SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ANDREW BORROK** **PART** **IAS MOTION 53EFM**

Justice

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HUGUENOT LLC,

Plaintiff,

- v -

MEGALITH CAPITAL GROUP FUND I, LP, MATAWAN EMERALD INVESTMENTS LLC,6 CORTLANDT ALLEY, LLC,THE MARTIN GROUP LLP

Defendant.

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INDEX NO. 654851/2018

MOTION DATE 02/15/2019

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49

were read on this motion to/for DISMISSAL.

Upon the foregoing documents and for the reasons set forth below, 6 Cortlandt Alley, LLC (**6 Cortlandt**), the Martin Group LLP (**Martin**), Megalith Capital Group Fund I, LP (**Megalith**) and Matawan Emerald Investments, LLC's (**Matawan**) motion to dismiss is granted solely to the extent that the second (breach of the implied covenant of good faith and fair dealing), third (unjust enrichment), fourth (fraud), fifth (General Business Law § 349), and seventh (indemnification of attorneys' fees and disbursements) causes of action of its verified complaint pursuant to CPLR §§ 3211 (a) (1) and (7) is granted in part as set forth below. 6 Cortlandt, Martin, Megalith, and Matawan are collectively hereinafter referred to as the **Moving Parties**.

Reference is made to a certain Contract of Sale (the **Original Contract**), dated October 4, 2012 (NYSCEF Doc. No. 36), as amended by the Amendment to Contract (the **First Amendment**), dated March 6, 2013 (NYSCEF Doc. No. 37), and as further amended by the Second Amendment to Contract (the **Second Amendment;** the Original Contract, the First Amendment,

and together with the Second Amendment, hereinafter, collectively, the **Agreement**), dated May 3, 2013 (NYSCEF Doc. No. 38), each by and between Huguenot, as seller, and Megalith and Matawan, collectively, as purchaser, as such Agreement was assigned by the Assignment and Assumption Amended Contract (the **Assignment**), dated May 2013, by and between Megalith and Matawan as assignors and 6 Cortlandt as assignee (NYSCEF Doc. No. 39), and as further amended by the Third Amendment to Contract (the **Third Amendment;** the Agreement, the Assignment and together with the Third Amendment, hereinafter, collectively, the **Amended Contract**), dated May 27, 2014, by and between Huguenot, as seller, and 6 Cortlandt, as purchaser (NYSCEF Doc. No. 23).

Pursuant to the Original Contract, Huguenot, as the fee owner of the property located at 372 Broadway a/k/a 6 Cortlandt Alley, New York, New York 10013 (the **Property**), agreed to convert the Property to condominium ownership and create a two-unit condominium (NYSCEF Doc. No. 36 § 1.01 [a]). Unit #1 was to include "a portion of the Ground Floor and most of the Cellar Level, less and subject to condominium common elements and/or portions of Unit #2" (*id.*, § 1.01 [b]). Unit #2 was to "include all floors above the Ground Floor, through and including the roof of the Building, a portion of the Cellar Level and most of the Sub-Cellar Level, less and subject to condominium common elements" (*id.*). The parties further agreed that, following the condominium conversion, Huguenot would sell Unit #2, along with an undivided interest in the appurtenant common elements, to Megalith and Matawan for $10,000,000 (*id.*, §§ 1.02, 2.01).

Section 17.17 of the Original Contract provides:

> The internal walls demising Unit#1 and Unit #2 shall be constructed of cinder block or like material by Purchaser as its cost and expense. Except as otherwise set forth in the attached Floor Plans, all structural columns, if absolutely necessary, and any additional electrical and mechanical chases shall be placed tight against exterior walls only, in locations subject to Seller's reasonable approval. The provisions of this sub-section shall be included and incorporated into all condominium declarations to be filed in accordance with this contract.

Pursuant to Section 17.18, Megalith and Matawan agreed to perform certain work, "diligently and in a workmanlike manner," with all work to be substantially completed within two years of the date of the Original Contract, (*i.e.*, by October 12, 2014). Specifically, Section 17.18 provides, in relevant part:

> Purchaser shall repair and renovate the façade of exterior walls surrounding Unit #1, shall build out a storefront for Unit #1 . . . , shall construct the interior of Unit #1, **in accordance with the attached drawings**, as what is commonly known as a "warm vanilla box", which shall include installation of ceilings; windows; lighting . . . ; working mechanical systems including installing the following, in good working order: fire alarm and sprinkler systems; all structural systems; plumbing . . . ; primed but unpainted interior walls; plywood flooring; all utilities including electrical service . . . ; stairways; a finished handicap accessible storefront entrance; handicap accessible rest rooms . . . ; HVAC equipment . . . ; roof dunnage for said HVAC equipment . . . ; and fresh air for the subbasement.

The Performance Guaranty annexed to the Original Contract provides that Martin:

> absolutely and unconditionally guarantees to the Seller, its successors and assigns, the performance and completion of any and all work Purchaser is required to perform under this Contract, including completion of Unit #1 build-out set forth in Section 17.18, free and clear of liens, in accordance with the terms of this Contract (*id.*, at 26).

Pursuant to the First Amendment, the parties agreed that the work to be performed was to be done in accordance with new drawings annexed to the First Amendment (*i.e.*, and not in accordance with the drawings attached to the Original Contract or the previously-filed tax map)

(NYSCEF Doc. No. 37, § 5). And, pursuant to the Second Amendment, (i) Section 3.01 of the Original Contract was amended to provide that "**TIME SHALL BE OF THE ESSENCE AS TO SAID CLOSING DATE AND TIME**" and (ii) Section 2.01 was amended to reflect a new purchase price of $10,300,000.00 (*id.*, §§ 2, 3).

In addition, Section 4 of the Second Amendment provides:

> Waiver of Claims and Defenses. Purchasers acknowledge that Seller has worked diligently, reasonably and in good faith to satisfy the Condition Precedent at all times prior to the date hereof, and Purchasers waive any and all claims and defenses with respect thereto to the contrary. Purchasers acknowledge that Seller is in full compliance with all of its obligations under the Contract through and including the date hereof, and Purchasers waive any and all claims and defenses with respect thereto to the contrary. Without limiting the generality of the foregoing, Purchasers acknowledge that Seller has provided all required access to the Premises and given all required cooperation, approval and consent to the date hereof, and Purchasers waive any and all claims and defenses with respect thereto to the contrary. Purchasers acknowledge that Sellers are not responsible for any delays, and have not in any way interfered with or impeded their applications to the NYC Department of Buildings, NYC Landmarks Preservation Commission, or any other agency, and Purchasers waive any and all claims and defenses with respect thereto. Purchasers acknowledge that they engaged the services of TRAStudio as project architects knowingly and willingly, that Sellers are not responsible for the performance of TRA Studio, and Purchasers waive any and all claims and defenses with respect thereto.

Thereafter, pursuant to the Assignment, Megalith and Matawan assigned all of their rights, title, and interest in the Amended Contract to 6 Cortlandt, their wholly-owned affiliate, and 6 Cortlandt assumed all of their duties and responsibilities under the Amended Contract (NYSCEF Doc. No. 39, §§ 1, 2).

Subsequently, pursuant to the Third Amendment, the parties modified Section 17.18 and agreed that 6 Cortlandt's work to be performed as purchaser was to be done in accordance with new

drawings attached to the Third Amendment and not in accordance with the prior drawings or tax map (NYSCEF Doc. No. 40, § [2] [b]). The parties expressly agreed that "the floor plans attached to the First Amendment are void and of no force or effect" (*id.*). And the parties further agreed that:

> [a]s soon as feasible, Purchaser and Seller will file an amendment to the last plans already filed by Purchaser with DoB to conform to the Third Amendment Floor Plans. Seller agrees, in conjunction with this Amendment, to execute a confirmation of the plans filed on the express condition such amended plans are filed as soon as feasible. Subject to the foregoing, Seller shall withdraw its objection to DoB Application #121519589 and shall cooperate in having same amended to reflect the condominium as the applicant (*id.*).

Significantly, Section 3 of the Third Amendment provides:

> Additional Construction Matters. Purchaser agrees to perform the following work in Unit 1 at Purchaser's cost and expense:
> a. all existing floors to be demolished and removed. All floors to be constructed of level and polished poured concrete (with using helicopter troweling machines) on steel decking. The following floors shall have the following ceiling heights:
> Ground-floor Retail: 15 ft, 10 and ¼ inches – Floor to ceiling
> Retail Mezzanine: 9 ft, 11 and 7/8 inches – Floor to ceiling
> Retail Cellar: 10 ft, 6 and 1⁄4 inches - [f]loor to ceiling
> Retail Sub-Cellar: 8 ft, 5 and 5/8 inches - floor to ceiling (*id.*, § 3 [a]).

The additional construction requirements set forth under Section 3 of the Third Amendment include: (i) the first floor on Broadway was to be at street level, (ii) no structural columns, chases, conduits, or pipes protruding more than two inches from any wall (except as otherwise provided in the Third Amendment) (iii) construction of stairs in rear of Unit #1, (iv) construction of shaftway, floors, and handicap lift, (v) piping was to be built inside of floor decking, (vi) vaults to be waterproofed and free of leaks, (vii) installation of HVAC equipment and cooling tower, and (viii) no sheetrock was to be installed on the existing brick North and South walls of Unit #1, which brick was to be patched where necessary (*id.*, §§ 3 [b]-[f]).

And, pursuant to Section 4 of the Third Amendment, all work was to be substantially completed by 6 Cortlandt by March 15, 2015 (the **Substantial Completion Date**), and if 6 Cortlandt failed to achieve substantial completion of work by the Substantial Completion Date, 6 Cortlandt was required to pay a daily fee of $1,333.33 for each additional day until the work was substantially completed (*id.*, §§ 4 [b], [d]).

The closing took place on July 2, 2013, at which time Huguenot conveyed title to Unit #2, together with an 80% undivided interest in the common elements of the condominium, to 6 Cortlandt, in accordance with the terms of the Amended Contract. Huguenot retained ownership of Unit #1 and a 20% undivided interest in the common elements. After the closing, Hugenot sued the Moving Parties alleging, among other things, that (i) since the closing date, the Moving Parties have failed to comply with their construction obligations under the Amended Contract, (ii) the Moving Parties' failure to fulfill their contractual obligations has resulted in multiple serious construction defects at the Property which they have neglected to rectify, and (iii) the Moving Parties improperly filed an amended condominium declaration.

DISCUSSION

A party may move for judgment dismissing one or more causes of action on the ground that the pleadings fail to state a cause of action for which relief may be granted (CPLR § 3211 [a] [7]). On a motion to dismiss pursuant to CPLR § 3211 (a) (7), the court must afford the pleadings a liberal construction and accept the facts alleged in the complaint as true, according the plaintiff the benefit of every favorable inference (*Morone v Morone*, 50 NY2d 481, 484 [1980]). The

court's inquiry on a motion to dismiss is whether the facts alleged fit within any cognizable legal theory (*id.*). Bare legal conclusions are not accorded favorable inferences, however, and need not be accepted as true (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999]). A party may also move to dismiss based on documentary evidence pursuant to CPLR § 3211 (a) (1). A motion to dismiss pursuant to CPLR § 3211 (a) (1) will be granted only where the documentary evidence conclusively establishes a defense to the plaintiff's claims as a matter of law (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]).

I. The Motion to Dismiss the Second Cause of Action (Breach of the Implied Covenant of Good Faith and Fair Dealing) is Denied

In every contract there is an implied covenant of good faith and fair dealing, according to which the parties pledge that "neither party shall do anything which 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. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002] [internal quotation marks and citation omitted]). Where a cause of action for breach of the implied covenant of good faith and fair dealing is based on allegations of additional wrongdoing beyond the conduct allegedly constituting a breach of contract, the claims are not duplicative (*Credit Agricole Corp. v BDC Fin., LLC*, 135 AD3d 561, 561 [1st Dept 2016]).

The Moving Parties argue that the second cause of action (breach of the duty of good faith and fair dealing) should be dismissed because it is duplicative of the breach of contract cause of action. This, however, misses the point.

Huguenot alleges that the Moving Parties acted in bad faith to deprive Huguenot of the benefit of its bargain by: (i) intentionally filing an application with the New York City Department of Buildings (**DOB**) to change the layout of Unit #1 to reduce the available space to which Huguenot was entitled, (ii) improperly filing a permit with the DOB falsely purporting to be the owner of the Property, (iii) failing to respond to emails from Huguenot concerning the Property for months at a time, thereby causing further delays (iv) failing to provide Huguenot access throughout the Cortlandt Alley entrance and the Unit #2 lobby, (v) refusing to turn over copies of the condominium offer plan, including 16 amendments thereto, (vii), representing that they had installed appropriate security mesh when in fact they had not, and (viii) entering the Property without providing adequate notice (Compl., ¶¶ 49-58). These allegations, which must be taken as true at this stage in the proceedings, include numerous instances of conduct taken in bad faith to deprive Huguenot of the benefit of its bargain and go well beyond the allegations forming the basis of the breach of contract claim. Accordingly, the motion to dismiss the cause of action for breach of the implied covenant of good faith and fair dealing is denied.

II. The Motion to Dismiss the Third Cause of Action (Unjust Enrichment) is Granted

To state a cause of action for unjust enrichment, "a plaintiff must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [internal quotations omitted]). A plaintiff need not establish privity, but a cause of action for unjust enrichment "will not be supported if the connection between the parties is too attenuated" (*id.*).

The Moving Parties argue that the cause of action for unjust enrichment must be dismissed because Huguenot alleges only speculative future harm and fails to allege that the Moving Parties have actually been enriched at Huguenot's expense and that, in any event, the claim is duplicative of the breach of contract claim. The court agrees.

The Complaint alleges that the Moving Parties have been enriched by retaining funds that should have been paid to Huguenot as delay fees under the Third Amended Contract and by continuing to improperly market residential units in the subject premises for sale (Compl., ¶¶ 61-64). In their opposition papers, Huguenot alleges that the Moving Parties filed an amended condominium declaration, which indicates that they are preparing to sell and close on the residential units (Pl. Mem. in Opp., at 14). With respect to the allegations concerning the marketing of residential units for sale, the Complaint fails to allege that any units have actually been sold. In other words, the Complaint fails to allege that the Moving Parties have in fact been enriched by the sale of any residential units, and instead merely offers speculation that they may be attempting to sell them in the future. Second, to the extent that this cause of action is based on the Moving Parties' failure to pay delay fees, it is dismissed as duplicative of the cause of action for breach of contract.

III. The Motion to Dismiss the Fourth Cause of Action (Fraud) is Granted

The prima facie elements of a cause of action for fraud are (i) a material misrepresentation of fact, (ii) made by the defendant with knowledge of its falsity, (ii) with an intent to induce the

plaintiff's reliance, (iv) justifiable reliance by the plaintiff, and (v) damages (*Schneiderman v Credit Suisse Securities (USA) LLC*, 31 NY3d 622, 638 [2018]). A cause of action alleging fraud must be pled with particularity (CPLR § 3016 [b]).

The Moving Parties argue that the cause of action for fraud must be dismissed because, among other reasons, Huguenot fails to plead a duty to disclose material information and fails to plead the fraud claim with the requisite particularity under CPLR § 3016 (b). The court agrees.

In the opposition papers, Huguenot argues that the Complaint alleges that the Moving Parties induced Huguenot into entering into the Amended Contract with them by making false misrepresentations that they had the experience and capabilities to perform the work that they were required to complete pursuant to the Amended Contract (Compl., ¶ 66). Huguenot further alleges that the Moving Parties made false statements of material fact with the intent to deceive Huguenot by asserting that they were the owners of the subject premises when they filed the application with the DOB and misrepresenting the amount of space to which Huguenot was entitled (*id.*, ¶ 69). In addition, Huguenot asserts that the Moving Parties' various written statements that they were complying with their contractual obligations regarding the Amended Contract's construction requirements constitute further false statements made with the intent to deceive Huguenot and induce it to continue their business relationship and enter into subsequent amendments to the contract (*id.*, ¶ 70).

The problem is, however, that because part of Huguenot's fraud claim is based on allegations that the Moving Parties fraudulently concealed the DOB Application and permit filing, Huguenot

must allege, "that the defendant[s] had a duty to disclose material information and failed to do so" (*Gottbetter v Crone Kline Rinde, LLP*, 162 AD3d 579, 580 [1st Dept 2018]). Simply put, Huguenot fails to allege a fiduciary or confidential relationship that would give rise to a duty to disclose material information (*Manti's Transp., Inc. v C.T. Lines, Inc.*, 68 AD3d 937, 940 [1st Dept 2009]). And, with respect to the allegations of affirmative misrepresentations, the complaint does not plead fraud with the requisite particularity. Specifically, Huguenot alleges that the Moving Parties made false statements regarding their experience and capabilities to induce Huguenot to believe that they were capable of performing the required work (Compl., ¶ 67), and made numerous written misrepresentations concerning their compliance with their contractual obligations (*id.*, ¶ 70), but fails to allege with any detail the specific contents of such communications, the dates on which such statements were made, to whom they were delivered, or any other relevant information concerning the circumstances of the alleged wrongdoing. Therefore, the fourth cause of action for fraud must be dismissed.

IV. The Motion to Dismiss the Fifth Cause of Action (General Business Law § 349) is Denied

General Business Law § 349 (a) states: "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful." To state a cause of action for deceptive business practices under General Business Law § 349, a plaintiff must establish that the defendant has engaged in a consumer-oriented act or practice that is materially deceptive or misleading, resulting in injury to the plaintiff (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, N.A.*, 85 NY2d 20, 25 [1995]). The "defendant's acts or practices must have a broad impact on consumers at large; '[p]rivate

contract disputes unique to the parties . . . would not fall within the ambit of the statute'" (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 320 [1995], quoting *Oswego*, 85 NY2d at 25).

The Moving Parties argue that the General Business Law § 349 claim must be dismissed because the alleged acts and practices set forth in the Complaint do not affect the public at large, which is an essential element of the claim. The argument, however, is unavailing.

Huguenot alleges that the Moving Parties engaged in deceptive acts and practices by, among other things, making written misrepresentations to Huguenot regarding their compliance with the Amended Contract as it relates to the defendants' obligations concerning fire safety, securing demising walls, piping, HVAC systems, and other conditions and renovations in the Property (Compl., ¶¶ 74-77). Huguenot further argues that by marketing residential units for sale to the public that are incomplete and in dangerous condition, including due to potential fire safety issues, the Moving Parties are providing materially misleading information to the public at large (Pl. Mem. in Opp. at 15). And, because of the Moving Defendant's alleged conduct, Huguenot alleges that the plumbing will have to be replaced at significant expense, and potential buyers are not being made aware of this liability (*id.*). Finally, and, contrary to the Moving Parties' argument that marketing the residential units for sale does not affect the public at large, General Business Law § 349 has been expressly applied to deceptive practices relating to the marketing and sale of condominium units (*Bd. of Mgrs. of Bayberry Greens Condominium v Bayberry Greens Assocs.*, 174 AD2d 595, 571 [2d Dept 1991]), and the sale of shares in a cooperative corporation (*B.S.L. One Owners Corp. v Key Intl. Mfg., Inc.*, 225 AD2d 643, 640 [2d Dept 1996]). Therefore, taking the allegations in the complaint as true and affording Huguenot the

benefit of every favorable inference, Huguenot sufficiently states a claim under General Business Law § 349.

V. The Motion to Dismiss the Seventh Cause of Action (Indemnification of Attorneys' Fees and Costs/Disbursements) is Denied

As a general rule, attorneys' fees "are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule" (Hooper Assoc. v AGS Computers, 17 NY2d 487, 491 [1989]). However, parties may contractually agree that one party will indemnify the other for attorneys' fees and costs incurred in connection with any disputes arising from or relating to the contract (*id.*). A contractual provision providing for indemnification or attorneys' fees and disbursements will be held to apply to a dispute between the parties to the contract where the clause "provides coverage for extremely broad claims, and is consistent with other clauses that have been held to provide for indemnification of attorneys' fees for intra-party disputes" (*Square Mile Structured Debt (One), LLC v Swig*, 110 AD3d 449, 449 [1st Dept 2013]). But "[w]ords in a contract are to be construed to achieve the apparent purpose of the parties," and the court should not infer one party's intention to indemnify the other for attorneys' fees and costs "unless the intention to do so is unmistakably clear from the language of the promise" (*Hooper*, 74 NY2d at 491-492). The Moving Parties argue that Section 17.23 only applies to claims asserted by third parties, not to claims brought by the seller against the purchaser. In its opposition papers, Huguenot asserts that it is entitled to indemnification for its attorneys' fees and costs in connection with this lawsuit pursuant to Section 17.23 of the Amended Contract because it contemplates actions intra-party disputes. The argument however fails.

Section 17.23 provides, in pertinent part:

> Purchaser . . . hereby covenants to indemnify, defend, save and hold harmless Seller . . . , from and against any and all claims, actions, liabilities, damages, fines, suits, liens, fees, expenses and costs (including reasonable attorneys' fees, disbursements, and court costs . . .), including claims of injury (including death), or damage to any person or property occurring at or about the Property, . . . against or incurred by Indemnitee, and/or seeking enforcement against the Property ("Claims"), arising from, in connection with, or related to:
> (i) The performance of work or alterations at or about the Building or the Property or any part thereof by, at the direction or on behalf of Purchaser;
> (ii) Any negligence or wrongful acts or omissions on the part of the Purchaser in connection with Purchaser's work or alterations at or about the Building (NYSCEF Doc. No. 36, § 17.23).

Based on a plain reading of Section 17.23, it contemplates claims brought by third parties and not claims between the parties to the Amended Contract. The use of the language "from and against any and all claims" indicates an intention to indemnify only from and against claims asserted by third parties. This is simply not a clear and unmistakable promise to waive the protection of the general rule that parties are responsible for their own attorneys' fees with respect to intra-party disputes (*Hooper*, 74 NY2d at 492). As in Hooper, the indemnification clause in this case "is typical of those which contemplate reimbursement when the indemnitee is required to pay damages on a third-party claim" (*id.*). The language of Section 17.23 expressly contemplates indemnification for attorneys' fees and costs ***in an action brought by a third party*** arising from or relating to work performed by or at the direction of 6 Cortlandt or negligent or wrongful acts by 6 Cortlandt. None of the provisions of Section 17.23 "are exclusively or unequivocally referable to claims between the parties themselves or support an inference that defendant promised to indemnify plaintiff for counsel fees in an action on the contract" (*id.*). And, as in Hooper, "[c]onstruing the indemnification clause as pertaining only to third-party

suits affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect" (*id.* at 493). Accordingly, the motion to dismiss the seventh cause of action is granted.

VI. The Motion to Dismiss is Denied as it Relates to Megalith and Matawan

It is well settled that "an assignment does not release the assignor of its obligations under the assigned contract, absent an express agreement to that effect or one that can be implied from facts other than the other contracting party's mere consent to the assignment (*Mandel v Fischer*, 205 AD2d 375, 376 [1st Dept 1994] [internal citation omitted]).

The Moving Parties argue that Huguenot unequivocally acknowledged and accepted the assignment because it executed the Third Amendment, which states in the recitals: "WHEREAS, contract-vendees Megalith Capital Group Fund I LP and Matawan Emerald Investments LLC assigned their interest in the contract to their wholly owned affiliate 6 Cortlandt Alley LLC, the Purchaser," and subsequently ratified the Amended Contract in all respects. The Moving Parties rely on *Mandel v Fisher* (205 AD2d 375 [1st Dept 1994]) and *Worldcom, Inc. v Prepay USA Telecom. Corp.* (294 AD2d 157 [1st Dept 2002]) in support of their argument that there was an implied release based on the facts of this case. Notably, however, in neither case did the First Department find such an implied release.

In *Mandel*, the plaintiff's decedent assigned a lease with the defendant to his wholly-owned corporation (*Mandel*, 205 AD2d at 376). The defendant claimed that he was released from paying rent under the lease as a result of the assignment (*id.*). The Supreme Court granted

summary judgment in favor of the plaintiff and the First Department unanimously affirmed (*id.*). Rather than supporting the Moving Parties' position, however, this case merely re-states the well-established principle that "an assignment does not release the assignor of its obligations under the assigned contract, absent an express agreement to that effect or one that can be implied from facts other than the other contracting party's mere consent to the assignment (*id.*, citing (*Rosenthal Paper Co. v National Folding Box & Paper Co.*, 226 N.Y. 313, 326 [1919]; *185 Madison Assocs. v Ryan*, 174 A.D.2d 461, 461 [1st Dept 1991]). The First Department did not, however, find such an implied release in that case.

In *WorldCom*, pursuant to an addendum to a certain contract, the plaintiffs consented to the corporate defendants' assignment of the contract to the defendant-respondent. The Supreme Court granted partial summary judgment in favor of the plaintiffs on the issue of the corporate defendants' liability for breach of contract and the First Department affirmed (*WorldCom*, 294 AD2d at 158). Putting aside that the motion in WorldCom was a summary judgment motion (which this is not), the First Department explained that "[t]he addendum . . . specifically provided that the corporate defendant was to remain bound, and the record contains no express agreement releasing the corporate defendants or any facts, other than plaintiffs' consent to the assignment, tending to imply such a release" (*id.*, citing *Mandel*, 205 AD2d at 375). Similarly, in this case, as in *Mandel* and *WorldCom*, there are no facts that would imply a release of Megalith and Matawan of their liability under the Amended Contract.

In their opposition papers, Huguenot argues that it never executed or consented to the Assignment, and that in any event, the assignment did not expressly release Megalith and

Matawan from liability under the Amended Contract and as such Megalith and Matawan remain liable. The court agrees. The Assignment did not expressly release Megalith and Matawan of their obligations under the Amended Contract and no such release of liability can be implied from the facts and circumstances presented to the court. The recital in the Third Amendment referencing the Assignment does not necessarily indicate that Huguenot acknowledged or accepted the Assignment. But even if it does, there is no express release to which Huguenot is a party and no such release can be implied from the facts.

The motion to dismiss is denied as it relates to Megalith and Matawan.

Accordingly, it is

ORDERED that the motion to dismiss is granted in part solely to the extent that the third cause of action (unjust enrichment), the fourth cause of action (fraud), and the seventh cause of action (indemnification of attorneys' fees and disbursements) are dismissed.

April 17, 2020

Hon. Andrew Borrok
J.S.C. Hon. Andrew Borrok