

5-AM

**SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK
PRESENT: HON. JOSEPH COVELLO,**

Justice.

EXCEL BUILDERS GROUP, INC.,

Plaintiff,

-against-

**MICHAEL KAHOU,
BRITANNICA FLOOR COVERING, INC. and
UTICA FIRST INSURANCE COMPANY,
Defendants.**

**TRIAL/IAS, PART 24
NASSAU COUNTY**

Index No.:003406/03

Motion Seq.: 004

Motion Date: 09/13/04

The following paper read on this motion:

Notice of Motion	1
Affirmation in Opposition	2
Memorandum of Law	3, 4

Upon the foregoing papers, the motion by defendants, Michael Kahoud (“Kahoud”), and Britannica Floor Covering Inc. (“Britannica”), pursuant to CPLR §3212, for partial summary judgment dismissing the fraud, conversion, restitution and breach of contract causes of action against Kahoud and dismissing the fraud, conversion and restitution causes of action against Britannica, is denied.

Defendant, Utica First Insurance Company, is no longer a party to this action as the claims against that defendant were discontinued pursuant to stipulation.

Plaintiff commenced this action for conversion, breach of contract, restitution and fraud. Plaintiff, Excel, asserts that it entered into a contract in March 2002, with the State University Construction Fund (“SUCF”) of the State of New York to perform work

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at the State University Campus at Farmingdale, N.Y. Thereafter, in May 2002, Excel entered into a contract with Britannica to be a subcontractor on the project. At the time of the allegations, defendant, Kahoud, was the president of Britannica.

Excel alleges Britannica and Kahoud breached the contract by failing to procure the required materials and by not performing its tasks up to standard. Excel also alleges that it had to hire a replacement contractor to perform Britannica's tasks due to Britannica's failure to properly perform its contractual obligations.

Excel further asserts that Britannica was paid for certain materials for the project, however, Britannica kept those funds and kept the refunded monies.

Kahoud and Britannica assert that the plaintiff never properly compensated them for their efforts, and thus they left the job site. They allege no impropriety on their part.

Initially it is noted that the plaintiff's complaint does not allege a contract between Excel and Kahoud, nor a breach thereof.

The causes of action in plaintiff's complaint as to Kahoud that sound in restitution, fraud, and conversion are viable to the point that there are issues of fact as to the alleged conduct by Kahoud. As plaintiff notes, it is entitled to attempt to seek recovery against Britannica and also against Kahoud for his alleged individual wrongful acts.

Moreover, plaintiff may pursue alternate theories of liability against the defendants (CPLR §3014). Accordingly, the plaintiff may go forward with its causes of action for

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restitution, fraud, and conversion based on the written contract as well as a quasi-contract (CPLR §3002).

The court must concur with the plaintiff that the defendants in this motion are primarily asserting the same arguments, which the defendants submitted in opposing the plaintiff's prior motion for summary judgment. In the decision denying plaintiff's motion for summary judgment, it was noted at length that issues of fact existed precluding summary judgment. Now with the roles reversed, defendants moving for summary judgment and the plaintiff opposing, the defendants have failed to extinguish any of the material issues of fact that existed when the plaintiff's motion for summary judgment was denied.

In addition, the portion of defendants' motion to dismiss the restitution claim against Kahoud, due to the fact that the complaint fails to pray for relief as against Kahoud on that claim in the "wherefore clause", is denied. Plaintiff alleges that it did assert a cause of action against Kahoud for restitution, and that any failure to include that in the "wherefore clause" was a mere oversight. Plaintiff requests that the complaint be amended to correct that oversight.

Therefore, it is hereby

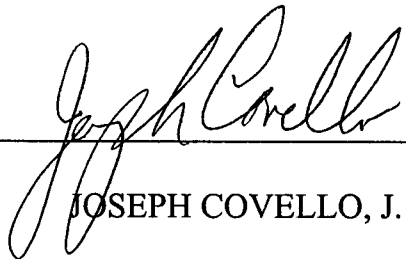
ORDERED, that the motion by defendants, Kahoud and Britannica, for summary judgment is denied in its entirety. It is further

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ORDERED, that the plaintiff's complaint is deemed amended to include in the "wherefore clause" defendant, Kahoud, on the fourth cause of action for restitution.

This constitutes the decision and Order of the Court.

Dated: November 29, 2004



JOSEPH COVELLO, J. S. C.

ENTERED

DEC 01 2004

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**