SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: COIN **PART** 63

HON. ELLEN M. COIN *Justice*

Index Number : 651327/2011
226 FIFTH AVENUE LLC
vs.
SBF INTERNATIONAL, INC.
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 001

The following papers, numbered 1 to _____ **, were read on this motion to/for** _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION AND ORDER.

This constitutes the decision and order of the Court.

Dated: 6/5/12

_____, J.S.C.
HON. ELLEN M. COIN

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 63

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226 FIFTH AVENUE LLC,

Plaintiff,

-against-

SBF INTERNATIONAL, INC., BORIS FURLENDER, INDIVIDUALLY AND D/B/A NYBGROUP AND AS BIDONTHECITY, ALBERT FAYNSHTEYN, A/K/A ALBERT FEINSTEIN, INDIVIDUALLY AND D/B/A LAW OFFICES OF ALBERT FEINSTEIN, AS NYBGROUP, AND AS BIDONTHECITY, GAMBRINUS ENTERPRISES, LLC, INDIVIDUALLY AND D/B/A NYBGROUP, BIDONTHECITY.COM LLC, AND BIDONTHECITY WESTCHESTER, LLC,

Defendants.

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Index Number 651327/2011
Submission Date March 26, 2012
Motion Seq. 001

DECISION AND ORDER

For Plaintiff:
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By Steven M. Nachman, Esq.
675 Third Avenues, 29th Floor
New York, New York 10017
212-983-8490

For Defendants:
Sills Cummis & Gross P.C.
By David F. Segal, Esq.
30 Rockefeller Plaza, 29th Floor
New York, New York 10112
212-643-7000

Papers considered in review of this motion to dismiss:

Papers	**Numbered**
Notice of Motion and Affidavits Annexed	1
Memo of Law in Supp	2
Plaintiff's Memo. of Law in Opp	3
Affid. in Opposition	4
Memo in Reply	5

ELLEN M. COIN, J.:

In this action for damages for breach of a lease due to nonpayment of rent, defendants move, pursuant to CPLR 3211 (a) (1) and (a) (7), for an order (1) dismissing the first cause of action for breach of contract on the ground that the relief sought is not provided for in the lease and lease amendment agreements executed by plaintiff 226 Fifth Avenue LLC and defendant SBF International, Inc. (SBF); (2) dismissing the second cause of action for attorney's fees against all defendants other than SBF, on the ground that only SBF signed the lease and lease

amendment with plaintiff; (3) dismissing the third cause of action for account stated against all defendants other than SBF on the ground that plaintiff issued invoices for rent and base rent only to SBF; and (4) dismissing the fourth and fifth causes of action for unjust enrichment and quantum meruit as such claims do not lie in this action for breach of lease.

In response, plaintiff amended its complaint as of right. (Jacobowitz Affid., Ex. 1). However, the amendments do not cure the infirmities of the original pleading. Thus, for the reasons set forth below, defendants' partial motion to dismiss the complaint is granted.

FACTS

Plaintiff is the owner and landlord of 226 Fifth Avenue, New York, NY (the Premises) (Amended Complaint ¶ 2). Plaintiff, as landlord, and SBF, as tenant, entered into a written lease (the Lease) dated as of June 11, 2007, for the period of June 12, 2007 through May 31, 2014, pursuant to which plaintiff leased to SBF the ground floor and basement of the Premises (*id.*, ¶ 9). By agreement of the parties, the Lease was subsequently amended in August 2008, January 23, 2009 and September 3, 2009 (collectively, "the Amendments") to include, inter alia, the deferment or reduction of certain of the payment obligations (*id.*).

Articles 41-42 of the Lease obligated SBF to pay base rent to 226 Fifth monthly in the amounts stated in those provisions of the Lease (*id.*, ¶ 10). Those amounts were amended and revised by the terms of the Amendments (*id.*)

The Lease further required that SBF pay "Tax Rent" in amounts to be computed in accordance with Article 44 of the Lease (*id.*, ¶ 11). The Lease also required SBF to pay additional rent of $100 per month as water charges (*id.*, ¶ 12). Article 59 of the Lease provided that, if SBF failed to pay base rent or additional rent within 10 days of when due, plaintiff could

charge certain late fees as additional rent (*id.*, ¶ 13). Article 19 of the Lease provided that SBF was obligated to reimburse plaintiff for the landlord's costs, including attorney's fees, incurred in any proceeding which plaintiff initiated as a result of any failure by SBF to observe or perform any of the terms of the lease (*id.*, ¶ 14).

Defendants Boris Furlender and Albert Feinstein signed a guaranty of SBF's obligations to plaintiff under the lease (*id.*, ¶ 15).

Pursuant to the terms of the August 2008 amendment to the Lease, plaintiff consented to the use of the Premises by defendants Gambrinus Enterprises, LLC, a/k/a Bidonthecity, Law Offices of Albert Feinstein, and NYBgroup (*id.*, ¶ 17). Plaintiff alleges, on information and belief, that defendants Bidonthecity.com LLC and Bidonthecity Westchester, LLC occupied some or all of the Premises as subtenants of SBF or otherwise (*id.*, ¶ 18).

In early 2009, SBF experienced financial difficulties, and sought various rent concessions from plaintiff (*id.*, ¶ 23). By agreements reached on January 23, 2009, and September 3, 2009, plaintiff agreed to various concessions, including to defer certain rental obligations, and to reduce the total amounts due for base rent and additional rent for certain months (*id.*, ¶ 24). Nevertheless, SBF failed to pay the rental amounts that were due to plaintiff (*id.*, ¶ 25).

On December 20, 2010, plaintiff served a "3 Day Notice" which required the payment of $122,915.92, which was due as of that date (*id.*, ¶ 26). When that payment was not made, plaintiff commenced a summary proceeding (the L&T Proceeding) in the Civil Court of the City of New York against SBF, Gambrinus Enterprises, LLC a/k/a Bidonthecity, Law Offices of Albert Feinstein and NYBgroup (*id.*, ¶ 27).

On April 5, 2011, while the L&T Proceeding was pending, defendants moved out and vacated the Premises (*id.*, ¶ 28). They then opened new offices in midtown Manhattan (*id.*).

On May 6, 2011, the L&T Proceeding was discontinued, without prejudice to plaintiff's right to commence and pursue this action (*id.*, ¶ 30).

By lease dated May 17, 2011, plaintiff leased the Premises to a new tenant for a term of 15 years, to commence on July 1, 2011 (*id.*, ¶ 32). Plaintiff alleges that the base rent and the additional rent to be paid by the new tenant for the Premises is at a rate less than that which defendants are obligated to pay under the Lease, and that the new lease included a period of "free rent," during which the new tenant would not be paying any rent to plaintiff (*id.*, ¶¶ 33-34). Plaintiff further alleges that to obtain the new lease, it incurred real estate brokerage fees of $92,667.84, for which defendants are liable pursuant to Article 18 of the Lease (*id.*, ¶ 35).

The amended complaint contains seven causes of action: breach of the Lease (first cause of action); recovery of attorney's fees in connection with the L&T Proceeding, pursuant to Article 19 of the Lease (second cause of action); account stated (third cause of action); unjust enrichment (fourth cause of action); quantum meruit (fifth cause of action); and breach of guaranty as against Feinstein and Furlander (sixth and seventh causes of action).

DISCUSSION

Although on a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), "the pleading is to be afforded a liberal construction," and "the facts as alleged in the complaint [are presumed] as true" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]; *see also Rovello v Orofino Realty Co.*, 40 NY2d 633 [1976]), "'factual claims [that are] either inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration'" (*Mark Hampton,*

Inc. v Bergreen, 173 AD2d 220, 220 [1st Dept 1991] [citation omitted], *lv denied* 80 NY2d 788 [1992]; *see also Caniglia v Chicago Tribune-N.Y. News Syndicate*, 204 AD2d 233 [1st Dept 1994]).

In order to prevail on a motion to dismiss based upon documentary evidence pursuant to CPLR 3211 (a) (1), the movant must demonstrate that the documentary evidence conclusively refutes the plaintiff's claims (*AG Capital Funding Partners, L.P. v State St. Bank and Trust Co.*, 5 NY3d 582 [2005]). In addition, "[f]actual allegations presumed to be true on a motion pursuant to CPLR 3211 may properly be negated by affidavits and documentary evidence." (*Wilhelmina Models, Inc. v Fleisher*, 19 AD3d 267, 269 [1st Dept 2005]). Thus, dismissal is warranted where, as here, documentary evidence establishes that "the allegations of the complaint fail to state a cause of action" (*L.K. Sta. Group, LLC v Quantek Media, LLC*, 62 AD3d 487, 491 [1st Dept 2009]; *see e.g. Hallman v Kantor*, 72 AD3d 895, 896 [2d Dept 2010], *lv denied* 15 NY3d 706 [2010] [granting motion to dismiss where clear language in the retainer agreement "conclusively established a defense to the plaintiff's claims of malpractice"]).

Breach of the Lease (First Cause of Action)

In the first cause of action, plaintiff alleges that, pursuant to the Lease and the Amendments, for the period from and after February 2009 through the balance of the Lease term, the Lease required payments of $988,692.43 (Amended Complaint, ¶ 37). Plaintiff further alleges that for that same period, it is to be paid $416,000 by the new tenant (*id.*, ¶ 38), and that it incurred real estate brokerage fees of $92,667.84 to obtain the lease with the new tenant (*id.*, ¶ 39). Plaintiff alleges that, as a result of the foregoing and pursuant to the provisions of Articles 17 and 18 of the Lease, it is entitled to judgment against all defendants in the amount of

$669,521.27, late fees and attorneys' fees as provided in the Lease, plus interest, costs and disbursements (*id.*, ¶ 40).

Plaintiff alleges that it incurred damages for breach of the Lease from February 2009 "through the balance of the lease term." This is an attempt to seek judgment by way of accelerating the rate to be due, rather than as the rent falls due on a monthly basis. However, the plain and unambiguous terms of the Lease clearly demonstrate that plaintiff does not have the right to accelerate the rent due under the Lease. Rather, the Lease specifically provides that the rent is to be paid monthly.

Article 17 of the Lease provides that, if the tenant defaults in the payment of rent, the landlord is entitled to dispossess the tenant by summary proceeding or otherwise. Article 18 provides that:

> In case of any such default, re-entry, expiration and/or dispossess by summary proceedings or otherwise, (a) the rent, and additional rent, shall be become due, thereupon and be paid up to the time of such re-entry, dispossess and/or expiration; (b) Owner may re-let the demised premises or any part or parts thereof, either in the name of Owner or otherwise, for a term or terms, which may at Owner's option be less than or exceed the period which would otherwise have constituted the balance of the term of this lease, and may grant concession or free rent or charge a higher rental than that in this lease and/or (c)Tenant or the legal representatives of Tenant shall also pay Owner, as liquidated damages, for the failure of Tenant to observe and perform said Tenant's covenants herein contained, any deficiency between the rent hereby reserved and/or covenanted to be paid and the net amount, if any, of the rents collected on account of the subsequent lease or leases of the demised premises for each month of the period which would have otherwise constituted the balance of the term of this lease. The failure of Owner to re-let the demised premises or any part or parts thereof shall not release or affect Tenant's liability for damages. In computing such liquidated damages there shall be added to said deficiency such expenses as Owner may incur in connection with

> re-letting, such as legal expenses, reasonable attorney's fees, brokerage, advertising and for keeping the demised premises in good order, or for preparing the same for re-letting. Any such liquidated damages ***shall be paid in monthly installments by Tenant on the rent day specified in this lease.***

(Lease, Article 18 [emphasis added]).

Thus, pursuant to Article 18, the landlord is entitled to commence a nonpayment proceeding against the tenant, and dispossess the tenant by summary proceeding or otherwise. In such event, the rent is due to the date of such dispossess, and the landlord has the right, in its sole discretion, to mitigate its damages by re-leasing the premises. If it does, the landlord's damages are reduced by the net amount of rent recovered from the subsequent tenant. However, in clear language, the Lease further provides that, to the extent the landlord is entitled to any damages, such "damages shall be paid in monthly installments by Tenant on the rent day specified in this lease."

Thus, under the express language of the Article 18 of the Lease, plaintiff is limited to recovering the rent that has fallen due from the tenant on a month-by-month basis, and/or as it subsequently accrues. There is no provision to accelerate the rent due through the end of the term. Accordingly, the first cause of action must be dismissed because the plain terms of Article 18 of the Lease completely negate plaintiff's cause of action for acceleration of the rent. (*Long Is. R. R. Co. v Northville Indus. Corp.*, 41 NY2d 455, 465 [1977](restating the settled law that "no suit can be brought for future rent in the absence of a clause permitting acceleration" (citations omitted); *see also Runfola v Cavagnaro*, 78 AD3d 1035, 1035 [2nd Dept] (citations omitted)).

In opposition to the motion, plaintiff argues that by the time this case will reach judgment, the amount asserted in the amended complaint will be due and owing, and, therefore, it is entitled to plead such amount. The court rejects this argument, as it still contemplates an acceleration of rent. Plaintiff shall have leave to re-plead the first cause of action for breach of contract as against SBF to the extent of requesting presently accrued damages. Claims for additional rent as it accrues may be made by means of supplemental pleading pursuant to CPLR 3025(b).

Recovery of Attorney's Fees (Second Cause of Action)

In its second cause of action, plaintiff alleges that Article 19 of the Lease provides that the tenant is obligated to reimburse it for its costs, including attorney's fees, incurred as a result of any failure of SBF to observe or perform any of the terms of the Lease (Amended Complaint, ¶ 42). Plaintiff further alleges that it incurred attorney's fees in the amount of $4,161.00, including costs and disbursements, in connection with the L&T Proceeding, and that, pursuant to the terms of Article 19, it is entitled to recover its attorney's fees against all defendants.

Defendants' motion to dismiss this cause of action as against all defendants other than SBF is granted. It is undisputed that both the Lease and the Amendments were executed only by plaintiff, as landlord, and SBF, as tenant. Plaintiff does not allege that any of the other defendants were parties to the Lease, or were considered tenants by plaintiff. Recovery of the attorney's fees against individual guarantors Furlender and Faynshteyn is properly addressed through claims on the guaranty, asserted in the sixth and seventh causes of action. As such, the remaining defendants cannot be held liable for attorney's fees pursuant to Article 19 of the Lease. (*See Caprer v Nussbaum*, 36 AD3d 176, 200 [2d Dept 2006]).

Account Stated (Third Cause of Action)

In its third cause of action, plaintiff alleges that it "rendered and sent invoices for base rent and Additional Rent which invoices detailed the balances then owed to [plaintiff]" (Amended Complaint, ¶ 46), that the last invoice showed a balance due of $201,992.28 (*id.*, ¶ 47), and that defendants retained the invoices without objection for a reasonable time (*id.*, ¶ 48).

Under New York law, "'[a]n account stated is an agreement between the parties to an account based upon prior transactions between them with respect to the correctness of the separate items composing the account and the balance due, if any, in favor of one party or the other.'" (*Shea & Gould v Burr*, 194 AD2d 369, 370 [1st Dept 1993] [citation omitted]). A cause of action for an account stated "'exists where a party to a contract receives bills or invoices and does not protest within a reasonable time (citation omitted)'" (*Morrison Cohen Singer & Weinstein v Ackerman*, 280 AD2d 355, 356 [1st Dept 2001] ["(t)he receipt and retention of an account, without objection, within a reasonable period of time, coupled with an agreement to make partial payment, gives rise to an account stated"]). "'The very meaning of an account stated is that the parties have come together and agreed upon the balance of indebtedness ... so that an action to recover the balance as upon an implied promise of payment may thenceforth be maintained (citation omitted).'" (*Herrick, Feinstein LLP v Stamm*, 297 AD2d 477, 478 [1st Dept 2002]).

The amended complaint does not specify to whom plaintiff sent its invoices. Indeed, the bills that were issued by plaintiff during the course of SBF's tenancy reveal that such bills were addressed only to SBF (*see* Aff. of Albert Feinstein, Exh E). "[I]n order for an account stated to

be established, the invoices must be addressed to the party responsible for payment." (*Brown Rudnick Berlack Israels LLP v Zelmanovitch*, 11 Misc 3d 1090[A], 2006 NY Slip Op 50800[U], * 5 [Sup Ct, Kings County 2006]). It is undisputed that the defendants other than SBF did not receive any invoices, and plaintiff does not specifically allege that any of those invoices were addressed to or received by any of these defendants. In addition, no judgment for account stated can be entered against any affiliated entity without such affiliate having assented to pay the amount stated. (*Tridee Assoc., Inc. v Board of Education of City of N.Y.*, 22 AD3d 833 [2d Dept 2005], *lv denied* 6 NY3d 706 [2006]). Plaintiff does not allege that any of these defendants assented to pay the amounts due.

Accordingly, the account stated claim fails with respect to the defendants other than SBF, and must be dismissed as against these defendants.

In opposition to the motion, plaintiff does not dispute that the defendants other than SBF cannot be held directly liable for attorneys' fees pursuant to Article 19 of the Lease, or for the account stated claim, but argues that these causes of action can be still sustained against these defendants on the ground of alter ego liability.

A party seeking to pierce the corporate veil must establish that "(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury." (*Matter of Morris v New York State Dept. of Taxation and Fin.*, 82 NY2d 135, 141 [1993]). The requirements of *Morris* are not easy to meet: "Those seeking to pierce a corporate veil of course bear a heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted

in wrongful or inequitable consequences." (*TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339 [1998]; *see also Sheridan Broadcasting Corp. v Small*, 19 AD3d 331 [1st Dept 2005]). Thus, mere conclusory alter ego allegations are insufficient to survive a motion to dismiss. (*Andejo Corp. v South St. Seaport Ltd. Partnership*, 40 AD3d 407 [1st Dept 2007] [conclusory statements of domination and control and failure to allege particularized facts were insufficient to impose alter ego liability]; *Itamari v Giordan Dev. Corp.*, 298 AD2d 559 [2d Dept 2002] [same]).

Moreover, even in the presence of domination and control, the corporate form cannot be disregarded without a showing of fraud or that the misuse of the corporate form led to avoidance of obligations:

> Evidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance ... [P]laintiffs have failed to show that, even if MKI dominated Batchnotice, that control resulted in some fraud or wrong mandating disregard of the corporate form ... An inference of abuse does not arise from this record where a corporation was formed for legal purposes or is engaged in legitimate business. There is no showing that through its domination MKI misused the corporate form for its personal ends so as to commit a fraud or wrongdoing or avoid any of its obligations.
>
> * * *
>
> Under these circumstances, it cannot be said that MKI has perverted "the privilege [of doing] business in a corporate form"

(*TNS Holdings, Inc. v MKI Securities Corp.*, 92 NY2d at 339-340 [citation omitted]). Indeed, "courts should permit veil-piercing only under 'extraordinary circumstances.'" (*EED Holdings v Palmer Johnson Acquisition Corp.*, 228 FRD 508, 512 [SDNY 2005] [citation omitted]; *accord Bravado Intl. Group Merchandising Servs., Inc. v Ninna, Inc.*, 655 F Supp 2d 177 [EDNY 2009]).

The amended complaint is devoid of any specific facts demonstrating that SBF exercised complete domination and control over the remaining defendants for the purpose of damaging or defrauding plaintiff. The complaint asserts, in a conclusory manner, and "upon information and belief," that:

> [T]he defendants at the Premises utilized common assets and engaged in common operations, including by operating the business publically known as "Bidonthecity" and including by using and sharing telephone, fax and computer lines and networks, equipment and personnel, commingled their assets and their operations, and failed to conduct their businesses in separate corporate capacities and the individual defendants dominated and controlled the intertwined operations of the corporate defendants.
>
> By reason of the foregoing, upon information and belief, the defendants operate their businesses in such a manner as they are each other's alter egos and as such are liable for each other's debts and obligations, and any separate and distinct corporate forms should be disregarded

(Amended Complaint, ¶¶ 20-21).

These conjectural conclusions of domination and control are insufficient to establish alter ego liability. More importantly, plaintiff fails to allege that any purported domination among the various defendant entities was used to defraud or injure plaintiff, or otherwise resulted in wrongful or inequitable consequences. Domination alone is not sufficient to justify holding defendants liable for the actions of SBF (*TNS Holdings, Inc. v MKI Securities Corp.*, 92 NY2d at 339 ["Evidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or misfeasance"]). Plaintiff must also allege "'particularized statements detailing fraud or other corporate misconduct (citation omitted)'" (*Prichard v 164 Ludlow Corp.*, 2006 NY Slip Op 52381[U], * 5 [Sup Ct, NY County 2006], *affd* 49 AD3d 408 [1st Dept 2008]).

Plaintiff fails to make any such allegations. Thus, plaintiff's allegations are insufficient to pierce the corporate veil (*see e.g. Roth Law Firm, PLLC v Sands*, 2010 NY Slip Op 32633[U] [Sup Ct, NY County 2010], *affd as mod* 82 AD3d 675 [1st Dept 2011] [rejecting alter ego claims where plaintiff failed to show the corporate form was used to commit a fraud or wrong against the plaintiff]; *see also Matter of Goldman v Chapman*, 44 AD3d 938, 939 [2d Dept 2007], *lv denied* 10 NY3d 702 [2008] ["The mere claim that the corporation was completely dominated by the owners, or conclusory assertions that the corporation acted as their 'alter ego,' without more, will not suffice to support the equitable relief of piercing the corporate veil"]).

Plaintiff also argues that the second and third causes of action can be sustained against individual defendants Boris Furlender and Albert Feinstein base on their role as guarantors. The court rejects this argument. It is clear that the individuals themselves are not responsible for attorney's fees from the landlord/tenant proceeding, or liable on an account stated. Indeed, the proper remedy against these individuals is based upon the alleged breach of the guaranty, which plaintiff has already asserted in the sixth and seventh causes of action. Therefore, it is duplicative for plaintiff to name the individual defendants in the second and third causes of action, as plaintiff's sole remedy against these individuals is based on the guaranty.

Unjust Enrichment and Quantum Meruit (Fourth and Fifth Causes of Action)

In the fourth cause of action for unjust enrichment, plaintiff alleges that "[d]efendants received the benefit of the premises provided by 226 Fifth and 226 Fifth continued to provide such premises based upon SBF's promise to pay for the same" (Amended Complaint, ¶ 53). Plaintiff further alleges that defendants "have not paid 226 Fifth in full for their use of the

Premises" and "have been unjustly enriched by the use of the Premises without making such payment" (*id.*, ¶ 54).

In the fifth cause of action for quantum meruit, plaintiff alleges that it "continued to make the Premises available to defendants based upon their promise to pay for same" (*id.*, ¶ 57), but that "defendants have failed, and continued to refuse and fail, to pay 226 Fifth fully for the Premises provided to and accepted and used by them" (*id.*, ¶ 60).

However, it is well settled that a plaintiff is precluded from asserting a cause of action sounding in quasi-contract, such as unjust enrichment or quantum meruit, if there is a written contract that covers the matter at issue (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987] ["The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter"]; *Goldstein v CIBC World Mkts. Corp.*, 6 AD3d 295, 296 [1st Dept 2004] ["A claim for unjust enrichment, or quasi contract, may not be maintained where a contract exists between the parties covering the same subject matter"]).

The Lease is such a contract, and thus bars plaintiff's unjust enrichment and quantum meruit claims here. (*See e.g., Sheiffer v Shenkman Capital Mgt.*, 291 AD2d 295, 295 [1st Dept 2002] ["the existence of a valid and enforceable written contract governing the disputed subject matter precludes plaintiffs from recovering in quantum meruit"]; *Scavenger, Inc. v GT Interactive Software Corp.*, 289 AD2d 58, 59 [1st Dept 2001] ["since the matters here in dispute are governed by an express contract, defendant's counterclaim for unjust enrichment was properly found untenable"]).

Plaintiff cites *Seiden Assoc., Inc. v ANC Holdings, Inc.* (754 F Supp 37 [SD NY 1991]) in support of its position that its claims for unjust enrichment and quantum meruit can be asserted against the defendants other than SBF, since these defendants were not parties to the Lease. However, *Seiden* has fallen out of favor in New York courts and is no longer considered persuasive authority (*see Viable Mktg. Corp. v Intermark Communications, Inc.*, 2011 WL 3841417, *3 [EDNY 2011] ["the rule pronounced in *Seiden* 'has decidedly fallen out of favor in New York courts'"] [citation omitted]; *Air Atlanta Aero Eng'g Ltd. v SP Aircraft Owner I, LLC*, 637 F Supp 2d 185, 196 [SDNY 2009] ["[*Seiden*], rendered eighteen years ago, has decidedly fallen out of favor in New York courts"]).

In *Viable Mktg. Corp. v Intermark Communications, Inc.* (2011 WL 3841417, *supra*), the issue presented to the court was whether quasi-contractual claims can stand "when Plaintiff is a party to the contract but the Defendants are not, or vice versa" (*id.* at *2). Relying on recent cases which have abrogated *Seiden*, the Court found that quasi-contractual claims will be precluded by the existence of a valid and binding contract governing the subject matter in dispute, even against a third party non-signatory to the agreement. (*Id.*; *see also Air Atlanta Aero Eng'g Ltd*, 637 F Supp 2d at 196 ["a quasi-contractual claim against a third party must be dismissed when an indisputably valid and enforceable written contract governs the same subject matter"]).

Thus, the fourth and fifth causes of action must be dismissed. The court has considered the remaining claims, and finds them to be without merit.

Accordingly, it is

ORDERED that defendants' motion to dismiss the complaint in part is granted, and the first, fourth and fifth causes of action are dismissed in their entirety, with plaintiff having to re-plead the first cause of action within twenty days of the date of this Order; and it is further

ORDERED that the second and third causes of action of the amended complaint are dismissed as against defendant Boris Furlender, individually and d/b/a NYBgroup and as Bidonthecity, Albert Faynshteyn, a/ka Albert Feinstein, individually and d/b/a Law Offices of Albert Feinstein, as NYB Group and as Bidonthecity, Gambrinus Enterprises, LLC, individually and d/b/a NYBgroup, Bidonthecity.com LLC, and Bidonthecity Westchester LLC; and it is further

ORDERED that defendants are directed to serve an answer to the amended complaint within 20 days after service of a copy of this order with notice of entry.

This constitutes the decision and order of the Court.

Dated: June 5, 2012

ENTER:

J.S.C.

HON. ELLEN M. COIN