

<b>CNY Hotel 48 LLC v TMHCR 48th St. LLC</b>
2021 NY Slip Op 30941(U)
March 24, 2021
Supreme Court, New York County
Docket Number: 161033/2020
Judge: Arlene P. Bluth
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**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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**INDEX NO. 161033/2020**

CNY HOTEL 48 LLC,

**MOTION DATE 03/10/2021**

Plaintiff,

**MOTION SEQ. NO. 001**

- v -

TMHCR 48TH STREET LLC,SAM CHANG, S3 RE 150W48  
FUNDING LLC,THE CITY OF NEW YORK

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17

were read on this motion to/for DISMISS.

The motion by defendants TMHCR 48th Street LLC and Sam Chang (“Defendants”) to dismiss the second, third, fourth, fifth and seventh causes of action and the seventh cause of action against defendant Chang is granted in part and denied in part.

**Background**

Defendant TMHCR owns a property located in Manhattan and plaintiff contends that it entered into a contract with TMHCR related to construction work. Plaintiff contends that it was the general contractor for the construction project at the premises. Defendants insist that the second (GBL), third (quantum meruit), fourth (account stated), fifth (unjust enrichment) and seventh (trust fund diversion) causes of action should be dismissed.

Defendants claim that third, fourth and fifth causes of action are duplicative of the first cause of action for breach of contract. They point out that where a plaintiff asserts a breach of

contract claim, a claim for quantum meruit must be dismissed as well as claims for account stated and unjust enrichment.

Defendants also maintain that the seventh cause of action for trust fund diversion should be dismissed because plaintiff failed to allege the elements of this cause of action; they contend plaintiff did not explain the amount of the building loan, the date the loan was taken, the lender or even the terms of the loan. They argue that under CPLR 3013, plaintiff was required to allege the material elements of each cause of action and it failed to do so for this claim. Defendants add that plaintiff did not satisfy the heightened pleading standard under CPLR

Defendants also argue that the portion of the seventh cause of action against defendant Chang (the principal of TMHCR) should be dismissed because he was not a party to the contract and was only acting in his capacity as the owner of TMHCR.

In opposition, plaintiff maintains that it is permitted to plead claims in the alternative in the event the parties dispute the validity of the agreement. Plaintiff argues that Defendants have not admitted the enforceability of the contract at issue. With respect to the trust fund diversion claim, plaintiff argues that all it must plead is that the defendant was the trustee of a fund and used fund assets for purposes other than paying subcontractors at the construction site. Plaintiff rejects Defendants' claim that this cause of action is subject to a heightened pleading standard.

Plaintiff insists that defendant Chang can be held personally liable under a trust fund diversion claim and points to cases which purportedly support this argument. It argues that Chang wrongfully diverted assets which should have been used to pay plaintiff.

In reply, Defendants insist that plaintiff's opposition contradicts its complaint in that it questions the validity of the contract that forms the basis of this complaint. They also contend

that while plaintiff could theoretically bring claims against defendant Chang personally, the allegations in the complaint are conclusory and cannot support any cognizable claim against him.

The Court observes that it did not consider the “supplemental” affirmation (NYSCEF Doc. No. 18) filed by plaintiff. The Court does not consider a sur-reply filed without permission.

### **Discussion**

“It is settled that a motion for dismissal pursuant to CPLR 3211(a)(7) must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law. The pleading is to be liberally construed. The court must accept the facts alleged in the pleading as true and accord the opponent of the motion, here defendants, the benefit of every possible favorable inference to determine only whether the facts as alleged fit within any cognizable legal theory” (*Siegmund Strauss, Inc. v East 149<sup>th</sup> Street Realty Corp.*, 104 AD3d 401, 403, 960 NYS2d 404 [1st Dept 2013] [internal quotations and citations omitted]).

As an initial matter, the branch of the motion seeking to dismiss the second cause of action is denied as Defendants did not offer any specific arguments as to why this claim should be dismissed; it was only included in the requested relief.

### **Quasi Contract Claims**

The Court denies the branch of the motion with respect to the account stated and quantum meruit causes of action. There is no doubt that plaintiff can plead causes of action in the alternative and Defendants have not admitted to the validity of the contract. At this stage of the litigation, plaintiff can seek relief in the alternative.

However, the Court grants the branch of the motion that seeks dismissal of the unjust enrichment claim. “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]).

The allegations relating to this cause of action (NYSCEF Doc. No. 2, ¶¶ 29-33) evidence a “catch-all” cause of action and one that duplicates the breach of contract and quasi-contract claims. The Court finds that this is not an “unusual” situation where this cause of action might be permitted.

### **Seventh Cause of Action Alleged Against Chang**

“Generally . . . 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” (*Morris v New York State Dept. of Taxation and Finance*, 82 NY2d 135, 141, 603 NYS2d 807 [1993]).

“The primary purpose of [article 3–A of] the Lien Law is to ensure that those who have directly expended labor and materials to improve real property at the direction of the owner or a

general contractor' receive payment for the work actually performed. Moreover, the officers and directors of a corporate trustee are under a duty to the beneficiaries of a trust administered by the corporation not to cause the corporation to misappropriate trust property and will be personally liable for participation in a breach of trust" (*Atlas Bldg. Sys., Inc. v Rende*, 236 AD2d 494, 495, 653 NYS2d 694 [2d Dept 1997] [internal quotations and citations omitted]).

Defendants seek to dismiss the seventh cause of action against Chang on the grounds that the allegations are conclusory and cannot be maintained against Chang in his personal capacity. However, the case law cited above clearly permits plaintiff to allege a trust fund diversion cause of action against the principal of a corporation that improperly diverts trust assets. Therefore, the Court finds that plaintiff has stated a cause of action against Chang.

### **Trust Fund Diversion**

The Court finds that plaintiff has stated a valid cause of action for trust fund diversion against defendant TMHCR. Although Defendants argued that this cause of action must be pled with particularity pursuant to CPLR 3016(b), they did not cite any binding case law for their contention that a heightened pleading standard applies. And plaintiff satisfied its burden to state the cause of action under CPLR 3013. The complaint alleges that TMHCR received a building loan and did not use those funds for expenditures related to the construction project as required under the Lien Law (NYSCEF Doc. No. 2 at 7).

Defendants' assertions that plaintiff did not provide enough detail are without merit. Plaintiff need not specify every detail about the building loan and Defendants' alleged trust fund diversion. That is the purpose of discovery.

Accordingly, it is hereby

ORDERED that the motion by defendants TMHCR 48th Street LLC and Sam Chang (“Defendants”) to dismiss is granted only to the extent that the third and fourth causes of action are dismissed, and denied as to the remaining relief requested. These defendants are directed to answer pursuant to the CPLR.

Remote Conference: May 13, 2021.

3/24/2021  
DATE

  
ARLENE P. BLUTH, J.S.C.

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