

**Structure Tone, Inc. v Hanover Ventures
Marketplace LLC**

2015 NY Slip Op 30463(U)

March 31, 2015

Supreme Court, New York County

Docket Number: 160939/2014

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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STRUCTURE TONE, INC.,

Plaintiff,

- v -

Index No.
160939/2014

**DECISION
and ORDER**

Mot. Seq. 001

HANOVER VENTURES MARKETPLACE LLC, PAUL
LAMAS, and ABC COMPANY #1 through ABC
COMPANY #10,

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

This is an action for breach of contract, unjust enrichment, *quantum meruit* and account stated. Plaintiff, Structure Tone, Inc. (“STI” or “Plaintiff”), brings this action based on an alleged agreement (the “Contract”) between Plaintiff and defendants, Hanover Ventures Marketplace LLC (“Hanover”), Paul Lamas (“Lamas”), and ABC Company #1 through ABC Company #10 (the “Successor Companies”) (and together with Hanover and Lamas, collectively, “Defendants” or the “Hanover Defendants”). Pursuant to the Contract, Plaintiff allegedly agreed to provide certain construction management and preconstruction services for the real property located at 2 World Financial Center, 225 Liberty Street, New York New York (the “Project” or “Property”). Plaintiff claims to have performed under the Contract, and that Defendants failed to pay Plaintiff as required under the Contract.

Defendants now move for an Order, pursuant to CPLR §§ 3211(a)(1) and (a)(7), dismissing Plaintiff’s complaint on the basis of documentary evidence and failure to state a cause of action. In support, Defendants submit: the affidavit of Lamas, dated December 24, 2014; a draft contract emailed to Lamas for comment and review on July 23, 2013; and, a copy of an email exchange, dated May 6, 2014, between Lamas and STI.

Plaintiff opposes.

CPLR § 3211 provides, in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(1) a defense is founded upon documentary evidence; or

(7) the pleading fails to state a cause of action.

On a motion to dismiss pursuant to CPLR § 3211(a)(1), “the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007] [internal citations omitted]). A movant is entitled to dismissal under CPLR § 3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint. (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dep’t 2007] [citation omitted]). “When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.” (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]). In determining whether dismissal is warranted for failure to state a cause of action, the court must “accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory.” (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dep’t, 2003] [internal citations omitted]; CPLR § 3211[a][7]).

As for Plaintiff’s first cause of action, for breach of contract, “[t]he elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant’s failure to perform, and resulting damage.” (*Flomenbaum v New York Univ.*, 71 A.D. 3d 80, 91 [1st Dep’t 2009]). “Under New York law, parties are free to enter into a binding contract without memorializing their agreement in a fully executed document.” (*Winston v. Mediafare Entertainment Corp.*, 777 F.2d 78, 80 [2d Cir. 1985]). Additionally, even where parties contemplate a writing to memorialize an agreement, “the mere intention to commit the agreement to writing will not prevent contract formation prior to execution.” (*Elizabeth St. Inc. v. 217 Elizabeth St. Corp.*, 276 A.D.2d 295, 296 [1st Dep’t 2000] quoting *Winston*, 777 F.2d at 80 [2d Cir. 1985]).

Plaintiff’s complaint alleges: “On or about May 31, 2013, STI entered into an agreement (the ‘Contract’) with the Hanover Defendants whereby STI undertook to

provide certain construction management and preconstruction services (the ‘Work’) for the Project.” Plaintiff’s complaint further alleges, “STI agreed to perform the Work on a time and material reimbursement basis at agreed to hourly rates and mark-ups”, that, “STI has fully performed all Work required of it under the Contract, except those which were excused by the acts or omissions of the Hanover Defendants, and by virtue of breaches of the Contract by the Hanover Defendants”, and that, “Defendants have breached the Contract by, among other things, failing to make payments for Work performed by STI”.

Accepting Plaintiff’s allegations as true, Plaintiff’s Complaint adequately alleges the formation of a Contract, performance of Work pursuant to the Contract, the Defendants’ failure to make payment as required, and damages. Accordingly, accepting Plaintiff’s allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiff’s complaint adequately plead a cause of action for breach of the Contract as against Hanover and the Successor Companies.

As far as Defendants’ documentary submissions are concerned, Defendants argue that the emails dated July 23, 2014 and May 6, 2014 (collectively, the “Emails”) constitute documentary evidence warranting the dismissal of Plaintiff’s complaint. Specifically, Defendants argue that the Emails demonstrate that Plaintiff “merely submitted a proposal and a draft of a contract” to Defendants as indicated in the email dated July 23, 2014 and the draft contract (the “Draft Contract”) attached thereto. Defendants further argue that Plaintiff, in the May 6 email exchange, acknowledges that “no signed document was returned” to Defendants. As a result, Defendants contend, the Emails establish that no contract between the parties was signed, and that the Contract complained of does not exist.

Defendants also argue that the proposed Draft Contract conclusively establishes that the Contract complained of is void under the Statute of Frauds’ requirement for a writing where an agreement, by its terms, cannot be performed within one year. (Gen. Oblig. § 5-701[a]). To this end, Defendants argue that the commencement date of the proposed Draft Contract is July 22, 2013 and the date of “substantial completion” is September 1, 2014, 13 months and 10 days later. Defendants argue that the Statute of Frauds bars Plaintiff’s instant breach of contract claim because the proposed Draft Contract, by its terms, cannot be performed within one year.

Here, even assuming, *arguendo*, that the Emails are properly considered “documentary” evidence within the meaning of CPLR § 3211(a)(1), (*see generally*,

(*Flowers v. 73rd Townhouse LLC*, 99 A.D.3d 431 [1st Dep't 2012]; *Fontanetta v. John Doe 1*, 73 A.D.3d 78, 85-86 [2d Dep't 2010]), the Emails do not flatly contradict the factual allegations and legal conclusions asserted in Plaintiff's complaint. Plaintiff's complaint does not allege that the Contract is an executed written agreement, nor is a signed writing necessarily required to plead a breach of contract claim. Accordingly, insofar as the Emails fail to conclusively establish that the Contract in issue does not exist, the Emails fail to conclusively establish a defense to Plaintiff's breach of contract claim.

Additionally, the Emails fail to conclusively establish that the Contract complained of is void under the Statute of Frauds. As Defendants point out, the proposed Draft Contract is not signed, and the July 23, 2014 email invites further comment and negotiation. The Emails, therefore, do not conclusively establish that the proposed Draft Contract is, in all respects, the Contract in issue in Plaintiff's complaint. Accordingly, whether or not the proposed Draft Contract would fall within the ambit of the Statute of Frauds' prohibition against contracts which cannot be performed within one year, the Emails fail to conclusively establish that the Statute of Frauds bars Plaintiff's instant claim for breach of the Contract.

As for Plaintiff's second cause of action, for unjust enrichment, to prevail on a claim for unjust enrichment, the "plaintiff must show that the other party was enriched, at plaintiff's expense, and that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered." (*Georgia Malone & Co., Inc. v. Rieder*, 86 A.D.3d 406 [1st Dep't 2011]). Generally, "the existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." (*Clark- Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y. 2d 382, 399 [1987]). However, "where there is a bona fide dispute as to the existence of a contract or the application of a contract in the dispute in issue, a plaintiff may proceed upon a theory of quasi contract as well as breach of contract, and will not be required to elect his or her remedies." (*Sabre Intl. Sec., Ltd. v. Vulcan Capital Mgt., Inc.*, 95 A.D.3d 434, 438-39 [1st Dep't 2012]; *Loheac v. Children's Corner Learning Ctr.*, 51 A.D. 3d 476, 476 [1st Dep't 2008]).

Here, Plaintiff's complaint alleges: "At the special instance and request of, and for the benefit of, the Hanover Defendants, STI, in good faith, performed Work at the Project." Plaintiff's complaint further asserts that "Defendants have benefited from the Work provided by STI to the Project, since, among other things, the value of the Premises has been increased and enhanced by STI's Work", and that, Defendants have been unjustly enriched "due to the benefits conferred upon the

Hanover Defendants and the Project by STI, which benefits the Hanover Defendants have inequitably appreciated, accepted, and retained and for which payment by the Hanover Defendants has not been made.” Accepting Plaintiff’s allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiff’s complaint adequately plead a cause of action for unjust enrichment. Furthermore, as Defendants expressly deny Contract, there appears to be a bona fide dispute as to the existence of the Contract and the application of a Contract to the dispute in issue. Accordingly, Plaintiff’s second cause of action stands as against Hanover and the Successor Companies.

As for Plaintiff’s third cause of action, for *quantum meruit*, in order to sustain a cause of action for *quantum meruit*, the plaintiff must allege: (1) the performance of services in good faith; (2) the acceptance of the services by the person to whom they are rendered; (3) an expectation of compensation therefor; and, (4) the reasonable value of the services. (*Soumayah v. Minnelli*, 41 A.D.3d 390, 391 [1st Dep’t 2007]). Plaintiff’s complaint alleges, “At the special instance and request of, and for the benefit of, the Hanover Defendants, STI, in good faith, provided Work to the Project.” Plaintiff’s complaint alleges that “Defendants accepted the Work STI provided to the Project” and that, “STI performed such Work at the Project with the expectation that it would be compensated for such items.” Plaintiff’s complaint further asserts:

The reasonable value of said Work is an amount in excess of One Hundred Seventy Five Thousand Six Hundred Seventy Three 29/100 Dollars (\$175,673.29), plus nine percent (9%) interest from January 29, 2014 to the present and continuing, of which not one dime has been paid to STI, leaving a balance due STI from the Hanover Defendants in excess of One Hundred Seventy Five Thousand Six Hundred Seventy Three 29/100 Dollars (\$175,673.29), plus nine percent (9%) interest from January 29, 2014, plus interest, no part of which has been paid, although duly demanded.

Accordingly, accepting Plaintiff’s allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiff’s complaint are sufficient to state a claim for *quantum meruit* as against Hanover and the Successor Companies, for purposes of surviving a motion to dismiss at this early stage of litigation.

As for Plaintiff's fourth cause of action, an account stated is "an account balanced and rendered, with an assent to the balance express or implied". (*Morrison Cohen Singer & Weinstein v. Janet L. N. Ackerman*, 280 A.D.2d 355, 355-56 [1st Dep't 2001]). Here, Plaintiff's complaint alleges: "On or about January 28, 2014, an account was stated between STI and the Hanover Defendants." Plaintiff's complaint further alleges, "Upon such statements a balance of One Hundred Seventy Five Thousand Six Hundred Seventy Three 29/100 Dollars (\$175,673.29) was found and agreed to be due and payable from the Hanover Defendants to STI." Plaintiff's complaint alleges that Defendants, "received, accepted and retained said account without objection being made thereto or to any item thereof", and that Defendants "have neglected and refused to pay to STI said sum despite due demand." Accordingly, accepting Plaintiff's allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiff's complaint adequately plead an account stated as against Hanover and the Successor Companies.

However, with respect to individual defendant Lamas, it is the general rule that a corporate officer is not liable for contracts entered into on the corporation's behalf "unless there is clear and explicit evidence" of the individual officer's intention to be personally bound. (*Mencher v. Weiss*, 306 N.Y. 1, 4, 114 N.E.2d 177 [1953]). Here, the sole allegation in Plaintiff's complaint respecting Lamas merely asserts that Lamas is "an officer, director, principal or shareholder of Hanover". Plaintiff's complaint does not allege that Plaintiff contracted with Lamas individually, nor does Plaintiff's complaint contain any factual allegations from which to infer any intention for Lamas to be personally bound under the Contract. Additionally, Plaintiff's complaint does not seek to pierce the corporate veil to impose Hanover's alleged contractual obligations on Lamas individually. Indeed, Plaintiff's complaint fails to allege that Lamas benefitted individually under the Contract. Accordingly, even accepting Plaintiff's allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiff's complaint fail to state a claim as against Lamas individually.

Wherefore, it is hereby

ORDERED that Defendants' motion to dismiss Plaintiff's complaint is granted only to the extent that Plaintiff's complaint as against individual defendant Paul Lamas is dismissed and the clerk is directed to enter judgment accordingly; and it is further

ORDERED that Plaintiff's complaint, as against the remaining Hanover Defendants, namely, Hanover Ventures Marketplace LLC and ABC Company #1 through ABC Company #10, is severed and shall proceed.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: March 31 2015



EILEEN A. RAKOWER, J.S.C.