

**Feldman Lbr.-US LBM, LLC v Dark Side III Inc.**

2023 NY Slip Op 33865(U)

October 30, 2023

Supreme Court, New York County

Docket Number: Index No. 150702/2022

Judge: John J. Kelley

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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. JOHN J. KELLEY PART 56M**

*Justice*

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FELDMAN LUMBER- US LBM, LLC,  
Plaintiff,

INDEX NO. 150702/2022

MOTION DATE 09/29/2023

MOTION SEQ. NO. 003

- v -

DARK SIDE III INC., FOREMOST CONTRACTING &  
BUILDING, LLC, 1516 PARK AVENUE PARTNERS, LLC,  
SALVATORE BORGIA, WESTCHESTER FIRE  
INSURANCE COMPANY, INTEREBAR FABRICATORS,  
LLC, formerly known as JRC OPCO, LLC, as successor-in-  
interest to METAL PARTNERS REBAR, LLC, doing  
business as FGH REBAR, and JOHN DOE,

**DECISION + ORDER ON  
MOTION**

Defendant.

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INTEREBAR FABRICATORS LLC F/K/A JRC OPCO LLC,  
SUCCESSOR-IN-INTEREST TO METAL PARTNERS REBAR  
LLC D/B/A FGH REBAR

Third-Party Plaintiff,

-against-

PHILADELPHIA INDEMNITY INSURANCE COMPANY,  
DECORAMA BUILDING & PLUMBING SUPPLY, INC.,  
TAMEER INC., M.I.R. CONSTRUCTION GROUP, LLC,  
LAYOUT, INC., and CASA REDIMIX CONCRETE CORP.,

Third-Party Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 81, 82, 83, 84, 85,  
86, 87, 88, 89, 90, 91, 92, 93, 94, 95

were read on this motion to/for AMEND PLEADINGS/X-MOTION TO EXTEND  
DISCOVERY DEADLINES.

This is an action to foreclose on mechanics' liens, declare the priority of said liens, and  
to recover for breach of contract, which has been consolidated with an action entitled *Casa  
Redmix Concrete Corp. v Yaphank Bldg. Supply Corp.*, New York County Index No.

154950/2021 (the 2021 action) to the extent of joining the two actions for discovery and trial. The defendant/third-party plaintiff in the instant action, InteRebar Fabricators, LLC, formerly known as JRC OPCO, LLC, as successor-in-interest to Metal Partners Rebar, LLC, doing business as FGHI Rebar (InteRebar), moves pursuant to CPLR 3215(b) for leave to amend its answer with cross claims, counterclaims, and third-party complaint in this action (a) to assert its first third-party cause of action, which seeks the foreclosure of mechanic's liens, against the third-party defendants Decorama Building & Plumbing Supply, Inc., Tameer, Inc., M.I.R. Construction Group, LLC, Layout, Inc., and Casa Redimix Concrete Corp., (b) to assert cross claims to recover for breach of contract, on an account stated, pursuant to UCC article 2 for goods sold and delivered, and for unjust enrichment against the defendant Foremost Contracting and Building, LLC (Foremost), and (c) to assert a cross claim for unjust enrichment against the defendants Dark Side III, Inc. (Dark Side), and Salvatore. Dark Side and Salvatore oppose the motion. Foremost cross-moves to extend the deadlines for discovery and the filing of the note of issue, as set forth in prior discovery orders. InteRebar opposes the cross motion.

InteRebar's motion is granted, and it thus is granted leave to serve an amended answer with cross claims, counterclaims, and third-party complaint in the form uploaded to the New York State Court Electronic Filing system as docket entry 88, and that pleading shall be deemed served as of the date of the entry of this decision and order. Foremost's cross motion is granted to the extent that all current discovery and note-of-issue filing deadlines shall be extended in accordance with the status conference order that will be issued by the court subsequent to the November 1, 2023 discovery conference that is presently scheduled. The cross motion is otherwise denied.

Leave to amend a pleading is to be freely given absent prejudice or surprise resulting from the amendment, provided that the evidence submitted in support of the motion indicates that the proposed amendment may have merit (*see* CPLR 3025[b]; *McCaskey, Davies and Assocs., Inc v New York City Health & Hospitals Corp.*, 59 NY2d 755, 757 [1983]; *360 West*

*11th LLC v ACG Credit Co. II, LLC*, 90 AD3d 552, 553 [1st Dept 2011]; *Smith-Hoy v AMC Prop. Evaluations, Inc.*, 52 AD3d 809, 811 [1st Dept 2008]). The court must examine the sufficiency of the proposed amendment only to determine whether the proposed amended pleading is “palpably insufficient or clearly devoid of merit” (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]; see *Hill v 2016 Realty Assoc.*, 42 AD3d 432, 433 [2d Dept 2007]). The court also “should consider how long the amending party was aware of the facts upon which the motion was predicated [and] whether a reasonable excuse for the delay was offered” (*Haller v Lopane*, 305 AD2d 370, 371 [2d Dept 2003]).

InteRebar seeks leave to amend its answer with counterclaims, cross claims, and its first third-party cause of action so as to assert them against various parties to this action.

Specifically, InteRebar seeks to assert its foreclosure claim (first third-party cause of action) against several of the third-party defendants to preserve its contention that its mechanic’s liens have priority over liens that may have been filed by those parties or their principals or agents, or to provide complete relief in the event that it prevails on its foreclosure claims against the owner of the subject property and the general contractor on the subject project. The proposed assertion the first third-party cause of action against those parties for these purposes is not palpably insufficient or clearly devoid of merit.

The elements of a breach of contract cause of action are the “formation of a contract between the parties, performance by the plaintiff, the defendant’s failure to perform, and resulting damage” (*Flomenbaum v New York Univ.*, 71 AD3d 80, 91 [1st Dept. 2009]; see *Clearmont Prop., LLC v Eisner*, 58 AD3d 1052, 1055 [3d Dept 2009]). To establish the formation of the contract, the plaintiff must authenticate any writing purporting to constitute the contract and any signature inscribed on that contract (see *Knight v New York & Presbyterian Hosp.*, \_\_\_\_\_ AD3d \_\_\_\_\_, 2023 NY Slip Op 04258, \*2). To recover on an account stated, a plaintiff must establish the existence of an agreement between the parties to an account, based upon prior transactions between them with respect to the correctness of both the separate items

composing the account and the balance due, (a) along with the defendant's receipt and retention of those accounts, without objection within a reasonable time, and an agreement to pay a portion of the indebtedness or (b) an actual partial payment (*see Morrison Cohen Singer and Weinstein, LLP v Waters*, 13 AD3d 51, 52 [1st Dept 2004]; *Shea & Gould v Burr*, 194 AD2d 369, 370-371 [1st Dept 1993]). Proof supporting the existence of such an account may include the "[p]laintiff's business records . . . and resulting invoices and statement of accounts for a balance due" (*Commissioners of State Ins. Fund v Allou Distributions*, 220 AD2d 217, 217 [1st Dept 1995]; *see Commissioners of State Ins. Fund v DiPietro*, 289 AD2d 46 [1st Dept 2001]; *Commissioners of State Ins. Fund v Country Carting Corp.*, 265 AD2d 158 [1st Dept 1999]). A cause of action to recover for goods sold and delivered that is premised upon UCC 2-607(1) requires "proof of a sale and delivery of the goods in question, the defendant's acceptance of the goods and its failure either to pay the agreed upon price or raise an objection to the sale terms, as reflected in the invoices, when the goods were delivered or within a reasonable time thereafter" (*Sunkyoung Am. v Beta Sound of Music Corp.*, 199 AD2d 100, 100-101 [1st Dept 1993]; *see Orbis Co. v Rivera*, 140 AD2d 679, 680 [2d Dept 1988]; *Avis Rent A Car Sys. v McNamara Buick Pontiac*, 90 AD2d 783, 783 [2d Dept 1982]). The causes of action to recover for breach of contract, on an account stated, and for goods sold and delivered, as set forth in the facts alleged by InteRebar, are not palpably insufficient or clearly devoid of merit, and no party against whom it seeks to assert these causes of action would be prejudiced by the proposed amendment, as InteRebar did not unduly delay in seeking leave to amend its answer.

To establish unjust enrichment, "the plaintiff must show that the defendant was enriched, at the plaintiff's expense, and that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (*Castelotti v Free*, 138 AD3d 198, 207 [1st Dept 2016]; *see Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012]; *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 (2011)). "The 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]). Moreover, an unjust enrichment claim requires a sufficiently close relationship between the parties (see *Georgia Malone & Co., Inc. v Rieder*, 19 NY3d at 516; *Sperry v Crompton Corp.*, 8 NY3d 204, 215-216 [2007]). Nonetheless, where there is a “genuine dispute over the existence of the contract,” an unjust enrichment claim may “properly [be] pleaded in the alternative to the contract claim” (*Goldin v TAG Virgin Is., Inc.*, 149 AD3d 467, 468 [1st Dept 2017]; see *Sabre Intl. Sec., Ltd. v Vulcan Capital Mgt., Inc.*, 95 AD3d 434, 438-439 [1st Dept 2012]). Hence, to the extent that this action ultimately may present a genuine dispute over the existence of a written contract involving InteRebar, the court will not preclude InteRebar from asserting the unjust enrichment cause of action at this stage of the litigation, since the claim otherwise is not palpably insufficient or clearly devoid of merit.

Inasmuch as the court has scheduled a status conference in this action for November 1, 2023, at which it will extend all discovery deadlines and the note of issue filing deadline, the cross motion is granted only to the extent that those deadlines will be extended to some future date in accordance with the discovery order or orders issued subsequent to that conference.

Accordingly, it is

ORDERED that the motion is granted, and the defendant/third-party plaintiff, InteRebar Fabricators, LLC, formerly known as JRC OPCO, LLC, as successor-in-interest to Metal Partners Rebar, LLC, doing business as FGH Rebar, is granted leave to serve an amended answer with cross claims, counterclaims, and third-party complaint in the form uploaded to the New York State Court Electronic Filing system as docket entry 88, and said pleading shall be deemed served as of the date of the entry of this decision and order; and it is further,

ORDERED that the cross motion is granted to the extent that all current discovery and note of issue filing deadlines will be extended in accordance with the status conference order that will be issued by the court subsequent to the November 1, 2023 discovery conference that is presently scheduled in this action, and the cross motion is otherwise denied

This constitutes the Decision and Order of the court.

JOHN J. KELLEY, J.S.C.

10/30/2023

DATE

MOTION:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE

CROSS MOTION:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE