SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LYLE E. FRANK** **PART** **11M**

Justice

----------X

OLSHAN FROME WOLOSKY LLP,

Plaintiff,

- v -

LOUIS KESTENBAUM, JOEL KESTENBAUM, FORTIS PROPERTY GROUP, LLC,FPG MAIDEN LANE, LLC,FPG MAIDEN HOLDINGS, LLC

Defendant.

----------X

INDEX NO. 656174/2023

MOTION DATE 01/18/2024

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 17, 22

were read on this motion to/for DISMISS.

This action arises from a non-payment of legal fees, in which plaintiff, Olshan Frome Wolosky LLP ("Olshan"), asserts five causes of action against defendants, Fortis Property Group, LLC ("Fortis"), FPG Maiden Lane, LLC ("FPG Maiden Lane"), FPG Maiden Holdings, LLC ("FPG Maiden Holdings"), Joel Kestenbaum, and Louis Kestenbaum (collectively, the "Defendants"): (1) breach of contract; (2) unjust enrichment; (3) quantum merit; (4) fraudulent misrepresentation; and (5) charging lien. Defendants now seek to dismiss the complaint in its entirety pursuant to CPLR § 3211(a)(1) and (7). Upon the foregoing documents and oral argument, for the reasons indicated below, Defendants' motion to dismiss is granted in part, and denied in part[1].

Background

[1] The Court would like to thank Sophia Hartman for her assistance in this matter.

Olshan is a New York limited liability partnership engaged in the practice of law. Defendant Fortis owns and/or controls defendants FPG Maiden Holdings and FPG Maiden Lane[2]. Defendant Joel Kestenbaum is the president of FPG Maiden Lane, as well as the president and a member of Fortis. Defendant Louis Kestenbaum is a founder, member, and the Chairman of Fortis. The complaint alleges that Louis Kestenbaum made all decisions regarding Defendants' financial dealings with Olshan.

Olshan's complaint alleges that the fees owed, $1,038,127.09, by Defendants stem from their representation of Defendants in three different ongoing commercial actions in New York County Supreme Court: (1) Valley National Bank, as successor by merger to Bank Leumi USA v. FPG Maiden Lane, LLC et al., Index No. 657252/2020 (the "Foreclosure Action") (in which Olshan appeared on behalf of and represented Fortis, FPG Maiden Lane, Joel Kestenbaum and other related entities); (2) FPG Maiden Lane, LLC et al. v. Bank Leumi USA et al., Index No. 653584/2020 (the "Lender Liability Action") (in which Olshan appeared on behalf of and represented Fortis, FPG Maiden Lane and Joel Kestenbaum); and (3) MREF REIT Lender 2 LLC v. FPG Maiden Holdings et al., Index No. 653189/2022 (the "Mezz Lender Action") (in which Olshan appeared on behalf of and represented Fortis, FPG Maiden Holdings, FPG Maiden Lane and Joel Kestenbaum) (collectively, the "Actions").

Defendants' retention of Olshan was memorialized in July 2022 through Olshan's Engagement Letter and accompanying Terms of Engagement (collectively, the "Engagement Agreement"). The Engagement Agreement was signed by Fortis' General Counsel, Michael Regan, on behalf of FPG Maiden Lane, formally commencing Olshan's representation of the Defendants. Olshan continuously provided legal services to Defendants until November 2023.

[2] Defendant FPG Maiden Holdings is the parent entity of defendant FPG Maiden Lane.

Throughout that time, Olshan alleges that Defendants defaulted on payments multiple times under the payment procedure clause of the Engagement Agreement, but that Olshan had continued representing Defendants because they had promised to pay. The most notable of these promises asserted in the complaint occurred on July 12, 2023, when Regan, acting as Fortis' General Counsel, informed Olshan that "Louis [Kestenbaum] has approved payment of $425k to fully resolve the open invoices from November through April," and further set out new guidelines regarding how Defendants' would handle payments from thereon out.

Olshan accepted these new terms, thus forming a supplementary agreement between the parties ("Revised Fee Agreement"). When Defendants allegedly did not comply with the new terms, and Olshan indicated its inability to continue representing Defendants without full payment for the services previously rendered. The parties formally severed their relationship by stipulating to a substitution of counsel, which was filed in the Mezz Lender Action on November 8, 2023.

Standard of Review

It is well-settled that on a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the pleading is to be liberally construed, accepting all the facts as alleged in the pleading to be true and giving the plaintiff the benefit of every possible inference. See *Avgush v Town of Yorktown*, 303 AD2d 340 [2d Dept 2003]; *Bernberg v Health Mgmt. Sys.*, 303 AD2d 348 [2d Dept 2003]. Moreover, the Court must determine whether a cognizable cause of action can be discerned from the complaint rather than properly stated. *Matlin Patterson ATA Holdings LLC v Fed. Express Corp.*, 87 AD3d 836, 839 [1st Dept 2011]. "The complaint must contain allegations concerning each of the material elements necessary to sustain recovery under a viable legal theory.'" *Id.*

"In a motion to dismiss pursuant to CPLR § 3211(a)(1), the defendant has the burden of showing that the relied-upon documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" *Fortis Fin. Servs., LLC v Fimat Futures USA, Inc.*, 290 AD2d 383, 383 [1st Dept 2002] (internal quotations and citations omitted). Further, dismissal pursuant to CPLR § 3211(a)(1) is warranted where documentary evidence "conclusively establishes a defense to the asserted claims as a matter of law." *Gottesman Co. v A.E.W, Inc.*, 190 AD3d 522, 24 [1st Dept 2021].

Discussion

Defendants move to dismiss the complaint in its entirety, arguing that it is defective because Olshan fails to allege therein that it complied with New York's Fee Dispute Program or, in the alternative, that compliance with New York's Fee Dispute Program was unnecessary. Defendants contend that although the Fee Dispute Program may be inapplicable, the complaint must still plead that the dispute is not covered by the Fee Dispute Program.

The Court does not find this argument persuasive. The Fee Dispute Program established by Part 137 does not apply in matters where the parties have consented to arbitrate according to the rules of a separate and distinct arbitral body.

As set forth by the Rules of the Chief Administrator of the Courts, the Fee Dispute Program "provides for the informal and expeditious resolution of fee disputes between attorneys and clients through arbitration and mediation." 22 NYCRR § 137.0. Section 137.2(d) further states that "[t]he attorney and client may consent in advance to submit fee disputes for final and binding arbitration to an arbitral forum other than an arbitral body created by this Part…Arbitration in that arbitral forum shall be governed by the rules and procedures of that forum and shall not be subject to this Part." 22 NYCRR § 137.2(d).

It is well established that "an arbitration clause, as a component of a contractual agreement, must be enforced according to its terms." *Eiseman Levine Lehrhaupt & Kakoyiannis, P.C. v Torino Jewelers, Ltd*., 44 AD3d 581 [1st Dept 2007]. Because the parties to this action consented in advance to arbitrate any disputes before the American Arbitration Association ("AAA") in their Engagement Agreement, and Defendants did not bring a claim before the AAA within 10 days of being served the summons and complaint pursuant to the terms of Engagement Agreement, this action is therefore properly before this Court as it is not subject to the rules of the Fee Dispute Program. See 22 NYCRR § 137.2(d).

Furthermore, Defendants' argument that the breach of contract cause of action should be dismissed because the Engagement Agreement violates public policy, due to its omission of the parties' rights under the Fee Dispute Program, is similarly not persuasive, as the Engagement Agreement provides for the arbitration rights of the parties before the AAA, and Defendants were on notice of these rights at the time they entered into the Engagement Agreement.

As to the cause of action for fraudulent misrepresentation, defendants contend that it should be dismissed because the complaint fails to plead that cause of action with particularity pursuant to CPLR § 3016(b). Olshan alleges that Defendants only proposed the Revised Fee Agreement because Olshan advised the Defendants in July 2023 that it was prepared to seek leave to withdraw from all three Actions unless it received adequate assurances that its past-due bills would be paid and a commitment to timely pay future bills. Olshan further claims that it only continued representing Defendants because of the promises made by Defendants in the Revised Fee Agreement.

"The elements of a cause of action for fraud require a material representation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance . . . and damages." *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009].

The First Department has established that a cause of action for fraud is duplicative of the breach of contract claim regardless of whether a duty by defendant, independent of the contract governing the parties' relationship, is sufficiently alleged. *Empire Outlet Builders LLC v Constr. Resources Corp. of New York*, 170 AD3d 582 [1st Dept 2019] ("Regardless of whether plaintiff sufficiently alleged breach of a duty independent of the Subcontractor Agreement, the fraud claim is duplicative because plaintiff will be fully compensated via the contract claim. (*see MBIA Ins. Corp. v Credit Suisse Sec. [USA] LLC*, 165 AD3d 108, 114 [1st Dept 2018]).

Here, the Court finds that the allegations in the complaint are insufficient to establish a cause of action for fraudulent misrepresentation and the cause of action is duplicative of the breach of contract cause of action.

The concept of "piercing the corporate veil" is a limitation on accepted principles that corporation exists independently of its owners as a separate legal entity, that owners are normally not liable for debts of corporation, and that it is perfectly legal to incorporate for the express purpose of limiting liability of corporate owners. *Morris v. New York State Dep't of Tax'n & Fin.*, 82 NY2d 135 [1993]. Although there are no definitive rules governing circumstances when corporate veil may be pierced, there is generally required showing that: (1) owners exercised complete domination of corporation in respect to transaction attacked; and (2) such domination was used to commit fraud or wrong against plaintiff which resulted in plaintiff's injury. *Id.* Further, it has been held by the Court of Appeals that, at the pleading stage, a plaintiff seeking to pierce the corporate veil must adequately allege the existence of a corporate obligation and that

the defendant exercised complete domination and control over the corporation and abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice. *Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30 [2018].

Here, Louis Kestenbaum does have dominion over at least one of the corporate defendants. However, the complaint does not adequately allege that said dominion and control was used to commit fraud or wrongdoing.

Although not plead as a separate cause of action in the complaint, the Court finds that the complaint does not contain sufficient allegations to pierce the corporate veil to sustain any causes of action as against individual defendant Louis Kestenbaum.

Defendants offer the Engagement Agreement as its documentary evidence pursuant to CPLR § 3211 (a)(1). Defendants contend, that based on the Engagement Agreement, all causes of action should be dismissed against Joel Kestenbaum, Fortis, and FPG Maiden Holdings on the grounds that these defendants did not have an attorney-client relationship with Olshan. Because the Engagement Agreement was only entered into by FPG Maiden Lane, and it provides that Olshan' representation "does not extend to any of your affiliates," the breach of contract cause of action is dismissed as to defendants Joel Kestenbaum, Fortis, and FPG Maiden Holdings for lack of privity. NYSCEF Doc. No. 10.

However, because there were services rendered for Joel Kestenbaum, Fortis, and FPG Maiden Holdings, including Olshan's formal representation of said defendants in at least one Action, this Court does not find this argument availing as to the other causes of action, thus the complaint adequately establishes its quasi-contract cause of action. Accordingly, it is hereby

ORDERED that the complaint is dismissed in its entirety as against defendant Louis Kestenbaum; and it is further

ORDERED that the first cause of action for breach of contract be dismissed only as to defendants Joel Kestenbaum, Fortis Property Group, LLC, and FPG Maiden Holdings, LLC; and it is further

ORDERED that the fourth cause of action for fraudulent misrepresentation be dismissed in its entirety.

20240822094305LFRANK7413A27C39904F4789AC2C1FBB1B1071

8/21/2024
DATE

LYLE E. FRANK, J.S.C.

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