SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 60M

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LANTERN ENDOWMENT PARTNERS, LP,

Plaintiff,

- v -

BLUEFIN SERVICING LTD., PATRIOT CREDIT COMPANY, LLC,MODERN ART SERVICES, LLC,IAN PECK,

Defendant.

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INDEX NO. 654002/2019

MOTION DATE 01/04/2022

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

HON. MELISSA CRANE:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 99, 100, 101, 102, 103, 104, 105, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127

were read on this motion to/for DISMISS.

BACKGROUND AND RELEVANT FACTS

This dispute arises from a loan agreement and a series of subsequent participation agreements, one of which was assigned, in part, to plaintiff Lantern Endowment Partners, L.P. Plaintiff alleges that defendants' businesses involve loaning money to art collectors, dealers, or brokers, and financing the purchase and later sale of valuable art, and that these businesses are a fraudulent scheme to extract all the upside, but absorb none of the risk, of an otherwise legitimate art lending operation (NYSCEF Doc. No. 2, ¶¶ 7, 19). As is appropriate on a motion to dismiss, and unless otherwise indicated, the court derives the following facts from the plaintiff's complaint.

I. The Loan and Loan Documents

On or around May 2014, non-party Art Capital Bermuda Ltd. ("ACB") loaned $5,100,000 (the "Loan") to non-party Igal Ahouvi ("Ahouvi") through a loan agreement (*id.*, ¶ 20). The Loan was memorialized by a secured promissory note (the "Note"), dated April 28, 2014, between Ahouvi and ACB, pledges of collateral, and an arranger agreement between Ahouvi and defendant Modern Art Services, LLC ("MAS" or the "Arranger") (the "Arranger Agreement") (*id.*, ¶ 23). The Note, pledges of collateral, and Arranger Agreement, were "all collectively referred to as the 'Loan Documents'" (*id.*). The Loan Documents required Ahouvi to "remit quarterly interest payments in advance every January 31, April 30, July 31, and October 31" (*id.*, ¶ 25).

II. The Senior Participation Agreement and Senior Servicing Agreement

On or around May 2014, ACB sold a 90% interest in the Loan to non-party Bank of N.T. Butterfield & Son Limited (the "Senior Participant" or the "Bank") pursuant to a participation agreement (the "Senior Participation Agreement") (*id.*, ¶ 21). Defendant Bluefin Servicing LTD. ("Bluefin" or the "Servicer") later entered into a servicing agreement with the Senior Participant and ACB (the "Senior Servicing Agreement") to service the Loan (*id.*, ¶ 22). Under the Senior Servicing Agreement, Bluefin was "obligated to collect all payments due from [Ahouvi] every month, and remit them immediately to the [Senior Participant] and…[ACB] according to the terms of the Senior Participation Agreement" (*id.*, ¶ 27).

III. The Junior Participation Agreement

On June 9, 2014, ACB sold the remaining 10% interest in the Loan (the "Junior Participation Interest") to defendant Patriot Credit Company, LLC ("Patriot" or the "Junior Participant") pursuant to a later participation agreement (the "Junior Participation Agreement") effective May 28, 2014 (*id.*, ¶ 28). Defendant Ian S. Peck ("Peck") "executed the [Junior Participation Agreement] on behalf of [ACB], as Lender; [MAS], as Arranger; Patriot, as Junior Participant; and Bluefin, as Servicer" (*id.*, ¶ 29). Section 4 of the Junior Participation Agreement included a waterfall structure providing "for payments to [Patriot, as the Junior Participant,] in its *pro rata* share with the [Bank, as the Senior Participant,] on their respective participation amounts from all collections from [Ahouvi] for interest on the Loan's promissory note, servicing fees, and default servicing fees" (*id.*, ¶ 32). The waterfall provision stated:

> **"Waterfall Structure: Payments to the Junior Participant.**
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> a) Waterfall- with no Event of Default by the Borrower. The Lender shall direct the Servicer to make distributions from all collections in accordance with the following priorities on each Distribution Date: first, to the Servicer for Servicer Advances and Servicer Out-of-Pocket Costs in connection with the Loan; second to the Servicer for any unpaid base Servicing Fees (i.e. not including Default Servicing Fees); third, to the Senior and Junior Participants in their pro-rata share for all amounts owing in respect of all Default Servicing Fees not payable to the Servicer, fourth, to the Senior and Junior Participants in their pro-rata share for all amounts owing in respect of the Interest on their respective Participation Amounts until paid in full; fifth, to the Senior and Junior Participants in their pro-rata share for all amounts owing in respect of Unpaid Principal Balance on their respective Participation Amounts until paid in full; sixth, to the Servicer for all accrued and unpaid Default Servicing Fees due to the Servicer; seventh, if applicable, to Arranger or its assignee; and lastly, to the Borrower any excess proceeds.
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> b) Waterfall- with an Event of Default by the Borrower. The Lender shall direct the Servicer to make distributions from all collections in accordance with the following priorities on each Distribution Date: first, to the Servicer for Servicer Advances and Servicer Out-of-Pocket Costs in connection with the Loan; second to the Servicer for any unpaid base Servicing Fees (i.e. not including the Default Servicing Fees); third, to the Senior and Junior Participant in their pro-rata share for all amounts owing in respect of their unrecovered advances until paid in full on their respective Participation Amounts (solely in the event of a Borrower default in the Loan), fourth, to the Senior Participant all amounts owing in respect of interest including certain Default Servicing Fees as agreed to on its Senior Participation amount and not payable to the Servicer until paid in full; fifth, to the Senior Participant for all amounts owing in respect of Unpaid Principal Balance on its Senior Participation amount until paid in full in full; sixth, to the Junior Participant all amounts owing in respect of interest including certain Default Servicing Fees as agreed to on its Junior Participation amount and not payable to the Servicer until paid in full; seventh, to the Junior Participant for all amounts owing in respect of Unpaid Principal Balance on its

> Junior Participation Amount until paid in full in full; eighth, to the Servicer for all accrued and unpaid Default Servicing Fees due to the Servicer; ninth, to Arranger or its assignee; and lastly, to the Borrower any excess proceeds.
>
> c) Interest; Servicing Fee and Default Servicing Fee. The Junior Participant shall be entitled to receive interest on the Junior Participation Amount equal to the Note payments less the sum of i) the Senior Percentage Interest Payment, and ii) the Servicer Fees due under the Servicing Agreement. For clarity, if the Loan experiences an Event of Default (as defined in the applicable Note), the Junior Participant shall be entitled to receive 10% of all interest paid at the Default Rate (as such term is defined in the Note) and the Senior Participant shall be entitled to receive 90% of all interest paid at the Default Rate. In addition, the Lender shall be entitled to receive, in addition to the Servicing Fee (which shall increase from 1.00% to 1.50%) an amount equal to 50% of all late fees due and payable under the Note, whether paid by the Borrower or from the proceeds of the liquidation of the Collateral.
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> d) Sharing of Arranger's Loan Fee. It is further agreed among the parties hereto that the Arranger shall be entitled to retain 1.25% out of the total 1.50% loan arrangement fee (the "Loan Fee") payable by the Borrower to the Arranger pursuant to Section 4(a)(1) of the Arranger Agreement on the date hereof and shall pay the remaining portion of 0.25% to the Senior Participant. For the sake of clarity and the avoidance of doubt, if the Loan Fee equals US$76,500.00, the Arranger would retain US$63,750.00 and the Senior Participant would receive US$12,750.00. Furthermore, the Junior Participant shall receive back on or prior to the Maturity Date (as defined in the Note), its Junior Participation Amount, plus applicable interest, fees and costs, as described herein, prior to the Arranger retaining for its own account any future collections due under the Arranger Agreement.
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> e) The Lender shall have no obligation to make any payment of principal, interest or other amount payable under the Note to which the Junior Participant may be entitled except out of amounts actually received by the Lender pursuant to the Loan Documents"

(NYSCEF Doc. No. 104, pgs. 3-5)

The Junior Participation Agreement also required that ACB direct Bluefin to distribute collections from Ahouvi to Junior Participant Patriot on each Distribution Date, defined in the Loan Documents as the fifth business day of each month (NYSCEF Doc. No. 2, ¶ 33).

IV. The Junior Servicing Agreement

After the Junior Participation Agreement, Patriot, ACB and Bluefin entered into a servicing agreement (the "Junior Servicing Agreement") dated June 9, 2014 (*id.*, ¶ 34). The Junior Servicing Agreement required Bluefin to distribute funds to Patriot from the Loan collection in accordance with the Junior Participation Agreement (*id.*, ¶ 35).

V. The Assignment Agreement

On or around June 9, 2015, Patriot and plaintiff entered into an assignment of participation interest agreement (the "Assignment Agreement"), where plaintiff "purchased 50% of the Junior Participation Interest, or 4.8% of the…Loan" (*id.*, ¶ 40). Under the Assignment Agreement, Patriot "assigned its present and future rights, title, and interest in, to, and under its Junior Participation, [including] [its] participation rights in the Loan and all the Loan Documents pursuant to the Junior Participation Agreement and the Junior Servicing Agreement" (*id.*, ¶ 42).

DISCUSSION

In Motion Seq. No. 4, Patriot and MAS, the remaining defendants,[1] move to dismiss plaintiff's complaint as against them, and for an award of attorneys' fees pursuant to the parties' agreements (NYSCEF Doc. No. 99-100). As relevant, the complaint asserts the following claims against Patriot and MAS: Breach of Contract (First Cause of Action), Unjust Enrichment as an alternative claim (Third Cause of Action), Accounting (Fourth Cause of Action), and Fraud as an alternative claim (Fifth Cause of Action).

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. [The court] accept[s] the facts as alleged in the complaint as true, [and] accord[s] plaintiff the benefit of every possible favorable inference" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citation omitted]). However, bare legal conclusions and "factual claims which are either inherently incredible or flatly contradicted by documentary evidence" are not accorded their most favorable intendment" (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995]). "[T]he court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts" (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]; *see also Water St. Leasehold LLC v Deloitte & Touche LLP*, 19 AD3d 183 [1st Dept 2005], *lv denied* 6 NY3d 706 [2006]). Dismissal under subsection (a)(1) is warranted if documentary evidence "conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]).

I. Breach of Contract — First Cause of Action

Defendants argue that the breach of contact claim against MAS requires dismissal because "the complaint fails to allege that MAS earned any arranger fees in connection with the Loan to which Plaintiff would be entitled a share" (NYSCEF Doc. No. 100, pg. 12). Defendants also argue that the breach of contract claim against Patriot requires dismissal because under the Assignment Agreement, "Patriot sold and assigned Plaintiff an 'undivided interest' in the Junior Participation Agreement…[but] did not agree to make any payment to Plaintiff itself" (*id.*). Defendants argue that "[a]lthough Plaintiff…alleges that it did not receive payments that were due to it, the right to such payments arises exclusively under the Junior Participation Agreement and would be payable only by Bluefin and/or ACB" (*id.*, pg. 13).

In opposition, plaintiff argues that under the Junior Participation Agreement, MAS "agreed to pay Patriot (as junior participant) a proportional share of fees" and that "Patriot then assigned its rights under the Junior Participation Agreement, including as it relates to [MAS], to Plaintiff" (NYSCEF Doc. No. 107, pg. 9). Plaintiff contends that MAS "to the extent that it failed to pay Patriot or Plaintiff, breached its agreement with Plaintiff (as it was assigned to it)" (*id.*). Plaintiff further contends that "Patriot was obligated to direct Bluefin to pay Plaintiff, which it did not, and

[1] Defendant Bluefin is bankrupt and severed out of this action (*see* NYSCEF Doc. No. 32). Defendant Peck has defaulted (*see* NYSCEF Doc. No. 133).

[that] Patriot was obligated to ensure Plaintiff was paid its full amount due before retaining any payments itself" (*id.*, pgs. 10-11).

Nothing in the agreements requires MAS to pay plaintiff. Section 4(d) of the Junior Participation Agreement states that "[MAS] shall retain 1.25% out of the total 1.50% loan arrangement fee...payable by [Ahouvi] to [MAS] pursuant to Section 4(a)(1) of the Arranger Agreement...and shall pay the remaining portion of 0.25% to the Senior Participant" (NYSCEF Doc. No. 122, pg. 4). Section 4(d) further states that "[Patriot] shall receive back on or prior to the Maturity Date (as defined in the Note), its Junior Participation Amount, plus applicable interest, fees and costs, as described herein, prior to [MAS] retaining for its own account any future collections due under the Arranger Agreement" (*id.*, pgs. 4-5). The Junior Participation Agreement does not impose any obligation on MAS to share any fees received from Ahouvi except for the 0.25% that would be due to the Senior Participant under Section 4(d). Further, the complaint does not allege that plaintiff was owed any Arranger Fees, that MAS was required to share any Arranger Fees with plaintiff, or that MAS improperly earned Arranger Fees in connection with the Loan to which plaintiff would be entitled a share (NYSCEF Doc. No. 100, pg. 12).

Patriot also did not agree to make any payments to plaintiff. Under the Assignment Agreement, Patriot assigned plaintiff an undivided interest in its rights as contained in the Junior Participation Agreement. But, at no point did Patriot agree to make any payments to plaintiff. Rather, Patriot assigned Plaintiff the right to receive payments from Bluefin and/or ACB, under the terms and conditions of the Junior Participation Agreement. Therefore, based on the Assignment Agreement, Patriot, as assignor, is not the party that is obligated to make loan participation payments under the Junior Participation Agreement.

The court rejects plaintiff's argument that Patriot breached the Assignment Agreement in failing to direct Bluefin to make payments to plaintiff. Plaintiff misconstrues Section 4(a) of the Assignment Agreement, styled "*Priority of Payment to Assignee*." Under Section 4(a), Patriot, as assignor, was not obligated to direct payments to plaintiff. Section 4(a) speaks only to Patriot's obligation to notify the Junior Participation Agreement's Servicer, Bluefin, as to the assignment's terms so that the plaintiff, as assignee, would receive the Assignment Agreement's benefit (*see* NYSCEF Doc. No. 15, ¶ 4 [a]). Plaintiff concedes that the Servicer, Bluefin, was aware of the assignment. Further, ACB was required to direct Bluefin to make participation payments under the Junior Participation Agreement (NYSCEF Doc. No. 2, ¶ 33).

Accordingly, the breach of contract claim is dismissed against MAS and Patriot.

II. Unjust Enrichment — Third Cause of Action (*Alternative Claim*)

Plaintiff's third cause of action for unjust enrichment, asserted as an alternative claim against MAS and Patriot, is also dismissed. To state a claim for unjust enrichment, the "plaintiff must show 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" (*Kramer v Greene*, 142 AD3d 438, 442 [1st Dept 2016] [internal quotation marks and citation omitted]). However, "[a]n unjust enrichment claim is not available where it simply duplicates, or

replaces, a conventional contract or tort claim (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388-389 [1987]; citing *Samiento v World Yacht Inc.*, 10 NY3d 70, 81 [2008]; *Town of Wallkill v Rosenstein*, 40 AD3d 972, 974 [2d Dept 2007]). Where a valid and enforceable written contract governing the subject matter exists, a plaintiff is precluded from recovery on a quasi-contract claim (*Id.* at 388).

Here, the unjust enrichment claim fails because it, and the underlying dispute's subject matter, is governed by the applicable written contracts, namely the Junior Participation Agreement and Assignment Agreement. The complaint alleges that MAS and Patriot "will be unjustly enriched to Plaintiff's detriment unless judgment is entered against [them] for the full amounts due and owing under the [Junior Participation Agreement] and [Assignment Agreement]" (NYSCEF Doc. No. 2, ¶¶ 88-89). However, in doing so, the court finds that plaintiff is merely seeking to enforce these two contracts, rather than recover on a quasi-contract claim.

The court rejects plaintiff's argument that it may plead unjust enrichment in the alternative in this instance. Where "there is a bona fide dispute as to the existence of a contract, or where the contract does not cover the dispute at issue," a plaintiff may plead both breach of contract and quasi-contract as alternative theories of recovery (*Hochman v LaRea*, 14 AD3d 653, 654-655 [2d Dept 2005]). However, plaintiff does not challenge or dispute the validity or existence of the underlying agreements governing this dispute. As discussed above, plaintiff seeks to enforce the Assignment Agreement and the Junior Participation Agreement, both of which are central to this dispute.

The court also rejects plaintiff's argument, in Footnote 4 of its opposition, that its unjust enrichment claim "is differentiated from its cause of action for breach of contract by the inclusion of a request for punitive damages in the former, which is not present in the latter" (NYSCEF Doc. No. 107, fn. 4). There is no basis for an award of punitive damages, as there is no public injury (*Linkable Networks, Inc. v MasterCard Inc et al*, 184 AD3d 418, 419 [1st Dept 2020]). Accordingly, the unjust enrichment claim against MAS and Patriot is dismissed.

III. Accounting — Fourth Cause of Action

Plaintiff's fourth cause of action for an accounting is also dismissed. To demonstrate entitlement to equitable accounting, a plaintiff must establish: (1) the existence of a confidential or fiduciary relationship between the parties, (2) the defendant's breach of the duty imposed by that relationship with respect to money or property in which the plaintiff has an interest, and (3) the absence of an adequate remedy at law (*see Adam v Cutner & Rathkopf*, 238 AD2d 234, 242 [1st Dept 1997]; *Unitel Telecard Distrib. Corp v Nunez*, 90 AD3d 568, 569 [1st Dept 2011]). "A cause of action for accounting requires 'the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest" (*Greenberg v Wiesel*, 186 AD3d 1336 [2d Dept 2020], *citing Palazzo v Palazzo*, 121 AD2d 261 [1st Dept 1986]).

Here, plaintiff fails to establish that a confidential or fiduciary relationship exists between the parties. In its complaint, plaintiff alleges that "[r]elations of a mutual and confidential nature

exist among [it] and...Patriot...as evidenced by the [Assignment Agreement], and between [it] and... [MAS] as evidenced by the Junior Participation Agreement" (NYSCEF Doc. No. 2, ¶ 92). Plaintiff further alleges that it "entrusted Defendants with money, thereby imposing a fiduciary duty," that no adequate remedy exists at law, and that despite repeated "[requests] for a full accounting, Defendants have failed and refused to provide Plaintiff with the appropriate transparency of the Loan" (*id.*, ¶¶ 93-95). However, plaintiff does not provide any other basis or support for finding that a fiduciary or confidential relationship existed between it and defendants MAS or Patriot. Further, the Assignment Agreement, Junior Participation Agreement and other relevant agreements all indicate that the parties merely had an arms-length contractual relationship rather than a confidential or fiduciary one. "A claim for an accounting cannot be maintained in the absence of a fiduciary relationship between plaintiff and defendants" (*Royal Warwick S.A. v Hotel Representative, Inc.*, 106 AD3d 451, 452 [1st Dept 2013]). Accordingly, the accounting claim against Patriot and MAS is also dismissed.

IV. Fraud — Fifth Cause of Action (*Alternative Claim*)

Plaintiff's fifth cause of action for fraud, asserted as an alternative claim against MAS and Patriot, is also dismissed. To plead fraud, the plaintiff must demonstrate: (1) a material false representation; (2) made with knowledge of its falsity; (3) with an intent to defraud; and (4) reasonable reliance on part of the movant (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553 [2009]; *Swersky v Dreyer & Traub*, 219 AD2d 321, 326 [1st Dept. 1996]).

First, the fraud claim lacks specificity and is not plead with the particularity under CPLR 3016(b) (*Eurycleia Partners, LP v Seward & Kissel, LLP*,12 NY3d at 550). Plaintiff asserts only that the defendants allegedly made false statements related to the underlying agreements between the parties (NYSCEF Doc. No. 2, ¶¶ 96-102). There are no allegations that Patriot or MAS made any specific misrepresentations, or that they engaged in any specific fraudulent acts as related to plaintiff and the underlying agreements at hand. Plaintiff's conclusory allegations are insufficient.

Second, the fraud claim is duplicative of its breach of contract claim because the central allegations and facts underlying the two claims are the same. The fraud claim alleges, in part, that "Patriot, Bluefin, [MAS], and Peck intended to, and did in fact, deceive Plaintiff in order to cause Plaintiff's reliance upon their false statements, by falsely stating that they would make payments to Plaintiff" (*id.*, ¶ 99). These alleged false statements concern the underlying contracts and agreements between the parties that are the subject of this dispute. In any event, the allegedly false statements put forth in the complaint are not separate and apart from the agreements underlying the parties' dispute, as plaintiff fails to assert any non-conclusory allegations specificizing any false statements made by Patriot or MAS.

Further, that the fraud claim contains a request for punitive damages does not change the fact that it is duplicative. "A party cannot bootstrap a fraud claim seeking duplicative relief merely by alleging a potential for punitive damages" (*MBIA Insurance Corp. v. Credit Suisse Securities (USA) LLC*, 165 A.D.3d 108, 115, [1st Dep't 2018]). Accordingly, the fraud claim against MAS and Patriot is dismissed.

V. **Defendants' Request for Attorneys' Fees**

Finally, the court denies defendants' request for an award of reasonable attorneys' fees and costs incurred under the terms of the parties' contract. Defendants request attorneys' fees in their Notice of Motion (NYSCEF Doc. No. 99), but do not address that request in their Memorandum of Law in support of this motion (*see* NYSCEF Doc. No. 100). Therefore, defendants' request for attorneys' fees and costs is abandoned.

The court has considered the parties' remaining arguments and finds them unavailing.

Accordingly, it is

ORDERED that Motion Seq. No. 4, defendants' motion to dismiss, is granted to the extent that the complaint is dismissed in its entirety as against defendants MAS and Patriot.

4/6/2022
DATE

MELISSA CRANE, J.S.C.

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