

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ORIN R. KITZES
Justice

PART 17

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**CARMELA TURANO, Individually, and CARMELA
TURANO As Administrator of THE ESTATE OF
SALVATORE TURANO,**

Plaintiff,

- against-

Index No. 13802/08
Motion Date: 3/4/09
Motion Cal. No. 45

**GIACOMO TURANO, GIOVANNI TURANO
INTERNATIONAL DESIGNS, INC., and JOHN
TURANO AND SONS, INC.,**

Defendants.

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The following papers numbered 1 to 11 read on this motion by defendant Giacomo Turano for an order pursuant to CPLR 3211(a)(7) dismissing the second and third second causes of action and dismissing plaintiff Carmela Turano’s cause of action for breach of contract.

	<u>PAPERS NUMBERED</u>
Notice of Motion.....	1-2
Memorandum of Law-Exhibits.....	3-5
Affirmation in Opposition-Exhibits.....	6-8
Memorandum of Law.....	9
Reply Memorandum.....	10-11

Upon the foregoing papers it is ordered that defendant's motion to dismiss the second and third causes of action of the complaint pursuant to CPLR 3211 (a) (7) and to dismiss plaintiff Carmela Turano’s cause of action for breach of contract is granted for the following reasons:

The plaintiff’s allegations, which must be accepted as true for the purpose of this CPLR 3211(a)(7) motion (see, 1455 Washington Ave. Assocs. v Rose & Kiernan, 260 AD2d 770), are as follows:

That on or about September 10, 1986, Salvatore Turano and his brother, the Defendant, Giacomo Turano entered into a certain written contract, wherein Defendant, Giacomo Turano contracted to purchase from Salvatore Turano, *inter alia*, all of Salvatore Turano’s interest in several corporations. Specifically, the Defendant, Giacomo Turano contracted to purchase all of Salvatore Turano’s interest in: Defendant John Turano & Sons, Inc., Turano Realty Corp., Turano Bros., Inc., Defendant Giovanni Turano International Designs, Inc., 4789 Realty Corp., 8514 Gemma Corp., and J&S Realty Co., for the sum of

one million six hundred fifty thousand dollars (\$1,650,000.00). Pursuant to the parties' contract, Defendant Giacomo Turano was to pay fifty thousand dollars (\$50,000.00) at the time of the execution of the contract and was to simultaneously execute a Purchase Money Note, (hereinafter, the "note,") in the amount of One million six hundred thousand dollars (\$1,600,000.00). Payment on the note was to commence one month from the date of execution thereof, September 10, 1986, to be made as follows: three hundred (300) equal monthly payments of twelve thousand one hundred sixty-eight dollars and forty cents (\$12,168.40); one payment of fifty thousand dollars (\$50,000.00) on or before November 10, 1986; one payment of fifty thousand dollars (\$50,000.00) on or before December 10, 1986; and one payment of fifty thousand dollars (\$50,000.00) on or before January 10, 1987.

On or about January 22, 1993, Salvatore Turano and Defendant, Giacomo Turano, executed a written modification of the parties contract, wherein he agreed to tender a payment of one hundred thousand dollars (\$100,000.00) and, in exchange therefor, the monthly payments due on the Note would be reduced by 15%, from twelve thousand one hundred sixty-eight dollars and 40/100 (\$12,168.40) to eleven thousand one hundred six dollars and 75/100 (\$11,106.75); and the final payment on the note would be in the amount of eleven thousand three hundred eighty-eight dollars and 49/100 (\$11,388.49) and was due on October 1, 2011.

Salvatore Turano died on September 16, 1996, and pursuant to Letters of Administration dated December 12, 1996, plaintiff, Carmela Turano was named the Administrator of the Estate of Salvatore Turano. Defendant Giacomo Turano made scheduled payments under the Note, payable to the Estate of Salvatore Turano, until June 8, 2007. However, on or about June 8, 2007, defendant Giacomo Turano ceased making scheduled payments under the Note. On June 8, 2007, defendant Giacomo Turano tendered a check payable to the Estate of Salvatore Turano representing partial payment in the amount of Six thousand nine hundred sixty-five dollars and 14/100 (\$6,965.14). This payment was significantly less than the amount due for the June 2007 payment under the Note and the check was deposited by the Plaintiffs under protest. The balance of the June 2007 payment was never tendered by the Defendant. Moreover, from June 8, 2007, to date, defendant has failed to make any payment whatsoever on the Note. On February 19, 2008, the Plaintiffs, through their attorneys, sent Defendant Giacomo Turano written Notice of Default, which advised him that he was in default under the parties' Agreement and the Note; that he had ten (10) days to cure said default; and that under Paragraph 4 of the parties' Agreement, he was responsible for all costs and expenses of collection, plus reasonable attorney's fees, in the

event of an uncured default. Defendants have failed to cure the alleged default.

Plaintiffs further claim that on or about July, 2004, defendants sold the manufacturing facility and warehouse building which housed defendants John Turano and Sons, Inc., and Giovanni Turano International Designs, Inc, for approximately nine million dollars. (\$9,000,000.00). Thereafter, defendants purchased a 256,000 square foot warehouse facility in Piscataway, New Jersey, which thereafter became their principal place of business. In 2006, the defendants obtained financing for the Piscataway facility in the amount of eleven million five hundred thousand dollars (\$11,500,000.00). Despite receiving these windfalls from the sale of the New York real estate obtained under the parties' Agreement, the defendants have failed to use these available funds to pay the amount due and owing to the plaintiffs. Instead of paying the plaintiffs what they are duly owed, in fact, the defendants used these funds to purchase the New Jersey real estate they currently occupy.

Thereafter, plaintiffs brought the instant action and set forth three causes of action, breach of contract, fraud, and unjust enrichment. Defendant Giacomo Turano now moves to dismiss the fraud and unjust enrichment causes of action based upon these claims being based upon the same allegations that give rise to the breach of contract. Defendant moves to dismiss Carmela Turano's cause of action for breach of contract, based upon her lack of privity to the subject contract. Plaintiffs oppose this motion.

"It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference. (Jacobs v Macy's East, Inc., 262 AD2d 607, 608; Leon v Martinez, 84 NY2d 83.) The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (see, Stukuls v State of New York, 42 NY2d 272; Jacobs v Macy's East Inc., supra), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading. (See, Rovello v Orofino Realty Co., Inc., 40 NY2d 633.) The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint. (See, Rovello v Orofino Realty Co., Inc., supra; Kenneth R. v Roman Catholic Diocese of Brooklyn, 229 AD2d 159.) In determining a motion brought pursuant to CPLR 3211(a)(7), the court "must afford the complaint a liberal construction, accept as true the allegations contained therein, accord the plaintiff the benefit of every favorable inference and determine only whether the facts alleged fit within any cognizable legal theory ." (1455 Washington Ave. Assocs. v Rose & Kiernan, supra, 770-771;

Esposito-Hilder v SFX Broadcasting Inc., 236 AD2d 186.)

A fraud claim should be dismissed as redundant when it merely restates a breach of contract claim, when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract. By contrast, a cause of action for fraud may be maintained when the plaintiff pleads a breach of duty separate from, or in addition to, a breach of the contract. McKernin v. Fanny Farmer Candy Shops, 176 A.D.2d 233 (2d Dept 1991) *See also*, Heffez v L&G General Construction, Inc., 56 AD2d 526 (2d Dept 2008.) Here, plaintiffs allege that the fraud stemmed from “defendants knowingly misrepresented an intention to pay the plaintiffs the amounts due and owing under the parties’ agreement. By means of defendant’s misrepresentations, defendant knew that plaintiff could be and indeed were imposed upon and taken advantage of”. These allegations have failed to state a claim for fraud since the same circumstances also give rise to the plaintiffs breach of contract claim, and merely set forth a misrepresentation of future intent to perform under the contract. This is not sufficient to set forth a cause of action for fraud. *Id.* Accordingly, the branch of this motion to dismiss the fraud cause of action is dismissed.

The plaintiffs’ third cause of action sounds in unjust enrichment. A cause of action pursuant to a quasi contract theory only applies in the absence of an express agreement and is not really a contract at all, but rather a legal obligation imposed in order to prevent a party’s unjust enrichment. *See*, Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382, 388 (1987.) When, as here, there is no dispute as to the existence of a contract and the contract covers the dispute between the parties, the plaintiff may not proceed upon a theory of quantum meruit as well as seek to recover damages for breach of contract. *See*, Alamo Contract Builders v CTF Hotel Co., 242 AD2d 643 (2d Dept 1997.) The logic behind this is that the contract itself and its alleged breach provide the basis for full recovery and the other quasi contract claims are unnecessary and duplicative. Accordingly, the branch of this motion to dismiss unjust enrichment is granted.

Plaintiff Carmela Turano has brought a breach of contract cause of action in her individual capacity. The complaint fails to set forth any connection she had with the contract and the contract fails to make any mention of her. Since Carmela Turano is not a party to the contract alleged to have been breached, her cause of action for breach of contract is dismissed. *See*, Podolsky v. Citation Abstract, Inc., 279 A.D.2d 559 (2d Dept 2001.) Contrary, to plaintiffs’ assertion, the fact that she is the Administrator of the Estate of Salvatore Turano, a party to the contract, does not give her the right to sue in her individual capacity. Accordingly, the branch of the motion seeking to dismiss the breach of contract

cause of action brought by Carmela Turano in her individual capacity is granted.

The Court notes that in reaching its decision, the proposed amended complaint submitted with plaintiffs' opposition papers has not been referred to. Plaintiffs have not sought to amend their pleadings and the only complaint properly before this Court for consideration with this motion is the original complaint.

Dated: March 10, 2009

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ORIN R. KITZES, J.S.C.