

<b>Gans v Wilbee Corp.</b>
2020 NY Slip Op 33378(U)
October 16, 2020
Supreme Court, New York County
Docket Number: 153621/2018
Judge: Joel M. Cohen
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

-----X

ROBERT M. GANS, W&G VENTURE HOLDINGS LLC,

Plaintiffs,

- v -

WILBEE CORPORATION, KING KULLEN GROCERY  
 CO., INC., QUEENSBORO FARM PRODUCTS, INC.,  
 KAUFMAN BEDROCK ASTORIA I LLC, SILVERSTEIN  
 PROPERTIES, INC., BEDROCK REAL ESTATE  
 PARTNERS, LLC.,

Defendants.

-----X

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 012) 479, 480, 481, 482, 483, 484, 489, 490, 491, 492, 493, 494, 495, 496, 497, 503, 506, 507, 515, 516, 517, 518, 519

were read on this motion to

INDEX NO. 153621/2018

MOTION DATE 02/18/2020,  
02/18/2020

MOTION SEQ. NO. 012 013

**DECISION + ORDER ON  
 MOTION**

DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 013) 485, 486, 498, 499, 500, 501, 505

were read on this motion to

DISMISS

This case concerns the ambitious Steinway Square Project, which proposes the redevelopment of Astoria, Queens, near the intersection of Steinway Street and 35th Avenue, by re-zoning, up-zoning, and transforming the neighborhood with an influx of new mixed-use properties, all without public funding (First Amended Compl. ¶¶12-13 [“FAC”] [NYSCEF 491]). The Project remains on the drawing board, however, because the government approval needed to commence development has yet to be obtained.

According to the Complaint, Plaintiffs Robert M. Gans and W&G Venture Holdings LLC (together, “Plaintiffs”) tried for years to obtain such approval, shepherding the Project and investing “millions of dollars and thousands of man hours into the Project,” to no avail. Worse,

Plaintiffs allege, they were ousted from the Project altogether by the Defendants, a collection of landowners and property developers with whom Plaintiffs previously tried to collaborate.<sup>1</sup>

Plaintiffs filed the instant action, asserting various claims against Defendants stemming from the ouster, and Defendants now move to dismiss Plaintiffs' First Amended Complaint. For the reasons set forth below, Defendants' motions are granted in part and denied in part.

### BACKGROUND

The Court presumes the parties' familiarity with the background facts of this case, which have been recounted at length in prior opinions of the Court (*see* NYSCEF 124, 246, 450). In a nutshell, Plaintiffs allege that after laboring for years to advance the Steinway Square Project, Defendants Silverstein and KBA/Bedrock usurped control of the Project by, *inter alia*, inducing Defendants Queensboro, King Kullen, and Wilbee to breach their agreements with Plaintiffs and to enter into ground lease agreements with Silverstein and KBA/Bedrock instead (FAC ¶¶74-75). As a result, "[d]espite Plaintiffs' investment of millions of dollars and thousands of man hours into the Project, Defendants have ejected Plaintiffs from the Project and have denied them any proceeds from their investment" (*id.* ¶108).

Plaintiffs intervened in this action, which was originally brought by Quadriad and DPD (NYSCEF 1), in June 2018, asserting that they were the rightful owners of all claims against Defendants (*see* Intervenor's Am. Compl. ¶74 [NYSCEF 135]). Intervenor Plaintiffs also asserted a cross-claim against the original plaintiffs, seeking a declaratory judgment as to their rights with respect to the claims (*id.*). By Decision and Order dated December 20, 2018, the

---

<sup>1</sup> "Defendants" refers collectively to Defendants Wilbee Corporation ("Wilbee"), King Kullen Grocery Co. Inc. ("King Kullen"), Queensboro Farm Products, Inc. ("Queensboro"), Kaufman Bedrock Astoria I LLC ("KBA"), Silverstein Properties, Inc. ("Silverstein"), and Bedrock Real Estate Partners, LLC ("Bedrock").

Court (Bransten, J.) granted in part Defendants' prior motion to dismiss, but denied the motion with respect to Intervenor Plaintiffs' claims for tortious interference with contract, tortious interference with prospective business relations, and unjust enrichment, as those claims were pled in Intervenor Plaintiffs' original complaint (NYSCEF 246).

In July 2019, Intervenor Plaintiffs and Defendants both moved for default judgment against the erstwhile plaintiffs. This Court granted those motions for default judgment on September 3, 2019, but noted that the decision "in no way binds or prejudices Defendants with respect to any arguments, claims, or defenses Defendants may have against Intervenors, such as the argument that Intervenors lack standing to pursue any claims against Defendants" (NYSCEF 415). Intervenors – now Plaintiffs – subsequently moved for leave to amend their Complaint, and that motion was granted in part (NYSCEF 450).

In their First Amended Complaint ("FAC"), Plaintiffs now assert six causes of action against various Defendants: (1) tortious interference with contract against Silverstein and Bedrock; (2) tortious interference with prospective economic relations against Silverstein and Bedrock; (3) unjust enrichment against all Defendants; (4) breach of contract against Silverstein; (5) unfair competition against Silverstein; and (6) declaratory judgment against Queensboro, Wilbee, and King Kullen.

## DISCUSSION

On a motion to dismiss under CPLR 3211(a)(7), the Court must "accept the complaint's factual allegations as true, according to plaintiff the benefit of every possible favorable inference, and determining only whether the facts as alleged fit within a cognizable legal theory" (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 270-71 [1st Dept 2014] [internal quotation marks and citation omitted]; *see also Leon v Martinez*, 84 NY2d 83,

87-88 [1994]). However, “allegations consisting of bare legal conclusions, as well as factual claims inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration” (*Tal v Malekan*, 305 AD2d 281 [1st Dept 2003] [granting motion to dismiss], citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233, 233-234 [1994]).

As an initial matter, the law of the case doctrine does not control the Court’s decision on this motion, because the Court’s ruling on Defendants’ prior motion to dismiss, in December 2018, addressed only the original complaint, which is now superseded by the FAC. “Law of the case is a judicially crafted policy that expresses the practice of courts generally to refuse to reopen what has been decided, [and is] not a limit to their power,” and “[a]s such, law of the case is necessarily amorphous in that it directs a court’s discretion, but does not restrict its authority” (*People v Cummings*, 31 NY3d 204, 208 [2018] [internal quotations and citations omitted]).

Being “a discretionary doctrine,” “[l]aw of the case d[oes] not require the court to deny the motion to dismiss the [ ] amended complaint, even though it had previously denied the motion to dismiss the [original] complaint” (*Cobalt Partners, L.P. v GSC Capital Corp.*, 97 AD3d 35, 39 [1st Dept 2012]). Indeed, “[b]ecause the original complaint was superseded by the amended complaint, the sufficiency of the allegations in the earlier complaint is rendered academic,” and law of the case does not apply (*Peters v Peters*, 118 AD3d 593, 594 [1st Dept 2014]; *Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005] [“reject[ing] plaintiff’s argument that the doctrine of law of the case precluded the motion court from dismissing the second amended complaint in its entirety. . . . [s]ince the original complaint was superseded by the amended complaints”]). The Court will address the sufficiency of the allegations as they appear in the First Amended Complaint.

**A. Tortious Interference with Contract against Silverstein and Bedrock (First Cause of Action)**

The tortious interference with contract claim is dismissed for failure to allege the existence of a valid contract between Plaintiffs and Defendants Queensboro, King Kullen, and Wilbee (the “Landowner Defendants”) (*330 Acquisition Co., LLC v Regency Sav. Bank, F.S.B.*, 293 AD2d 314, 315 [1st Dept 2002] [“To state a cause of action for tortious interference with contract, it is necessary to demonstrate the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom”], citing *Lama Holding Co. v Smith Barney, Inc.*, 88 NY2d 413, 424 [1996]; *see Lau v Lazar*, 130 AD3d 413, 413 [1st Dept 2015] [dismissing tortious interference with contract claim “because plaintiffs do not allege the existence of a valid contract between [themselves] and a third party”] [internal citations omitted]).

Plaintiffs allege that Silverstein and Bedrock interfered with the Pre-Lease Agreements, but those agreements were entered by Quadriad, not by Plaintiffs, and contained enforceable anti-assignment provisions (*see* NYSCEF 462 §19a; *Allhusen v Caristo Const. Corp.*, 303 NY 446 [1952] [holding that antiassignment clauses in contracts that expressly prohibit assignment do not violate public policy and are thus valid and enforceable]; *Craft EM CLO 2006-1, Ltd v Deutsche Bank AG*, 2018 N.Y. Slip Op. 32682[U], 3 [Sup Ct, New York County 2018] [dismissing breach of contract claim where “the plain language of the anti-assignment provision . . . expressly states that ‘any attempted assignment in violation of this provision shall be null and void’”]). These provisions set out stringent preconditions for effectuating a valid assignment of the Agreement, and expressly declare that “[a]ny assignment or other transfer of this Agreement

other than as aforesaid shall be null and void and of no force and effect” (NYSCEF 462 §19a).<sup>2</sup>

Plaintiffs have not alleged compliance with the terms of the anti-assignment provisions.

Therefore, Plaintiffs have failed to allege the existence of a valid contract between themselves and the Landowner Defendants.

Moreover, Plaintiffs do not offer valid grounds for excusing compliance with the anti-assignment provisions. That Quadriad and Wollman purported to assign their Project-related assets to W&G through an Operating Agreement, Asset Contribution Agreement, and Bill of Sale is immaterial. Under the plain language of Section 19(a) of the Pre-Lease Agreements, “[a]ny assignment . . . other than as [prescribed under the Agreement] shall be null and void and of no force and effect” (*id.*). Regardless of how Quadriad, Wollman, Gans, and W&G allocated rights among themselves, Plaintiffs cannot assert a claim against a third party based upon a contract that was not validly assigned to it. To hold otherwise would defeat the purpose of these provisions. The restrictions protect the Landowner Defendants by ensuring they had some control over who they were partnering with on the ground-lease deal. Those contractual limitations would lack teeth if one side could circumvent them by simply agreeing, in separate transactions with other parties, that the assignment was legitimate.<sup>3</sup>

---

<sup>2</sup> Specifically, any attempted assignment of the Option Agreements by Quadriad was invalid unless: (a) advance notice to each of the Landowner Defendants was provided at least ten days prior to the assignment; (b) Quadriad maintained at least 50% managerial control over the entity to which the Option Agreements were being assigned; (c) the assignee executed a written agreement to assume Quadriad’s obligations under the Option Agreements; and (d) Quadriad executed a written agreement to remain jointly and severally liable with the assignee for all obligations under the Option Agreements (*see id.*).

<sup>3</sup> As noted above, the Court’s prior order granting Plaintiffs a default judgment against Quadriad and DPD “in no way binds or prejudices Defendants with respect to . . . the argument that [Plaintiffs] lack standing to pursue any claims against Defendants” (NYSCEF 415). All along, Plaintiffs have based their alleged standing on provisions in W&G agreements, like the

Plaintiffs do not allege facts sufficient to show that they were intended third-party beneficiaries of the Pre-Lease Agreements. “In the context of a third-party beneficiary claim, the plaintiff must establish: (1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [its] benefit, and (3) that the benefit to [it] is sufficiently immediate . . . to indicate the assumption by the contracting parties of a duty to compensate [it] if the benefit is lost” (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [dismissing contract claim], citing *Mendel v Henry Phipps Plaza W., Inc.*, 6 NY3d 783, 786 [2006]). Here, each Pre-Lease Agreement included a section entitled “No Third Party Beneficiaries,” which relayed “that in no event shall such rights be conferred upon, or for the benefit of, any third party” (NYSCEF 461 §14.11). Plaintiff does not adequately allege, therefore, that the Pre-Lease Agreements were “intended for [their] benefit.”

Plaintiffs’ reliance on *GoodWorldCreations LLC v Albright*, 14 CIV. 3848 TPG, 2015 WL 4900246, at \*5 [SD NY Aug. 17, 2015], is misplaced. In that case, the court sustained the plaintiff’s tortious interference claim because the plaintiff allegedly acquired all of the assets of a company, which included the company’s 1/3 membership interest in the relevant party (*id.*). By contrast, Plaintiffs’ acquisition of assets from Quadriad was, by its terms, limited to “the right, title and interest of Quadriad in the Assets” (NYSCEF 466 §1.1). Quadriad could only give away the rights it possessed, and for the reasons above, Quadriad did not possess the right to freely assign its interest in the Pre-Lease Agreements. Indeed, the Asset Contribution Agreement itself recognizes that Quadriad may be restricted from transferring all of its assets, providing that “[i]f any of the Assets are not by their terms or by applicable law assignable or

---

Operating Agreement, that they say confer rights under the Pre-Lease Agreements (*see, e.g.*, NYSCEF 135; NYSCEF 388 [Intervenors’ Mot. for Default Judgment]).

transferable, Quadriad shall use its reasonable efforts to obtain, or cause to be obtained, any approvals or consents necessary to convey to Company such Assets” (*id.*). In the end, Quadriad is not alleged to have met the necessary conditions to assign its rights under the Pre-Lease Agreements, meaning those rights were not assigned to Plaintiffs.

Next, Plaintiffs’ argument that the Landowner Defendants waived their right to contest the assignment is foreclosed by no-waiver provisions in the Pre-Lease Agreements (*e.g.*, NYSCEF 461 §17; *Omansky v 160 Chambers St. Owners, Inc.*, 155 AD3d 460, 461 [1st Dept 2017] [rejecting waiver of assignment requirements “because the lease contained a specific ‘No Waiver’ provision”]; *Kennedy Assoc. v JPMorgan Chase Bank N.A.*, 134 AD3d 412, 413 [1st Dept 2015] [“reject[ing] plaintiff’s contention that defendant waived the writing requirement because, on other occasions, it had paid plaintiff placement fees despite the lack of a formal, written assignment document” because “[t]he contract contained a provision repudiating unwritten waivers of its requirements”]). In any event, the FAC does not adequately allege that the Landowner Defendants “knowingly, voluntarily, and intentionally abandoned” the protections of the anti-assignment provisions (*Fundamental Portfolio Advisors, Inc. v Tocqusville Asset Mgt., L.P.*, 7 NY3d 96, 104 [2006]).

To be sure, Plaintiffs are not required at this stage of the case to “*prove* that Quadriad satisfied [the conditions for assignment]” (NYSCEF 493 at 16 [emphasis in original]), but they are required to allege the existence of a valid contractual right subject to interference, and they have failed to do so.<sup>4</sup> Therefore, the tortious interference with contract claim is dismissed.

---

<sup>4</sup> The other cases cited by Plaintiffs are inapt, as the defendants in those cases did not dispute the valid assignments of contractual rights (*see C. A. Foley Const. Co., Inc. v Davis*, 51 AD2d 834 [3d Dept 1976]).

**B. Tortious Interference with Prospective Economic Advantage against Silverstein and Bedrock (Second Cause of Action)**

Plaintiffs' claim for tortious interference with prospective economic advantage is also dismissed. "A claim for tortious interference with prospective business advantage must allege that: (a) the plaintiff had business relations with a third party; (b) the defendant interfered with those business relations; (c) the defendant acted with the sole purpose of harming the plaintiff or by using unlawful means; and (d) there was resulting injury to the business relationship" (*Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 108 [1st Dept 2009], citing *Carvel Corp. v Noonan*, 3 NY3d 182, 189-190 [2004]).

"[C]onclusory allegations about a potential relationship" are "insufficient" to state a cause of action (*Shawe v Kramer Levin Naftalis & Frankel LLP*, 167 AD3d 481, 483 [1st Dept 2018] [dismissing claim], appeal dismissed, 33 NY3d 1009 [2019], rearg dismissed, 33 NY3d 1137 [2019]; *BDCM Fund Adviser, L.L.C. v Zenni*, 103 AD3d 475, 478 [1st Dept 2013] ["The court properly dismissed these claims with respect to Quartilium, given that plaintiffs offered only a vague and conclusory allegation that BDCM had a reasonable probability of a business relationship with this company."]). The complaint must "allege . . . that but for defendants' conduct plaintiff would have had an economic relationship with the [third party]" (*Shawe*, 167 AD3d at 483, citing *Vigoda v DCA Productions Plus Inc.*, 293 AD2d 265, 266 [1st Dept 2002] ["Tortious interference with prospective economic relations requires an allegation that plaintiff would have entered into an economic relationship but for the defendant's wrongful conduct."]); *Algomod Technologies Corp. v Price*, 65 AD3d 974, 975 [1st Dept 2009] [affirming dismissal of tortious interference with prospective business relations claim, where plaintiff "fails to plead, in non-conclusory language, that defendants' acts were accompanied by wrongful means and that but for such acts plaintiff would have entered into new relationships with Verizon."]).

The conclusory allegations in the FAC fail to allege that, but for Silverstein and Bedrock's conduct, Plaintiffs would have restarted a business relationship with the Landowner Defendants that the Landowner Defendants had previously terminated. Plaintiffs allege that Silverstein and Bedrock used Plaintiffs' confidential information to negotiate directly with the Landowner Defendants at the same time Quadriad/W&G were "actively pursu[ing] the Landowners' acceptance of an alternative financing structure" (NYSCEF 493 at 21 [Pls.' Opp. to Bedrock's Mot. to Dismiss]; NYSCEF 501 at 20 [Pls.' Opp. to Silverstein's Mot. to Dismiss]; *see* FAC, ¶¶89-90). But by then, the Landowner Defendants had already rebuffed Gans's previous attempt to renegotiate the Pre-Lease Agreements (FAC ¶¶77-78), Quadriad and Plaintiffs defaulted under the Pre-Lease Agreements (FAC ¶¶78-79, Exs. 13-14), and the Landowner Defendants terminated the Agreements (*id.* ¶80, Exs. 13-14).

Following those events, and in the wake of DCP's earlier rejection of Plaintiffs' rezoning plan, there is no indication in the FAC that the Landowner Defendants reciprocated Plaintiffs' interest in continuing their business relationship (*Vigoda*, 293 AD2d at 266; *see Downtown Music Publ'g LLC v Peloton Interactive, Inc.*, 2020 WL 469639, at \*7 [SD NY Jan. 29, 2020] ["Although Peloton has alleged that it sent 'term sheets,' 'other offer materials,' and a non-disclosure agreement to certain Music Publishers, and 'provided data and proposed license terms' to another before NMPA's alleged interference, Peloton has not alleged that any of these Music Publishers reciprocated Peloton's interest in continuing, much less finalizing, these agreements."]). For instance, in early 2017, W&G proposed an alternative financing structure to the Landowner Defendants, but the "plan was considered . . . without definitive decision" (FAC ¶90). Even assuming the truth of the factual allegations contained in the FAC, Plaintiffs' one-sided efforts to regain the Landowner Defendants' business, without more, is insufficient to state

a cause of action. Therefore, the claim for tortious interference with prospective economic advantage is dismissed.

**C. Unjust Enrichment against Wilbee, King Kullen, Queensboro, KBA, and Bedrock (Third Cause of Action)**

The claim for unjust enrichment is dismissed against Defendants Wilbee, King Kullen, Queensboro, KBA, and Bedrock – that is, all Defendants except Silverstein (which is discussed *infra* at Section F). To state a claim for unjust enrichment, a plaintiff must allege 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” (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 517-18 [2012]). “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” (*Corsello v Verizon New York, Inc.*, 18 NY3d 777, 790 [2012] [internal citations omitted]). While, “[i]n a broad sense, this may be true in many cases,” unjust enrichment “is not a catchall cause of action,” but rather “is available only in unusual situations,” such as cases “in which the defendant, though guilty of no wrongdoing, has received money to which he or she is not entitled” (*id.*).

*First*, Plaintiffs have failed to allege that Defendants (other than Silverstein) have been unjustly enriched at Plaintiffs’ expense. For now, the enrichment of those Defendants is entirely speculative (*see Norcast S.ar.l. v Castle Harlan, Inc.*, 147 AD3d 666, 668 [1st Dept 2017] [“[P]laintiffs’ claimed entitlement to the fee is too speculative to support their allegation that defendant was enriched ‘at [their] expense’”]). The Steinway Square Project allegedly “will result in a massive increase in value to the land owners of the core sites,” but only “[o]nce governmental approval is achieved,” which has not happened (NYSCEF 493 at 6 [Pls.’ Mem. of Law]; FAC ¶17 [“[T]he redevelopment contemplated by the Steinway Square Project is subject

to the approval of New York City’s Department of City Planning”)). In fact, Plaintiffs’ prior rezoning plan was rejected by DCP in 2016, resulting in “a substantial negative impact on the economics of the Project” (*id.* ¶47). Until government approval is secured, the alleged “benefit” conferred to these five Defendants consists of unrealized potential. Unjust enrichment is predicated on the idea that ill-gotten gains should be returned to their rightful owners, which presupposes that the defendant has something to return. Plaintiffs’ claim, in effect, asks five Defendants to return a benefit they have not yet obtained, and may never obtain. That theory of recovery is not viable as an unjust enrichment claim.

That critical flaw in Plaintiffs’ claim cannot be fixed with expert modeling (*see* Aug. 3, 2020 Oral Arg. Tr. at 53-54 [Plaintiffs’ counsel stating that they will “have an expert who is going to testify about how projects at this stage of pre-completion are bought and sold on the open market . . . using commonly accepted valuation models”] [NYSCEF 524]). Without government approval for the Project, the five Defendants’ alleged “enrichment” is not unjust (*Dobroshi v Bank of Am., N.A.*, 65 AD3d 882, 885 [1st Dept 2009] [“It is not sufficient that a defendant is enriched; rather, the enrichment must be unjust”] [dismissing unjust enrichment claim], citing *McGrath v Hilding*, 41 NY2d 625, 629 [1977]; *Corsello*, 18 NY3d at 790 [noting requirement that the defendant “obtained a benefit which in ‘equity and good conscience’ should be paid to the plaintiff”]).<sup>5</sup>

As Plaintiffs state repeatedly, their expenditure of money, time, and other resources into the Project was an “investment” (FAC ¶¶17, 101, 104, 108). And the investment promised no

---

<sup>5</sup> To be clear, the Court takes as true the allegation in the FAC that “[a]s a result of Plaintiffs’ time, effort, and money, the value of the Landowner Defendants’ properties and the KBA Site have significantly increased” (FAC ¶126).

guaranteed return; Plaintiffs' share in the Project's upside depended on the Project's approval. For example, Quadriad paid the Landowner Defendants for ground-lease options that were "conditioned on the ability of Quadriad to obtain a rezoning of the Property . . . sufficient to undertake a Project" (Pre-Lease Agreement §6 [e] [i]). The ground leases, like the other parts of Plaintiffs' investment, were a bet on Plaintiffs' ability to win approval for the Project and on the Project's long-term profitability. Essentially, Plaintiffs and Quadriad undertook their development efforts entirely "on spec." The factual allegations in the FAC, taken as true for purposes of this motion, do not state a viable claim that Plaintiffs are entitled to recoup their investment now that their own development efforts have failed.

*Second*, as to Bedrock specifically, Plaintiffs fail to allege a relationship "that could have caused reliance or inducement" (*Georgia Malone & Co., Inc.*, 19 NY3d at 517). The FAC does not allege that Plaintiffs and Bedrock were joint venturers in connection with the Project (*compare with Philips Intern. Inv., LLC v Pektor*, 117 AD 1, 3 [1st Dept 2014] [plaintiff joint venturer held to have sufficient relationship of "reliance or inducement" to support unjust enrichment claim against former joint venturer arising out of former joint venturer's usurpation of investment opportunity that belonged to the joint venture]). More broadly, the FAC does not contain allegations that Bedrock did anything to induce Plaintiffs to spend additional time, money, or other resources on the Project. Rather, it appears that during the period when Plaintiffs allegedly poured millions of dollars into development – between 2014 and 2016 (FAC ¶22) – they had no awareness of KBA or Bedrock's interest. In all, the relationship between Plaintiffs and Bedrock is too attenuated to support the unjust enrichment claim.

#### **D. Breach of Contract against Silverstein (Fourth Cause of Action)**

Plaintiffs state a viable claim for breach of contract against Silverstein. That claim requires Plaintiffs to allege “the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages” (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]).

The allegations in the FAC satisfy these basic requirements. Plaintiffs allege the existence of a written Confidentiality Agreement, which they have attached to the FAC (FAC ¶¶58-65; Ex. 11 [NYSCEF 470]). And according to Plaintiffs, they performed under this contract, sharing confidential Project-related information with Silverstein on the condition that such information would remain confidential, and subsequently returned or destroyed if the parties could not finalize a joint venture within a year (*i.e.*, before February 16, 2017) (*id.* ¶¶64-65). Plaintiffs allege that Silverstein breached the Confidentiality Agreement by, *inter alia*, failing to return or destroy the materials, and by using the materials to directly compete with W&G (*id.* ¶¶137, 139).

In moving to dismiss this claim, Silverstein advances two arguments – (1) that Plaintiffs have failed to allege a breach of the terms of the Confidentiality Agreement, and (2) that Plaintiffs waived the right to confidentiality. Neither persuades, at least at this early stage of the litigation. *First*, even if Silverstein’s interpretation of the Confidentiality Agreement were plausible – that the “large scale mixed use project” envisioned by the agreement really referred to a single location at 34-35 Steinway Street – Silverstein would have merely identified at most an ambiguity in the text of the agreement (*New York Univ. v Pfizer Inc.*, 151 AD3d 42, 48 [1st Dept 2017] [denying motion to dismiss upon finding contract language ambiguous]). *Second*, Silverstein cites no authority for finding, as a matter of law, that Plaintiffs intentionally waived

their rights under the Confidentiality Agreement by providing additional information after the term of the agreement expired. Again, Silverstein raises, at most, fact issues about contractual interpretation and enforcement that cannot be resolved at this stage.

**E. Unfair Competition against Silverstein (Fifth Cause of Action)**

The unfair competition claim against Silverstein also survives. “Generally, quasi-contractual remedies are unavailable where there exists a valid and enforceable agreement governing the particular subject matter,” but “where there is a bona fide dispute as to the existence of a contract **or the application of a contract in the dispute in issue**, a plaintiff may proceed upon a theory of quasi contract as well as breach of contract, and will not be required to elect his or her remedies” (*Kramer v Greene*, 142 AD3d 438, 441-42 [1st Dept 2016] [emphasis added]). Among other things, Silverstein disputes the applicability of the Confidentiality Agreement to the larger Steinway Square Project, arguing that the agreement covered only the Metropolitan Lumber & Hardware site at 34-35 Steinway Street. Therefore, Plaintiffs may proceed on the basis of alternative theories of liability concerning Silverstein’s alleged usurpation of the Project, and thus the unfair competition claim will not be dismissed.

**F. Unjust Enrichment against Silverstein (Third Cause of Action)**

The FAC contains sufficient factual allegations to state a claim for unjust enrichment against Silverstein, “since it alleges that [Plaintiffs] gave [Defendants] confidential information and that defendant failed to compensate plaintiff for the value of the appropriated information” (*Redf Organic Recovery, LLC v Rainbow Disposal Co., Inc.*, 116 AD3d 621, 622 [1st Dept 2014], citing *Wiener v Lazard Freres & Co.*, 241 AD2d 114, 119-120 [1st Dept 1998]). Plaintiffs may assert both breach of contract and unjust enrichment claims because Silverstein disputes the application of the parties’ confidentiality agreement to the Steinway Square Project

as a whole (*Kramer*, 142 AD3d at 441-42). Therefore, as an alternative, quasi-contract cause of action stemming from Silverstein’s alleged misuse of Plaintiffs’ confidential information, the unjust enrichment claim survives.<sup>6</sup>

**G. Declaratory Judgment against Queensboro, King Kullen, and Wilbee (Sixth Cause of Action)**

Plaintiffs’ sixth cause of action, which seeks a declaratory judgment that the Landowner Defendants’ termination of the Pre-Lease Agreements was “ineffective, null and void,” is dismissed because Plaintiffs lack standing to pursue claims under the Agreements for the reasons stated in Part A, *supra*.

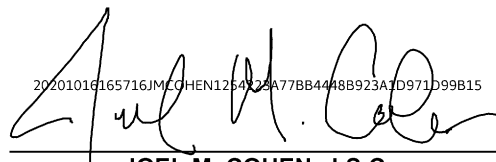
\* \* \* \*

Accordingly, it is

**ORDERED** that Defendants’ motion to dismiss is Denied as to claims against Silverstein for breach of contract, unfair competition, and unjust enrichment, and is otherwise Granted; and it is further

**ORDERED** that the remaining parties are to appear for a telephonic status conference on **October 27, 2020 at 11 a.m.**

10/16/2020  
DATE

  
20201016165716JMLCOHEN125422A77BB4448B923A7D971D99B15  
JOEL M. COHEN, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

<sup>6</sup> The Court also notes that Silverstein’s briefing, while purporting to seek dismissal of all claims against it (*see* NYSCEF 485 [Notice of Motion]), fails to advance any substantive arguments for dismissing the unjust enrichment claim (*see* NYSCEF 486 [Silverstein’s Mot. to Dismiss]).