Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE Rudolph E. Greco, Jr.
Justice

IA Part 32

Index Number: 700480/12
Motion Date: November 29, 2012
Motion Cal. No. 1
Motion Seq. No. 2

FLEET FINANCIAL GROUP, INC.

Plaintiff,

- against -

THE LESSARD ARCHITECTURAL GROUP, INC. a/k/a THE LESSARD ARCHITECTURAL GROUP, INC., P.C. LESSARD GROUP,INC., LESSARD DESIGN, INC., and L. DESIGN GROUP, INC.,

Defendants.

ORIGINAL

The following papers numbered 1 to 6 read on this motion by plaintiff Fleet Financial Group, Inc. and third party defendants Richard Xia, Jiqing Yue, X&Y Development Group, LLC, and Samuel Development Group, LLC for an order pursuant to CPLR 3211(a)(1), (2), (4) and (7) dismissing the counterclaims and third party claims asserted against them and on this cross motion by defendant Lessard Architectural Group, Inc. and defendant Lessard Group, Inc. (collectively the Lessard parties) for an order pursuant to CPLR 3025(b) and RPAPL 1301(3) permitting them to amend their pleadings so as to state that they may assert their counterclaims and third party claims in this action

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1
Notice of Cross Motion - Affidavits - Exhibits	2
Answering Affidavits - Exhibits	
Reply Affidavits	3
Memoranda of Law	4-6

Upon the foregoing papers it is ordered that: The cross motion by the Lessard parties is granted to the extent that they may serve amended pleadings within twenty days of the service of a copy of this order with notice of entry. Those branches of the motion which seek an order

dismissing the counterclaim and third party cause of action for contractual indemnification pursuant to CPLR 3211(a)(7) are granted. The remaining branches of the motion are denied.

I. The Allegations of the Lessard parties

The Lessard parties allege the following: Plaintiff Fleet Financial Group, Inc. (Fleet) on its own behalf and as the agent of X&Y Development Group, LLC (X&Y) retained defendant Lessard Architectural Group, Inc. (LAG) to provide architectural services for a large real estate development project to be undertaken in Flushing, New York. Third party defendant Richard Xia told LAG that he owned Fleet which in turn owned the property. LAG entered into a written contract with Fleet calling for the provision of architectural services, which the former did provide for a time before terminating its work for non-payment of fees. LAG subsequently discovered that Fleet did not own the property, but instead was merely "an un-capitalized sham entity." The Fleet parties engaged in a fraudulent scheme whereby they induced LAG to provide architectural services to entities that ostensibly were not liable for the work performed and/or lacked any ability to pay for the work. Xia and his wife, Jiqing Yue, disregarded corporate forms and used their corporations as though they were alter egos. The Fleet parties owe LAG $880, 452.63 for its architectural services, $170,016.51 in lost profits, and other sums as well.

On or about December 8, 2009, LAG filed a mechanic's lien against the property, and Fleet responded with a demand made pursuant to Lien Law § 59 requiring the lienor to commence an action to foreclose on or before September 27, 2010. On or about that date, LAG began an action to foreclose on the lien in the New York State Supreme Court County of Queens (*The Lessard Architectural Group v. X&Y Development Group,* Index No 24430/10).

A few months previously, on or about June 25, 2010, LAG began an action in the Circuit Court of the County of Fairfax, Virginia against Fleet, Xia, Yue, X&Y and Samuel Development in compliance with the forum selection clause and choice of law clause found in the contract between LAG and Fleet (*Lessard Architectural Group, Inc. v. Fleet Financial Group Inc.*, Case No. 2010–9087).Fleet filed a motion to dismiss in the Virginia action, claiming that the forum and choice of law clauses were unenforceable, but the Virginia court denied the motion. However, the court dismissed the complaint against Xia for lack of in personam jurisdiction, and in November, 2011, the parties entered into a stipulation which provided that LAG would discontinue the Virginia action, but would have the right to reassert its claims in New York. The stipulation read in relevant part:

> "Lessard agrees that it will not re-file Lessard's nonsuited [discontinued] claims *** in the Courts of the Commonwealth of Virginia or Virginia's federal courts. To the extent that Lessard intends to re-file its nonsuited claims or similar claims against Fleet and X&Y, Lessard agrees that it will do so in the state courts of New York, and that such claims shall be filed within six (6) months from October 28, 2011 or in the event Lessard's claims are filed as a counterclaim to any action filed against Lessard by Fleet or X&Y, within such time as is allowed under the rules of the applicable court for the filing of such counterclaims, whichever is later. ***"

In the meantime, pursuant to an order dated February 18, 2011, the IAS court in New York denied a motion by LAG for a stay of the action until resolution of the Virginia case and granted a cross motion by X &Y for an order cancelling the notice of pendency. On appeal, the Appellate Division, Second Department, affirmed the order insofar as the denial of the stay was concerned. The appellate court wrote: "The Supreme Court providently exercised its discretion in denying the plaintiff's motion to stay this action pending the determination of the Virginia action. This action and the Virginia action do not share a "complete identity of parties, claims, and reliefs sought" (*Lessard Architectural Group, Inc., P.C. v. X & Y Development Group, LLC*, 88 AD3d 768, 770, quoting *Green Tree Fin. Servicing Corp. v. Lewis*, 280 AD.d 642, 643.)

In or about March 2012, Fleet began the instant action against LAG, among others, asserting claims for breach of contract, fraud in the inducement, negligent misrepresentation, and professional negligence. The Lessard parties responded by asserting counterclaims and third party causes of action for breach of contract, unjust enrichment, breach of intellectual property rights, fraud, and indemnification. LAG's contract and quasi -contractual claims are the same as those asserted in the Virginia action.

II. Breach of Contract

RPAPL § 1301," Separate action for mortgage debt," provides in relevant part that " (3) While [an] action [to foreclose a mortgage] is pending * * * no other action shall be commenced or maintained to recover any part of the mortgage debt, without leave of the court in which the former action was brought." (*See*, *Anron Air Systems, Inc. v. Columbia Sussex Corp.*, 202 AD2d 460.)

The purpose of RPAPL § 1301is to avoid several actions to recover the same debt and to restrict proceedings to collect the mortgage debt to one court. (*See*, *Valley Sav. Bank v. Rose*, 228 AD2d 666.)

RPAPL §1301 is made applicable to actions to foreclose on a lien by Lien Law §43, " Action in a court of record; consolidation of actions," which provides : "The provisions of the real property actions and proceedings law relating to actions for the foreclosure of a mortgage upon real property, and the sale and the distribution of the proceeds thereof apply to actions in a court of record, to enforce mechanics' liens on real property, except as otherwise provided in this article." (*See*, *Anron Air Systems, Inc. v. Columbia Sussex Corp.*, 202 AD2d 460; DeWinter, Supplementary Practice Commentaries, McKinney's Cons. Laws of NY, Book 49 ½, Section 1301.)

Contrary to the contention made by the Fleet parties, LAG's claims in the instant action are not barred by RPAPL §1301. First, the Appellate Division, Second Department, affirmed an order denying a stay of the foreclosure action, finding that the Virginia action and the foreclosure action did not share a "complete identity of parties, claims, and reliefs sought." The Lessard parties are basically asserting here the same causes of action they asserted in the Virginia action, and the Appellate Division in effect permitted the Lessard parties to maintain these causes of action simultaneously with the foreclosure action. Second, the parties stipulated

in the Virginia action that if LAG reasserted its claims against the Fleet parties, it would do so in New York state courts within certain time constraints. Moreover, the stipulation contemplated that LAG would reassert its causes of action as counterclaims in an action brought by Fleet against LAG. The Fleet parties cannot invoke RPAPL §1301 here without in effect repudiating the agreement they made in Virginia, an agreement that the Lessard parties relied upon. Third, LAG did not begin the instant main action, but merely seeks to assert counterclaims and third party causes of action. LAG did not choose to begin multiple actions or to enter this action, but was named as a defendant. (*See*, *Anron Air Systems, Inc. v. Columbia Sussex Corp*, *supra* [plaintiff did not *elect* to enter the foreclosure action, but was named as a defendant, and was obliged to raise its claims therein or 'be deemed to have waived the same,' under the terms of Lien Law § 44(5) ***."(Emphasis in original)].)

In sum the Lessard parties may maintain their causes of action, including the claim for breach of contract, here despite the pending foreclosure action.

III. Unjust Enrichment

"To state a cause of action for unjust enrichment, a plaintiff must allege that it conferred a benefit upon the defendant, and that the defendant will obtain such benefit without adequately compensating plaintiff therefor." (*Nakamura v. Fujii*, 253 AD2d 387, 390; *see*, *MT Property, Inc. v. Ira Weinstein and Larry Weinstein, LLC*, 50 AD3d 751; *Smith v. Chase Manhattan Bank, USA, N.A.*, 293 AD2d 598.) In the case at bar, LAG has adequately alleged that it provided architectural services to Fleet for which the latter has not paid. The Fleet parties argue that "[a]n unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim *** " (*Corsello v. Verizon New York, Inc.*, 18 NY3d 777, 790-791) and that "[w]here the parties executed a valid and enforceable written contract governing a particular subject matter, recovery on a theory of unjust enrichment for events arising out of that subject matter is ordinarily precluded ***." (*IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142.) However, "[w]here, as here, there is a bona fide dispute as to the existence of a contract, or where the contract does not cover the dispute in issue, a plaintiff may proceed upon a theory of quasi-contract as well as breach of contract and will not be required to elect his or her remedies ***." (*Hochman v. LaRea*, 14 AD3d 653, 654–655; *AHA Sales, Inc. v. Creative Bath Products, Inc.*, 58 AD3d 6.) In the case at bar, LAG may maintain its counterclaim for unjust enrichment because (1) Fleet contends that there is no enforceable contract between the parties because of fraud in the inducement, (2) Fleet in the Virginia action contended that the alleged contract is not enforceable against it, (3) X &Y in the Virginia action denied the existence of a contractual relationship with LAG, and (4) Xia in the Virginia action denied the existence of a contractual relationship with LAG.

IV. Violation of Intellectual Property Rights

LAG alleges that the Fleet parties have been using architectural drawings and plans which are entitled to the protection of federal copyright laws and which the Fleet parties had a license to use only if "the Owner shall comply with all obligations, including prompt payment of all sums when due, under this Agreement." The Fleet parties argue that federal law

precludes LAG from asserting this counterclaim because state courts do not have jurisdiction over actions to enforce rights under the federal copyright laws. (*See*, *Editorial Photocolor Archives, Inc. v. Granger Collection* , 61 NY2d 517.)

However, the rules of federal preemption do not apply where claims arise out of contractual relations rather than from rights granted under the Copyright Act. (*See*, *Bryant v. Broadcast Music, Inc.*, 27 AD3d 683; *Jordan v. Aarismaa,* 245 AD2d 616; *General Mills, Inc. v. Filmtel Intern. Corp.* 178 AD2d 296.) In the case at bar, despite its misleading labeling of the counterclaim, LAG is actually attempting to enforce its contractual rights, though they concern intellectual property, rather than its rights arising under the copyright law. "[A] dispute over the terms or the enforcibility of a contract to transfer the exclusive rights comprised in a copyright is wholly a state law matter. Contract questions that depend upon common law or equitable principles belong in state court even if they involve copyrights [citation omitted]." (*Borden v. Katzman*, 881 F2d 1035, 1038; *Jordan v. Aarismaa, supra; Saturday Evening Post Co. v. Rumbleseat Press, Inc.*, 816 F2d 1191; *General Mills, Inc. v. Filmtel Intern. Corp., supra.*) In the case at bar, the central issue arising under the counterclaim is whether the Fleet parties materially breached the contract and thereby lost their contractual right to use the architectural plans and drawings. This, of course, is a dispute involving the terms and conditions of the contract.

In the case at bar, Fleet contractually obligated itself (1) not to use architectural plans and drawings without the making of prompt payment of all sums due LAG, (2) to accept the termination of its license to use the architectural plans and drawings if the parties ended their contractual relationship prior to the completion of the project, (3) to return architectural plans and drawings upon termination of the agreement prior to the completion of the project, and (4) to refrain from assigning any license given to it to another party without the consent of LAG. The counterclaim seeks to protect rights that arose from the parties' contractual relationship rather than from the copyright law, and, therefore, federal law does not preempt the counterclaim. (*See*, *Jordan v. Aarismaa*, *supra.*) The defense of preemption under the copyright act usually fails in an action for breach of contract (*see*, *Lennon v. Seaman,* 63 Fsupp2d 428), and the defense fails here because LAG is not seeking to protect rights which are equivalent to those arising under copyright law. (See, *Lennon v. Seaman*, *supra.*) The court notes that LAG's remedies under the counterclaim will be limited to those pertaining to contract law and do not include those arising solely under the copyright act.

V. Fraud

The Lessard parties allege, inter alia, that Fleet and Xia induced LAG to enter into the contract by making false representations that Fleet was the owner of the property and would make the promised payments. Fleet was allegedly undercapitalized and could not make the payments. The elements of a cause of action or defense alleging fraud in the inducement are representation of a material existing fact, falsity, scienter, reliance, and injury . (*See*, *Urstadt Biddle Properties, Inc. v. Excelsior Realty Corp.*, 65 AD3d 1135; *Chopp v. Welbourne & Purdy Agency, Inc.*, 135 AD2d 958.) These elements are satisfied to the extent that LAG alleges that Fleet and Xia made false representations concerning the former's ownership of the property and ability to make the contractual payments. While fraud must be plead in detail (*see*, CPLR

3016[b])) "the standard is simply whether the allegations are 'set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of ' ***."(*Caprer v. Nussbaum* 36 AD3d 176, 202, quoting *Lanzi v. Brooks*, 43 NY2d 778, 780.) LAG met the standard in regard to Fleet and Xia. Moreover, in regard to Fleet, the contracting party, the fourth counterclaim is not duplicative of the counterclaim for breach of contract. It is true that LAG cannot assert fraud against Fleet in connection with its contractual relationship unless LAG adequately alleges that Fleet violated an independent legal duty. (*See*, *Heffez v. L & G General Const., Inc.*, 56 AD3d 526.) In the case at bar, LAG has adequately alleged that Fleet and Xia, as Fleet's principal, made false representations collateral to the contract. (*See*, *Selinger Enterprises, Inc. v. Cassuto,* 50 AD3d 766.) In regard to the non-contracting parties, there is no duplication of the counterclaim for breach of contract. (*See*, *Selinger Enterprises, Inc. v. Cassuto*, *supra*.)

Finally, the fourth counterclaim adequately alleges causes of action against Xia, Yue, X&Y, and Samuel for aiding and abetting fraud. "In order to plead properly a claim for aiding and abetting fraud, the complaint must allege: (1) the existence of an underlying fraud; (2) knowledge of this fraud on the part of the aider and abettor; and (3) substantial assistance by the aider and abettor in achievement of the fraud ***." (*Stanfield Offshore Leveraged Assets, Ltd. v. Metropolitan Life Ins. Co.,* 64 AD3d 472, 476 [internal quotation marks and citations omitted].) LAG has adequately alleged that Xia, Yue, X&Y, and Samuel, with knowledge of the fraud committed by Fleet, helped to make Fleet judgment proof by shifting assets to shell companies.

VI. Contractual Indemnification

LAG asserts a claim for contractual indemnification (primarily for attorney's fees) against Fleet based on two sections of the contract. "A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances' ***." (*Drzewinski v. Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777, quoting *Margolin v. New York Life Ins. Co.*, 32 NY2d 149, 153.) The cause of action for contractual indemnification alleges that "Fleet failed to perform its respective duties and obligations in accordance with the terms of the Fleet/LAG contract." An intention by Fleet to indemnify LAG for losses arising from the former's own actions is not clear from the parties' agreement. The sections of the contract relied upon by LAG apply to the actions of third parties, not to claims between Fleet and LAG, or are otherwise inapplicable to the case at bar. (*See*, *Hooper Associates, Ltd. v. AGS Computers, Inc.*, 74 NY2d 487.) Finally, LAG cannot avoid the dismissal of its claim for contractual indemnification merely by raising new and equivocal allegations in a memorandum of law.

Dated: March 8, 2013

J.S.C.