SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

----------X

JDS FOURTH AVENUE JV II LLC,JDS CONSTRUCTION GROUP, LLC,JDS FOURTH AVENUE DEVELOPER LLC

Plaintiff,

- v -

LARGO 613 BALTIC STREET PARTNERS LLC,MAXX LLC,

Defendant.

----------X

INDEX NO. 651948/2020

MOTION DATE N/A

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the Defendants' motion for summary judgment is granted in its entirety and the Defendants are entitled to attorneys' fees incurred in this action. The Defendants have met their burden of coming forth with evidence to demonstrate their entitlement to judgment as a matter of law and the Plaintiffs' fail to present evidence sufficient to demonstrate any material issue of fact for trial (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Specifically, the Defendants have demonstrated that (i) JDS Construction's claim against Maxx for breach of the Contractor Agreement fails because JDS Construction was already fully reimbursed for any alleged damages and therefore can not demonstrate damages at trial and (ii) the Plaintiffs' (x) claim for breach of oral contract alleging that certain moneys paid to Largo were a loan and (y) alternative claims for promissory estoppel and unjust enrichment are refuted

by the documentary evidence which establishes that the payment of $925,119.39 by Fourth Avenue Property Owner LLC (the **Property Owner**) to Largo (the **Payment**) was an equity distribution. As such, the complaint against the Defendants must be dismissed and the Defendants are entitled to attorneys' fees pursuant to the LLC Agreement. For completeness, JDS Fourth II's cause of action for a declaratory judgment against Largo is withdrawn.

Reference is made to (i) this Court's Decision and Order dated July 7, 2021 (the **July 2021 Decision**; NYSCEF Doc. No. 55) pursuant to which this Court (x) dismissed the causes of action for breach of contract, fraudulent inducement, and unjust enrichment without prejudice and (y) disqualified the law firm Kasowitz Benson Torres LLP from representing the Plaintiffs and (ii) this Court's Decision and Order dated April 26, 2022 (the **April 2022 Decision**, and, together with the July 2021 Decision, hereinafter, collectively, the **Prior Decisions**) pursuant to which this Court denied Largo's motion to dismiss the causes of action for breach of contract, promissory estoppel, and unjust enrichment. The underlying facts and circumstances are set forth in the Prior Decisions and familiarity is presumed. Terms used herein and not otherwise defined shall have the meaning ascribed thereto in the Prior Decisions.

The Defendants are entitled to dismissal of the claim against Maxx for breach of the Contractor Agreement because the Plaintiffs have already been compensated for the alleged damages arising from Maxx's alleged breach. The damages the Plaintiffs seek are:

- $29,500 paid to Architectural Testing, Inc. ("ATI") for window testing and retesting due to repeated failed tests from September 2016 through July 2017;
- $1,231,611 expended in general conditions and insurance costs as a result of Project delays from November 2016 through May 2017;
- $184,546 expended on labor for the installation of temporary protection on the Project between December 2016 and May 2017;

- $15,596 paid to other contractors, including Open Architectural Windows & Doors, to address Maxx warranty items and water damage from February 2017 through May 2019; and
- 1,006 paid to Luxury Tile & Painting for repairs to Unit 9C in May 2019

(NYSCEF Doc. No. 167, ¶ 34). These are the exact same damages that the Plaintiffs identified in their interrogatory responses (Response No. 5 [NYSCEF Doc. No. 133]). The Plaintiffs previously admitted that these amounts have all been paid by the Property Owner (*id.*, Response No. 6). Having been fully compensated for all of the damages they allege they incurred by Maxx's alleged breach, the Plaintiffs can not maintain a claim for breach of contract and the cause of action must be dismissed.

The documentary evidence also establishes that the Payment to Largo was not a loan. In the April 2022 Decision, the Court declined to dismiss the cause of action for breach of oral contract because the emails attached on the motion did not conclusively refute the Plaintiffs' allegations as a matter of law that the Payment was intended to be a loan (NYSCEF Doc. No. 97, at 4). Specifically, the Court held that the emails did not provide sufficient context for the Court to determine whether there were additional oral terms agreed upon by the parties for Largo to pay back the Payment at some future point (*id.*). Now, on the fully developed record, the Defendants have established their entitlement to summary judgment dismissing the cause of action for breach of oral contract. The Defendants adduce an email dated May 17, 2018 from Mr. Stern to Nissim Ben-Nun in which he refers to the Payment as a distribution of returned equity:

> We received you wire instructions and request for a distribution of $925,119.39 of returned equity, which we accept as your acknowledgment and confirmation of your agreement with the distribution calculations distributed yesterday. Please confirm and upon receipt we will initiate the distribution

(NYSCEF Doc. No. 155). The Payment was then made by wire transfer, as confirmed in an email from Mr. Stern to Mr. Ben-Nun dated the same day, from the Property Owner LLC to Largo in the amount of $925,119.39, and the transaction details stated: "FOURTH AVE LLC EQUITY DISTR" (NYSCEF Doc. No. 156). Kenneth Yormark, an expert retained by Largo in this matter, analyzed the Property Owner's general ledger and testified that (i) the Property Owner recorded the Payment as a distribution, an decrease in Largo's equity account, not an increase in a liability account, (ii) a loan would have been recorded on JDS Developer's books and records and not on the Property Owner's general ledger, and (iii) numerous documents he was provided with demonstrated that the Payment was treated as a distribution (NYSCEF Doc. No. 161, ¶¶ 27-31). The Payment was also treated as a distribution and not a loan by Largo in its 2018 tax return (NYSCEF Doc. No. 130). Accordingly, the Defendants have come forward with sufficient evidence to demonstrate their entitlement to judgment on this issue. In response, the Plaintiffs have failed to produce any documentary evidence to demonstrate an issue of fact and rely solely on the self-serving testimony of Mr. Stern. Even Mr. Byrd, Mr. Stern's expert conceded (tr at 13, lines 8-9 [NYSCEF Doc. No. 212]) that the basis for suggesting that the Payment was a loan was based solely on Mr. Stern's deposition testimony:

> Q. So what about the records supports the view that this was a loan as opposed to something else?
> A. It is consistent with Mr. Stern's deposition that he lent money from JDS Developer to Largo.
> Q. Okay. So you're basing your conclusion of the consistency of the records with a loan based on Mr. Stern's deposition, correct?
> A. Yes.
> Q. Anything else?
> A. No

(*id.*, at 99-100, lines 16-4). This is insufficient to raise a triable issue of fact (*Caraballo v Kingsbridge Apt. Corp.*, 59 AD3d 270, 270 [1st Dept 2009]). The Defendants are therefore

entitled to summary judgment dismissing the Plaintiffs' claim for breach of oral contract. Inasmuch as this was decidedly an equity distribution, the claims for promissory estoppel and unjust enrichment are also dismissed.

The Defendants are also entitled to reasonable attorneys' fees pursuant to the LLC Agreement.

It is hereby ORDERED that the Defendants' motion for summary judgment is granted; and it is further

ORDERED that the Defendants shall provide a bill of costs for reasonable attorneys' fees within 14 days of the date of this order; and it is further

ORDERED that if the parties' disagree as to the amount of reasonable attorneys' fees to be paid, they shall promptly notify Part 53 (sfc-part53@nycourts.gov) and the matter shall be referred to a JHO/Special Referee.

20231214153607AB0RR0K9E41B4FF6E5243BFA59B6C625334CF38

12/14/2023
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	[X]	**CASE DISPOSED**		[ ]	**NON-FINAL DISPOSITION**		
	[X]	**GRANTED**	[ ] **DENIED**	[ ]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**