SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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MCBP 451 HOLDINGS, LLC and MARCAL CONTRACTING CO. LLC,

Plaintiffs, Decision and order

-against-

Index No. 515710/2024

CENTRAL AVENUE DEVELOPERS, LLC, ABRAHAM A LESSER and MORRIS LOWY,

Defendants, November 6, 2024

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PRESENT: HON. LEON RUCHELSMAN Motion Seq. #3

The plaintiffs have moved seeking to dismiss counterclaims filed by the defendants. The defendants have opposed the motion. Papers have been submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

As recorded in a prior decision, on February 27, 2023 the defendant Central Avenue Developers LLC purchased a vacant lot from the plaintiff MCBP for $1,970,000. The lot was located in Richmond County. The price included work already performed and the parties agreed that the plaintiffs MCBP and Marcal Contracting would engage in additional work for a price of $1,500,000. The payment of the $1,970,000 was contingent upon MCBP completing all the necessary work. Some of the work that was required included removal of contaminated landfill in compliance with various environmental regulations. The complaint alleges the defendant frustrated MCBP's ability to perform the work and obstructed its completion. This action was commenced

and the complaint alleges causes of action for violating the covenants of good faith and fair dealing and to enforce guaranty's executed by defendants Lesser and Lowy. The defendants answered and asserted counterclaims. Specifically, the defendants have asserted the plaintiff's failed to complete the environmental work necessary which delayed the defendant's ability to develop the property. They assert counterclaims for breach of contract, breach of good faith and fair dealing, a constructive trust and unjust enrichment. This motion seeking to dismiss the counterclaims has now been filed. As noted it is opposed.

Conclusions of Law

It is well settled that upon a motion to dismiss the court must determine, accepting the allegations of the counterclaims as true, whether the party can succeed upon any reasonable view of those facts (Strujan v. Kaufman & Kahn, LLP, 168 AD3d 1114, 93 NYS3d 334 [2d Dept., 2019]). Further, all the allegations contained within the counterclaims are deemed true and all reasonable inferences may be drawn in favor of the party that has alleged such counterclaims (Weiss v. Lowenberg, 95 AD3d 405, 944 NYS2d 27 [1st Dept., 2012]). Whether the counterclaims will later survive a motion for summary judgment, or whether the party will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to

dismiss (see, Moskowitz v. Masliansky, 198 AD3d 637, 155 NYS3d 414 [2021]).

It is well settled that to succeed upon a counterclaim of breach of contract the defendants must establish the existence of a contract, the defendant's performance, the plaintiff's breach and resulting damages (Harris v. Seward Park Housing Corp., 79 AD3d 425, 913 NYS2d 161 [1st Dept., 2010]).

Although the contract to actually engage in the environmental work was executed only by Marcal there are significant questions of fact whether MCBP likewise agreed to be responsible for the environmental work as well. Thus, the agreement entered into between MCBP and the defendant Central Avenue Developers acknowledges that Central Avenue Developers entered into an agreement with Marcal, an affiliate of MCBP to engage in environmental work (see, Agreement [NYSCEF Doc. No. 71]). The agreement specifically states that "the Parties agree that MCBP Affiliate is responsible for the Environmental Work" (see, Agreement ¶2(b) [NYSCEF Doc. No. 71]). Thus, MCBP as a signatory of the agreement bound its affiliate to engage in the work. The same paragraph concludes and states that "for the avoidance of doubt, and notwithstanding anything to the contrary in this Agreement, the AIA or otherwise, the "Environmental Work", and MCBP's obligation to perform same, shall not include any requirement to remove or replace the Prior Work or any

construction that was completed below grade" (id). Thus, the agreement interchangeably refers to both MCBP and its affiliate as the party tasked with performing the work. The mere fact that only the affiliate actually signed the agreement does not mean that MCBP cannot be responsible for the work that was performed (or not performed). Thus, MCBP cannot execute an agreement to permit one if its affiliates to perform work and absolve itself of any liability by arguing it was not contracted to actually perform any work. MCBP did not contract to actually perform the work but it did contract with the defendant that one of its affiliates would perform the work. Thus, both the affiliate Marcal and MCBP may be responsible for any breaches that occurred. There can be no summary determination at this juncture that MCBP cannot be responsible for any breach that occurred.

Next, Article 9 of the contract incorporates AIA Document A201TM – 2017 (see, Article 9 of the agreement between Marcal and Central Avenue Developers LLC [NYSCEF Doc. No. 74]). Article 15.1.7 of that contract is entitled 'Waiver of Claims for Consequential Damages' [NYSCEF Doc. No. 75]). That article states that the parties waive claims for consequential damages including "damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and...damages incurred by the

Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit, except anticipated profit arising directly from the Work" (id). To the extent such waiver is applicable, the damages sought here may be specifically excluded. Thus, anticipated profit resulting directly from the work is excluded and thus such damages sought are not waived. There are surely questions whether the damages sought fit within that exception. At this juncture, before any discovery has taken place there are questions which foreclose a summary determination. In truth, each party has accused the other of being responsible for the delay. Further discovery should narrow and sharpen these disputed facts. Further, there are surely questions whether a breach actually occurred. Consequently, the motion seeking to dismiss the breach of contract counterclaim is denied.

Turning to the counterclaim of a breach of the covenant of good faith and fair dealing, it is well settled that cause of action is premised upon parties to a contract exercising good faith while performing the terms of an agreement (Van Valkenburgh Nooger & Neville v. Hayden Publishing Co., 30 NY2d 34, 330 NYS2d 329 [1972]). However, that cause of action is not applicable when it is duplicative of a breach of contract claim (P.S. Finance LLC v. Eureka Woodworks Inc., 214 AD3d 1, 184 AD3d 114

[2d Dept., 2023]). Even if pled in the alternative, the claim of a breach of any implied covenant is based upon the same facts as the breach of contract claim, namely the failure to enable the defendant to develop the property. That is duplicative of the breach of contract and consequently, the motion seeking to dismiss the second counterclaim is granted.

Turning to the next counterclaim, generally, a constructive trust may be imposed when property has been acquired under such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest therein (Plumitallo v. Hudson Atl. Land Co., 74 AD3d 1038, 903 NYS2d 127 [2d Dept., 2010]). It is well settled that in order to impose a constructive trust the following four elements must be proven. There must be a confidential or fiduciary relationship, a promise, a transfer in reliance of the promise and unjust enrichment (Sharp v. Kosmalski, 40 NY2d 119, 386 NYS2d 72 [1976]). These elements are not applied rigidly but flexibility is employed, especially to promote and satisfy the demands of justice (Sanxhaku v. Margetis, 151 AD3d 778, 56 NYS3d 238 [2d Dept., 2017]). Essentially, as expressed by Justice Cardozo in Beatty v. Guggenheim Exploration Co., 225 NY 380, 122 NE 378 [1919], "a constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title

may not in good conscience retain the beneficial interest, equity converts him into a trustee" (id).

Concerning the first element, there is no fiduciary relationship between the parties (see, Plumitallo v. Hudson Atlantic Land Company LLC, 74 AD3d 1038, 903 NYS2d 127 [2d Dept., 2010]). Consequently, the motion seeking to dismiss the third counterclaim is granted.

The last counterclaim is unjust enrichment. The elements of a cause of action to recover for unjust enrichment are that "(1) the defendant was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (see, GFRE, Inc., v. U.S. Bank, N.A., 130 AD3d 569, 13 NYS3d 452 [2d Dept., 2015]). Thus, "the essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (see, Paramount Film Distributing Corp., 30 NY2d 415, 344 NYS2d 388 [1972]).

However, a claim of unjust enrichment is not available when it duplicates or replaces a conventional contract or tort claim (see, Corsello v. Verizon New York Inc., 18 NY3d 777, 944 NYS2d 732 [2012]). As the court noted "unjust enrichment is not a catchall cause of action to be used when others fail" (id).

This counterclaim is different than the breach of contract

counterclaim and is not duplicative. The breach of contract counterclaim concerns the loss of profits as a result of the failure to develop the property in a timely manner. The unjust enrichment counterclaim involves the initial purchase price that was retained despite the alleged failure to develop the property. They thus assert two distinct claims. Further, the defendants assert the seller is an affiliate of the plaintiff MCBP "upon information and belief" and since that information is in the exclusive control of the plaintiff's the defendants should be afforded an opportunity to explore that allegation.

Therefore, the motion seeking to dismiss the unjust enrichment counterclaim is denied.

Turning to the affirmative defenses, pursuant to CPLR §3018(b) affirmative defenses are "matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading" (id). While the affirmative defenses will require elaboration and explanation there is no basis to dismiss them at this early juncture. As noted, they are brief and do not provide much information, however, they assert defenses the validity of which cannot be decided at this time. The parties will engage in discovery and the progression of discovery will determine the viability of the affirmative defenses. Therefore, the motion seeking to dismiss the affirmative defenses is denied at this

time without prejudice.

So ordered.

ENTER:

DATED: November 6, 2024
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC