

**Lehm Holdings, LLC v Certified Constr. Corp.**

2013 NY Slip Op 32330(U)

September 25, 2013

Sup Ct, New York County

Docket Number: 653556/2012

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. EILEEN A. RAKOWER

PRESENT: \_\_\_\_\_
Justice

PART 15

Index Number : 653556/2012
LEHM HOLDINGS LLC
vs.
CERTIFIED CONSTRUCTION CORP.
SEQUENCE NUMBER : 005
DISMISS

INDEX NO. \_\_\_\_\_
MOTION DATE \_\_\_\_\_
MOTION SEQ. NO. \_\_\_\_\_

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). 2
Replying Affidavits \_\_\_\_\_ No(s). 1

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

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

Dated: 9/25/13

[Signature], J.S.C.

HON. EILEEN A. RAKOWER

- 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 15

-----X

LEHM HOLDINGS, LLC,

Plaintiff,

- v -

Index No.  
653556/2012

**DECISION  
and ORDER**

Mot. Seq. 5

CERTIFIED CONSTRUCTION CORP., JOHN  
GRADY, JOE GRADY, BELMONT FREEMAN,  
AKF ENGINEERS LLP, and ROSS DALLAND,  
P.E.,

Defendants.

-----X

CERTIFIED CONSTRUCTION CORP., JOHN GRADY,  
JOE GRADY,

Third-Party Plaintiffs,

-v-

CRAIG LUCAS, STUART ZIMMER, KENNETH  
VAN LIEW, ZIMMER LUCAS PARTNERS INC.,  
MARK PEDIN, DOUGLAS RADEKE, IGOR  
LACKMAN, C&R CIVIL INC., H.T.O.  
ARCHITECTS, PLLC, GLOBAL DEVELOPMENT  
SERVICES, SHARP MANAGEMENT, LLC, FIVE  
STAR ROOFING, LLC, JOHN BARDSLEY, INC.,  
H. THOMAS O'HARA, JOE AND BARBARA MARINO,  
and JOHN BARDSLEY,

Third-Party Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

This is an action filed by plaintiff Lehm Holdings, LLC (“Plaintiff” or “Lehm”) seeking recovery of damages in connection with the restoration and conversion of a historic five story townhouse, commonly known as the “Lehman House,” owned by Lehm and located at 7 West 54<sup>th</sup> Street, New York, New York (“the Project”). Lehm filed an Amended Verified Complaint on December 20, 2012 against Certified Construction Corp. (“Certified”), John Grady, Joe Grady, Belmont Freeman, AKF Engineers, LLP, and Ross Dalland, P.E., the Project’s general contractor and its officers, architect and engineers, respectively. The Complaint alleges nine causes of action based on Defendants’ alleged failure to “properly design, manage and construct the Project,” “properly administer and perform the work,” and “meet applicable building codes and other legal requirements.”

Certified, the general contractor of the Project, and John Grady and Joe Grady, Certified’s principals, interposed an Answer on March 7, 2013, denying the allegations, and asserting, certain affirmative defenses. Certified and the Gradys did not assert affirmative defenses based on standing or statute of limitations.

Certified, John Grady, and Joe Grady thereafter filed an Amended Third Party Complaint on March 27, 2013 against third party defendants and additional parties relating to the Project.

Certified, John Grady, and Joe Grady now move post-answer to dismiss Plaintiff’s Complaint pursuant to CPLR §§3211(a)(1), (5), and (7). In support, Defendants submit the affidavit of John Grady, a principal of Certified. Plaintiff opposes, and submits the affidavit of Stuart Zimmer, a managing member of Zimmer Lucas Partners, LLC (“Zimmer Lucas”). Lehm is alleged to be a wholly-owned subsidiary of Zimmer Lucas at all relevant times in connection with the Project.

CPLR §3211 provides, in relevant part:

- (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
  - (1) a defense is founded upon documentary evidence; or
  - (5) the cause of action may not be maintained because of . . . statute of limitations . . . ; or

(7) the pleading fails to state a cause of action.

In determining whether dismissal is warranted for failure to state a cause of action, the court must “accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory.” (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]).

On a motion to dismiss pursuant to CPLR §3211(a)(1) “the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted). “When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.” (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]) (emphasis added). A movant is entitled to dismissal under CPLR §3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint. (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted).

Specifically, Certified and the Gradys move to dismiss Lehm’s Complaint on the basis that: (1) Lehm lacks standing to sue Certified and John Grady; (2) the statute of limitations bars the claims for breach of contract, negligence, gross negligence and conversion; (3) the Complaint seeks recovery in both tort and contract based on an identical breach; (4) the existence of a contract precludes unjust enrichment; and (5) the breach of contract and fraud claims lack specificity.

Affirmative defenses based on lack of standing and statute of limitations are waived unless raised either in the pre-answer motion or responsive pleading. CPLR §3211(e). Here, Lehm contends that Certified and the Gradys did not assert an affirmative defense based on standing or statute of limitations in a motion before the service of their answer or in the answer itself, and as such, waived any defense based on those two grounds accordingly. Alternatively, Lehm argues that the defenses are without merit. These defenses, even if preserved, are without merit.

Certified and the Gradys first contend that Lehm lacks standing to assert claims as against them.

Plaintiff’s third cause of action in its Amended Complaint alleges breach of contract as against Certified and the Gradys, alleging that “[i]n or around May 2005, Lehm entered into an agreement with Certified, John Grady, and Joe Grady ... pursuant to which Certified was to perform general contracting services related to the

Project,” and “the Construction Agreement constituted a valid and binding agreement between Lehm and Certified and the Gradys,” “Lehm performed all of its obligations under the Construction Agreement,” and Certified and the Gradys breached their obligations by failing to “furnish the construction, work, labor, services and materials in a good and workmanlike manner,” causing Plaintiff damages.

As for its argument that Lehm lacks standing, Certified submits the affidavit of John Grady, principal of Certified, which alleges that in April 2005, he met with Craig Lucas and Stuart Zimmer to discuss and negotiate the terms of Certified’s role on the Project, and that Certified was ultimately hired by “ZLP” [Zimmer Lucas Partners]. Certified argues that Plaintiff Lehm lacks standing because “[a]t no time did Craig Lucas or Stuart Zimmer [alleged principals of Plaintiff and the individuals who Certified allegedly contracted with] represent themselves as representatives of Lehm Holdings.” In addition, Certified contends that Lehm lacks standing because certain insurance claims were submitted to Certified’s insurance carrier on behalf of “ZLP.” In opposition, Plaintiff submits the affidavit of Stuart Zimmer, which includes an alleged sample of payment invoices for the Project, all of which were addressed and sent by Certified to Lehm, and further states that Lehm directly paid for its services from its checking account.

Here, accepting all allegations as true, the four corners of the Amended Complaint establish standing on Lehm’s part to bring claims as against Certified and the Gradys based on the allegations that Lehm entered into an agreement with Certified and the Gradys, and the documentary evidence submitted by Movants does not flatly contradict the factual and legal conclusions of the Complaint.

Certified and the Gradys also contend that the statute of limitation has run on Plaintiff’s negligence, breach of contract, and conversion claims.

“In a suit by a construction project owner against a general contractor and architect for defective construction and design, the cause of action generally accrues upon the completion of construction, meaning construction of the actual physical work.” *State v. Lundin*, 60 N.Y. 2d 987, 989 (1983). “[N]o matter how a claim is characterized in the complaint- negligence, malpractice, breach of contract - an owner’s claim arising out of defective construction accrues on date of completion.” *City School Dist. of Newburgh v. High Stubbins & Associates, Inc.*, 85 N.Y. 2d 535, 538 [1995]. See *Cabrini Med Ctr. v. Desina*, 64 N.Y. 2d 1059, 1061 (1985) (“By itself instructing its architect to release all funds payable to defendants, plaintiff here signaled the completion of work under the terms of the contract. Moreover, the

issuance of a final certificate of payment by the architect and complete occupancy of the building by plaintiff further indicate that completion occurred . . .”).

Here, as set forth in Zimmer’s affidavit, work was completed in November 2012, the final certificate of occupancy was issued on November 8, 2012, and final payment was made to Certified on December 10, 2010. The Complaint against Certified was filed on October 10, 2012. Even based on the earliest of these dates, December 10, 2010, the deadlines for Lehm to file the negligence and breach of contract claim were December 10, 2013 and December 10, 2016, respectively, and Lehm’s filing of the instant action on October 10, 2012 was therefore timely.

“A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person’s right of possession.” *Colavito v. New York Organ Donor Network, Inc.*, 8 N.Y.3d 43, 49-50 (N.Y. 2006). CPLR §214[3] mandates that a cause of action for conversion be commenced within three years of the date that the action accrues. The three year statute of limitations “normally runs from the date the conversion allegedly took place. Where possession is originally lawful, a conversion does not occur until the owner makes a demand for the return of the property and the person in possession of the property refuses to return it.” *In re Estate of King*, 305 A.D. 2d 683, 683 [2nd Dept 2003].

Here, Lehm alleges conversion by Certified and the Grady’s based on their unlawful retention of “historical artifacts and/or materials” when performing the agreed upon services of demolition and debris removal on the subject property. As attested to by Zimmer, Lehm demanded that the Certified return the inventory of historical artifacts in 2011, and Certified refused. Based on these allegations, Lehm’s commencement on this litigation in October 2012, less than three years after the statute of limitations began to run on the conversion claim, renders that claim timely.

Certified and the Gradys also move to dismiss Plaintiff’s claims based on an alleged failure to state a claim.

Plaintiff’s fourth cause of action is for unjust enrichment against Certified and the Gradys. “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.” *See Clark- Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y. 2d 382, 399 [1987]. Here, in light of the existence of a written agreement with respect to Certified, John Grady, and Joe Grady’s alleged services

in connection with the Project, which the parties do not dispute, Plaintiff's fourth cause of action for unjust enrichment fails as a matter of law.

Plaintiff's fifth cause of action asserts negligence and gross negligence against Certified and the Gradys, alleging that, "As general contractors and construction managers performing construction services in connection with the Project, Certified and the Gradys owed a duty to Lehm to perform such services in a manner consistent with the level of learning, skill and experience ordinarily exercised by similar general contractors and construction managers, and to use reasonable and ordinary care and diligence to perform such work," that they breached that duty "by performing their services and work defectively and contrary to sound construction principles, and failing to execute their work in an efficient, workmanlike, professional and competent manner," and that "knew or recklessly disregarded the risks and losses associated with the breach of his duties and his failure to diligently perform their services, which constituted gross negligence." Failure to use due care in design or supervision allows recovery of both tort and contract damages. *See Sears, Roebuck & Co. v. Enco Associates, Inc.*, 43 N.Y.2d 389, 396 [1977]). Turning to the four corners of the Complaint, Plaintiff's fifth cause of action states a cause of action for malpractice and gross negligence against Certified and the Gradys.

The seventh cause of action is for conversion as against Certified and the Gradys, alleging that Certified and the Gradys unlawfully retained possession of "historical artifacts and/or materials" when performing the agreed upon services of demolition and debris removal on the subject property. "A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession." *Colavito v. New York Organ Donor Network, Inc.*, 8 N.Y.3d 43, 49-50 (N.Y. 2006). Turning to the four corners of the Amended Complaint, the seventh cause of action states a claim against Certified and the Gradys for conversion.

The sixth cause of action alleges fraud against Certified and the Gradys, asserting that Certified and the Gradys invoiced Lehm for workers compensation premiums and other costs which they knew had not actually been incurred, that Lehm relied upon their misrepresentations and paid for such alleged premiums and costs, and has been damaged as a result. Defendants move to dismiss this fraud claim, as well as the breach of contract claim asserted against them, on the basis that Lehm has provided no ascertainable damages for which relief could be granted.



Turning to the four corners of the Complaint, Plaintiff has made out a claim for both breach of contract and fraud claim.

Wherefore it is hereby

ORDERED that defendants Certified Construction Corp., John Grady, and Joe Grady's motion to dismiss is granted only to the extent that Plaintiff's fourth cause of action for unjust enrichment as against said defendants is dismissed.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED:

9/25/13



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EILEEN A. RAKOWER, J.S.C.