Marko Constr. LLC v Berman
2026 NY Slip Op 30261(U)
January 21, 2026
Supreme Court, New York County
Docket Number: Index No. 654129/2023
Judge: Gerald Lebovits
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. GERALD LEBOVITS** **PART** **07**

Justice

----------X

MARKO CONSTRUCTION LLC,

Plaintiff,

- v -

LIZA BERMAN, CHAIM WEISS, NATHAN BERMAN, METRO LOFT DEVELOPERS, LLC,509 EAST 84TH STREET ASSOCIATES LLC, JOHN DOES, and ABC COMPANIES,

Defendants.

----------X

INDEX NO. 654129/2023

MOTION DATE N/A

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67

were read on this motion to DISMISS.

Gainey McKenna & Egleston, Paramus, NJ (Barry J. Gainey of counsel), for plaintiff.
Robert E. Brown, P.C., Staten Island, NY (Robert E. Brown of counsel), for defendants.

Gerald Lebovits, J.:

This action arises from renovation work performed on a Manhattan apartment. Plaintiff, Marko Construction LLC claims that defendants Liza and Nathan Berman, Chaim Weiss, Metro Loft Developers LLC, and 509 East 84th Street Associates, LLC, hired it to perform work on the Berman's apartment. According to plaintiff, defendants failed to pay her $101,530.74 for the completed work.

Defendants claim that they do not own the apartment and therefore cannot be held liable for work done to renovate it. According to defendants, nonparty Greene Street Properties Group Ltd. owns the premises. They move under CPLR 3211 (a) (1), (3), (5), and (8) to dismiss plaintiff's complaint. The motion is granted in part and denied in part.

DISCUSSION

I. CPLR 3211 (a) (8)

Defendants argue that the Bermans, Weiss, and 509 East 84th Street Associates were not properly served and therefore should be dismissed from this action.

The Bermans represent that they "never received a copy of the Complaint in the mail." (NYSCEF No. 33 [Liza Berman affidavit]; NYSCEF No. 34 [Nathan Berman affidavit].) But these representations are insufficient to rebut the presumption of service. (*See Eros Intl. PLC v Mangrove Partners*, 191 AD3d 464, 465 [1st Dept 2021] ["Defendant's conclusory denials of receipt of service failed to rebut the presumption of proper service created by the affidavits."].)

Plaintiff also challenges service on defendants Weiss and 509 East. This court need not reach that issue. In supplemental briefing, plaintiff began to assert its claims only against the Bermans. Plaintiff appears to drop Weiss, 509 East, and Metro—the last defendant—from this action. (*See* NYSCEF no. 65 at 4-6.) Defendants' motion to dismiss the complaint against Weiss, 509 East, and Metro is therefore granted, and this court does not reach the question of service with respect to Weiss and 509 East.

II. CPLR 3211 (a) (3)

Defendants contend that plaintiff is not authorized to conduct business in this state and thus that, under Business Corporation Law (BCL) § 1312, it may not maintain this action. Plaintiff argues that defendants have not met their burden to show that plaintiff's business contacts with New York is systematic and regular, as required to rely on BCL § 1312.

BCL § 1312 (a) "constitutes a statutory barrier to the foreign corporation's right to bring suit." (*Airtran NY, LLC v Midwest Air Group, Inc.*, 46 AD3d 208, 214 [1st Dept 2007].) A "party seeking to impose the barrier, in order to rebut the presumption that the corporation does business in its state of incorporation rather than New York, has the burden of proving that the foreign corporation's activity in New York is systematic and regular." (*Id.*)

Defendants have not met their burden. They have not shown that plaintiff's "business activities in New York [are] not just casual or occasional, 'but so systematic and regular as to manifest continuity of activity in the jurisdiction.'" (*Highfill, Inc. v Bruce & Iris, Inc.*, 50 AD3d 742, 743 [2d Dept 2008], quoting *S & T Bank v Spectrum Cabinet Sales*, 247 AD2d 373, 373 [2d Dept 1998].) Moreover, defendants abandon their CPLR 3211 (a) (3) argument on reply. (See NYSCEF No. 58.)

The branch of defendants' motion to dismiss plaintiff's claims under CPLR 3211 (a) (3) is denied.

III. CPLR 3211 (a) (5) and Plaintiff's FIFA Claim

The parties agree that plaintiff's Freelance Isn't Free Act (FIFA) claim is governed by a two-year statute of limitations. (*See* NYC Admin Code 20-933 [a] [2].) Defendants argue that plaintiff's FIFA claim is time-barred because plaintiff performed its work in 2018 and brought this action in 2023. (NYSCEF No. 40 at 4.) Plaintiff contends that defendants are equitably estopped from asserting a limitations defense because defendants caused plaintiff's delay by improperly requiring plaintiff to resend invoices. (NYSCEF No. 46 at 10.) Plaintiff provides emails and text messages, it says, support its contention. (*See* NYSCEF No. 52.) Plaintiff also

claims that defendants acted fraudulently by telling plaintiff that a written contract was not necessary. (NYSCEF No. 46 at 11.)

This court agrees with defendants. Plaintiff's communications with defendants stopped in 2020. (*See* NYSCEF No. 52.) Even assuming that plaintiff is entitled to equitable estoppel until the end of 2020, it did not bring this action until 2023. And plaintiff does not otherwise allege that any fraud persisted beyond 2020. Plaintiff's FIFA claim is dismissed as time-barred.

IV. CPLR 3211 (a) (1)

Defendants contend that plaintiff's complaint must be dismissed because they do not own the property on which plaintiff performed the work. (NYSCEF No. 40 at 3.) Defendants provide a deed and New York City Department of Finance Records which, they say, show that they do not own the property. (*See* NYSCEF no. 9 [deed]; NYSCEF No. 10 [records].) Defendants argue that nonparty Greene Street owns the property.

Defendants' submissions do not conclusively refute plaintiff's claim that the Bermans hired plaintiff to do work on the premises. This court finds no basis to hold that a contractor may not sue the party who hired it—even if that party does not own the property—when plaintiff makes allegations to support contractual privity.[1] (*We're Assoc., Inc. v F.W. Koehler & Sons, Inc.*, 213 AD2d 478, 479 [2d Dept 1995] [holding that although plaintiff did not own the premises, he was still in privity with the contractor and could assert a breach-of-contract claim against it].) Accordingly, this branch of defendants' motion is denied.

V. CPLR 3211 (a) (7)

Defendants argue that plaintiff's allegations against them are either conclusory or concern a contract about property they do not own and to which they would not be parties. (NYSCEF No. 40 at 5-6.)

A. Breach of Contract (Fourth Cause of Action)[2]

Defendants argue that they could not have breached a contract to which they were not parties. This contention is unavailing for the reasons stated above. Plaintiff also introduces emails reflecting communications between Ms. Berman and plaintiff about renovating the premises and paying for those renovations. (*See* NYSCEF No. 26.) The branch of defendants' motion to dismiss this claim is denied.

---

[1] That Greene Street might have made some payments to plaintiff for the project (NYSCEF no. 53) does not mean that the *Bermans* lack privity with plaintiff.

[2] Plaintiff withdraws its claims for a book account (first cause of action) and indebtedness (third cause of action). Those claims are dismissed. Plaintiff's claim for nonpayment for work performed and services rendered is also dismissed. That claim is same as plaintiff's claim for plaintiff's quantum-meruit and unjust-enrichment claim (fifth cause of action).

B. Quantum Meruit and Unjust Enrichment (Fifth Cause of Action)

Defendants argue that this claim should be dismissed, because there "is no contract between Plaintiff and Defendants" and "none of the Defendants own the Subject Property where the alleged services were rendered." (NYSCEF No. 40 at 7.) This argument is unavailing. The branch of defendants' motion to dismiss this claim is denied.

C. Account Stated (Sixth Cause of Action)

Defendants argue that there can be no account-stated claim against them because plaintiff and defendants never contracted for services in the first place. This contention is unpersuasive. The branch of defendants' motion to dismiss the account-stated claim is denied.

D. Fraud (Seventh Cause of Action)

Defendants argue that plaintiff has not pleaded—with particularity—facts that would support a claim for fraudulent misrepresentation. (NYSCEF No. 40 at 8.) Plaintiff contends that "the defendants acted in a fraudulent manner when they hired the plaintiff to do work in the Bermans residence and then fraudulently refused to pay the invoices by offering a slew of false and fraudulent excuses and delay tactics." (NYSCEF No. 46 at 14.)

In its complaint, plaintiff alleges that "defendants told plaintiff that they would pay plaintiff for the work performed and the services rendered" and "that they would pay the plaintiffs when they paid for other work, but the defendants' representations and statements were knowingly and intentionally false and fraudulent." (NYSCEF No. 2 at ¶ 45 [complaint].) According to plaintiff, "[d]efendants knew that they would not pay in full for the work performed and the services rendered when they promised otherwise." (*Id.* at ¶ 49.)

The court agrees with defendants. Plaintiff's fraudulent-misrepresentation claim is not pleaded with requisite particularly. (*See* CPLR 3016.) And even assuming that the claim has been pleaded properly, it involves statements that "were promissory future statements that are not actionable." (*Safariland, LLC v H.B.A. Agencies, Ltd.*, 198 AD3d 519, 521 [1st Dept 2021].)

E. Breach of Guaranty (Eighth Cause of Action)

Defendants argue that plaintiff's claim for breach of guaranty against the Bermans (and Weiss) must be dismissed, because plaintiff has not alleged that a written guaranty exists. (NYSCEF No. 6 at 8, citing General Obligations Law § 5-701 [a] [2] [statute of frauds].) Plaintiff argues that its email communications with defendants constitute a written guarantee between the parties. (NYSCEF No. 46 at 14.) But the emails appear to support the existence of a services contract, not necessarily a guarantee. (*See* NYSCEF No. 26.)

The branch of defendants' motion to dismiss the breach-of-guaranty claim is granted.

Accordingly, it is

ORDERED that the branch of defendants' motion to dismiss defendants Weiss, Metro, and 509 East from this action is granted; and it is further

ORDERED that the branch of defendants' motion to dismiss plaintiff's complaint is granted to the extent that the book-account (first cause of action); nonpayment-for work-performed-and-services-rendered (second cause of action); indebtedness (third cause of action); fraud (seventh cause of action); and breach-of-guaranty (eighth cause of action); FIFA (ninth cause of action) claims are dismissed, and otherwise denied; and it is further

ORDERED that the balance of claims in this action are severed and shall continue; and it is further

ORDERED that plaintiff serve a copy of this order with notice of its entry on defendants; and on the office of the County Clerk (using the NYSCEF document type "Notice to the County Clerk - CPLR § 8019 (c)"), which shall enter judgment accordingly.

1/21/2026
DATE

HON. GERALD LEBOVITS
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