

**Kuklo v Studio Kestrel LLC**

2023 NY Slip Op 31634(U)

May 15, 2023

Supreme Court, New York County

Docket Number: Index No. 656979/2021

Judge: Lyle E. Frank

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

**PRESENT:** HON. LYLE E. FRANK **PART** **11M**

*Justice*

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GWEN KUKLO, TIM KUKLO

Plaintiff,

- v -

STUDIO KESTREL LLC, PAUL DE ANDRADE,

Defendant.

-----X

**INDEX NO.** 656979/2021

**MOTION DATE** 03/07/2022

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 17, 18, 19, 20, 21, 22

were read on this motion to/for DISMISS.

This action arises out of allegations that defendants breached a contract to provide interior design services. Defendants now move to dismiss the complaint pursuant to CPLR § 3211(a)(7). Plaintiffs oppose the instant motion. For the reasons set forth below, defendants' motion to dismiss is granted in part.

Background and Factual Allegations<sup>1</sup>

Plaintiffs contracted with Studio Kestrel LLC (Kestrel) to provide design and general oversight services in connection with a renovation project located at 130 William Street, Unit 34B New York, NY 10038. Plaintiffs and defendant Kestrel executed a written agreement that provided the services included "selecting and/or advising the Kuklos as to selecting [...] furniture, other furnishings, stone, and a custom fireplace."

<sup>1</sup> According to the amended complaint, NYSCEF Doc. 16.

Plaintiffs allege that defendants, in breach of the contract, failed to provide adequate services, abandoned the renovation project, failed to return the remainder of the retainer agreement, failed to order the correct items, and failed to properly pay vendors.

### Discussion

When considering a motion to dismiss based upon CPLR § 3211(a)(7), the court must accept the alleged facts as true, accord the plaintiff the benefit of every possible favorable inference, and determine whether the facts alleged fit into any cognizable legal theory. *See Leon v Martinez*, 84 NY2d 83 [1994].

Preliminarily, the Court finds that the complaint does not sufficiently state a cause of action as against defendant Paul De Andrade. "Generally, a plaintiff seeking to pierce the corporate veil must show 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" (*Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 47 [2018] quoting *Conason v Megan Holding, LLC*, 25 NY3d 1, 18 [2015]).

The Court finds that plaintiff's complaint is absent of any allegations of the type of conduct necessary to pierce the corporate veil. As such there is no basis for De Andrade, who is alleged to be the sole member of Kestrel, to be liable for its alleged breach. In opposition, plaintiffs admit that the breach of contract cause of action is pled only as to defendant Kestrel, however, does not address how the amended complaint is adequate as against De Andrade for any other causes of action in the amended complaint. Accordingly, the amended complaint is dismissed in its entirety as against defendant Paul De Andrade.

*First Cause of Action: Breach of Contract*

It is well established to recover damages for breach of contract, plaintiff must show (1) the existence of a valid, enforceable contract between the parties (2) the plaintiff's full performance thereunder (3) the defendant's breach of the contract and (4) resulting damages. (*see Detringo v South Island Family Medical LLC*, 158 AD3d 609 [2nd Dept 2018]).

Contrary to defendant's contention, plaintiffs have sufficiently alleged a breach of contract. As outlined above, the amended complaint sufficiently alleges a contract, plaintiffs' payment pursuant to the contract, the breach of the contract by defendant by abandoning the renovation, among other conduct, and plaintiffs' damages. Accordingly, the portion of the motion that seeks dismissal of the breach of contract claim is denied,

*Second Cause of Action: Fraud*

Plaintiffs amended complaint alleges that defendant's alleged incorrect invoices and plaintiffs' payment of those invoices constitute fraud. In opposition, defendant contends that those claims are duplicative of the breach of contract claims and are also pled inadequately.

"To establish fraud, a plaintiff must show 'a misrepresentation or a material omission of fact which was false and known to be false by [the] defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury.'" *Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 151 AD3d 83 at 85 [1st Dept 2017]. "The element of justifiable reliance is 'essential' to any fraud claim" [internal citations omitted]. *Id.* Further, CPLR § 3016(b) provides that when a cause of action is based upon fraud "the circumstances constituting the wrong shall be stated in detail."

Here, the Court finds that plaintiffs' second cause of action is not pled with specificity as required by CPLR § 3016(b). Moreover, the Court finds that this cause of action is duplicative of the breach of contract cause of action. The Court agrees with defendant, that the allegations

of being overcharged for costs and expenses as well as the alleged charging for services not rendered is duplicative of the breach of contract claim. The amended complaint's second cause of action contains conclusory language and lacks factual specificity. It is therefore insufficient and is hereby dismissed.

*Third Cause of Action: Unjust Enrichment &*

*Fourth Cause of Action: Moneys had and received*

Defendant argues that the unjust enrichment claims must be dismissed because as plaintiffs' third and fourth causes of action are duplicative of the breach of contract claim.

It is well established that "it is impermissible... to seek damages in an action sounding in quasi contract where the suing party has fully performed on a valid written agreement, the existence of which is undisputed, and the scope of which clearly covers the dispute between the parties." *Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 389 [1987]; *see also*, *e.g., IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009].

Here, the Court finds that the conduct alleged arises from the same conduct that is governed by the agreement between the parties. In opposition, plaintiff does not contend that there is some other transaction between the parties that serve as the basis for the quasi-contractual claims, rather they aver that they are pled in the alternative to the extent that the contract is disputed or unenforceable. As this is a pre-answer motion to dismiss, plaintiff is entitled to plead in the alternative as defendant may very well deny the existence of a contract or its enforceability. Consequently, the fourth and fifth causes of action survive the instant motion to dismiss.

*Fifth Cause of Action: Violation of N.Y. Gen. Bus. L. § 349*

Plaintiffs seeking to claim the benefit General Business Law §349 must charge conduct of the defendant that is consumer-oriented (*Oswego Laborers' Local 214 Pension Fund v Mar. Midland Bank, N.A.*, 85 NY2d 20, 25 [1995]). The Court of Appeals has consistently held that “private contract disputes unique to the parties... would not fall within the ambit of GBL §349” (*id.*; *New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 320 [1995]).

The Court finds that plaintiffs have failed to sufficiently plead its fifth cause of action. The Court is not persuaded that the allegation that defendant alleged its conduct was industry practice is sufficient for the purposes of the GBL and not limited to the alleged contract between the parties. The Court has reviewed the parties remaining contentions and finds them unavailing. Accordingly, it is hereby

ADJUDGED that defendants’ motion to dismiss is granted in part; and it is further

ORDERED that the amended complaint is dismissed in its entirety as against defendant Paul De Andrade; and it is further

ORDERED that the second and fifth causes of action are hereby dismissed.

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5/15/2023

DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE