

**O'Keefe's Inc. v 400 Times Sq. Assoc., LLC,**

2023 NY Slip Op 34494(U)

December 23, 2023

Supreme Court, New York County

Docket Number: Index No. 150702/2019

Judge: Joel M. Cohen

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This opinion is uncorrected and not selected for official publication.

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

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O'KEEFFE'S INC. D/B/A SAFTI FIRST,

Plaintiff,

- v -

400 TIMES SQUARE ASSOCIATES, LLC, BRF  
 CONSTRUCTION CORP., SCOTT 42 DEVELOPMENT,  
 LTD, CACTUS ON NINTH, LLC, NEW YORK CITY  
 ENVIRONMENTAL CONTROL BOARD, NES  
 EQUIPMENT SERVICES CORPORATION D/B/A NES  
 RENTALS, KENSEAL CONSTRUCTION PRODUCTS OF  
 MARYLAND INC. N/K/A HD SUPPLY CONSTRUCTION  
 SUPPLY, LTD., TANNER BOLT & NUT INC., FENSTE  
 INC., 400 TSA MEZZ LLC, 400 TSA HOTEL JV LLC, 42/9  
 BRF REALTY LLC, BERNARD FRIEDMAN, ROBERT  
 FRIEDMAN, DAVID FRIEDMAN, JOHN AND JANE DOE'S  
 1-10, (SAID NAMES BEING FICTITIOUS, AS THE NAMES  
 OF THESE OTHER DEFENDANTS ARE UNKNOWN AT  
 THIS TIME),

Defendants.

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 007) 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310

were read on this motion to DISMISS.

Defendants' motion to dismiss Plaintiff O'Keeffe's Inc. d/b/a/ Safti First ("Plaintiff") Amended Verified Complaint (NYSCEF 262) pursuant to CPLR 3211(a)(1), (a)(5), (a)(7) and (a)(10) is **denied**.

**A. Background**

Plaintiff provided fire-rated glass and framing to non-party Crowne Architectural Systems, Inc. ("Crowne") for use on Defendants' construction project. According to Plaintiff,

following Crowne's bankruptcy, Defendants took possession of the glass and framing for which Plaintiff has not been paid pursuant to its contract with Crowne.

By order dated August 11, 2023, the Court granted Plaintiff's motion to amend to withdraw its lien foreclosure claim and assert quasi-contract claims (NYSCEF 260). Plaintiff's Amended Complaint, also filed on August 11, 2023, asserts claims for (1) unjust enrichment; (2) quantum meruit; (3) promissory estoppel; (4) conversion; and (5) replevin.

By order dated August 14, 2023, the Court referred this case to the Commercial Division ADR Program (NYSCEF 264). On September 1, 2023, Defendants moved to dismiss (NYSCEF 272) before mediation commenced. Defendants' motion raises nearly identical arguments to those raised in opposition to Plaintiff's motion to amend, including the statute of frauds, the statute of limitations and failure to state a claim (*Cf.* NYSCEF 241, 273).

The mediator determined that ADR would not be productive while a dispositive motion was pending. Accordingly, on September 8, 2023, the Court adjourned the mediation until after this motion was decided (NYSCEF 285).

The motion to dismiss was fully briefed on October 17, 2023 and the Court scheduled oral argument. On November 28, 2023, counsel for Plaintiff wrote to the Court to request that the motion be taken on submission (given that no party requested oral argument) or that the oral argument date be advanced in order that the parties may proceed to mediation (NYSCEF 310). Defendants have not responded.

#### **B. The Motion to Dismiss is Denied**

When assessing a motion to dismiss, the Court examines the complaint for legal sufficiency and affords the non-moving party every favorable inference (*Sassi v Mobile Life Support Services, Inc.*, 37 NY3d 236, 239 [2021] [collecting cases]). Relevant here, “[a]

proposed amendment that cannot survive a motion to dismiss should not be permitted” (*Scott v Bell Atl. Corp.*, 282 AD2d 180, 185 [1st Dept 2001], *affd as mod sub nom. Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314 [2002] *citing Glenn Partition, Inc. v Trustees of Columbia Univ. in City of New York*, 169 AD2d 488, 489 [1st Dept 1991]).

CPLR 3211(e)’s “single motion rule” does not preclude a motion to dismiss an amended complaint so long as the challenged claims are not identical to any claims in the original complaint (*Barbarito v Zahavi*, 107 AD3d 416, 420 [1st Dept 2013]). That said, the Court evaluated the legal sufficiency the First Amended Verified Complaint when considering Plaintiff’s motion for leave to amend the complaint (*O’Keeffe’s Inc. v 400 Times Sq. Assoc., LLC*, 2023 N.Y. Slip Op. 32776[U], 3 [N.Y. Sup Ct, New York County 2023] *citing Olam Corp. v Thayer*, 2021 N.Y. Slip Op. 30345[U], 1 [N.Y. Sup Ct, New York County 2021]). As explained by the Court in *Olam*, “it would be pointless to grant leave to file an amended complaint if the Court concludes that the complaint will, in turn, be dismissed under CPLR 3211” (*Olam citing Scott v. Bell Atl. Corp.*).

The Court has considered the considerable evidence, affidavits, and other submissions made by the parties and again finds – again – that the Amended Complaint sets forth plausible claims for relief (assuming the truth of its factual allegations). Contrary to Defendants’ assertions, the correspondence, invoices, and other documents submitted in connection with this motion do not utterly refute the Plaintiff’s quasi-contract claims. Accordingly, the motion to dismiss is denied without prejudice to Defendants testing the legal sufficiency of the claims on a summary judgment record or at trial.

\* \* \* \*

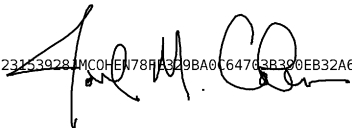
Accordingly, it is

**ORDERED** that Defendants' motion to dismiss Plaintiff's First Amended Verified Complaint is **DENIED**; it is further

**ORDERED** that the parties inform the Commercial Division ADR coordinator that this motion has been decided and request that mediation be scheduled without additional delay; it is further

**ORDERED** that the parties submit a status update letter on or by January 12, 2024 advising as to the mediation schedule and status of discovery; it is further

**ORDERED** that Defendants file an answer within thirty (30) days of this order.

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JOEL M. COHEN, J.S.C.

12/23/2023  
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DATE

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER  
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: