Koszta v Pavane & Kwalbrun Consulting Engrs.
2019 NY Slip Op 33855(U)
December 11, 2019
Supreme Court, Richmond County
Docket Number: 150968/2019
Judge: Jr., Orlando Marrazzo

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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LEE KOSZTA, Individually and Doing Business as JLK ASSOCIATES,	**Present:**
Plaintiff,	**HON. ORLANDO MARRAZZO, JR.**
-against –	**DECISION AND ORDER**
PAVANE & KWALBRUN CONSULTING ENGINEERS and DAVID KWALBRUN,	**Index No: 150968/2019**
	Mot. Nos: 2317-001
Defendants.	**2637-002**
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The following papers numbered 1 to 5 were fully submitted on the 29th day of October, 2019:

	Papers Numbered
Notice of Motion to Extend Time to Answer by Defendants (Attorney Affirmation and Incorporated Memorandum of Law in Support of Defendants' Motion for Extension of Time to File a Response to the Summons and Complaint, with Supporting Exhibits) (Dated: May 31, 2019)	1
Plaintiff's Affirmation in Opposition to Motion to Extend Time to Answer, with Supporting Exhibits (Dated: June 24, 2019)	2
Notice of Motion to Dismiss Plaintiff's Complaint (Attorney Affirmation in Support, Memorandum of Law in Support of Defendants' Motion to Dismiss, with Supporting Exhibits) (Dated June 24, 2019)	3
Plaintiff's Affirmation, Affidavit in Opposition to Motion to Dismiss Complaint, with Supporting Exhibits (Dated: October 1, 2019)	4
Defendants' Reply Memorandum of Law in Further Support of Motion to Dismiss (Dated: October 25, 2019)	5

KOSZTA v. PAVANE & KWALBRUN, et.al.,

Upon the foregoing papers, the motion of defendants, Pavane & Kwalbrun Consulting Engineers and David Kwalbrun, (hereinafter, together "defendants") for an extension of time to answer or move with respect to the complaint of plaintiffs, Lee Koszta and JLK Associates, (hereinafter "plaintiffs") (Mot. Seq. 001) is granted. Defendants' motion (Mot. Seq. 002) to dismiss plaintiffs' complaint for failure to state a cause of action pursuant to CPLR 3211 (a)(7) and for expiration of the statute of limitations pursuant to CPLR 3211(a)(5) is denied without prejudice.

This matter arises out of the alleged breach of agreement(s) between the parties, who have done business together for the past 27 years. Plaintiff, Lee Koszta, an electrical engineer and the principal of JLK Associates, alleges that defendant, David Kwalbrun and his engineering consulting company, Pavane & Kwalbrun, have entirely failed to pay and/or only partially paid for electrical services plaintiffs rendered on defendants' building projects during an eight-year period between 2010 and 2018. Specifically, in paragraphs 14, 15 and 16 of the April 22, 2019 Verified Complaint (*see* Defendants' Exhibit A), plaintiffs set forth that they submitted invoices to defendants "on a monthly basis" upon completion of electrical work, and that despite written demands for payment, a significant number of those invoices remain entirely or partially unpaid. Accordingly, plaintiffs set forth four causes of action[1] under which monetary damages are sought in the total sum of $299,367.00, defined by year as follows: **$10,825.00** for **2010**; **$24,340.00** for **2011**; **$45,520.00** for **2012**; **$66,760.00** for **2013**; **$41,472.50** for **2014**; **$43,850.00** for **2015**; **$36,585.00** for **2016**; **$27,115.00** for **2017**, and **$2,900.00** for **2018**.

Defendants maintain, *inter alia*, that upon receipt of payment from the party that hired them, defendants in turn paid plaintiffs for services rendered. Defendants allege that plaintiffs

[1] The causes of action as asserted by plaintiffs are (1) Breach of Contract; (2) Unjust Enrichment; (3) Promissory Estoppel, and (4) Account Stated.

stopped working on projects at some point in 2018, "causing defendants' clients to become upset, which cost the defendants a substantial loss of business" (*see* October 25, 2019 Reply Memorandum of Law, p. 8).

Rather than file and serve an Answer with Counterclaims, defendants moved for a 45-day extension of time to answer or move herein (*see* Mot. Seq. 001), followed by this motion to dismiss pursuant to CPLR 3211 (a)(5), (7). Plaintiffs oppose both motions.

Defendants' motion to extend the time to answer or move with respect to the complaint (Mot. Seq. 001) is granted, and defendants' motion to dismiss the complaint pursuant to CPLR 3211(a) (5), (7) (Mot. Seq. 002) is denied in its entirety.

In support of dismissal defendants argue that (1) all causes of action for payment from 2010, 2011 and 2012 are time-barred under CPLR 213(2) (*i.e.*, the six-year statute of limitations for breach of contract), and must be dismissed pursuant to CPLR 3211(a)(5); (2) the causes of action for breach of contract, unjust enrichment and account stated for all remaining years must be dismissed for failure to state a cause of action pursuant to CPLR 3211(a)(7)[2], and (3) all causes of action as against the individual defendant, David Kwalbrun, must be severed and dismissed as no adequate basis exists for holding Kwalbrun personally liable for plaintiffs' claims.

Plaintiffs oppose defendants' motion arguing, *inter alia*, (1) the causes of action may be pled alternatively, such that plaintiffs' "Breach of Contract" cause of action does not nullify plaintiffs' "Unjust Enrichment" cause of action; (2) all of the elements comprising "Breach of Contract" were alleged with specificity; (3) partial payments tendered by defendants and accepted

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[2] Defendants argue, *inter alia*, that the "**Breach of Contract**" cause of action was not pled with requisite specificity, *e.g.*, identification of the breached terms of the agreement(s), identification of specific payments owed, etc.; that the "**Unjust Enrichment**" cause of action may not be maintained under the same facts as "Breach of Contract" where, as here, all parties concede that a contract existed, and that the "**Account Stated**" cause of action is inapplicable because Plaintiffs accepted the payments remitted without timely objection.

by plaintiffs from 2010 through 2012 tolled the relevant statute of limitations, and (4) the court should not resolve the question of whether to pierce the corporate veil until the parties complete the discovery process.

Plaintiffs support their contentions through the submission of an October 1, 2019 affidavit of Lee Koszta (*see* Plaintiff's Exhibit B) in which he authenticates four documents which he attached as Plaintiffs' Exhibit C: David Kwalbrun's six page hand-written "assessment of what payments if any [plaintiffs] are entitled to for 2017," together with a copy of a January 11, 2019 Pavane & Kwalbrun check payable to "JLK Associates" for $7,120.00, and the 2010, 2011 and 2012 breakdown of payments received by plaintiffs, reflecting "total payments for some of the jobs...[and] only partial payments" for other jobs (*see* Plaintiff's Exhibit B, paras 6-9).

The Court rejects defendants' argument that it should not consider plaintiffs' opposition because they failed to adhere to NYCRR 208.11. While 22 NYCRR 208.11 (regarding motions and procedures) provides "affidavits shall be for a statement of the relevant facts, and briefs shall be for a statement of the relevant law, defendants offer no authority requiring the court to take such drastic action.

STANDARD FOR DECIDING A MOTION TO DISMISS UNDER CPLR 3211(a)(7)

In deciding a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7) the allegations in the complaint must be liberally construed in favor of the plaintiff and all the facts alleged must be accepted as true (*see Leon v. Martinez*, 84 NY2d 83, 87 [1994]; *Zellner v. Odyl, LLC* 117 AD3d 1040 [2d Dept. 2014]). The standard on a CPLR 3211(a)(7) motion is "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*High Definition MRI, P.C. v. Travelers Cos., Inc.,* 137 AD3d 602 [1st Dept. 2016]) and "affidavits and other evidence may be used freely to preserve inartfully pleaded but potentially

meritorious claims" (*R.H. Sanbar Projects v. Gruzen Partnership*, 148 AD2d 316, 318 [1st Dept. 1989]). The court is to determine only whether the facts as alleged fit within any cognizable legal theory (*see Arnav Indus., Inc. Retirement Trust v. Brown, Raysman, Millstien, Felder & Steiner*, 96 NY2d 300, 303 [2001] [*revd on other grounds*]; *Thompson Bros. Pile Corp. v. Rosenblum*, 121 AD3d 672, 673 [2d Dept. 2014]), and is precluded from making a determination of the truth of the allegations (*see Campaign for Fiscal Equity v. State,* 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v. Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). Whether a plaintiff can ultimately establish its allegations is not part of the calculus in the court's decision (*EBCI v. Goldman, Sachs & Co.,* 5 NY3d 11, 19 [2005]), which is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1977]; *Sokol v. Leader*, 74 AD3d 1180 [2d Dept. 2010]).

DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' BREACH OF CONTRACT CAUSE OF ACTION IS DENIED, INCLUDING CLAIMS FROM 2010 THROUGH 2012

The elements for a cause of action for breach of contract are (1) the existence of a contract, (2) due performance of the contract by claimant, (3) breach of the contract by the other party, and (4) damages resulting from the breach (*Harris v. Seward Park Housing Corp.*, 79 AD3d 425, 426 [1st Dept. 2010]; *Morris v. 702 East Fifth Street HDFC*, 46 AD3d 478 [1st Dept. 2007]).

Here, plaintiffs' Complaint sets forth the parties' agreement for plaintiff to perform services (*i.e.,* paragraph 14 of the Complaint alleges that the parties entered into "numerous agreements by way of written proposals"), plaintiffs' performance of the services as requested (*see* paragraphs 17, 27), the defendants' failure to pay pursuant to the agreement (*see* paragraphs 18, 28), and the resulting damages to plaintiffs (*see* paragraphs 20, 29). Assuming the truth of these

allegations—as the court must do at this juncture--the Complaint sufficiently states a cause of action for breach of contract against the defendants.

Defendants' motion to dismiss plaintiffs' causes of action for Breach of Contract, Unjust Enrichment, Promissory Estoppel and Account Stated arising from claims during 2010, 2011 and 2012 pursuant to CPLR 3211(a)(5), is likewise denied.

The statute of limitations on claims for breach of contract and accounts stated actions is six years "and it accrues on the date of the last transaction in the account" (*see* CPLR §213[2]; *Elie Int'l, Inc. v. Macys West Inc.*, 106 AD3d 442, 444 [1st Dept. 2012]). A six-year time limit likewise applies for a claim for unjust enrichment (*see* CPLR §213(1); *Massey v. Byrne*, 112 AD3d 532 [1st Dept. 2013]).

Here, while it might initially appear that plaintiffs' claims for 2010, 2011 and 2012 expired in 2016, 2017 and 2018 respectively, the six-year limitations period may be tolled and start running anew in one of two ways: (1) pursuant to General Obligations Law §17-101[3], a signed written acknowledgment of an existing debt which contains nothing inconsistent with an intention on the part of the debtor to pay it (*see Bernstein v. Kaplan*, 67 AD2d 897 [2d Dept. 1979]; *internal citations omitted*), and (2) a partial payment of the debt before or after the statute has expired. A plaintiff must show a partial payment "was of a portion of an admitted debt under circumstances amounting to a clearly demonstrated intention to pay the balance…[t]he circumstances of a partial payment may be proven by extrinsic evidence, including the books and records of the debtor, admissions of the debtor, as well as testimony of the debtor or persons having direct knowledge of the circumstances of the payment" (*Bernstein v. Kaplan*, 67 AD2d 897, 897).

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[3] GOL §17-101 reads as follows: "An acknowledgment or promise contained in a writing signed by the party to be charged thereby is the only competent evidence of a new or continuing contract whereby to take an action out of the operation of the provisions of the limitations of time for commencing actions under the civil practice law and rules other than an action for the recovery of real property…."

This Court is mindful that a plaintiff opposing a motion to dismiss must be afforded the benefit of every favorable inference (*see Leon v. Martinez,* 84 NY2d 83, 87-88 [1994]). Whether the statute of limitations expired in this action cannot be resolved without a more in-depth inquiry concerning whether defendants implicitly promised to pay outstanding balances to plaintiffs. Accordingly, this Court denies defendants' motion to dismiss based on the expiration of the relevant statute of limitations because a question exists, *inter alia*, as to whether defendants' tendering of partial payments to plaintiffs, continuing as recently as January 11, 2019, tolled the applicable statute of limitations (*see* Plaintiffs' Exhibit C).

DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' UNJUST ENRICHMENT AND PROMISSORY ESTOPPEL CAUSES OF ACTION IS DENIED, INCLUDING CLAIMS FROM 2010 THROUGH 2012

Unjust enrichment is "defined as the receipt by one party of money or a benefit to which it is not entitled, at the expense of another" (*Abacus Federal Savings Bank v. Lim,* 75 AD3d 472 [1st Dept. 2010]). To establish unjust enrichment, a plaintiff must show "that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" (*Mandarin Trading Ltd. v. Wildenstien,* 16 NY3d 173, 182 [2011]; *internal quotation marks omitted*). An unjust enrichment claim does not require privity (*Georgia Malone & Co., Inc. v. Ralph Rieder, supra, citing Sperry v. Crompton Corp.,* 8 NY3d 204, 215 [2007]), but "a claim [for unjust enrichment] will not be supported unless there is a connection or relationship between the parties that could have caused reliance or inducement on the plaintiff's part" (*Georgia Malone & Co., Inc. v. Ralph Rieder, supra, citing Mandarin Trading Ltd. v. Wildenstein*, 16 NY3d 173, 182 [2011]). Here, plaintiffs sufficiently allege a relationship existed between the parties that could have cause plaintiffs to rely on promises

of payment. Plaintiffs' allegations maintain that they conferred a benefit on the defendants by providing electrical engineering consultations, which defendants accepted. Further allegations contained in the Complaint support a cause of action based on unjust enrichment because the parties' long-term business relationship and the value and extent of the services would make it inequitable to allow defendants to withhold payment from plaintiffs for the agreed-upon value of such services.

Contrary to defendants' contention, "plaintiff is entitled to plead inconsistent causes of action in the alternative; the quasi-contractual claims are not precluded by the pleading of a cause of action for breach of an oral agreement" (*Winick Realty Group LLC v. Austin & Associates*, 51 AD3d 408 [1st Dept. 2008]). "Where there is a bona fide dispute as to the existence of a contract **or the application of a contract in 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" (*Goldman v. Simon Prop. Group, Inc.*, 58 AD3d 208, 220 [2d Dept. 2008]; *emphasis supplied*).

"A written agreement does not exclude proof of an oral collateral agreement made even between the same parties, where the written contract is not intended to embody the whole agreement and does not on its face purport to cover completely the subject matter of the alleged collateral agreement" (*Traders' Nat. Bank of Rochester v. Laskin*, 238 NY 535, 541-542 [1924]; *see Treeline 90 Stewart Partners, LLC v. RAIT Atria, LLC*, 107 AD3d 788, 790 [2013]). Here, the plaintiffs may allege causes of action to recover for unjust enrichment and promissory estoppel as alternatives to a cause of action for breach of contract despite basing the Complaint's first cause of action on the existence of a written agreement (*see* CPLR 3014; *Auguston v. Spry* 282 AD2d 489, 491 [2001]).

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DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' ACCOUNTS STATED CAUSE OF ACTION IS DENIED, INCLUDING CLAIMS FROM 2010 THROUGH 2012

"[A]n account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and the balance due. By retaining billing statements and failing to object to the account within a reasonable time, the recipient of the bill implies that he or she agrees with the sender regarding the amount owed" (*Stephan B. Gleich & Assocs. v. Gritsipis*, 87 AD3d 216, 233 [2d Dept. 2011]; [*internal citations omitted*]). To state a cause of action of account stated, plaintiff must allege defendant's receipt and retention of the subject statement of account without proper objection within a reasonable time (*see, e.g., Loheac v. Children's Corner Learning Center*, 51 AD3d 476 [1st Dept. 2008]; *Ruskin, Moscou, Evans & Faltischek v. FGH Realty Credit Corp.*, 228 AD2d 294, 295 [1st Dept. 1996]). Thus, "where an account is made up and rendered, the one who receives it is bound to examine it, and, if the accounting is admitted as correct, it becomes a stated account and is binding on both parties, the balance being the debt which may be sued for and recovered by law" (*Rosenman Colin Freund Lewis & Cohen v. Neuma*, 93 AD2d 745 [1st Dept. 1983]). Moreover, "where an account is rendered showing a balance, if the party receiving the account fails to dispute its correctness or completeness, that party will be bound by it as an account stated, unless fraud, mistake or other equitable considerations are shown" (*Peterson v. IBJ Schroder Bank & Trust Co.*, 172 AD2d 165 [1st Dept. 1991]).

Here, plaintiffs pled that they provided invoices to defendants monthly, that defendants received the invoices without making an objection, and that when plaintiffs advised defendants that the balances were due and owing, defendants failed to pay or object to the invoices.

Accordingly, plaintiffs' Complaint sets forth the elements for a cause of action for an account stated.

DEFENDANTS' MOTION TO SEVER AND DISMISS THE INDIVIDUALLY NAMED DEFENDANT FROM THE ACTION IS DENIED.

Plaintiffs may maintain their action against both the business entity and individual defendants at this juncture. Plaintiffs have pleaded that the individual defendant, David Kwalbrun, is "sole owner" of Pavane & Kwalbrun Consulting Engineers, and that Pavane & Kwalbrun Consulting Engineers is a domestic corporation, a foreign corporation, or a business entity which regularly does or solicits business in New York State (*see* paras 5-10 of Complaint). Defendants have identified Pavane & Kwalbrun Consulting Engineers simply as "**an entity** that has and continues to provide consulting services in the mechanical and electrical engineering industries" (*see* Page 3 of Defendants' June 24, 2019 Memorandum of Law in Support of Defendants' Motion to Dismiss). While it is well settled that "a corporation exists independently of its owners, as a separate legal entity, [and] that the owners are normally not liable for the debts of the corporation (*Matter of Morris v. New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 140 [1993]), the courts will pierce the corporate veil and disregard the corporate form "whenever necessary 'to prevent fraud or to achieve equity'" (*id.* [*internal quotation marks and citation omitted*]). Here, where the Court is unable to answer the first question of whether the business entity is a partnership, a corporation or some other business model, it cannot find, at this early stage of the proceedings, that the defendant David Kwalbrun is legally insulated from personal liability for the debts alleged by plaintiffs.

Accordingly, it is hereby

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ORDERED, that defendants' motion for an order granting an extension of time to answer or move with respect to the complaint is granted; and it is further

ORDERED, that defendants' motion to dismiss the Complaint of plaintiffs pursuant to CPLR 3211 (a) (5) and CPLR 3211(a)(7) is denied; and it is further

ORDERED, that the parties return to IAS Part 21, 26 Central Avenue, Staten Island, New York, Room 430, on Feb. 11, 2020 at 9:30 a.m. for a preliminary conference.

This constitutes the decision and order of this Court.

ENTER,

Dated: 12/11/19

J. S. C.

Hon. Orlando Marrazzo, Jr
Supreme Court Justice