

<b>G&amp;Y Maintenance Corp. v McSam Hotel Group LLC</b>
2022 NY Slip Op 32818(U)
August 18, 2022
Supreme Court, New York County
Docket Number: Index No. 653714/2020
Judge: Debra A. James
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. DEBRA JAMES

PART 59

*Justice*

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G&amp;Y MAINTENANCE CORP.,

Plaintiff,

INDEX NO. 653714/2020MOTION DATE 03/23/2022MOTION SEQ. NO. 002 004

- v -

MCSAM HOTEL GROUP LLC, RS 206 LLC, CORE  
CONTINENTAL CONSTRUCTION LLC, and CHUNGLIN  
CHIANG,

Defendants.

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 69, 70, 71, 72, 73, 74

were read on this motion to/for

DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 004) 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 103, 104, 105, 106, 118, 119, 120, 121, 122, 123

were read on this motion to/for

JUDGMENT - DEFAULTORDER

Upon the foregoing documents, it is

ORDERED that the cross motion of plaintiff to amend the Complaint (motion sequence number 002) is granted and the Second Amended Verified Complaint in the proposed form annexed to the moving papers shall be deemed served on May 21, 2021, the date of its filing; and it is further

ORDERED that the motion of defendants Core Continental Construction, LLC and Chun Lin Chiang to dismiss the Second Amended Complaint is granted; and it is further

ORDERED that the motion of plaintiff to enter a default judgment against defendants RS 206 LLC and McSam Hotel Group LLC for failure to timely respond to the Amended Verified Complaint (motion sequence number 004) is denied; and it is further

ORDERED that, to extent it seeks to extend their time to respond to the Second Verified Amended Complaint, the cross motion (motion sequence number 004) of such defendants is granted; and it is further

ORDERED that, upon such extension of time to respond, the cross motion of defendants McSam Hotel Group LLC and RS 206 LLC to dismiss the Second Verified Amended Complaint against them (cross motion sequence number 004) is granted, and it is further

ORDERED that the Second Amended Complaint against defendants McSam Hotel Group, LLC, RS 206 LLC, Core Continental Construction, LLC and Chunglin Chiang is dismissed in its entirety as against all such defendants, with costs and disbursements to such defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of such defendants.

#### DECISION

With respect to the cross motion (motion sequence number 004) wherein defendants McSam Hotel Group, LLC and RS 206 LLC seek relief from their default in answering the original complaint, this court finds the health issues, including heart

surgical procedures undergone by the principal of defendant McSam Hotel Group, LLC, and the dissolution of RS 206 LLC on September 24, 2018, each constitute a reasonable excuse for their unintentional delay in answering the complaint. In addition, each such defendant propounded a meritorious defense. See Shanker v 119 East 30<sup>th</sup>, Ltd, 63 AD3d 553 (1<sup>st</sup> Dept 2009).

This court concurs with plaintiff that commencement date for determining whether the statute of limitations has expired is August 11, 2020, the date that the original complaint, which was served on the moving defendants McSam Hotel Group LLC and 206 RS 206 LLC, was the filed with the Clerk of the Court, with the purchase of an index number. See In Re Spodek v New York State Commissioner of Taxation and Finance, 85 NY2d 760 (1995).

The Second Amended Verified Complaint alleges six causes of action, as follows: breach of contract (first); account stated (second); accounting (third); conversion (fourth); piercing the corporate veil (fifth); unjust enrichment (sixth).

The only claim of the Second Amended Complaint interposed against McSam Hotel Group, LLC and RS 206 LLC, the cross moving defendants, is the sixth cause of action for unjust enrichment. Defendants are correct that the applicable statute of limitations for unjust enrichment is six years and that the claim accrues from the date on which plaintiff G&Y Maintenance alleges that it performed services. See Demian v Calmenson, 156

AD3d 422, 423 (1<sup>st</sup> Dept 2017). Thus, with respect to defendant McSam Hotel Group, LLC, claims for payment for services rendered before August 12, 2014 would be time-barred as of filing of the original complaint. Likewise, with respect to defendant RS 206 LLC, claims for payment for services rendered before August 12, 2014, would be untimely. A review of the Second Amended Complaint shows that plaintiff's claims are for payment for services that it alleges it rendered before August 12, 2014, with the last date for services rendered alleged as April 2014. Therefore, since the complaint was served upon defendants McSam Hotel Group, LLC and RS 206 LLC on August 11, 2020, which was more than six years after the last services that plaintiff rendered in April 2014, the claim of unjust enrichment against such defendants is time-barred.

In opposing plaintiff's cross motion to amend the Amended Complaint (cross motion sequence number 002) by offering the same arguments that they made in their motion to dismiss such Amended Complaint (motion sequence number 002), defendants Core Continental Construction LLC (Core) and Chung-Lin Chiang (Chiang) clearly have determined to apply their motion to dismiss to the new pleadings in the form of the Second Amended Complaint. Sage Realty Corp v Proskauer Rose LLP, 251 AD2d 35, 38 (1<sup>st</sup> Dept 1998).

The amendments to the Amended Complaint set forth in the Second Amended Complaint do not cure the infirmities of the Amended Complaint. Therefore, though granting plaintiff's cross motion to amend its pleadings, this court, nevertheless, must dismiss such claims against defendants Core and Chiang, for the following reasons, in summary:

- (1) Breach of contract; account stated; and unjust enrichment against Core; and account stated against Chiang: The expiration of statute of limitations, as this action was commenced more than six years after the services were rendered, and as to the claim for account stated, more than six years "after the date of the last transaction in the account", Kyer v Ravena Coeymans-Selkirk Cent. School Dist., 144 AD3d 1260 (3<sup>rd</sup> Dept 2013);
- (2) Breach of fiduciary duty and fraud against Core and Chiang: Plaintiff has not alleged "conduct suggestive of a relationship with the general contractor that was other than arm's length", Board of Managers of Highpoint Condominium, 278 AD2d 55, 55-56 (1<sup>st</sup> Dept 2000); Nor has plaintiff alleged sufficient facts, rather than "wholly conclusory" allegations with respect to personal liability of Chiang, owner of Core, based upon a theory of corporate veil piercing. The non-specific allegations about Chiang ignoring corporate formalities of the Second Amended Complaint are insufficient. Nor does the Second Amended Complaint contain any particularized statement detailing the fraud (misrepresentation of an existing fact) or other corporate misconduct against the plaintiff that resulted in plaintiff's injury, that is

distinct from a claim that Core/Chiang committed breaches of agreement(s), on behalf of plaintiff, by failing to submit certain change orders to McSam Hotel Group LLC and RS 206 LLC, or by failing to pay plaintiff what such defendants owed to it, see Springut Law PC v Rates Tech Inc, 157 AD3d 645, 646 (1<sup>st</sup> Dept 2018) and Max Markus Katz, PC v Sterling National Bank, 206 AD3d 533, 534-535 (1<sup>st</sup> Dept 2022).

*Debra A. James*  
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<u>8/18/2022</u>			<u>DEBRA JAMES, J.S.C.</u>
<b>DATE</b>			
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE