

**Pavarini McGovern, LLC v HFZ KIK 30th St.  
Owner, LLC**

2023 NY Slip Op 32045(U)

June 20, 2023

Supreme Court, New York County

Docket Number: Index No. 160556/2020

Judge: Lisa S. Headley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: PART 28M

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PAVARINI MCGOVERN, LLC,

Plaintiff,

- v -

HFZ KIK 30TH STREET OWNER, LLC, HFZ KIK 30TH STREET, LLC, OTERA CAPITAL INVESTMENTS IX, INC., EMPIRE STATE LAYOUT INC., BSI SERVICES AND SOLUTIONS (NYC) INC., ZIEL FELDMAN, NIR MEIR, JOHN SHANNON, ANTHONY MORRONE, JOHN DOE, RICHARD ROE, XYZ CORP. 1 THROUGH XYZ CORP. 10, BETONS PREFABRIQUES DU LAC INC., 9229-0188 QUEBEC INC., ACHESON DOYLE PARTNERS, ARCHITECTS, P.C., B.I.G. ARCHITECTURE D.P.C., CODE CONSULTANTS PROFESSIONAL ENGINEERS, P.C., DESIMONE CONSULTING ENGINEERING, D.P.C., FABBRICA LLC, GILLMAN CONSULTING INC., KRYPTON ENGINEERING, PLLC, LANGAN ENGINEERING, ENVIRONMENTAL, SURVEYING, LANDSCAPE ARCHITECTURE AND GEOLOGY, D.P.C., LINDEGRIFFITH CONSTRUCTION CO., MG ENGINEERING D.P.C., MGE UNIFIED TECHNOLOGIES CORP., TILLOTSON DESIGN ASSOCIATES, INC., ENVIRONMENTAL WASTE MINIMIZATION, INC., ROSCHMANN STEEL & GLASS CONSTRUCTIONS INC., HOWARD I. SHAPIRO & ASSOCIATES CONSULTING ENGINEERS, P.C., DELTA TESTING, INC., SALTUS LLC, TOP HAT EXTERM1NATING CORP., PSI AGENCY INC., VBGO COLLEGIATE TOWER LLC,

Defendant.

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INDEX NO. 160556/2020

MOTION DATE 05/25/2022

MOTION SEQ. NO. 003

**DECISION + ORDER ON MOTION**

HON. LISA S. HEADLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 317, 318, 319, 320, 321, 322, 326, 327, 328, 329, 330, 331, 332, 333, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356

were read on this motion to/for DISMISSAL.

Plaintiff, Pavarini McGovern, LLC, (“Pavarini/Plaintiff”), claims in this action, *inter alia*, that defendants, HFZ KIK 30th Street Owner LLC (“KIK Owner”) and HFZ KIK 30th Street LLC (“KIK”), failed to pay for construction work it performed at a construction/development project

(the "Project") located at 11 West 29th Street, 9 West 29th Street and 3 West 29th Street in New York, New York (Block 831, Lots 28, 29 and 30), (hereinafter the "Subject Property").

Defendant, VBGO Collegiate Tower LLC ("VBGO") filed a motion to intervene, which this Court granted on April 22, 2022. (*See, Motion #002, NYSCEF Doc. No. 269*). The intervening defendant, VGBO, filed a counterclaim seeking an amount of \$20,440,524.34, and VGBO has alleged it is a mezzanine lender to the project and that VBGO advanced \$95,000,000 in funds to the mezzanine borrower, defendant KIK, in reliance on executed waivers of mechanic's liens and pursuant to a loan agreement. Defendant VBGO further asserts to have a collateral pledge of equity in the interest and mortgage to defendant KIK. Defendant VBGO alleges the mezzanine borrower, KIK, was required to use the loan funds to pay plaintiff Pavarini and various other subcontractors that work on the improvements to the Subject Property, including co-defendant Linde-Griffith. Additionally, defendant VBGO alleged that the waivers of mechanic's lien that were signed by plaintiff, Pavarini, and co-defendant Linde-Griffith were intended to induce the mezzanine borrower, KIK, to release loan funds, which were materially false and fraudulent.

In the instant motion before the Court, the movant-plaintiff Pavarini is seeking an Order, pursuant to *CPLR §§ 3211(a)(1) and 3211 (a)(7)*, to dismiss the intervening defendant VBGO's counterclaims and affirmative defenses on the grounds that the claims fail to state a cause of action and are refuted by documentary evidence.

Co-defendant, Linde-Griffith Construction Co. ("Linde-Griffith") filed a cross-motion, pursuant to *CPLR §§3211(a)(1) and 3211 (a)(7)*, against the intervening defendant VGBO to dismiss its crossclaims. Defendant VGBO filed opposition to plaintiff's motion and defendant Linde-Griffith's cross-motion. Plaintiff and defendant Linde-Griffith filed a reply.

#### **Plaintiff's Motion to Dismiss VBGO's Counterclaims**

In the motion to dismiss, Plaintiff argues that the intervening defendant VGBO's counterclaims for 1) common law fraud; 2) promissory estoppel; 3) equitable estoppel; 4) aiding and abetting a fraud; and 5) tortious interference with contract all fail because the said causes of actions require the requisite intent, which Defendant VGBO failed to allege in its claim.

In support of the motion to dismiss defendant VBGO's claims, plaintiff submits, *inter alia*, the affirmation of Gregory J. Spaun, counsel for Plaintiff Pavarini (*see, NYSCEF Doc. No. 291*) and the affidavit of Marc DePaul, Executive Vice President to Pavarini McGovern, LLC, (*see, NYSCEF Doc. No. 292*).

Specifically, plaintiff argues that it can establish that VBGO's claims only total \$909,193.98 rather than the \$20,440,524.24 sought in its counterclaims. Plaintiff asserts defendant VGBO's own mezzanine loan agreement requires that Performance Letters (similar to the ones executed for Phases 1, 2, & 3) be executed for all work to be funded by VBGO (*See Exhibit F, G, H, I, J, K, L, M, and O NYSCEF Doc. Nos. 298- 307*). Plaintiff Pavarini contends that Pavarini executed contracts with KIK Owner for Phases 1, 2, and 3 for work at the Subject Property. (*See Exhibit B and C NYSCEF Doc. Nos. 294 - 295*). Pavarini also contends that VGBO issued Performance Letters to secure payments for the work on the Subject Property. (*See, Exhibits B and C, and*

*NYSCEF Doc. Nos. 294 and 295*). Therefore, plaintiff argues the instant motion to dismiss should be granted.

**Defendant Linde-Griffith Construction Co.’s Cross-Motion to Dismiss VGBO’s Crossclaims**

Defendant Linde-Griffith filed a cross-motion to dismiss VGBO’s crossclaims and argues, *inter alia*, that defendant VGBO’s crossclaims should be dismissed, pursuant to *CPLR §§3211(a)(1) and (a)(7)*, based upon documentary evidence and for failure to state a cause of action. Defendant Linde-Griffith submitted in support of this motion the affirmation of Carl M. Perri, the attorney for defendant Linde-Griffith Construction Co. (*see NYSCEF Doc. No. 319*), and the affidavit of Kevin Shannon, partner of Linde-Griffith Construction Co. (*see NYSCEF Doc. No. 320*), and the original motion papers of plaintiff Pavarini, which establishes that defendant VGBO cannot claim more than \$909,193.98 in damages through documentary evidence.

Defendant Linde-Griffith argues defendant VGBO’s crossclaims for: 1) common law fraud; 2) promissory estoppel; 3) equitable estoppel; 4) aiding and abetting a fraud; and 5) tortious interference with contract all fail since defendant VGBO cannot prove defendant Linde-Griffith had knowledge to commit the acts alleged in the crossclaims. Defendant Linde-Griffith argues they submitted the lien waiver to plaintiff Pavarini, and Pavarini used the lien waivers to request payment from KIK Owner or defendant VGBO. Here, defendant Linde-Griffith claims it was not privy to what happened with the lien waivers once they were sent to plaintiff Pavarini, therefore defendant VGBO’s crossclaims against Linde-Griffith must fail.

**Defendant VGBO’s Opposition to Plaintiff’s Motion to Dismiss**

In opposition to plaintiff Pavarini’s motion to dismiss, defendant VGBO argues, *inter alia*, that plaintiff’s pre-answer motion to dismiss cannot be used to limit damages because plaintiff failed to cite case law that supports a motion to dismiss to be used as a proper vehicle for limiting potential damages. Defendant VGBO asserts the documentary evidence presented by plaintiff Pavarini is insufficient to support dismissal of VGBO’s counterclaims pursuant to *CPLR §3211(a)(1)* because plaintiff fails to explain which specific documents support dismissal of VGBO’s counterclaims as required under *CPLR §3211(a)(1)*. Defendant VGBO further argues that none of plaintiff’s documents utterly refute the allegations in VGBO’s counterclaims, and the documents that plaintiff submitted in the motion to dismiss support the conclusion that VGBO has stated a claim. Defendant VGBO contends there is a factual dispute regarding whether plaintiff Pavarini became aware or should have become aware that VGBO was financing HFZ KIK 30th Street, LLC (“KIK”) as opposed to HFZ KIK 30th Street Owner, LLC (“KIK Owner”).

In addition, defendant VGBO asserts plaintiff’s computation submitted in support of its motion to dismiss is inaccurate and raises triable issues of fact since plaintiff Pavarini’s calculations do not include any adjustments for Divergent Draw Requests associated with Phase 3 of the project amounting to \$3,523,729 accrued as owing before July 17, 2020. Furthermore, defendant VGBO argues that if plaintiff Pavarini submitted truthful lien waivers, VGBO would have known the Mezzanine Borrower was “shorting” Pavarini the amounts Pavarini said were paid. Defendant VGBO asserts they would have declared the Mezzanine Borrower in breach of

the Mezzanine Loan Agreement before plaintiff Pavarini performed additional work for which plaintiff now seeks to recover through foreclosure. Here, defendant VGBO claims that plaintiff's motion to dismiss is improper because plaintiff admits the defendant VGBO has stated causes of action and only contends that the amount of any judgment VGBO is awarded should be limited.

**Defendant VGBO's Opposition to Linde-Griffith Cross-Motion**

In opposition to Linde-Griffith's cross-motion, defendant VGBO argues, *inter alia*, that defendant Linde-Griffith's pre-answer motion to dismiss cannot be used to limit damages because defendant Linde-Griffith also failed to cite to case law that states a motion to dismiss is a proper vehicle for limiting potential damages. Defendant VGBO argues the documentary evidence presented by plaintiff Pavarini and defendant Linde-Griffith are insufficient to support dismissal of VGBO's crossclaims pursuant to *CPLR §3211(a)(1)* because both motions filed by plaintiff Pavarini and defendant Linde-Griffith fail to explain which specific documents support dismissal of VGBO's counterclaims and crossclaims as required under *CPLR §3211(a)(1)*.

Defendant VGBO further argues that none of plaintiff or defendant Linde-Griffith's documents utterly refute the allegations in VGBO's claims, and the documents that plaintiff Pavarini submitted in the motion to dismiss support the conclusion that VGBO has stated a claim. Additionally, defendant VGBO contends the documents submitted by defendant Linde-Griffith, namely, the lien waivers submitted by Linde-Griffith to plaintiff Pavarini, do not support any conclusion that VGBO failed to state a claim. Defendant VGBO contends there is a factual dispute regarding whether plaintiff Pavarini became aware or should have become aware that VGBO was financing HFZ KIK 30th Street, LLC ("KIK") as opposed to HFZ KIK 30th Street Owner, LLC ("KIK Owners"), but the documentary evidence does not support dismissal of VGBO's crossclaims.

Additionally, defendant VGBO asserts plaintiff's computation as relied on by defendant Linde-Griffith is inaccurate and raises triable issues of fact since plaintiff Pavarini's calculations do not include any adjustments for Divergent Draw Requests associated with Phase 3 of the project amounting to \$3,523,729.00 that was due before July 17, 2020. Furthermore, defendant VGBO argues it has sufficiently alleged each of the causes of action against defendant Linde-Griffith, and defendant Linde-Griffith fails to cite to any case law demonstrating that any of the crossclaims require that a defendant must possess such a heightened level of knowledge or direct privity with the injured party. Lastly, Defendant VGBO argues the court should deny defendant Linde-Griffith's motion since there is a pending action before Justice Bannon, which contains identical issues in this case.

**Defendant Linde-Griffith Construction Co. Reply**

In reply, defendant Linde-Griffith contends their motion is procedurally proper because defendant Linde-Griffith made clear in its original papers that they support the plaintiff's motion and adopted the arguments made plaintiff Pavarini's motion to dismiss. Defendant Linde-Griffith argues that they refer to the instant motion as a cross-motion in an effort to aid the court, to convenience all parties, and to ensure judicial efficiency regarding motion practice. Defendant Linde-Griffith further argues that counsel for VGBO signed the stipulation to adjourn, which

included time to cross move. Thus, counsel for VGBO was aware that a cross-motion would be filed, making defendant Linde-Griffith's cross-motion proper.

Additionally, defendant Linde-Griffith argues their cross-motion to dismiss is not an attempt to circumvent discovery to limit damages in this matter because defendant VGBO's damages are limited to \$909,193.98, and defendant VGBO has not submitted evidence to counter the amount stated. Furthermore, Defendant Linde-Griffith asserts the lien waivers submitted by defendant Linde-Griffith support dismissal of VGBO's cross-claims because the lien waivers defendant Linde-Griffith attached demonstrate that it was not aware that defendant VGBO was the financier for the project. Lastly, defendant Linde-Griffith argues defendant VGBO's cross-claims for fraud, promissory estoppel, aiding and abetting fraud, and tortious interference with contract must fail since defendant Linde-Griffith lacked knowledge of the target of the alleged "ill behavior."

#### **Plaintiff's Reply**

In reply, Plaintiff Pavarini argues, *inter alia*, defendant VGBO is not entitled to any divergence credit for Phase 3 of the project because the released documents must be enforced only to the extent intended since documentary evidence refutes defendant VGBO's claims that plaintiff did not include adjustments for Divergence Draw Request. Plaintiff Pavarini asserts there was no divergence in what was paid. Furthermore, plaintiff argues there was no partial release or waiver of lien, therefore plaintiff Pavarini represents what was, and what was not, paid by KIK Owner.

#### **Discussion**

On a motion brought under *CPLR §3211(a)(1)* dismissal is warranted when "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." Allegations that are "bare legal conclusions" or that are "inherently incredible or flatly contradicted by documentary evidence" are not sufficient to withstand a motion to dismiss." *RTW Retailwinds, Inc. v. Colucci & Umans*, No. 150794/20, 2023 WL 1974320 (N.Y. App. Div. Feb. 14, 2023).

Here, this court finds based upon the documentary evidence provided by the parties, there are triable issues of fact pertaining to the correct date plaintiff Pavarini was required to submit payment requisition forms. Furthermore, triable issues exist pertaining to which party is liable for payment regarding the subject property.

Furthermore, pursuant to *CPLR § 3211(a)(7)*, a complaint may be dismissed for failure to state a cause of action. On a motion to dismiss pursuant to *CPLR §3211(a)(7)*, the court is limited to ascertaining whether the pleadings state a cause of action and may not consider whether there is evidentiary support for the complaint. The allegations are construed in the light most favorable to plaintiff, and factual allegations are presumed true and are afforded every favorable inference. The sole criterion for this motion is whether the pleading states a cause of action, with the court accepting the facts alleged by plaintiffs as true. *See, Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). This Court finds that pursuant to *CPLR §3211(a)(7)*, Defendant VGBO's counterclaims and crossclaims state a cause of action against plaintiff Pavarini and defendant Linde-Griffith.

Accordingly, it is hereby

**ORDERED** that plaintiff Pavarini's motion to dismiss defendant VGBO's counterclaims and affirmative defenses and defendant Linde-Griffith's cross-motion to dismiss defendant

VGBO's cross-claims are DENIED on the basis that this Court finds there are triable issues of fact; and it is further

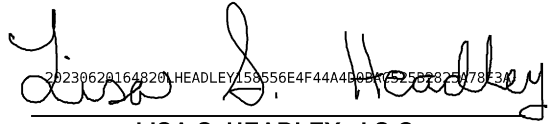
**ORDERED** that any requested relief sought not expressly addressed herein has nonetheless been considered and is denied; and it is further

**ORDERED** that within 30 days of entry, plaintiff shall serve a copy of this decision/order upon the respondents with notice of entry.

This constitutes the Decision and Order of the Court.

6/20/2023

DATE



LISA S. HEADLEY, 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