, 582-83 (2d Dep't 1996). See Philippine Am. Lace

Corp. v. 236 W. 40th St. Corp., 32 A.D.3d 782, 784 (1st Dep't 2006). Nor does the claimed failure to respond to defendant's correspondence somehow rise to the level of unconscionable or other wrongful conduct to support an unclean hands defense. Citibank, N.A. v. American Banana Co., Inc., 50 A.D.3d 593, 594 (1st Dep't 2008); Willett v. Lincolnshire Mgt., 302 A.D.2d 271; 390 W. End Assocs. v. Baron, 274 A.D.2d 330, 332 (1st Dep't 2002); Wells Fargo Bank v. Hodge, 92 A.D.3d 775, 776 (2d Dep't 2012).

Since plaintiff's waiver of its rights may be inferred from circumstances manifesting its voluntary, intentional abandonment or relinquishment of those rights, a defense of waiver may constitute a factual question. Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Mgt., Ltd., 7 N.Y.3d 96, 104 (2006); Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966, 968 (1988); Jefpaul Garage Corp. v. Presbyterian Hosp., 61 N.Y.2d 442, 446, 448 (1984); Jumax Assoc. v. 350 Cabrini Owners Corp., 46 A.D.3d 407, 408 (1st Dep't 2007). Nevertheless, defendant must allege facts to raise such a question: a threshold defendant again fails to meet. The facts it alleges regarding plaintiff's failure to respond to defendant's claimed cure do not amount to an unequivocal expression of plaintiff's intent not to invoke its right to terminate the parties' contract due to defendant's default under the contract. Benjamin v. Madison Med. Bldg. Condominium Bd. of Mgrs, 66 A.D.3d at 512; Bercy Invs. v. Sun, 239 A.D.2d 161, 162 (1st Dep't 1997). Nor does defendant

show how it relied on plaintiff's omission to defendant's detriment: an essential element of estoppel. Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Mgt., Ltd., 7 N.Y.3d at 106-107; Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d at 968; Jumax Assoc. v. 350 Cabrini Owners Corp., 46 A.D.3d at 409; 49-50 Assoc. v. Free-Tan Corp., 248 A.D.2d at 129.

E. Fifth Affirmative Defense

Finally, defendant's fifth affirmative defense that plaintiff breached the covenant of good faith and fair dealing by failing to respond to defendant's correspondence of June 5, 2012, and by terminating the parties' contract without cause merely duplicates it proposed counterclaim for breach of contract, addressed below. Netologic, Inc. v. Goldman Sacks Group, Inc., 110 A.D.3d 433, 434 (1st Dep't 2013); Amcan Holdings, Inc. v. Canadian Imperial Bank of Commerce, 70 A.D.3d 423, 426 (1st Dep't 2010); AJW Partners LLC v. Itronics Inc., 68 A.D.3d 567, 568-69 (1st Dep't 2009); Logan Advisors; LLC v. Patriarch Partners, LLC, 63 A.D.3d 440, 443 (1st Dep't 2009). Both claims arise from the parties' dispute over their satisfaction of their obligations under the Management Agreement. Therefore the court grants plaintiff's motion to the extent of dismissing defendant's second, third, fifth, and sixth affirmative defenses, but denies the motion insofar as it seeks to dismiss defendant's first and fourth affirmative defenses. C.P.L.R. § 3211(a)(7) and (b).

IV. THE MERITS OF DEFENDANT'S PROPOSED COUNTERCLAIMS

A. First and Sixth Counterclaims, for Breach of Contract and for Attorneys' Fees

Defendant's proposed amended answer, verified by defendant, alleging, as set forth above, that plaintiff breached the Management Agreement by terminating it without cause after defendant cured a claimed breach, supports defendant's proposed first counterclaim for breach of contract, an amendment that plaintiff does not oppose. C.P.L.R § 3025(b); Pier 59 Studios, L.P v. Chelsea Piers, L.P., 40 A.D.3d at 366. See McGhee v. Odell, 96 A.D.3d at 450-51; MBIA Ins. Corp. v. Greystone & Co., Inc., 74 A.D.3d at 500; Thompson v. Cooper, 24 A.D.3d at 205. The amended answer also adequately supports defendant's original and now sixth counterclaim for attorneys' fees based on the Management Agreement's indemnification provision. It requires plaintiff to indemnify defendant for reasonable attorneys' fees incurred for (i) injury to property in connection with plaintiff's building from any cause other than defendant's own culpable conduct or (ii) acts defendant performed pursuant to plaintiff's instruction. Since both parties claim financial injury from defendant's building services, and defendant claims that neither party's claimed injury is caused by defendant's culpable conduct, but that its injury results from its performance as instructed by plaintiff under the Management Agreement, this provision would entitle defendant to fees if it prevails on these claims.

B. Second, Fourth, and Fifth Quasi-Contract Counterclaims

Absent a challenge to the Management Agreement's enforceability or its applicability to the expenses for which defendant seeks reimbursement, that contract governs the parties' dispute and bars defendant's second counterclaim for services performed, its fifth counterclaim based on the same theory, quantum meruit, Gordon v. Credno, 102 A.D.3d 584, 585 (1st Dep't 2013); Schutty v. Speiser Krause P.C., 86 A.D.3d 484, 485-86 (1st Dep't 2011), and its fourth counterclaim for unjust enrichment. Clark- Fitzpatrick, Inc. v. Long Is. R.R. Co., 70 N.Y.2d 382, 388 (1987); Accurate Copy Serv. of Am., Inc. v. Fisk Bldg. Assoc. L.L.C., 72 A.D.3d 456 (1st Dep't 2010); Adelaide Prods., Inc. v. BKN Intl. AG, 38 A.D.3d 221, 225 (1st Dep't 2007); Cerberus Intl., Ltd. v. Banctec, Inc., 16 A.D.3d 126, 127 (1st Dep't 2005). See Cox v. NAP Constr. Co., Inc., 10 N.Y.3d 592, 607 (2008); Russo v. Heller, 80 A.D.3d 531, 532 (1st Dep't 2011). Defendant does not claim compensation for services rendered to plaintiff or benefits conferred on plaintiff after it terminated the Management Agreement, other than for expenses defendant paid on a monthly basis for June 2012. In fact, defendant would have no expectation of compensation if the services were not compensable under the agreement or were performed after plaintiff terminated the agreement. Fulbright & Jaworski, LLP v. Carucci, 63 A.D.3d 487, 489 (1st Dep't 2009); Soumayah v. Minnelli, 41 A.D.3d 390, 391-92 (1st Dep't 2007); Freedman v. Pearlman, 271 A.D.2d 301, 304 (1st Dep't 2000); Jordan Panel Sys. Corp. v.

Turner Constr. Co., 45 A.D.3d 165, 180 (1st Dep't 2007). See Balestriere PLLC v. Banxcorp, 96 A.D.3d 497, 498 (1st Dep't 2012).

On the other hand, although plaintiff does not oppose the pleading of defendant's counterclaim for breach of that contract, plaintiff has not yet replied to that proposed counterclaim. Therefore it is unknown whether plaintiff will raise a defense to the breach of contract counterclaim based on the contract's inapplicability to the compensation defendant seeks or the contract's unenforceability, especially if in the future plaintiff's own breach of contract claim based on the same Management Agreement fails. Consequently, at least at this stage, defendant may proceed based on the alternative quasi-contract theories. Sabre Intl. Sec., Ltd. v. Vulcan Capital Mgt., Inc., 95 A.D.3d 434, 438-39 (1st Dep't 2012); Beach v. Touradji Capital Mgt. L.P., 85 A.D.3d 674, 675 (1st Dep't 2011); Forman v. Guardian Life Ins. Co. of America, 76 A.D.3d 886, 888 (1st Dep't 2010); Henry Loheac, P.C. v. Children's Corner Learning Ctr., 51 A.D.3d 476 (1st Dep't 2008). See Caribbean Direct, Inc. v. Dubset LLC, 100 A.D.3d 510, 511 (1st Dep't 2012).

The proposed counterclaim for services performed, however, is duplicative of the counterclaim based on quantum meruit, as both are based on the same factual allegations regarding defendant's performance of services in good faith, which plaintiff accepted, and for which defendant reasonably expected to be compensated, and the services' reasonable value. Fulbright

& Jaworski, LLP v. Carucci, 63 A.D.3d at 489; Soumayah v. Minnelli, 41 A.D.3d at 391; Freedman v. Pearlman, 271 A.D.2d at 304. Therefore the court denies defendant's motion to amend its answer to include its proposed second counterclaim, but grants its motion to amend the answer to include the proposed fourth and fifth counterclaims as well as the new first and sixth counterclaims. C.P.L.R. § 3025(b).

C. Third Counterclaim, for an Account Stated

Finally, the court also denies defendant's motion to amend its answer to include its proposed third counterclaim, for an account stated. Although the verified amended answer does allege that "Defendant provided Plaintiff with a true and complete account in the amount of $4,204.12 to which Plaintiff has made no objection," Aff. of Gary M. Kavulich Ex. A ¶ 29, defendant fails to support this conclusory claim with actual invoices transmitted to and retained by plaintiff totalling the balance claimed. Digital Ctr., S.L. v. Apple Indus., Inc., 94 A.D.3d 571, 573 (1st Dep't 2012); Risk Mgm't Planning Group, Inc. v. Cabrini Medical Ctr., 63 A.D.3d 421 (1st Dep't 2009); RPI Professional Alternatives, Inc. v. Citigroup Global Mkts. Inc., 61 A.D.3d 618, 619 (1st Dep't 2009); Graubard Miller v. Nadler, 60 A.D.3d 499 (1st Dep't 2009). Hence defendant fails to establish plaintiff's assent to the balance due: an essential element of an account stated claim. Digital Ctr., S.L. v. Apple Indus., Inc., 94 A.D.3d at 572-73; Risk Mgm't Planning Group, Inc. v. Cabrini Medical Ctr., 63 A.D.3d 421; Graubard Miller v. Nadler, 60 A.D.3d

499; Raytone Plumbing Specialties, Inc. v. Sano Constr. Corp., 92 A.D.3d 855, 856 (2d Dep't 2012). See A.O. Textile Inc. v. SEP Plus Inc., 57 A.D.3d 397 (1st Dep't 2008). In fact, in opposition, plaintiff presents the only invoice from defendant before the court, for a balance of $2,454.76 as of September 17, 2012, three months after plaintiff terminated the contract for services. Defendant preserves its claim for the $4,204.12 balance via one of its quasi-contract counterclaims or its contract counterclaim.

V. THE ABSENCE OF PREJUDICE TO PLAINTIFF

Insofar as defendant may have delayed in seeking to amend its answer and add counterclaims, delay alone, without prejudice to plaintiff, does not bar the amendments. McGhee v. Odell, 96 A.D.3d at 450; Kocourek v. Booz Allen Hamilton, Inc., 85 A.D.3d at 504; Jacobson v. McNeil Consumer & Specialty Pharms., 68 A.D.3d at 205; Thompson v. Cooper, 24 A.D.3d at 205. Plaintiff points to no specific or substantial surprise or other prejudice, nor does the court discern any, that would dictate denial of permission to amend the answer to add the factual allegations supporting the fourth affirmative defense and the first, fourth, fifth, and sixth counterclaims. Kocourek v. Booz Allen Hamilton Inc., 85 A.D.3d at 504; Solomon Holding Corp. v. Golia, 55 A.D.3d 507, 507 (1st Dep't 2008); Ward v. Eastchester Health Care Ctr., LLC, 34 A.D.3d 247, 248 (1st Dep't 2006).

VI. DISPOSITION

In sum, for the reasons explained above, the court grants defendant's cross-motion to amend its answer to plead its first and fourth affirmative defenses and its counterclaims based on breach of contract, unjust enrichment, and quantum meruit and for attorneys' fees, but otherwise denies defendant's motion. C.P.L.R. § 3025(b). The court grants plaintiff's motion to dismiss defendant's second, third, fifth, and sixth affirmative defenses, but otherwise denies plaintiff's motion. C.P.L.R. § 3211(a)(7) and (b). Defendant shall serve and file an amended answer as permitted above within 20 days after service of this order with notice of entry. Plaintiff shall serve any reply to defendant's counterclaims within 20 days after service of the amended answer. See C.P.L.R. §§ 3012(a), 3025(d).

DATED: November 22, 2013

LUCY BILLINGS, J.S.C.