JF Capital Advisors, LLC v Merchants Hospitality LLC
2022 NY Slip Op 34339(U)
December 19, 2022
Supreme Court, New York County
Docket Number: Index No. 651394/2020
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 42

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JF CAPITAL ADVISORS, LLC,

Plaintiff,

- v –

MERCHANTS HOSPITALITY LLC,1101-43 AVE ACQUISITION LLC, ROCHE ENTERPRISES LLC, and HG MANAGEMENT, LLC,

Defendants.

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INDEX NO. 651394/2020

MOTION DATE 02/25/2021, 02/25/2021

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

HON. NANCY M. BANNON:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 22, 24, 25, 26, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 94, 95, 96, 97, 98, 99, 100, 101, 102

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93

were read on this motion to/for DISMISS.

I. INTRODUCTION

In this action to recover $225,714.91 in damages for, *inter alia*, breach of contract, unjust enrichment, account stated, and fraud, the defendant Merchants Hospitality, Inc. (MHI), incorrectly sued herein as Merchants Hospitality, LLC, (SEQ 001) and the defendants Roche Enterprises, LLC (Roche), and HG Management, LLC (HG), (SEQ 002) move pursuant to CPLR 3211(a) to dismiss the complaint as against them based on a defense founded on documentary evidence (CPLR 3211[a][1]) and for failure to state a cause of action (CPLR 3211[a][7]). The plaintiff opposes the motions and cross-moves (SEQ 001) pursuant to CPLR 3025 to amend the

caption to substitute MHI for Merchants Hospitality, LLC. The motion of MHI is granted in part, the motion of Roche and HG is granted in part, and the plaintiff's cross-motion is granted.

II. BACKGROUND

The following allegations are drawn from the plaintiff's complaint, unless otherwise noted, and are assumed to be true solely for purposes of this motion. See Grassi & Co. v Honka, 180 AD3d 564 (1st Dept. 2020).

The plaintiff, a boutique investment advisory firm specializing in the hotel and hospitality industry, avers that it provided its services to the defendants between March and December 2019, in connection with two hotel properties co-owned by certain of the defendants (the hotels). The first hotel property, known as the Z Hotel, was located at 11-01 43rd Avenue in Long Island City. The second hotel property, known as the Cachet Hotel, was located at 510 West 42nd Street in midtown Manhattan.

The plaintiff's CEO, Jonathan Falik (Falik) met with Adam Hochfelder (Hochfelder), MHI's former Managing Director of Real Estate Acquisitions and Development, and Richard Cohn (Cohn), Founding Partner and General Counsel of MHI, at MHI's offices on March 29, 2019, to discuss the plaintiff's retention and scope of work for the hotels. On March 31, 2019, the plaintiff sent MHI a draft engagement letter covering work the plaintiff was to perform, with an initial retainer of $70,000.00, plus success fees and ongoing monthly asset management fees. On April 8, 2019, Falik and other officers of the plaintiff met with Hochfelder and Abraham Merchant (Merchant), MHI's CEO, at the plaintiff's offices to further discuss the plaintiff's retention and scope of work. The same day, the plaintiff updated the draft engagement letter and sent the same to MHI. On May 10, 2019, Hochfelder asked Falik to instead prepare two separate

engagement letters, one for work on the Z Hotel, and one for work on the Cachet Hotel. In connection with such request, Hochfelder sought the division of the $70,000.00 retainer fee between work for the Z Hotel, which would require a $20,000.00 retainer, and work for the Cachet Hotel, which would require a $50,000.00 retainer. Hochfelder further requested a reduction in overall fees proposed and that the engagement letter applicable to work for the Z Hotel (the Z Hotel engagement letter) name 1101-43 Ave Acquisition, LLC (1101-43 Ave Acquisition) as the party to be bound, rather than MHI.

On May 10, 2019, the plaintiff sent two revised engagement letters to Hochfelder, on the terms requested. Specifically, the Z Hotel engagement letter provided for a $20,000.00 retainer and the engagement letter applicable to work for the Cachet Hotel (the Cachet Hotel engagement letter) provided for a $50,000.00 retainer. The engagement letters were otherwise substantively identical. Each provided that the plaintiff would perform services for the Z Hotel and the Cachet Hotel, respectively, in three phases, consisting of (1) "deep dive asset performance and analysis on repositioning/manager replacement" (Phase 1), (2) "management/brand repositioning" (Phase 2), and (3) "ongoing management services" (Phase 3). Retainer fees were to be paid as compensation for Phase 1 work. Phase 2 work was to be compensable by a success fee of $75,000.00, upon the execution of new definitive documents with an operator or brand and an actual take-over of operations. Phase 3 work was to be compensable by a monthly fee of 1.0% of the subject hotel's monthly revenue.

The engagement letters provided that the plaintiff's work on all three phases would commence "upon execution" of the subject engagement letter. Notwithstanding, on May 10, 2019, Hochfelder advised Falik that the plaintiff should commence work immediately and that

both engagement letters would be signed in due course. The plaintiff thus began performing substantial services for both hotels under all three phases of the engagement letters.

On May 19, 2019, Merchant signed the Z Hotel engagement letter on behalf of 1101-43 Ave Acquisition. The plaintiff performed all Phase 1 and Phase 2 services for the Z Hotel and identified a new management company for the Z Hotel. On June 29, 2019, the defendants retained the new management company to take over operations of the Z Hotel. The plaintiff also performed all Phase 3 services for the Z Hotel.

In June 2019, the defendants paid the plaintiff the $20,000.00 retainer fee. On September 2, 2019, the plaintiff invoiced MHI for $75,000.00 owed as a success fee for Phase 2 work, and $15,132.56 owed for Phase 3 work through August 2019. On November 4, 2019, the plaintiff invoiced MHI for an additional $10,582.35 owed for Phase 3 work from September through October 2019. However, the defendants have not paid the plaintiff any amount owed for Phase 2 and Phase 3 work performed in connection with the Z Hotel. Nor have the defendants objected to the amounts provided in the invoices.

The Cachet Hotel engagement letter, which listed the plaintiff and MHI as parties, was never executed. Nonetheless, the plaintiff performed all Phase 1 and Phase 2 services in the Cachet Hotel engagement letter and identified a new management company for the Cachet Hotel. On September 12, 2019, the defendants retained the new management company to take over operations of the Cachet Hotel.

In the course of its work in connection with the Cachet Hotel, the plaintiff learned that the Cachet Hotel was jointly owned by MHI and Roche, and operated through Roche's subsidiary, HG. Accordingly, the plaintiff "communicated and coordinated" all of its work "by and through" MHI, Roche, and HG. On June 20, 2019, Jacob Bracken (Bracken), a

representative of Roche and HG, told Falik that the Cachet Hotel engagement letter would not be signed and that neither the retainer nor a success fee would be paid to the plaintiff.

On March 2, 2020, this action ensued. The plaintiff states claims arising out of the engagement letters for monies due (first cause of action), breach of contract (second and third causes of action), quantum meruit (fourth cause of action), unjust enrichment (fifth cause of action), promissory estoppel (sixth cause of action), account stated (seventh cause of action), and fraudulent misrepresentation (eighth cause of action). The plaintiff also seeks contractual attorney's fees under indemnification provisions included in the engagement letters (ninth cause of action). 1101-43 Ave Acquisition filed an answer on August 31, 2020. The remaining defendants filed the instant motions.

III. DISCUSSION

A. Motions to Dismiss

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court's role is "to determine whether [the] pleadings state a cause of action." 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-152 (2002). To determine whether a claim adequately states a cause of action, the court must "liberally construe" it, accept the facts alleged in it as true, accord it "the benefit of every possible favorable inference" (id. at 152: see Romanello v Intesa Sanpaolo, S.p.A., 22 NY3d 881 [2013]; Simkin v Blank, 19 NY3d 46 [2012]), and determine only whether the facts, as alleged, fit within any cognizable legal theory. See Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994).

On a motion to dismiss based on documentary evidence, dismissal is appropriate 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) (internal citation omitted). A particular paper will qualify as "documentary evidence" only if it satisfies the following criteria: (1) it is "unambiguous"; (2) it is of "undisputed authenticity"; and (3) its contents are "essentially undeniable." See VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC, 171 AD3d 189 (1st Dept. 2019).

MHI contends that the Z Hotel engagement letter, which it submits in support of its motion, shows MHI is not a proper party to this action. Specifically, MHI observes that 1101-43 Ave Acquisition and the plaintiff are the only signatories of the Z Hotel engagement letter. Thus, it claims, MHI cannot be held responsible for 1101-43 Ave Acquisition's obligations as defined in such contract. Additionally, MHI avers it should be awarded expenses and attorney's fees for the plaintiff's purportedly frivolous conduct in naming MHI as a defendant.

Roche and HG contend, like MHI, that the Z Hotel engagement letter excludes them and that they cannot be responsible for payments purportedly owed under that contract. Further, Roche and HG aver that the parties did not reach any oral contract incorporating the terms of the Cachet Hotel engagement letter. Roche and HG also claim that the plaintiff fails to propound any legal theory in the complaint under which they may be held liable.

Since each of the moving defendants seeks dismissal of the complaint in its entirety, the court addresses each cause of action in turn.

i. First Cause of Action

The plaintiff's first cause of action, entitled "monies due", seeks compensation due under the engagement letters, to which the plaintiff is a party. Thus, the first cause of action is

duplicative in its entirety of the plaintiff's second and third causes of action, seeking to recover in breach of contract. The first cause of action is dismissed.

ii. Second Cause of Action

The second cause of action sounds in breach of the Z Hotel engagement letter as against all defendants. The elements of a cause of action for breach of contract are "(1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendant's breach of that contract, and (4) resulting damages. See Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010). No party disputes that the Z Hotel engagement letter constituted an offer, and that such offer was accepted, and an enforceable contract formed, by Merchant's execution of the letter on behalf of 1101-43 Ave Acquisition. Thus, the plaintiff pleads a breach of contract claim against 1101-43 Ave Acquisition arising out of the Z Hotel engagement letter.

The plaintiff further claims that MHI, Roche, and HG, whom the plaintiff identifies as co-owners of the Z Hotel, are bound by the Z Hotel engagement letter under a veil piercing theory. Ordinarily, a corporation exists independently of its owners, as a separate legal entity, and its owners are not liable for the actions of the corporation. See Matter of Morris v New York State Dept. of Taxation & Fin., 82 NY2d 135 (1993). The doctrine of piercing the corporate veil is a limitation to this rule, "typically employed by a third party seeking to go behind the corporate existence in order to circumvent the limited liability of the owners and to hold them liable for some underlying corporate obligation." Id. "Piercing the corporate veil requires a showing that (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury." Ciavarella v Zagaglia, 132 AD3d 608, 608-609 (1st Dept. 2015) (quotation and citation omitted); see also Fantazia Int'l Corp. v CPL Furs New

York, Inc., 67 AD3d 511 (1st Dept. 2009). "[U]ndercapitalization of a corporation and the corporation's owner's personal use of corporate funds, which results in the corporation's being unable to pay a judgment, constitute wrongdoing and injury sufficient to satisfy the second prong of [Matter of Morris v New York State Dept. of Taxation & Fin., supra.]" Ciavarella v Zagaglia, supra at 609.

Here, the plaintiff contends in the complaint that 1101-43 Ave Acquisition is an investment subsidiary of MHI. The plaintiff further avers that 1101-43 Ave Acquisition was named in the Z Hotel engagement letter at the request of Hochfelder, who held himself out as MHI's agent, and that the plaintiff communicated with representatives of MHI in the course of its negotiations and work related to the Z Hotel. The Z Hotel engagement letter, submitted as documentary evidence in support of the moving defendants' applications, is addressed to Merchant, MHI's CEO, "care of" MHI, and references 1101-43 Ave Acquisition by the shorthand "Merchants" throughout.

In its opposition papers, the plaintiff supplements its allegations and the information in the Z Hotel engagement letter with affidavits sworn to by Falik. The court may properly consider the affidavits on the instant motions to preserve the claims in the complaint. See 511 West 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-52 (2002); Cron v Hargro Fabrics, Inc., 91 NY2d 362, 366 (1998). Falik avers that 1101-43 Ave Acquisition was a mere shell corporation, with no capital or assets of its own, through which MHI exercised control over the daily operations of the Z Hotel and the plaintiff's provision of services to the Z Hotel. Falik further explains that all its communications and representations concerning the Z Hotel were with MHI and MHI's principals and employees, in the name of MHI; that the executed agreement was emailed to him by Cohn using his MHI business address and MHI signature

block; that all email communications regarding the Z Hotel were made through Hochfelder, Merchant, and Cohn using MHI business addresses; that he regularly met with and consulted with Hochfelder, Merchant, and other MHI employees in the course of the plaintiff's work for the hotels, sometimes at MHI's offices; that MHI represented on its website, in offering memoranda, and elsewhere that it owned the hotels; and that the plaintiff addressed invoices for its work in connection with the Z Hotel to "Richard Cohn, Merchants Hospitality," without receiving any objection from Cohn or anyone else at MHI.

The plaintiff's assertions in the complaint and its submissions in opposition to the instant motions suffice, at this stage in the proceedings and under the liberal standard the court is bound to apply, to state a cause of action against MHI arising out of the Z Hotel engagement letter. Taken together, the plaintiff's allegations amount to a claim that MHI exercised complete domination and control over 1101-43 Ave Acquisition, an undercapitalized shell corporation, thereby abusing the privilege of doing business in the corporate form and perpetrating a fraud against the plaintiff.

MHI submits no documentary evidence that definitively refutes the plaintiff's claims in this regard. While the court is required to consider affidavits submitted by a plaintiff to preserve inartfully pleaded, but potentially meritorious claims, affidavits submitted by a defendant in support of a motion pursuant to CPLR 3211(a)(1) are not entitled to the same deference. To be sure, affidavits such as those submitted by MHI here, consisting of party denials of the plaintiff's factual allegations, do not constitute documentary evidence that may be considered in support of an application for dismissal. See Bou v Llamoza, 173 AD3d 575, 575 (1st Dept. 2019); Art & Fashion Group Corp. v Cyclops Prod. Inc., 120 AD3d 436, 438 (1st Dept. 2014). Even if the court were to convert MHI's motion to one for summary judgment, the motion would necessarily

be denied as premature. It is plain that only MHI and its co-defendants possess the information that might support the plaintiff's veil piercing allegations. To deny the plaintiff leave to seek such information in the course of discovery upon the defendants' bare assertions that, *inter alia*, the corporate form was not abused and Hochfelder was not an employee of MHI, as he is alleged to have represented, would be improper. See CPLR 3212(f); Belziti v Langford, 105 AD3d 649 (1st Dept. 2013); Blech v West Park Presbyterian Church, 97 AD3d 443 (1st Dept. 2012).

The plaintiff's allegations in support of piercing the corporate veil as against Roche and HG with respect to the Z Hotel engagement letter are far thinner than those in support of its claim against MHI. The plaintiff asserts in the complaint only that Roche co-owns the Z Hotel, with MHI, that Roche is a co-owner of 1101-43 Ave Acquisition, and that HG is a Roche subsidiary through which Roche provides operational oversight to its U.S. assets. The plaintiff's submissions in opposition to Roche and HG's motion do little to supplement the complaint, at least with regard to the Z Hotel. Since mere co-ownership of a contracting party, without more, is insufficient to plead contractual liability under a veil piercing theory, the second cause of action is dismissed as against Roche and HG.

iii. Third Cause of Action

The third cause of action sounds in breach of the unexecuted Cachet Hotel engagement letter as against all defendants. That the written agreement was never signed is not dispositive of the plaintiff's claim. "To establish the existence of an enforceable agreement, a plaintiff must establish an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound." Ostojic v Life Medical Technologies, Inc., 201 AD3d 522, 523 (1st Dept. 2022) (citing Kowalchuk v Stroup, 61 AD3d 118, 121 [1st Dept. 2009]). Further, the parties' manifestation of mutual assent must be "sufficiently definite to assure that the parties are truly in agreement with

respect to all material terms." Stonehill Capital Management, LLC v Bank of the West, 28 NY3d 439, 448 (2016) (internal citations omitted). "While an offer may be revoked at any time before acceptance, a contract is created at the moment that there is acceptance of the offer, and in order for an acceptance to be effective, it must comply with the terms of the offer and be clear, unambiguous, and unequivocal." Ostojic v Life Medical Technologies, Inc., supra at 523 (citing Kowalchuk v Stroup, supra at 122). Thus, objective evidence establishing the elements of an enforceable agreement, including acceptance of an offer and intent to be bound, will suffice to render contractual obligations binding "unless the parties have agreed that their contract will not be binding until executed by both sides." Ostojic v Life Medical Technologies, Inc., supra at 523 (citing Kowalchuk v Stroup, supra at 125).

In its complaint, the plaintiff avers that it sent the Cachet Hotel engagement letter, which named the plaintiff and MHI as the contracting parties, to Hochfelder on May 10, 2019. Hochfelder responded that the letter would be signed and that the plaintiff should commence provision of its services immediately. The plaintiff further avers that it performed pursuant to the Cachet Hotel engagement letter, including by identifying a new management company for the Cachet Hotel, which was ultimately retained by the defendants to manage the Cachet Hotel. The plaintiff's allegations are sufficient to state a direct breach of contract claim against MHI.

MHI fails to present any argument to the contrary in its moving papers. While MHI claims on reply that the plaintiff "has generally failed to oppose MHI's arguments mandating dismissal relating to the Cachet Hotel," a review of MHI's submissions does not reveal any such arguments. MHI's only cursory reference to the Cachet Hotel is Merchant's self-serving statement in his affidavit that MHI has "no ownership interest" in either the Z Hotel or the Cachet Hotel. To be sure, all of the moving defendants are eager to disclaim legal ownership of

the hotels, without providing more information. The court notes that the moving defendants, by all appearances, were intimately involved in the business operations of the hotels. Presumably, they know the identity of the hotels' legal owner. Nonetheless, for undisclosed reasons, they decline to name the owner. In any event, a bare denial of the plaintiff's allegations in affidavits improperly submitted on a pre-answer motion pursuant to CPLR 3211 does not establish a basis for dismissal of the third cause of action as against MHI.

With regard to its breach of contract claim against Roche and HG, the plaintiff asserts in the complaint that Roche co-owned the Cachet Hotel with Merchants, that HG operated the Cachet Hotel, and that representatives of Roche and HG, including Bracken, communicated with the plaintiff regarding its work pursuant to the Cachet Hotel engagement letter. In his affidavit in opposition to Roche and HG's motion, Falik further avers that he communicated with Bracken, whom he identifies as HG's CEO and Robert Roche (Robert), whom he identifies as Roche's president, throughout May and June 2019. According to Falik, Bracken and Roche received the Cachet Hotel engagement letter and responded that they would sign it and thanked the plaintiff for its work on various occasions. Bracken ultimately sent an email to the plaintiff purporting to decline its services in connection with the Cachet Hotel. In all correspondence described by the plaintiff, Hochfelder and/or MHI personnel were included.

The plaintiff's allegations do not state a direct breach of contract claim against Roche and HG inasmuch as they fail to plead that there was any offer made to Roche and HG that they could accept by words or conduct. The Cachet Hotel engagement letter, which the plaintiff claims controls, names only MHI as the party to be bound. The plaintiff identifies no other offer, oral or otherwise, that it made. Moreover, the plaintiff fails to plead the elements requisite to pierce the corporate veil as against Roche and HG. Unlike 1101-43 Ave Acquisition, there has

been no allegation that MHI is a shell entity dominated by any other defendant to perpetrate a fraud on the plaintiff. Accordingly, the third cause of action is dismissed as against Roche and HG.

iv. Fourth, Fifth, and Sixth Cause of Action

As a general rule, where a plaintiff seeks to recover under an express agreement, no cause of action lies to recover in quasi contract. See Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382 (1987); JDF Realty, Inc. v Sartiano, 93 AD3d 410 (1st Dept. 2012). However, where the validity or scope of the contract is in dispute, a plaintiff may plead a claim under a quasi contract theory, such as quantum meruit, unjust enrichment, or promissory estoppel, in the alternative. See Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., supra; Henry Loheac, P.C. v Children's Corner Learning Center, 51 AD3d 476 (1st Dept. 2008); ME Corp. S.A. v Cohen Brothers LLC, 292 AD2d 183 (1st Dept. 2002). That is, "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, plaintiff may proceed upon a theory of [quasi contract] and will not be required to elect his or her remedies (Joseph Sternberg, Inc. v Wolber 36th St. Assocs., 187 AD2d 225)." American Telephone & Utility Consultants, Inc. v Beth Israel Med. Ctr., 307 AD2d 834, 835 (1st Dept. 2003).

Here, the plaintiff sues upon alleged written and oral engagement agreements it entered into with certain of the defendants. The moving defendants do not challenge the validity of the Z Hotel engagement letter. Rather, they assert that the Z Hotel engagement letter is not enforceable as against them because they are not signatories. Under these circumstances, no quasi contract claim may lie. Insofar as the plaintiff's quasi-contractual claims are asserted as again MHI in relation to the Z Hotel engagement letter, they duplicate the second cause of action. Insofar as they are asserted as against Roche and HG, the existence of an express contact

covering the subject matter of the claims bars such claims from being asserted against third party nonsignatories. See J.T. Magen & Company, Inc. v Nissan North America, Inc., 178 AD3d 466, 467 (1st Dept. 2019); Randall's Island Aquatic Leisure, LLC v City of New York, 92 AD3d 463, 464 (1st Dept. 2012).

However, the moving defendants do challenge the validity of the Cachet Hotel engagement letter, which the plaintiff contends was agreed to orally. Specifically, the moving defendants aver that there was no meeting of the minds with respect to the Cachet Hotel engagement letter because it was ultimately rejected. In light of the foregoing, the plaintiff's quasi-contract claims based on the Cachet Hotel engagement letter are not subject to dismissal as duplicative of the plaintiff's breach of contract claims. While a subsequent legal determination that the Cachet Hotel engagement letter is a valid and binding agreement would require dismissal of all of the plaintiff's remaining quasi-contract claims, including those sustained as against Roche, such determination cannot be made at this juncture.

The court turns to the individual quasi-contract claims in the complaint. The fourth cause of action sounds in quantum meruit. A plaintiff seeking to recover under a cause of action sounding in quantum meruit must demonstrate (1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services allegedly rendered. Caribbean Direct, Inc. v Dubset, LLC, 100 AD3d 510, 511 (1st Dept. 2012). The plaintiff's allegations are sufficient to state a claim under a quantum meruit theory as against MHI inasmuch as the plaintiff alleges that it performed services in connection with the Cachet Hotel with the expectation of compensation and that MHI, the alleged owner of the Cachet Hotel, accepted such services without making any payment to the plaintiff. The plaintiff also states a

claim as against Roche. Specifically, the plaintiff avers that Roche was a co-owner of the Cachet Hotel, that its agents were aware of the work the plaintiff was performing and thanked the plaintiff for the same, and that Roche benefited from the plaintiff's labors without compensating the plaintiff. The plaintiff does not state a claim against HG, which is merely alleged to be the operator of the Cachet Hotel, as a subsidiary of Roche.

The fifth cause of action sounds in unjust enrichment. A cognizable claim for unjust enrichment requires a plaintiff to demonstrate that (i) the other party was enriched, (ii) at that party's expense, and (iii) "it is against equity and good conscience to permit the [other party] to retain what is sought to be recovered." Paramount Film Distrib. Corp. v State, 30 NY2d 415, 421 (1972) (citations omitted). The plaintiff states a claim for unjust enrichment against MHI and Roche inasmuch as it pleads that, as owners of the Cachet Hotel, they were enriched by accepting services the plaintiff rendered for the benefit of the Cachet Hotel without paying the plaintiff. The plaintiff does not state a claim against HG, for the reasons previously described.

The sixth cause of action sounds in promissory estoppel. "To establish a viable cause of action sounding in promissory estoppel, a plaintiff must allege (1) a clear and unambiguous promise, (2) reasonable and foreseeable reliance by the party to whom the promise is made, and (3) an injury sustained in reliance on the promise." Rogers v Town of Islip, 230 AD2d 727, 727 (2nd Dept. 1996); see Castellotti v Free, 138 AD3d 198, 2014 (1st Dept. 2016). The plaintiff states a claim for promissory estoppel as against MHI inasmuch as it pleads that MHI agreed to accept the plaintiff's services in accordance with certain payment terms described in the Cachet Hotel engagement letter, and that the plaintiff performed in reliance on such promise. However, the plaintiff does not state a claim against Roche or HG, since it does not aver that Roche or HG similarly indicated that they would personally make the payments described in the letter.

v. Seventh Cause of Action

To assert a claim for damages under an account stated theory, the plaintiff must allege that the defendant "received [and] retained without objection" invoices sent by the plaintiff. Scheichet & Davis, P.C. v Nohavicka, 93 AD3d at 478 (1st Dept. 2012), *quoting* Gamiel v Curtis & Reiss-Curtis, P.C., 60 AD3d 473, 474 (1st Dept. 2009). A cause of action for account stated may be pleaded by alleging either partial payment or retention of bills without objection. See Morrison Cohen Singer & Weinstein, LLP v Waters, 13 AD3d 51 (1st Dept. 2004); M&R Constr. Corp. v IDI Constr. Co., 4 AD3d 130 (1st Dept. 2004).

The plaintiff has sufficiently stated an account stated claim with respect to the invoices it sent to MHI in September and November of 2019 for services rendered. The plaintiff avers in the complaint that it invoiced the defendants in connection with amounts due under the Z Hotel engagement letter totaling $100,714.91, that no defendant objected to the sum, and that no amount thereof has been paid.

The invoices submitted by the plaintiff in opposition to the defendants' motions establish that they are addressed only to Cohn and "Merchants Hospitality." Accordingly, the seventh cause of action may be pleaded only as against MHI. It is dismissed as against Roche and HG.

vi. Eighth Cause of Action

"It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated." Dormitory Authority v Samson Construction Co., 30 NY3d 704 (2018) (citation omitted). However, the Court of Appeals has also recognized that "a contracting party may be charged with a separate tort liability arising from a breach of a duty distinct from, or in addition to, the breach of contract." North Shore Bottling Co. v Schmidt & Sons, 22 NY2d 171 (1968); see also Sommer v

Federal Signal Corp., 79 NY2d 540 (1992). Thus, in actions involving parties to a contract, a plaintiff states a cause of action sounding in fraudulent inducement where he pleads that the defendant misrepresented a present fact extraneous to the contract with knowledge of its falsity, the plaintiff justifiably relied on the misrepresentation, and the plaintiff suffered damages. See The Hawthorne Group, LLC v RRE Ventures, 7 AD3d 320 (1st Dept. 2004); First Bank of Americas v Motor Car Funding, Inc., 257 AD2d 287 (1st Dept. 1999); see generally Eurycleia Partners, LP v Seward & Kissel, LLP, 12 NY3d 553 (2009).

Here, the plaintiff's only basis for its fraud claim is that Hochfelder's representation that "an agreement was reached" on the terms set forth in the engagement letters was materially false. Put differently, the plaintiff claims that Hochfelder misrepresented the defendants' intention to pay the plaintiff for its work in accordance with the engagement letters. This is tantamount to a promissory statement of future performance. It does not amount to a misrepresentation of a present fact extraneous to the contract, as required to state a separate cause of action based on a fraud in the inducement. See Glanzer v Kelin & Bloom, 281 AD2d 371, 371-72 (1st Dept. 2001).

Accordingly, the eighth cause of action is dismissed as against the moving defendants.

vii. Ninth Cause of Action

To the extent that the plaintiff seeks attorney's fees under the indemnification clauses of the Z Hotel engagement letter and the Cachet Hotel engagement letter, its claims are contractual in nature and may be pleaded only against parties bound by the engagement letters. As discussed above, the plaintiff may maintain its breach of contract claims against MHI and 1101-43 Ave Acquisition only. The ninth cause of action is thus dismissed as against Roche and HG.

B. Cross-Motion to Amend

The plaintiff's cross-motion to amend the caption to correctly name MHI as a defendant is granted, without opposition. The plaintiff merely seeks to change Merchants Hospitality, LLC to Merchants Capital, Inc. It is well-settled that where, as here, pleadings have been served under a misnomer upon the party which the plaintiff intended as a defendant, and the misnomer could not possibly have misled the defendant as to who it was that the plaintiff was in fact seeking to sue, the court should allow an amendment to correct the error. See CPLR 305(c); 3025(b); Tsoumpas 1105 Lexington Equities, LLC v 1109 Lexington Avenue LLC, 189 AD3d 524 (1st Dept. 2020); Duncan v Emerald Expositions, LLC, 186 AD3d 1321 (2nd Dept. 2020); National Refund and Utility Servs. v Plummer Realty Corp., 22 AD3d 430 (1st Dept. 2005).

IV. CONCLUSION

Accordingly, it is

ORDERED that the motion of Merchants Hospitality, Inc., incorrectly sued herein as Merchants Hospitality, LLC, to dismiss the complaint as against it pursuant to CPLR 3211(a)(1) and (a)(7) (SEQ 001) is granted to the extent that the first and eighth causes of action are dismissed in their entirety as against Merchants Hospitality, Inc., and the fourth, fifth, and sixth causes of action are dismissed to the extent that they arise out of work the plaintiff performed for the Z Hotel as against Merchants Hospitality, Inc., and the motion is otherwise denied; and it is further

ORDERED that the cross-motion of the plaintiff to amend the caption pursuant to CPLR 3025(b) and CPLR 305(c) to reflect the correct name of defendant Merchants Hospitality, Inc.,

incorrectly named in the original complaint as Merchants Hospitality, LLC, (SEQ 001 X-MOT) is granted, without opposition; and it is further

ORDERED that upon service of a copy of this order, the Clerk is directed to amend the caption and the file to reflect the correction, so that the caption reads as follows:

JF CAPITAL ADVISORS, LLC

v

MERCHANTS HOSPITALITY, INC.,
1101-43 AVE ACQUISITION LLC,
ROCHE ENTERPRISES LLC, and
HG MANAGEMENT, LLC

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and it is further

ORDERED that the motion of the defendants Roche Enterprises, LLC, and HG Management, LLC to dismiss the complaint as against them pursuant to CPLR 3211(a)(1) and (a)(7) (SEQ 002) is granted to the extent that the complaint is dismissed in its entirety as against HG Management, LLC; the first, second, third, sixth, seventh, eighth, and ninth causes of action are dismissed in their entirety as against Roche Enterprises, LLC; and the fourth and fifth causes of action are dismissed to the extent that they arise out of work the plaintiff performed for the Z Hotel as against Roche Enterprises, LLC, and the motion is otherwise denied; and it is further

ORDERED that defendants Merchants Hospitality, Inc., and Roche Enterprises, LLC, are directed to serve answers to the remainder of the complaint within 20 days after service of a copy of this order with notice of entry.

This constitutes the Decision and Order of the court.

DATED: December 19, 2022

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON