At an IAS Term, Part 81 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 29th day of September, 2022.

P R E S E N T:
HON. CARL J. LANDICINO, JSC

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MAURICIO SUTHERLAND,

Plaintiff,

- against -

PBC ENTERPRISES, INC., WALLACK MANAGEMENT CO., INC. KOJO SIMPSON ARCHITECT, PLLC, and ANC CONTRACTING CO., INC,

Defendants.

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Index No.: 511668/2021

DECISION AND ORDER

Motion Sequence #1, 2

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

	Papers Numbered (NYSCEF)
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	5-7,
Opposing Affidavits (Affirmations)	11, 13-15,
Reply Affidavits (Affirmations)	
Memorandum of Law	8, 12, 16

After a review of the papers and oral argument on the motion the Court finds as follows:

The Plaintiff Mauricio Sutherland (hereinafter the "Plaintiff") has commenced this action against Defendants PBC Enterprises, Inc. ("Defendant PBC"), Wallack Management Co., Inc. ("Defendant Wallack"), Kojo Simpson Architect, PLLC ("Defendant Kojo"), and ANC Contracting Co., Inc. ("Defendant ANC") (hereinafter referred to collectively as the "Defendants"). The dispute concerns a certain lease by and between the Plaintiff as tenant and Defendant PBC as landlord (the "Lease") for commercial space in a building known as 1251-71 Ralph Avenue, Brooklyn, New York (hereinafter the "Premises"). The Plaintiff was apparently interested in developing a nightclub at the Premises (hereinafter the "Project"). Defendant Wallack

was allegedly the property manager of the Premises and Defendant Kojo was allegedly hired by Plaintiff as the architect to transform the Premises into a single space as a nightclub. Plaintiff alleges that Defendant PBC, Defendant Wallack, and Defendant Kojo knew of violations at the Premises that would not permit the Project to be completed notwithstanding the purported understanding that Plaintiff would expend significant capital to fund the project. Plaintiff further alleges that Defendant PBC sought Plaintiff's eviction without paying for the renovations Plaintiff performed at the Premises. The Plaintiff raises causes of action for breach of express/implied and/or quasi-contract, interference with prospective economic advantage, promissory estoppel and/or detrimental reliance, professional malpractice, breach of contract, and unjust enrichment.

Defendants PBC and Wallack (hereinafter referred to as the "Owner Defendants" or "Owners") now move (motion sequence #1) to dismiss the complaint for failure to state a cause of action pursuant to CPLR 3211(a)(1) and (7). The Owner Defendants contend that this action is governed by the terms of the Lease agreement and therefore, the first, second, third, and seventh causes of action as against them, respectively, should be dismissed. The Owners argue that the Lease provides that the Plaintiff accepted the Premises "as is," Plaintiff agreed that any improvements would be made at his sole cost and expense, and any improvements would become the property of PBC. The Owners also contend that the causes of action for tortious interference with prospective economic advantage, promissory estoppel and unjust enrichment are either improperly plead or duplicative of the breach of contract claim.

The Plaintiff opposes the motion. The Plaintiff contends that the Plaintiff and the Owners made several oral modifications of the Lease that support the Plaintiff's position and that dismissing the Plaintiff's complaint would provide the Owner Defendants with an unjust financial windfall. Specifically, the Plaintiff contends that he invested over Four Hundred Thousand

($400,000.00) dollars in the Premises and that as a result of the impact of the COVID-19 Pandemic the Project was suspended. Plaintiff further contends that during the Project suspension the Owner Defendants initiated an eviction proceeding that forced the Plaintiff to vacate the Premises.

Defendant Kojo also moves (motion sequence #2) to dismiss the complaint pursuant to CPLR 3211(a)(5) as the causes of actions as against Kojo are time-barred given that Defendant Kojo was allegedly terminated in 2015 and the action was commenced six years later on May 17, 2021. The Plaintiff opposes the motion. Specifically, the Plaintiff contends that the statute of limitations did not begin to run until he discovered Defendant Kojo's negligence and wrongdoing in January 2020. Plaintiff also contends that his time to commence an action was tolled pursuant to Executive Order 202.8 and the subsequent extension orders as a result of the Covid-19 pandemic. As a result, the Plaintiff contends that the tolling period should be added to the Plaintiff's time to commence.

> **On a CPLR 3211 motion to dismiss, the court will accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove his or her claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss.**

Kinnear v. Cefoli, 184 AD3d 628, 123 N.Y.S.3d 509, 510 [2d Dept 2020].

Pursuant to CPLR §3013, "[s]tatements in a pleading should be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." Furthermore, "[a]lthough on a motion to dismiss plaintiff's allegations are presumed to be true and accorded every favorable inference, conclusory allegations - claims consisting of bare legal

conclusions with no factual specificity - are insufficient to survive a motion to dismiss." *Godfrey v. Spano*, 13 NY3d 358, 373, 892 N.Y.S.2d 272, 278 [2009].

> **"[W]here evidentiary material is adduced in support of the motion, the court must determine whether the proponent of the pleading has a cause of action, not whether the proponent has stated one" (*Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 46 AD3d 530, 530 [2007]; see *Meyer v. Guinta*, 262 AD2d 463, 464 [1999]). A motion to dismiss based on documentary evidence may be appropriately granted "only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; see *Leon v. Martinez*, 84 NY2d at 88, *Lucia v. Goldman*, 68 AD3d 1064, 1065 [2009]; *Mazur Bros. Realty, LLC v. State of New York*, 59 AD3d 401, 402 [2009]).**

Feggins v. Marks, 171 AD3d 1014, 1015-6, 99 N.Y.S.3d 45, 47 [2d Dept 2019].

"On a motion to dismiss a complaint pursuant to CPLR 3211(a)(5) on statute of limitations grounds, the moving defendant must establish, *prima facie*, that the time in which to commence the action has expired." *See Yang v. Oceanside Union Free Sch. Dist.*, 90 AD3d 649, 649, 933 N.Y.S.2d 905 [2d Dept 2011]. "As a general principle, the statute of limitations begins to run when a cause of action accrues (*see* CPLR 203 [a]), that is, 'when all of the facts necessary to the cause of action have occurred so that the party would be entitled to obtain relief in court.'" *Hahn Auto. Warehouse, Inc. v. Am. Zurich Ins. Co.*, 18 NY3d 765, 770, 967 N.E.2d 1187 [2012], quoting *Aetna Life & Cas. Co. v. Nelson*, 67 NY2d 169, 175, 492 N.E.2d 386 [1986]. However, a statute of limitations can be tolled, and the toll suspends the running of the statute of limitation and that period is excluded from calculating the statute of limitation. *See Bermudez Chavez v. Occidental Chem. Corp.*, 35 NY3d 492, 158 N.E.3d 93 [2020], *reargument denied sub nom. Chavez v. Occidental Chem. Corp.*, 36 NY3d 962, 161 N.E.3d 480 [2021].

I. First Cause of Action Against Defendant PBC for Breach of Express, Implied and/or Quasi Contract

The Owner Defendants contend that the claims in Plaintiff's first cause of action as against Defendant PBC should be dismissed because the parties entered into the Lease and the Lease controls the relationship, rights and obligations of the parties to the Lease. The Owner Defendants point to the Lease as documentary evidence in support of this contention, and direct the Court to Articles 11, 39, 42 and 49 of the Lease. Those articles state in pertinent part as follows:

Article 11 states:

> All Improvements made by the Tenant to or upon the demised premises, except said trade fixtures, shall when made, at once be deemed to be attached to the freehold, and become the property of the Landlord, and at the end or other expiration of the term, shall be surrendered to the Landlord in as good order and condition as they were when installed, reasonable wear and damages by the elements excepted.

Article 39 (Use) states:

> Tenant covenants and agrees that it shall use the leased premises solely as an office, including for the booking of parties and other events, and for no other purpose. Tenant warrants that such use shall be lawful and proper and does not and will not constitute a breach of any laws, regulations, ordinances, or statutes, and that Tenant shall be and remain responsible for the legality of such use of the leased premises by Tenant, and that Tenant at its own cost and expense shall be responsible for legalizing such use and/or curing any violation with respect to such use and Landlord shall not be required to expend any monies to either obtain permission for such use by Tenant and/or to remove any violation or defend any action resulting from the use of the leased premises. Tenant agrees to defend, indemnify and hold Landlord harmless from any costs, losses, liabilities or expenses (including legal fees and costs) due to any violation, complaint or claim resulting from Tenant's use of the leased premises.

Article 42 (Compliance with Law) states:

> In furtherance of Article 2 hereof, Tenant shall be responsible for obtaining all permits and licenses required for the conduct of its business at the leased premises and shall keep the leased premises violation free and (except in connection with the obtaining by Landlord of the Commencement Date Documentation) promptly take all steps at its own cost necessary to cure and remove such violations as they occur…

Article 49 (As-is Condition) states:

> (a) Tenant acknowledges that it has inspected the building and the leased premises, and agrees to accept the leased premises in its 'AS IS' physical condition as of the date possession is tendered to Tenant and acknowledges the Landlord shall not be obligated to provide a sprinkler system, if required, or to make any improvements or alterations to the leased premises whatsoever.

Upon a reading of those provisions, Defendant PBC should prevail in relation to the dismissal of the quasi-contract claim. "As a general rule, the existence of a valid and enforceable written contract governing a particular subject matter precludes recovery in quasi-contract on theories of quantum meruit and unjust enrichment for events arising out of the same subject matter." *Yenrab, Inc. v. 794 Linden Realty, LLC*, 68 AD3d 755, 892 N.Y.S.2d 105, 110 [2d Dept 2009]; see *Marc Contr., Inc. v. 39 Winfield Assoc., LLC*, 63 AD3d 693, 695, 880 N.Y.S.2d 346 [2d Dept 2009]; see also *AHA Sales, Inc. v. Create Bath Prods., Inc.*, 58 AD3d 6, 867 N.Y.S.2d 169 [2d Dept 2008].

However, Plaintiff has alleged that the Lease had been orally modified by the parties as reflected by their course of conduct. Plaintiff alleges in his Verified Complaint that in 2016, Owner Defendants orally agreed that Plaintiff could remain a tenant "without paying rent or other fees while the planning, filing and construction necessary to complete the Project was performed." Plaintiff apparently did not pay rent for over two years after this purported oral agreement. On August 5, 2019, PBC petitioned to evict Plaintiff for nonpayment of rent and made no offer to pay for the renovations Plaintiff made at the Premises. Plaintiff apparently agreed to vacate the Premises on January 25, 2021, in accordance with the stipulation of the parties dated October 21, 2020. The stipulation provided that Plaintiff reserved his right to seek pecuniary damages claim in a plenary action. The issue of possession has been resolved.

Plaintiff relies on *Rose v. Spa*, 42 NY2d 338, 366 N.E.2d 1279 [1977]. The Court of Appeals in *Rose* wrote that "when the oral agreement to modify has in fact been acted upon to completion, the same need to protect the integrity of the written agreement from false claims of modification does not arise. In such case, not only may past oral discussions be relied upon to test the alleged modification, but the actions taken may demonstrate, objectively, the nature and extent of the modification. Moreover, apart from statute, a contract once made can be unmade, and a contractual prohibition against oral modification itself be waived" *Rose v. Spa*, 42 NY2d 338, 343, 366 N.E.2d 1279, 1283 [1977]. The Court in *Rose* continued that "[w]here there is partial performance of the oral modification sought to be enforced, the likelihood that false claims would go undetected is similarly diminished. Here, too, the court may consider not only past oral exchanges, but also the conduct of the parties. But only if the partial performance be unequivocally referable to the oral modification is the requirement of a writing under section 15-301 avoided" *Id.* at 343-44. "Once a party to a written agreement has induced another's significant and substantial reliance upon an oral modification, the first party may be estopped from invoking the statute to bar proof of that oral modification…[and] conduct relied upon to establish estoppel must not otherwise be compatible with the agreement as written" *Id.* 344.

> **Appellants contend that our decision in *Rose v Spa Realty Assoc.* (42 NY2d 338), suggests that a contract which by its terms required written notice of termination may be terminated by mere conduct of the parties. This is not so. In *Rose*, we stated that conduct of the parties may be considered in addressing the validity of an oral modification, "[but] only if the partial performance be unequivocally referable to the oral modification is the requirement of a writing under [General Obligations Law] section 15-301 avoided". (42 NY2d, pp 343-344.) Here, appellants do not allege that there was any oral notice of termination. In the absence of such oral notice, mere conduct is unavailing. (See *Associated Food Stores v Siegel*, 10 AD2d 1003, affd 9 NY2d 816.)**

Chemical Bank v. Sepler, 60 NY2d 289, 294, 457 N.E.2d 714, 716 [1983].

Further, "General Obligations Law § 15–301 becomes meaningless if a tenant's nonpayment of the rent required by a lease is sufficient to prove an oral modification of payment terms, or estop the landlord from recovering the shortfall" *Eujoy Realty Corp. v. Van Wagner Commc'ns, LLC*, 22 NY3d 413, 427, 4 N.E.3d 336, 345 [2013].

The Plaintiff contends in his complaint that the Lease provides that the Premises could be used solely as office space. He further contends that after entering into the Lease, Plaintiff and Owner Defendants discussed Plaintiff's intentions of converting the space into a nightclub. As a result of these discussions, and in reliance thereon, the Plaintiff allegedly took "extensive steps" to pursue his plans to convert the space as purportedly agreed. Plaintiff alleges that the Owner Defendants had an obligation to inform the Plaintiff that his plans for the Premises were incompatible with the Certificate of Occupancy and that a previous owner had previously attempted and failed to utilize the Premises for similar use. The Plaintiff also contends that the Owner Defendants orally agreed to suspend payment of rent but then sought to evict the Plaintiff for non-payment of rent after substantial improvements had been made.

The Owner Defendants argue that the Lease does not allow Plaintiff to recover costs incurred in attempting to convert the Premises into a nightclub based on the provisions of the Lease mentioned above. The Owner Defendants further argue that even if there was an oral modification to suspend rent payments, the modification does not affect the enforceability of the other provisions of the Lease. The Owner Defendants point to Article 31 of the Lease which states that "[t]he invalidity or unenforceability of any provision of this lease shall in no way affect the validity or enforceability of any other provision hereof." The Lease also includes a no oral modification clause. Article 19 of the Lease states that "[t]he Landlord has made no representations or promises

in respect to said building or to the demised premises except those contained herein, [redacted]. This instrument may not be changed, modified, discharged or terminated orally."

In the instant matter, there was an express contract between the Plaintiff and Defendant PBC that governs the subject matter at issue and as a result, precludes recovery under a quasi-contract theory. *Cooper, Bamundo, Hecht & Longworth, LLP v. Kuczinski*, 14 AD3d 644, 646, 789 N.Y.S.2d 508 [2d Dept 2005]. The alleged oral modification waiving the payment of rent does not clearly serve to amend the other provisions of the Lease. It does not reflect an agreement that PBC guaranteed Plaintiff's ability to complete the Project. The forbearance only related to the payment of rent and the Plaintiff remained responsible for utilizing the Premises legally. *Hylan Ross, LLC v. 2582 Hylan Boulevard Fitness Group, LLC*, 206 AD3d 893, 172 N.Y.S.3d 29 [2d Dept 2022]. These other provisions include that a) improvements shall become PBC's property (Article 11), b) Plaintiff was responsible for legalizing his use at his own expense (Articles 39 and 42), and c) the Premises were accepted "as is" (Article 49). As such, the first cause of action is dismissed. See *Eujoy Realty Corp. v. Van Wagner Commc'ns, LLC*, 22 NY3d 413, 4 N.E.3d 336 [2013].

II. Second Cause of Action Against Defendant Wallack for Interference with Prospective Economic Advantage

The Owner Defendants contend that the claims in Plaintiff's second cause of action as against Defendant Wallack should be dismissed because Plaintiff failed to allege the necessary elements for tortious interference with prospective economic advantage. The Plaintiff contends that Defendant Wallack knew or should have known that Plaintiff's intended use of the Premises would be incompatible with the Certificate of Occupancy and that Defendant Wallack should have advised Plaintiff that a previous owner had attempted and failed to utilize the Premises as a

nightclub or other similar use. The Plaintiff contends that Defendant Wallack knew or should have known that Plaintiff was relying on Wallack's knowledge of the history of the Premises and Wallack's failure to inform Plaintiff of these issues caused Plaintiff to expend large sums of money and time on a project that Wallack knew would be unsuccessful. The Plaintiff contends that Defendant Wallack's failure to inform the Plaintiff constitutes tortious interference with prospective economic advantage.

Generally, to plead a cause of action for tortious interference with prospective economic advantage, a Plaintiff must "allege a specific business relationship with an identified third party with which the defendants interfered" *Influx Cap., LLC v. Pershin*, 186 AD3d 1622, 1624, 131 N.Y.S.3d 712, 715 [2d Dept 2020], quoting *Mehrhof v. Monroe-Woodbury Cent. Sch. Dist.*, 168 AD3d 713, 714, 91 N.Y.S.3d 503 [2d Dept 2019]. Further, "a plaintiff must demonstrate that the defendant's interference with its prospective business relations was accomplished by 'wrongful means' or that defendant acted for the sole purpose of harming the plaintiff." *Moulton Paving, LLC v. Town of Poughkeepsie*, 98 AD3d 1009, 950 N.Y.S.2 762, 766 [2d Dept 2012], quoting *Caprer v. Nussbaum*, 36 AD3d 176, 181, 825 N.Y.S.2d 55, 61 [2d Dept 2006]. "As a general rule, such wrongful conduct must amount to a crime or an independent tort, and may consist of 'physical violence, fraud or misrepresentation, civil suits and criminal prosecutions.'" *Smith v. Meridian Techs., Inc.*, 86 AD3d 557, 560, 927 N.Y.S.2d 141, 144 [2d Dept 2011], quoting *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 50 NY2d 183, 188, 406 N.E.2d 445, 447 [1980].

The Plaintiff does not properly plead the second cause of action and merely states that Defendant Wallack knew or should have known that the Plaintiff's business plans were likely to fail. Plaintiff does not indicate why Wallack had a duty to inform Plaintiff about the legality of Plaintiff's planned use of the property. Plaintiff does not allege interference with a prospective

business relation or that the interference was accomplished by wrongful means such as fraud or misrepresentation. Moreover, such allegations would require that the pleading contain greater particularity. See *Simaee v. Levi*, 22 AD3d 559, 802 N.Y.S.2d 493 [2d Dept 2005]; see also *Lee Dodge, Inc. v. Sovereign Bank, N.A.*, 148 AD3d 1007, 1009, 51 N.Y.S.3d 531 [2d Dept 2017]. As a result, the Plaintiff's second cause of action for tortious interference with prospective economic advantage is dismissed.

III. Third Cause of Action Against Defendants PBC and/or Wallack for Promissory Estoppel and/or Detrimental Reliance

The Owner Defendants contend that the claims in Plaintiff's third cause of action as against Defendants PBC and/or Wallack should be dismissed because Plaintiff failed to allege the necessary elements for promissory estoppel against the Owner Defendants. The Owner Defendants also argue that the third cause of action is duplicative of Plaintiff's second cause of action [interference with prospective economic advantage] and first cause of action [breach of contract]. The Plaintiff contends that the Owner Defendants made certain representations and promises that encouraged the Plaintiff to continue with the Project and that they knew or should have known that the Plaintiff would rely on these representations. Plaintiff contends that as a result he expended large sums of money on a project that was destined to fail.

"The elements of a cause of action based upon promissory estoppel are a clear and unambiguous promise, reasonable and foreseeable reliance by the party to whom the promise is made, and an injury sustained in reliance on that promise." *Williams v. Eason*, 49 AD3d 866, 868, 854 N.Y.S.2d 477, 479 [2d Dept 2008]. In the instant matter, the Plaintiff does not properly plead the cause of action for promissory estoppel as against Defendant Wallack as he fails to show that Defendant Wallack made a clear and unambiguous promise to the Plaintiff. Plaintiff argues that

Defendant Wallack made representations about the existence of code violations at the Premises and other matters that Plaintiff relied upon when he sought to bring the Premises up to code. However, the Plaintiff does not allege what clear and unambiguous promises or statements Defendant Wallack made to the Plaintiff. Merely stating that violations existed, without more, is not material, especially since these statements were apparently true. Further, Plaintiff has failed to establish reasonable reliance on the representations that Defendant Wallack allegedly made based on the nature of Plaintiff's relationship with Wallack. Wallack represented PBC. The Plaintiff did not allege that he conducted any due diligence relating to his ability to complete the planned Project. In fact, Plaintiff acknowledges that he discovered the publicly published existence of violations and other issues concerning the property six months prior to commencement of this action. (See NYSCEF Document 1, Plaintiff's Complaint, Paragraph 7). Additionally, there is a "lack of reasonable reliance, given the 'as is' clause" in the Lease. *B&C Realty, Co. v. 159 Emmut Props.* LLC, 106 AD3d 653, 966 N.Y.S.2d 402 [1st Dept 2013]; see *Franklin v. Haffika*, 140 AD3d 922, 35 N.Y.S.3d 142 [2d Dept 2016]. Accordingly, the third cause of action against Wallack is dismissed.

Plaintiff also fails to plead a cause of action for promissory estoppel against Defendant PBC. Plaintiff fails to show that Defendant PBC made a clear and unambiguous promise to the Plaintiff outside of the terms contained in the Lease, except for the forbearance of rent which has been addressed above. In any event, it is also duplicative of Plaintiff's first cause of action for breach of contract. "[T]he written lease agreement, which constitutes a valid and enforceable contract between the parties, precludes recovery under the promissory estoppel cause of action, which arises out of the same subject matter" *Hylan Ross, LLC v. 2582 Hylan Boulevard Fitness Grp., LLC*, 206 AD3d 893, 896, 172 N.Y.S.3d 29, 33 [2d Dept 2022]. Although the Court has

indicated that the forbearance of rent was a product of an oral modification of the payment provision, Plaintiff has not alleged other provisions of the Lease, including Article 49 (As-Is Clause), were modified. Moreover, the issue of possession of the Premises was resolved in the prior Civil Court action. Accordingly, the third cause of action against PBC is dismissed.

IV. Seventh Cause of Action Against Defendant PBC for Unjust Enrichment

The Owner Defendants contend that the claims in Plaintiff's seventh cause of action as against Defendant PBC should be dismissed because the parties entered into the Lease and the Lease controls the rights and obligations of Plaintiff and PBC. The Plaintiff contends that he surrendered the Premises to PBC with the improvements he made without reimbursement from PBC. Plaintiff argues that Defendant PBC has thereby been unjustly enriched. Plaintiff argues that as Defendant PBC did not challenge the cause of action for unjust enrichment, the cause of action should not be dismissed. However, the Owner Defendants do argue for dismissal of the unjust enrichment claim in the preliminary statement of their opposition papers. The Owner Defendants argue that Plaintiff is unable to recover the costs of his alleged improvements pursuant to the Lease provisions. Similar to the limits placed on claims seeking relief pursuant to quasi-contract, unjust enrichment claims are generally dismissed as duplicative in circumstances where the rights and obligations of the parties are defined by a valid written agreement such as a lease or contract that has not otherwise been modified. See *Fortune Limousine Serv., Inc. v. Nextel Commc'ns*, 35 AD3d 350, 353, 826 N.Y.S.2d 392, 395 [2d Dept 2006]; *Battery Park Realty, Inc. v. RKO Delaware Inc.*, 680, 681, 795 N.Y.S.2d 351, 352 [2d Dept 2005]. Accordingly, Plaintiff's seventh cause of action is dismissed.

V. Fourth and Fifth Causes of Action against Defendant Kojo for Architectural Malpractice and Breach of Contract

Defendant Kojo contends that Plaintiff's fourth and fifth causes of action should be dismissed as time barred. The Plaintiff argues that Plaintiff relied on Defendant Kojo's representations that it possessed the degree of skill and care required to undertake the design of the Premises and that Defendant Kojo failed to discharge its obligations in its failure to adhere to zoning regulations and legal requirements. Plaintiff also alleges that Defendant Kojo intentionally and actively withheld material information from him relating to why the work at the Premises was stopped by the Department of Buildings. Additionally, the Plaintiff argues that Defendant Kojo breached its contractual agreement with Plaintiff by failing to perform its obligations pursuant to their agreement.

Pursuant to CPLR § 3211(a)(5), a "party may move for judgment dismissing one or more causes of action asserted against him on the ground that the cause of action may not be maintained because of…statute of limitations." "[A]n 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" is an action that "must be commenced within three years." CPLR 214(6). The Court of Appeals has held that CPLR 214(6) covers claims against architects arising from their professional services. See *R.M. Kliment & Frances Halsband, Architects v. McKinsey & Co.*, 3 NY3d 538, 788 N.Y.S.2d 648 [2004]. An action founded upon "defective design or construction accrues upon the actual completion of the work to be performed and the consequent termination of the professional relationship. The completion of an architect's obligations must be viewed in light of the particular circumstances of the case" *Frank v. Mazs Group, LLC*, 30 AD3d 369, 815 N.Y.S.2d 738 [2d Dept 2006] [internal citations omitted].

In the instant matter, Plaintiff and Defendant Kojo entered into a written agreement on March 14, 2013. The agreement, *inter alia*, reflected that Kojo would provide architectural services to Plaintiff in relation to the Premises. The Plaintiff contends in his complaint (paragraph 33) that "[i]n 2016, Kojo was fired from the Project by PBC and/or WALLACK and a new architect was hired." The Plaintiff further contends in his complaint (paragraph 34) that "[a]s a result of the history of the violations and the incorrect sequencing of the demolition and construction as recommended by KOJO, SUTHERLAND was told by the new architect that he was required to restore the Premises to their original condition and obtain approval of a work permit based on the original floorplan before SUTHERLAND could obtain a permit to move ahead to complete the Project as originally designed." The Plaintiff further alleges (paragraph 40) that "[i]n 2018, SUTHERLAND was informed by the new architect that the manner in which the Project had been designed and envisioned by KOJO was sequenced incorrectly and the resulting new design would violate the Certificate of Occupancy and the zoning laws."

Defendant Kojo argues that "Sutherland terminated KSA in 2015 and hired another architect of record in 2015." (See Simpson Kojo's affidavit, NYSCEF Doc. No. 23, Paragraph 6). Defendant Kojo also provides a letter dated March 27, 2015, and signed by Kojo Simpson, releasing Defendant Kojo of its professional services. Additionally, Defendant Kojo provides a publicly available record from the New York City Department of Buildings ("DOB") that shows that a new architect, Takos, submitted two applications in connection with the project as of October 12, 2015, and that Defendant Kojo's submissions ended in 2014. (See NYSCEF Doc. No. 26).

The Plaintiff argues that Defendant Kojo should be estopped from pleading the statute of limitations because Plaintiff was induced by fraud, misrepresentation or deception to refrain from timely commencing an action. *Gleason v. Spota*, 194 AD2d 764, 599 N.Y.S.2d 297 [2d Dept

1993]. The Plaintiff contends that Defendant Kojo knew that the Project as contemplated could not be completed but allowed the Plaintiff to continue funding the Project. The Plaintiff alleges that he was never informed of the violations until his attorney informed him in 2020. However, this allegation contradicts paragraph 34 of Plaintiff's Verified Complaint where he states that the new architect told him of the history of violations and the incorrect recommendations by Defendant Kojo. The Plaintiff's fourth and fifth causes of action arise from architectural services by Defendant Kojo and as such are subject to a three-year statute of limitations. *R.M. Kliment & Frances Halsband, Architects v. McKinsey & Co.*, 3 NY3d 538, 788 N.Y.S.2d 648 [2004]. The Plaintiff acknowledges that in 2016 the new architect informed him about the violations, giving the Plaintiff sufficient time to inquire as to the relevant facts prior to the expiration of statute of limitations. He also acknowledges that the new architect told him that "he was required to restore the Premises to their original condition and obtain approval of a work permit based on the original floorplan before SUTHERLAND could obtain a permit to move to complete the Project as originally designed." (Verified Complaint, Paragraph 34). Defendant Kojo's obligations under the contract and its professional relationship concluded upon its termination of its services. See *Frank v. Mazs Group, LLC*, 30 AD369, 815 N.Y.S.2d 738 [2d Dept 2006]; see also *Vlahakis v. Belcom Development, LLC*, 86 AD3d 567, 927 N.Y.S.2d 152 [2d Dept 2011].

Defendant Kojo argues that the cause of action for malpractice is duplicative to the cause of action for breach of contract. "The allegations in the former cause of action were essentially identical to those in the latter and did not allege a distinct injury or distinct damages" *Anderson v. Pinn*, 185 AD3d 534, 126 N.Y.S.3d 759 [2d Dept 2020] [Plaintiff hired defendant to provide architectural services to construct a building which was unable to be completed because of building violations. The Court held that the breach of contract for services and malpractice of not

completing the project without violations were identical and should be dismissed]; see also *Bruno v. Trus Joist a Weyerhaeuser Business*, 87 AD3d 670, 929 N.Y.S.2d 163 [2d Dept 2011]. As such, the fourth and fifth causes of action are dismissed as time barred.

Based on the foregoing, it is hereby ORDERED as follows:

The motion by Defendants PBC and Wallack (motion sequence #1) is granted and the first, second, third and seventh causes of action are dismissed as against them.

Defendant Kojo's motion (motion sequence #2) is granted and the fourth and fifth causes of action are dismissed as against the movant.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.

KINGS COUNTY CLERK
FILED
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