

**Conversationalist v HXMXN, Inc.**

2023 NY Slip Op 31268(U)

April 19, 2023

Supreme Court, New York County

Docket Number: Index No. 653288/2022

Judge: Lyle E. Frank

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. LYLE E. FRANK PART 11M

*Justice*

-----X

THE CONVERSATIONALIST,

Plaintiff,

- v -

HXMXN, INC. D/B/A GREY HORSE HOLDINGS, GREY  
HORSE

Defendant.

-----X

INDEX NO. 653288/2022

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18

were read on this motion to/for DISMISS.

Upon the foregoing documents, Defendant's motion to dismiss is granted in part, and the cross-motion to amend is granted.<sup>12</sup>

*Background*

In June 2021, Plaintiff hired Defendant to perform consulting services. The parties entered into three different contracts. The Initial Contract was commenced on June 15, 2021, which included three (3) monthly payments of \$10,000.00 for Initial Term Consulting Services and Deliverables. While Plaintiff made the three payments, Defendant allegedly did not complete its performance and represented to Plaintiff that the Initial Term Incomplete Services and Deliverables were in progress.

<sup>1</sup> The Court would like to thank Sarah Silbowitz for her assistance in this matter.

<sup>2</sup> The Defendant does not oppose the filing of the amended complaint, so the cross-motion is granted without opposition. The Court therefore has reviewed the amended complaint for sufficiency purposes without objection indicated by defendant.

In September 2021, the parties entered into the Second Contract with two parts. First, Plaintiff was to make monthly payments of \$9,000.000 for Defendant's performance of Second Term Development Deliverables. Second, Plaintiff was to make monthly payments of \$5,000.00 in exchange for Defendant's performance of Second Term Social Media Services and Deliverables. While Plaintiff claims to have made four monthly payments for each part of the Second Contract, Defendant allegedly did not complete its performance on either part of the contract, and represented to Plaintiff that both parts were in progress.

In January 2022, the parties entered into a Third Contract to extend their contractual relationship to permit the Defendant the opportunity to perform Incomplete Second Term Services and Deliverables, for monthly fee of \$5,000.000 and other services, for monthly fee of \$9,000.00. While Plaintiff made three monthly payments, Defendant did not complete its performance. The Defendant agreed to plan a dinner concerning the Plaintiff's board recruitment efforts. Plaintiff informed Defendant that their contractual relationship will conclude at the end of the Third Contract. Defendant abandoned the dinner plan and Plaintiff was forced to cancel altogether.

Plaintiff brings this instant action alleging five causes of action, including 1) breach of contract, 2) unjust enrichment, 3) monies had and received, 4) fraud, deceit, misrepresentation, and 5) constructive fraud. Pursuant to CPLR § 3211(a), Defendant moves to dismiss the second, third, fourth, and fifth causes of action. Plaintiff opposes the instant motion, except that plaintiff concedes that the fifth cause of action should be dismissed.

### *Discussion*

It is well-settled that on a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the pleading is to be liberally construed, accepting all the facts as alleged

in the pleading to be true and giving the plaintiff the benefit of every possible inference. *See Avgush v Town of Yorktown*, 303 A.D.2d 340, 755 N.Y.S.2d 647, 2003 N.Y. App. Div. LEXIS 2102 (2d Dep't 2003); *Bernberg v Health Mgmt. Sys.*, 303 A.D.2d 348, 756 N.Y.S.2d 96, 2003 N.Y. App. Div. LEXIS 2110 (2d Dep't 2003).

Where a contract exists but allegedly fails to cover the entire scope of the parties' dispute, quasi contract causes of action may co-exist. *See, e.g., Smith v. Kirkpatrick*, 305 N.Y. 66, 73-74 (1953). Accepting all facts as alleged and in the light most favorable to the Plaintiff, the Court finds that there is a question of fact as to whether the contract at issue covers the entire scope of the parties' dispute, specifically whether a dinner held fell under the auspices of the third contract entered into between the parties. At this very early stage of the litigation and giving Plaintiff every favorable inference, the second and third cause of action are quasi contract claims and must not be dismissed.

In New York, fraud claims require a misrepresentation of a material fact which is known to be false by defendant for the purposes of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation, and injury. *Spector v. Wendy*, 63 A.D.3d 820, 821 (2009). Fraud claims must be pled with particularity. CPLR § 3016. Fraud claims which simply allege the same conduct that gave rise to a breach of contract are impermissible. *Jakes-Johnson v. Gottlieb*, 200 A.D.3d 1679, 1680 (2021). In the light most favorable to the Plaintiff, and accepting all facts as alleged, Plaintiff's fraud claim does not allege the same conduct that gave rise to the breach of contract claim. Plaintiff's fraud claim, unlike the breach of contract claim, alleges a misrepresentation that the incomplete work was not actually in progress and/or soon to be performed as Defendant had represented. Plaintiff alleges this misrepresentation is material because it led Plaintiff to extend their contractual relationship with

Defendant. This material fact is alleged to have been known by Defendant and for the purpose of deceiving Plaintiff to extend the contractual relationship. The allegations are specific as to who Plaintiff alleges relied on the misrepresentation and the documents that were misrepresented, which as a result allegedly caused Plaintiff injury in the amount of \$77,450.00, plus other costs. Therefore, giving Plaintiff every favorable inference, Plaintiff's fourth cause of action is not dismissed.

Plaintiff withdrew its fifth cause of action in its opposition to the instant motion to dismiss. Therefore, the Plaintiff's fifth cause of action is dismissed.

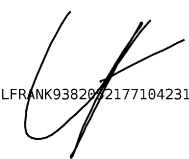
It is therefore

ORDERED that the Defendant's motion to dismiss is granted in part, in that the fifth cause of action is dismissed, and the motion to dismiss is otherwise denied; and it is further

ORDERED that the plaintiff's motion for leave to amend the complaint herein is granted, and the amended complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the defendant shall serve an answer to the amended complaint within 20 days from the date of said service.

4/19/2023  
DATE

  
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LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED  
 GRANTED  DENIED  
 SETTLE ORDER  
 INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
 GRANTED IN PART  OTHER  
 SUBMIT ORDER  
 FIDUCIARY APPOINTMENT  REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: