

**Emerald Servs. Corp. v Empire Core Group LLC**

2023 NY Slip Op 33605(U)

October 13, 2023

Supreme Court, New York County

Docket Number: Index No. 452437/2022

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*

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EMERALD SERVICES CORPORATION,

Plaintiff,

- v -

EMPIRE CORE GROUP LLC,ROYAL CHARTER  
PROPERTIES EAST - LLC,ED 97 OWNER, LLC,HIGHLINE  
22 LLC,101 WEST REIT, LLC,

Defendant.

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INDEX NO. 452437/2022

MOTION DATE N/A

MOTION SEQ. NO. 003

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 101, 102, 103

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

This matter arises out of an alleged breach of contract between Plaintiff and Defendant, Empire Core Group LLC.<sup>1</sup> The Defendants in this case are Empire Core Group LLC; Royal Charter Properties East – LLC; ED 97 Owner, LLC; Highline 22 LLC; and 101 West End Reit LLC. Defendants ED 97 Owner LLC (“ED 97”) and 101 West End Reit LLC (“101 West End”) now move under CPLR § 3212 for summary judgement against Plaintiff dismissing Plaintiff’s Complaint in its entirety against Defendant ED 97 and Defendant 101 West End. For the blow reasons, the summary judgment motion is granted and plaintiff’s cross-motion to amend is denied without prejudice.

Under CPLR § 3212, a motion for summary judgement is warranted where the movant makes “a prima facie showing [its] entitlement to judgment as a matter of law [by] tendering sufficient evidence to demonstrate the absence of material issues of fact.” *Ayotte v. Gervasio*, 81

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

N.Y.2d 1062, 601 N.Y.S.2d 463 (1993) (quoting *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986)). CPLR § 3212(b) allows the Court to grant summary judgment “if, upon all the papers and proof submitted, the cause of action or defense shall be established to warrant the court as a matter of law in directing judgment in favor of any party.”

To establish a cause of action for a breach of contract, the Plaintiff must demonstrate: (1) the existence of an agreement; (2) adequate performance of the agreement by plaintiff; (3) breach of the agreement by defendant(s); and (4) damages suffered by the Plaintiff based upon the defendants’ breach. See *Noise in the Attic Productions v. London Records*, 10 A.D.2d 303 (1st Dept. 2004). A party makes prima facie showing of entitlement to summary judgment as a matter of law in a breach of contract action by “offering proof that it had an agreement to provide the defendants with labor and materials to complete a certain job, that the defendants agreed to compensate the plaintiff on a time and material basis, and that no payment was made.” *Ecoline, Inc. v. W.H. Peepels Co.*, 153 A.D.3d 786, 787 (2d Dep’t 2017).

To state a claim for unjust enrichment, a plaintiff must show that: “(1) the defendant was enriched, (2) at the plaintiff’s expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered.” *GFRE, Inc. v. US Bank, N.A.*, 130 A.D.3d 569, 570 (2d Dept. 2015). A cause of action for unjust enrichment does not arise from the breach of a written contract, but, rather, from a quasi-contract or a contract implied in law that prevents a person from enriching himself or herself unjustly at the expense of another. See *Tower Intl., Inc. v. Caledonian Airways, Ltd.*, 969 F.Supp. 135, 137 (E.D.N.Y. 1997), *aff’d* 133 F.3d 908 (2d Cir. 1998). A quasi-contract can only apply when there is no express agreement. *Clark-Fitzpatrick, Inc. v. Long Island R. Co.*, 70 N.Y.2d 382, 388 (1987).

Here, it is undisputed that Plaintiff entered into contracts and/or agreements with Defendant Empire Core Group LLC (“Empire Core”) for the properties located at 101 West End Avenue, New York, NY (owned by 101 West End) and 226-230 West 97<sup>th</sup> Street, New York, NY (owned by ED 97). Defendants ED 97 and 101 West End were not parties to the contracts; therefore no privity of contract exists between Plaintiff and Defendants ED 97 and 101 West End. Therefore, as to Plaintiff’s First and Second Cause of Action (breach of contract and/or agreement) must be dismissed as to Defendants ED 97 and 101 West End.

Additionally, it is undisputed that Plaintiff and Defendant Empire Core have an express written contract for both the properties located at 101 West End Avenue, New York, NY (owned by 101 West End) and 226-230 West 97<sup>th</sup> Street, New York, NY (owned by ED 97). There is no privity of contract between Plaintiff and Defendants ED 97 and 101 West End. There also is no quasi-contract implied by law, as it is undisputed that a contract exists between plaintiff and defendant Empire Core. Therefore, Plaintiff’s Third Cause of Action (unjust enrichment) West End must be dismissed against Defendants ED 97 and 101

Further, Plaintiff’s Cross-Motion under CPLR §§ 3205(b) and 3025(c) to amend the complaint is denied.

Under CPLR § 3205(b) a motion for leave to amend the complaint should be freely granted unless the proposed amendment is insufficient to state a cause of action or is patently devoid of merit. *See Lucido v. Mancuso*, 49 A.D.3d 220, 229, 851 N.Y.S.2d 238 (2d Dep’t 2008). The “legal sufficiency or merits of a pleading will not be examined unless the insufficiency or lack of merit is clear and free from doubt.” *Sample v. Levada*, 8 A.D.3d 465, 467-68 (2d Dep’t 2004). Under CPLR §3025(c), “the court may permit pleadings to be amended

before or after judgment to conform them to the evidence, upon such terms as may be just including the granting of costs and continuances.

Here, Plaintiff's motion seeking to amend the Complaint as against Defendants ED 97 and 101 West End on the theory of Agency is without merit. On its face, agency does not exist between Empire Core and Defendants ED 97 and 101 West End. Empire signed two contracts with Plaintiff in its own capacity and not as an agent of Defendants ED 97 and 101 West End. There is no indication in the contract in question as to the existence of Agency. Therefore, Plaintiff's motion to amend the complaint asserting Agency is without merit.

Similarly, Plaintiff's claim of Third-Party Beneficiary is without merit. There is a general rule that "the owner has no right against the subcontractor, in the absence of clear words to the contrary." *Logan-Baldwin v. L.S.M. Gen. Contractors, Inc.*, 914 N.Y.S.2d 617, 621 (2011) (N.Y. Sup. Ct., Monroe Co., Jan 5, 2011), *aff'd as modified*, 942 N.Y.S.2d 718 (4th Dept. 2012). The intent to confer a third-party beneficiary is to be determined from the language of the contract. *Pierce Assocs., Inc. v. Nemours Found.*, 865 F.2d 530, 535 (3d Cir. 1988). Here, the contract states that "Subcontractor agrees to be bound by the provisions of the Contract Documents and Work Order." There is nothing in the Contracts that expressly or impliedly states that Defendants ED 97 and 101 West End are third-party beneficiaries of the Contracts. Therefore, Plaintiff's claim that ED 97 and 101 West End are third-party beneficiaries is patently void of merit.

Additionally, Plaintiff's Motion to reinstate Unjust Enrichment as an alternative relief in its complaint as against Defendants ED 97 and 101 West End is without merit. It is undisputed that Plaintiff is not in privity of contract with Defendants ED 97 and 101 West End. Plaintiff's contract is with Defendant Empire Core. Therefore, Plaintiff's remedy is against Defendant Empire Core. Further, unjust enrichment is not a proper remedy where a contract exists. *See*

*Corsello v. Verizon N.Y., Inc.*, 967 N.E.2d 1177, 1185 (N.Y. 2012) (the court held that an unjust enrichment claim is not available where it simply duplicates or replaces a conventional contract or tort claim). As a result, Plaintiff's Motion for Leave to Amend the Complaint and reinstate Unjust Enrichment as alternative relief is denied.

Accordingly, it is hereby,

ORDERED that Plaintiff's Complaint is dismissed in its entirety against Defendants ED 97 Owner, LLC and 101 West End REIT, LLC, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

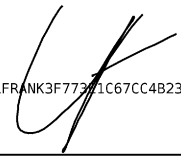
ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk's Office, who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website); and it is further

ADJUDGED that Plaintiff's Cross-Motion for leave to amend the Complaint is denied.

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10/13/2023

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