SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LYLE E. FRANK** **PART** **11M**

Justice

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FAST TRACK CONSTRUCTION SYSTEMS,INC,

Plaintiff,

- v -

TURKEN FOUNDATION INC, CNY RESIDENTAL LLC,CATALYST CHILMARK LLC,BEHRAM TURAN, FORWARD MECHANICAL CORP., TITAN FORMWORK SYSTEM LLC,SUNBELT RENTALS INC, TRINITY BUILDERS OF NEW YORK INC, NEW YORK CITY DEPARTMENT OF FINANCE, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, COMMISSIONER OF LABOR OF THE STATE OF NEW YORK, NEW YORK CITY BUREAU OF HIGHWAY OPERATIONS, ISLAMIC DEVELOPMENT BANK

Defendant.

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INDEX NO. 650073/2024

MOTION DATE 04/15/2024

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27, 28, 29, 30, 31, 32

were read on this motion to/for DISMISS.

Upon the foregoing documents, the motion by defendants Turken Foundation, Inc. and Behram Turan ("Movants") is granted in part and denied in part.

Defendant Turken Foundation, Inc. ("Turken") is a not-for-profit organization that hired Plaintiff Fast Track Construction Systems, Inc. ("Fast Track" or "Plaintiff") in 2020 regarding the construction of a mixed-use building in Manhattan. The parties signed a written contract (the "Contract"), which Plaintiff now alleges is invalid. There followed several disputes between the parties regarding payments due to subcontractors and project funding. In December of 2022, Plaintiff was terminated for cause, relating to an alleged misappropriation of funds. Plaintiff filed suit on January 5, 2024, alleging fraud and six causes of action against several defendants. Although somewhat unclear from the amended complaint, Plaintiff appears to be largely alleging

that the Contract is void because of a lack of intent to fully fund the building project at the time the Contract was signed. Defendant Turken along with Defendant Behram Turan ("Turan", collectively with Turken "Defendants") brings the present motion to dismiss the suit in its entirety.

Standard of Review

It is well settled that when considering a motion to dismiss pursuant to CPLR § 3211, "the pleading is to be liberally construed, accepting all the facts alleged in the pleading to be true and according the plaintiff the benefit of every possible inference." *Avgush v. Town of Yorktown*, 303 A.D.2d 340 (2d Dept. 2003). Dismissal of the complaint is warranted "if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery." *Connaughton v. Chipotle Mexican Grill, Inc*, 29 N.Y.3d 137, 142 (2017).

A party may move for a judgment from the court dismissing causes of action asserted against them based on the fact that the pleading fails to state a cause of action. CPLR § 3211(a)(7). For motions to dismiss under this provision, "[i]nitially, the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *Guggenheimer v. Ginzburg*, 43 N.Y. 2d 268, 275 (1977).

CPLR § 3211(a)(1) allows for a complaint to be dismissed if there is a "defense founded upon documentary evidence." Dismissal is only warranted under this provision if "the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon v. Martinez,* 84 N.Y.2d 83, 88 (1994).

CPLR § 3211(a)(5) allows for a complaint to be dismissed if, among other reasons, it is barred by the statute of limitations. For motions made pursuant to this provision, the defendant has the "initial burden of demonstrating, prima facie, that the time within to commence the cause of action has expired", at which point the burden then shifts to the plaintiff to "raise a question of fact as to whether the statute of limitations is tolled or otherwise inapplicable." *Haddad v. Muir*, 215 A.D.3d 641, 642-43 (2nd Dept. 2023).

Discussion

Movants move to dismiss the action in its entirety based on documentary evidence, statute of limitations, and failure to state a cause of action. For the reasons that follow, the motion is granted in part and denied in part.

I: The Fraud Cause of Action Fails to State a Claim

In their second cause of action, Plaintiffs allege that Movants (as well as another defendant, Catalyst Chilmark, LLC) knowingly and intentionally misrepresented the Contract to Plaintiff and that this rose to the level of fraud. The fraud allegations go to the heart of the Plaintiff's complaint. These allegations are that Movants failed to disclose the existence of an "undisclosed third party in Turkey" that had approval authority over the project, that they withheld information regarding their financial status and made false representations about their ability to pay for the project, and that they knew at the time of the Contract that there would be scheduling issues amounting to a "cardinal change" in the Contract as a result of lack of funds. For relief, Plaintiff asks for actual, consequential, and punitive damages. Movants move to dismiss on the grounds that Plaintiff has failed to adequately plead a claim.

Under CPLR § 3016(b), allegations of fraud must be stated in detail. In order to survive a motion to dismiss, a cause of action based on fraud must assert "a misrepresentation or a material

omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." *Connaughton*, at 142. There are two main misrepresentations that Plaintiffs allege: that at the time of the Contract, Defendants knew that 1) they would not have sufficient funds to complete the project; and 2) there was an unidentified party in Turkey who had some form of approval authority over the Contract.

To begin with, Plaintiff's statements about the existence or not of a third-party in Turkey do not adequately state claim for fraud or fraudulent inducement. According to the terms of the Contract, it is binding on both parties. If Movants failed to perform under the Contract, on the orders of a mysterious Turkish entity, then that would constitute a breach of contract, not fraud in the inducement. Plaintiffs do not allege that Movants breached the Contract. It is difficult to determine what the alleged injury Plaintiff suffered as a result of this misrepresentation, how the misrepresentation was material, or where the nexus is between the alleged Turkish party and any injury that Plaintiff may have suffered.

As regards the knowledge of funds or lack thereof, Plaintiff has not adequately pled the required future intent nor justifiable reliance beyond conclusory statements. When a fraud cause of action is "based a statement of future intention, it must allege facts sufficient to show that the party never intended to honor or act on that statement" at the time the contract was made, and general allegations to that effect are not enough to survive a motion to dismiss. *Rising Sun Constr. LLC v. CabGram Dev. LLC*, 202 A.D.3d 557, 559 (1st Dept. 2022). In fact, the First Department has held that "as a matter of law, a sophisticated plaintiff cannot establish that it entered into an arm's length transaction in justifiable reliance on alleged misrepresentations if the plaintiff failed to make use of the means of verification that were available to it." *Ventur*

Group, LLC v. Finnerty, 68 A.D.3d 638, 639 (1st Dept. 2009). Nowhere does Plaintiff allege that they engaged in any due diligence or other efforts to determine the financial state of Movants before entering into the Contract.

Plaintiff fails to state a claim for fraudulent inducement for yet another reason. They admit to helping draft the Contract in Section 20.1 of the agreement, so they would have been aware of the merger clause in the same section. Any previous representations regarding Movants' financial state would, by the terms of the contract that Plaintiff helped to draft, be superseded by the merger clause. New York courts have routinely upheld the dismissal of fraudulent inducement claims based on merger clauses that supersede any prior understandings. *See, e.g., Pate v. BNY Mellon-Alcentra Mezzanine III, LP*, 163 A.D.3d 429 (1st Dept. 2018); *see also PSW NYC LLC v. Bank of Am., N.A.*, 150 A.D.3d 601 (1st Dept. 2017).

Overall, even with the benefit of every favorable inference, here Plaintiff has failed to adequately allege a claim for fraudulent inducement. While Plaintiff alleges that they were underpaid and that the Movants entered into the contract knowing that they did not have enough money to pay Plaintiff, "a contract action may not be converted into one for fraud by the mere additional allegation that the contracting party did not intend to meet his contractual obligation." *Comtomark v. Satellite Communications Network*, 116 A.D.2d 499, 500 (1st Dept. 1986). Likewise, the allegation that funding for the project was impacted by a mysterious Turkish entity would go towards breach of contract and not fraudulent inducement. Therefore, dismissal of the Second cause of action is proper.

II: The Declaratory Judgment Cause of Action Fails to State a Claim

Plaintiff in their First cause of action seeks a declaratory judgment that the Plaintiff was fraudulently induced into signing the Contract and that the Contract is void. This claim

necessarily relies on the adequate pleading of fraud in the inducement. There are three things that the Plaintiff asks the Court to order in the declaratory judgment: 1) that the Contract is unenforceable and void, 2) that the relationship between the Plaintiff and Movants in relation to the building project is governed by a time-and-materials contract, and 3) that the Plaintiff's termination for cause is null and void because the basis for the termination is the Contract. Plaintiff argues that the grounds for declaring the Contract void are lack of meeting of the minds and fraudulent inducement. Movants move to dismiss this claim on the grounds that the first and second causes of action are duplicative, that the cause of action fails to state a claim, and that it is barred by documentary evidence.

Under CPLR § 3001, a court may issue a "declaratory judgment having the effect of a final judgment as to the rights and other legal relations of parties to a justifiable controversy." The First cause of action is not duplicative of the second, because the First alleges a different basis for finding the Contract void (lack of meeting of the minds) and whereas the Second cause of action asks for monetary damages as a result of entering into the Contract, the declaratory judgment that the First asks for is different and would set aside the Contract entirely. The issue is that the First cause of action, like the Second, fails to state a claim.

As addressed above, Plaintiff has failed to make a case for fraudulent inducement and therefore that ground for declaring the Contract void is unavailable. As regards the meeting of the minds argument, although it is not entirely clear from the pleadings, Plaintiff appears to be arguing that there was no necessary meeting of the minds because of an undisclosed principal (the Turkish entity) that defeated contract formation. A contract is unenforceable due to no meeting of the minds if "the parties understand the contract's material terms differently." *D'Artagnan v. Sprinklr Inc.*, 192 A.D.3d 475, 476-77 (1st Dept. 2021).

Plaintiff does not clarify what material terms the parties understood differently, but merely states that the Contract did not contain a disclosure that the incorporated fees agreement "would be approved and/or disapproved by an undisclosed party in Turkey." But as addressed above, this is more properly a breach of contract claim (should Plaintiff allege that Movants failed to perform based on instructions from Turkey), rather than an issue with contract formation. Plaintiff does not, for instance, allege that Movants are relying on a different interpretation or understanding of the Contract than the Plaintiff is, simply that Movants were acting on instructions from another party when performing (or failing to) under the Contract. When, as is the case here, a party "does not identify any material terms in the contract that the parties understood differently and does not allege any ambiguity in the contract", dismissal is proper. *D'Artagnan*, at 477.

Additionally, the other two requests for the declaratory judgment are not proper. Because Plaintiff has failed to properly allege fraudulent inducement that would render the Contract void, a declaratory judgment that his termination is null on those grounds likewise fails. Finally, the Plaintiff never expands further on the time and materials agreement that they request the Court issue a declaratory judgment on. It is unclear, and Plaintiffs cite to no authority or exhibit on this matter, whether there is an existing time and material agreement that they wish to be declared binding, or whether they wish the Court to create a sort of quasi-contract agreement binding the two parties. Either way, the Court declines to do so. Therefore, dismissal of the First cause of action is proper.

III: Dismissal of the Mechanic's Liens Claim is Proper Because the Second Lien is an Invalid Amendment of the First Lien

The Third cause of action concerns two Mechanic's Liens that Plaintiff filed in 2023 regarding unpaid work, labor and services. The first was filed On June 2, 2023, in the amount of $723, 544.54. Turken paid (in two installments) $636,372.47 towards the lien. Then, in August Plaintiff filed a second Mechanic's Lien for what they claim is the final requisition amount of $1,320,677.52. Plaintiffs ask for a foreclosure on this second lien in their complaint. Movants move to dismiss this claim on several grounds, including that the second lien is a defective amendment in violation of Section 12-a of the Lien Law. Plaintiff opposes the motion and argues that Section 12-a does not apply here and that the partial release does not bar the second lien.

Section 12-a of the Lien Law allows for an amendment of a lien within sixty days after the filing. NY CLS Lien 12-a. Both mechanic's liens cover the same dates: from January 20, 2021, to February 28, 2023. Plaintiff alleges that the increased amount in the second lien was not a mere increase of the original amount but is rather an additional claim for services performed. In support of this, Plaintiff attaches a payroll summary for the total hours spent on the project. The problem is that Plaintiff does not specify what additional services were performed that would make the second lien not simply an amendment of the first stating a revised labor amount due. In fact, both liens state the same overall amount agreed to as the value of the labor and materials ($34,370,169.29), and the only difference between the two is the amount that Plaintiffs list as unpaid from this overall value (from $723,544.54 to $1,320,677.52). Because the two liens cover the same dates, and because Plaintiff has not submitted any basis for the second lien other than a general overview of the payroll for the project, the second lien is functionally an amendment of the first in order to state a revised amount due.

The case *Perrin v. Stempinski Realty Corp.* is instructive here. In that case, there was a similar attempt to amend a filed mechanic's lien in order to state what the respondents claimed

was the correct, if higher, amount due. *Perrin v. Stempinski Realty Corp.*, 15 A.D.2d 48, 49 (1st Dept. 1961). The First Department held there that the purpose of Section 12-a was to allow the amendment of liens that are "defective in their recitals or executions" and that figures "have been allowed to be corrected but only where the amount of the lien was unchanged." *Id.* The court there further stated that even in the rare cases where a lien amendment would be allowed in order to raise the amount, proof of the "validity of the additional amount claimed and the reason why it was not included in the original application" would need to be submitted to the court. *Id.*, at 50. Here, Plaintiff has submitted only a general payroll listing, and has given no reason to the court as to why the labor claimed was not listed in the original lien for those dates. Even with the favorable inferences due to Plaintiff on a motion to dismiss, the second mechanic's lien does not currently provide a basis for relief. Because the Third cause of action seeks a foreclosure on the second lien, which is an impermissible amendment to the first lien based on the facts stated, dismissal of this cause of action is proper.

IV: The Quantum Meruit and Unjust Enrichment Claims Are Proper at this Stage When Pled in the Alternative to any Written Contract or When Regarding Actions Not Covered by a Written Agreement

Plaintiff makes two quasi-contract claims in their Fourth and Fifth causes of action, one for quantum meruit and unjust enrichment. Defendant moves to dismiss these claims on the grounds that they are based on Turken's failure to conform to the Contract and therefore these causes are barred. As a general rule, the existence of a written contract conclusively bars quasi-contractual claims such as quantum meruit and unjust enrichment. *See, e.g., Singer Asset Fin. Co., LLC v. Melvin*, 33 A.D.3d 355, 358 (1st Dept. 2006). But here, taking the facts pled by

Plaintiff to be true as the Court must at this stage, these two claims rest on actions not covered by the terms of a written agreement (valid or invalid).

Plaintiff alleges in both causes of actions that they worked with creditors of Defendants in order to proceed with the building project, despite not having a duty to do so under a written agreement. As a result, they allege that they are entitled to unpaid debt resolution fees. Furthermore, it is well settled law that plaintiffs are allowed to plead quasi-contractual claims in the alternative to breach of contract claims. *See, e.g., Curtis Props. Corp. v. Greif Cos.*, 236 A.D.2d 237, 239 (1st Dept. 1997). To the extent that the Third and Fourth causes of action are pled in the alternative of any duties resting on a written agreement, and to the extent that they allege monies owed as a result of duties not covered by a written agreement, dismissal at this stage would be improper.

V: The Defamation Claim

The final cause of action in Plaintiff's amended complaint alleges defamation and defamation *per se*. Specifically, Plaintiff alleges that "the Defendant Turan engaged in a pattern of defamation per se", and that Turan "admitted to publishing these defamatory statements on numerous occasions." The Sixth cause of action does not clearly state what the allegedly defamatory statements are or who they were published to, but it appears that Plaintiff is alleging that Turan made certain statements to the Board of Directors for Turken that led to Plaintiff's termination. There are more statements regarding an alleged defamation in the Second cause of action for fraud, where it appears that the statements in question related to an accusation that Plaintiff was diverting money from requisition. Defendants move to dismiss this cause of action for failure to state a claim.

The elements for a claim of defamation are "a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se." *Dillon v. City of New York*, 261 A.D.2d 34, 38 (1st Dept. 1999). To state a claim, the complaint must "allege the time, place, and manner of the false statement and specify to whom it was made." *Id.* Furthermore, CPLR § 3016(a) requires that the complaint set forth "the particular words complained of." Here, the complaint is lacking the words that are alleged to be defamation, any details as the to the time, place, and manner, as well as any direct statements about who the statements were made to. For several reasons, the Sixth cause of action fails to state a claim and dismissal is proper. Accordingly, it is hereby

ORDERED and ADJUDGED that the defendants' motion to dismiss is granted as to the First, Second, Third, and Sixth causes of action and these causes of action are dismissed; and it is further

ADJUDGED that the defendants' motion to dismiss is denied as to the Fourth and Fifth causes of action.

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11/1/2024
DATE

LYLE E. FRANK, 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