

HCPD LLC v MW Capital LLC

2025 NY Slip Op 30688(U)

February 27, 2025

Supreme Court, New York County

Docket Number: Index No. 654713/2024

Judge: Lyle E. Frank

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

-----X

HCPD LLC

Plaintiff,

- v -

MW CAPITAL LLC,

Defendant.

-----X

INDEX NO. 654713/2024

MOTION DATE 10/22/2024

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, defendant’s motion is granted in part and denied in part.

Background

In 2019, HCPD LLC (“Plaintiff”) entered into an agreement to oversee the building of a luxury condominium (the “Agreement”) that was owned by MW Capital LLC (“Defendant”). To date, Plaintiff has obtained a Temporary Certificate of Occupancy (“CO”) for the building and all units have been sold. The required documentation and application for a Permanent CO has been submitted, but the Department of Buildings has not yet granted it. Under Article 4.3 of the Agreement, Defendant is to pay Plaintiff an additional amount of compensation “after the complete completion of the Project.” The amount that Plaintiff would be owed is dependent on the amount of net profit generated by the building. If the net profit is less than \$3 million, Plaintiff would be paid \$850,000. A further condition is that the extra compensation is to be paid after the construction loan and owner’s equity have been paid/repaid.

As matters currently stand, Plaintiff alleges that the construction loan has been paid and the remainder of the sales proceeds were put towards repaying the owner’s equity. It is also

alleged that the project overall has been characterized as “a total loss.” In July of 2024, Plaintiff sent Defendant a demand letter seeking the \$850,000 referred to in the Agreement. Defendant rejected the notice and has not paid any additional compensation under Article 4.3 of the Agreement. As a result, Plaintiff brought this underlying lawsuit, pleading claims for breach of contract, breach of the implied covenant of good faith and fair dealing, fraudulent inducement, and unjust enrichment.

Standard of Review

It is well settled that when considering a motion to dismiss pursuant to CPLR § 3211, “the pleading is to be liberally construed, accepting all the facts alleged in the pleading to be true and according the plaintiff the benefit of every possible inference.” *Avgush v. Town of Yorktown*, 303 A.D.2d 340 (2d Dept. 2003). Dismissal of the complaint is warranted “if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery.” *Connaughton v. Chipotle Mexican Grill, Inc*, 29 N.Y.3d 137, 142 (2017).

CPLR § 3211(a)(1) allows for a complaint to be dismissed if there is a “defense founded upon documentary evidence.” Dismissal is only warranted under this provision if “the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994).

A party may move for a judgment from the court dismissing causes of action asserted against them based on the fact that the pleading fails to state a cause of action. CPLR § 3211(a)(7). For motions to dismiss under this provision, “[i]nitially, the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned

which taken together manifest any cause of action cognizable at law.” *Guggenheimer v. Ginzburg*, 43 N.Y. 2d 268, 275 (1977).

Discussion

Defendant brings the present motion to dismiss the complaint in its entirety pursuant to CPLR § 3211(a)(1) and (7). Their arguments are that 1) the claims are premature as the Agreement requires a Permanent CO before entitlement to additional compensation; 2) the building did not generate a net profit and therefore there is no entitlement; 3) that the fraudulent inducement and breach of the implied covenant of good faith claims are duplicative of the breach of contract claim; 4) the claim for fraudulent inducement is not pled with the requisite specificity; and 5) that there can be no claim for unjust enrichment when the governing contract is not in dispute. Plaintiff opposes the motion. For the reasons that follow, Defendant’s motion is granted as to the second and third causes of action but denied as to the first and fourth.

There is Ambiguity as to Whether Issuance of a Permanent CO is Required for Complete Completion of the Project

The language of the additional compensation provision in the Agreement states that Plaintiff becomes entitled to the payment “after complete completion of the Project.” Defendant argues that completion of the Project is not complete until the Permanent CO is issued. The Agreement does not define “complete completion”, but “Project” is defined in the Recitals section as “a residential building which comports with the Scope (as hereinafter defined) (all such work, collectively, the “**Project**”))” (emphasis in original). Scope is then defined as “the construction on the Property of an eleven-unit residential building containing (i) not less than 22,955 square feet of residential ground floor to the 7th floor thereof and (ii) the maximum Floor Area permitted under the Zoning Resolution, and otherwise conforming to the Approved Plans

and Specifications and the Legal Requirements.” Under Article 2 which lays out Plaintiff’s obligations under the Agreement, 2.2.39 states that “[o]n completion of the Work, make such requests, applications and government filings as may be required to obtain such government approvals and sign-offs (including without limitation, temporary and permanent certificates of occupancy).”

Defendant contends that the phrase “complete completion of the Project” requires that Plaintiff actually obtain a Permanent CO under Section 2.2.39. Plaintiff argues, among other things, that their obligation under 2.2.39 was just to make the necessary application for the Permanent CO, which has been submitted to DOB. On the standard of a motion to dismiss, given the benefit of every favorable inference, there is sufficient ambiguity in the Agreement to survive the present motion on this ground. When a motion to dismiss is “based on a written agreement that contains a material ambiguity [it] must be denied because such an agreement does not conclusively establish the asserted defense as a matter of law.” *Mulacek v. ExxonMobil Corp.*, 42 N.Y.3d 931, 933 (2024). There is ambiguity “when specific language is susceptible of two reasonable interpretations.” *Id.* As “complete completion” was never defined, and as the wording of 2.2.39 could reasonably be read to require simply *making* the necessary application for a Permanent CO, it would be improper to say that the Agreement conclusively requires the issuance of a Permanent CO before Project has reached “complete completion.”

There are Ambiguities as to the Net Profit Requirement and the Complaint is Sufficiently Pled

Another precondition for the payment of additional compensation, according to Defendant, is that the project as a whole generates a net profit. Under this interpretation of Article 4.3, if there is no net profit generated or if the project results in a net loss, Plaintiff is not entitled to any additional compensation. The Agreement defined net profit as “the actual profit

from the Project after all the applicable cost . . . is deducted from the revenue generated from the Project.” The complaint alleges that Defendant “agreed and stipulated that the Gramercy Project was a total loss, generating less than (3) million United States Dollars.” It is not fully clear whether Plaintiff is alleging that there was no net profit from the project, that there was a net loss after the costs were deducted from the revenue, or whether the project generated some amount less than \$3 million and that it was minor enough to be considered a “total loss.” Plaintiff argues that the formula listed in the Agreement that gives Plaintiff a certain payout if there is net profit under \$3 million is an indication of an intent between the parties to ensure that Plaintiff would receive a payment along with the owner’s equity payment if the project ended up generating “less than ideal revenue.” There is some ambiguity as to what additional compensation if any Plaintiff would be entitled to if the amount left over after costs are deducted from the revenue is zero or negative. And although the Complaint does not clearly state the alleged status of the project’s profit, the allegation that the project generated “less than (3) million United States Dollars” is sufficient to survive a motion to dismiss.

The Claim for Breach of the Covenant of Good Faith and Fair Dealing is Duplicative of the Breach of Contract Claim

The second cause of action alleges that Defendant “breached the covenant of good faith and fair dealing by failing to honor its financial obligations under the provisions of the Development Agreement.” Defendant moves to dismiss this claim as duplicative of the breach of contract claim. If the “breach of an implied covenant of good faith and fair dealing is intrinsically tied to the damages allegedly resulting from a breach of the contract”, the claim is duplicative and should be dismissed. *Canstar v. J.A. Jones Constr. Co.*, 212 A.D.2d 452, 453 (1st Dept. 1995). Such a claim is not, however, duplicative when “the complaint alleges conduct

that is separate from the conduct constituting the alleged breach of contract and such conduct deprived the other party of the benefit of its bargain.” *AEA Middle Mkt. Debt Funding LLC v. Marblegate Asset Mgt., LLC*, 214 A.D.3d 111, 133 (1st Dept. 2023). Here, the complaint does not allege conduct that is separate from the conduct alleged for breach of contract. Both claims are premised on the allegation that Defendant failed to pay additional compensation as required by the Agreement. And both claims seek the same damages in the prayer for relief. Therefore, dismissal is proper.

Fraudulent Inducement Cause of Action Fails to State a Claim

The third cause of action is for fraudulent inducement, pled in the alternative. Plaintiff alleges that Defendant represented to them that it would obtain a CPA to calculate the net profit from the project and that additional compensation would be paid when the individual units would be sold. Defendant is moving to dismiss this claim on three grounds: 1) that it was not pled with specificity; 2) that it is duplicative of the breach of contract claim; and 3) that the integration clause in the Agreement bars the claim. Turning first to the specificity argument, Defendant claims that Plaintiff has failed to plead either Defendant’s scienter or Plaintiff’s justifiable reliance. The element of scienter must be pled with specificity, and conclusory allegations are insufficient. *Fried v. Lehman Bros. Real Estate Assoc. III, L.P.*, 156 A.D.3d 464, 465 (1st Dept. 2017). Furthermore, there must be a “knowing misrepresentation of present fact” and not a “misrepresentation of future intent to perform under the contract” or “merely an insincere promise of future performance.” *GoSmile, Inc. v. Levine*, 81 A.D.3d 77, 81 (1st Dept. 2010).

Here, the misrepresentations pled by Plaintiff are all allegedly insincere promises to perform under the contract: that Defendant promised it would obtain a CPA as required under the contract and pay Plaintiff additional compensation as outlined in the Agreement, but that

Defendant did not intend to perform these obligations. While the allegations are pled with the requisite specificity as to facts, these facts fail to state a claim for fraudulent inducement.

Therefore, dismissal of this cause of action is proper.

The Unjust Enrichment Claim

Plaintiff's fourth cause of action is a claim for unjust enrichment pled in the alternative. Defendant is seeking to dismiss it as duplicative of the breach of contract claim. When there is an "enforceable contract [that] governs the services" described as being performed as the basis for the unjust enrichment claim, quasi-contract recovery is precluded, and the claim should be dismissed. *Reveam, Inc. v. Taylor Freres Capital Mkts., LLC*, 228 A.D.3d 538, 539 (1st Dept. 2024). A claim for unjust enrichment that is "predicated on conduct not covered by the contract" should not, however, be dismissed. *Sergeants Benevolent Ass'n Annuity Fund v. Renck*, 19 A.D.3d 107, 112 (1st Dept. 2005). Here, all the conduct that Plaintiff alleges that they performed that unjustly enriched Defendant was conduct covered by the Agreement, such as completing the development and management of the project. Although the fourth cause of action does not allege conduct separate from the breach of contract claim, dismissal as duplicative at this stage would be premature.

A party is permitted to specifically plead a claim of unjust enrichment in the alternative. *Maya NY, LLC v. Hagler*, 106 A.D.3d 583, 585 (1st Dept. 2013). When there is a dispute as to either the existence or application of a contract, a plaintiff does not need to elect their remedy until trial and a quasi-contract claim pled in the alternative is permitted to stand. *Wilmoth v. Sandor*, 259 A.D.2d 252, 254 (1st Dept. 1999). As here the parties dispute the nature of the application of the Agreement to the issue of additional compensation, the fourth cause of action should not be dismissed. As Defendant's remaining arguments in favor of dismissing this claim

turn on it being precluded by or duplicative of the Agreement, this cause of action will not be dismissed at this time. Accordingly, it is hereby

ORDERED and ADJUDGED that defendant’s motion to dismiss is granted as to the second and third causes of action and those causes of action are hereby dismissed; and it is further

ADJUDGED that defendant’s motion to dismiss is denied as to the first and fourth causes of action.


20250227110752LFRANK0779977FF5864313B1F4472BBE80EC46

2/27/2025
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	
<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN

<input type="checkbox"/>	SUBMIT ORDER	
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

CHECK IF APPROPRIATE: