[* 1]

SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 3

NASSAU COUNTY

ELENI BOUTSOURIS and SPIRIDON BABASSIKAS,

Plaintiffs,

-against-

MOTION SEQ. NO.: 001
MOTION DATE: 10/5/11

ENP GENERAL CONSTRUCTION CORP. a/k/a ENP GENERAL COONSTRUCTION CORP.,

INDEX NO.: 2379/10

Defendants.

The following papers having been read on the motion (numbered 1-4):

Notice of Motion.....1
Affirmation in Opposition.....2
Memorandum of Law.....3
Reply Affirmation.....4

Motion pursuant to CPLR §3211[a][7] by the defendant ENP General Construction Corp., a/k/a ENP General Coonstruction Corp. for an order dismissing the plaintiffs' complaint.

In late December of 2010, the plaintiffs Eleni Boutsouris and Spirdon Babassikas commenced the within action as against ENP General Construction Corp. The plaintiff's action arises out of certain renovations made by the defendant to the plaintiffs' Queens County residence (Cmplt., ¶¶ 5-10). The verified complaint contains eight separately pleaded causes of action, including claims sounding in breach of contract, negligence, accounting, unjust enrichment, conversion, fraud, prima facie tort and "reasonable reliance".

Upon receipt of the summons, the defendant thereafter filed a notice of appearance dated January 31, 2001, which was allegedly post-marked February 9, 2011 and received by the plaintiffs on or about February 11, 2011 (Arvanitakis Aff., Exhs., "A" -"G").

It is undisputed that the defendant's responsive pleading was therefore due on or before March 19, 2011, and that the defendant did not serve its answer within that period (Arvanitakis Aff., ¶¶ 17-18; Davis Reply Aff., ¶ 3-4). Rather, on or about April 4, 2011, the defendant noticed a motion to dismiss the complaint pursuant to CPLR §3211[a][7].

According to defense counsel, however, he contacted plaintiff's counsel and timely requested an extension of the defendant's time to serve an answer – which request was

allegedly granted for a period of "approximately one month" (Davis Reply Aff., ¶¶ 4-5). Apart from the counsel's assertions, however, there is no written document evidencing the claim that the extension was granted by opposing counsel.

Thereafter, and at the request of plaintiffs' counsel, defense counsel consented to a series of adjournments of the plaintiffs' time to serve opposing papers – which papers were ultimately served in September of 2011, some five months after the motion was originally noticed (Davis Reply Aff., ¶¶ 7-12).

In moving to dismiss the foregoing claims, the defendant contends, *inter alia*, that: (1) the breach of contract claim is defective since the plaintiffs have not attached the written agreement relied upon; (2) the tort claims are substantively duplicative of – and merely restate – the underlying breach of contract claim; and (3) the accounting, unjust enrichment and reasonable reliance causes of action are similarly defective as a matter of law.

In opposition to the motion, the plaintiffs preliminarily contend, *inter alia*, that the motion to dismiss is untimely because it was made after the defendants' time to answer had already expired. The motion should be granted to the extent indicated below.

It is true that a motion pursuant to CPLR §3211[a][7] "may be made at any subsequent time or in a later pleading * * *" (CPLR §3211[e]), and that a stipulation which extends the time to answer a complaint generally extends the time to move pursuant to CPLR §3211 (*Rich v. Lefkovits*, 56 NY2d 276, 280 [1982]; *Tatar v Port Auth. of N.Y. & N.J.*, 291 AD2d 554; *Redlyn Elec. Corp. v. Dean Elec. Co., Inc.*,___Misc.3d.___, 2009 WL 1725807 [Supreme Court, New York County 2010]). However, a motion to dismiss made after a defendant's time to answer has expired is untimely (*Smith v Pach*, 30 AD2d 707 *see also, Wenz v Smith*, 100 AD2d 585, 586; *Manhattan Real Estate Equities Group LLC v. Pine Equity NY, Inc.*, ___Misc.3d___, 2005 WL 5351322 [Supreme Court, New York County 2005], *aff'd*, 27 AD3d 323).

Nevertheless, the Court possesses authority to extend the relevant time period in the interests of justice, where – as here – the delay was brief, a reasonable excuse has been supplied, and there is no showing of willfulness or prejudice (*see*, CPLR §2004 *see also*, Alexander, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 2004, at 691-692; *Brown v. Noble, Inc.*, ___Misc.3d___, 2010 WL 4941999, at 2 [Supreme Court, New York County 2010] *see generally, Zeccola & Selinger, LLC v. Horowitz*, 88 AD3d 992, 993; *Giha v. Giannos Enterprises, Inc.*, 69 AD3d 564, 565). It bears noting that the parties' conduct in prosecuting the action is consistent with defense counsel's assertions that an extension had, in fact, been granted.

Turning to the substance of the defendant's motion, and accepting as true, the facts "alleged in the complaint and submissions in opposition to the motion (*ABN AMRO Bank,*

N.V. v. MBIA Inc., 17 NY3d 208 [2011]; *Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]), the first (breach of contract) action states a cause of action as pleaded (*see generally, Clearmont Prop., LLC v Eisner*, 58 AD3d 1052, 1055). Nor is dismissal as a matter of law warranted because the actual, written contract was not annexed to the plaintiffs' verified complaint – although it has now been attached to the plaintiffs' opposing papers.

However, the plaintiff's remaining causes of action should be dismissed. Specifically, the Court agrees that: (1) there are absent allegations establishing the requisite fiduciary duty required to support the accounting cause of action (*East End Laboratories, Inc. v. Sawaya*, 79 AD3d 1095 1096-1097; *Akkaya v Prime Time Transp., Inc.*, 45 AD3d 616, 617); (2) the unjust enrichment cause of action is defective since there exists a valid contract governing the same subject matter (*IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]; *A. Montilli Plumbing & Heating Corp. v. Valentino*,___AD3d___, 2011 WL 6825911 [2nd Dept. 2011]); and (3) the plaintiffs' prima facie tort allegations do not plead – or otherwise support an inference – that the defendant's alleged misconduct was solely the product disinterested malevolence within the meaning of relevant case law (*Shaw v. Club Managers Ass'n of America, Inc.*, 84 AD3d 928, 930; *Ford v. Fink*, 84 AD3d 725, 728 *see generally, Curiano v. Suozzi,* 63 NY2d 113, 117 [1984]; *Burns Jackson Miller Summit & Spitzer v. Lindner*, 59 NY2d 314, 332 [1983]).

Similarly, the conversion and negligence causes of action are duplicative of the underlying breach of contract claim. It is settled that "a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 390 [1987]; *LHR, Inc. v. T-Mobile USA, Inc.*, 88 AD3d 1301, 1303-1304), and relatedly, that "a claim of conversion cannot be predicated on a mere breach of contract" (*MBL Life Assur. Corp. v. 555 Realty Co.*, 240 AD2d 375, 376-377 *see also, East End Laboratories, Inc. v. Sawaya, supra,* 79 AD3d 1095, 1096). Here, the plaintiffs' negligence and the sparsely pleaded conversion claims do not allege or properly identify an independent duty springing from "circumstances extraneous to, and not constituting elements of" the parties' written agreement (*MBL Life Assur. Corp. v. 555 Realty Co., supra*, 240 AD2d 375). Rather, and to the extent relevant, the complaint alleges instead that the negligence-based tort duty relied upon arose "by virtue of the underlying contract" (Cmplt.,¶¶ 43-44)(*see, East End Laboratories, Inc. v. Sawaya, supra,*79 AD3d 1095, 1096).

Lastly, the defendant has established its entitlement to dismissal of the fraud and "reasonable reliance" claims – which are themselves duplicative and/or redundantly pleaded (Cmplt., ¶¶ 61-67; 71-77). To sustain a cause of action predicated upon a fraudulent misrepresentation,"a plaintiff must allege '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'" (*Mandarin Trading Ltd. v. Wildenstein*, 16 NY3d 173, 178 [2011], *quoting from, Lama Holding Co. v. Smith Barney,* 88 NY2d 413, 421 [1996] *see also, Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; *Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 488 [2007]).

Moreover, "[a] cause of action premised upon fraud cannot lie where it is based on the same allegations as the breach of contract claim" (*Heffez v L & G Gen. Constr., Inc.*, 56 AD3d 526, 527 *see also, Niagara Foods, Inc. v. Ferguson Elec. Service Co., Inc.,* 86 AD3d 919). Nor will a fraud claim lie when a complaint merely asserts that a defendant misrepresented its intention to perform in the future under the contract (*Baer v. Complete Office Supply Warehouse Corp.*, 89 AD3d 877*see also, High Tides, LLC v. DeMichele*, 88 AD3d 954).

Here, the plaintiffs' fraud claims contain vague averments that the defendants made unspecified false promises and assurances to the plaintiffs and that the defendant misrepresented its intent to perform under the parties' agreement (*e.g.*, Cmplt.,¶¶ 65-66; 71-72, 75)(*see generally, High Tides, LLC v. DeMichele, supra*, 88 AD3d 954; *Venables v. Sagona*, 85 AD3d 904, 906; *Hense v Baxter*, 79 AD3d 814). These inconclusive averments neither plead a claim grounded upon fraud, nor establish the violation of a separately existing tort duty independent of those already imposed by the parties' underlying contract (*see, Venables v. Sagona*, 85 AD3d 904, 906; *Yenrab, Inc. v 794 Linden Realty, LLC*, 68 AD3d 755, 758). It also bears noting that within the factual context presented here, "reasonable reliance" comprises an element of a fraud claim (*e.g., Eurycleia Partners, LP v. Seward & Kissel, LLP, supra*, 12 NY3d 553, 559), and does not support an independent cause of action as pleaded here.

The Court has considered the parties' remaining contentions and concludes that they are lacking in merit.

The defendant shall serve its answer in accordance with the provisions of CPLR §3211[f].

Accordingly, it is,

ORDERED that the motion by the defendant ENP General Construction Corp., a/k/a ENP General Coonstruction Corp., is **granted** to the extent that the second through eighth causes of action are **dismissed**, and the motion is otherwise **denied.**

This constitutes the Order of the Court.

Dated: December 23, 2011

Donna Linsdon
J.S.C.

ENTERED
JAN 24 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE