

**ARC NYWWPJV001, LLC v WWP JV LLC**

2023 NY Slip Op 34043(U)

November 14, 2023

Supreme Court, New York County

Docket Number: Index No. 654977/2022

Judge: Joel M. Cohen

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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ARC NYWWPJ001, LLC, A DELAWARE LIMITED  
LIABILITY COMPANY,

INDEX NO. 654977/2022

Plaintiff & Counterclaim  
Defendant,

MOTION DATE 08/07/2023,  
08/07/2023

- v -

MOTION SEQ. NO. 003 004

WWP JV LLC, A DELAWARE LIMITED LIABILITY  
COMPANY,

**DECISION + ORDER ON  
MOTION**

Defendant &  
Counterclaim Plaintiff.

-----X

WWP JV LLC, A DELAWARE LIMITED LIABILITY COMPANY,  
Third-Party/Counterclaim  
Plaintiff,

Third-Party  
Index No.

-against-

NEW YORK REIT LIQUIDATING LLC

Third-Party/Counterclaim  
Defendant.

-----X

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 29, 30, 31, 32, 33,  
34, 40, 43, 44, 45, 46, 47, 49, 50, 51, 66, 68

were read on this motion to DISMISS COUNTERCLAIMS AND THIRD-PARTY CLAIMS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 35, 36, 37, 38, 39,  
41, 42, 48, 66, 68

were read on this motion to DISMISS/STRIKE AFFIRMATIVE DEFENSES.

This case arises out of a joint venture between Plaintiff ARC NYWWPJ001, LLC  
("ARC") and Defendant WWPJV, LLC ("WWPJV") to invest in property located at 825 Eighth  
Avenue, New York, New York, commonly known as the Worldwide Plaza. WWPJV asserted

counterclaims against ARC and New York REIT Liquidating LLC (“NYRT”). WWPJ also purportedly brought third-party claims against NYRT.

In these motions, ARC and NYRT move to dismiss WWPJV’s Counterclaims and purported Third-Party Claims (NYSCEF 30) (Motion Sequence 03) and ARC moves to dismiss and/or strike WWPJV’s affirmative defenses (NYSCEF 36) (Motion Sequence 04). For the following reasons, ARC and NYRT’s motion to dismiss the Counterclaims is **granted** and ARC’s motion to dismiss and/or strike the affirmative defenses is **granted in part**.

### **BACKGROUND**

In 2017, ARC and WWPJV entered into a joint venture to invest in the Worldwide Plaza project (NYSCEF 23 ¶ 4; *see also* NYSCEF 3). As part of that venture, the parties acknowledged that the property needed renovation and redevelopment and agreed to make capital contributions for that purpose (NYSCEF 23 ¶¶ 2-5; NYSCEF 2 ¶ 10). The present dispute revolves around ARC and NYRT’s obligations under the LLC Agreement to fund a portion of the Initial Budget Capital Requirements and whether the Initial Budget expired in 2018, as those terms are defined in the LLC Agreement (*see* NYSCEF 23 ¶¶ 9-10). ARC initiated this action asserting a single cause of action seeking a declaration that the Initial Budget Capital Requirements and the Initial Budget had expired and therefore ARC has no further obligation to fund any portion of the Initial Budget Capital Requirements under the LLC Agreement (NYSCEF 2 at 9).

WWPJV asserts a counterclaim seeking its own declaration that the Initial Budget did not expire in 2018 and thus ARC and NYRT must contribute the required capital (\$90.7 million) towards the Initial Budget when called upon to do so (NYSCEF 23 ¶¶ 9, 68-70). In the alternative, WWPJV asserts two counterclaims sounding in fraud alleging that ARC and NYRT fraudulently induced WWPJV to invest in the joint venture based on their promise to invest

\$90.7 million in the property, and that NYRT made material misrepresentations throughout the following years which prevented WWPJV from otherwise protecting its rights under the LLC Agreement (*id.* ¶¶ 71-84). WWPJV also asserts a counterclaim alleging that NYRT has been unjustly enriched as a result of its failure to make the \$90.7 million contribution (*id.* ¶¶ 85-93).

## DISCUSSION

### **I. Counterclaim/Third-Party Defendants' Motion to Dismiss (Mot. Seq. 03)**

“On a CPLR 3211 motion, the court must ‘accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.’” (*DKR Soundshore Oasis Holding Fund Ltd. v Merrill Lynch Int'l*, 80 AD3d 448, 449 [1st Dept 2011], quoting *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). “Although on a motion to dismiss the complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the facts pleaded are presumed to be true and are accorded every favorable inference,” where “the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994] [citations omitted]). Likewise, pursuant to CPLR 3211(a)(1), “dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” (*Leon*, 84 NY2d at 88).<sup>1</sup>

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<sup>1</sup> ARC and NYRT also sought dismissal pursuant to CPLR 3211 (a)(4) due to the pendency of a related Delaware action (NYSCEF 30 at 5). However, the Delaware action has now been stayed pending disposition of the action in this Court (NYSCEF 50). Accordingly, there are no grounds for dismissal under CPLR 3211 (a)(4).

a. CPLR 1007

ARC and NYRT argue, first, that Counterclaims/Third-Party Claims Two, Three, and Four should be dismissed insofar as they are deemed third-party claims for failing to meet the requirements of CPLR 1007 (NYSCEF 30 at 4). That provision states that “a defendant may proceed against a person not a party who is or may be liable to that defendant for all or part of the plaintiff’s claim against that defendant.” Stated differently, “the liability sought to be imposed upon a third-party defendant must arise from or be conditioned upon the liability asserted against the third-party plaintiff in the main action” (*BBIG Realty Corp. v Ginsberg*, 111 AD2d 91, 93 [1<sup>st</sup> Dept 1985]).

WWPJV’s attempt to assert claims against NYRT as third-party claims has resulted in a procedural morass. Despite attaching a third-party summons to the Answer with Counterclaims, and referring to NYRT as a third-party defendant, WWPJV has failed to acquire a requisite separate index number or file a third-party complaint (NYSCEF 23). More importantly, WWPJV’s purported third-party claim does not “arise from” and is not “conditioned upon” any potential liability WWPJV may owe to ARC (*BBIG Realty*, 111 AD2d at 93). Accordingly, WWPJV’s claims against NYRT cannot be asserted as third-party claims under CPLR 1007.<sup>2</sup>

b. Direct v. Derivative Claims

Next, ARC and NYRT argue that Counterclaims Two, Three, and Four should be dismissed because they are derivative claims improperly asserted as direct claims (NYSCEF 30

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<sup>2</sup> Such claims – if otherwise viable – could be asserted as counterclaims pursuant to CPLR 3019, which provides that “[a] counterclaim may be any cause of action in favor of one or more defendants... against one or more plaintiffs, a person whom a plaintiff represents or a plaintiff and other persons alleged to be liable.” Accordingly, for efficiency, the Court addresses the merits of the claims below as if they had been asserted as counterclaims rather than third-party claims.

at 8). The LLC Agreement is governed by Delaware Law (NYSCEF 3 § 15.8). Under Delaware law, in determining whether a claim is derivative or direct in nature, the “court should look to the nature of the wrong and to whom the relief should go” (*Tooley v Donaldson, Lufkin & Jenrette, Inc.*, 845 A2d 1031, 1039 [Del. 2004]). This determination turns “solely on the following questions: (1) who suffered the alleged harm (the corporation or stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or stockholders, individually)” (*id.* at 1033).

Here, WWPJV’s counterclaims are properly asserted as direct claims. WWPJV’s two fraud counterclaims allege that ARC and NYRT made false statements to induce WWPJV, individually, to invest in the joint venture and then made repeated misrepresentations preventing WWPJV from taking action to protect its own rights (*see* NYSCEF 23 ¶¶ 4-6, 25-29, 46-47, 71-84). In other words, WWPJV alleges that it has been “directly injured” and asserts these claims “for injuries affecting [its] legal rights as a stockholder. Such [counterclaims are] distinct from an injury caused to the corporation alone” (*Tooley*, 845 A2d at 1036; *see also Citigroup Inc. v AHW Inv. Partnership*, 140 A3d 1125, 1141 n. 76 [Del. 2016] [noting that “a claim on a fraud affecting the shareholder directly is a direct claim”] [internal citation omitted]). Similarly, WWPJV’s counterclaim for unjust enrichment alleges harm *to WWPJV* arising from NYRT’s alleged refusal to invest its portion of the reserve for the capital expenditures (NYSCEF 23 ¶¶ 87-93). Accordingly, ARC and NYRT’s motion is denied insofar as it seeks dismissal of Counterclaims Two, Three, and Four on the ground they are improperly asserted as direct claims.

c. Counterclaims Two & Three - Fraudulent Inducement & Fraudulent Misrepresentation

Turning to the merits, ARC and NYRT challenge the legal sufficiency of WWPJV's counterclaims for fraudulent inducement (Counterclaim Two) and fraudulent misrepresentation (Counterclaim Three).

With respect to allegations of fraud, CPLR 3016 (b) requires that “the circumstances constituting the wrong shall be stated in detail.” This “imposes a more stringent standard of pleading than the generally applicable notice of transaction rule of CPLR 3013” (*DDJ Management LLC v Rhone Group LLC*, 78 AD3d 442, 443 [1<sup>st</sup> Dept 2010] [internal quotation omitted]). “However, at this early stage of litigation, plaintiffs are entitled to the most favorable inferences, including inferences arising from the positions and responsibilities of defendants, and plaintiffs need only set forth sufficient information to apprise defendants of the alleged wrongs” (*id.* [internal quotations and citations omitted]). Thus, “[w]hat is critical to a fraud claim is that a complaint allege the basic facts to establish the elements of the cause of action” and the standard set forth in CPLR 3016 “should not be confused with unassailable proof of fraud” (*Sargiss v Magarelli*, 12 NY3d 527, 530-31 [2009] [internal quotations omitted]).

“To maintain a cause of action for fraudulent inducement of contract, a plaintiff must show a material representation, known to be false, made with the intention of inducing reliance, upon which [it] actually relie[d], consequentially sustaining a detriment” (*Frank Crystal & Co., Inc. v Dillmann*, 84 AD3d 704, 704 [1<sup>st</sup> Dept 2011] [internal quotation omitted]). Similarly, “[t]o state a cause of action for fraudulent misrepresentation, a plaintiff must allege a misrepresentation or a material omission of fact which was false and known to be false by 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” (*Gomez-Jiminez v New York Law School*, 103 AD3d 13, 17-18 [1<sup>st</sup> Dept 2012] [internal citation omitted]).

Here, the alleged misrepresentations that underlie WPPJV’s fraud counterclaims relate to ARC and NYRT’s future performance under the LLC Agreement. “Absent a present intent to deceive, a statement of future intentions, promises or expectations is not actionable on the grounds of fraud” (*Non-Linear Trading Co., Inc. v Braddis Associates, Inc.*, 243 AD2d 107, 118 [1<sup>st</sup> Dept 1998] [internal quotation omitted]). “Conversely, a misrepresentation of material fact, which is collateral to the contract and serves as an inducement for the contact, is sufficient to sustain a cause of action alleging fraud” (*WIT Holding Corp. v Klein*, 282 AD2d 527, 528 [2d Dept 2001]).

In its second counterclaim WWPJV alleges that ARC and NYRT concealed from WWPJV their intention not to make the \$90.7 million available for renovations of the property (NYSCEF 23 ¶¶ 6, 75). WWPJV likewise alleges in the third counterclaim that NYRT made repeated misrepresentations in SEC filings with respect to the reserve for future capital improvements on the property, preventing WWPJV from taking unspecified “appropriate actions to protect its rights” (*id.* ¶¶ 34, 82). However, at the same time, WWPJV concedes that “at no time has NYRT distributed any of the \$90.7 million to unitholders” and that ARC and NYRT have only “threatened to distribute [the \$90.7 million] to NYRT’s unitholders” (*id.* ¶¶ 36, 46).

WWPJV fails to sufficiently allege facts that ARC and/or NYRT never intended to honor or act on their statements with respect to the reserve funds at the time the parties entered into the LLC Agreement (*Non-Linear Trading Co., Inc.*, 243 AD2d at 118 [“A complaint based upon a statement of future intention must allege facts that show that the defendant at the time the promissory representation was made, never intended to honor or act on his statement”]). At most,

WWPJV alleges “a mere misrepresentation of an intention to perform under the contract [which] is insufficient to alleged fraud” (*WIT Holding Corp.*, 182 AD2d at 528).

WWPJV’s reliance on *Sargiss* to argue that it has alleged facts “sufficient to permit a reasonable inference of the alleged conduct” is unavailing (*id.* at 530-31). The court in *Sargiss* sustained a fraud claim relying on affidavits attaching relevant documents that created an “indirect circumstantial inference” of fraudulent conduct specific to an individual defendant (*id.* at 531). By contrast, WWPJV’s allegations fail to “sufficiently detail the allegedly fraudulent conduct” (*id.*; see also *Pace v Raisman & Assoc., Esqs.*, 93 AD3d 1185, 1189 [2d Dept 2012] [dismissing fraud claims where allegations were “merely a recitation of the legal malpractice cause of action, plus the conclusory allegation that the [defendants] knowingly made false representations”]). Accordingly, WWPJV fails to adequately state viable claims for fraudulent inducement or fraudulent misrepresentation, and Counterclaims Two and Three are dismissed.

*d. Counterclaim Four – Unjust Enrichment*

Finally, ARC and NYRT argue that the contract claims asserted in this matter bar WWPJV’s fourth counterclaim for unjust enrichment (see NYSCEF 30 at 15). “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” (*Maor v Blue Sand Intl. Inc.*, 143 AD3d 579, 579 [1<sup>st</sup> Dept 2016] [quoting *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]]).

It is undisputed that the relevant LLC Agreement governs the parties’ responsibilities and obligations with respect to the \$90.7 million reserve in dispute. In fact, both ARC and WWPJV seek a declaration of their respective rights to the reserve funds under the LLC Agreement (NYSCEF 23 ¶¶ 49-70; NYSCEF 2 ¶¶ 27-36). Moreover, regardless of whether NYRT is bound

by the LLC Agreement, “there can be no quasi-contract claim against a third-party nonsignatory to a contract that covers the subject matter of the claim” (*Maor*, 143 AD3d at 579 [internal citations omitted]). Accordingly, WWPJV cannot maintain its counterclaim for unjust enrichment against NYRT and Counterclaim Four is dismissed.

**II. Plaintiff/Counterclaim Defendant’s Motion to Strike, or Alternatively Dismiss WWPJV’s Affirmative Defenses**

ARC moves to strike, or dismiss, all eleven affirmative defenses asserted by WWPJV. As set forth below, ARC’s motion is **granted** with respect to the second, fourth, fifth, sixth, seventh, eighth, tenth, and eleventh Affirmative Defenses and **denied** with respect to the first, third, and ninth Affirmative Defenses.

On a motion to strike affirmative defenses, “the allegations set forth in the answer must be viewed in a light most favorable to the defendants, and the defendant is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed” (*Pugh v New York City Housing Authority*, 159 AD3d 643, 643 [1<sup>st</sup> Dept 2018] [internal citations omitted]). However, striking affirmative defenses may be appropriate where a defendant “merely plead[s] conclusions of law without any supporting facts” (*Fireman’s Fund Ins. Co. v Farell*, 57 AD3d 721, 723 [2d Dept 2008]; *see also Kronish Lieb Weiner & Hellman LLP v Tahari, Ltd.*, 35 AD3d 317, 319 [1<sup>st</sup> Dept 2006] [affirming dismissal of affirmative defenses as conclusory]).

Here, the second, fourth, fifth, sixth, seventh, eighth, tenth, and eleventh affirmative defenses fail to allege any “facts or circumstances constituting a legal basis” for their assertion in this action (*Griffin v Gould*, 131 AD2d 432, 433 [2d Dept 1987]). For example, the fifth and sixth affirmative defenses respectively assert that “the Complaint is barred, in whole or in part, because [ARC] has not sustained any cognizable damages,” and that ARC’s “gross negligence,

willful misconduct, and bad faith breach of the LLC Agreement” bar the Complaint (NYSCEF 23 at 14). However, ARC’s complaint asserts only one cause of action for a declaratory judgment declaring its rights to the reserve funds under the LLC Agreement (*see* NYSCEF 2). Thus, WWPJV fails to articulate a legal basis for the applicability of these defenses to ARC’s complaint and they are dismissed.

By contrast, the first, third, and ninth, affirmative defenses are all fact-intensive defenses supported by the allegations in the Answer with Counterclaims/Third-Party Claims (*see* NYSCEF 23). Accordingly, ARC has not met the “heavy burden of showing that the[se] defense[s] [are] without merit as a matter of law” (*Pugh*, 159 AD3d at 643).

Based on the foregoing, ARC’s motion is **granted** to the extent it seeks to dismiss WWPJV’s second, fourth, fifth, sixth, seventh, eighth, tenth, and eleventh affirmative defenses and is otherwise **denied**.

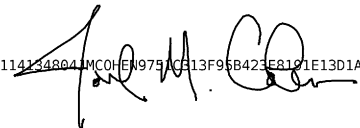
Accordingly, it is

**ORDERED** that ARC and NYRT’s motion to dismiss WWPJV’s third-party claims and its Second, Third, and Fourth Counterclaims is **granted**; it is further

**ORDERED** that ARC’s motion to strike, or alternatively, dismiss WWPJV’s affirmative defenses is **granted** with respect to WWPJV’s second, fourth, fifth, sixth, seventh, eighth, tenth, and eleventh affirmative defenses, and is otherwise **denied**; and it is further

**ORDERED** that the parties appear telephonically for a preliminary conference on **November 28, 2023, at 11:00 a.m.**, with the parties circulating dial-in information to chambers at [SFC-Part3@nycourts.gov](mailto:SFC-Part3@nycourts.gov) in advance of the conference.<sup>3</sup>

This constitutes the Decision and Order of the Court.

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**JOEL M. COHEN, J.S.C.**

11/14/2023  
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
			DENIED		OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					REFERENCE

<sup>3</sup> If the parties agree on a proposed preliminary conference order in advance of the conference date (consistent with the guidelines in the Part 3 model preliminary conference order, available online at <https://www.nycourts.gov/LegacyPDFS/courts/comdiv/NY/PDFs/PC-Order-Part-3.pdf>), they may file the proposed order and email a courtesy copy to chambers with a request to so-order in lieu of holding the conference.