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NO. 12395/2008

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 11 NASSAU COUNTY

PRESENT:

HONORABLE LEONARD B. AUSTIN

Justice

Motion R/D: 8/7/08

Submission Date: 9/12/08

Motion Sequence No.: 001/MOT D

ABCON BUILDERS CORP.,

Plaintiff,

- against -

**JOHN NG, HARRY NG and SHUN KWAI
NG,**

Defendants.

COUNSEL FOR PLAINTIFF

Lee J. Mondschein, Esq.

**7600 Jericho Turnpike, Ste. 200
Woodbury, New York 11797**

COUNSEL FOR DEFENDANT

(John Ng & Shun Kwai Ng)

Laurence H. Olive, Esq.

**128 Mott Street
New York, New York 10013**

(Harry Ng)

Davidoff Malito & Hutcher LLP

**200 Garden City Plaza, Suite 315
Garden City, New York 11530**

ORDER

The following papers were read on Defendant Harry Ng's motion to dismiss pursuant to CPLR 3211(a)(1) and (7):

Notice of Motion, dated July 17, 2008;

Affirmation by Frank L. Perrone, Jr., Esq., dated July 16, 2008;

Affidavit of Harry Ng, sworn to on July 17, 2008;

Affidavit in Opposition of Michael Zenobio, sworn to on August 25, 2008;

Affirmation in Opposition of Lee Mondschein, Esq., dated August 25, 2008;

Affirmation in Opposition of Laurence H. Olive, Esq., dated August 25, 2008.

Defendant, Harry Ng ("Harry"), moves to dismiss the complaint of Plaintiff, Abcon Builders Corp. ("Abcon"), in its entirety, pursuant to CPLR 3211(a)(1) and (7).

BACKGROUND

A. Project Management Services Agreement

A Project Management Services Agreement ("P.S.M.A."), dated December 15, 2005, was entered into pursuant to which Abcon was to serve as construction manager for the demolition and reconstruction of a residential structure located at 265 81st Street, Brooklyn, New York. Harry alleges that he was never a party to the agreement.

The heading of the P.S.M.A. reads that the agreement is "BETWEEN PROPERTY OWNER John Ng and Shun Kwai Ng and CONSTRUCTION MANAGER ABCON BUILDERS CORP." Article 1 paragraph 1.1 of the P.S.M.A. refers to John Ng as the co-owner of the project and indicates that the agreement is between John Ng, as the "Owner," and Abcon.

The footer on each page of the P.S.M.A. reads, "CM Services Agreement—John and Harry Ng." The P.S.M.A. is signed by John Ng, as owner, and Michael Zenobio ("Zenobio"), as President of Abcon. However, above John Ng's signature is typed, "Owner John and Harry Ng."

B. The Deed

Harry further maintains that he possessed no ownership interest in the property at 265 81st Street, Brooklyn, New York. A correction deed to the property was issued January 17, 2006. The cover page indicates that the correction deed was issued to

correct a deed, dated October 30, 2001, and recorded November 21, 2001, in which the grantors were incorrectly stated as John Ng and Shun Kwai Ng whereas the correct grantor should only be in the name of John Ng. The name of "Harry Ng" is not found anywhere in the instrument.

There is no dispute that Harry was not an owner of the property where the contracted work was to be done. In fact, the fifth paragraph of Plaintiff's complaint acknowledges that John Ng and Shun Kwai Ng are the owners of the property.

C. Personal Checks

Zenobio swears that in furtherance of the P.S.M.A., invoices were transmitted to Ng, and checks were received from Ng. Copies of several checks written on a joint bank account of Harry and Vicky Ng, and a copy of one check written on a company allegedly owned by Harry were submitted (Zenobio Aff. Ex. 1). Specifically, the checks were issued as follows: dated September 13, 2007 in the amount of \$150,000; dated August 6, 2007 in the amount of \$100,000; dated May 9, 2006 in the amount of \$40,000; dated December 26, 2006 in the amount of \$25,000; dated December 22, 2006 in the amount of \$50,00; dated August 14, 2006 in the amount of \$60,000; and dated December 9, 2005 in the amount of \$23,000 (written on a company check of a company allegedly owned by Harry).

All of the checks are signed by Harry. The first check is payable to Abcon, and the subsequent checks are all payable to "Recal Associates" or "Recal Assoc. Ltd. JNG 265 81st St." On the memo line of the checks, Ng wrote "265 81st St." or some variation

thereof. It is clear that these checks were intended as payment for the construction project contemplated in the P.S.M.A.

D. Correspondence

Abcon submits in opposition to Harry's motion a letter purportedly from Harry to Lawrence Olive, Esq. ("Olive"), the attorney for Defendants, John Ng and Shun Kwai Ng. The letter is undated and unsigned, and indicates that it was written in response to a letter from Olive to Zenobio. The referenced letter between Olive and Zenobio is not attached.

In the letter, Harry states that although the property is not listed under his name, the construction project does concern him because the incompetence of his siblings and Abcon resulted in unnecessary fines and increased costs. He further states that he will be involved in the project to protect his interest and his mother's interest.

E. The Complaint

Abcon filed its summons and complaint on July 7, 2008.

As its first cause of action, Abcon seeks \$85,000.00 with interest thereon from September 7, 2006 as the balance due and owing for the fair and reasonable value of the labor and services furnished under the contract.

For a second cause of action, Abcon claims breach of the provision of the P.S.M.A. which provides that Defendants pay it a fee of 10% of the project's construction, design, equipment, consulting costs and the construction manager's reimbursable expenses. Abcon alleges that since the project has not been completed, it

has not received this fee and suffered damage in an amount to be determined at trial.

As its third cause of action, Abcon claims unjust enrichment. Abcon alleges that the services performed by it have enhanced the value of the property owned by the Defendants and that the work was performed with the knowledge and consent of Defendants. If the Defendants are able to retain the benefits, Abcon alleges, they will be unjustly enriched in an amount of no less than \$85,000.00.

As its fourth cause of action, Abcon seeks payment for losses or damages incurred in connection with the performance of the P.S.M.A, including legal fees and expenses. Specifically, Abcon estimates this amount at \$25,000.00, with the exact amount to be determined by the Court at trial.

F. Co-defendants' Answer

Defendants, John Ng and Shun Kwai Ng, filed an answer with a cross-claim on August 25, 2008. Their answer asserts seven separate affirmative defenses; to wit: failure to state a valid cause of action; breach of contract by Abcon; failure to properly account for all expenditures and disbursements; wrongfully entering into the contract with Harry, who was not and is not an owner of the subject property and had no right or authority to represent Shun Kwai Ng; failure to provide a complete accounting; failure to respond or properly respond to the letter of June 11, 2008; and failure to adequately protect the interests of Defendants, John and Shun Kwai Ng.

Co-defendants also brought a cross-claim against Harry. The first cause of action set forth in the cross-claim is for fraudulent misrepresentation. John Ng and Shun Kwai

Ng allege that Harry hired Abcon without the knowledge or authority of Shun Kwai Ng and promised that he would fully fund the project with monies he owed to Shun Kwai Ng. They also seek complete indemnification from Harry for all claims and allegations of the Plaintiff.

DISCUSSION

A. Motion to Dismiss Standard

1. *CPLR 3211(a)(1)*

A motion to dismiss under CPLR 3211(a)(1) should be granted “[w]here documentary evidence definitively contradicts the plaintiff’s factual allegations and conclusively disposes of the plaintiff’s claims.” Baradino v. Ochlan, 2 A.D.3d 556, 557 (2nd Dept. 2003); and Prudential Wykagyl/Rittenberg Realty v. Calabria-Maher, 1 A.D.3d 422 (2nd Dept. 2003). See also, Leon v. Martinez, 84 N.Y.2d 83 (1994).

The principal argument made by Harry, is that he is not a party to the P.S.M.A.. As noted above, Harry did not sign the P.S.M.A. and is not named as a party to the agreement in ¶ 1.1 of the P.S.M.A.. Harry’s name does appear in the footer of each page of the P.S.M.A., and it is typed in the signature block along with the name of John Ng above John Ng’s signature. Thus, the documentary evidence establishes that Harry was not a signatory to the P.S.M.A..

Zenobio alleged that there was a binding, contractual relationship between Harry and Abcon despite the fact that he did not sign the P.S.M.A.. However, Abcon fails to cite any law to support this proposition. Additionally, the P.S.M.A. contains an

integration clause which recites that the agreement, “together with any other *writings signed by the parties* expressly stated to be supplementary constitutes the entire agreement between the parties and *supersedes all prior understandings.*” (emphasis added)(Harry Ng Ex. B) .

Abcon also submitted copies of checks proving that Harry made payments to Abcon for the work performed to support its argument that Harry was a party to the contract. Plaintiff has failed to prove that these payments were anything more than mere gratuitous payments.

The documentary evidence in the form of the deed also establishes that Harry was not, and is not, an owner of the subject property. The fact that Harry is not an owner does not mean that he could not be a party to a contract relating to that property, but it does establish that he cannot be the “Owner” or “Co-Owner” referred to in the P.S.M.A. Similarly, the mere fact that Harry’s name is typed into the signature block as a co-owner is not enough to make him a party to the contract.

John Ng and Shun Kwai Ng also argue that the complaint cannot be dismissed against Harry because they have filed a cross-claim against him, along with their answer, making him a necessary party to the litigation. However, dismissing Abcon’s complaint against Harry does not preclude Defendants John Ng and Shun Kwai Ng from being able to seek indemnification or pursue the claims set forth in their cross-claim against Harry.

2. CPLR 3211(a)(7)

The standard of review for a motion to dismiss for failure to state a cause of action is that the allegations in the complaint must be assumed to be true and to “accord the plaintiff the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory.” Leon v. Martinez, *supra*. The court must accept the facts alleged in the complaint as true and determine whether those facts set forth a cause of action. Morad v. Morad, 27 A.D.3d 626 (2nd Dept. 2006).

However, “such an assumption must fail where there are conclusory allegations lacking factual support.” Elsky v. KM Ins. Brokers, 139 A.D.2d 691 (2nd Dept. 1988). Bare legal conclusions which are flatly contradicted by evidence are not entitled to the presumption of truth and are not accorded every favorable inference. Hartman v. Morgenstern, 28 A.D.3d 423 (2nd Dept. 2006). In addition, where affidavits have been submitted regarding a motion to dismiss, the court may consider allegations set forth in the affidavits to remedy any deficiencies within the pleading. See, Nonnan v. City of New York, 9 N.Y.3d 825 (2007).

a. Breach of Contract (First and Second Causes of Action)

The first two causes of action alleged by Abcon arise out of the alleged breach of the P.S.M.A.. The elements of a cause of action for breach of contract are: (1) the existence of a contract between the plaintiff and defendant; (2) consideration; (3) performance by the plaintiff; (4) breach by the defendant; and (5) damages resulting

from the breach. Furia v. Furia, 116 A.D.2d 694, 694-95 (2nd Dept. 1986).

Harry argues that “Harry Ng is not, and never was a party to the agreement upon which plaintiff’s claims are based.” (Perone Affirmation ¶12). It is a fundamental principle of contract interpretation that “when the parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms.” Henrich v. Phazar Antenna Corp., 33 A.D.3d 864 (2nd Dept. 2006). The interpretation of an unambiguous contract term or provision is a matter for the court, and the circumstances extrinsic to the agreement will not be considered when the parties’ intent may be gleaned from the four corners of their agreement. Innophos, Inc., v. Rhodia, S.A., 10 N.Y.3d 25, 29 (2008); Greenfield v. Philles Records Inc., 98 N.Y.2d 562, 569 (2002); Katina, Inc. v. Famiglietti, 306 A.D.2d 440 (2nd Dept. 2003); and Tikotzky v. New York City Transit Auth., 286 A.D.2d 493 (2nd Dept. 2001).

The P.S.M.A. unambiguously states in §1.1 that the agreement was made and entered into between John Ng and Abcon. This paragraph also designates John Ng as the “Owner,” which is the term used for the contracting party throughout the agreement. The addition of Harry’s name in the footer of the agreement’s pages does not, without more, indicate the parties’ intention to make Harry a party to the agreement.

Although Harry’s name also appears in the signature block, as “Owner: John and Harry Ng,” the fact that the P.S.M.A. was only signed by John Ng further demonstrates that the agreement was made solely between John Ng and Abcon.

b. Unjust Enrichment (Third Cause of Action)

Abcon's third cause of action is for unjust enrichment. Plaintiff alleges that the work, labor, and services performed enhanced the value of the real property owned by Defendants and was performed with their knowledge and consent.

The plaintiff who alleges that he or she has provided services without compensation and deserves compensation has the burden of proving a contract implied in law to pay for services. Such a plaintiff must prove: (1) performance of services in good faith; (2) acceptance by person for whom the services were rendered; (3) expectation of compensation therefore; and (4) reasonable value of the services. See, Tesser v. Allboro Equipment Company, 302 A.D.2d 589, 589 (2nd Dept. 2003); and 22A NY Jur. Contracts § 598.

However, the existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter. See, EBC I, Inc. v. Goldman Sachs & Co., 5 N.Y.3d 11, 23 (2005); and State of New York v. Barclays Bank of NY, 76 N.Y.2d 533, 540 (1990). This prohibition applies not only to the parties that are in privity of contract, but to noncontracting parties as well. See, Bellino Schwartz Padob Adv. v. Solaris Mktg Group, 222 A.D.2d 313, 313 (1st Dept. 1995); and Feigen v. Advance Capital Mgt. Corp., 150 A.D.2d 281, 283 (1st Dept.), *app. dism. in part and den. in part*, 74 N.Y.2d 874 (1989).

The documentary evidence of the P.S.M.A. proves that there is an express agreement covering the exact work, labor, and services allegedly performed by Abcon. Therefore, a cause of action sounding in quasi contract is inappropriate.

The complaint alleges that the improvements were made to "enhance the value of the real property owned by Defendants." (Complaint ¶ Fourteenth). Since the documentary evidence of the deed establishes that Harry is not an owner of the property, he did not receive the benefit from the enhancements made to the property.

c. Reimbursement (Fourth Cause of Action)

The fourth cause of action in the complaint alleges that, pursuant to the P.S.M.A., Defendants agreed to reimburse Plaintiff for all losses or damages incurred in connection with the performance of the agreement, including legal fees and expenses.

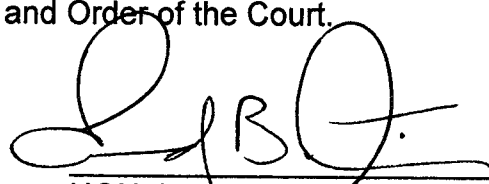
Since it has been established that Harry was not a party to the P.S.M.A., this cause of action must also be dismissed as against him.

Accordingly, it is,

ORDERED that the motion of Defendant, Harry Ng, to dismiss the complaint as against him is **granted**. The cross-claim by Co-Defendants, John Ng and Shun Kwai Ng is continued.

This constitutes the decision and Order of the Court.

Dated: Mineola, New York
March 18, 2009


HON. LEONARD B. AUSTIN, J.S.C.