SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK **PART** IAS MOTION 53EFM

Justice

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A&B DELI INC.

Plaintiff,

- v -

251 SIXTH AVE., LLC,

Defendant.

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INDEX NO. 451990/2018

MOTION DATE 10/11/2018

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 22

were read on this motion to/for DISMISSAL.

Upon the foregoing documents and following oral argument, for the reasons set forth below, 251 Sixth Ave., LLC (**Defendant**)'s motion to dismiss is granted solely with respect to A&B Deli Inc. (**Plaintiff**)'s first cause of action for breach of contract and is otherwise denied in its entirety.

The allegations are relatively simple and straight forward. The Plaintiff claims that during the period of 2011 through 2016, the Plaintiff was overbilled real estate tax escalation under a certain Lease Agreement (the **Original Lease**), dated Sept 8, 2011, by and between 251 Sixth Ave, LLC and A&B Deli Inc. To wit, the Plaintiff claims that the Defendant billed them their percentage of the current year tax bill as opposed to their percentage of the real estate tax escalation amount (*i.e.*, there was no credit for the base year amount in the amount the Plaintiff was billed). For the avoidance of doubt, Article 46(a) of the Original Lease requires the

Defendant (landlord)'s consent to any assignment of the Original Lease. The Original Lease was assigned pursuant to an Assignment and Assumption Agreement (the **Assignment**; the Original Lease, as assigned, hereinafter, the **Lease**), dated July 27, 2016, by and between A&B Deli, Inc. and 251 Deli Deli LLC. Terms used but not otherwise defined herein shall have the meaning ascribed thereto in the Lease.

Defendant moves to dismiss this action pursuant to CPLR 3211(a)(1) and (7). When considering a motion to dismiss under CPLR 3211(a)(1) and (7), the Court "must 'accept the facts alleged in the complaint as true, accord plaintiff the benefit of every possible inference, and determine only whether the facts alleged fit within any cognizable legal theory.'" (*Kolchins v Evolution Markets, Inc.*, 31 NY3d 100, 105-06 [2018] quoting *Leon v Martinez*, 84 NY2d 83, 87–88, [1994]). A motion to dismiss pursuant to CPLR 3211(a)(1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002] citing *Leon*, 84 NY2d at 88).

First, the Defendant argues that the action must be dismissed because the Plaintiff lacks legal capacity to commence this action because the Plaintiff was dissolved on February 10, 2017 (affirmation of defendant's counsel ¶ 5). The Court does not agree. Although it is true that, once dissolved, a corporation does not have the legal capacity to commence an action unless it is necessary to wind up the corporation's affairs ((*Tedesco v A.P. Green Industries, Inc.*, 864 NYS2d 141, 142 [2007]; Business Corporation Law (BCL) § 1005 [a] [1])), in the course of winding up its affairs, "a dissolved corporation . . . may prosecute [an] action . . . to recover

damages sustained prior to its dissolution." (*Schorr v Steiner*, 46 AD3d 435, 436 [1st Dept 2007]; *Lance intern., Inc. v First Nat. City Bank*, 86 AD3d 479, 480 [1st Dept 2011]; BCL § 1005, 1006). Although the BCL does not provide a specific time limit pursuant to which a corporation must wind up its affairs, winding up a corporations affairs should proceed within a reasonable timeframe. *Spiegelberg v Gomez*, 44 NY2d 920, 921 [1978]; *Lance Intern., Inc.*, 86 AD3d at 480. Simply put, the Plaintiff commenced this action in 2018 and began its dissolution in 2017. The action appears to be a winding up of the Plaintiff's affairs to recover overbilled real estate tax escalation. Accordingly, the Plaintiff has the legal capacity to bring this action.

However, the Plaintiff's First Cause of Action (breach of contract) must be dismissed. Section 42 of the Lease governs real estate tax escalation. Specifically, Section 42(c) of the Lease provides that the Landlord shall provide the Tenant with a written statement setting forth the tax bill for the property for each year. Under the Lease, the Plaintiff (tenant) received a copy of the real estate tax bill each and every year it was billed. Pursuant to Section 7 of the Assignment, the Plaintiff (tenant/assignor) and the successor tenant (assignee) expressly stated that the Landlord is not in default under the Lease. Accordingly, the First Cause of Action (breach of contract) fails as the Plaintiff is estopped from raising this claim by virtue of the representation contained in the Assignment.

With respect to the Plaintiff's Second Cause of Action (unjust enrichment), the Defendant's motion to dismiss is denied. To state a cause of action for unjust enrichment, a Plaintiff must show: 1) the defendant was enriched, 2) at the plaintiff's expense, and 3) allowing the defendant to retain what is sought by plaintiff would be "against equity and good conscience." (*E.J. Brooks*

Company v Cambridge Security Seals, 31 NY3d 441, 455 [2018]; *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]). The cause of action for unjust enrichment is reserved only for those unique cases in which "circumstances create an equitable obligation running from the defendant to the plaintiff," and where "the defendant, though guilty of no wrongdoing, has received money to which [it] is not entitled." (*Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790 [2012]). In this case, the Plaintiff alleges that the Defendant improperly billed, and Plaintiff paid, more than the amount owed for each tax year from 2011 through 2016, and that the Defendant therefore received a benefit at the Plaintiff's expense (*see* complaint at 2-4). The Plaintiff further alleges that it would be inequitable to allow Defendant to retain "it's ill-gotten gains." (affirmation of plaintiff's counsel at 5, ¶ 12). Assuming the factual allegations asserted in the complaint to be true and affording the Plaintiff the benefit of every possible inference, the Plaintiff has stated a cause of action for unjust enrichment.

The Plaintiff has also stated a claim for money had and received. To state a claim for money had and received, a plaintiff must allege: "1) the defendant received money belonging to plaintiff, 2) the defendant benefited from receipt of the money, and 3) under principles of equity and good conscience, the defendant should not be permitted to keep the money." (*In re Estate of Witbeck*, 245 AD2d 848, 850 [3d Dept 1997]). The Plaintiff alleges in its complaint that the Defendant overbilled the Plaintiff for real estate tax escalation and benefited from the receipt of funds to which the Defendant was not entitled, and that it would be unjust for the Defendant to be permitted to keep the overbilled funds.

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2/8/2019
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	☐	CASE DISPOSED		☒	NON-FINAL DISPOSITION		
	☐	GRANTED	☐ DENIED	☒	GRANTED IN PART	☐	OTHER
APPLICATION:	☐	SETTLE ORDER		☐	SUBMIT ORDER		
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN		☐	FIDUCIARY APPOINTMENT	☐	REFERENCE