

Clarke Contr. LLC v Promethean Bldrs. LLC
2025 NY Slip Op 33749(U)
October 1, 2025
Supreme Court, New York County
Docket Number: Index No. 656229/2023
Judge: Lyle E. Frank
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

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CLARKE CONTRACTING LLC,

Plaintiff,

INDEX NO. 656229/2023

MOTION DATE 07/03/2025

MOTION SEQ. NO. 008

- v -

PROMETHEAN BUILDERS LLC, ROBERT J. HUBNER,

Defendant.

**DECISION + ORDER ON
MOTION**

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PROMETHEAN BUILDERS LLC, ROBERT HUBNER

Plaintiff,

Third-Party
Index No. 595259/2024

-against-

MICHAEL CLARKE, JC ELITE CONSTRUCTION SERVICES,
LLC

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 008) 198, 199, 200, 201, 202, 203, 204, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222 were read on this motion to/for DISMISS.

Defendants/ third-party plaintiffs, Promethean Builders LLC (“Promethean”), Robert J. Hubner (“Hubner”), and PB South Construction, LLC (“PB South”), seek an order pursuant to CPLR § 3211(a)(8) to dismiss defendant PB South from this action based on lack of jurisdiction and to dismiss, pursuant to CPLR § 3211(a)(1)and (7), plaintiff Clarke Contracting LLC’s and third-party defendants Michael Clarke and JC Elite Construction Services LLC’s amended complaint’s fourth cause of action for breach of fiduciary duty, fifth cause of action for the imposition of a constructive trust, sixth cause of action for conversion, and seventh cause of action for an equitable accounting. Plaintiff and third-party defendants oppose the instant motion

and cross-move for jurisdictional discovery. For the reasons set forth below, the motion to dismiss is granted and the cross-motion is denied.

Factual Background

The individual parties, Clark and Hubner, were business partners that had a falling out prompting the instant litigation. The underlying action is based on allegations that defendants/third-party plaintiffs breached a promissory note, as well as allegations that Hubner breached his fiduciary duty by committing waste of corporate assets, conversion of corporate assets and that plaintiff/third-party defendants are entitled to an accounting.

Standard of Review

When considering a motion to dismiss based upon CPLR § 3211(a)(7), the court must accept the alleged facts as true, accord the plaintiff the benefit of every possible favorable inference, and determine whether the facts alleged fit into any cognizable legal theory. *Leon v. Martinez*, 84 NY2d 83 [1994]. On a motion to dismiss the court “merely examines the adequacy of the pleadings”, the court “accept as true each and every allegation made by plaintiff and limit our inquiry to the legal sufficiency of plaintiff’s claim.” *Davis v Boenheim*, 24 NY3d 262, 268 [2014].

Discussion

Defendants contend that the fourth and fifth causes of action asserted against defendant PB South requires dismissal because the court lacks jurisdiction over it. As alleged in the amended complaint, PB South is a Florida entity that operates in Florida.

In his affidavit in opposition Clarke, claims that PB has several general ties to New York because it retains vendors that allegedly operate in New York. However, the affidavit does not establish the connection between these third-party companies’ New York operations and the

alleged transfer, which took place in Florida, that is the basis of the fourth and fifth cause of action.

Assuming for the purposes of this motion, as the Court is required to do, that all the allegations in the amended complaint are true, plaintiff has failed to allege a sufficient nexus between the alleged connection of the third-party companies and PB South and the alleged transferring construction contracts to PB South from a non-party Florida company. The amended complaint alleges conduct by a Florida company that occurred in Florida.

With respect to the cross-motion, plaintiff has failed to articulate any factual or legal basis to warrant jurisdictional discovery. Plaintiff's contentions that jurisdictional discovery is required is supported by mere speculation with no factual allegations to support the contention that a nexus between the conduct and the foreign entity warrants exploration of the possibility of jurisdiction in this county. Accordingly, the portion of the motion that seeks dismissal of the amended complaint as against PB South, a Florida company, is granted, and the cross-motion seeking jurisdictional discovery is denied.

Fourth Cause of Action

Plaintiff alleges that it is entitled to assert derivative claims based on Promethean's failure to file suit against Hubner, for his alleged breach of fiduciary duty, waste of corporate assets and unjust enrichment. Plaintiff contends that Promethean's failure to initiate an action is not protected under the business judgment rule. The amended complaint also asserts that Clarke Contracting made a demand to initiate an action against Hubner and the demand was denied.

Defendants contend that with respect to its breach of fiduciary duty allegation, the amended complaint are pleaded without particularity, fails to meet the higher pleading standard

required by CPLR § 3016(b), fails to state a claim, and attacks decisions that are protected by the business judgment rule, and are refuted by documentary evidence.

The elements of a cause of action to recover damages for breach of fiduciary duty are the existence of a fiduciary relationship, misconduct by the defendant, and damages directly caused by the defendant's misconduct. *106 N. Broadway, LLC v Lawrence* 189 AD3d 733 [2d Dept 2020]. "A cause of action sounding in breach of fiduciary duty must be pleaded with particularity under CPLR 3016 (b)" *Id.*

Here, the amended complaint alleges that Hubner wasted corporate fund by paying for personal expenses and allowing other members to pay for personal expenses using corporate funds. The amended complaint does not allege the dates of the alleged purchases or the amounts, nor does amended complaint assert plaintiff's basis for its allegations that the purchases were made and that those purchases were made for an improper purpose. The Court agrees that the amended complaint alleges conclusory allegations that fail to provide the required particularity pursuant to CPLR § 3016 (b) to state a claim for breach of fiduciary duty.

As to the allegation that plaintiff is entitled to assert derivative causes of action based on defendants' refusal to commence an action as against Hubner, the Court finds that plaintiff has failed to allege that defendants' denial of plaintiff's demand was for made in bad faith and not a legitimate corporate purpose. Accordingly, this cause of action is dismissed in its entirety.

Fifth, Sixth, and Seventh Causes of Action

Plaintiff's fifth and sixth cause of action allege derivative claims for a constructive trust and conversion.

“A constructive trust is an equitable remedy, and its purpose is to prevent unjust enrichment” (*Homapour v Harounian*, 182 AD3d 426, 427 [1st Dept 2020] internal citations omitted).

Plaintiff has not sufficiently opposed defendant’s position that it has adequate remedies in contract law and that a constructive trust is inappropriate in this matter. *See Bertoni v Catucci*, 117 AD2d 892, 895 [3d Dept 1986] (“[A] constructive trust should not be imposed unless it is demonstrated that a legal remedy is inadequate”).

With respect to the derivative cause of action for conversion, the Court finds that the amended complaint fails to adequately allege a cause of action for conversion.

“Conversion occurs when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession” (*Family Health Mgt., LLC v Rohan Devs., LLC*, 207 AD3d 136, 139 [1st Dept 2022] citing *Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]). A claim for conversion cannot be maintained if it is duplicative of one for breach of contract. *See Peters Griffin Woodward, Inc., v WCSC, Inc and MMT Sales, Inc.*, 88 AD2d 883 [1st Dept 1982]; see also *Retty Financing, Inc. v Morgan Stanley Dean Witter & Co.*, 293 AD2d 341 [1st Dept 2002].

Here, the alleged conversion is based on the same conduct that plaintiff alleges as waste and breach of fiduciary duty and does not articulate that defendants were without authority and interfered with plaintiff’s right of possession. Contrary to defendants’ contention that this cause of action is duplicative of the breach of contract causes of action, that is not the case. The breach of contract causes of action relate to the breach of payment pursuant to the promissory notes however even based on a liberal reading of the amended complaint the Court finds that plaintiff fail to state

a cause of action for conversion. Accordingly, the defendant’s motion seeking dismissal of the conversion claim is granted.

Plaintiff’s seventh cause of action alleges entitlement to an equitable accounting.

Defendants contend that an equitable accounting is only viable when the plaintiff does not have an adequate remedy at law, and cites to *Koppel v Wien, Lane & Malkin* (125 AD2d 230, 234 [1st Dept 1986]) in support of that proposition. However, *Koppel* stands for the proposition that when there is a fiduciary relationship an equitable accounting is an absolute right. The First Department however has later changed course and required plaintiff to demonstrate “that he or she has no adequate remedy at law” (*Unitel Telecard Distrib. Corp. v Nunez*, 90 AD3d 568, 569 [1st Dept 2011]). Here, as with the cause of action for a constructive trust, plaintiff has not established that it does not have an adequate remedy at law. Neither the amended complaint nor the opposition clarify how or why plaintiff is entitled to an equitable accounting. Accordingly, it is hereby

ADJUDGED that plaintiff’s cross-motion is denied; and it is further

ORDERED that the fourth, fifth, sixth and seventh causes of action in the amended complaint are dismissed in their entirety; and it is further

ORDERED that the Clerk is directed to amend the caption to remove defendant PB South Construction, LLC from the action.


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LYLE E. FRANK, J.S.C.

10/1/2025
DATE

CHECK ONE:

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

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
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<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: