Trump Vil. Section 4, Inc. v Lawless & Mangione Architects Engrs. LLP
2022 NY Slip Op 33159(U)
September 6, 2022
Supreme Court, Kings County
Docket Number: Index No. 510209/19
Judge: Lawrence Knipel
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part COMM 4, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 6th day of September, 2022.

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

----------X

TRUMP VILLAGE SECTION 4, INC.,

Plaintiff,

-against- Index No.: 510209/19

LAWLESS & MANGIONE ARCHITECTS ENGINEERS LLP. RONALD MANGIONE, ELECTRICAL CONTRACTING . SOLUTIONS CORP., QNCC ELECTRICAL CONTRACTING CORP., ELECTRICAL CONTRACTING SERVICES, CORP., and JOSEPH KASHINSKY,

Defendants.

----------X

The following e-filed papers read herein:	NYSEF Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	6-7 17-18,31
Opposing Affidavits (Affirmations)	54 50
Affidavits/ Affirmations in Reply	57,61,62
Other Papers: Memorandum in Support of Motion	

Defendants Lawless & Mangione Architects & Engineers, LLP, i/s/h/a Lawless & Mangione Architects Engineers, LLP (L&M), and Ronald Mangione, i/s/h/a Robert Mangione (Mangione) move, pre-answer, in motion sequence (mot. seq.) one for orders:

> (1) Pursuant to CPLR 3211(a) (7), dismissing plaintiff Trump Village Section 4, Inc.'s (Trump Village) complaint on the grounds that it is barred by the three-year statute of limitations applicable to all claims against professional engineers, and
>
> (2) For costs and disbursements associated with this action.

Defendants Joseph Kashinsky (Kashinsky), QNCC Electrical Contracting Corp. (QNCC) and Electrical Contracting Services Corp. (EC Services) move, pre-answer[1] in mot. seq. two for orders:

> (1) pursuant to CPLR 3211(a) (4), 3211(a) (5), and CPLR 3211(a) (7), dismissing Trump Village's complaint to the extent it relates to these defendants on the grounds that:
>
> > (a) the second cause of action in the complaint may not be maintained against these defendants because a prior action is pending, which involves the same cause of action and effectively the same parties;
> >
> > (b) the second cause of action in the complaint may not be maintained against these defendants because of collateral estoppel and/or res judicata, in light of a forthcoming trial decision based upon the same operative facts; and
> >
> > (c) Trump Village fails to state a valid cause of action, and

[1] Moving defendants Kashinsky, QNCC and EC Services served an answer to the amended verified complaint during the pendency of this motion. Defendant Electrical Contracting Solutions Corp. (ECS) was brought into this action after the instant motions were filed. Although plaintiff alleges that ECS is an alter-ego of defendant EC Services, and ECS is represented by the same firm, ECS is still a separate corporate entity who is, technically, a non-moving party herein. ECS joins the moving defendants in the aforementioned answer to the amended verified complaint.

(2) Pursuant to 22 NYCRR 130-1.1 (b), against Trump Village, awarding defendants costs in the form of reimbursement for actual costs and/or expenses incurred and reasonable attorney's fees expended as a result of Trump Village's exhibited frivolous conduct in initiating the instant action.

Relevant Facts and Procedural History

According to the complaint, plaintiff entered into three contracts with ECS to replace a wiring system in plaintiff's building complex after the system was damaged by Hurricane Sandy. All three contracts identified L&M as the architect and ECS as the contractor. Plaintiff and L&M entered into separate contracts where L&M agreed to assist in contractor selection, make site inspections, and review and approve payment requisitions, among other duties. Plaintiff does not specifically sue herein under its contracts with L&M, but rather its contracts with ECS and the surrounding circumstances that led plaintiff to contract with ECS.

The gravamen of plaintiff's complaint is an allegation of fraud against all defendants. Plaintiff alleges that defendant L&M, led by Mangione, colluded with co-defendants ECS, QNCC and EC Services, all allegedly owned by Kashinsky, in a scheme to defraud plaintiff into contracting with ECS and paying unjustified funds. More specifically, plaintiff states that L&M knew that ECS was an unlicensed shell company for QNCC, the licensed contractor that performed the electrical work under all three contracts. Despite this knowledge, plaintiff claims, L&M did not engage in a bidding process but instead conspired with defendants to present ECS as the sole qualified electrical contractor.

Plaintiff alleges that L&M conspired with ECS and knowingly approved inflated requisition payments that ECS requested and subsequently diverted to QNCC and EC Services. Although plaintiff does not specifically sue under its contracts with L&M, it alleges that L&M shared responsibility as the named architect in plaintiff's three relevant contracts with ECS. As a result of the alleged scheme between L&M and the remaining defendants, plaintiff asserts that it was injured in the amount of at least $1.6 million.

ECS filed a prior action (index no. 503333/2016) against plaintiff for breach of contract and plaintiff counterclaimed therein. In that action, ECS alleged that plaintiff did not make full payment on the second contract[2] between plaintiff and ECS. A trial was held, and this Court issued a verdict by order dated July 17, 2019. Pursuant to this Court's decision, a judgment was entered on November 20, 2019 in favor of ECS in the amount of $458,584.84.

L&M and Mangione's Motion to Dismiss (Mot. Seq. One)

Defendants L&M and Mangione move to dismiss pursuant to CPLR § 3211(a) (7) for failure to state a cause of action. As an initial matter, defendant's assertion that plaintiff

[2] In the prior action, ECS sued only on contract two. During trial the parties disputed whether Trump Village's counterclaims related to all three contracts as a singular operative contract. J. Knipel ruled that Trump Village's first and second counterclaims (for breach of contract) related only to the second contract and the third counterclaim for fraud was broader and could pertain to all three contracts. The fourth counterclaim was for a mechanic's lien and the fifth was for damages to hire an independent engineer to inspect the work, so they were not related to any specific contract. The verdict granted judgment on contract two, declined to award any unbilled sums on contract three and dismissed all of the counterclaims.

was not entitled to amend its complaint is incorrect. CPLR § 3025 (a) allows a party to amend its pleading "once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it." Here, plaintiff served its amended complaint before defendants' time to answer expired.[3] Thus, plaintiff was entitled to amend its complaint as of right.

Defendants' motion to dismiss is directed to the amended complaint, as defendants submitted reply papers addressing the additional causes of action in the amended complaint (*see Sobel v Ansanelli*, 98 AD3d 1020, 1022 [2d Dept 2012]; *see also Sage Realty Corp. v Proskauer Rose LLP*, 251 AD2d 35, 38 [1st Dept 1998][adopting rule that moving party has the option to decide whether its motion to dismiss should be directed to the amended complaint]). Indeed, this Court considered specific arguments defendants made in their reply papers regarding each of plaintiff's additional causes of action. As defendants had a fair opportunity to argue for dismissal of plaintiff's new claims, any due process concerns have been satisfied. Defendants did not otherwise indicate that they wish to withdraw their motion to dismiss or file a new motion. Thus, directing defendants' motion and reply papers to the amended complaint is correct and avoids unnecessary motion practice.

[3] By virtue of defendants' instant motion to dismiss, defendants' time to answer is extended until ten days after service of notice of entry of this order. CPLR 3211(f).

Discussion

Defendants move pursuant to CPLR § 3211(a) (7) to dismiss the complaint for failure to state a cause of action. Accordingly, "the narrow question presented for review is not whether the plaintiff will ultimately prevail in the litigation, but whether the complaint states a cause of action" (*Reliance Ins. Co. v Morris Assocs., P.C.*, 200 AD2d 728, 729 [2d Dept 1994]). For the purposes of this review the allegations in the plaintiff's complaint must be assumed to be true (*id*). Where evidentiary material is presented and considered, "the court must determine whether the proponent of the pleading has a cause of action, not whether he or she has stated one" (*Steiner v Lazzaro & Gregory, P.C.*, 271 AD2d 596, 597 [2d Dept 2000]).

In its amended complaint, plaintiff alleges six causes of action against defendants L&M and Mangione. The second and fifth causes of action pertain to fraud, the fourth is a claim for breach of contract, the sixth and seventh sound in malpractice, and the eighth is a claim under New York General Business Law § 349 [h] (GBL 349[h]).[4]

Breach of Contract and Malpractice –
Fourth, Sixth, and Seventh Causes of Action

Defendants present relevant documentary evidence addressing plaintiff's breach of contract and malpractice causes of action. Although defendants do not move under CPLR 3211(a) (5) - - statute of limitations grounds - - they submit documentary evidence to

[4] As enumerated in the amended complaint.

demonstrate that the statute of limitations has run on these causes of action. Defendants' argument is, essentially, that since the causes of action are untimely, plaintiff has lost the ability to move on them and each must be dismissed pursuant to CPLR 3211(a) (7).

As to causes of action six and seven for negligence and malpractice, CPLR 214 (6) establishes a three-year statute of limitations on "an action to recover damages for malpractice, other than medical, dental or podiatric malpractice, regardless of whether the underlying theory is based in contract or tort" (*id.*). Malpractice claims begin to accrue "upon the actual completion of the work to be performed and the consequent termination of the professional relationship" (*Vlahakis v Belcom Dev., LLC*, 86 AD3d 567, 568 [2d Dept 2011]). The statute of limitations on malpractice begins running when the physical work is completed, notwithstanding incidental matters that remain open (*see Phillips Const. Co. v City of New York*, 61 NY2d 949 [1984]). "The completion of an architect's obligations must be viewed in light of the particular circumstances of the case" (*Vlahakis*, 86 AD3d at 568).

Defendants' evidentiary materials demonstrate that the actual physical work was completed in February 2015. Among others, defendants submit the final requisition for payment dated February 11, 2015, signed by Mangione, and the New York City Department of Buildings permit approval, indicating an inspection date of February 2, 2015. In opposition, plaintiff asserts that defendants performed contract administration as

late as February 2016 (or later)[5] and their duties for supervision and administration have an undetermined termination date.

Having considered the underlying factual circumstances in this case, this Court is inclined to view contract administration and supervision as incidental matters (*see Phillips Const. Co.* 61 NY2d at 949), and accordingly finds that "no significant dispute exists," (*Korsinsky v Rose*, 120 AD3d 1307, 1308 [2014]), regarding the completion date of the actual physical work. Thus, even taking plaintiff's allegations as true and according plaintiff the benefit of every possible favorable inference as the court should on a motion to dismiss, (*see Allen v Echeverria*, 128 AD3d 738, 740 [2d Dept 2015]), the actual physical work was completed more than three years before plaintiff commenced this action on May 8, 2019.[6]

Accordingly, the statute of limitations has run on plaintiff's malpractice claims and consequently, plaintiff's causes of action numbered six and seven must be dismissed.

The plaintiff's breach of contract claim (cause of action four) against defendants are based on the same underlying facts as its malpractice claims. Plaintiff's malpractice and

---

[5] Plaintiff's original complaint alleged that the work continued until at least February 2016 while its amended complaint alleges that the work continued "well into 2016."

[6] CPLR 203(f) provides that "a claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed." Thus, all causes of action plaintiff added in the amended complaint are deemed to have been interposed on May 8, 2019, the date plaintiff filed the original complaint.

breach of contract claims against defendants L&M and Mangione are both based on defendants' alleged negligence in exercising their professional duty of care, including their obligation of loyalty to plaintiff. Plaintiff alleges that L&M and Mangione demonstrated loyalty to co-defendants ECS, QNCC, EC Services, and Kashinsky through a scheme to contract electrical work and authorize inflated requisition payments to ECS, an unlicensed shell company, which would divert payments to Kashinsky's other companies (EC Services and QNCC).

The New York Court of Appeals has clarified that the three-year limitations period pursuant to CPLR § 214 (6) applies to all actions that are technically malpractice actions, regardless of the theory of liability or proposed remedy (*In re R.M. Kliment & Frances Halsband, Architects* (*McKinsey & Co., Inc.*), 3 NY3d 538, 541 [2004]). Thus, the "pertinent inquiry is . . . whether the claim is essentially a malpractice claim" (*id.* at 542).

Plaintiff's breach of contract claim is duplicative of its malpractice claims, as compliance with defendants' contractual duties "is consistent with the defendant's ordinary professional obligations" (*id.*). Additionally, plaintiff's breach of contract and malpractice claims arise out of the same facts (*see e.g., Shivers v Siegel*, 11 AD3d 447 [2d Dept 2004][affirming Supreme Court's dismissal of breach of contract claim as duplicative of legal malpractice claim as both claims arose from the same facts]). As such, plaintiff's breach of contract claim (cause of action four) is time-barred pursuant to CPLR 214 (6) and must be dismissed.

Fraud – Second and Fifth Causes of Action

Next, L&M and Mangione argue that plaintiff's causes of action for fraud are time barred under CPLR 214 (6) and, even if not time-barred, do not apply to them because they were not parties to any of the three contracts between plaintiff and ECS.

The three-year limitations period pursuant to CPLR 214 (6) is inapplicable to the fraud causes of action, as those claims are not duplicative of the malpractice claims and do not arise out of the same facts. While the malpractice claims arise out of facts pertaining to defendants' duty of loyalty to plaintiff primarily in the execution of the contracts, the fraud claims are based on allegations of an underlying fraudulent scheme between defendants and co-defendants ECS, EC Services, QNCC, and Kashinsky to induce plaintiff into contracting with ECS. Accordingly, "the time within which the action must be commenced shall be the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it" (CPLR 213 [8]).

Under the circumstances presented herein, the greater limitations period is six years from the date the causes of action for fraud accrued. "A cause of action to recover damages for fraud cannot accrue until every element of the claim, including injury, can truthfully be alleged" (*Carbon Capital Mgmt., LLC v Am. Exp. Co.,* 88 AD3d 933, 939 [2d Dept 2004]). Plaintiff's reliance on defendants' alleged misrepresentations would not have given rise to

injury until it entered into its first contract with ECS on September 13, 2013, which is therefore the date of accrual. Six years from that date is September 13, 2019.

Plaintiff reasonably could have discovered the alleged fraud as early as fall of 2013, when QNCC likely commenced its work pursuant to the first contract,[7] or, at the very latest, on April 5, 2016, the date plaintiff filed its counterclaims in the prior related action. If plaintiff's discovery occurred at the former date, a two-year limitations period pursuant to CPLR 213 [8] would have run no later than fall of 2015; if the discovery occurred at the latter date, a two-year period would have expired in April 2018. In either case, the two-year period would have ended earlier than September 13, 2019. Thus, the greater limitations period is six years from the date of accrual.

Plaintiff commenced the instant action on May 8, 2019, prior to the expiration of the six-year statute of limitations. Although plaintiff filed its amended complaint on September 27, 2019, the applicable commencement date for statute of limitations purposes is the date plaintiff filed its original complaint. Pursuant to CPLR 203 (f), "a claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading." The facts in the original pleading must be sufficient to alert a

[7] The papers do not specify when the physical work commenced; however, as plaintiff entered into the first contract in September 2013, it is reasonable to conclude that the work commenced at approximately that time.

defendant to the possibility of the future claims *(Jolly v Russell*, 203 AD2d 527, 529 [2d Dept 1994]; *see Brown v Vail-Ballou Press Inc.*, 188 AD2d 972, 973 [3d Dept 1992] [new claims should share common factual foundation and theory to relate back to claims in original pleading]).

The original complaint in this case listed fraudulent inducement as the second cause of action and alleged that defendants L&M and Mangione conspired with ECS, EC Services, QNCC, and Kashinsky to induce plaintiff to contract with ECS and pay inflated prices. Plaintiff did not identify the specific contract it was allegedly induced into in its original complaint but corrected that error in its amended complaint. In the amended complaint, plaintiff directs its second cause of action to the first contract and its fifth cause of action to all three contracts between plaintiff and ECS. The facts in the original complaint are sufficient as to put defendants on notice to new claims of fraud with respect to the three contracts. Indeed, all three contracts between plaintiff and ECS arose out of the same occurrence – an agreement to repair electrical wiring after Hurricane Sandy.

Accordingly, plaintiff's second and fifth causes of action in the amended complaint relate back to its fraud claim in the original complaint and are deemed to have been interposed on the date of the original complaint (May 8, 2019). As this date falls within

the six-year statute of limitations for fraud under CPLR 213 [8], plaintiff's second and fifth causes of action are timely.[8]

Defendants argue that even if the fraud claims are timely, they should not apply to them because they were not parties to the contracts between plaintiff and ECS. Defendants' argument is inapposite. First, "a misrepresentation of a material fact which is collateral to the contract and serves as an inducement to enter into the contract is sufficient to sustain a cause of action sounding in fraud" (*Introna v Huntington Learning Centers, Inc.*, 78 AD3d 896, 898 [2d Dept 2010]). Second, a cause of action sounding in fraud is not duplicative of a breach of contract claim where the plaintiff sues individuals who are not parties to the contract (*id.* at 899); *Selinger Enterprises, Inc. v Cassuto*, 50 AD3d 766, 767 [2d Dept 2008]).

Taking plaintiff's allegations in its amended complaint as true – that defendants had a close and long-standing relationship with co-defendants ECS and Kashinsky whereby they colluded to solicit work while falsely representing that ECS was a licensed electrical contractor – plaintiff has sufficiently stated a cause of action for fraud against L&M and Mangione. Furthermore, as this Court determined, plaintiff's fraud claims are timely as plaintiff commenced this action within the six-year statute of limitations for fraud.

[8] Although plaintiff filed its amended complaint on September 27, 2019, the applicable date is the date plaintiff commenced the action.

Without explicitly arguing *res judicata* or collateral estoppel, defendants next contend that plaintiff's references to fraud have been fully litigated in the prior related action (index no. 503333/2016) and cite this Court's order dated July 17, 2019. Therein, the court found that plaintiff's then General Manager Henry Dubrow approved the work at issue herein.

Plaintiff's approval of the work does not necessarily preclude plaintiff's claim that defendants fraudulently induced it to enter the contracts with ECS in the first place. The New York Court of Appeals has held that where a fraud is perpetrated in procuring a contract and the defrauded party does not rescind the contract upon discovering the fraud, the Court will deem the party's conduct as an election to affirm the contract (*Strong v Strong*, 102 NY 69, 73 [1886]). Even in such cases, however, the defrauded party retains the right to sue for damages incurred as a result of the fraud unless it waived that right (*Pryor v Foster*, 130 NY 171, 175 [1891]). "[T]he question of waiver is largely one of intent" (*Id.* at 177).

Herein, plaintiff did not rescind the subject contracts with ESC and is thus deemed to have affirmed them. While it is true that plaintiff's then-manager approved the work completed by QNCC, it is a question of fact as to whether such conduct manifested plaintiff's intent to abandon its fraud claims. For example, it might have been inconvenient or implausible for plaintiff to transition to another contractor mid-project. Without more

relevant facts, this Court cannot make a determination regarding plaintiff's intent to pursue its fraud claims.

Additionally, although this Court considered defendants' argument with respect to plaintiff's approval of the work, it again notes that L&M and Mangione did not move to dismiss under CPLR 3211(a) (5) on grounds of *res judicata* or collateral estoppel. Thus, defendants' implicit arguments on those grounds are inapposite. Pursuant to CPLR 3211(e), arguments sounding in res judicata and collateral estoppel are waived if not raised in defendants' answer or a pre-answer motion to dismiss. This Court will not disregard defendants' failure to assert the correct subsection of 3211(a) as there would be prejudice to the plaintiff since the *res judicata* issues have not been fully argued (*Rodriguez v Dickard Widder Indus.*, 150 AD3d 1169, 1171 [2d Dept 2017]).

Accordingly, defendants' requests to dismiss plaintiff's second and fifth causes of action sounding in fraud are denied.

GBL 349(h) – Eighth Cause of Action

Finally, L&M and Mangione argue that plaintiff's eighth cause of action under GBL 349(h) is inapplicable as the activity at issue does not affect consumers at large.

To maintain a cause of action under section GBL 349(h), a party must allege conduct that is consumer-oriented. Generally, "consumer-oriented" conduct must have a broader impact on consumers at large, though it does not require repetition or a pattern of deceptive

behavior (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, N.A.*, 85 NY2d 20, 25 [1995]). Private contract disputes unique to the parties, including large single-shot transactions, do not fall within the ambit of the GBL 349 (h) (*id.*, citing *Genesco Entm't, a Div. of Lymutt Indus., Inc. v Koch*, 593 F Supp 743, 752 [SDNY 1984] [rental agreement for Shea Stadium was single-shot transaction not covered by GBL 349 (h)]).

In New York, plaintiffs have recovered under GBL 349 (h) in cases involving transactions with a small amount in controversy (*id.*). The statute's applicability to small transactions, rather than large or commercial transactions, is further demonstrated by the modest remedies the statute provides[9] (*Teller v Bill Hayes, Ltd.*, 213 AD2d 141, 147 [2d Dept 1995] [finding that home remodeling contract for hundreds of thousands of dollars does not fall under GBL 349 (h)]). Examples of transactions cognizable under GBL 349 (h) include false advertising, pyramid schemes, deceptive pre-ticketing, misrepresentation of the origin, nature or quality of a product, deceptive collection efforts against debtors, insurance companies' deceptive practices, and bait and switch operations (*id.*).

On the other hand, large single-shot contractual transactions are not cognizable under GBL 349 (h) (*id.*; see also *Quail Ridge Assocs. v Chem. Bank*, 162 AD2d 917 [3d Dept 1990] [large commercial contract for development of condominium complex fell outside scope of GBL 349 (h)]). Although, generally, GBL 349 (h) protects against

[9] Under NY GBL 349 (h), a party may recover "the greater of actual damages or $50." Where treble damages are awarded for willful violations, the award is capped at $1000.

consumer fraud, (*Oswego* 85 NY2d at 27), "[t]he goals of GBL §§ 349–350 were major assaults upon fraud against consumers, particularly the disadvantaged" (*Teller*, 213 AD2d at 145, quoting Givens, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 19, General Business Law § 349, at 574–575).

Herein, the three contracts at issue are between plaintiff and defendant ECS to repair electrical wiring that was damaged during Hurricane Sandy. Although plaintiff entered into three separate contracts, all three contracts were part of a common transaction for electrical wiring work. The contracts herein operate as one agreement for an ongoing project and are more akin to a large commercial single-shot transaction, (*id.* at 146), rather than the small, consumer-oriented, transactions contemplated by GBL 349 (h). Plaintiff states in a conclusory manner that defendants' conduct is consumer-oriented because they have entered into similar contracts with other property owners in the past. However, recurring behavior is not the threshold for determining whether conduct is consumer-oriented (*Oswego* 85 NY2d at 25).

Viewing plaintiff's allegations of fraud as true would not change this Court's determination as fraudulent transactions of the "single-shot" type that do not fall within the ambit of GBL 349 (h) (*Teller*, 213 AD2d at 145). Accordingly, this Court agrees with defendants that this is a private commercial contract dispute unique to the parties herein, and that plaintiff has not stated a cause of action under NY GBL § 349(h).

Thus, defendants L&M and Mangione's request to dismiss plaintiff's eight cause of action is granted.

QNCC, EC Services, and Kashinsky's Motion to Dismiss (Mot. Seq. Two)

The remaining defendants, except ECS,[10] move to dismiss under mot. seq. two, pursuant to CPLR 3211(a) (4), 3211(a) (5), 3211(a) (7), and for costs and attorney's fees pursuant to 22 NYCRR § 130-1.1(b).

Defendants' motion to dismiss is directed to the amended complaint as defendants have not withdrawn their motion and have not otherwise indicated that they do not wish to pursue the motion.[11] Defendants' motion to dismiss under mot. seq. two is directed only to one of plaintiff's causes of action, fraudulent inducement, which is the only claim plaintiff made against these defendants in the original complaint. Plaintiff, in its opposition, asserts that it significantly revised the causes of action in the amended complaint to focus on specific contracts between plaintiff and defendant ECS. However, having reviewed the original and amended complaints, this Court concludes that the causes of action in the original and amended complaints are not significantly different, as they all

[10] As stated above, ECS was brought into this action after the instant motions and is, thus, a non-moving defendant.

[11] The Court notes that on February 28, 2020, during the pendency of the instant motion, defendants answered plaintiff's amended complaint. Because the sole inquiry here is the sufficiency of the complaint and not the merits of this litigation, this Court will not consider defendants' answer and defenses therein.

arise from the same fact pattern and series of transactions. As such, this Court will consider defendants' motion to dismiss as directed to all causes of action against them rather than just the cause of action for fraudulent (*see Sobel* 98 AD3d at 1021 [amended complaint was substantially similar to original complaint even though it added additional cause of action]; *see also Rodriguez*, 150 AD3d at 1170 [where plaintiff filed an amended complaint during the pendency of defendant's motion to dismiss, and where trial court directed defendant's motion to the amended complaint and granted dismissal after considering only those causes of action in the original complaint, Second Department upheld trial court's decision to grant plaintiff's motion to reargue the dismissal on grounds that court overlooked additional causes of action]).

Discussion

Dismissal Pursuant to CPLR § 3211 (a)(5)

The court first elects to address that branch of defendants' motion pursuant to CPLR 3211 (a) (5). Pursuant to CPLR 3211(a) (5), an action may be dismissed on the grounds of *res judicata*. The *res judicata* doctrine "precludes a party from litigating a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter" (*Josey v Goord*, 9 NY3d 386, 389 [2007] [internal quotation omitted]). In New York, *res judicata* provides that when a claim reaches a final conclusion, "all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (*Webb v*

Greater New York Auto. Dealers Ass'n, Inc., 144 AD3d 1134, 1134–35 [2d Dept 2016][internal citations omitted]). In determining "what 'factual grouping' constitutes a 'transaction,' the court must consider how 'the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether ... their treatment as a unit conforms to the parties' expectations or business understanding or usage" (*Douglas Elliman, LLC v Bergere*, 98 AD3d 642, 643 [2d Dept 2012]). *Res judicata* applies to any claim that could have been raised in the prior litigation even if it was not actually raised (*id.*).

Although New York does not establish any compulsory counterclaims, (*67-25 Dartmouth St. Corp. v Syllman*, 29 AD3d 888, 889 [2d Dept 2006]), the *res judicata* doctrine often extends to counterclaims that have been resolved on the merits in a prior action. New York's permissive counterclaim rule may only "save from the bar of *res judicata* those claims for separate or different relief that could have been but were not interposed in the parties' prior action" (*id.*). In determining what constitutes "separate or different relief," a court must consider whether the claims "would impair the rights or interests established in the first action" (*id.*). Merely recasting a claim in terms of a new legal theory does not permit a party to avoid the preclusive effect of *res judicata* to the new claim (*Henry Modell & Co. v Minister, Elders & Deacons of Reformed Protestant Dutch Church of City of New York*, 68 NY2d 456, 461 [1986]).

Where *res judicata* applies, it bars claims not only against parties involved in the prior litigation, but also those in privity with them (*see Farren v Lisogorsky*, 87 AD3d 713, 714 [2d Dept 2011]). Privity is established when there is "a connection between the party to be precluded and a party to the prior action 'such that the interests of the nonparty can be said to have been represented in the prior proceeding'" (*id.*, quoting *Green v Santa Fe Indus., Inc.*, 70 NY2d 244, 250 [1987]).

Applicability of *Res Judicata* to Plaintiff's Claims

ECS commenced the prior action (index no. 503333/2016) to recover unpaid funds on the second of three contracts between plaintiff and ECS for electrical wiring work. In that action, plaintiff pleaded counterclaims (for breach of contract, fraud, an invalid mechanic's lien, and expenses to hire an independent engineer to inspect the work). After trial, this Court issued its decision by order dated July 17, 2019. Pursuant to that decision, a judgment in favor of ECS on the second contract was entered on November 20, 2019. The Court declined to award unbilled sums on the third contract and dismissed all counterclaims.

Although a final judgment on the merits has been rendered in the prior action, New York's permissive counterclaim rule may preclude *res judicata* where plaintiff's claims are for different relief and would not impair the rights established in the prior action (*Syllman*, 29 AD3d at 889). The Court will thus consider each of plaintiff's claims in light of the prior action to determine the applicability of *res judicata*.

In the instant action, plaintiff alleges five causes of action against defendants Kashinsky, EC Services, and QNCC. Causes of action one and three sound in breach of contract, causes of action two and five are fraud claims, and cause of action eight is a claim under New York General Business Law § 349 [h] (GBL 349[h]).

The doctrine of *res judicata* does not apply to plaintiff's first and third causes of action seeking overpayment funds on the first and third contracts. Although plaintiff could have raised this breach of contract claim in the prior action, this claim is for separate and different relief. Specifically, plaintiff now seeks monetary damages for overpayment on specific contracts that were not the subject of the earlier action (*see Rackowski v Araya*, 152 AD3d 834, 835 [2d Dept 2017] [finding County Court's dismissal of plaintiff's claims was "clearly erroneous" where monetary relief plaintiff sought was different than relief obtained on his counterclaim in earlier action]). Nor would an award on the first and third contracts impair the rights established in the prior action, in which ECS obtained judgment specifically on the second contract. Although the Court declined to award unbilled sums on the third contract, the Court did not fully adjudicate to final judgment any claim pertaining to the third contract as no such claim was before the Court – ECS only sued under the second contract and none of plaintiff's counterclaims were specific to the third contract.

However, *res judicata* applies to plaintiff's fraud claims against the moving defendants (causes of action two and five), which seek substantially similar relief as the

relief plaintiff sought in the prior action. Plaintiff's third counterclaim in the prior action was for fraudulent misrepresentation and sought $1.5 million dollars in damages. In the instant action, the second cause of action is for fraud under the first contract (in the amount of $830,821.45 in damages) and the fifth cause of action is for fraud under all three contracts (in the amount of $1.6 million in damages). Just as in the prior action, both claims seek monetary relief to compensate plaintiff for entering into contracts with ECS that it was allegedly induced into through defendants' misrepresentations that ECS would perform the work. Additionally, allowing plaintiff's fraud claims herein would impair the rights established in the prior action. This Court dismissed plaintiff's counterclaim for fraud in the prior action after determining that ECS was a nominal contractee, which Kashinsky created for reasons pertaining to his divorce proceedings (not as part of a fraudulent scheme). Accordingly, *res judicata* applies to plaintiff's second and fifth causes of action.

Finally, *res judicata* does not apply to plaintiff's eighth cause of action under GBL 349 (h), as plaintiff seeks relief under a separate statute. Such separate relief does not impair the rights established in the first action as the parties in that action did not litigate any claim or counterclaim pertaining to consumer-oriented activity.

***Res Judicata* Analysis – Are Causes of Action Two and Five Barred?**

With respect to plaintiff's second and fifth causes of action, to which the doctrine of *res judicata* applies, the Court turns to an analysis of whether *res judicata* bars those causes of action.

Res judicata bars claims that arise out of the same transaction or series of transactions as a claim that has reached a final conclusion (*Webb*, 144 AD3d at 1134–35). Plaintiff's fraud claims herein arise out of the same series of transactions as those in the prior action – specifically, the contracts plaintiff entered into with ECS for electrical wiring work after Hurricane Sandy. Notwithstanding plaintiff's assertion that their claims herein are directed toward different contracts than that in the prior action, this Court finds that all three relevant contracts arise out of the same series of transactions as they are "related in . . . motivation" – plaintiff's need to repair damages from Hurricane Sandy – and "form a convenient trial unit" (*Douglas*, 98 AD3d at 643). As such, the three contracts were all part of one ongoing project and served as a single agreement.

Furthermore, the facts plaintiff alleged to underly its counterclaims in the prior action are very similar to those it presents to support its claims in this action. (*see Ram v Hershowitz*, 76 AD3d 1022, 1023 [2d Dept 2010] [*res judicata* barred petition where claims brought to final judgment in prior suit alleged "same underlying facts"]). In the prior action, plaintiff alleged that defendant ECS intentionally concealed its intention to have QNCC perform the work on its behalf and that plaintiff would not have hired ECS

with this knowledge. Plaintiff further detailed QNCC's poor litigation history and failure to provide insurance proof. Similarly, plaintiff's amended complaint herein reiterates ECS's and defendants' alleged misrepresentations. For example, plaintiff states that defendants knowingly misrepresented which entity would perform the work and that plaintiff would not have hired ECS had it known about QNCC's role. Additionally, plaintiff once again details QNCC's poor credit, litigation, and accident history.

In light of the foregoing, the *res judicata* doctrine bars plaintiff's second and fifth causes of action, which could have been brought as counterclaims in the prior action (*see Douglas*, 98 AD3d at 643).

Privity

All the moving parties herein are in privity to ECS, the plaintiff in the prior action. As defendant correctly argues, Kashinsky is the common principal for the entities that join him in seeking dismissal – EC Services, and QNCC – and the entities' interests are identical. This Court, in its order dated July 17, 2019, found that ECS was a nominal contractee that Kashinsky created for reasons related to divorce proceedings. In fact, the parties do not dispute that ECS was a nominal contractee and that QNCC performed the electrical work for plaintiff under all three contracts between plaintiff and ECS. Thus, it is implausible that QNCC did not share interests with ECS. Taking plaintiff's allegations as true that ECS diverted funds to QNCC and EC Services also points to the shared interests

of ECS, QNCC, and EC Services. Also, defendants aptly highlight plaintiff's acknowledgment in its complaint that EC Services is the alter ego of ECS.

Accordingly, this Court finds that the interests of Kashinsky and all three of his companies were represented in the prior litigation and that these defendants are in privity. As such, *res judicata* bars plaintiff's fraud claims against the moving defendants. Plaintiff's argument that the prior action did not reach final judgment at the time this motion was filed is inapposite; a final judgment exists at the time of this Court's ruling.

In light of the foregoing, plaintiff's second and fifth causes of action are dismissed as against defendants EC Services, QNCC, and Kashinsky.

Dismissal Pursuant to CPLR 3211 § (a)(7)

The Court next considers that branch of defendants' motion pursuant to 3211(a)(7) to dismiss plaintiff's remaining causes of action against them (causes of action one, three, and eight). The narrow question before the court on a 3211(a) (7) motion is "whether the complaint states a cause of action" (*Reliance Ins. Co.*, 200 AD2d at 729).

Plaintiff's first and third causes of action are for breach of contract on the first and third contracts, respectively. As none of the moving defendants are named parties to either the first or third contracts, which were between plaintiff and non-moving defendant ECS, plaintiff failed to state a cause of action as against the moving defendants.

Finally, plaintiff fails to state a cause of action under GBL 349 (h) for the same reasons it failed to do so against defendants L&M and Mangione (mot. seq. one). Accordingly, the court adopts its rationale, stated above, as such pertains to GBL 349 (h).

In light of the foregoing, plaintiff's first, third, and eighth causes of action are dismissed as to defendants EC Services, QNCC, and Kashinsky.

Having resolved defendants' motion under CPLR § 3211(a) (5) and CPLR § 3211(a) (7), the court need not address defendants' argument under CPLR § 3211(a) (4).

Costs pursuant to 22 NYCRR 130-1.1 (b)

22 NYCRR 130-1.1 (b) states, in relevant part:

> "The court, as appropriate, may make such award of costs or impose such financial sanctions against either an attorney or a party to the litigation or against both."

Pursuant to 22 NYCRR 130-1.1 (a):

> "The court, in its discretion, may award to any party ... in any civil action ... before the court ... costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party ... in a civil action ... who engages in frivolous conduct"

Frivolous conduct is defined as conduct that is "(1) completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the

litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false" (22 NYCRR 130-1.1[c]). In determining whether conduct is frivolous, a court shall also consider "whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party" (*Id.*; *see Glenn v Annunziata,* 53 AD3d 565 [2d Dept 2008]).

The court finds that the plaintiff's conduct, while at times questionable, fails to meet the level envisioned by the above authority. While the court notes that improper conduct will not be countenanced, it declines to award attorneys' fees and costs at this time, subject to reconsideration if later warranted.

Conclusion

Accordingly, it is

ORDERED, that plaintiff's amended complaint is deemed timely served and filed; and it is further

ORDERED, that defendants L&M and Mangione's motion under mot. seq. one is granted to the extent that plaintiff's fourth, sixth, seventh and eight causes of action are dismissed. Defendants' request to dismiss plaintiff's second and fifth causes of action is denied; and it is further

ORDERED, that defendants EC Services, QNCC and Kashinsky's motion under mot. seq. two is granted to the extent that plaintiff's first, second, third, fifth, and eighth causes of action are dismissed as against only these three defendants; and it is further

ORDERED, that all requests for costs and attorneys' fees are denied subject to reconsideration if later warranted; and it is further

ORDERED, that the time for defendants L&M and Mangione to answer is extended until ten days after service of notice of entry of this order.

The court, having considered the parties remaining contentions, finds them unavailing. All relief not expressly granted herein is denied.

The foregoing constitutes the decision and order of the Court.

ENTER:

J.S.C.

HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE