# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. JOHN J. KELLEY** **PART** **56M**

***Justice***

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ELITE SERVICE GROUP, LLC,

Plaintiff,

- v -

ASPHALT GREEN and KARINA MEJIA,

Defendants.

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**INDEX NO.** 651955/2017

**MOTION DATE** 11/15/2021

**MOTION SEQ. NO.** 005

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 005) 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 176

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

## I. INTRODUCTION

In this action to recover damages for breach of contract, in quantum meruit for services rendered, and for conversion, the plaintiff moves pursuant to CPLR 3212 for summary judgment (1) on its breach of contract cause of action in the third amended complaint, and thereupon for entry of judgment in its favor in the sum of $125,755.90, plus interest (first cause of action), (2) dismissing the defendants' counterclaims, and (3) severing any remaining counterclaims so as to permit entry of judgment on its first cause of action. The defendants oppose the motion, and cross-move for summary judgment so much of their second counterclaim that seeks to recover for breach of an implied covenant of good faith and fair dealing or, in the alternative, pursuant to 22 NYCRR Part 130-1.1 for an award of attorneys' fees and costs. The motion is granted only to the extent that the plaintiff is awarded summary judgment dismissing the defendants' second counterclaim, and the motion is otherwise denied. The cross motion is denied. The court notes that, although the plaintiff did not discontinue the action against the individual defendant, Karen

Mejia, none of the three causes of action in its third amended complaint is asserted against Mejia.

II. BACKGROUND

The plaintiff asserts that it entered into two separate contracts with the defendant Asphalt Green (AG) to provide cleaning services at two of that defendant's facilities, that AG terminated both contracts in March and April 2017 respectively, but failed to pay for the services rendered, and that AG prevented the plaintiff from recovering its equipment. Thus, the plaintiff seeks to recover damages for the unpaid services, plus interest, and for the value of the equipment converted, plus interest. The defendants counter that the plaintiff's performance under both contracts was materially deficient, and that, upon AG's proper termination of the contracts, the plaintiff altered and forged the actual contracts so as to indicate that they were automatically renewable, and commenced the present lawsuit in bad faith. The defendants also counterclaim, alleging that the plaintiff breached the contracts (first counterclaim), that the plaintiff breached the covenant of good faith and fair dealing implied into the contracts by commencing this lawsuit in bad faith, in effect, violated Judiciary Law § 487, and should be liable for sanctions for frivolous litigation conduct under 22 NYCRR part 130 (second counterclaim), and that that the plaintiff illegally removed and converted some of AG's property (third counterclaim).

III. DISCUSSION

A. Summary Judgment

1. Standard Applicable to Summary Judgment Motions

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), as well as the

pleadings and other proof such as affidavits, depositions, and written admissions (*see* CPLR 3212). The facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp*., 18 NY3d 499, 503 [2012]). In other words, "[i]n determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility" (*Garcia v J.C. Duggan, Inc*., 180 AD2d 579, 580 [1st Dept 1992]).

Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*see Vega v Restani Constr. Corp*., 18 NY3d at 503). "The drastic remedy of summary judgment, which deprives a party of his [or her] day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even 'arguable'" (*De Paris v Women's Natl. Republican Club, Inc*., 148 AD3d 401, 403-404 [1st Dept 2017]; *see Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr*., 161 AD2d 480, 480 [1st Dept 1990]). Thus, a moving defendant does not meet his or her burden of affirmatively establishing entitlement to judgment as a matter of law merely by pointing to gaps in its opponent's case. He or she must affirmatively demonstrate the merit of his or her claim (s*ee Koulermos v A.O. Smith Water Prods*., 137 AD3d 575, 576 [1st Dept 2016]; *Katz v United Synagogue of Conservative Judaism,* 135 AD3d 458, 462 [1st Dept 2016]).

In support of its motion, the plaintiff, a limited liability company, submitted the affidavit of its member, Robert Sheppard, its third amended complaint and other pleadings, copies of the two contracts that were provided to it by the defendants in the course of discovery, spreadsheets of all of the invoices of services it rendered to AG in 2015, 2016, and 2017 at both of its facilities, unpaid invoices for work performed thereat, and the deposition transcripts of AG's executive director, Maggy Siegel, and AG's housekeeping manager, Karina Mejia.

In opposition to the plaintiff's motion and in support of its cross motion, the defendants submitted Siegel's affidavit, both contracts at issue, emails, photographs, and meeting notes regarding complaints about the quality of service and extent of cleanliness provided by the

plaintiff, termination notices, a letter to the plaintiff regarding the alleged altered contracts, payments made to the plaintiff from 2013 to 2017, invoices from a nonparty cleaning service, and the deposition transcripts of Siegel, Meijia, AG's former director of operations, Thomas O'Connor, and its former employee, Jennifer Coccia.

2. First Cause of Action--Breach of Contract

The plaintiff has established its prima facie entitlement to judgment as a matter of law on the first cause of action in its third amended complaint, sounding in breach of contract. The elements of a cause of action to recover for breach of contract are the "formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage" (*Flomenbaum v New York Univ.*, 71 AD3d 80, 91 [1st Dept 2009]). In the first cause of action, the plaintiff adequately alleged that it entered into a written contract with the AG on June 23, 2010 to provide cleaning services at the defendant's Upper East Side location (hereinafter the UES Contract), and on June 1, 2014 to provide the same services at AG's Battery Park City location (hereinafter the BPC Contract). Sheppard alleged in his affidavit that the plaintiff performed the agreed-upon cleaning services at both locations, that AG failed to perform its obligation under the agreement by failing to tender payment for certain services, mainly between February 2017 and April 2017, and that, as a result, it suffered damages in the amount of $125,755.90.

In opposition to the plaintiff's showing in this regard, however, the defendants raised triable issues of fact as to whether the plaintiff did indeed perform under the contract. The defendants alleged that the plaintiff's "standard of care and quality" was materially deficient and declined over the years. Siegel alleged in her affidavit that specific terms of the contracts were not met, particularly where the contracts expressly stated, inter alia, that the plaintiff would "thoroughly clean the facility and bring the level of cleanliness up to the proper standard of excellence," ensure that the facilities were maintained "at the highest level of cleanliness," and ensure "consistent and complete work on all projects." Siegel further alleged that AG met with

the plaintiff in January 2017 to discuss staff schedules, staff appearances, and complaints about the cleanliness of the facilities, and that, in January 2017, AG sent emails, accompanied by photographs, detailing those issues. Finally, Siegel averred that, in April 2017, the plaintiff failed to send the necessary staff needed to maintain AG's facilities and, as such, AG had to retain another cleaning service to cover for the plaintiff on several occasions. Thus, the defendants have raised triable issues of fact as to whether the plaintiff performed as per the contracts.

Although the plaintiff asserts that the defendants failed to raise material issues of fact, as they have not shown that the unpaid services were sub-par or in any way inadequate, the defendants asserted in both their answer to the third amended complaint and in Siegel's affidavit that the services set forth in the unpaid invoices were either not performed or were not performed adequately, thus constituting a material breach of the contracts. The plaintiff cites to *Rebecca Broadway Ltd. Partnership v Hotton* (143 AD3d 71 [1st Dept 2016]), holding that a party to a bilateral contract must either declare a breach and terminate the contract or ignore the breach and continue to perform under the contract, and asserts that, because AG accepted and paid for allegedly inadequate services in the previous years, without protest or termination of the contracts, AG waived the right to later terminate the contracts based on the alleged breach. Contrary to the plaintiff's contention, AG did in fact protest the allegedly inadequate services through its emails and meetings with the plaintiff. Shortly thereafter, AG sent a termination letter, dated February 27, 2017, with respect to both the UES and BPC contracts. Moreover, while AG has alleged a breach due to the decline in services over the years, it is not seeking damages for the entirety of the parties' contractual relationship, but, rather, is seeking damages only for the last few months of the relationship, as denoted in the alleged unpaid invoices. Hence, summary judgment on the plaintiff's first cause of action in its third amended complaint must be denied.

3. First Counterclaim---Breach of Contract

Inasmuch as the court is denying summary judgment to the plaintiff on its first cause of action in its third amended complaint, the court also denies summary judgment to the defendants on their first counterclaim, sounding in breach of contract, as the claim arises from the same disputed facts as to whether the plaintiff did or did not meet its obligations under the two contracts.

4. Second Counterclaim

a. Breach of the Implied Covenant of Good Faith and Fair Dealing

The plaintiff established that it is entitled to dismissal of so much of the defendants' second counterclaim as alleges a breach of the covenant of good faith and fair dealing. In every contract there is an implied covenant of good faith and fair dealing that works to ensure that neither party shall act in a manner that will destroy or injure the right of the other party to receive the benefit of the contract (*see Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995], citing *Kirke La Shelle Co. v Paul Armstrong Co.*, 263 NY 79, 87 [1933]; *see also 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]). In pleading their second counterclaim, the defendants asserted that the plaintiff engaged in years-long litigation, in which it knowingly and repeatedly based its verified complaints on fraudulent contracts in an attempt to deny AG its contractual right to terminate the UES and BPC contracts. The plaintiff correctly argues that AG did in fact terminate the contracts and that the plaintiff did cease to be AG's cleaning contractor, and thus a breach of the implied covenant of good faith and fair dealing could not have occurred.

The plaintiff also correctly argues that the conduct allegedly giving rise to the counterclaim was not the subject matter of, or even related to the subject matter of, the contracts at issue, and that, in fact, the contracts did not govern or exclude any conduct by the parties during litigation. "While the covenant of good faith and fair dealing is implicit in every

contract, it cannot be construed so broadly as effectively . . . to create independent contractual rights" (*Fesseha v TD Waterhouse Investor Servs.*, 305 AD2d 268, 268 [1st Dept 2003]).

In opposition, the defendants failed to raise a triable issue of fact. The defendants have not shown that, merely by litigating this action, the plaintiff has deprived them "of the fruits of the contract" (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d at 153; *see generally Jaffe v Paramount Communications Inc.*, 222 AD2d 17 [1st Dept 1996]; *D'Ambrogio v Morgenstern*, 135 Misc 2d 643 [Sup Ct, N.Y. County 1987]). Additionally, the defendants have not demonstrated that the implied covenant of good faith and fair dealing applies to conduct during the litigation of a claim involving the underlying contracts. Hence, the plaintiff is entitled to summary judgment dismissing so much of the second counterclaim as sought recovery for breach of the implied covenant of good faith and fair dealing.

b. New York Judiciary Law § 487

The second counterclaim also asserted, in effect, that the plaintiff violated New York Judiciary Law § 487.

New York Judiciary Law § 487 provides, in relevant part, that

> "An *attorney* or *counselor* who:
>
> (1) Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; . . .
>
> Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action"

(emphasis added). It is well settled that a cause of action to recover under Judiciary Law § 487 does not lie against the client, but only against the attorney (*see Bill Birds, Inc. v Stein Law Firm, P.C.*, 35 NY3d 173, 179 [2020], citing *Looff v Lawton*, 14 Hun 588, 590 [2d Dept 1878] [the statute is limited to a particular class of citizens consisting of attorneys]; *Neroni v Follender*, 137 AD3d 1336, 1338 [3d Dept 2016] [holding that Judiciary Law § 487, by its terms, does not apply to non-attorneys]).

In any event, even if the plaintiff could itself be liable under Judiciary Law § 487, it corrected any alleged litigation misconduct by effectively conceding, by way of its third amended complaint--- which was served and filed pursuant to the defendant's stipulation---that the contracts provided by the defendants, and not those on which it initially relied, are the true contracts at issue and the contracts under which it seeks to recover. Furthermore, in its third amended complaint, the plaintiff withdrew the causes of action based on its previous, differing version of the contracts that the defendants claimed were fraudulent. Notably, Judiciary Law § 487 does not encompass the filing of a pleading or brief containing nonmeritorious legal arguments, as such statements cannot support a claim under the statute (*see Bill Birds, Inc. v Stein Law Firm, P.C.*, 35 NY3d 173, 180 [2020]).

Finally, as the defendants noted in their opposition papers, the plaintiff, prior to filing its third amend complaint, discharged its former counsel, and is now represented by different counsel. Therefore, even if this court properly could find a violation of Judiciary Law § 487 by an attorney, the defendants have not sufficiently demonstrated that the plaintiff's current attorney intended to deceive the court or the defendants (*see* Judiciary Law § 487[1]); *Agostini v Sobol*, 304 AD2d 395, 396 [1st Dept 2003]). Hence, so much of the second counterclaim as, in effect, sought recovery pursuant to Judiciary Law § 487 must also be summarily dismissed.

For the same reasons, the court does not find a basis for the imposition of sanctions upon the plaintiff pursuant to 22 NYCRR 130-1.1, and that portion of the second counterclaim also is dismissed.

5. Third Counterclaim---Conversion

A conversion occurs "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" (internal quotation marks omitted; *see Reif v Nagy*, 175 AD3d 107, 120 [1st Dept 2019]). The 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" (see *Pappas v Tzolis*, 20 NY3d 228, 234 [2012] citing *Colavito v NY Organ Donor Network, Inc.*, 8 NY3d 43 [2006]). In his affidavit, Sheppard asserted that the plaintiff never took any property that belonged to the defendants, and thus did not exercise control over or interference with the property. While the plaintiff has established, prima facie, that it did not convert the defendants' property, the defendants have raised triable issues of fact in opposition to the plaintiff's showing in this regard. The defendants rely on Siegel's affidavit, in which she describes the alleged converted property, screenshots from security footage dated March 31, 2017, and e-mail communications dated April 5, 2017, regarding missing cleaning equipment.

The court rejects the plaintiff's contention that the defendants cannot demonstrate a viable, non-time barred claim for conversion (*see* CPLR 203[d], 214[3])

CPLR 203(d) provides, in relevant part, that

> "[a] defense or counterclaim is not barred if it was not barred at the time the claims asserted in the complaint were interposed, except that if the defense or counterclaim arose from the transactions, occurrences, or series of transactions or occurrences, upon which a claim asserted in the complaint depends, it is not barred to the extent of the demand in the complaint notwithstanding that it was barred at the time the claims asserted in the complaint were interposed."

Siegel alleges that the property was allegedly taken "in the period following Elite's termination (but before its last date at the facilities) and was marked by . . . the disappearance of cleaning supplies and theft of Asphalt Green's equipment by Elite," that such period began in February 2017, and that the claim was thus not time-barred when the plaintiff commenced this action on April 11, 2017. The court also rejects the plaintiff's contention that the evidence that the defendants provided with regard to the converted property is hearsay, as both parties submitted the deposition transcript of the AG's housekeeping manager, Karina Mejia, in which she testified that she had personal knowledge of the alleged conversion. Hence, there are triable issues of fact as to the defendant's third counterclaim. Therefore, that branch the of the plaintiff's motion seeking dismissal of the defendants' third counterclaim is denied.

B. Severing Remaining Counterclaims

Inasmuch as the court declines to award summary judgment to the plaintiff on its first cause of action, there is no cause for the entry of a judgment at this juncture, and there is thus no basis for severing any of the defendants' counterclaims to expedite the entry of a judgment in the plaintiff's favor. Hence, that branch of the plaintiff's motion seeking severence is denied as academic.

IV. CONCLUSION

Accordingly, it is

ORDERED that the plaintiff's motion is granted to the extent that it is awarded summary judgment dismissing the defendants' second counterclaim, the second counterclaim is dismissed, and the motion is otherwise denied; and it is further,

ORDERED that the defendant's cross motion is denied; and it is further,

ORDERED that the plaintiff shall file the note of issue on or before May 31, 2022.

This constitutes the decision and order of the court.

3/11/2022
DATE

JOEL J. KELLEY, J.S.C.

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| 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 |
| CROSS MOTION: | | CASE DISPOSED | | | X | NON-FINAL DISPOSTION | |
| | | GRANTED | X | DENIED | | GRANTED IN PART | OTHER |
| APPLICATION: | | SETTLE ORDER | | | | SUBMIT ORDER | |
| CHECK IF APPROPRIATE: | | INCLUDES TRASNFER/REASSIGN | | | | FIDUCIARY APPOINTMENT | REFERENCE |