SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD **PART** IAS MOTION 35EFM

Justice

----------X

JSIGNAL LLC,

Plaintiff,

- v -

CCM PROPERTY MANAGEMENT LLC,CCM VENTURES HOLDING LLC,JACOB SACKS, JAMES WISEMAN

Defendant.

----------X

INDEX NO. 653763/2019

MOTION DATE 9/24/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is

ORDERED that plaintiff, JSignal LLC, is directed to file a certificate of conformity with respect to the affidavit of Jacob Toll within 20 days of the filing of notice of entry of this order; and it is further

ORDERED that the part of defendants CCM Property Management LLC (PM), CCM Ventures Holding LLC (VH), Jacob L. Sacks and James P. Wiseman (collectively defendants) motion, pursuant to CPLR 3211 (a) (1), (5) and (7), to dismiss the complaint as against defendants Sacks and Wiseman (motion seq.001) is granted, and the complaint is dismissed as to them, and the clerk of the court is directed to enter judgment accordingly with costs and disbursements as taxed; and it is further

ORDERED that the part of defendants' motion, pursuant to CPLR 3211 (a) (1), (5) and (7) to dismiss the complaint as against PM and VH is granted to the extent that the first cause of action is dismissed with respect to any claims arising from patent or latent defects in the Premises, the second and fourth causes of action are dismissed with respect to all claims that arose prior to the tender of final payment to VH, and the third, fifth, sixth, seventh, eighth, ninth, tenth, eleventh and twelfth causes of action are dismissed in full; and it is further

ORDERED counsel for defendants shall serve a copy of this order along with notice of entry on all parties within twenty (20) days; and it is further

ORDERED that the PM and VH are thereafter directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry.

MEMORANDUM DECISION

This is an action for breach of several contracts related to the development and construction of a mixed-use building located at 76 North 4th Street, Brooklyn, New York (the Premises), which was owned by plaintiff JSignal LLC (plaintiff or JSignal). Defendants CCM Property Management LLC (PM), CCM Ventures Holding LLC (VH), Jacob L. Sacks and James P. Wiseman (collectively, defendants) move, pursuant to CPLR 3211 (a) (1), (5) and (7), to dismiss the complaint (motion seq. 001).

BACKGROUND

Sacks and Wiseman are the co-owners of PM and VH. On January 10, 2011, JSignal and PM entered into a developer's agreement with respect to the Premises (the Developer's Agreement). On April 5, 2011, JSignal and VH entered into a construction agreement (the 2011 Construction Agreement) and a construction management agreement (the Construction Management Agreement) with respect to the Premises. Subsequently, on January 17, 2012, JSignal and VH entered into a separate construction agreement with respect to the Premises (the 2012 Construction Agreement) (the 2011 Construction Agreement, 2012 Construction Agreement and the Construction Management Agreement are collectively referred to as the VH Agreements).

Plaintiff alleges 12 causes of action as follows: (1) breach of contract against PM for failing to perform under the Developer's Agreement; (2) breach of contract against VH for failure to perform under the 2011 Construction Agreement; (3) breach of contract against VH for failure to perform under the 2012 Construction Agreement; (4) breach of contract against VH for failure to perform under the Construction Management Agreement; (5) fraudulent inducement by misrepresentation of material facts as against PM; (6-8) fraudulent inducement by

misrepresentation of material facts as against VH for each of the VH Agreements; (9) negligence against PM; (10) negligence against VH; (11) unjust enrichment against PM; and (12) unjust enrichment against VH.

Each cause of action also seeks to pierce PM and/or VH's corporate veils to allow for recovery against Sacks and/or Wiseman directly.

The Breach of Contract Allegations

The breach of contract allegations against PM include that PM "failed to manage and direct the planning and administration of the Project" and "failed to direct and coordinate the flow of information and instructions" (complaint, ¶ 19), failed to meet with JSignal or make recommendations throughout the term of the Development Agreement (*id.* at 20) and failed to provide services because it fired its construction manager from the Project in 2014 (*id.* at 21).

The breach of contract allegations against VH include that VH breached its obligations under its various contracts by failing to (1) supervise and direct the Project, (2) complete work in a timely manner, (3) correct work when needed (*id.* at 29, 30, 37, 45, 46), and (4) employ a competent superintendent (*id.* at 38).

The Fraudulent Inducement Allegations

The fraudulent inducement allegations against PM include that PM misrepresented material facts as to its expertise and experience with respect to prior complex development projects (*id.* at 52-55). The fraudulent inducement allegations against VH also include that VH misrepresented material facts as to its expertise and experience with respect to prior complex construction projects (*id.* at 60-62, 69-71, 78-80).

The Negligence Allegations

The negligence allegations against PM include claims that PM "failed to manage and direct the planning and administration of the Project" and "failed to direct and coordinate the flow of information and instructions" (*id.* at 88), failed to meet with JSignal or make recommendations throughout the term of the Development Agreement (*id.* at 90) and failed to provide services, as evidenced by its firing of a construction manager from the Project in 2014 (*id.* at 91).

The negligence allegations against VH include claims that VH breached its obligations under its various contracts by failing to supervise and direct the project, complete work in a timely manner, correct work (*id.* at 97-99) and employ a competent superintendent (*id.* at 100).

The Unjust Enrichment Claims

The unjust enrichment allegations against PM and VH include claims that they failed to complete the Project but was paid in full (*id.* at 114-115, 126-127). Plaintiff further claims that it had to complete the Project at its own expense (*id*). Therefore, it seeks $500,000 in restitution.

Claims Set Forth in the Affidavit of Jacob Toll

In opposition, JSignal supplies the affidavit of its majority member, Jacob Toll (the Toll Affidavit) (NYSCEF doc No. 30). The Toll Affidavit was notarized without the state and does not include a certificate of conformity.

In the Toll Affidavit, Toll asserts, for the first time, that latent defects existed at the Premises, and that all of the causes of action in the complaint are based, at least in part, upon the existence of these latent defects.

More specifically, Toll acknowledges that JSignal paid PM and VH in full pursuant to their contracts for the Project, despite being aware of several problems with the Project. First,

Toll states that PM failed to develop, and VH failed to construct, the commercial retail portion of the Project (Toll Affidavit, ¶ 26). Next, Toll states that several latent defects in the Premises were found beginning in January 2016, after PM and VH completed work on the Project.

According to Toll, these latent defects included a "defective roof" and "defective boilers" (*id.* at 38). Specifically, Toll states the following:

> "[Defendants] improperly sloped the roof and left it unfinished in certain areas. These defects caused rainwater to leak into the building and cause further damage . . ."
>
> (*id.* at 39).
>
> "The boilers were defective in that valves malfunctioned, pressure limits were exceeded and parts and/or entire boilers needed to be replaced"
>
> (*id.* at 40).

DISCUSSION

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court "accept[s] the facts as alleged in the complaint as true, accord[ing] plaintiffs the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory" (*id.* at 87-88). "[W]here . . . the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration" (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

CPLR 3211 (a) (1) governs motions to dismiss where a defense is founded upon documentary evidence. "When documentary evidence is submitted by a defendant the standard morphs from whether the plaintiff stated a cause of action to whether it has one" (*Basis Yield*

Alpha Fund (Master) v Goldman Sachs Group, Inc., 115 AD3d 128, 135 [1st Dept 2014] [internal quotation marks and citation omitted]). Such documentary evidence must utterly refute the factual allegations of the complaint and conclusively establish a defense to the claims as a matter of law (*see Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Ladenburg Thalmann & Co. v Tim's Amusements* 275 AD2d 243, 246 [1st Dept 2000]).

CPLR 3211 (a) (7) governs motions to dismiss for the failure to state a cause of action. While the court is normally constrained to the facts as pleaded in the complaint, on a 3211 (a) (7) motion, "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,* 84 NY2d at 88 [internal quotation marks and citations omitted]).

Sufficiency of the Toll Affidavit

Certificate of Conformity

As a procedural matter, the Court first addresses the issue of the sufficiency of the Toll Affidavit. Defendants ask the court to ignore the Toll Affidavit on the ground that it was notarized without the state and does not contain a certificate of conformity. The court declines to do so at this time. "[T]he absence of a certificate of conformity 'is a mere irregularity, and not a fatal defect'" (*Wager v Rao*, 178 AD3d 434, 435 [1st Dept 2019]). "As long as the oath is duly given, authentication of the oathgiver's authority can be secured later, and given nunc pro tunc effect if necessary" (*id.*).

Accordingly, plaintiff is directed to provide the court with a certificate of conformity for the Toll Affidavit within 20 days of entry of this order. Failure to timely produce such a

certificate of conformity may lead to the preclusion of testimony or evidence in support of the claims raised for the first time in the Toll Affidavit.

Lack of Evidence Supplied in the Toll Affidavit

Defendants argue that all of the claims in the Toll Affidavit should be ignored by the court because Toll and JSignal fail to provide any evidentiary support for the claims that there were latent defects in the roof and boilers at the Premises. However, this is not required in defense of a motion to dismiss. Rather, "affidavits received on an unconverted motion to dismiss for the failure to state a cause of action are not to be examined for the purpose of determining whether there is evidentiary support for the pleading" (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]; *see also Kenyon & Kenyon LLP v SightSound Tech., LLC*, 151 AD3d 530, 531 [1st Dept 2017]). Accordingly, the court need not address the evidentiary sufficiency of the allegations set forth in the Toll Affidavit at this time.

Defendants' Motion to Dismiss

Defendants move to dismiss all claims as against them.

The Breach of Contract Claims (The First, Second, Third and Fourth Causes of Action)

Defendants argue that the first cause of action, which seeks recovery for breach of the Development Agreement, should be dismissed because JSignal paid PM in full pursuant to said agreement. Defendants also argue that the second, third and fourth causes of action, which seek recovery for breach of the VH Contracts, should be dismissed because JSignal paid VH in full pursuant to those agreements.

In opposition, plaintiff raises a claim not found in the complaint. It argues that all four breach of contract causes of action are based on latent defects and, therefore, its payment to PM and VH did not constitute acceptance of that defective work.

"As a rule, acceptance of performance under a construction contract is a waiver of the right to recover for defects that were known or discernable with reasonable inspection, *i.e.* patent, as opposed to latent, defects" (*Yeshiva Univ. v Fidelity & Deposit Co. of Md.*, 116 AD2d 49, 52 [1st Dept 1986]; *lv denied* 68 NY2d 603 [1986]). A final payment pursuant to a construction agreement is "conclusive evidence that the [defendant's] work had been accepted" (*Menorah Nursing Home v Zukov*, 153 AD2d 13, 21 [2d Dept 1989], citing *Yeshiva Univ.*, 116 AD2d at 51; *see also Alvarez v Attack Asbestos*, 287 AD2d 349, 350 [1st Dept 2001] [argument that "tender of final payment without qualification" was not acceptance of the work found to be "without merit"]).

The First Cause of Action as Against PM

Additional Facts Relevant to this Claim

The Development Agreement (NYSCEF doc No. 3) establishes that PM was responsible for, amongst other things, providing general development services and project management for the Project. It sets forth the following, as relevant:

> "A. Development Services. [PM] agrees to provide the following development services in connection with the Project:
>
> > "(i) Manage and direct the overall planning and administration of the Project. Guide and monitor the decision-making process during each phase of the Project and direct and coordinate the flow of information and instructions among Owner and the various consultants . . . involved in the completion of the Project.
> >
> > "(ii) Meet with Owner as necessary to provide information [to Owner] . . . ;
> >
> > "(iii) Provide such other services as reasonably requested by Owner that are necessary and appropriate to cause the Project to be developed in accordance with the Project Documents . . .

> "B. Compensation for [PM's] Development Services. The Owner shall pay [PM] a fee of $360,000 for the development services provided . . . This fee shall be payable on a monthly basis evenly over 24 months . . . with full payment due upon issuance of temporary or permanent certificate of occupancy for the Project.
>
> (NYSCEF Doc No 3 at 1-2).
>
> Further, the Development Agreement states:
>
> "3. Term. The initial term of this Agreement shall be for a period commencing on the date hereof and last until the later of (a) thirty (30) months from the date hereof; or (b) issuance of a final certificate of occupancy for the Project. Thereafter, the term of this Agreement shall continue until terminated by either party giving to the other ninety (90) days written notice"
>
> (*id.* at 5).

Here, the complaint does not list any explicit violations of the Development Agreement, relying instead on general statements that PM failed to plan, administer and/or coordinate the Project at the Premises. In opposition to defendants' motion, plaintiff submits the Toll Affidavit which asserts, as discussed above, that (1) PM failed to develop the retail portion of the Premises, and (2) that latent defects existed at the Premises – the "improperly sloped" and "unfinished" roof and the "significantly defective" boilers (Toll Affidavit ¶¶ 39-40; NYSCEF doc No 30). These defects were found in 2016.

It is uncontested that JSignal paid PM its final payment in full on December 31, 2013 (NYSCEF Doc. No 18). It is also uncontested that a temporary certificate of occupancy (COO) was issued on October 6, 2015 (NYSCEF Doc. No. 20) and a final certificate of occupancy was issued on May 24, 2017 (NYSCEF Doc. No. 21).

Initially, defendants argue that JSignal has waived all its claims because it paid PM in full for its work on the Project (*Yeshiva Univ. v Fidelity & Deposit Co. of Md.*, 116 AD2d at 52). However, the rationale set forth in *Yeshiva Univ.* is limited to construction contracts – where full

payment constitutes a waiver of patent defects in the constructed project. *Yeshiva Univ.* does not implicate consulting agreements, such as the Development Agreement, as such agreements are not construction contracts (i.e. they do not include construction or construction management services). Accordingly, defendants' sole argument that JSignal waived its rights to recovery against PM because it paid PM in full, is misplaced.

The Development Agreement requires PM to provide its services "during each phase of the Project" until either 30 months have elapsed, or the final COO was issued for the Premises. It also provides for a payment schedule for PM and caps the amount that JSignal was required to pay. It does not, however, affirmatively state that full payment by a date prior to the issuance of the final COO would act as a waiver of claims. In addition, PM's argument that the Development Agreement was completed over six years prior to the filing of suit and was "superseded by the subsequent contracts" (memorandum in support of motion at 7) is conclusory and otherwise unsupported by evidence establishing such an understanding.

Here, JSignal's claim against PM focuses on a failure to provide all the consulting services that PM agreed to, which purportedly led to increased costs and delays in the construction of the Premises. This claim is sufficiently plead to survive defendants' motion.

That said, JSignal's claim, asserted in the Toll Affidavit, that PM should be liable for patent and/or latent defects at the Premises is meritless. PM was neither the construction manager nor did it have contractual responsibilities for physically constructing the Premises. Therefore, claims of damages arising from the alleged defective construction of the Premises are outside the scope of PM's contract, and are not compensable.

Thus, PM's motion to dismiss the first cause of action is granted to the extent that the part of the first cause of action that seeks recovery for breach of contract for patent and/or latent defects at the premises is dismissed.

The Second, Third and Fourth Causes of Action as Against VH

Conditions Precedent to Litigation

As an initial matter, VH argues that the second, third and fourth causes of action must be dismissed as JSignal failed to fulfill a condition precedent to litigation.

The Second Cause of Action

The second cause of action addresses the 2011 Construction Agreement. VH argues that section 15.5 of this agreement prevents JSignal from bringing a breach of contract claim against it for failure to submit its claims to the architect prior to initiating litigation.

Section 15.5 provides the following, as relevant:

> "The Architect will interpret and decide matters concerning performance under and requirements of the Contract Documents on written request of either [JSignal] or [VH]. . . . The Architect's decisions in matters relating to aesthetic effect will be final if consistent with the intent expressed in the Contract Documents. All other decisions of the Architect, except those which have been waived by making or acceptance of final payment, shall be subject to arbitration upon the written demand of either party"

(NYCEF doc No. 4, § 15.5).

Notably, this clause does not create a condition precedent to litigation. The clause does not mandate that the architect hear matters prior to litigation, or that arbitration is a requirement before proceeding to litigation.

Accordingly, this claim is not barred by JSignal's purported failure to fulfill a condition precedent to litigation.

The Third Cause of Action

The third cause of action addresses the 2012 Construction Agreement. VH argues that section 6 of the Rider to this agreement prevents JSignal from bringing a breach of contract claim against it because JSignal did not submit its disputes under this agreement to mediation prior to filing this action.

Section 6 of the Rider to the 2012 Construction Agreement provides that "[JSignal] and [VH] shall submit all disputes to mediation as a condition precedent to litigation" (NYSCEF doc No. 5).

JSignal, in opposition, does not contest that it failed to satisfy the condition precedent to commencing litigation with respect to this claim.

Thus, the third cause of action is dismissed (*see MCC Dev. Corp. v Perla,* 81 AD3d 474, 474 [1st Dept 2011] [affirming the dismissal of, among other claims, a breach of contract claim "on the ground that plaintiff failed to satisfy the contract's conditions precedent to commencing litigation"]).

The Fourth Cause of Action

The fourth cause of action addresses the Construction Management Agreement. VH argues that §§ 4.7.2 and 4.7.3 of this agreement prevent JSignal from initiating a breach of contract claim against it because JSignal did not submit its disputes under this agreement to the architect prior to initiating litigation.

Section 4.7 of the AIA Document A201/CMa form annexed to the Construction Management Agreement governs "Claims and Disputes."

A "Claim" is defined as a dispute between the owner and contractor "arising out of or relating to the Contract" (NYCEF doc No. 6, § 4.7.1). In addition, "Claims must be made by written notice" (*id.*). Section 4.7.2 provides the following:

> "Claims, including those alleging an error or omission by [VH] . . . shall be referred initially to the Architect for action as provided in Paragraph 4.8. A decision by the Architect . . . shall be required as a condition precedent to litigation of a Claim between [VH] and [JSignal] as to all such matters arising prior to the date final payment is due, regardless of (1) whether such matters relate to execution and progress of the Work or (2) the extent to which the Work has been completed"
>
> (NYSCEF Doc. No 6).
>
> Section 4.7.3 provides, in pertinent part, as follows:
>
> "Claims by either party must be made within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later. Claims must be made by written notice. . . ."
>
> (*id.*).

Given the foregoing, it is a condition precedent to litigation that any claim which arose prior to the date of final payment had to be referred to the architect. It is uncontested that JSignal did not raise any claims with the project's architect. Accordingly, any claim based on VH's construction management services prior to the date of final payment – such as its failure to complete the commercial portion of the Project – is dismissed due to JSignal's failure to fulfill a condition precedent.

However, the alleged latent defects – the improperly sloped roof and defective boilers – purportedly arose after the date of final payment. Accordingly, per the language of section 4.7.2, these alleged latent defects did not have to be referred to the architect. Therefore, a

determination by the architect – where no such determination is mandated by the contract – cannot be considered a condition precedent to litigation.

Notably, while section 4.7.3 sets forth a timeframe for noticing claims, it does not set forth a penalty for the failure to do so, or state that JSignal's timely notice of a claim to VH is a precondition for litigation.

Accordingly, the latent defect portion of the fourth cause of action is not barred by JSignal's failure to fulfill a condition precedent to litigation.

The Substance of the Breach of Contract Claims

Additional Facts Relevant to this Claim

VH entered into two construction contracts and a construction management contract with JSignal. The 2011 Construction Agreement is an AIA standard form contract (Form A117) between JSignal as owner and VH as contractor. The 2012 Construction Agreement is an AIA standard form contract (Form A101) between JSignal as owner and VH as contractor. The Construction Management Agreement is an AIA standard form contract (A801/CMa) between JSignal as owner and VH as construction manager.

Each contract contains a general conditions addendum that includes the following language:

> "The making of final payment shall constitute a waiver of claims by the Owner except those arising from:
> * * *
> "2. Failure of the work to comply with the requirements of the Contract documents . . ."

(Construction Management Agreement, annexed AIA Document A201/CMA, § 4.7.5; 2011 Construction Agreement, § 20.5; 2012 Construction Agreement, annexed AIA Document A201, § 9.10.4).

In addition, the Construction Management Agreement includes the following:

> 12.2 Correction of Work
>
> 12.2.2 If, within one year after the date of Substantial Completion of the Work . . . any of the Work is found to be not in accordance with the requirements of the Contract Documents, the Contractor shall correct it promptly after receipt of written notice from the Owner to do so unless the Owner has previously given the Contractor a written acceptance of such condition. . . . The Owner shall give such notice promptly after discovery of the condition."

(Construction Management Agreement, notice of motion, exhibit D, NYSCEF doc No. 13 [annexed AIA Document A201/CMa form]).

Here, as with the claim against PM, the complaint does not list any explicit violations of the VH Agreements, relying instead on general statements that VH failed to sufficiently supervise and direct the Project, complete work in a timely manner, correct work when needed or employ a competent superintendent.

VH argues that these claims must be dismissed against it due to JSignal's full payment under the VH Agreements. As stated above, in opposition to defendants' motion, plaintiff submits the Toll Affidavit which asserts that (1) VH failed to begin or complete the construction of the retail portion of the Premises, and (2) that latent defects, first found in 2016, existed at the Premises – i.e., the "improperly sloped" and "unfinished" roof and the "significantly defective" boilers (Toll Affidavit ¶¶ 39-40; NYSCEF doc No 30).

Initially, it is uncontested that JSignal paid VH the final payment due under the VH Agreements on January 5, 2016 (NYSCEF doc No. 19). Per the VH Agreements, JSignal waived all claims except those arising from the failure of the work to comply with the requirement of the contract documents. Further, as set forth above, JSignal waived all claims

relating to patent defects in the Premises (*Yeshiva Univ.*, 116 AD2d at 52; *Menorah Nursing Home*, 153 AD2d at 21).

Given this, JSignal's assertion that VH failed to construct the commercial portion of the Project has been waived. JSignal does not allege that an open and obviously unfinished portion of the Premises was a latent defect (i.e., that it was impossible for JSignal to ascertain this problem). Accordingly, JSignal's claim for damages for the alleged failure to complete the commercial portion of the Project is waived by its full payment under its agreements with VH.

As to the alleged latent defects, VH argues that they are not, in fact, latent, and should have been detected through reasonable inspection of the Premises.

Turning first to the unfinished nature of the roof, the court agrees with defendants that such a condition, as alleged, was a deficiency that could have been found through reasonable inspection. However, whether the roof was "improperly sloped" (or whether an inspection would have revealed this issue) is not as obvious. Defendants' reliance on *Talbi v ZCWK Assoc.* (179 AD2d 475, 476 [1st Dept 1992]) for the proposition that an improperly sloped roof is a patent defect is unavailing. The court in *Talbi* held that "green water, crooked wall and malfunctioning windows" were patent defects that were "visually ascertainable" (*id.*). Here, taking the Toll Affidavit in the light most favorable to JSignal, JSignal has alleged that slope of a roof was improper, and that such slope was not easily discernable until problems began arising after the completion of the Project. Accordingly, JSignal has sufficiently asserted that the slope of the roof was a latent defect.

Regarding the boilers, Toll has sufficiently stated that the boilers were improperly installed and/or defective. While VH argues that any problems with the boilers were patent, they supply no evidence establishing that fact sufficient to warrant the dismissal of the claim at this

time. Accordingly, when viewing this claim in a light most favorable to JSignal, it has sufficiently alleged that the issues with the boilers were latent defects in the premises.

Thus, as discussed above, VH is entitled to dismissal of the third cause of action as against it, and VH is also entitled to dismissal of that part of the second and fourth causes of action that pertain to claims which arose prior to JSignal's tender of final payment for VH's services under the VH Agreements.

The Fraudulent Inducement Claims (The Fifth, Sixth, Seventh and Eighth Causes of Action)

The fifth, sixth, seventh and eighth causes of action each allege fraudulent inducement, against PM for the Development Agreement (fifth), against VH for the 2011 Construction Agreement (sixth), against VH for the 2012 Construction Agreement (seventh) and against VH for the Construction Management Agreement (eighth).

"The statute of limitations for claims based on fraud is the greater of six years from the date the cause of action accrued or two years from the time plaintiff discovers the fraud, or could with reasonable diligence have discovered it" (*Cusimano v Schnurr*, 137 AD3d 527, 531 [1st Dept 2016]); CPLR 213[8]). A cause of action for fraudulent inducement "accrues and the Statute of Limitations commences to run at the time of the execution of the contract" (*Rogal v Wechsler*, 135 AD2d 384, 385 [1st Dept 1987]; *see K-Bay Plaza, LLC v Kmart Corp.*, 132 AD3d 584, 590 [1st Dept 2015]).

It is uncontested that the parties entered into the contracts between 2011 and 2012. This action was filed on June 27, 2019 – well outside the six-year statute of limitations. JSignal argues that its allegations are entitled to the application of the discovery accrual rule – i.e., that defendants continued to misrepresent their prior experience, skill and expertise throughout the course of the Project and after the end of the Project, such that the statute of limitations

continued to run to, effectively, the present (*Kaufman v Cohen*, 307 AD2d 113, 123 [1st Dept 2003] ["An inquiry as to the time that a plaintiff could, with reasonable diligence, have discovered the fraud turns upon whether a person of ordinary intelligence possessed knowledge of facts from which the fraud could be reasonably inferred (citations omitted)"] [internal quotation marks and citations omitted]).

A review of the allegations set forth in the complaint and the Toll Affidavit establish that the fraudulent inducement claims are expressly tied to purported statements made about PM and VH prior to entering into their respective agreements with JSignal.

Specifically, the fifth cause of action alleges that PM misrepresented material facts including "its expertise, experience, competence and ability to render development services" by "stating that they had experience in working on other construction and development projects as complex as the Project" and by "stating that they had the requisite knowledge and experience to oversee the Project" (complaint ¶¶ 52-54).

The sixth and seventh causes of action allege that VH misrepresented material facts as to "its expertise, experience, competence and ability to render construction services" by "stating that they had experience in working on other construction and development projects as complex as the Project" and by "stating that they had the requisite knowledge and experience to oversee the Project" (complaint ¶¶ 60-62, 69-71).

The eighth cause of action alleges that VH misrepresented material facts as to "its expertise, experience, competence and ability to render construction management services" by "stating that they had experience in working on other construction and development projects as complex as the Project" and by "stating that they had the requisite knowledge and experience to oversee the Project" (complaint ¶¶ 78-80).

JSignal does not allege that it performed any form of vetting with respect to the defendant companies. JSignal does, however, allege that it became aware of slowdowns and problems during the construction of the Project, and that it attributed these slowdowns and problems to defendants' lack of skill and expertise. It is at this time that JSignal could have reasonably inferred that defendants had made misrepresentations as to their skill and expertise. Notably, JSignal does not assert that it did any investigation, or perform any form of due diligence into PM or VH's prior project history and prior experiences at any point in time.

Accordingly, JSignal should have been aware of defendants' purportedly fraudulent statements at some point during construction – which officially ended on May 24, 2017, when the final COO was issued. Therefore, the two-year statute of limitations for when JSignal should have found the fraud began to run, at the latest, on May 24, 2017. As noted above, this action was commenced on June 27, 2019, over two years later.

Further, the claims raised in the Toll Affidavit do not raise issues with respect to continued misrepresentation. The Toll Affidavit asserts that defendants misrepresented that they had the "time, materials and workforce to complete the Project on time" (Toll Affidavit at 22) and the "commitment to completing the Project" (*id.* at 24), and that there were latent defects in the Premises (*id.* at 37).

These allegations do not address continued misrepresentations as to defendants' expertise, experience, or competence that induced JSignal to enter into the agreements with defendants. Rather, they focus solely on the sufficiency of defendants' actions in undertaking their contractual obligations, which is not actionable as fraud where a breach of contract claim is pleaded (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987] [dismissing a fraudulent inducement claim where "[t]he existence of a valid and enforceable written contract

govern[s] a particular subject matter" and the recovery sought arose from the same facts and circumstances]). Accordingly, these allegations do not address any continuing misrepresentations sufficient to extend the statute of limitations (*see e.g. Duberstein v National Med. Health Card Sys., Inc*., 37 AD3d 209, 210 [1st Dept 2007]).

Notably, even had the fraudulent inducement claims been timely made, dismissal would still be warranted. CPLR 3016 (b) requires that fraud claims be pleaded with specificity. To meet the requirements of this rule, a plaintiff does not need to plead the exact time, date or words of the alleged fraudulent statements (*Kaufman*, 307 AD2d at 120). Rather, "section 3016 (b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct" *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 492 [2008]).

Here, plaintiff fails to sufficiently allege specific facts to permit a reasonable inference of defendants' alleged conduct. The complaint alleges only that at an unspecified time, an unspecified defendant made unspecified statements to an unspecified person with respect to PM and/or VH's skills, competence, and prior experience. Such broad, unspecific statements do not provide "sufficient detail to inform defendants of the substance" of its fraudulent inducement claims (*Kaufman*, 307 AD2d at 120 [citation and internal quotation marks omitted]; *Pludeman v Northern Leasing Systems, Inc.*, 10 NY3d at 492).

Thus, defendants are entitled to dismissal of the fifth, sixth, seventh and eighth causes of action sounding in fraudulent inducement.

The Negligence Claims (The Ninth and Tenth Causes of Action)

PM and VH seek to dismiss the ninth and tenth causes of action, which allege negligence as against PM and VH, respectively.

A negligence claim cannot be based on breach of a contractual duty (*Board of Mgrs of Soho N. 267 W. 124th St. Condominium v NW 124 LLC*, 116 AD3d 506, 507 [1st Dept 2014] ["Breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated"]).

The ninth cause of action mirrors the allegations of the first cause of action for breach of contract nearly word for word and does not raise a violation of a legal duty separate and independent of PM's contractual duties under the Development Agreement.

Similarly, the tenth cause of action mirrors the allegations found in the second, third and fourth causes of action for breach of contract and does not raise a violation of legal duties separate and independent of VH's contractual duties under the VH Agreements.

JSignal's argument that PM and VH had a duty, separate from their respective contractual duties, to perform their work in a "good and workmanlike" manner is unpersuasive given the language of the contracts themselves (*see e.g., Verizon N.Y., Inc. v Optical Communications Group, Inc.*, 91 AD3d 176, 180 [1st Dept 2011] [alleging "that a party breached a contract because it failed to act with due care [does] not transform a contract claim into a negligence claim"]).

Thus, because the ninth and tenth causes of action are duplicative of the breach of contract claims alleged against PM and VH, defendants are entitled to dismissal of said claims.

The Unjust Enrichment Claims (The Eleventh and Twelfth Causes of Action)

PM and VH seek to dismiss the eleventh cause of action, which alleges unjust enrichment as against PM, and the twelfth cause of action, which alleges unjust enrichment against VH.

> "The basis of a claim for unjust enrichment is that the defendant has obtained a benefit which in equity and good conscience should be paid to the plaintiff. . . . An unjust enrichment claim is not

> available where it simply duplicates, or replaces, a conventional contract or tort claim"

(*Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790 [2012] [internal quotation marks and citations omitted]).

The eleventh and twelfth causes of action explicitly address the existence of the four contracts at issue in this matter. Further, these causes of action allege that PM and VH were unjustly enriched expressly because they allegedly failed to complete their contractual obligations. Accordingly, the unjust enrichment claims are duplicative of the breach of contract claims

Thus, PM and VH are entitled to dismissal of the unjust enrichment claims as against them.

The Veil Piercing Claims

Attendant to each cause of action in the complaint is an allegation that PM and/or VH's obligations "should also be imputed to" defendants Sacks and/or Wiseman – PM and VH's principals, respectively – because they are "nothing more than the alter ego" of PM and/or VH and they "assert complete dominion and control" over said entities (complaint, ¶¶ 23, 31, 39, 49, 57, 66, 75, 84, 93, 105, 117, 129).

A party seeking to pierce the corporate veil must show dominion and control of the subsidiary or affiliate by the parent, or vice-versa (*Alexander & Alexander of N.Y. v. Fritzen*, 114 AD2d 814, 815 [1st Dept 1985], *affd* 68 NY2d 968 [1986]). Corporate veil piecing is warranted where a party has complete dominion over a corporation and abuses the corporate form to perpetrate some fraud or wrong on the injured party (*Matter of Morris v. New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141-142 [1992]). "In determining the question of control, courts have considered factors such as the disregard of corporate formalities; inadequate capitalization;

intermingling of funds; overlap in ownership, officers, directors and personnel; common office space or telephone numbers; the degree of discretion demonstrated by the alleged dominated corporation; whether the corporations are treated as independent profit centers; and the payment or guarantee of the corporation's debts by the dominating entity . . . [n]o one factor is dispositive" (*Tap Holdings, LLC v Orix Fin. Corp.*, 109 AD3d 167, 174 [1st Dept 2013], *quoting TNS Holdings v MKI Sec. Corp.*, 243 AD2d 297, 300, [1st Dept. 1997], *rev'd on other grounds*, 92 NY2d 335 [1998]).

A plaintiff is not required to plead the elements of alter ego liability with the particularity required of a fraud claim by CPLR 3016(b), but must plead them in a nonconclusory manner (*see 2406-12 Amsterdam Assocs. LLC v Alianza LLC*, 136 AD3d 512, 512 [1st Dept 2016]; *Art Capital Bermuda Ltd. v Bank of N.T. Butterfield & Son Ltd.*, 169 AD3d 426, 427 [1st Dept 2019]; *Am. Media, Inc. v Bainbridge & Knight Labs., LLC*, 135 AD3d 477, 477 [1st Dept 2016] ["Plaintiffs' allegations in support of piercing the corporate veil to hold [defendant] liable for [the corporation's] alleged breaches of contract, i.e., that [the corporation 'ignored corporate formalities' and was totally dominated by [defendant], are conclusory and therefore insufficient to warrant piercing the corporate veil'"]). The plaintiff must supply factual allegations related to the transaction at issue (*Remora Capital S.A. v Dukan*, 175 AD3d 1219, 1220 [1st Dept 2019] and may not merely recite the factors upon information and belief (*see Cornwall Mgmt. Ltd. v Kambolin*, 140 AD3d 507, 507 [1st Dept 2016]). Here, the complaint and the Toll Affidavit are silent with respect to Sacks and Wiseman's alleged abuses of the corporate form, inadequate capitalization, commingling of assets or the use of corporate funds for personal use.

JSignal argues that, pursuant to CPLR 3211 (d),[1] the court should deny the motion to dismiss because further discovery may present facts that support its veil piercing claims against Sacks and Wiseman. However, "the mere hope that discovery may reveal facts essential to justify opposition [to a motion to dismiss] does not warrant denial of the motion" (*Karpovich v City of New York*, 162 AD3d 996, 998 [2d Dept 2018] [internal quotation marks and citation omitted]; *see also Rochester Linoleum & Carpet Ctr., Inc. v Cassin*, 61 AD3d 1201, 1202 [3d Dept 2009] [to obtain relief under CPLR 3211 [d], "plaintiff was obliged to provide some evidentiary basis for its claim that further discovery would yield material evidence . . ."]).

Accordingly, the veil piercing components of each cause of action as against Sacks and Wiseman are dismissed, and the complaint is dismissed as against those individual defendants.

The court has examined the remaining arguments of the parties and finds them to be unavailing.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that plaintiff, JSignal LLC, is directed to file a certificate of conformity with respect to the affidavit of Jacob Toll within 20 days of the filing of notice of entry of this order; and it is further

ORDERED that the part of defendants CCM Property Management LLC (PM), CCM Ventures Holding LLC (VH), Jacob L. Sacks and James P. Wiseman (collectively defendants) motion, pursuant to CPLR 3211 (a) (1), (5) and (7), to dismiss the complaint as against defendants Sacks and Wiseman (motion seq.001) is granted, and the complaint is dismissed as to them, and the clerk of the court is directed to enter judgment accordingly with costs and disbursements as taxed; and it is further

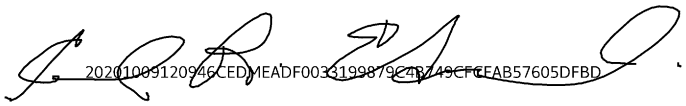
ORDERED that the part of defendants' motion, pursuant to CPLR 3211 (a) (1), (5) and (7) to dismiss the complaint as against PM and VH is granted to the extent that the first cause of action is dismissed with respect to any claims arising from patent or latent defects in the Premises, the second and fourth causes of action are dismissed with respect to all claims that

[1] CPLR 3211 (d) provides, as relevant, that "[s]hould it appear from affidavits submitted in opposition to a motion [to dismiss] that facts essential to justify opposition may exist but cannot be stated, the court may deny the motion . . ."

arose prior to the tender of final payment to VH, and the third, fifth, sixth, seventh, eighth, ninth, tenth, eleventh and twelfth causes of action are dismissed in full; and it is further

ORDERED counsel for defendants shall serve a copy of this order along with notice of entry on all parties within twenty (20) days; and it is further

ORDERED that the PM and VH are thereafter directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry.



10/9/2020
DATE

CAROL R. EDMEAD, J.S.C.

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