SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **42**

Justice

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88TH REALTY, INC.,

Plaintiff,

- v –

ENVIRONMENTAL APPRAISERS AND BUILDERS, MARC STRONGWATER, G.S. ADJUSTMENT COMPANY, INC., GARY SCHWARTZ and J.P. MORGAN CHASE & CO. d/b/a J.P MORGAN CHASE BANK, N.A.

Defendants.

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INDEX NO. 154912/2021

MOTION DATE

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 41, 42, 43, 44, 45, 46, 47, 48, 51, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68

were read on this motion to/for DISMISS.

I. INTRODUCTION

In this action to recover, *inter alia*, $339,554.16 in insurance proceeds from a fire on its premises, the plaintiff seeks relief from defendant G.S. Adjustment Company, Inc. (GSA) and its principal, defendant Gary Schwartz, under theories of fraud, breach of contract, unjust enrichment, breach of duty of loyalty, and breach of fiduciary duty. The plaintiff also seeks to hold Schwartz individually liable for breach of a fiduciary duty under a theory of piercing the corporate veil. Essentially, the plaintiff alleges that these defendants, the public adjuster and the construction contractor it hired, conspired to obtain the insurance proceeds and retain a fee greater than the amount agreed upon, and that the contractors work was deficient.

Defendants GSA and Schwartz now move pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint as against them. The plaintiff opposes the motion and cross-moves pursuant to CPLR 3025(b) to amend the complaint to add a cause of action for conversion against them and to add factual allegations to the existing causes of action. Defendants GSA and Schwartz oppose the cross-motion. The motion and cross-motion are each granted in part.

II. BACKGROUND

The plaintiff owns real property located at 1712 2nd Avenue in Manhattan insured by Wesco Insurance Co. (Wesco). Former defendant J.P. Morgan Chase Bank, N.A. (Chase Bank) held a mortgage on the property. On September 15, 2019, a fire occurred at the property and the loss was covered under the plaintiff's policy with Wesco. A few days after the fire, on or about September 20, 2019, the plaintiff contracted with GSA, a public insurance adjuster, for its services pursuant to a written Public Adjusters Agreement (PA Agreement) signed by GSA's principal, Gary Schwartz. The PA agreement provided that (1) GSA was retained to "act or aid in the preparation, presentation, adjustment, and negotiation of or effecting the settlement of the claim for the loss or damage by fire", (2) the plaintiff "agrees to pay GSA. for such services their expenses, disbursements…when adjusted with the insurance companies or otherwise recovered, regardless to whom the loss is payable" and (2) the plaintiff would pay GSA a fee of 10% of the building loss amount and 2% of the income loss, and that the 10% fee would be paid by non-moving defendant Environmental Appraisers and Builders (Environmental) if Environmental was hired as a contractor for the repairs. They were hired.

The plaintiff entered into a subsequent agreement with Environmental, which was signed by defendant Marc Strongwater, to perform the repairs to the building (the EAB Agreement). Notably, the EAB Agreement provides (1) that the "contractor agrees to perform all work required of him under this in a good and workmanlike manner in accordance with the contractor's standard practice", (2) the that the owner "assigns all his rights, title and interest in and to all checks or drafts from said insurance carrier for Emergency services and Repairs due to fire for building claim only" , (2) that owner agrees to "request the Insurance Carrier to issue check or checks for the insurance proceeds, naming owner and contractor as joint payees", and (3) that the "owner hereby appoints contractor as attorney-in-fact, authorizing contractor to endorse owner's name on Insurance company checks".

In October 2019, a construction consulting firm hired by Wesco inspected the damaged premises and determined that repairs would cost $451,746.06. On or about December 11, 2019, Wesco mailed a check in the amount of $100,000.00 to GSA which was made payable to the plaintiff and Chase Bank. This advance payment is not at issue in this action, and the plaintiff does not dispute the negotiation of the loss or the amount paid out by Wesco on the claim. In January 2020, Chase Bank, pursuant to its contract with the plaintiff, hired a contractor

which inspected the premises and determined that 90% of the repairs were completed so as to allow for the release of the proceeds. No one from GSA was present.at the inspection.

On or about February 6, 2020, Wesco issued a check in the amount of $339,554.16, made payable to GSA, the plaintiff and Chase Bank as payees and mailed it to GSA, and not to Environmental. Chase Bank was to hold the insurance proceeds pursuant to its agreement with the plaintiff. The plaintiff alleges that Schwartz and Strongwater schemed to defraud the plaintiff by Schwartz endorsing the check without authorization from the plaintiff (only Environmental was so authorized) and Schwartz receiving 12 ½ % of the proceeds, which is the maximum allowable for a public adjustor but more than the agreed upon amount. The plaintiff alleges that Schwartz forged the signature of the plaintiff's principal, Christina Ting, on the check. GSA and Schwartz deny any forgery and allege that Schwartz sent a copy of the $339,554.16 check to the plaintiff's principal informing her that he would present it to the bank for signature.

The plaintiff further alleges that Schwartz and Strongwater made false representations to Chase Bank that 90% of the work had been completed in order for Chase Bank to disburse funds to them. The plaintiff also alleges that Environmental intentionally failed to complete the agreed upon repairs to the property and that the work that was completed was deficient. The plaintiff alleges that Chase Bank nonetheless disbursed the full cash value of the loss, $439,554.16, to Environmental. Environmental also filed a mechanic's lien against the property in the amount of $18,873.83, which the plaintiff argues is willfully exaggerated and should be discharged. The plaintiff maintains that it was damaged by the consequent delays, lost income and the cost of completing or remediating the defendants' deficient work.

The plaintiff commenced this action on May 19, 2021, alleging eleven causes of action sounding in fraud, breach of contract, unjust enrichment, breach of fiduciary duty, breach of duty of loyalty, piercing and willful exaggeration of a lien. The plaintiff seeks to recover $339,554.16, plus $500,000.00 in compensatory damages and $1,000,000.00 in punitive damages. All defendants except Chase Bank answered. By an order dated February 28, 2022, the court granted a pre-answer motion by Chase Bank to dismiss the sole cause of action alleged against it, for breach of fiduciary duty, pursuant to CPLR 3211(a)(7), without prejudice. (MOT SEQ 001).

This motion and cross-motion ensued. Defendants GSA and Gary Schwartz seek dismissal of the causes of action alleged against them - fraud, breach of contract, unjust

enrichment, and breach of duty of loyalty, and against Schwartz to pierce the corporate veil and breach of fiduciary duty. In its cross-motion, the plaintiff seeks to amend the complaint to add a cause of action for conversion as against those defendants and to add factual allegations to the existing causes of action, mostly in regard to Schwartz and his alleged forgery of a signature.

III. DISCUSSION

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); Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc., 10 AD3d 267 (1st Dept. 2004); CPLR 3026.

Dismissal under CPLR 3211(a)(1) is warranted only when the documentary evidence submitted "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." Fortis Financial Services, LLC v Fimat Futures USA, 290 AD2d 383, 383 (1st Dept. 2002); see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc., 120 AD3d 431, 433 (1st Dept. 2014); Fontanetta v John Doe 1, 73 AD3d 78 (2nd Dept. 2010). 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) quoting Fontanetta v John Doe 1, supra. The moving defendants proffer the agreement between the plaintiff and GSA as the document that establishes their defense.

(1) Motion to Dismiss

A. Fraud

The plaintiff's fraud claims are insufficiently pleaded to survive a motion to dismiss. "'The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages.'" Epiphany Community Nursery Sch. v Levey, 171 AD3d 1, 8 (1st Dept. 2019)

(quoting Eurycleia Partners, LP v Seward & Kissel, LLP, 12 NY3d 553, 559 [2009]). Further, "[a] claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016(b)." Eurycleia Partners, LP, supra at 559, which the plaintiff's complaint failed to do, as it simply alleges that work was not performed, that false representations were made by Schwartz and Strongwater, and that there existed a scheme between Strongwater and Schwartz which was not detailed in the complaint. Notably, the plaintiff fails to allege that any representation by GSA or Schwartz induced the plaintiff. Moreover, "[i]t is well settled that a cause of action for fraud will not arise when the only fraud charged relates to a breach of contract." Gordon v Dino De Laurentiis Corp., 141 AD2d 435, 436 (1st Dept. 1988). Therefore, the first cause of action for fraud is dismissed as to defendants GSA and Schwartz.

B. Breach of Contract

To successfully prosecute a cause of action to recover damages for breach of contract, the plaintiff is required to establish (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 Flomenbaum v New York Univ., 71 AD3d 80 (1st Dept. 2009). Applying these standards, the moving defendants met their burden on the motion as to Schwartz. Since Schwartz is not a party to the PA Agreement, a breach of contract claim cannot be maintained against him. Thus, that cause of action is dismissed as against Schwartz. However, the motion is denied to the extent it seeks dismissal of the breach of contract claim against GSA. GSA is a party to the PA Agreement in which it contracted to "act or aid in the preparation, presentation, adjustment, and negotiation of or effecting the settlement of the claim for the loss or damage by fire" and to work with Environmental if hired such that Environmental would pay the 10% fee to GSA from the proceeds it received. As stated, plaintiff does not dispute GSAs the negotiation of the loss, its submission of the claim to Wesco or the amount paid out by Wesco on the claim, $439,554.16, but only that GSA, acting with co-defendants Environmental and Strongwater, mishandled those proceeds and retained more than they were contractually entitled to retain. To the extent those terms of the agreement were not followed by GSA, there is a breach. While the plaintiff may not ultimately prevail on this claim against GSA, it is sufficient for pleading purposes.

C. 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's claim for unjust enrichment fails against GSA because a plaintiff may not recover under this theory as it asserts that it has a valid, enforceable contract that governs the same subject matter as the unjust enrichment claim. See Clark-Fitzpatrick, Inc. v Long Island Rail Road Co., 70 NY2d 382 (1987); JDF Realty, Inc. v Sartiano, 93 AD3d 410 (1st Dept. 2012); Steven Pevner, Inc. v Ensler, 309 AD2d 722 (1st Dept. 2003). Thus, the fifth cause of action of the complaint, alleging unjust enrichment, is dismissed as to GSA. However, with respect to Schwartz, the claim may proceed. Schwartz is not a party to the PA Agreement, but the plaintiff alleges in the complaint that Schwartz endorsed the check and retained unearned funds through a scheme with Strongwater and Environmental. The complaint also alleges that Schwartz received insurance funds in excess of what GSA was contractually entitled to receive and that retaining such funds is against good conscience. As the complaint alleges a cognizable claim against Schwartz, the unjust enrichment cause of action against him is not dismissed.

D. Breach of Duty of Loyalty

The eighth cause of action, alleging breach of a duty of loyalty, is dismissed in its entirety as the plaintiff fails to allege any legal or factual basis for such a claim here. Breach of duty of loyalty or "faithless servant" claims may be asserted against an employee who has acted against the employer's interest. See e.g. Bluebanna Group v Sargent, 176 AD3d 408 (1st Dept. 2019); Digital Connection, LLC v Sin, 16 AD3d 118 (1st Dept. 2005); Veritas Capital Mgmt. LLC v Campbell, 82 AD3d 529 (1st Dept. 2011). Neither GSA nor Schwartz was an employee of the plaintiff.

E. Piercing the Corporate Veil – Breach of Fiduciary Duty

"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). Here, the plaintiff makes a conclusory allegation in these papers that Schwartz "exercised complete dominion over [GSA]", but the complaint is otherwise "devoid of any allegations as to how [Schwartz] used their domination of [GSA] to commit a wrong against the plaintiff[]." TMCC, Inc. v Jennifer Convertibles, Inc., 176 AD3d 1135, 1136 (2nd Dept. 2019); see Cornwall Management Ltd. v Kambolin, 140 AD3d 507 (1st Dept. 2016). In addition, the plaintiff fails to

show the existence of a fiduciary relationship with Schwartz, as the conduct of the parties did not rise to the level of fiduciary, nor was one created with them through the PA Agreement. See Wiener v Lazard Freres & Co., 241 AD 2d 114 (1st Dept. 1998); see also Frydman & Co. v Credit Suisse First Boston Corp., 272 AD 2d 236 (1st Dept. 2000). Furthermore, the relief of declaratory relief under CPLR 3001 would be appropriate here. Therefore, this cause of action is dismissed.

(2) Cross-Motion to Amend

The plaintiff cross-moves to amend the complaint to add more factual detail to the existing claims against defendants GSA and Schwartz and to add a cause of action for conversion against them. The plaintiff is correct in observing that leave to amend is freely given absent prejudice or surprise resulting and where the evidence submitted in support of the motion indicates that the amendment may have merit. See CPLR 3025(b); McCaskey, Davies and Assocs., Inc v New York City Health & Hospitals Corp., 59 NY2d 755 (1983); 360 West 11th LLC v ACG Credit Co. II, LLC, 90 AD3d 552 (1st Dept. 2011). To plead a cause of action for conversion, a plaintiff must sufficiently allege that a defendant, intentionally and without authority, assumed or exercised control over the property belonging to someone else, thereby interfering with that person's right of possession. See William Doyle Galleries, Inc. v Stettner, 167 AD3d 501 (1st Dept. 2018). "Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights." Pappas v Tzolis, 20 N.Y.3d 228, 234, (2012) *quoting* Colavito v New York Organ Donor Network, Inc., 8 NY3d 43, 50, (2006); see Reif v Nagy, 175 AD3d 107, 118 (1st Dept. 2019).

The plaintiff has demonstrated entitlement to amend the complaint to include additional allegations to the surviving claim against Schwartz, cause of action five alleging unjust enrichment, to the extent the allegations concern an alleged forgery by defendant Schwartz and to add a cause of action for conversion as to Schwartz based on those allegations. Again, the plaintiff asserts that Schwartz endorsed a check he was not authorized to endorse and improperly retained proceeds. However, a conversion claim cannot be asserted against defendant GSA since "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382, 388 (1987). "A simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated." Id. at 389; see Superior Officers Council Health & Welfare

Fund v Empire HealthChoice Assur., Inc., 85 AD3d 680 (1st Dept. 2011). While the plaintiff may not prevail on any of the surviving claims or the added conversion claim, these claims may be asserted at this juncture.

IV. CONCLUSION

The motion and cross-motion are each granted in part such that the only remaining causes of action are the breach of contract cause of action as alleged against defendant G.S. Adjustment Company, Inc. and the unjust enrichment cause of action as alleged against defendant Gary Schwartz, against who the plaintiff may also assert additional allegations in regard to the unjust enrichment claim and an additional cause of action for conversion in an amended complaint.

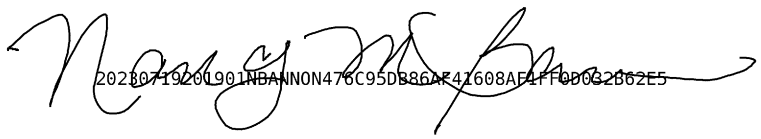
Accordingly, it is

ORDERED that the motion of defendants G.S. Adjustment Company, Inc. and Gary Schwartz to dismiss the complaint as against them pursuant to CPLR 3211(a)(1) and (7) is granted to the extent that all causes of action are dismissed as against those defendants except for the cause of action for breach of contract as alleged against defendant G.S. Adjustment Company, Inc, and the cause of action for unjust enrichment as alleged against defendant Schwartz, and it is further

ORDERED that the plaintiff's cross-motion to amend the complaint is granted to the extent indicated herein and the plaintiff may serve and file an amended complaint in accordance herewith within 20 days of this order, and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.



07/18/2023
DATE

NANCY M. BANNON, J.S.C.

CHECK ONE: [ ] CASE DISPOSED [X] NON-FINAL DISPOSITION
[ ] GRANTED [ ] DENIED [X] GRANTED IN PART [ ] OTHER