At an IAS Term, Comm-11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 10th day of July, 2017.

PRESENT:

HON. SYLVIA G. ASH,

Justice.

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BOGART LOTS LLC,

Plaintiff(s),

- against -

SIS SERVICES GROUP INC., RICK SABLE, RON TANA, and JOHN and JANE DOES 1-10,

Defendant(s).

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SIS SERVICES GROUP INC.,

Third-Party Plaintiff,

- against -

U.M.F. CONTRACTING INC., NATALE DISTEFANO, VICTOR SOLOMENO AND MARCIO DINIZ,

Third-Party Defendants.

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DECISION AND ORDER

Index # 511041/2015

The following papers numbered 1 to 8 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1 - 5
Opposing Affidavits (Affirmations)	6
Reply Affidavits (Affirmations)	7, 8

Upon the foregoing papers, the motion by Defendants, SIS SERVICES GROUP, INC. ("SIS") and RON TANA ("Tana")(collectively referred to as "Defendants"), for partial summary judgment is granted in part and denied in part. Plaintiff's cross-motion for a trial preference pursuant to CPLR §3403[4] is denied.

Background

On May 22, 2015, Plaintiff, BOGART LOTS LLC ("Bogart"), as owner, and SIS, as general contractor, entered into a contract ("Contract")[1] for the demolition and construction of a new four-story building at 13 Grattan Street in Brooklyn, New York at a contract price of $9.6 million. On May 27, 2015, and thereafter on two more occasions in June and July 2015, Bogart advanced SIS the total sum of $602,500.00 to begin work under the Contract. Tana is the principal of SIS.

According to Bogart, on August 7, 2015, Toros Hovivian ("Hovivian"), Bogart's principal, was informed by Rick Sable ("Sable"), SIS's vice president and project manager, that another company, UMF Contracting Corp. ("UMF"), a Third-Party Defendant herein, would be pulling the Department of Building ("DOB") permits as contractor for the work instead of SIS. Thereafter, by letter dated August 25, 2015, Bogart's counsel wrote to SIS indicating Bogart's intention of canceling the Contract in seven days due to Defendant's "material breach." The letter stated that the revelation of UMF being brought in as a "joint venture" caused Bogart concerns regarding the qualifications and financial capability of this new, unknown entity and that, by the terms of the Contract, an assignment to a new "joint venture" was impermissible without written consent.[2] The letter further stated that Bogart requested information about UMF, which was never provided and that SIS's responses in this regard were unclear and vague. The letter requested an accounting of the advanced funds and an explanation in writing within seven days explaining why "this Contract should not be terminated because of [the] "bait and switch.""

Sable and Tana responded separately via letter and through their respective counsel. Sable's letter, dated August 31, 2015, written solely on behalf of Sable and UMF, stated that Hovivian was aware of Sable's and UMF's involvement from "the time of his initial introduction to SIS, made by

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[1] The Contract is comprised of three parts: (1) the A101 Agreement; (2) the A201 General Conditions of Contract; and (3) a Rider to the Contract.

[2] In pertinent part, section 13.2.1 pf A201 provides that "neither party to the Contract shall assign the Contract as a whole without written consent of the other. If either party attempts to make such an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Contract."

Mr. Kaufman" and that Mr. Kaufman was aware from past projects that SIS does not have the license necessary to obtain DOB permits for the project and thus contracts with licensed contractors for that purpose. Sable's letter also stated that, as independent consultants employed by SIS, he and UMF were not responsible for any monies paid to SIS. In the event the Contract with SIS terminated, Sable's letter indicated that UMF could complete the project for a $9 million contract price.

Tana's letter, dated September 1, 2015, stated that, due to "recent health issues," Tana "explored the idea of participating in the build-out on a somewhat limited basis, with UMF's role increasing to some limited degree" but that an assignment of the contact in whole was never Tana's intent. Tana's letter conveyed his desire to "complete the project in full" and took the position that SIS did not breach the contract, and therefore, Bogart's proposed cancellation was without cause. Tana's letter further stated that a substantial amount of funds advanced by Bogart had been "expended on labor materials...demolition of the several existing structures on the property, site clearing, removal of debris, site office set up, protective fencing, signage and safety measures, site safety plan filing, DOT permits obtained, and temporary electric installation."

By letter dated September 2, 2015, Bogart stated that Sable and Tana's response letters "raised more unanswered questions and issues about SIS and UMF" and terminated the Contract "for cause."[3] On or around September 9, 2015, Bogart commenced this action against Defendants alleging breach of contract, fraud, violation of the lien law and unjust enrichment. On December 7, 2016, Bogart filed its note of issue.

Now, Defendants move for partial summary judgment dismissing all causes of action except conversion limited to the amount of $26,546.51. Defendants argue that Bogart's breach of contract claim must fail because Bogart cannot identify a single breach of the Contract. Further, that insofar as Bogart alleges that the "breach" was the assignment of the Contract to UMF, based on Hovivian's own deposition testimony, the supposed breach never took place as the Contract was never assigned.

[3] Under section 14.2.1[4] of A201 of the Contract, the Owner may terminate the Contract "for cause" when the Contractor "otherwise is guilty of substantial breach of a provision of the Contract Documents."

Secondly, Defendants argue that Bogart's unjust enrichment claim must be dismissed because an express contract governs the dispute. Third, that Bogart's fraud claim must be dismissed as duplicative of the breach of contract claim since the conduct complained of is the alleged attempt to substitute UMF for SIS. Fourth, that Bogart lacks standing under New York Lien Law because the landowner is not a beneficiary contemplated under the statute. However, that if the Lien Law claim survives, that such claim should be limited to $26,546.51.[4] Fifth, that Bogart's claim for a constructive trust must fail because Bogart cannot show the existence of a fiduciary duty between the parties, a necessary element for a constructive trust claim. Lastly, that Bogart fails to provide any facts in support of its claim to pierce the corporate veil.

In addition, Defendants seek summary judgment on its breach of contract counterclaim. They argue that, because they did not breach any provision in the Contract, Bogart's termination of the Contract could not be for cause and must be deemed to be one of convenience. That as such, Bogart must pay to Defendants $100,000.00 as set forth in section 3 of the Rider to the Contract.[5]

Bogart opposes Defendants' motion for summary judgment and cross-moves for a trial preference based on the fact that its two and only members are over the age of seventy.

Bogart disputes that it knew "all along" that UMF and not SIS would be performing as contractor and pulling the permits. By way of affidavit, Hovivian states that he never had prior discussions with Sable or Tana that any other company other than SIS would be the contractor. Hovivian also states that, prior to the Contract's execution, Tana and Sable held themselves out as

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[4] Out of $602,000.00 in advanced funds, Defendants state that they have incurred documented costs related to the project in the amount of $344,203.49; that they are owed $100,000.00 as a termination fee under the Contract; and that $131,250.00 is being held in escrow pursuant to a previous Court Order.

[5] Paragraph 3 of the Rider to the Contract provides: "Termination: Article 7.1 of the A101 is amended to provide that only the Owner may terminate the Contract, without cause...[i]f the Owner elects to termination the contract for convenience, the Owner is only response[sic] to pay the Contractor for the Work performed to date of the termination and is not responsible to pay for any lost or unearned profit on Work not performed at time of termination and, in addition, the Owner shall compensate the Contractor a sum of $100,000.00 as a termination fee, notwithstanding anything that may be contrary in the contract.

"partners" in SIS but that later, in Sable's explanatory letter, Sable claimed he was an "independent contractor" for SIS. Moreover, that the explicit terms of the Contract reflect that SIS would be the contractor, not UMF.

Secondly, Bogart disputes the amount of work performed and contends that SIS's figure of $344,203.49, representing monies spent on materials and labor, is unsupported by checks or documentary evidence indicating that such payments were made for the subject project. It is Bogart's position that the only work performed prior to termination of the Contract was the erection of a construction fence and the demolition of two small structures which fit into dumpsters that cost $8,000.00. Bogart contends that the total cost of work performed should amount to no more than $50,000.00. Further, that because the aforementioned demolition was done without a permit, Bogart's replacement contractor had to "legalize" the prior work done and, accordingly, the replacement contract cost $10.2 million, or $600,000.00 more than the SIS Contract. Additionally, Bogart argues that SIS did not pay vendors that it claimed it paid, such as Danbro and Pilku, because Bogart had to pay these vendors to resolve their claims of nonpayment. Finally, Bogart contends that, during discovery, it was disclosed that project money was transferred to entities unrelated to the construction project, as evidenced by a $160,000.00 payment to a Nora Ferrari, who is Tana's wife or ex-wife.

With regards to Bogart's cross-motion for a trial preference, Defendants oppose arguing that no case permits a preference based on the age of a corporate plaintiff's members or shareholders. They further argue that Bogart should not be permitted to assert the benefits of the corporate form for protection from liability, only to disregard the corporate form to seek a procedural advantage.

Discussion

The Court begins with the principle that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [Ct App 1986]). If a prima facie showing has been made, the burden shifts to the

opposing party to produce evidence sufficient to establish the existence of material issues of fact (*Id.*). The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]).

The Court first turns to Defendants' motion seeking summary judgment motion dismissing Bogart's cause of action for breach of contract and finds that summary judgment is warranted. The only breach of the Contract asserted by Bogart is the alleged substitution of UMF for SIS. However, there is no evidence that SIS assigned the Contract in whole to UMF. The fact that UMF would be the entity to pull DOB permits is not precluded by the Contract and thus, there could be no breach of the Contract on that basis. Moreover, the Contract explicitly provides that, in the event SIS assigned the Contract without Bogart's written consent, SIS would remain legally responsible for all obligations under the Contract. There is no indication that SIS, by enlisting UMF's involvement in the project, intended to renege on its legal responsibility. Based on the foregoing, Defendants are entitled to summary judgment dismissing Bogart's breach of contract claim.

Similarly, the Court finds that Defendants established their entitlement to summary judgment on their counterclaim that Bogart terminated the Contract out "of convenience." Thus, Defendants are entitled to the $100,000.00 termination fee pursuant to the Contract.

With respect to Bogart's unjust enrichment claim, it is well established that where an enforceable written contract exists between the parties, recovery in quasi contract based on the doctrine of unjust enrichment is precluded (*see Sunrise Plaza Assocs., L.P. v Int'l Summit Equities Corp.*, 288 AD2d 300, 301 [2d Dept 2001]). Here, there is a valid contract between the parties and, thus, no claim for unjust enrichment can be maintained.

With respect to Bogart's cause of action for fraud, "[i]t is axiomatic that a cause of action for fraud does not arise where . . . the fraud alleged relates to a breach of contract" (*Egan v New York Care Plus Ins. Co.*, 277 AD2d 652, 653 [3d Dept 2000]). "A fraud claim is not sufficiently stated where it alleges that a defendant did not intend to perform a contract with a plaintiff when he made

it...." (*Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435, 436 [1st Dept 1988]). Here, Bogart's fraud claim is based upon the allegation that it contracted with SIS to perform the work but, in fact, Bogart intended that UMF would perform the Contract in its stead, which is the same allegation that undergirds Bogart's breach of contract claim. Bogart fails to otherwise allege a legal duty owed to it by Defendants, independent of that encompassed by the Contract, and therefore, its fraud claim must be dismissed (*see Roklina v Skidmore College*, 268 AD2d 765, 766 [3d Dept 2000]).

With respect to Bogart's cause of action under Article 3-A of the New York Lien Law, "[t]he primary purpose underlying enactment of the Lien Law, which makes a property owner or general contractor a trustee for the benefit of unpaid subcontractors and materialmen, was to ensure that laborers and materialmen are paid" (*AABCO Sheet Metal Co. v Lincoln Ctr. for the Performing Arts*, 174 Misc. 2d 232, 234 [New York Cty, 1997][*citing Allerton Constr. Corp. v Fairway Apartments Corp.*, 26 AD2d 636, 637 [2d Dept 1966]]). "It provides that funds received by a general contractor in the course of a construction project constitute assets of a trust, that a person in a trust position shall be held to a fiduciary standard of care and duty and shall be accountable for trust assets" (*Id.*). Lien Law § 77[1] provides: "A trust arising under this article may be enforced by the holder of any trust claim, including any person subrogated to the right of a beneficiary of the trust holding a trust claim." Here, based on the foregoing, to the extent that Bogart has paid out monies to Danbro and Pilku due to SIS's neglect of paying them, Bogart is subrogated to the rights of the subcontractors under the Lien Law, and thus has standing to enforce the trust to that extent (*see Eastside Floor Serv., Ltd. v Ibex Constr.*, LLC, 2012 NY Slip Op 33416(U), 2012 NY Misc LEXIS 6388, *10 [New York Cty 2012][*citing Broadway Houston Mack Dev., LLC, v Kohl*, 71 AD3d 937, 937 [2d Dept 2010]). Accordingly, Bogart's claim under the Lien Law remains to the extent it seeks recompense for the amounts paid out to subcontractors like Danbro and Pilku.

With respect to Bogart's cause of action to impose a constructive trust, "[t]he elements needed for the imposition of a constructive trust are (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment" (*Shasho v Kleiner*, 138

AD3d 973, 974 [2d Dept 2016]). Here, because there was no confidential or fiduciary relationship between Bogart and Defendants, there is no basis for a constructive trust claim. Thus, Bogart's cause of action to impose a constructive trust is dismissed.

In addition, Bogart's cause of action to pierce the corporate veil and hold the individual Defendants personally liable must be dismissed. Bogart's allegation that Sable and Tana failed to observe corporate formalities in the operation of SIS is conclusory and the completion of discovery has failed to yield any specificity to its claims.

Finally, while Defendants argue that Bogart is only entitled to $26,546.51, the amount Defendants allege remains from the $602,500.00 advance, Defendants failed to establish as a matter of law that it expended $344,203.49 in costs related to the project. Some of Defendants' claimed costs are without evidentiary support. Other claimed costs are either only supported by an invoice (and not payment) or the evidence of payment fails to indicate that the payment is related to the subject project. Defendants thus fail to establish as a matter of law their claimed costs.

Turning now to Bogart's motion for a trial preference, the Court finds that Bogart's motion must be denied. Although the two sole members of Bogart are over 70 years of age, they do not have a cognizable cause of action in their individual capacities and they are not the real party in interest here (*see EFCO-FA Dev. Corp. v State*, 266 AD2d 338, 339 [2d Dept 1999]). Therefore, Bogart cannot obtain a trial preference based on the age of its members.

Accordingly, it is hereby

ORDERED that Defendants' motion for summary judgment is GRANTED as to Plaintiff's claims for breach of contract, fraud, imposition of a constructive trust, piercing the corporate veil, and unjust enrichment but that the motion is otherwise DENIED; and it is further

ORDERED that Plaintiff's motion for a trial preference is DENIED.

This constitutes the Decision and Order of the Court.

E N T E R,

SYLVIA G. ASH, J.S.C.