

**SPCH Multifamily Credit Ops 1 LLC v  
Construction Mgt. & Dev.-Cal., LLC**

2025 NY Slip Op 34313(U)

November 10, 2025

Supreme Court, New York County

Docket Number: Index No. 655080/2024

Judge: Kathleen Waterman-Marshall

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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. KATHLEEN WATERMAN-MARSHALL**

**PART**

*Justice*

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**INDEX NO.** 655080/2024

SPCH MULTIFAMILY CREDIT  
OPS 1, LLC

**MOTION DATE** 12/09/2024

Plaintiff,

**MOTION SEQ. NO.** 001

- v -

CONSTRUCTION MANAGEMENT &  
DEVELOPMENT- CALIFORNIA, LLC,

**DECISION + ORDER ON  
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28

were read on this motion to/for

DISMISS

Upon the foregoing documents, and following on-the-record oral argument on June 17, 2025, the motion by Defendant Construction Management & Development-California, LLC (“CM&D-Cal”), for an order, pursuant to CPLR §§ 3211(a)(3) and (a)(8), dismissing the complaint by Plaintiff SPCH Multifamily Credit Ops 1 LLC (“SPCH”), is granted in part insofar as the first cause of action is dismissed for lack of standing and the matter is set down for discovery on the limited issue of long arm jurisdiction.

**Brief Background**

This action involves alleged contractual obligations between non-New York entities for a project to construct a multi-family development in Portland, Oregon (“the Construction Project”). On this pleadings motion the facts, as set forth below, are derived from the allegations in the complaint and matters conceded by the parties in their motion submissions.

Non-Party West Coast Home Solutions was the Developer and General Contractor for the Construction Project. Non-Party Riverbend Lending (“Riverbend”) financed the Construction Project pursuant to a loan. Non-Party Churchill Funding assumed the loan originated by Riverbend.

Thereafter, plaintiff SPCH assumed the loan from Churchill Funding. SPCH is a joint venture between Churchill Funding (a New York private real estate lender) and Silver Point Capital (a Connecticut hedge fund). SPCH is Delaware limited liability company with a principal place of business in New York.

In February 2021, Riverbend retained defendant CM&D-Cal to perform construction management and oversight services pursuant to an agreement entitled "Proposal for Project Assessment and Monthly Oversight Services" ("the Agreement"). CM&D-Cal is a California limited liability company.

Under the Agreement, CM&D-Cal agreed to provide, *inter alia*, monthly project oversight, including but not limited to review of the Developer's monthly progress reports, disbursement requests, and payment applications; perform monthly site surveys; and provide a Monthly Project Overview Report including summaries of the Developer's progress, disbursements and payments. The Agreement between Riverbend and CM&D-Cal does not contain any choice of law or venue provisions.

The complaint does not allege that Riverbend assigned to SPCH its rights and obligations under the Agreement; and it is undisputed that there is no assignment. However, after SPCH assumed the loan from Churchill Funding, CM&D-Cal issued construction management and oversight reports and invoices to SPCH over an approximately 18-month period, and SPCH received the reports and paid the invoices. SPCH alleges that it relied upon "accurate and complete reports from [CM&D-Cal] as per the Agreement to determine whether to continue funding under the loan."

SPCH also alleges that CM&D-Cal breached the Agreement in that its budget projections "were widely and negligently inaccurate." Among other things, SPCH alleges that CM&D-Cal failed to verify the Developer's buyout logs, miscalculated the formulas for buyout percentages, and failed to alert SPCH about budget overruns. SPCH alleges that it "eventually discovered that the Project was overbudget by approximately \$10 million, contrary to the reports issued by [CM&D-Cal], roughly 40% beyond the budget that [CM&D-Cal] advised was appropriate."

Upon these (and other) factual allegations, the complaint asserts three causes of action, to wit: breach of contract (first cause of action); professional negligence (second cause of action); and unjust enrichment (third cause of action). SPCH asserts jurisdiction under CPLR § 302(a)(1), upon the ground that CM&D-Cal transacts business within New York, and CPLR § 302(a)(3), upon the ground that CM&D-Cal committed a tortious act causing SPCH injury in New York.

On the instant motion, however, CM&D-Cal seeks dismissal for lack of jurisdiction under CPLR § 301.

### **Discussion**

#### **Jurisdiction – CPLR § 3211(a)(8)**

CPLR § 3211(a)(8) provides a party may move to dismiss the claims against it for want of jurisdiction. The party seeking to assert personal jurisdiction bears the burden of establishing that jurisdiction was properly obtained (*James v iFinex Inc.*, 185 AD3d 22 [1st Dept 2020]; *College v Brady*, 84 AD3d 1322 [2d Dept 2011]). A plaintiff opposing a motion to dismiss pursuant to CPLR § 3211(a)(8) on the ground that discovery is required on the issue of personal jurisdiction need only provide "a sufficient start" to show jurisdiction has been obtained and that plaintiff's position is not frivolous, not a prima facie showing of jurisdiction (*Peterson v Spartan Indus.*, 33 NY2d 463, 467 [1974]; *American BankNote Corp. v Daniele*, 45 AD3d 338 [1st Dept

2007]; *see also Shore Pharm. Providers Inc. v Oakwood Care Ctr. Inc.*, 65 AD3d 623 [2d Dept 2009]).

In determining whether longarm jurisdiction may be exercised, the Court must consider the quality of defendant's actions (*State v Vayu, Inc.*, 39 NY3d 330 [2023]). As noted above, SPCH relies on the "transacts business" provision of CPLR § 302(a)(1) as well as the "tortious act without the state causing injury to a person within the state" provision of CPLR § 302(a)(3) as bases for longarm jurisdiction.

For purposes of CPLR § 302(a)(1), a single transaction within the state will confer jurisdiction in New York (*id.* at 336 citing *Parke-Bernet Galleries v Franklyn*, 26 NY2d 13, 17 [1970]). However, mere solicitation of business within the state, standing alone, will not confer jurisdiction; the solicitation must be accompanied by a transaction or continuity in New York (*O'Brien v Hackensack University Medical Center*, 305 AD2d 199 [1st Dept 2003]). Regular communication with a defendant entity that has projected itself into the state to do business is a sufficient basis to exercise long arm jurisdiction (*see generally, Fischbarg v Doucet*, 9 NY3d 375 [2007] [jurisdiction established over California residents who engaged New York attorney to represent them in Oregon based upon frequent communications with New York attorney and payment to attorney's New York office]); as are meetings within the state in furtherance of the business relationship (*Vayu*, 39 NY3d at 336; *Presidential Realty Corp. v Michael Sq. W. 44*, NY2d 672 [1978] [single business meeting in New York sufficient minimum contact for jurisdiction]).

For the purposes of CPLR § 302 (a)(3), "the situs of the injury is the location where the event giving rise to the injury occurred, and not where the resultant damages occurred" (*O'Brien*, 305 AD2d at 202)

SPCH has established the requisite "sufficient start" to show jurisdiction over CM&D-Cal pursuant to CPLR § 302(a)(1), to defeat the motion to dismiss. CM&D-Cal's February 19, 2021 Project Assessment lists a New York address on the cover-page ("200 Madison Avenue Suite 2230 New York, NY 10016") as well as a Manhattan telephone number ("212-871-9787") (NYSCEF Doc. No. 12). Furthermore, CM&D-Cal's letterhead lists New York as the first place it conducts business (*id.* "NEW YORK | HONOLULU | TAMPA | LOS ANGELES | LAS VEGAS | COSTA RICA | MEXICO"), and this letterhead was included on the Project Assessment and invoices (*id.*; NYSCEF Doc. No. 22). CM&D-Cal's invoices also directed that any physical payment be sent to the 200 Madison Avenue address. Finally, CM&D-Cal does not dispute attending meetings with Churchill Funding in New York, before SPCH assumed the loan. However, the parties sharply dispute whether the Construction Project was discussed at those meetings. SPCH contends that Churchill's affidavit establishes the purpose of the meetings was to discuss the Construction Project, including billing and performance; CM&D-Cal contends the meetings related to other projects and deficiencies with its work at the Construction Project was never discussed in New York. Thus, there is an issue of fact regarding the subject of the New York meetings requiring discovery.

To the extent that CM&D-Cal argues it does not have offices in New York, and that it is only nonparty CM&D Hawaii which has offices in New York, this is belied by its own Proposal

for this project.<sup>1</sup> CM&D-Cal's "Proposal For: Project Assessment / Monthly Oversight Services" states it was prepared by CM&D-Cal and contains letterhead listing a New York address, among others. Additionally, the affidavit of Scott M. Stay, CM&D-Cal's president in reply was executed in New York (NYSCEF Doc. No. 28). CM&D-Cal cites no authority for its argument that providing a New York address to make payments, or otherwise listing a New York address in its letterhead, does not constitute transacting business in the state under CPLR § 302(a)(1).

Consequently, SPCH has established at least a "sufficient start" to show jurisdiction over CM&D-Cal and that additional discovery may more fully establish the content of the parties' meetings and whether those meetings addressed the subject Construction Project and SPCH's claims raised herein. Therefore, jurisdictional discovery is warranted to assess the precise nature and quality of potential business transactions by defendant in New York. (*See, e.g., Vayu*, 39 NY3d 330; *College*, 84 AD3d 1322).

On the other hand, however, jurisdiction under CPLR § 302(a)(3) has not been established, nor has SPCH made a "sufficient start" showing jurisdiction under that statute. First, this is a contract dispute. The site of the injury, as alleged – CM&D-Cal's failure to review and report on the Developer's progress and payments – is in Oregon, the location of the Construction Project. SPCH is a Delaware company, and even if it sustained damages in its New York office, such fact is irrelevant. The proper inquiry is the location of the tortious conduct, which is not alleged to have occurred in New York (*O'Brien*, 305 AD2d at 202). Thus, jurisdiction is not proper under CPLR § 302(a)(3).

Standing – CPLR § 3211(a)(3)

On a motion to dismiss for lack of standing under CPLR § 3211(a)(3), the burden falls on the movant "to establish, *prima facie*, the plaintiff's lack of standing as a matter of law." *U.S. Bank Nat. Ass'n v Guy*, 125 AD3d 845, 847 (2d Dept 2015).

CM&D-Cal alleges that a lack of privity to the Agreement bars SPCH from bringing this action and, thus, that the first cause of action for breach of contract should be dismissed. Indeed, it is undisputed that SPCH is not a party to the Agreement, as CM&D-Cal contracted with the first lender, Riverbend and there is no allegation that Riverbend assigned the Agreement to SPCH.

However, SPCH argues that it is a party to the contract because CM&D-Cal "clearly orally agreed to a novation of the [Agreement] to assign it to" SPCH. This argument lacks merit. Indeed, SPCH cites no legal authorities to support its novel contention that a contract novation can occur between one party to a contract and a non-party to the contract. To the contrary, a valid novation is "a previously valid obligation, agreement of the parties to the new obligation, extinguishment of the old [obligation], and a valid new contract" (*Arici v Poma*, 202 AD3d 584 [1st Dept 2022]). While parties, by their actions, can demonstrate their intention to create a new contract as *between them* (*id.* at 585; *Wasserstrom v Interstate Litho Corp.*, 114 AD2d 952 [2d Dept 1985]), there is no authority that a stranger to the contract can create a new contract by novation. While CM&D-Cal sent invoices and reports to SPCH, that *ipso facto* does not amount

<sup>1</sup> Mr. Stay is the president of all CM&D entities: CM&D Holdings; CM&D-Cal; and CM&D Hawaii.

to an agreement by Riverbend to the extinguishment of the Agreement and formation of a new contract in which it is removed and SPCH is added. Notably, SPCH does not even allege that Riverbend agreed to the new obligation owed to SPCH, or that the Agreement was extinguished. Without a valid novation, SPCH does not have privity of contract and it is widely accepted that a person or entity not in privity cannot sue on a contract (*see Arroyo v Cent. Islip UFSD*, 173 AD3d 814, 816 [2d Dept 2019] ["Liability for breach of contract does not lie absent proof of a contractual relationship or privity between the parties. One cannot be held liable under a contract to which he or she is not a party."] [internal quotations and citations omitted]).

SPCH's argument that its breach of contract claim is not barred by the Statute of Frauds because the parties' course of conduct – namely, CM&D-Cal's submission of reports and invoices to SPCH and SPCH's reliance on the reports and payment of the invoices – constitutes partial performance of its oral novation under *Bowers v Hurley*, 134 AD3d 1191 [3d Dept 2015] and *Burns v McCormick*, 233 NY 330 [1922], misses the mark. While that conduct may support a separate independent oral contract between SPCH and CM&D-Cal, it does not cure the fatal deficiencies in its novation argument or serve to give SPCH the privity it needs to support a claim under the Agreement between Riverbend and CM&D-Cal.

#### Remaining Causes of Action in Complaint

Presuming, in the moment, that after discovery it is shown that long arm jurisdiction exists, and because CM&D-Cal seeks dismissal of the entire complaint on standing grounds, the Court finds that SPCH has standing to assert, and the complaint sufficiently states, causes of action for professional negligence (second cause of action) and unjust enrichment (third cause of action), and those claims may proceed.

SPCH has adequately plead a claim for professional negligence against CM&D-Cal in that the complaint sufficiently alleges a relationship between the parties "so close as to approach that of privity" (*Parrot v Coopers & Lybrand, LLP*, 95 NY2d 479, 483 [2000]). It is alleged that CM&D-Cal undertook to continue its work under the Agreement "in the knowledge" that it was for SPCH alone, that its "findings would be reported to and relied on" by SPCH to continue to fund the Construction Project, and that its work was authorized by SPCH and its invoices paid by SPCH (*Ossining Union Free Sch. Dist. v Anderson LaRocca Anderson*, 73 NY2d 417, 425-26 [1989] [professional negligence claim sustained in absence of privity of contract where "[t]hough under contract to Anderson, defendants allegedly undertook their work in the knowledge that it was for the school district alone, and that their findings would be reported to and relied on by the school district in ongoing project—the evaluation of the structural soundness of the school buildings. Defendants were retained to visit plaintiff's premises, examine its buildings, and prepare reports of their findings upon which action would be taken. . . . the retention of defendants specifically was authorized by the school board, and they were so informed; [defendants] sent a bill directly to the school district. . . and had various types of contact directly with the school district."]).

The complaint also adequately alleges a cause of action for unjust enrichment by alleging that CM&D-Cal was enriched, at SPCH's expense, and it is against "equity and good conscience" to permit CM&D-Cal to retain payment for its monthly oversight services (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]). Unlike breach of contract,

privity is not required to bring a claim for unjust enrichment claim (see *Georgia Malone & Co. v Ralph Rieder*, 86 AD3d 406, 408 [2d Dept 2011]).


Accordingly, it is hereby

**ORDERED** that the instant motion is granted to the extent that SPCH’s first claim for breach of contract is dismissed; and it is further

**ORDERED** that the limited issue of jurisdiction is set down for discovery; and it is further

**ORDERED** that, within 20 days of the date of this Decision and Order, the parties are to exchange demands directed to the jurisdictional issues, with their responses thereto due 20 days after receipt of the demands. This matter is set down for a **Conference on jurisdiction discovery on January 21, 2026 at 10:00 a.m.** Counsel are reminded of the Part Rules, specifically those governing conferences and conference orders.

11/10/2025  
DATE

  
KATHLEEN WATERMAN-MARSHALL,  
J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE