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| 1 Stop Elecs. Ctr. Inc. v 101 W. End REIT, LLC |
| 2022 NY Slip Op 31490(U) |
| May 9, 2022 |
| Supreme Court, New York County |
| Docket Number: Index No. 155552/2021 |
| Judge: William Perry |
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. WILLIAM PERRY PART 23

Justice

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INDEX NO. 15552/2021

1 STOP ELECTRONICS CENTER INC. D/B/A
APPLIANCES CONNECTION,

MOTION DATE 09/17/2021

Plaintiff,

MOTION SEQ. NO. 001

- v -

101 WEST END REIT, LLC, EMPIRE CORE GROUP LLC,
LNE CORP, L & B ELECTRICAL INTERNATIONAL, INC.,
HVAC PROS LLC, FLORIM LAJQI, JOHN DOE #1 TO
JOHN DOE #100

DECISION + ORDER ON
MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10,
17, 18, 19, 20, 23, 24, 25, 26, 27

were read on this motion to/for DISMISS

Plaintiff 1 Stop Electronics Center Inc., a subcontractor, brings this action against
Defendants 101 West End REIT LLC, Empire Core Group LLC, L&B Electrical International Inc.,
HVAC Pros LLC, Florim Lajqi, and John Does, alleging that Defendants owe a balance of
\$124,550.03 for services and materials provided by Plaintiff under a construction contract.

Plaintiff alleges that it entered into the contract with Empire Core Group ("Empire") on
February 22, 2019 to provide residential appliances to several apartments being built at the
premises located at 101 West End Avenue, Block 1171, Lot 62, New York, NY, owned by
Defendant 101 West End REIT. (NYSCEF Doc No. 1, Complaint, at ¶¶ 3, 6, 13, 15.)

Plaintiff alleges that it performed the contract work from September 18, 2019 through June
11, 2020, but that Empire only paid it \$10,061.07 of the \$134,566.10 owed under the contract,
leaving the balance of \$124,550.03. (Id. at ¶ 17.) Plaintiff alleges that it filed a mechanics' lien
against the premises on February 9, 2021. (Id. at ¶ 28.)

Plaintiff commenced this action on June 9, 2021, setting forth the following causes of action: (1) breach of contract against Empire; (2) foreclosure of mechanics' lien against all Defendants; (3) unjust enrichment against Empire; (4) account stated against Empire; and (5) diversion of trust funds against Empire and Lajqi.

In motion sequence 001, (1) Empire moves to dismiss Plaintiff's causes of action for unjust enrichment and account stated as duplicative of Plaintiff's cause of action for breach of contract; and (2) Empire and Florim Lajqi, the principal and CEO of Empire, move to dismiss Plaintiff's cause of action for diversion of trust funds as against them. (NYSCEF Doc No. 5, Defs.' Memo.)

Defendant 101 West End REIT, represented by the same counsel as moving Defendants, cross-moves for dismissal, arguing that if the complaint is dismissed against moving Defendants, then "the herein action must also be dismissed against defendant 101 West End because plaintiff failed to join all necessary parties." (NYSCEF Doc No. 18 at ¶ 5.)

Discussion

On a pre-answer motion to dismiss a complaint for failure to state a cause of action, pursuant to CPLR 3211 [a] [7], "the court should accept as true the facts alleged in the complaint, accord plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory." (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 121 [1st Dept 2002].) However, "factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003].)

“The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter.” (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987].) “However, a party is not precluded from proceeding on both breach of contract and quasi-contract theories where there is a bona fide dispute as to the existence of a contract or where the contract does not cover the dispute in issue.” (*Curtis Props. Corp. v Greif Cos.*, 236 AD2d 237, 239 [1st Dept 1997].)


Empire’s motion to dismiss the causes of action of unjust enrichment and account stated as duplicative are denied. Although both Plaintiff and Empire represent that their business arrangement was governed by an express, written contract, the exact terms of the contract are unclear. Plaintiff alleges that it sent multiple invoices to Empire (NYSCEF Doc No. 2), while Empire submits 30 pages of purchase orders which are indecipherable due to the font size and low resolution. (NYSCEF Doc No. 10.) Further, Plaintiff alleges that there are certain discrepancies between the invoices and purchase orders pursuant to a subsequent agreement. (NYSCEF Doc No. 25 at 5.) As such, the court cannot determine whether the contract covers the dispute at issue and the motion to dismiss the causes of action is denied. (*See Power Air Conditioning Corp. v Batirest 229 LLC*, 2017 WL 1375262, at *3 [Sup Ct, NY County 2017] [denying motion to dismiss claim for unjust enrichment where there was a dispute as to the existence of a written contract]; *see also Gene Kaufman Architect, P.C. v The Gallery at Chelsea, LLC*, 2005 WL 7981803, at *3 [Sup Ct, NY County 2005] [denying motion to dismiss claim for account stated].)

Next, Empire and Lajqi’s motion to dismiss the cause of action for diversion of trust funds against them is denied. (NYSCEF Doc No. 5 at 4-5.) First, Defendants fail to set forth an argument as to why dismissal of this cause of action as to Empire is appropriate. Second, Defendants fail to

meet their burden for relief as to Lajqi, as their only argument is that “liability cannot be imposed upon... individuals *merely* because they were officers and agents of the defendant corporation at the time such trust funds were converted.” (*Id.*, quoting *Ace Hardwood Flooring Co. v Glazer*, 74 AD2d 912 [2d Dept 1980] [emphasis added].) However, Plaintiff’s allegations in the complaint adequately set forth a cause of action against Laqji for diversion of trust funds. (Complaint at ¶¶ 55-70.)

Finally, Defendants’ cross-motion against themselves is denied as it is procedurally improper and utterly without merit. As such it is hereby

ORDERED that Defendants’ motion sequence 001 is denied in its entirety.

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| <u>5/9/2022</u> DATE |  WILLIAM PERRY, J.S.C. | | | |
| CHECK ONE: | <input type="checkbox"/> | CASE DISPOSED | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION |
| | <input type="checkbox"/> | GRANTED | <input checked="" type="checkbox"/> | DENIED |
| APPLICATION: | <input type="checkbox"/> | SETTLE ORDER | <input type="checkbox"/> | GRANTED IN PART |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> | SUBMIT ORDER |
| | | | <input type="checkbox"/> | FIDUCIARY APPOINTMENT |
| | | | <input type="checkbox"/> | OTHER |
| | | | <input type="checkbox"/> | REFERENCE |