

**Murphy Kennedy Group LLC v Board of Mgrs. of the
St. Tropez Condominium**

2025 NY Slip Op 30214(U)

January 17, 2025

Supreme Court, New York County

Docket Number: Index No. 652913/2019

Judge: Arlene P. Bluth

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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. ARLENE P. BLUTH PART 14

Justice

-----X

MURPHY KENNEDY GROUP LLC,

Plaintiff,

INDEX NO. 652913/2019

MOTION DATE 12/16/2024

MOTION SEQ. NO. 009 & 010

- v -

BOARD OF MANAGERS OF THE ST. TROPEZ
CONDOMINIUM, SYLVIE DURHAM, IN HER CAPACITY AS
PRESIDENT OF THE BOARD OF MANAGERS OF THE ST.
TROPEZ CONDOMINIUM,

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

BOARD OF MANAGERS OF THE ST. TROPEZ
CONDOMINIUM,

Third-Party
Index No. 595117/2024

Plaintiff,

-against-

FIRSTSERVICE RESIDENTIAL NEW YORK, INC., FS
PROJECT MANAGEMENT, INC. D/B/A FS PROJECT
MANAGEMENT, LLC

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion Sequence 009) 266, 267, 269; (Motion Sequence 010) 268, 270, 284, 285, 289

were read on this motion to/for DISMISS.

Third-party defendants' motion to dismiss third-party plaintiff's complaint pursuant to CPLR 3211(a)(7) is decided as described below.

Background

The underlying case involves a dispute about whether defendants paid plaintiff Murphy Kennedy Group LLC ("MKG") for construction work that plaintiff contends it performed at

defendants' condominium building. The third-party action was commenced by defendant/third-party plaintiff Board of Managers of the St. Tropez Condominium ("St. Tropez") against third-party defendants FirstService Residential New York, Inc. ("FSRNY") and FS Project Management, Inc. ("FSPM") (together "FirstService Defendants"). St. Tropez insists that FirstService Defendants failed to properly manage the project and that any damages suffered by plaintiff MKG are attributable to FirstService Defendants.

In its third-party complaint, St. Tropez alleges that FSRNY and FSPM are both New York corporations with a common place of business at 575 Fifth Avenue, 9th Floor, New York, New York 10017. St. Tropez refers to the two entities collectively throughout its pleadings and claims that it entered into a management agreement with FirstService Defendants on September 12, 2012 for FirstService Defendants to provide project management services for the subject construction project.

FirstService Defendants brought two motions which are both addressed in this decision: motion sequence 009 and motion sequence 010. Movants initially filed a motion under motion sequence 009 that relied upon both CPLR 3211(a)(1) and (a)(7). The accompanying memorandum of law, however, only cited to CPLR 3211(a)(7). Movants seem to have then attempted to file an amended notice of motion (which only cites to CPLR 3211(a)(7)) but instead filed a new motion under motion sequence number 010. They did not bother to upload a new memorandum of law or even cite the papers upon which their motion was based in the notice of motion (*see* CPLR 2214[a] [requiring that a notice of motion identify the supporting papers upon which the motion is based]).

Despite this procedural blunder, the Court will do its best to consider the arguments on the merits although it can only consider the motion to dismiss under CPLR 3211(a)(7) as that is the only basis explored in movants' memorandum of law.

St. Tropez's third-party complaint alleges five causes of action against FirstService Defendants: breach of contract, unjust enrichment, breach of covenant of good faith and fair dealing, indemnification, and breach of fiduciary duty.

FirstService Defendants first argue that all of St. Tropez's claims must be dismissed because St. Tropez resorted to improper group pleading.

FirstService Defendants then argue that St. Tropez's breach of contract claim fails, as St. Tropez has not attached or sufficiently described the contract that was purportedly breached. FirstService Defendants contend that St. Tropez's unjust enrichment claim and claim for breach of the covenant of good faith and fair dealing claims both fail as impermissibly duplicative of St. Tropez's breach of contract claim.

FirstService Defendants state that the indemnification claim fails because neither a contractual nor a common-law duty for indemnification has been properly alleged.

Lastly, FirstService Defendants claim that the breach of fiduciary duty claim fails because this claim is likewise duplicative, and St. Tropez has failed to allege a fiduciary duty with enough detail to meet the heightened pleading standards required by CPLR 3016(b).

In opposition, St. Tropez does not address the group pleading allegation, but argues it met its burden for pleading all five of its causes of action.

In support of its breach of contract claim, St. Tropez does not annex a copy of the alleged agreement. However, in its amended third-party complaint St. Tropez claims it entered into a management agreement with FirstService Defendants on September 12, 2012, with FirstService

Defendants to provide project and construction management services. St. Tropez claims that “FSR failed to perform and defectively performed the construction management services required under the Agreements, inclusive of, but not limited to, failing to properly advise the Board regarding applications for payment and change orders, failing to monitor and implement Project cost control, failing to provide adequate Project supervision and failing to maintain Project documentation required under the Agreements” (NYSCEF Doc. No. 250 at 7 of 11). St Tropez further alleges that it paid FirstService Defendants, and that St. Tropez has suffered damages as a result of the alleged breach.

In support of its unjust enrichment claim, St. Tropez similarly alleges that FirstService Defendants’ services “were deficient and defective and failed to provide construction management services required under the Agreements” (*id.* at 8). St. Tropez therefore claims that FirstService Defendants were unjustly enriched when FirstService Defendants received and retained payments for the defective construction management services.

In support of its breach of the covenant of good faith and fair dealing claim, St. Tropez details in part that upon information and belief, FirstService Defendants failed to disclose conflicts of interest and acted contrary to the best interests of St. Tropez.

In support of its claim for indemnification, St. Tropez states that “[i]f MKG and/or the subcontractors and suppliers sustained damages...such damages were caused in whole by the actions and/or inactions of FSR, with no breach of contract on the part of the Board contributing thereto” (*id.* at 9).

In support of its claim for breach of fiduciary duty, St. Tropez claims that it had a fiduciary relationship with FirstService Defendants in FirstService Defendants’ capacity as property manager, that St. Tropez was owed the duty of care, and that FirstService Defendants

“breached the duty of care by failing to manage the Project in an appropriate manner, by failing to provide the management and oversight laid out in the agreement..., and by failing to manage the Project consistent with industry standards” (*id.* at 10).

Discussion

When considering a motion to dismiss pursuant to CPLR 3211(a)(7), the complaint must be considered in the light most favorable to the plaintiff, all factual allegations must be accepted as true, and the complaint is to be construed liberally with all reasonable inferences drawn in favor of the plaintiff (*Alden Global Value Recovery Master Fund, L.P. v KeyBank N.A.*, 159 AD3d 618 [1st Dept 2018], citing *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979] and *Leon v Martinez*, 84 NY2d at 87-88 [1994]).

Group Pleading

Both St. Tropez and FirstService Defendants have referred to FSRNY and FSPM collectively in virtually all of the papers they have filed with this Court. The parties refer to FSRNY and FSPM collectively as “FSR” in seven different stipulations which are signed by counsel for both St. Tropez and FirstService Defendants (NYSCEF Doc. Nos. 205, 206, 244, 263, 269, 270, 288). These stipulations contain language such as “FSR waives any personal jurisdiction defenses” (NYSCEF Doc. Nos. 205, 206, 263) and “FSR shall serve reply papers on or before...” a specified date (NYSCEF Doc. Nos. 244, 269, 270, 288). FSRNY and FSPM have filed all of their papers jointly and refer to themselves collectively as “FirstService Defendants” in three of their own notices of motion (NYSCEF Doc. Nos. 242, 266, 268). FSRNY and FSPM also refer to themselves collectively as “FirstService Defendants” in their memoranda of law in support of their motions and argue that St. Tropez’s claims should be dismissed for pleading

against FSRYN and FSPM collectively as “FSR” in the same sentence that they refer to themselves collectively as “FirstService Defendants” (NYSCEF Doc. Nos. 243, 267).

While the Court is baffled that St. Tropez does not address FirstService Defendants’ argument that St. Tropez’s claims should be dismissed due to improper group pleading, the Court cannot find that dismissal is warranted in this case on this basis. Group pleading is permissible in cases where the allegations are made against closely related defendants (*see Arena Riparian LLC v CSDS Aircraft Sales & Leasing Co.*, 184 AD3d 509, 510 [1st Dept 2020]). Here, when viewing the facts in the light most favorable to St. Tropez, the Court observes that FirstService Defendants are closely related. FirstService Defendants have the same business address and, obviously, share a similar name. Furthermore, they have the same counsel who have repeatedly referred to the two entities collectively and as if they were one entity on numerous occasions, such as when waiving their jurisdictional defenses and agreeing to submit documents by certain dates. Even in the papers submitted in support of the instant motion, the movants have not made a concerted effort to distinguish the defendants. Movants did not explain which entity did what, deny that they share the same business address, or otherwise attempt to set the defendants apart. Accordingly, this is not a basis for which the Court can grant the instant motion.

Breach of Contract

The elements of a claim for breach of contract are “the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages” (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425 [1st Dept 2010] [internal citations omitted]).

When considering if a breach of contract claim has been adequately plead for the purpose of surviving a CPLR 3211(a)(7) challenge, the plaintiff is not required to annex a copy of the

contract or state its terms verbatim (*First Class Concrete Corp. v Rosenblum*, 167 AD3d 989, 990 [2d Dept 2018]). “Pursuant to CPLR 3013, a complaint must allege facts that are sufficiently particular to give the court and the defendants proper notice of the transactions, occurrences, or series of transactions and occurrences intended to be proved” (*Nationstar Mtge., LLC v Ocwen Loan Servicing, LLC*, 194 AD3d 490, 492 [1st Dept 2021] [internal quotation marks and citations omitted]).

Here, St. Tropez alleges a specific date that the parties entered into the alleged agreement, alleges that FirstService Defendants failed to properly advise St. Tropez about applications for payment and change orders, to monitor and implement cost control, to provide adequate project supervision, and to maintain documentation as required by the agreement. The Court finds that St. Tropez plead sufficiently to put defendants on notice of the transactions and occurrences intended to be proved, and this amounts to adequately pleading the existence of a contract and the defendant’s breach thereunder. St. Tropez further alleges that it paid FirstService Defendants and suffered damages as a result of the alleged breach, thus adequately pleading the third and fourth elements for a breach of contract claim. The Court therefore finds that St. Tropez has sufficiently alleged a cause of action for breach of contract.

Unjust Enrichment

The Court grants the part of FirstService Defendants’ motion seeking to dismiss St. Tropez’s unjust enrichment claim. “An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim” (*Redwing Constr. Co., Inc. v Sexton*, 181 AD3d 1027, 1030 [3d Dept 2020] [internal quotation marks and citations omitted]).

The part of St. Tropez’s pleading alleging unjust enrichment relies on the allegation that FirstService Defendants did not provide the construction management services required under

the agreement. Indeed, St. Tropez doubles down on the existence of a breached enforceable contract in support of its unjust enrichment claim (NYSCEF Doc. No. 285 at 12 of 16). As this claim is duplicative of its breach of contract claim, it must be dismissed.

Breach of the Covenant of Good Faith and Fair Dealing

The Court denies the part of FirstService Defendants' motion seeking to dismiss St. Tropez's claim for Breach of the Covenant of Good Faith and Fair Dealing. A covenant of good faith and fair dealing is breached when a party to an agreement acts in a way that, while not expressly forbidden in the contract, would deprive the other party of the right to receive the benefits under the contract (*see Aventine Inv. Mgt., Inc. v Canadian Imperial Bank of Commerce*, 265 AD2d 513, 514 [2d Dept 1999]).

St. Tropez alleges that FirstService Respondents failed to disclose conflicts of interest and acted contrary to the best interests of St. Tropez. When viewed in the light most favorable to St. Tropez, the Court finds that St. Tropez has adequately alleged an extracontractual misdeed that would deprive St. Tropez of the right to receive the benefits under the alleged agreement.

Indemnification

The Court denies the part of FirstService Defendants' motion seeking to dismiss St. Tropez's indemnification claim in its entirety but agrees that St. Tropez has not adequately plead a claim for contractual indemnification. New York law imposes common-law indemnification obligations upon those who are actually at fault in bringing about an injury; in the name of fairness, the party who caused the injury should be held liable for indemnity (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 375 [2011]).

In its amended third-party complaint, St. Tropez claims that any damages to MKG are attributable to FirstService Defendants' alleged breach of contract. If it is shown that FirstService Respondents did in fact breach their contract in a manner that led to St. Tropez causing the damages to MKG, St. Tropez could be found to be entitled to common-law indemnification. St. Tropez has properly plead its cause of action for common-law indemnification.

On the other hand, in St. Tropez's attorney affirmation in opposition it claims that "[n]owhere in the 50+ paragraphs of the Amended Third-Party Complaint does [St. Tropez] allege contractual indemnification" (NYSCEF Doc. No. 285 at 14). As St. Tropez explicitly affirms that it did not allege contractual indemnification, St. Tropez may not proceed on a claim for contractual indemnification, only common law indemnification.

Breach of Fiduciary Duty

The Court grants the part of FirstService Defendants' motion seeking to dismiss St. Tropez's claim for breach of fiduciary duty as duplicative. "A cause of action for breach of fiduciary duty which is merely duplicative of a breach of contract claim cannot stand" (*William Kaufman Org., Ltd. v Graham & James LLP*, 269 AD2d 171, 173 [1st Dept 2000] [internal citations omitted]).

Here, St. Tropez claims that it had a fiduciary relationship with FirstService Defendants in their role as property manager, that St. Tropez was owed the duty of care, and that FirstService Defendants "breached the duty of care by failing to manage the Project in an appropriate manner, by failing to provide the management and oversight laid out in the agreement..., and by failing to manage the Project consistent with industry standards" (NYSCEF Doc. No. 250 at 10). In sum, St. Tropez claims that it had a management agreement with FirstService Defendants, and

FirstService Defendants did not manage the project in an appropriate manner. This claim is duplicative of its breach of contract claim and cannot stand.

Summary

The Court denies the part of FirstService Defendants' motion seeking to dismiss St. Tropez's entire complaint on the ground that it amounted to an impermissible group pleading. When viewing the facts in the light most favorable to St. Tropez, FirstService Defendants are closely related entities and group pleading is therefore permissible in this instance – even defendants do not make a genuine attempt to distinguish one entity from the other. The Court also denies the parts of FirstService Defendants' motion seeking to dismiss St. Tropez's causes of action for breach of contract, breach of the covenant of good faith and fair dealing, and common-law indemnification, as these have been adequately plead. The Court grants the part of FirstService Defendants' motion to dismiss St. Tropez's causes of action for unjust enrichment and breach of fiduciary duty as duplicative of the breach of contract claim. The Court also dismisses St. Tropez's indemnification claim only to the extent that it is based on contractual indemnification, as St. Tropez stated that it had not plead this claim.

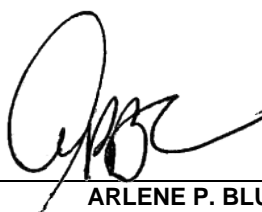
Accordingly, it is hereby

ORDERED that the part of FirstService Defendants' motion that seeks to dismiss St. Tropez's complaint due to group pleading is denied; and it is further

ORDERED that the parts of FirstService Defendants' motion that seek to dismiss St. Tropez's claims for breach of contract, breach of the covenant of good faith and fair dealing, and common-law indemnification are denied; and it is further

ORDERED that the parts of FirstService Defendants' motion that seek to dismiss St. Tropez's claims for unjust enrichment, breach of fiduciary duty, and contractual indemnification are granted; and it is further

ORDERED that FirstService Defendants submit an answer responding to the remaining sections of St. Tropez's amended third-party complaint by February 28, 2025.

<u>01/17/2025</u> DATE			 _____ ARLENE P. BLUTH, J.S.C.			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE