

6-1-10

SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
PRESENT: Hon. Doris Ling-Cohan, Justice **Part 36**

FWAN MANAGEMENT COMPANY LLC,

Plaintiff,

-against-

INDEX NO. 603569/09

MOTION SEQ. NO. 001

420 WEST BROADWAY CORP.,

Defendant.

The following papers, numbered 1 - 6 were considered on this motion to dismiss:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Order to Show Cause, — Affidavits — Exhibits _____	<u>1, 2</u>
Answering Affidavits — Exhibits _____	<u>6</u>
Replying Affidavits _____	_____
Cross-Motion: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	<u>3, 4, 5</u>

FILED
JUN 01 2010
NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion and cross motion are decided to the extent set forth below.

In this action, plaintiff, a shareholder in a real estate cooperative and proprietary lessee of commercial property space, alleges that defendant, who is responsible for maintaining the property located at 420 West Broadway including collecting the maintenance from the shareholders that occupy the units within, overcharged plaintiff for certain co-op maintenance charges from 2001 through 2007, when plaintiff sold its shares in the unit. Plaintiff claims that, pursuant to an Offering Plan and a Proprietary Lease, it was:

responsible for 19.8% of all expenses of the Corporation except the following: expenses for salary, taxes, benefits, uniforms and other related expenses for the employment of the superintendent and doormen, which staff will serve the residential tenants only; repairs and maintenance of those areas of the Property used exclusively by the residential occupants of the Property.

Compl ¶ 6. Plaintiff alleges that defendant “fail[ed] to deduct the cost and expenses intended for residential shareholders only, from the ground floor commercial space and pro-rat[e] accordingly.” *Id.* ¶

7. Plaintiff commenced this action for breach of contract and unjust enrichment to recover the amount of \$98,780.35 in which it alleges it overpaid.

Defendant 420 West Broadway Corporation now moves to dismiss plaintiff's second cause of action for unjust enrichment and dismiss plaintiff's demands for consequential damages and attorneys' fees on the grounds that they fail to state a cause of action, pursuant to CPLR 3211(a)(7). Plaintiff Fwan Management Company, LLC cross-moves for an order compelling the appointment of a forensic accountant.

On a motion to dismiss, pursuant to CPLR 3211, the pleading is given a liberal construction and the facts alleged therein are accepted as true. *Leon v Martinez*, 84 NY2d 83, 87 (1994). The motion to dismiss will only be granted if, upon giving the non-moving party every favorable inference, the facts do not fit within any cognizable legal theory. *Id.* at 87-88.

Generally, an enforceable written contract precludes recovery in quasi contract with respect to events arising from the same subject matter. *See Curtis Properties Corp. v Greif Companies*, 236 AD2d 237, 239 (1st Dep't 1997). An unjust enrichment cause of action is "precluded by the fact that a simple breach of contract claim may not be considered a tort unless a legal duty independent of the contract-i.e., one arising out of circumstances extraneous to, and not constituting elements of, the contract itself-has been violated." *Brown v Brown*, 12 AD3d 176, 176 (1st Dep't 2004). However, a plaintiff may proceed on both breach of contract and quasi-contract theories where there is a genuine dispute as to the existence of a contract. *Id.*; *see also* CPLR 3014.

Here, as there is no dispute as to the existence of a contract that defines the terms at issue here, the motion to dismiss plaintiff's second cause of action for unjust enrichment is granted. Plaintiff's claims stem completely from the terms set forth in the Offering Plan and Proprietary Lease. Plaintiff alleges that the provision in the Offering Plan sets forth what plaintiff's share of the maintenance charges would be and how they would be calculated, which is the issue in this case. As stated above, "[a] claim

for unjust enrichment, or quasi contract, may not be maintained where a contract exists between the parties covering the same subject matter.” *Goldstein v CIBC World Markets Corp.*, 6 AD3d 295, 296 (1st Dep’t 2004). In this case, plaintiff’s cause of action for unjust enrichment is “indistinguishable from the breach of contract claim.” *Id.* (internal quotations omitted).

The cases cited by plaintiff in opposition to defendant’s motion to dismiss are unpersuasive. In *EBC I, Inc. v Goldman Sachs & Co.*, 7 AD3d 418 (1st Dep’t 2004), the First Department held that the unjust enrichment cause of action should not have been dismissed, “since [it was] based on alleged wrongdoing not covered by the contract.” *Id.* at 420. The alleged wrongdoing claimed in this case is directly related to defendant’s miscalculation of plaintiff’s share of maintenance payments as set forth in the contract. Further, in *Niagara Mohawk Power Corp. v Freed*, 265 AD2d 938 (4th Dep’t 1999), the unjust enrichment cause of action was held not to be duplicative of the breach of contract claim because the plaintiff had alleged that the contracts were induced by fraud, and, thus, there was a possibility that the contract would be voided. *See id.* at 939. In the case at bar, there is no such allegation that could lead to the contract being voided. Thus, as there is a valid contract that directly relates to the subject matter, and there is no dispute that such contract is enforceable, the unjust enrichment claim is duplicative and, therefore, dismissed.

Defendant also seeks to dismiss plaintiff’s demands for consequential damages and attorneys’ fees, as no causes of action for these damages are alleged in the complaint and they only appear in the “wherefore” clause. With regard to consequential damages, plaintiff has not set forth any allegations as to what consequential damages are being claimed. “In order to recover consequential damages, the plaintiffs were required to plead that those damages were the natural and probable consequences of the breach, and were contemplated at the time the contract was executed.” *Atkins Nutritionals, Inc. v Ernst & Young, LLP*, 301 AD2d 547, 549 (2d Dep’t 2003). As plaintiff has not sufficiently pleaded consequential damages, plaintiff’s demand for such damages is dismissed.

Plaintiff also has not set forth any allegations regarding attorneys' fees. Unless authorized by agreement between the parties, by statute, or by court rule, attorneys' fees are generally not available as an item of damages. *Hooper Assoc., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 492 (1989). As there are no causes of action stated for consequential damages or attorneys' fees and no allegations set forth to support a recovery of such items of damages, they are also dismissed.

Plaintiff cross-moves for a forensic accountant to be appointed, to conduct a complete review of defendant's books, records and accounting procedures to determine the amount, if any, that defendant allegedly wrongly charged plaintiff. As to plaintiff's cross motion, such motion is denied as premature at this juncture. Issue still has not been joined in this case and the parties have yet to conduct any discovery, as a preliminary conference has not yet been held.

Accordingly, it is

ORDERED that the motion to dismiss is granted and the second cause of action of the complaint for unjust enrichment and demands for consequential damages and attorneys' fees are dismissed; and it is further

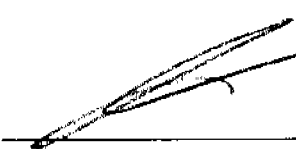
ORDERED that defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy of this order with notice of entry, upon defendant.

Dated: _____

5/20/10

Check one: FINAL DISPOSITION
Check if Appropriate: DO NOT POST


DORIS LING-COHAN, J.S.C.
[X] NON-FINAL DISPOSITION
FILED
JUN 01 2010
NEW YORK
COUNTY CLERK'S OFFICE