

Pizzarotti, LLC v Hudson Ins. Co.
2026 NY Slip Op 31919(U)
May 1, 2026
Supreme Court, New York County
Docket Number: Index No. 655803/2024
Judge: Kathleen Waterman-Marshall
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHLEEN WATERMAN-MARSHALL **PART** **31M**

Justice

-----X

PIZZAROTTI, LLC

Plaintiff,

- v -

HUDSON INSURANCE COMPANY,

Defendant.

-----X

INDEX NO. 655803/2024

MOTION DATE 12/23/2024

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20

were read on this motion to/for

DISMISS

Upon the foregoing documents, the motion by defendant Hudson Insurance Company (“Hudson”) for an order, pursuant to CPLR 3211(a)(1) and (a)(7), dismissing the second and third causes of action in the complaint of plaintiff Pizzarotti, LLC (“Pizzarotti”), is granted.

The Complaint and Completion Agreement

Pizzarotti sues to recover \$67 million allegedly due to it from Hudson for work it performed on a large-scale public construction project (“the Project”) involving 13 buildings at Amsterdam Houses in Manhattan, which is owned and operated by New York City Housing Authority (“NYCHA”) (see Complaint ¶¶ 1, 6; NYSCEF Doc. No. 1). In 2013, NYCHA sought public bids for the Project – which involved restoration and repair work to the exterior masonry facades, parapets and roofs of the buildings – pursuant to plans and specifications for Contract No. BW1313869 (Complaint ¶¶ 6, 7). NYCHA initially awarded the Contract to Intercontinental Construction Contracting (“ICC”), for which Hudson issued a performance bond. NYCHA declared ICC in default, terminated its Contract, and demanded that Hudson complete the work under the performance bond (*id.* ¶¶ 7, 8).

Hudson engaged Pizzarotti to complete the work of Contract No. BW1313869 by a Completion Agreement dated October 9, 2015 (*id.* ¶¶ 10; Completion Agreement, NYSCEF Doc. No. 7). The Completion Agreement incorporated all of the terms, plans and specifications of the Contract (Complaint ¶ 10), including the provision for compensation primarily on a unit-price basis, tied to estimated quantities of work identified in the contract documents (Completion Agreement Section II, Paragraphs 1, 2, 3). It expressly states that Pizzarotti is an independent contractor (*id.* Section II, Paragraph 17) and provides for reimbursement of attorney’s fees to Hudson only, and only in the event that Hudson is required to sue Pizzarotti under the Completion Agreement (*id.* Section II, Paragraph 18).

The other pertinent provisions of the Completion Agreement are:

Section II Terms and Conditions

* * * * *

8. Change Order Work. The Contractor shall be required to perform all change order work directed of it by the Surety [Hudson], including that change order work directed of the Surety by the Owner [NYCHA], and to follow, in connection with that change order work, all the requirements with regard to notice and pricing and otherwise, set forth in the Contract. **Moreover, the Contractor agrees that any claim for additional compensation relating to change order work, or for disputed work which the Contractor believes to be outside the scope of the Completion Work, shall be determined pursuant to the provisions of the Contract and pursuant to Paragraph 9 of this Agreement. . . . The Contractor also agrees to accept, as full compensation for any and all change order work or disputed work, whatever compensation the Surety receives for that work from the Owner, if any, less whatever mark-up the Surety is entitled to under the terms of the Contract. . . .** [emphasis added]

9. Contract Claims. The Contractor agrees that it shall make no claim against the Surety under this Agreement or otherwise, for an extension of time to complete the Completion Work, or for additional compensation or damages, unless it shall have first provided the Surety with written notice of such claim at least three full working days before the Surety is, or may be, required, under the Contract, to provide such notice to the Owner. . . . **Where the claim has been submitted to the Owner for action and/or decision, the Contractor shall be limited to whatever relief, if any, may be provided by the Owner to the Surety by reason of the claim. The Surety's obligation or liability, if any, to the Contractor arising as a consequence of a claim submitted to Owner shall be fully satisfied and liquidated by the Surety's submission of the claim to the Owner and by the Surety providing to the Contractor whatever relief, if any, it receives from the Owner on account of that claim. . . .** [emphasis added]

Of the 131 paragraphs in the Complaint, 101 contain factual allegations detailing Hudson's alleged "multiple material breaches" of the Completion Agreement, including, as is here most relevant, its alleged failure to submit to NYCHA Pizzarotti's 230+ claims for additional payments and time extensions (Complaint ¶¶ 12, 18, 19 – 83), which give rise to all of Pizzarotti's claims – breach of contract, as well as breach of covenant of good faith and fair dealing and breach of fiduciary duty (*id.* ¶¶ 102 – 107, 108 – 115, 116 – 122). At bottom, the Complaint alleges, *inter alia*, that Hudson: provided Pizzarotti with "defective, deficient and erroneous" construction documents that were materially inaccurate; failed to accurately survey and investigate the construction project conditions so as to properly define its work; significantly

expanded and altered Pizzarotti's work throughout the Project; and delayed Pizzarotti's work due to its "acts, omissions, mismanagement" (*id.* ¶¶ 12 – 17).

The Complaint further alleges that, in order to "compensate Pizzarotti for the increased costs and impact or performing such additional and different work. . . and for the impact of various other events and circumstances beyond Pizzarotti's control," Pizzarotti submitted numerous notices of claim seeking additional compensation and extensions of time to complete its work (*id.* ¶¶ 18-19), but that, in violation of the Completion Agreement, Hudson "failed to submit or pass through to NYCHA and diligently pursue Pizzarotti's claims" for time extensions and additional payment that Pizzarotti submitted to Hudson (*id.* ¶ 12). Over the course of 60 paragraphs, Pizzarotti alleges, "upon information and belief," that "Hudson failed or refused to duly submit to NYCHA" and "failed or refused to prosecute and pursue in good faith" Pizzarotti's 230+ claims for additional payment and time extensions, and never submitted to NYCHA Pizzarotti's monthly requisitions, totaling \$103,860,312.36 (*id.* ¶¶ 20 – 83). According to the Complaint, Hudson paid Pizzarotti \$37,136,196.30, leaving \$66,724,116.06 due (*id.* ¶ 80).

Upon those core allegations, Pizzarotti asserts causes of action for, in order: (1) breach of contract; (2) breach of contractual obligation to pursue Pizzarotti's claims against NYCHA in good faith; (3) breach of fiduciary duty; and (4) quasi-contract, cardinal change and unjust enrichment. Each cause of action seeks the same \$67 million in damages (*id.* ¶¶ 107, 115, 122, 131).

Hudson now moves, pursuant to CPLR 3211(a)(1) and (a)(7), to dismiss the second cause of action, for breach of contractual obligation to pursue Pizzarotti's claims against NYCHA in good faith; third cause of action, for breach of fiduciary duty; and Pizzarotti's demand for attorneys' fees, costs, and disbursements. In the main, Hudson argues, relying upon the express terms of the Completion Agreement, that its role "was primarily to act as a conduit or facilitator between NYCHA" and Pizzarotti "passing on directions to [Pizzarotti] with regard to the work and payment to [Pizzarotti] when received from NYCHA" and that it would not have any "direct exposure" for Pizzarotti's claims for additional payment and would "simply facilitate the submission of such claims to NYCHA" (Memorandum in Support p. 6 – 7; NYSCEF Doc. No. 11). Noting the absence of any non-conclusory allegations in the Complaint of bad faith or unfair dealing, or facts sufficient to infer a fiduciary duty, Hudson argues that, at best, its alleged failure to submit Pizzarotti's claims to NYCHA amounts to breach of contract (*id.* p. 8 – 9). Hudson further argues that there is no statutory or contractual basis for Pizzarotti's claim for attorney's fees (*id.*).

In opposition, Pizzarotti argues that the Completion Agreement contains a "claim liquidating" agreement which gives rise to an implied duty beyond its express contractual obligation, and that its allegation that Hudson engaged in "affirmative deception" is sufficient to state a claim for breach of that implied duty (Memorandum in Opposition p. 8 – 14). Similarly, Pizzarotti argues that the Complaint adequately states a breach of fiduciary duty claim because, under the Completion Agreement, Pizzarotti's right to recover "was limited to whatever relief Hudson obtained from NYCHA" requiring Hudson "to make a *bona fide* good faith effort to recover" payments for Pizzarotti (*id.* p. 14 – 20). Pizzarotti did not address that part of the motion that seeks to dismiss its request for attorney's fees.

Hudson is correct. As more fully explained below, the Complaint's allegations, presuming their truth and affording them all favorable inferences, fail to state causes of action for breach of implied covenant of good faith and breach of fiduciary duty; such claims are merely duplicative of Pizzarotti's breach of contract cause of action. In addition, Pizzarotti is not entitled to attorney's fees under the Completion Agreement or any statute.

Discussion

The law on dismissal under CPLR 3211(a) is well-settled and simply stated. On a motion to dismiss under this statute, the court must afford the complaint a liberal construction, accept the facts alleged as true, and afford the plaintiff the benefit of any favorable inference (*see, e.g., Leon v Martinez*, 84 NY2d 83 [1994]).

Dismissal pursuant to CPLR 3211(a)(1) is warranted where “the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). In other words, the documents relied upon must “definitely dispose of [the] plaintiff's claim” (*Blonder & Co. v Citibank, N.A.*, 28 AD3d 180, 182 [1st Dept 2006]). “A paper will qualify as ‘documentary evidence’ only if it satisfies the following criteria: (1) it is ‘unambiguous’; (2) it is of ‘undisputed authenticity’; and (3) its contents are ‘essentially undeniable’” (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019]).

Under CPLR 3211(a)(7), a motion to dismiss must be denied if, from the four corners of the pleadings, “factual allegations taken together manifest any cause of action cognizable at law” (*Polonetsky v Better Homes Depot*, 97 NY2d 46, 54 [2001] [internal quotation omitted]). However, bare legal conclusions and factual allegations that are inherently incredible or contradicted by documentary evidence are not presumed to be true (*Mark Hampton, Inc. v Bergreen*, 173 AD2d 220 [1st Dept 1991]).

Breach of the Covenant of Good Faith and Fair Dealing

Under New York law, all contracts implicitly contain “a covenant of good faith and fair dealing in the course of contract performance” (*Dalton v Educ. Testing Serv.*, 87 NY2d 384, 389 [1995]). As aptly explained by the Appellate Division, First Department in *Parlux Fragrances, LLC v S. Carter Enters., LLC*, 204 AD3d 72 (1st Dept 2022):

The implied covenant of good faith and fair dealing “embraces a pledge that neither party shall do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract” (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153, 746 NYS2d 131, 773 NE2d 496 [2002] [internal quotation marks omitted]), and is breached when a party acts in a manner that deprives the other party of the benefits of the contract (*id.*). Generally, a breach of the covenant of good faith and fair dealing is a breach of the contract itself (*Boscorale Operating, LLC*, 298 AD2d at 331, 749 NYS2d 233). Therefore, a separate cause of action for breach of the covenant cannot be maintained where, as here, “it is premised on the same conduct that underlies

the breach of contract cause of action and is intrinsically tied to the damages allegedly resulting from a breach of the contract”

(*Parlux Fragrances, LLC*, 204 AD3d at 91-92 [dismissing breach of covenant of good faith and fair dealing claim as it “is a breach of the contract itself”]).

However, a plaintiff may state a viable claim for breach of implied covenant of good faith, separate and apart from a breach of contract claim, where they allege that the defendant exercised contractual discretion in bad faith or engaged in conduct that, while not expressly prohibited by the contract, deprived the plaintiff of the benefits of the agreement (*see P.T. & L. Contractingn Corp. v Trataros Const., Inc.*, 29 AD3d 763, 764 [2d Dept 2006]).

Presuming the truth of the Complaint’s allegations and affording them liberal construction, the Complaint fails to state a cause of action for breach of the covenant of good faith and fair dealing. Pizzarotti’s claim is premised upon the *exact same conduct* and seeks the *exact same damages* that form the basis of its breach of contract claim, to wit: Hudson’s alleged failure to submit and pursue Pizzarotti’s claims for additional payment and time extensions to NYCHA, which allegedly caused it damages in the sum of \$67 million. Indeed, Pizzarotti identifies this precise failure as one of Hudson’s “multiple material breaches” of the Completion Agreement that form the basis for its breach of contract cause of action (Complaint ¶ 12, 103). The phrasing of the second cause of action is most telling – “Breach of *Contractual Obligation* to Pursue Pizzarotti’s Claims Against NYCHA in Good Faith” [emphasis added].

Consequently, the second cause of action, for breach of covenant of good faith, is dismissed for failure to state a cause of action and as duplicative of the breach of contract cause of action (*Dalton*, 87 NY2d 384; *Parlux Fragrances, LLC*, 204 AD3d 72; *see also AEA Middle Mkt. Debt Funding LLC v Marblegate Asset Mgmt., LLC*, 214 AD3d 111, 132-33 [1st Dept 2023] [“Where a cause of action for breach of the implied covenant of good faith and fair dealing is based on the same operative facts and seeks the same damages as a cause of action for breach of contract, the good faith claim is duplicative and should be dismissed”]).

Pizzarotti’s argument that the Complaint adequately states a claim for breach of the covenant of good faith and fair dealing because Paragraph 9 of the Completion Agreement is a “liquidating agreement,” like the one in *Rad & D’Aprile, Inc. v Arnell Constr. Corp.*, 159 AD3d 971 (2d Dept 2018), is unpersuasive and does not avoid dismissal. As explained in *Rad & D’Aprile, Inc.*,

An enforceable liquidating agreement requires “(1) the imposition of liability upon the general contractor for the subcontractor’s increased costs, thereby providing the general contractor with a basis for legal action against the owner; (2) a liquidation of liability in the amount of the general contractor’s recovery against the owner; and, (3) a provision that provides for the ‘pass-through’ of that recovery to the subcontractor (*Bovis Lend Lease LMB v GCT Venture*, 285 AD2d 68, 70 [2001]; *see Barry, Bette & Led Duke v State of New York*, 240 AD2d 54, 56 [1998]). Like every contract,

the contractual covenant of good faith and fair dealing is implied in a liquidating agreement (*see Martin Mech. Corp. v Mars Assoc.*, 158 AD2d 280, 281 [1990]). The covenant of good faith and fair dealing in this context requires the general contractor to “take all reasonable steps so that the [subcontractor’s] right to an eventual recovery, if any, from the [owner] will be protected” (*id.* at 281; *see T. G. I. E. Coast Constr. Corp. v Fireman's Fund Ins. Co.*, 534 F Supp 780, 782 [SDNY 1982]).

(*Rad & D’Aprile, Inc.*, 159 AD3d 972-973).

Here, unlike the liquidating agreement in *Rad & D’Aprile, Inc.*, the Completion Agreement does not obligate Hudson to pay Pizzarotti’s claims such that Hudson would have a cause of action against NYCHA. It does not obligate Hudson to pay Pizzarotti anything other than what it receives from NYCHA, or to prosecute Pizzarotti’s claims against NYCHA on its behalf, or assume liability for Pizzarotti’s damages occasioned by NYCHA’s delay or failure to pay. Rather, the Completion Agreement expressly and unambiguously states that Hudson’s “obligation or liability, if any, to [Pizzarotti] arising as a consequence of a claim submitted [NYCHA] shall be fully satisfied and liquidated by [Hudson’s] submission of the claim to [NYCHA] and by [Hudson] providing to [Pizzarotti] whatever relief, if any, it receives from [NYCHA] on account of that claim” (Completion Agreement, Section II, Paragraph 9). There is no other provision of the Completion Agreement, or allegation in the Complaint, from which it could be reasonably inferred that Hudson assumed any additional obligations or liabilities to prosecute Pizzarotti’s claims or pay for its damages – indeed, Pizzarotti is an independent contractor (*id.* Section II, Paragraph 17). In this regard, the unambiguous and “essentially undeniable” terms of the Completion Agreement constitute documentary evidence that utterly refutes Pizzarotti’s breach of covenant of good faith claim (*see VXi Lux Holdco S.A.R.L.*, 171 AD3d 189; *see also Mark Hampton, Inc.*, 173 AD2d 220).

Thus, presuming the truth of Pizzarotti’s allegations – notably all asserted upon “information and belief” – that Hudson “failed or refused to duly submit to NYCHA” and “failed or refused to prosecute and pursue in good faith” Pizzarotti’s 230+ claims for additional payment and time extensions, and never submitted to NYCHA Pizzarotti’s monthly requisitions (*id.* ¶¶ 20 – 83), such allegations state a cause of action for breach of contract at best, thus requiring dismissal of the second cause of action, for breach of covenant of good faith (*see Dalton v Educ. Testing Serv.*, 87 NY2d 384; *Parlux Fragrances, LLC v S. Carter Enters., LLC*, 204 AD3d 72; *AEA Middle Mkt. Debt Funding LLC v Marblegate Asset Mgmt., LLC*, 214 AD3d 111).

Breach of Fiduciary Duty

A claim for breach of fiduciary duty requires allegations, pleaded with particularity, that: “(1) defendant owed [plaintiff] a fiduciary duty, (2) defendant committed misconduct, and (3) [plaintiff] suffered damages caused by that misconduct” (*New York Marine & Gen. Ins. Co. v Wesco Ins. Co.*, 213 AD3d 461, 462 [1st Dept 2023]). A fiduciary relationship arises where one party reposes trust and confidence in another and the latter assumes a duty to act for or give advice for the benefit of the former. As the Court of Appeals explained in *EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11 (2005):

A fiduciary relationship “exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation” (Restatement [Second] of Torts § 874, Comment *a*). Such a relationship, necessarily fact-specific, is grounded in a higher level of trust than normally present in the marketplace between those involved in arm’s length business transactions (*see Northeast Gen. Corp. v Wellington Adv.*, 82 NY2d 158, 162 [1993]). Generally, where parties have entered into a contract, courts look to that agreement “to discover . . . the nexus of [the parties’] relationship and the particular contractual expression establishing the parties’ interdependency” (*see id.* at 160). “If the parties . . . do not create their own relationship of higher trust, courts should not ordinarily transport them to the higher realm of relationship and fashion the stricter duty for them” (*id.* at 162).

(*EBC I, Inc.*, 5 NY3d at 19-20).

Thus, parties engaged in arm’s-length commercial transactions do not owe fiduciary duties to one another (*Oddo Asset Mgt. v Barclays Bank PLC*, 19 NY3d 584 [2012]).

The relationship between Pizzarotti and Hudson is purely an arm’s-length commercial transaction as defined by the Completion Agreement, which governs all of the parties’ respective rights and obligations. The Complaint contains no allegations, pleaded with particularity, from which it can be inferred that Pizzarotti and Hudson had a special relationship, or that Hudson had a fiduciary duty to Pizzarotti (*New York Marine & Gen. Ins. Co.*, 213 AD3d at 463). The Complaint is also completely devoid of details of Hudson’s alleged misconduct. The bare statement that Hudson “failed and refused to timely, effectively and in good faith present and prosecute” Pizzarotti’s claims is insufficient (*see Celauro v Celauro*, 241 AD3d 1258, 1261 [2d Dept 2025] [“Here, affording the plaintiff the benefit of every possible favorable inference, the allegations of wrongdoing within the limitations period ‘are based on speculation and conjecture and thus, are insufficient to permit a reasonable inference of the alleged misconduct’.”]; *see also DeMartino v Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf, LLP*, 189 AD3d 774, 775 [2d Dept 2020] [breach of fiduciary duty claim dismissed where “there are no allegations of such self-interest in the complaint”]).

Indeed, the alleged “misconduct” that forms the basis of the breach of fiduciary duty claim is the exact same conduct that underlies the breach of contract claim, specifically, Hudson’s alleged failure to properly submit and pursue Pizzarotti’s claims. Pizzarotti does not identify any duty arising from a source independent of the Completion Agreement. “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]). Consequently, the third cause of action, for breach of fiduciary duty, is dismissed.

Pizzarotti is Not Entitled to Attorneys' Fees

Under New York law, attorneys' fees "are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule" (*Hooper Assocs., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 491 [1989]).

Pizzarotti has not identified any statutory basis or provision in the Completion Agreement entitling it to recover attorneys' fees from Hudson. To the contrary, the Completion Agreement only permits Hudson to recover attorneys' fees, and only in the event Hudson is required to sue Pizzarotti under the Completion Agreement (*id.* Section II, Paragraph 18).

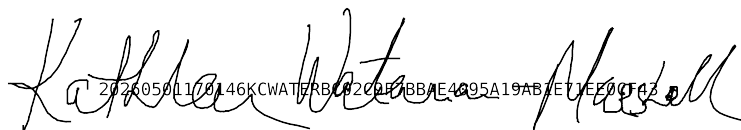
The Court has considered the other arguments contained in the moving and opposing papers and finds them to be without merit.

Accordingly, it is hereby

ORDERED that defendant Hudson Insurance Company's motion, pursuant to CPLR 3211(a)(1) and (a)(7), to dismiss the second cause of action, for breach of the covenant of good faith, the third cause of action, for breach of fiduciary duty, and Pizzarotti's claim for attorney's fees, is granted and those causes of action and claims are dismissed; and it is further

ORDERED that Hudson shall serve and file its answer to the Complaint within twenty (20) days of service of a copy of this Decision and Order with notice of entry; and it is further

ORDERED that the parties shall appear for a **Preliminary Conference on June 17, 2026 at 10:00 a.m.** Counsel are reminded of the Part 31 Rules, particularly those that govern conferences and conference orders.



**KATHLEEN WATERMAN-MARSHALL,
J.S.C.**

5/1/2026
DATE

CHECK ONE:

CASE DISPOSED

GRANTED DENIED

NON-FINAL DISPOSITION

GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE