

Changjun Gu v AH 10 Rutgers LLC
2020 NY Slip Op 32653(U)
August 13, 2020
Supreme Court, New York County
Docket Number: 651403/2020
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION14

Justice

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INDEX NO. 651403/2020

CHANGJUN GU, AS THE ADMINISTRATOR OF THE
ESTATE OF XIN GU A/K/A CHRISTOPHER GU, KG
MANAGEMENT & CONSULTING, INC.,CHANGJUN GU

MOTION DATE 08/11/2020

MOTION SEQ. NO. 001

Plaintiffs,

- v -

**DECISION + ORDER ON
MOTION**

AH 10 RUTGERS LLC,MAURICE KAUFMAN,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14

were read on this motion to/for DISMISS.

The motion to dismiss certain causes of action by defendants is granted.

Background

This action arises out of plaintiffs work as general contractor for defendants at a construction project located at 10 Rutgers Street in Manhattan. Plaintiffs claim that defendants received and accepted plaintiffs' invoices but failed to pay in full. They acknowledge that they entered into an agreement with defendants where defendants would pay plaintiffs \$370,000, review their records concerning a \$150,000 holdback, and report back to plaintiffs. Plaintiffs contend that defendants did not share the results of this review or pay plaintiffs the disputed \$150,000.

Plaintiffs bring causes of action against defendants for breach of contract (construction contract), promissory estoppel, unjust enrichment, declaratory judgment (construction contract), breach of contract (release), declaratory judgment (release) and quantum meruit.

Defendants move to dismiss all causes of action except for the breach of contract related to the release. They claim that many of the claims in this case are barred by the valid and binding release that the parties entered into and the quasi-contract claims should be dismissed as duplicative. Defendants assert that the only dispute concerns the \$150,000 holdback.

They also claim that the allegations against the individual defendant, Maurice Kaufman, must be dismissed because there is no basis to pierce the corporate veil. Defendants point out that Kaufman is not the managing member of the corporate defendant nor does he control this defendant.

With respect to the release, defendants observe that plaintiff KG Management entered into a Release and Waiver of Lien related to the construction work with defendant 10 Rutgers.

The release provided that:

“For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Releasors hereby waive, discharge, and release any and all liens, claims, right to liens, debts, actions and demands of any nature that Releasors now have or may have on or against Releasees, Releasees’ sureties, Releasees’ lenders and guarantors, on or against the above-mentioned Projects, and any and all other described above for and on account of work performed and labor, equipment and/or materials supplied at or in connection with construction or improvement at the Projects and premises described above”

“The Releasors further hereby acknowledge that the sum of Three Hundred Seventy Thousand and 00/100 Dollars (\$370,000.00) payable to KG Management & Consulting Inc. (the “Final Payment Amount”) constitutes the entire agreed upon **unpaid** balance due the Releasors. Separately, One Hundred Fifty Thousand and 00/100 US Dollars (\$150,000.00) (the “Holdback Amount”) remains subject to further review and negotiation Releasors and Releasees pursuant to the terms of the holdback described below” (NYSCEF Doc. No. 6 at 1).

Defendants argue that they paid the \$370,000 and the basis for plaintiffs’ complaint is their purported failure to provide plaintiffs with documents demonstrating why they did not pay the holdback to plaintiffs. They conclude that the rest of the claims are covered by the above release.

In opposition, plaintiffs allege that Kaufman retained plaintiffs to be general contractor for the project and Kaufman has failed to pay what is owed to plaintiffs. Plaintiffs assert that Kaufman, specifically, has not provided any documents about why the holdback amount was not sent to plaintiffs. They argue that because defendants have not released their review concerning the holdback amount, defendants did not execute under the terms of the release. Plaintiffs also contend that their quasi-contractual causes of action can be pled in the alternative and should not be dismissed.

In reply, defendants emphasize that the claims are barred by the release and waiver. They question how plaintiffs can hold Kaufman liable simply because he signed the contract on behalf of the corporate entity.

Discussion

“On a CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true. Further, on such a motion, the complaint is to be construed liberally and all reasonable inferences must be drawn in favor of the plaintiff” (*Alden Global Value Recovery Master Fund L.P. v Key Bank Natl. Assoc.*, 159 AD3d 618, 621-622, 74 NYS3d 559 [1st Dept 2018] [internal quotations and citations omitted]).

“In assessing a motion under CPLR 3211(a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one” (*Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972 [1994]).

A motion to dismiss based on documentary evidence “may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively

establishing a defense as a matter of law” (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]). “Whether a 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 NY3d 11, 19, 799 NYS2d 170 [2005]).

“Generally . . . piercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff’s injury” (*Morris v New York State Dept. of Taxation and Finance*, 82 NY2d 135, 141, 603 NYS2d 807 [1993]).

Here, defendants conclusively demonstrated that they are entitled to relief requested. They point to a clear and unambiguous release that bars the causes of action they seek to dismiss in this motion. The release establishes that the only remaining dispute between the parties is the \$150,000 holdback. Plaintiffs’ opposition (which is only from an attorney rather than plaintiffs), does not dispute that there was a release or that they didn’t sign it. Nor do plaintiffs deny that defendants paid the \$370,000 mentioned in the release. Instead, plaintiffs offer vague and conclusory assertions that they were not paid in full. The remedy for defendants’ purported breach of the release is to allege a breach of that agreement, something that plaintiffs have done here and the only cause of action defendants have not sought to dismiss.

To be clear, plaintiffs do not contend that the release was invalid, procured by fraud or duress or should be disregarded for some reason. Instead, plaintiff’ assertions are that a dispute (which was carved out in the release) remains in dispute. That is not a basis to sue defendants on the underlying contract. Nor is it a basis to bring quasi-contract claims because both sides admit there is a contract and neither seeks to invalidate the contract. Plaintiffs are certainly permitted to

plead causes of action in the alternative, but that only applies when there is a chance that the contract at issue might be invalidated; the claims here concern whether defendants breached a contract, not whether the contract will be declared a nullity.

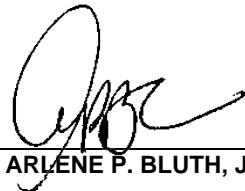
The claims against Kaufman must also be dismissed. The complaint refers to Kaufman and 10 Rutgers as a single entity. It does not parse out what, specifically, Kaufman did that might permit plaintiffs to recover against him as an individual; for instance, there are no allegations that Kaufman treated the corporate entity as his alter ego or abused the corporate form. And plaintiffs did not submit an affidavit in opposition that could cure this failure (only an attorneys' affirmation was submitted). Moreover, the release does not state it is between Kaufman and plaintiffs. Plaintiffs submit nothing to suggest that they have stated a cognizable theory under which Kaufman can be personally liable.

Accordingly, it is hereby

ORDERED that the motion by defendants to dismiss all causes of action except for the fifth cause of action (breach of contract—release) is granted and all claims against defendant Kaufman are severed and dismissed.

Remote Conference: November 20, 2020.

8/13/2020
DATE


ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER
 INCLUDES TRANSFER/REASSIGN

SUBMIT ORDER
 FIDUCIARY APPOINTMENT

REFERENCE

CHECK IF APPROPRIATE: