SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **IAS MOTION 38EFM**

Justice

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HARBORVIEW CAPITAL PARTNERS,

Plaintiff,

- v -

SOLOMON INVESTMENTS, SOLOMON INVESTMENTS LLC, SAMUEL GOLDNER, ARIEL FEIN, IRVING LANGER, LAZER SCHEINER, JACOB KARMEL, TZVI LUCHSHEIN a/k/a TEDDY LICHTSCHEIN, J-DEK ELLIOT Y JACOBS and MOSHE FEUER,

Defendants.

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INDEX NO.	651385/2019
MOTION DATE	04/15/2019, 04/15/2019, 04/16/2019, 04/16/2019
MOTION SEQ. NO.	001 002 003 004

DECISION + ORDER ON MOTION

LOUIS L. NOCK, J.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 27, 31, 32, 33, 39, (Motion 002) 25, 26, 30, 34, 38, (Motion 003) 19, 20, 21, 28, 35, 40, (Motion 004) 22, 23, 24, 29, 36, 41

were read on this motion to/for DISMISS.

Upon the foregoing documents, the motions of defendants Ariel Fein, Irving Langer, Jacob Karmel, Elliott Jacobs and Moshe Feurer (Motion Seq. 001), defendants Teddy Lichtschein and Eliezer Scheiner (Motion Seq. 002), defendant Samuel Goldner (Motion Seq. 003), and Solomon Investments (Motion Seq. 004) to dismiss the complaint are denied, in accord with the following memorandum decision.

Background

As alleged in the complaint (the "Complaint"), this action arises out of multiple breaches of contract relating to services provided by the plaintiff Harborview Capital Partners ("Plaintiff") to the defendants (all together, "Defendants"), in connection with a "Non-Exclusive Correspondent Agreement" (the "Contract") between Plaintiff and defendant Solomon

Investments (complaint ¶ 1). Plaintiff alleges that Solomon Investments is a partnership that defendants Samuel Goldner, Ariel Fein, Irving Langer, Lazer Scheiner a/k/a Eliezer Scheiner, Jacob Karmel, Tzvi Luchshein a/k/a Teddy Lichtschein, J-Dek Elliot Y Jacobs a/k/a Elliott Jacobs, and Moshe Feurer (together, the "Individual Defendants") are members of and, thus, liable in connection with the matters referred to in the complaint (*see, id*. ¶¶ 3, 5-12, 15, 20, 24). Plaintiff commenced the action on March 7, 2019, asserting claims for breach of contract, account stated, and unjust enrichment. By their respective motions, Defendants move to dismiss the complaint on the grounds that the Complaint fails to state a claim for breach of contract, unjust enrichment, or an account stated. The Individual Defendants also move to dismiss on the grounds that they are not parties to the Contract. Plaintiff opposes each of the motions.

Standard of Review

On a motion to dismiss brought under CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citations omitted]). Ambiguous allegations must be resolved in the plaintiff's favor (*see JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). "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" (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002][internal citations omitted]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*Cortlandt Street Recovery Corp. v Bonderman*, 31 NY3d 30, 38 [2018]), but a pleading consisting of "bare legal conclusions" is insufficient (*Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006]) and "the court is not required

to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts" (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]).

Discussion

At the outset, the Individual Defendants move to dismiss the Complaint against them on the grounds that they are not parties to the Contract and are, therefore, not liable for any causes of action arising in connection therewith. Plaintiff opposes and argues that the Individual Defendants are liable because they are members of Solomon Investments, which is a general partnership, as alleged in the Complaint (complaint ¶¶ 3, 5-13). Under New York partnership law, members of a general partnership are liable "jointly for all other debts and obligations of the partnership" (Partnership Law § 26 [2]). The law also provides indemnity to a partner who has satisfied a claim against the partnership (*id.* § 40 [2]). In litigation, "[a] cause of action against a partnership for breach of contract does not lie against the individual partners absent an allegation that the partnership is insolvent or otherwise unable to pay its obligations" (*Lifeline Funding, LLC v Ripka*, 114 AD3d 507, 507 [1st Dept 2014]). However, significantly, this rule "is one of pleading, and where a plaintiff has named the partnership as a party defendant, along with the individual partners, it is unnecessary to aver the insufficiency of partnership assets to satisfy the claim" (*National Union Fire Ins. Co. of Pittsburgh, Pa. v Christopher Assoc.*, 257 AD2d 1, 13 [1st Dept 1999]; see also *Lifeline Funding*, 114 AD3d at 507 ["Hence, a plaintiff is required either to name the partnership as a party defendant, along with the individual partners, or to aver the insufficiency of partnership assets to satisfy the claim"]). In this case, the Complaint sets forth factual allegations that Solomon Investments is a general partnership, of which each Individual Defendant is a partner, and has named each member of the partnership as a party

defendant, as required by the foregoing rule elucidated by the First Department. In the absence of unambiguous documentary evidence of undisputed authenticity (*Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 432 [1st Dept 2014]), on a motion to dismiss, the court must "accept the facts as alleged in the complaint as true" and "accord the plaintiff the benefit of every possible favorable inference" (*Leon v Martinez*, 84 NY2d at 87-88). None of the Defendants have denied that Solomon Investments is a general partnership of which they are members, nor have they moved to dismiss pursuant to CPLR 3211(a)(1) or presented any documentary evidence to demonstrate that they are not members of the partnership. The motions of the Individual Defendants to dismiss the complaint against them is, therefore, denied.

Defendants also move to dismiss the complaint on the grounds that Plaintiff fails to state a cause of action for breach of contract, account stated, and unjust enrichment, the three causes of action pleaded in the complaint. To state a cause of action for breach of contract, a plaintiff must plead the existence of a contract between the parties, plaintiff's performance, the defendant's breach, and damages (*Belle Lighting LLC v Artisan Construction Partners LLC*, 178 A.D.3d 605, 606 [1st Dept 2019]). The Complaint alleges that Plaintiff entered into the Contract with defendant Solomon Investments, as executed by defendant Samuel Goldner as Principal (complaint ¶ 1, exhibit A; NYSCEF Doc No 1); that it performed its contractual obligation to provide to Solomon Investments the services set forth in the Contract (*id.* at 4-5, ¶¶ 4-7, 11); that Solomon Investments breached the agreement by failing to make payments due thereunder (*id.* ¶¶ 5-8, 13-15); and that Plaintiff suffered damages in the amount of $260,000 as a result of the breach (*id.*). With respect to the "services" in question, the Complaint quotes language of the Contract which grants to Plaintiff the "right to negotiate on behalf of [Solomon Investments] to procure financing [] from one or more commercial lenders or other prospective providers of

Financing," in exchange for which Plaintiff would be reimbursed a "Correspondent's Fee" of 1% of the total amount of financing procured (*id.* ¶¶ 4-5). Plaintiff alleges that it performed its contractual obligations pursuant to the Contract and is owed a sum of $260,000 for the services provided (*id.* 7-8). These allegations adequately state a cause of action for breach of contract against Solomon Investments, and they are "sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved" (CPLR § 3013). Particularity is not required to plead a claim for breach of contract (CPLR § 3016). As such, the motions to dismiss are denied as to the claim for breach of contract.

"An account stated is an agreement, express or implied, between the parties to an account based upon prior transactions between them with respect to the correctness of account items and a specific balance due on them which is independent of the original obligation" (*Caring Professionals, Inc. v Landa*, 152 AD3d 738, 739 [2d Dept 2017]). It is well settled that "[e]ither retention of bills without objection or partial payment may give rise to an account stated" entitling the moving party to summary judgment in its favor (*Morrison Cohen Singer and Weinstein, LLP v. Waters*, 13 A.D.3d 51, 52 [1st Dept 2004]). By pleading that it sent letters demanding payment, to Defendants (complaint ¶¶ 9, 17-19, exhibit 2; NYSCEF Doc No 3), who retained the letters without objection (*id*. ¶¶ 18-19), Plaintiff has adequately stated a cause of action for an account stated for the purposes of withstanding a motion to dismiss (*see D'Agostino v D'Agostino*, 262 AD2d 269, 270 [2d Dept 1999] [The "appellant's receipt of the plaintiff's demand letter without objection within a reasonable time gave rise to an actionable implied account stated"]). The Defendants' argument that Plaintiff must also allege a third element, "that the debtor has agreed to pay such debt," is incorrect. The Appellate Division, First Department, specifically repudiated such a purported "third element" in *Morrison Cohen v Waters* (*supra*),

where it rejected as "in error" a reading of the elements for an action in account stated that required that the two elements be "coupled" with an agreement to make partial payment (13 AD3d at 52). Also unavailing is Defendants' contention that the reference in Plaintiff's second demand letter to "unfruitful exchange of correspondence" between counsels for the parties indicates that Defendants objected to the demands. Outside the vague reference to an "unfruitful exchange," the letter sets forth no additional detail regarding these communications and it further states that "you have failed to respond in any manner to my First Demand Notice" (complaint, exhibit B; NYSCEF Doc No 1). This ambiguous exchange is insufficient to form the basis for dismissal. Thus, the motions to dismiss are denied with respect to the cause of action for an account stated.

Finally, to state a cause of action for unjust enrichment a plaintiff must demonstrate "that (1) defendant was enriched, (2) at plaintiff's expense, and (3) that it is against equity and good conscience to permit defendant to retain what is sought to be recovered" (*Farina v Bastianich*, 116 AD3d 546, 548 [1st Dept 2014]). "A person may be unjustly enriched not only where she receives money or property, but also where she otherwise receives a benefit" (*id.*). The Complaint alleges that the partnership, Solomon Investments, and its members, the Individual Defendants, were enriched by receiving "substantial financial benefit" from the services Plaintiff provided pursuant to the Contract (complaint ¶¶ 4, 23), and that it was at plaintiff's expense because Defendants have failed to pay the amounts due (*id.* ¶ 24). It is alleged that it would be against equity and good conscience to permit Defendants to retain the benefit of Plaintiff's services without payment for same (*id.*). These allegations are sufficient to state a cause of action for unjust enrichment. Plaintiff is not precluded from pleading a cause of action for breach of contract and one for unjust enrichment as an alternative theory (*Loheac v Children's Corner*

Learning Center, 51 AD3d 476, 476 [1st Dept 2008]). Alternative pleading is particularly appropriate where, as here, questions of fact may exist regarding the liability of the individual partners for the contractual obligations of the general partnership (*see Lax v Design Quest, NY Ltd.*, 118 AD3d 490, 491 [1st Dept 2014]). As such, the motions to dismiss are denied as to the cause of action for unjust enrichment.

Accordingly, it is

ORDERED that the motions of defendants Ariel Fein, Irving Langer, Jacob Karmel, Elliott Jacobs and Moshe Feurer (Motion Seq. 001), defendants Teddy Lichtschein and Eliezer Scheiner (Motion Seq. 002), defendant Samuel Goldner (Motion Seq. 003), and Solomon Investments (Motion Seq. 004) to dismiss the complaint are denied; and it is further

ORDERED that the parties are directed to contact the Principal Court Attorney for the Court, Laurie K. Furdyna, at lfurdyna@nycourts.gov, within 14 days of entry of this order to arrange a telephonic preliminary conference.

ENTER:

Louis L. Nock

10/6/2020
DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE