SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **IAS MOTION 14**

Justice

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NOTIAS CONSTRUCTION, INC.,

Plaintiff,

- v -

GENESIS Y15 OWNERS, LLC,GENESIS Y15 MANAGERS LLC,GENESIS Y15 MEMBER LLC,GENESIS Y15 DEVELOPER LLC,HP GENESIS Y15 HOUSING DEVELOPMENT FUND COMPANY, INC.,KARIM HUTSON, IN HIS INDIVIDUAL CAPACITY

Defendant.

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INDEX NO. 656397/2020

MOTION DATE 02/10/2021

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 39, 40, 41, 42, 43, 44

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 45, 46, 47, 48

were read on this motion to/for DISMISS.

Motion sequence numbers 001 and 002 are consolidated for disposition.

The motion (MS001) by defendants to dismiss the complaint is denied as moot given that plaintiff filed an amended complaint. The motion (MS002) by defendants to dismiss the amended complaint is granted in part.

Background

This case deals with a construction project in which plaintiff entered into a contract with defendant Genesis Y15 Owners ("Genesis Owners"). Defendants claim that plaintiff sued a host of irrelevant entities who were not parties to the contract between plaintiff and Genesis Owners. Defendants also point out that there is another action already pending between plaintiff and Genesis Owners, and plaintiff (who is a defendant in that action) should bring counterclaims in

that action. That case is pending in this part and involves Genesis Owners, defendant HP Genesis Y15 Housing Development Fund Company Inc. ("HDFC') and plaintiff.

MS002

In this motion, defendants seek to dismiss the amended complaint on the grounds that it fails to state a valid cause of action, is controverted by documentary evidence and a prior pending action exists between the parties concerning the same issues.

Defendants claim that Genesis Owners retained Notias to do construction and renovation services pursuant to a contract dated June 24, 2015. Notias was hired to modernize 358 residential units and do exterior as well as common area work across 28 buildings. Defendants argue that Notias falsely alleged that it had completed its work under the contract at the beginning of 2018 when, in fact, Notias left numerous deficiencies with the work.

Notias then filed 28 mechanic's liens against Genesis Owners and HDFC; defendants question how these liens can stand given that they were filed two years after work stopped. After a subsequent litigation, defendants argue that 27 of the 28 liens were vacated. Then Genesis Owners and HDFC filed their own lawsuit on November 12, 2020 against Notias seeking damages for $1.58 million arising out of Notias' alleged failure to complete the work. Notias responded by filing this lawsuit.

Defendants argue first that the amended complaint should be dismissed because there was a previous action pending between the same parties pursuant to CPLR 3211(a)(4). They also argue that the first cause of action for breach of contract must be dismissed against those defendants who are not parties to the subject contract. Defendants emphasize that the contract was with Genesis Owners.

They add that there is no evidence to pierce the corporate veil against Genesis Managers, Genesis Member, Genesis Developer or Mr. Hutson and plaintiff only offers conclusory assertions in the amended complaint on this topic. Defendants maintain that plaintiff cannot allege that the non signatories to the contract are somehow third-party beneficiaries to the contract, especially in the absence of express language stating otherwise.

Defendants seek dismissal of the first amended complaint to the extent it seeks consequential damages as the contract expressly prohibited recovery of such relief. And they seek dismissal of the second, third, and fourth causes of action on the ground that these quasi-contract claims cannot stand where there is an express contract.

In opposition, plaintiff contends that it merely seeks to be paid the outstanding amounts it is due under the terms of the contract. It argues that as it completed work, a project architect would approve the invoice and Notias received over $25 million from the project. However, it claims it is still owed over $700,000 based on work it asserts was completed.

Notias observes that the contract had a provision which permitted 10% retainage to be withheld on every application for payment from Notias until Notias reached 50% completion of the project. Then, the retainage would be reduced to 5%. Plaintiff insists that retainage was improperly withheld and asserts that Hutson (along with the other Genesis entities) sought to divert these monies for his personal benefit. Plaintiff maintains that Hutson dominated each Genesis entity and commingled the funds of these corporations.

Plaintiff points out that the other action was filed via summons with notice and, therefore, does not fall under CPLR 3211(a)(4). It also claims it has valid causes of action for quantum meruit and unjust enrichment against HDFC. Plaintiff argues that Hutson and his Genesis entities should face liability for receiving benefits from Notias.

In reply, defendants argue that they have satisfied the elements for dismissal under CPLR 3211(a)(4). They also reject any claim for veil piercing against the non-parties to the contract and assert that plaintiff cannot allege quasi contract claims when there is a valid contract at issue.

CPLR 3211(a)(4)

"[A]n action commenced merely by service of a summons with notice is not a 'prior action pending'; service of a complaint is required" (*Kevorkian v Harrington*, 158 Misc 2d 464, 467 [Sup Ct, NY County 1993]). Here, the other action was commenced via a summons with notice and there is no dispute that the complaint in this case was filed before the complaint was filed in the action filed by defendants (under Index No. 656250/20). Therefore, there is no basis to dismiss under CPLR 3211(a)(4). Moreover, the Court observes that under this provision of the CPLR, dismissal is not required; in fact, the statute says the "Court need not dismiss on this ground."

Piercing the Corporate Veil

"New York law disfavors disregard of the corporate form. Accordingly, piercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (*Cobalt Partners, L.P. v GSC Capital Corp.*, 97 AD3d 35, 40 [1st Dept 2012] [internal citations and quotations omitted]).

Here, plaintiff's amended complaint alleges that defendant Hutson "is the controlling manager and member of Genesis Owners, Genesis Managers, Genesis Member and Genesis Developer, and by virtue of his individual conduct and complete domination of these entities as alleged herein, the alter ego of each entity" (NYSCEF Doc. No. 15, ¶ 12). Plaintiff also alleges

that Hutson improperly withheld retainage funds by claiming expenses that plaintiff asserts were inflated (*id*. ¶ 26). Paragraphs 28-33 describe plaintiffs' contentions that Hutson commingled funds between the Genesis defendants, that they shared the same office space and that Hutson loaned money between these entities without securing appropriate collateral.

These allegations permit plaintiff to allege causes of action for breach of contract against the Genesis entities and Hutson. Discovery may reveal that the corporate formalities were followed. But if, as plaintiff alleges, Hutson used these entities as his personal piggy bank to abscond with funds that are due to plaintiff, then piercing the corporate veil might be appropriate.

Second and Third causes of Action against HDFC

Plaintiff brings causes of action for quantum meruit and for unjust enrichment against HDFC. Plaintiff's claim is that HDFC benefitted from the work done to its apartments (HDFC owned the buildings that were renovated) at plaintiff's expense.

"[W]here there is a bona fide dispute as to the existence of a contract or where the contract does not cover the dispute in issue, plaintiff may proceed upon a theory of quantum meruit and will not be required to elect his or her remedies" (*Joseph Sternberg, Inc. v Walber 36th St. Assoc.*, 187 AD2d 225, 228, 594 NYS2d 144 [1st Dept 1993]). Here the contract was between plaintiff and Genesis Owner, so a claim for quantum meruit against the entity that benefitted from the contract is appropriate at the pleadings stage.

Similarly, the unjust enrichment claim should remain. "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. In a broad sense, this may be true in many cases, but unjust enrichment is not a catchall cause of action to be used when others fail. It is available only in

unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff. Typical cases are those in which the defendant, though guilty of no wrongdoing, has received money to which he or she is not entitled. An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim" (*Corsello v Verizon New York, Inc.*, 18 NY3d 777, 790, 944 NYS2d 732 [2012]).

Here, plaintiff's claim is that HDFC's apartments were improved despite the fact that the plaintiff was not fully compensated for making those improvements despite the fact that HDFC was not a party to the contract. That states a cause of action for unjust enrichment.

Fourth Cause of Action against Hutson

Similarly, the fourth cause of action against Hutson for unjust enrichment states a cognizable claim. The allegation is that Hutson withheld funds that should have been paid to plaintiff pursuant to a contract plaintiff had with Genesis Owner and that Hutson benefitted from the retainage funds that he should not have withheld.

Consequential Damages

Plaintiff did not dispute the fact that it cannot seek consequential damages. Therefore, the branch of defendants' motion to strike that request is granted.

Accordingly, it is hereby

ORDERED that the motion by defendants to dismiss the complaint (MS001) is denied as moot; and it is further

ORDERED that the motion by defendants to dismiss the amended complaint (MS002) is granted only to the extent that plaintiff's claim for consequential damages is stricken and is

denied as to the remaining portions of the motion and defendants are directed to answer pursuant to the CPLR.

Remote Conference: May 27, 2021.

2/22/2021
DATE

ARLENE P. BLUTH, J.S.C.

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