SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID BENJAMIN COHEN** **PART** **IAS MOTION 58EFM**

Justice

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EXCALIBUR GROUP, LLC, FACILITIES RESOURCE GROUP, LLC, FACILITY RESOURCE GROUP NBA, LLC,

Plaintiff,

- v -

R&R THIRD PROPERTIES, LLC (D/B/A R&R THIRD AVENUE, LLC), ROSENBAUM & ROSENFELD, LLP, ROSENBAUM, ROSENFELD & SONNEBLICK, LLP, ROSETTA RADIOLOGY, PLLC, ROSENBAUM & ROSENFELD RADIOLOGY LLP, ALFRED ROSENBAUM, STANELY ROSENFELD

Defendant.

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INDEX NO. 150867/2016

MOTION DATE 03/11/2020

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

In this action for payment of goods and services, plaintiffs, Excalibur Group, LLC (Excalibur) and Facility Resource Group LLC (Facility), move pursuant to CPLR 3212, for an order granting summary judgment in favor of plaintiffs, and a judgment for a total amount of $336,531.69 plus prejudgment and post-judgment interest as against all defendants. Defendants oppose.

For the reasons set forth below, the motion is granted in part and denied in part.

Background

A full recitation of the facts may be found in the court's decision and order dated June 25, 2018; only those facts relevant to the instant motion will be discussed herein.

Defendant Rosenbaum, Rosenfeld & Sonneblick LLP (RRS) is a medical imaging practice that leases the first and third floors of a building located at 1421 Third Avenue, New York, New York (the premises). Nonparty R & R Third Properties, LLC owns the premises.

In 2006, RRS entered into a lease for new imaging equipment with nonparty Philips Medical Systems (Philips). Philips also agreed to construct a new space within the premises for the equipment.

On June 28, 2007, Philips and Excalibur entered into a written "turnkey" construction agreement (Pierini aff, exhibit 1), wherein Excalibur was to remodel the existing image center to make space for an MRI system, a CT system, two mammography rooms, an ultrasound room, as well as install six new bathrooms, which included furnishing bathroom accessories and plumbing (the project). Excalibur hired nonparty A Superior Services and Repair Company (Superior) to perform the plumbing work required for the project.

After the project was completed, plaintiffs Excalibur and Facility continued to provide maintenance for the site, as well as emergency services for the heating and cooling systems in the building. Plaintiffs billed RRS for these services, and RRS paid the invoices through the end of 2010.

On April 18, 2011, after a rainstorm, a third-floor toilet overflowed causing flood damage to the premises and the newly installed equipment. RRS asked Excalibur to clean up the flood damage. It was determined that the flood was caused by a clog in a horizontal pipe, known as a "stack", which was located in the basement. Five days later, on April 23, 2011, the same toilet again overflowed causing additional damage. RRS called Excalibur to clean up the storm damage and repair the area and called Phillips to repair the leased medical imaging equipment.

Excalibur claims that it provided $300,000 of post-flood, clean-up and repair services, but RRS refused to pay the bill despite RRS's receipt of insurance reimbursement for the flood damage. Specifically, plaintiffs allege that after the two floods, Excalibur performed cleanup work removing and replacing damaged ceiling tiles, removing and reinstalling water-soaked rugs, and installing new rugs (Pierini aff, ¶ 15). In October 2011, Excalibur met with Ronsenbaum and Rosenfeld to discuss a series of repair work to be performed at the premises. The work was outlined by Excalibur and approved by Rosenbaum and Rosenfeld. It was later learned that an existing sanitary waste riser, which was connected to the new plumbing installed for the project, was improperly connected to an existing water storm water stack causing the floods on both days, which is the subject of three pending negligence cases.

Facility alleges that it performed routine and emergency maintenance at the premises from February 2011 through November 25, 2012. The work performed included resolving heating, cooling and electrical issues. Facility claims that it sent 18 invoices to defendants which defendants retained without objection.

In 2013, Geoffrey Pierini, the managing member of Excalibur and Facility, had a conversation with Stanley Rosenfeld (Rosenfeld) regarding the monies that he agreed were owed to Excalibur and Facility. Rosenfeld indicated that Emily Sonnenblick (Sonnenblick) was withdrawing from their partnership and that they needed the monies owed to plaintiffs to use in determining Sonnenblick's monetary interest in the medical practice for purposes of the buy-out. Plaintiffs believed that Sonnenblick's interest would ultimately be transferred to plaintiffs, but those monies never were provided to them (Pierini aff, ¶ 18).

According to plaintiffs, defendants repeatedly promised to pay plaintiffs once defendants received the insurance money but failed to do so, keeping the money for themselves. In addition,

plaintiffs claim that they had agreed to settle with Rosenbaum and Rosenfeld for $150,000. Plaintiffs provided defendants with a settlement agreement allegedly setting forth terms agreed to by the parties (Pierini aff, exhibit 17). Defendants, however, never paid plaintiffs.

Related Actions

On May 16, 2011, Travelers Indemnity Co. of Connecticut a/s/o Rosenbaum, Rosenfeld & Sonnenblick, LLP commenced a negligence action against Superior, Excalibur and Home Systems Engineering, Inc. (index No. 150153/2011) (Travelers) in connection with the property damage sustained as a result of the flooding that occurred on April 18, 2011. Home Systems Engineering, Inc. (Home Systems) did not appear in the action. Superior and Excalibur moved for summary judgment, which the court granted in part as to Superior. Superior appealed. The First Department modified the court's decision, dismissing the complaint and any and all cross claims asserted as against Superior.

On January 15, 2013, Federal Insurance Company, a/s/o Rosenbaum, Rosenfeld & Sonnenblick LLP, commenced a negligence action against Superior, Excalibur and Home Systems Engineering Inc. (index No. 150405/2013). Home Systems did not appear in the action. Superior was granted summary judgment on appeal. On July 24, 2017, the remaining parties, i.e., plaintiffs and Excalibur stipulated to discontinue the action with prejudice and without costs to either party as against the other.

On January 6, 2014, defendants Rosenbaum and Rosenfeld Radiology LLP and R & R Third Properties, LLC commenced a negligence action against Excalibur, Superior and Philips, among others (index No. 150083/2014) due to the floods. In that action, the claims against defendants Superior and Philips were dismissed. Plaintiffs appealed the two decisions dismissing

the action as against those defendants. By decision and order dated June 25, 2018, the present action was joined with *Rosenbaum, Rosenfeld & Sonnenblick, LLP v Excalibur Group, NA LLC*, for purposes of discovery and trial. A note of issue for trial without a jury was filed on September 18, 2019.

Discussion

It is well established that the proponent of a summary judgment motion "must 'make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact'" (*Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 26 NY3d 40, 49 [2015], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party 'to establish the existence of material issues of fact which require a trial of the action'" (*Nomura Asset Capital Corp.*, 26 NY3d at 49, quoting *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [citation omitted]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). On a motion for summary judgment, facts must be viewed in the light most favorable to the nonmoving party (*see Vega*, 18 NY3d 499). When there is any doubt as to the existence of triable issues, summary judgment should not be granted (*O'Sullivan v Presbyt. Hosp. in City of N.Y. at Columbia Presbyt. Med. Ctr.*, 217 AD2d 98, 100-101 [1st Dept 1995]).

Breach of Contract

"The essential elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach" (*Tudor Ins. Co. v Unithree Inv. Corp.*, 137 AD3d 1259, 1260 [2d Dept 2016]; *Flomenbaum v New York Univ.*, 71

AD3d 80, 91 [1st Dept 2009], *affd* 14 NY3d 901 [2010]). Plaintiffs argue that there was an agreement between the parties wherein plaintiffs were to provide certain services to defendants, and defendants were to pay for those services, but defendants failed to do so. Plaintiffs point to the deposition testimony of defendant Rosenfeld who admits that Excalibur is owed money. Specifically, Rosenfeld's testimony reveals the following:

Q. As you sit here today, do you know whether or not the practice owes any money to Excalibur for the work it did?

A. I believe it does.

(Rosenfeld dep tr at 53-54). Rosenfeld also answered, "I think so" when asked if he was pleased with Excalibur's work before the flood (*id.* at 97). Rosenfeld was not aware of any problems with Excalibur's remediation work and admitted that defendants sought Excalibur to do additional work.

Defendants do not deny that they owe plaintiffs money, but counter that much of the work Excalibur performed, invoiced and was paid for was never provided, and point to their affirmative defenses of setoff and recoupment. Set-off is a money demand independent of, and unconnected to, the underlying cause of action (*Otto v Lincoln Sav. Bank of Brooklyn*, 268 App Div 400, 402 [2d Dept 1944], *affd* 294 NY 798 [1945]). Recoupment is a deduction from a money claim based on cross demands arising out of the same transaction which is allowed to compensate and leave only the remaining balance to be recovered. "It is really a defense, as it denies the validity of plaintiff's claim in the amount claimed, and does not entitle defendants to any affirmative relief or any amounts in excess of the amount demanded by plaintiff" (*Enrico & Sons Contr., Inc. v Bridgemarket Assoc.*, 252 AD2d 429, 430 [1st Dept 1998] [citation omitted]).

Defendants claim that there were a number of instances where plaintiffs were paid for work that was not fully completed or installed. Specifically, defendants claim "to the best of [their] recollection" that plaintiff's were paid: $37,591 for a phone system that was not fully installed; at least $43,600 for a security alarm system that was not installed; $35,000 for a fire alarm system that was not installed; and an undetermined amount for pre-flood limestone work that was not completed (*see* memo of opposition at 4, relying on defendants' interrogatory response No. 06, Phillip M. Manela affirmation, exhibit A). Defendants claim that based on those figures, they have a set-off defense in the amount of $116,191. In reply, plaintiffs object to the sufficiency of the interrogatory to support this claim. By letter dated March 11, 2020, defendants submit the affidavit of Rosenfeld to affirm these figures, as well as aver that plaintiffs: charged defendants for $10,000 for post-flood basement work that was not provided; did not complete the post-flood wallpaper and flood work for defendants; and did not adequately provide post-flood HVAC maintenance for defendants (Rosenfeld aff dated 3/11/20). Aside from the affidavit, defendants submit no evidence to support these claimed charges nor do they provide any evidence to show that plaintiffs failed to complete these tasks.

Rather, defendants point to the complaint in the related action of *Rosenbaum, Rosenfeld & Sonnenblick, LLP v Excalibur Group NA, LLC,* (index No. 150083/2014) as evidence of Excalibur's negligent performance in a number of post-flood remedial services (see memo of opposition at 6, complaint at ¶¶ 60-62, 85, 85-86 (index No. 150083/2014).

The court finds that even accepting the belated submission of Rosenfeld's affidavit in support of these defenses, without more, the affidavit is nothing more than generalized and conclusory assertions which are insufficient to defeat summary judgment (*Ventura v Structural Concrete Corp.*, 227 AD2d 235, 235 [1st Dept 1996]). Moreover, defendants' proffered evidence

supporting the set-off and recoupment defenses, i.e., defendants' interrogatory responses, answer and allegations in another complaint, fail to sustain the affirmative defense in order to defeat summary judgment (*Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 121 n 11 [1st Dept 2012] Similarly, pleadings are not proof and the complaint from another case cannot substantiate an affirmative defense to survive summary judgment. (*Melman v Montefiore Med. Ctr.*, 98 AD3d 107 [1st Dept 2012]; [" In opposing a summary judgment motion, . . . [the party] is required to come forward with admissible evidence"]; *Sayeh v 66 Madison Ave. Apt. Corp.*, 73 AD3d 459, 461 [1st Dept 2010] [action dismissed where plaintiff unable to point to evidence of discrimination finding, among other things, "(w)hile plaintiff asserted in response to interrogatories that the board had honored the stockholder-to-stockholder exemption in the past, he provided no evidentiary support for this claim in opposition to the summary judgment motions"]).

Defendants also counter that the evidence submitted by plaintiffs is inconsistent and contradictory as the invoices and work tickets submitted do not amount to that which plaintiffs seek, and that some of the invoices submitted are duplicative, others vary in their detail, and some entitled "Finance Charges" could not be explained as to what those charges applied to. Defendants argue, therefore, that triable issues of fact exists, as to the amounts owed by defendants, and that these amounts should therefore be determined by a trial. The court agrees.

In light of the above, the court grants summary judgment with respect to the breach of contract claim, as to liability only. Defendants are not disputing that monies are owed to plaintiffs; however, the question remains as to how much is owed to plaintiffs. The court, therefore, directs an inquest to determine the amount of damages due and owing.

Conversion

A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession (*State of New York v Seventh Regiment Fund*, 98 NY2d 249 [2002]). Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006] [citations omitted]). It is also well established that the commingling of designated funds is a form of conversion (*see LeRoy v Sayers*, 217 AD2d 63 [1st Dept 1995]). An action will lie for the conversion of money where there is a specific, identifiable fund and an obligation to return or otherwise treat in a particular manner the specific fund in question (*Thys v Fortis Sec. LLC*, 74 AD3d 546 [1st Dept 2010]; *Amity Loans v Sterling Natl. Bank & Trust Co. of N.Y.*, 177 AD2d 277, 279 [1st Dept 1991]).

Plaintiffs allege that as part of the buy-out of Sonnenblick's interest in RRS, a portion of the buyout was identified to be used to pay plaintiffs' claim for $300,000 for services rendered, and that defendants kept those funds instead of paying plaintiffs' claim. Defendants counter that plaintiffs have not and cannot identify how much money was purportedly put aside and converted. According to defendants, the "amount put aside may have been only a portion of the amount owed to Excalibur, it may have been only Emily Sonnenblick's share of the amount owed to Excalibur, and furthermore, the amount [d]efendants believed was owed to Excalibur may be entirely different from the $300,000 Excalibur alleges is owed to it" (memo of law in opposition at 10).

Plaintiffs assert, however, that while the settlement agreement does not specify how much of the buyout was discounted due to the debt owed to plaintiffs, summary judgment should

not be precluded, but rather an inquest should be held to determine the amount of damages owed, citing *Murray v Farrell* (97 AD3d 953, 956 [3d Dept 2012]). As defendants concede that Excalibur is owed some monies in connection with this claim, the court agrees, and orders the matter to inquest to determine the specific amount of money due and owing.

Unjust Enrichment

Plaintiffs argue that defendants were unjustly enriched as a result of the work performed by plaintiffs and rely on defendants' testimony that they were pleased with Excalibur's work before the flood (Alfred Rosenbaum dep tr at 97), and that defendants believed plaintiffs were advised they would be paid for plaintiffs' work but that defendants were waiting to get paid by their insurance carriers (Rosenfeld dep tr at 48-51). "[A] person is unjustly enriched when retention of the benefit received would be unjust considering the circumstances of the transfer and the relationship of the parties" (*Hornett v Leather*, 145 AD2d 814, 816 [3d Dept 1988]). However, as here, "[a]n 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]; *Schultz v Gershman*, 68 AD3d 426, 427 [1st Dept 2009] [holding "(p)laintiff's unjust enrichment cause of action is barred by the existence of the contract between the parties"]). The court, therefore, denies this branch of the motion.

Account Stated

Plaintiffs' bills are sufficient to create an account stated.

> "Where an account is rendered showing a balance, the party receiving it must, within a reasonable time examine it and object, if he disputes its correctness. If he omits to do so, he will be deemed by his silence to have acquiesced, and will be bound by it as an account stated, unless fraud, mistake or other equitable considerations are shown"

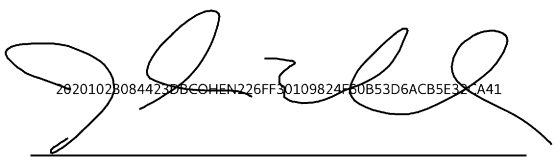
(*Shaw v Silver*, 95 AD3d 416, 416 [1st Dept 2012], quoting *Peterson v Schroder Bank & Trust Co.*, 172 AD2d 165, 166 [1st Dept 1991]). Defendants do not appear to oppose this branch of plaintiffs' motion except to say that they have a valid set-off and/or recoupment defense based on services defendants paid for that were not performed by Excalibur; however, as noted above the evidence in support of this defense is deficient. After a review of the parties' submissions, as noted above, it is clear that certain invoices and work tickets were issued to and retained by defendants without objection. However, given the multitude of documents submitted, coupled with the duplicative nature of some of those submissions, the court cannot, at this time, determine the specific amount due and owing. Therefore, the court will submit the issue as to the exact amount of money owed to plaintiff for inquest.

Conclusion

Accordingly, it is

ORDERED that the motion by plaintiffs Excalibur Group, LLC and Facility Resource Group LLC for summary judgment on the issue of liability on the causes of action for breach of contract, conversion and account stated is granted, and plaintiffs are granted summary judgment in their favor on the issue of liability as to those causes of action; and it is further

ORDERED that the trial of this action shall be damages only as to the causes of action for breach of contract, conversion and account stated in order to determine the actual amount of money due and owing to plaintiffs.



10/23/2020
DATE

DAVID BENJAMIN COHEN, 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