

**Computer Design & Inegration of Ga., LLC v MIO
Partners, Inc.**

2020 NY Slip Op 30927(U)

April 9, 2020

Supreme Court, New York County

Docket Number: 650654/2019

Judge: O. Peter Sherwood

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49**

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**COMPUTER DESIGN & INEGRATION OF
GEORGIA, LLC,**

Plaintiff,

**DECISION AND ORDER
Index No. 650654/2019**

-against-

MIO PARTNERS, INC.,

Motion Sequence No: 002

Defendant.

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O. PETER SHERWOOD, J.:

I. FACTS

On this motion plaintiff Computer Design & Integration LLC (CDI), seeks dismissal of the counterclaims of defendant, MIO Partners, Inc. (MIO). CDI designs and manages IT solutions. MIO serves pension plans and partners and former partners of McKinsey & Company. MIO and CDI entered into a service agreement by which MIO would pay CDI for various services specified in a Statement of Work (SOW). Plaintiff claims MIO has not paid for all of the services CDI provided and asserts claims for breach of contract, breach of the covenant of good faith and fair dealing, account stated, unjust enrichment, and conversion.

In the First Amended Verified Answer and Counterclaims MIO answers the complaint and asserts counterclaims (Counterclaims, NYSCEF Doc. NO. 37). According to the Counterclaims, MIO and CDI entered into a service agreement on July 8, 2015 (the Service Agreement, attached as Exhibit A to Counterclaims), for computer and database consulting services which would be spelled out in a future statement of work (SOW) which would have to be signed by both parties. According to the Service Agreement, when MIO requested services from CDI, CDI was required to provide a SOW. When MIO accepted the SOW, CDI would then provide the services, keep accurate accounting records and provide MIO with weekly time sheets. MIO should review and accept the time sheets before CDI sends an invoice for the services (Counterclaims, p. 7). CDI was not allowed to send MIO an invoice for time and services which had not been approved previously. Expenses also had to be pre-approved in writing. MIO could terminate the Service Agreement and Statements of Work at any time, for cause, or with proper notice, for any reason.

The parties entered into various SOWs, each governed by the Service Agreement. One SOW created around October 5, 2015 (SOW1) authorized CDI to provide up to 100 hours of services with a maximum fee of \$20,510 per month (Counterclaims, p. 9). Prior written consent was required before CDI was allowed to invoice payment for more than 105 hours. SOW1 also required CDI to provide 24 hour support to respond to queries from MIO. CDI subcontracted the work in SOW1 to Fortified Data Services, LLC (Fortified).

In approximately June 2016, Fortified asked to increase the number of monthly service hours provided and proposed other changes to how it would perform its duties. Following negotiations with MIO, the parties agreed that support services would be increased from 100 to 200 hours per month, which CDI and MIO put in writing in the August addendum to SOW1 (the August Addendum) (*see id.* at 11). CDI then entered into a similar addendum with subcontractor Fortified.

MIO claims CDI submitted inflated bills and falsely claimed Fortified provided services which it never performed, resulting in MIO overpaying at least \$280,897 (*id.* at 12-13). MIO claims the spreadsheet submitted by CDI illustrates CDI's fraudulent billing practices. MIO also argues CDI breached the Service Agreement and SOWs by failing to submit required timesheets for approval or timely invoices for services CDI now claims it provided, and that CDI failed to maintain the required accounting records. Further, the services for which CDI now seeks payment were not authorized by MIO in writing, as required by the Service Agreement.

MIO alleges 1) breach of the Service Agreement, SOWs, and the August Addendum for (a) failing to obtain advance authorization in writing from MIO for services and expenses, (b) seeking payment for services which were not performed, (c) failing to maintain records (d) failing to submit timesheets, and (e) failing to submit monthly invoices, among other things; 2) breach of the covenant of good faith and fair dealing for seeking payment for unauthorized services and expenses, inflating invoices, and withholding information from MIO; 3) unjust enrichment for inflating invoices and charging MIO for services which were not provided; 4) indemnification pursuant to section 9.20 of the Service Agreement, here attorneys' fees incurred in connection with CDI's breach of the Service Agreement, willful misconduct, or malfeasance; and 5) fraud by misrepresenting or omitting material facts to MIO about the services performed and fees earned on which MIO relied including omissions in making payments, evaluating CDI's services, and deciding whether to terminate the Service Agreement.

II. DISCUSSION

A. Standard

On a motion to dismiss a plaintiff's claim pursuant to CPLR § 3211 (a) (7) 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*, 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC Iv Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]).

To succeed on a motion to dismiss pursuant to CPLR § 3211 (a) (1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of the plaintiff's claims (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180, 182 [1st Dept 2006]). A motion to dismiss pursuant to CPLR § 3211 (a) (1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*McCully v. Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept. 2009]). The facts as alleged in the complaint are regarded as true, and the plaintiff is afforded the benefit of every favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (*see e.g. Nisari v Ramjohn*, 85 AD3d 987, 989 [2nd Dept 2011]).

CPLR § 3211 (a) (1) does not explicitly define "documentary evidence." As used in this statutory provision, "'documentary evidence' is a 'fuzzy term', and what is documentary evidence for one purpose, might not be documentary evidence for another" (*Fontanetta v John Doe I*, 73 AD3d 78, 84 [2nd Dept 2010]). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*id.* at 86, citing Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3211:10, at 21-22). Typically, that means

“judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are ‘essentially undeniable,’” (*id.* at 84-85). Here, the documentary evidence is the Services Agreement, which is of undisputed authenticity and is appropriate documentary evidence.

B. Breach of Contract

As to the breach of contract counterclaim, plaintiff asserts it fails to allege MIO incurred damages and the damages alleged are speculative based only on an experts’ analysis of the invoices (Pl. Mem. at 8-9, Doc. No. 46).

To sustain a breach of contract cause of action, plaintiff must show: (1) an agreement; (2) plaintiff’s performance; (3) defendant’s breach of that agreement; and (4) damages (*see Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). “The fundamental rule of contract interpretation is that agreements are construed in accord with the parties’ intent . . . and ‘[t]he best evidence of what parties to a written agreement intend is what they say in their writing’ Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain terms, and extrinsic evidence of the parties’ intent may be considered only if the agreement is ambiguous [internal citations omitted]” (*Riverside South Planning Corp. v CRP/Extell Riverside LP*, 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009]). Whether a contract is ambiguous presents a question of law for resolution by the courts (*id.* at 67). Courts should adopt an interpretation of a contract which gives meaning to every provision of the contract, with no provision left without force and effect (*see RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272 [1st Dept 2007]).

It is undisputed that the Services Agreement is a valid and enforceable agreement between MIO and CDI. MIO argues it is not required to provide a specific calculation of damages, to survive this motion, and that the nominal damages available for a breach of contract are sufficient to allow this claim to survive. CDI contends MIO must have more than speculative damages.

While New York courts allow the “legal fiction of nominal damages” (*Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 95 [1993]), the party claiming breach of contract must allege an injury. “A counterclaim ‘is fatally deficient’ if ‘it does not demonstrate how the [counterclaim] defendant’s alleged breach of the . . . agreement caused [counterclaim] plaintiffs any injury’” (*ERE LLP v Spanierman Gallery, LLC*, 94 AD3d 492, 493 [1st Dept 2012], quoting *Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435, 436 [1st Dept 1988]). “In the absence of any allegations of *fact* showing damage, mere allegations of breach of contract are not sufficient to sustain a complaint,

and the pleadings must set forth *facts* showing the damage upon which the action is based” (*id.*, emphasis in original).

In the counterclaims, MIO asserts the following breaches: “failing to obtain advance written authorization from MIO to perform services and incur expenses for which CDI now seeks payment; seeking payment for services that were not performed and expenses that were not incurred; failing to maintain accurate accounting records to substantiate all charges and expenses submitted to MIO for payment; failing to submit weekly time sheets to MIO for pre-approval; failing to obtain MIO’s written approval of overages and expenses; failing to provide Statements of Work for additional services; and failing to submit invoices monthly” (Counterclaims, para 92). The only injury alleged is “unjustifiable charges MIO has already paid and time and expenses incurred resulting from CDI’s breaches” (*id.* para 94). MIO has alleged it paid CDI’s bills for time not worked, which constitutes an injury. This claim will survive.

C. Good Faith and Fair Dealing

It is well settled that within every contract is an implied covenant of good faith and fair dealings (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]; *Dalton v Educ. Testing Serv.*, 87 NY2d 384, 389 [1995]). The implied covenant “embraces a pledge that neither party shall do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract” (*511 W. 232nd Owners Corp.*, 98 NY2d at 153 [internal quotation marks omitted]; *see also 6243 Jericho Realty Corp. v AutoZone, Inc.*, 71 AD3d 983, 984 [2d Dept 2010]; *Moran v Erk*, 11 NY3d 452, 457 [2008]). A breach of the covenant is a breach of the contract itself (*see Boscoral Operating, LLC v Nautica Apparel, Inc.*, 298 AD2d 330, 331 [1st Dept 2002]). The covenant of good faith and fair dealing is breached when a party acts in a manner that, although not expressly forbidden by the contractual provision, would deprive the other party of the benefits of the agreement (*see 511 W. 232nd Owners Corp.*, 98 NY2d at 153; *Sorenson v Bridge Capital Corp.*, 52 AD3d 265, 267 [1st Dept 2008]).

The covenant encompasses any promises that a reasonable person in the position of the promisee would be justified in understanding were included (*see 511 W. 232nd Owners Corp.*, 98 NY2d at 153; *Ochal v Tel. Tech. Corp.*, 26 AD3d 575, 576 [3d Dept 2006]). However, the obligations imposed by an implied covenant of good faith and fair dealing are limited to obligations in aid and furtherance of the explicit terms of the parties’ agreement (*see Trump on Ocean, LLC v State*, 79 AD3d 1325, 1326 [3d Dept 2010]). The covenant cannot be construed so broadly as to

nullify the express terms of a contract, or to create independent contractual rights (*see Phoenix Capital Invs. LLC v Ellington Mgt. Group, L.L.C.*, 51 AD3d 549, 550 [1st Dept 2008]; *767 Third Ave. LLC v Greble & Finger, LLP*, 8 AD3d 75, [1st Dept 2004]; *SNS Bank, N.V. v Citibank, N.A.*, 7 AD3d 352, 355 [1st Dept 2004]; *Fesseha v TD Waterhouse Inv. Servs., Inc.*, 305 AD2d 268, [1st Dept 2003]). To establish a breach of the implied covenant, the plaintiff must allege facts that tend to show that the defendants sought to prevent performance of the contract or to withhold its benefits from the Plaintiff (*see Aventine Inv. Mgmt., Inc. v Can. Imperial Bank of Communications Inc.*, 265 AD2d 513, 514 [2d Dept 1999]).

A “claim that defendants breached the implied covenant of good faith and fair dealing [may be] properly dismissed as duplicative of the breach of contract claim [when] both claims arise from the same facts” (*Logan Advisors, LLC v Patriarch Partners, LLC*, 63 AD3d 440, 443 [1st Dept 2009]). MIO claims CDI breached the covenant of good faith and fair dealing by: “seeking payment for unauthorized services and expenses; artificially inflating the invoices submitted to MIO for payment; seeking payment for services that were not performed and expenses that were not incurred; and withholding information about services and expenses in order to deprive MIO of the ability to determine in real time whether CDI was actually performing services for which it sought payment, whether CDI was performing services in an efficient manner, and whether MIO wanted to exercise its option to terminate any of the SOWs and/or the Service Agreement.” This is the same conduct which provides the basis of the breach of contract claim, with the exception of the “withholding information” allegation. However, that allegation is not sufficient to suggest that CDI sought to prevent performance of the contract or to withhold its benefits from MIO. Accordingly, this claim fails.

D. Unjust Enrichment

“Unjust enrichment is a quasi contract theory of recovery, and ‘is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned’” (*Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 [1st Dept 2011], *affd.* 19 NY3d 511 [2012], quoting *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]). In order to plead a claim for unjust enrichment, the plaintiff must allege “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.*, 86 AD3d at 408, quoting *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]).

MIO argues this claim is pled in the alternative to the breach of contract claim and that “[t]he allegations regarding the inflation of bills and the receipt by CDI of payments to which CDI was not entitled are not coextensive with the allegations of breach of contract” (Opp at 19). The inflation of bills and the receipt of monies to which CDI was not entitled are precisely the subject of the breach of contract claim.

It is well settled that “it is impermissible . . . to seek damages in an action sounding in quasi contract where the suing party has fully performed on a valid written agreement, the existence of which is undisputed, and the scope of which clearly covers the dispute between the parties” (*Clark-Fitzpatrick, Inc. v Long Is. R. Co.*, 70 NY2d 382, 389 [1987]). Such is the situation alleged here. Accordingly, this claim also fails.

D. Indemnification

By invocation of the indemnification provision of the Services Agreement, MIO seeks to shift its litigation costs to CDI should MIO prevail in this case. The Service Agreement does not contain a fees shifting provision. The indemnification clause is set forth at § 9.20 of the Services Agreement and states:

“Provider agrees to defend, indemnify and hold harmless MIO and its direct and indirect parents and affiliates, and the employees, officers, and directors of MIO and its direct and indirect parents and affiliates (“MIO Indemnified Parties”) from and against all claims, actions, losses and liabilities suffered by, and reasonable and necessary costs incurred by, MIO Indemnified Parties, including reasonable attorneys’ fees, arising out or relating to Provider’s or any Consultant’s breach of any provision of the Agreement or of applicable law, rule or regulation or its or their negligence, willful misconduct or malfeasance.”

The New York Court of Appeals has held that when interpreting an indemnification provision of a contract, a duty to indemnify “should not be found unless it can be clearly implied from the language and purpose of the entire agreement and surrounding circumstances,” *Hooper Assoc. Ltd. v AGD Computers*, 74 NY2d 487, 491-492 (1989). “Because promises in a contract to indemnify the other party’s attorney’s fees run against the grain of the accepted policy that parties are responsible for their own attorney’s fees, courts should not infer a party’s intention to provide counsel fees as damages for a breach of contract unless the intention to do so is ‘unmistakably clear’ from the language of the contract” *Great Northern Ins. Co. v Interior Constr. Corp.*, 7 NY3d

412, 417 (2006). Such unmistakably clear language is absent from § 9.20. The clause does not obligate CDI to “defend, indemnify and hold harmless MIO” against contract claims brought by CDI. Indeed, if the parties wished to provide for attorney fee shifting they could have written it into their contract. The elected not to do so. The indemnification counterclaim shall be dismissed.

F. Fraud

“To state a cause of action for fraud, a plaintiff must allege a representation of material fact, the falsity of the representation, knowledge by the party making the representation that it was false when made, justifiable reliance by the plaintiff and resulting injury” (*Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003] citing *Monaco v New York Univ. Med. Ctr.*, 213 AD2d 167, 169 [1st Dept 1995], lv. denied 86 NY2d 882 [1995]; *Callas v Eisenberg*, 192 AD2d 349, 350 [1st Dept 1993]). The fraudulent acts alleged here are CDI’s submission of invoices for work not done or overstating time charges. Specific invoices are not mentioned.

“As a general rule, to recover damages for tort in a contract matter, it is necessary that the plaintiff plead and prove a breach of duty distinct from, or in addition to, the breach of contract” (*Non-Linear Trading Co., Inc. v Braddis Assoc., Inc.*, 243 AD2d 107, 118 [1st Dept 1998] [internal quotation omitted]). “A cause of action premised upon fraud cannot lie where it is based on the same allegations as the breach of contract claim” (*Heffez v L & G Gen. Const., Inc.*, 56 AD3d 526, 527 [2d Dept 2008]). The allegations underlying the fraud claim here are the submission of false invoices and charging MIO for work not done, the same allegations underlying the contract claim. Accordingly, this claim also fails.

G. Punitive Damages

As far as MIO seeks punitive damages, MIO’s arguments regarding the availability of those damages in a fraud case are inapplicable since the fraud claim fails, as discussed above. Further, punitive damages “are not available in a breach of contract action based upon a mere private wrong, but are awarded only where the fraud is “aimed at the public generally, is gross and involves high moral culpability,” not merely an isolated transaction incident to the conduct of a legitimate business (*Fischer v Yaakov*, 176 AD2d 655, 656 [1st Dept 1991] quoting *Walker v. Sheldon*, 10 NY2d 401, 405 [1961]). The request for punitive damages shall be dismissed.

Accordingly, the motion to dismiss defendant’s counterclaims is granted in part and denied in part. It is hereby,

ORDERED that first claim for breach of contract survives; and it is further

ORDERED that the second, third, fourth, and fifth causes of action are hereby dismissed; and it is further

· **ORDERED** that the demand for punitive damages is dismissed; and it is further

ORDERED that counsel for the parties shall appear at a status conference on Tuesday, June 2, 2020 at 9:30 AM at Part 49, Courtroom 252, 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.

DATED: April 9, 2020

E N T E R,

Hon. O. Peter Sherwood

O. PETER SHERWOOD J.S.C.