SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. EILEEN BRANSTEN
J.S.C.

PRESENT: _____ **PART** 3
Justice

Index Number : 602044/2009
COAST TO COAST ENERGY
vs.
GASARCH, MARK
SEQUENCE NUMBER : 039
___ DISMISS

INDEX NO. 602044/2009
MOTION DATE 10/25/2013
MOTION SEQ. NO. 039

The following papers, numbered 1 to 3 **, were read on this motion to/for** dismiss

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

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

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 1-23-14

Eileen Branston **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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

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COAST TO COAST ENERGY, INC., and COAST TO COAST AMERICAN DRILLING I, L.P.,

Plaintiffs,

Index No. 602044/2009
Motion Date: 10/25/2013
Motion Seq. No. 039, 040 & 041

-against-

MARK GASARCH, CONTINENTAL DRILLING CORPORATION and GASMARK CORP.,

Defendants.

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Eileen Bransten, J.:

In this action, defendants Mark Gasarch and Gasmark Corporation ("Gasmark") move both to dismiss the second amended complaint as to themselves, and for a protective order (motion sequence no. 039). Defendant Continental Drilling Corporation ("Continental") likewise moves for a protective order (motion sequence no. 040), and to dismiss the second amended complaint against it (motion sequence no. 041). All of the motions are opposed.

I. Background

Once again, due to the extensive motion practice in this action, the court assumes the parties' familiarity with the relevant facts. The court will therefore discuss only those

facts necessary to its decision on the three open motions, which are consolidated herein for resolution.

In a February 20, 2013 decision (the "Decision"), this Court granted Gasarch, Gasmark and Continental's motion for summary judgment, dismissing all of plaintiffs' tort claims. The Court, however, permitted plaintiffs an opportunity to move to amend the complaint to plead a cause of action for breach of contract. Subsequently, plaintiffs did not seek leave of court, but, instead, filed a proposed second amended complaint. In a decision dated July 15, 2013, this Court denied defendants' motion to strike the second amended complaint, and granted plaintiffs' motion to amend the complaint.

In the second amended complaint (or "complaint"), plaintiffs allege a single breach of contract claim against all defendants. Essentially, plaintiffs allege that the parties had an agreement to recomplete Well #4A in Texas. According to plaintiffs, the general terms of that agreement were set forth in the "Turnkey Agreement" provision of the Private Placement Memorandum ("PPM") that plaintiff Coast to Coast American Drilling I, L.P. ("American Drilling") issued to its own investors. Plaintiffs allege that "[d]efendants agreed with plaintiffs that upon delivery of $900,000 to Gasarch, a Turnkey Agreement would be prepared and executed for the recompletion of well 4-A in the Green Lease Field in Wood County, Texas." (Second Am. Compl. ¶ 47.)

Yet, plaintiffs allege that, in contravention of the terms set forth in the PPM, defendants "never delivered on their obligations to hold onto investor funds until a Turnkey Agreement was executed, [and] they had secured a Turnkey Agreement, and there was never an assignment and delivery to Plaintiffs of a 100% working interest in the entirety of C. Green #1 Lease, Well #4A." *Id.* ¶ 41. Further, plaintiffs allege that "defendants acknowledge" that there was an enforceable agreement between "all parties for the recompletion of a well," and that plaintiffs delivered the $900,000 to the defendants. *Id.* ¶ 45. Additionally in the second amended complaint, plaintiffs allege that "defendants contend that the 'recompletion' was concluded in August 2008." *Id.* ¶ 43. According to plaintiffs, "this event was not reported to Plaintiffs for five months and, only then, when pressed to return funds, did Defendants contend that a producing well was one which would require approximately $235,000 in additional funding." (*id.*, ¶ 43).

Finally, plaintiffs seek the $900,000 they allegedly provided to defendants, plus interest, in damages, because "while the funds have been released, a Turnkey Agreement has not been delivered, a 100% working interest in the well has not been assigned and Plaintiffs have not received a recompleted well producing oil." *Id.* ¶ 51.

II. Discussion

A. *Gasarch and Gasmark's Motion to Dismiss*

Gasarch and Gasmark first seek dismissal of the complaint on the grounds that they were not parties to the relevant contract. These defendants argue that in the Decision, this Court noted that an agreement existed between American Drilling and Continental that did not include Gasarch or Gasmark. This uncontested fact, as set forth in the Decision states: "[i]n early 2008, American Drilling and Continental entered into an Agreement (the 'Turnkey Recompletion Agreement') in which American Drilling agreed to pay Continental a total of $900,000 and Continental agreed, on a 'turnkey' basis, to recomplete the Well." *See* Affirmation of David M. Siegal, Ex. 3 at 5 (the Decision). Gasarch and Gasmark further argue that, in the Decision, the Court made a finding that "Gasarch and Gasmark were not parties to the agreement . . ." *Id.* at 24.

In opposition, plaintiffs argue that the motion to dismiss the second amended complaint against Gasmark and Gasarch is in "direct defiance" of the court's ruling, because, according to plaintiffs, it is in direct contravention of defendants' previously held position that "only a contract claim exists." *See* Pl.'s Mem. of Law in Opp. to Defendants' Motion to Dismiss and for a Stay at 2. Further, plaintiffs refer to four allegations from their second amended complaint, in order to establish Gasarch's involvement in the subject transaction. For example, plaintiffs allege that after Gasarch,

"(who controls Continental)" received plaintiffs' $900,000, a Turnkey Agreement was supposed to be prepared and executed for the recompletion of the well, that "Gasarch agreed to hold investor funds until the Turnkey Agreement was executed . . . ," and that Gasarch and Continental "were to insure that Plaintiffs received a 100% Working Interest in the Well assigned to the Coast to Coast American Drilling I LP." *Id.* at 5. Plaintiffs cite these allegations from the second amended complaint to argue that defendants' motion is meritless, and that there is, in fact, enough there to establish a breach of contract claim against these two defendants. Finally, plaintiffs argue that the doctrine of judicial estoppel bars defendants from arguing that they were not parties to the agreement, when they argued previously that such an agreement existed.

In reply, Gasarch and Gasmark contend that they never argued that they were parties to the contract, and that, instead, it is plaintiffs who have switched positions. Defendants rely upon the portions of the Decision that cite plaintiffs' argument that Gasarch and Gasmark were not parties to the agreement. For example, defendants note that:

> The Court itself specifically cited to and relied upon these admissions in issuing its summary judgment decision [citations omitted]. 'In opposition, plaintiffs argue that Gasmark and Gasarch 'were never intended to be parties to the Agreement.'

See Reply Mem. of Law in Further Support of Motion of Defs. Mark Gasarch and Gasmark Corporation to Dismiss the Second Amended Verified Complaint and for a Protective Order at 2-3.

On a motion to dismiss a claim for failure to state a cause of action, the court is not called upon to determine the truth of the allegations. *See Campaign for Fiscal Equity v. State of N.Y.*, 86 N.Y.2d 307, 318 (1995); *219 Broadway Corp. v. Alexander's, Inc.*, 46 N.Y.2d 506, 509 (1979). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the [pleading] as true and provide plaintiff the benefit of every possible inference. Whether plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19 (2005). The court's role is limited to determining whether the facts as alleged in the pleading fit within any cognizable legal theory, not whether there is evidentiary support to establish a meritorious cause of action. *See Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977).

The "law of the case" doctrine addresses "the preclusive effect of judicial determinations made in the course of a single litigation *before* final judgment." *People v. Evans*, 94 N.Y.2d 499, 502 (2000).[1] Where no appeal has been made from such

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[1] The doctrine of judicial estoppel is inapplicable to the present matter, because the court does not find that the defendants are taking a contrary position to any they took earlier in this litigation. *See Jones Lang Wootton USA v. LeBoeuf, Lamb, Greene & MacRae*, 243 A.D.2d 168, 176 (1st Dep't 1998) ("The doctrine of judicial estoppel or the doctrine of inconsistent positions

determinations, arguments previously made and rejected "are precluded by the doctrine of law of the case." *CDR Creances S.A.S. v. Cohen*, 77 A.D.3d 489, 490-491 (1st Dep't 2010).

Here, the Court observed in the Decision that the parties both conceded the existence of an agreement between Continental and American Drilling. In fact, as defendants point out, the Court noted that plaintiffs argued previously that Gasarch and Gasmark were not parties to the agreement, and there has been no evidence submitted on these motions that support the allegation that either Gasmark or Gasarch were parties to the agreement. Further, in the absence of a fraud claim, Gasarch, although the secretary, treasurer and a director of Continental, cannot be held liable for the acts of Continental. *See Ramos v. 24 Cincinatus Corp.*, 104 A.D.3d 619, 620 (1st Dep't 2013). Accordingly, the Court finds no grounds to keep Gasmark and Gasarch in this action, and grants Gasmark and Gasarch's motion.

B. *Continental's Motion to Dismiss*

Continental argues that the second amended complaint should be dismissed against it because: (1) the PPM cannot form the basis for plaintiffs' breach of contract claim,

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precludes a party who assumed a certain position in a prior legal proceeding and who secured a judgment in his or her favor from assuming a contrary position in another action simply because his or her interests have changed.")

since Continental is not a party to the PPM; and (2) plaintiffs fail to show how defendants breached the provisions of the PPM. Specifically, Continental asserts that the second amended complaint does not define the term "recompletion" or explain how Continental allegedly failed to "'recomplete' the Texas well." *See* Def. Continental Drilling Corporation's Reply Mem. of Law in Further Support of its Motion to Dismiss the Second Amended Complaint at 3.

In the Decision, the Court noted that it was uncontested by the parties that, in 2008, "American Drilling and Continental entered into an Agreement (the 'Turnkey Recompletion Agreement') in which American Drilling agreed to pay Continental a total of $900,000 and Continental agreed, on a 'turnkey' basis, to recomplete the Well." *See* Decision at 5. The Court further observed that, although a PPM is generally not a contract, "the parties on this motion agree that some of the language in the PPM gave rise to an agreement between them that governed the subject transaction." *Id.* at 4.

Although plaintiffs continue to argue for their right to a written executed Turnkey Agreement, they have provided no authority for this, nor have they established that their actions were consistent with this expectation. According to the submissions of the parties and conclusions of this court, plaintiffs provided Continental with $900,000 to recomplete the well, regardless of the absence of a written and executed turnkey agreement.

In their second amended complaint plaintiffs allege that they had an agreement with Continental that, in exchange for a sum of money, the defendants would recomplete the well. The parties agree that such an agreement existed, and it is uncontested that plaintiffs delivered the monies to defendants. Plaintiffs further allege that they never received a recompleted well producing oil. With respect to this allegation, which is afforded all of the deference required on a motion to dismiss, plaintiffs need not offer proof of its truth, and the Court need not find that plaintiffs' claim is meritorious in order for it to survive dismissal at this juncture. *See 511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002) ("The motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law."). Thus, on this motion to dismiss, defendants' argument that plaintiffs have not offered a definition for "recompletion" of a well or offered an explanation of how Continental failed to "recomplete" the well is unavailing.

Whatever definition of "recomplete" is applied, the complaint raises questions concerning what work was done on the well, and whether plaintiffs got what they paid for. Along with other questions concerning whether plaintiffs "received" a "recompleted" well, this permits the Court to find that plaintiffs have articulated a prima facie contract claim worthy of going forward. The Court therefore denies Continental's motion to dismiss the second amended complaint.

C. *Continental's Motion for a Protective Order*

Finally, Continental argues that plaintiffs' June 2013 notice to admit is patently improper, since it demands that Continental admit numerous facts concerning the transfer of funds that purportedly have nothing to do with the allegations in the second amended complaint. In light of the Court's decision herein on motion sequence numbers 39 and 41, the scope of the second amended complaint has changed. Accordingly, the Court grants plaintiff the opportunity to serve a new notice to admit that is tailored to the second amended complaint in light of the Court's ruling herein. Thus, the Court grants Continental's motion for a protective order but with leave to plaintiffs to reserve a new notice to admit, bearing in mind that only one claim remains in this litigation – a breach of contract claim against defendant Continental. There are no fraud claims in this action, nor are there any claims remaining against defendants Gasarch and Gasmark. Based on this narrowing of the case, plaintiff is directed to tailor the scope of its notice to admit appropriately.[2]

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[2] The Court notes plaintiffs' argument that Continental's motion for a protective order is time-barred. This argument is wholly without merit. Both parties agree that the deadline to respond to the June 2013 notice to admit was extended on consent beyond the twenty days provided in CPLR 3123. Continental's response to the notice to admit was filed in the form of a motion for protective order on August 28, 2013 – the deadline agreed to by the parties. *See* Sept. 19, 2013 Affirm. of Douglas Jensen, Ex A & B.

III. Conclusion

Accordingly, it is hereby

ORDERED that the defendants Mark Gasarch and Gasmark Corp.'s motion to dismiss the second amended complaint and for a protective order (motion sequence no. 039) is granted and the complaint is dismissed in its entirety against Gasarch and Gasmark, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and it is further

ORDERED that the Clerk is directed to enter judgment accordingly in favor of defendants Mark Gasmark and Gasarch Corp.; and it is further

ORDERED that defendant Continental Drilling Corporation's motion to dismiss the second amended complaint (motion sequence no. 041) is denied; and it is further

ORDERED Continental's motion for a protective order (motion sequence 040) is granted with leave to plaintiffs to serve a new notice to admit tailored to the remaining claim in this litigation; and it is further

ORDERED that the action against Continental Drilling Corporation is severed and the action is continued against Continental Drilling Corporation; and it is further

ORDERED that defendant Continental Drilling Corporation is directed to serve an answer to the second amended complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the caption be amended to reflect the dismissal of defendants Mark Gasarch and Gasmark Corp. and that all future papers filed with this court bear the amended caption; and it is further

ORDERED that counsel for defendants Mark Gasarch and Gasmark Corp., within ten days of the date of signature of this order, shall serve a copy of this order with notice of entry, upon the County Clerk (Room 141B), the Clerk of the Trial Support Office (Room 158) and the Clerk of the E-file Support Office (Room 119), who are directed to mark the court's records to reflect the amended caption.

Dated: New York, New York
January 23, 2014

ENTER

Hon. Eileen Bransten, J.S.C.