SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK **PART 53**

Justice

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JMM CONSULTING, LLC, WILLIAM LICATA

Plaintiff,

- v -

TRIUMPH CONSTRUCTION CORP., CARLO CUZZI,

Defendant.

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INDEX NO. 650261/2016

MOTION DATE

MOTION SEQ. NO. 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

Upon the foregoing documents and for the reasons set forth on the record (1.19.2022), JMM Consulting LLC (the **Consultant**) and William Licata's motion for partial summary judgment is granted solely to the extent of finding that Triumph Construction Corp. (the **Company**) defaulted under the Promissory Note (hereinafter defined) and dismissing the related affirmative defense and counterclaim. The Company cannot assert that it was fraudulently induced to execute the Promissory Note and the Promissory Note is therefore invalid because it continued to make payments under the Promissory Note after Mr. Licata's alleged fraud with respect to the utility billing was discovered and his employment was terminated. The branch of the motion seeking judgment on the cause of action for breach of the Consulting Agreement (hereinafter defined) is denied, as there are issues of fact as to whether Mr. Licata resigned from his position under the Consulting Agreement or whether the Company terminated his employment. Thus, the Company's motion to file an amended answer must be granted to allow the Company to assert

Mr. Licata's alleged resignation as a counterclaim. There simply is no surprise as to this amendment and this has been fully explored during discovery.

The Relevant Facts and Circumstances

Reference is made herein to a (i) a Consulting Agreement dated November 30, 2012 (the **Consulting Agreement**; NYSCEF Doc. No. 157) by and between the Consultant and the Company whereby the Consultant caused Mr. Licata to consult the Company and Mr. Cuzzi, (ii) a Notice of Termination dated December 7, 2015 (the **Termination Notice**; NYSCEF Doc. No. 158) sent to the Mr. Licata from the Company, and (iii) a Promissory Note dated as of July 1, 2012 (the **Promissory Note**; NYSCEF Doc. No. 160) whereby the Company promised to pay the Consultant $2,400,000.

Mr. Licata worked for the Company as General Supervisor from 2009 (Licata Aff., NYSCEF Doc. No. 150, ¶ 5). Mr. Licata alleges that, as General Supervisor, he was promised a bonus of 7% of all sums received by the Company from utility companies in connection with the projects he oversaw, and that number was later raised to 10% (*id.*). While Mr. Licata was working as General Supervisor for the Company, he allegedly deferred portions of his bonus to assist with the Company's cash flow (NYSCEF Doc. No. 150, ¶ 11). Mr. Licata further alleges that, by July 2012, he was owed $2,400,000, and that the Promissory Note was issued to cover that amount (*id.*)

The Consulting Agreement was allegedly created to allow Mr. Licata the opportunity to continue his work while obtaining ownership interest in the Company (*id.*, ¶ 8). The Company was to pay

to the Consultant a consulting fee of $315,000 per year for the first four years after the Consulting Agreement went into effect, along with $600,000 per year for the first four years, in payments of $50,000 per month, to repay an outstanding note (NYSCEF Doc. No. 157, ¶ 5). Mr. Licata was also to participate in any employee benefit plan of the Company, be reimbursed for all travel and incidental expenses, and receive a salary of $85,000 per year (*id.*, ¶ 6). The Consulting Agreement included a confidentiality, non-competition, and non-solicitation clause (*id.*, ¶ 12). The Consulting Agreement could be terminated for, among other reasons, the removal of the Consultant for Cause of Extreme Cause (*id.*, ¶ 13).

Cause is defined in the Consulting Agreement as (i) gross negligence having a material adverse effect on the Company, (ii) misconduct involving fraud, dishonesty, or illegality, (iii) the Consultant or Mr. Licata being convicted of or pleading *nolo contendere* to a felony or misdemeanor involving moral turpitude, or (iv) intentional or repeated failure to perform obligations under the Consulting Agreement (*id.*, ¶ 1).

Extreme Cause is defined in the Consulting Agreement as (i) misconduct involving fraud, dishonesty, or illegality, or (ii) the Consultant or Mr. Licata being convicted of or pleading *nolo contendere* to a felony or misdemeanor involving moral turpitude (*id.*).

The Company alleges that Mr. Licata engaged in fraud with respect to the utility billing by directing employees to use billing codes on their forms that resulted in higher utility billings and then declining to pursue disputed billings, thus leaving the utility billings on the books without writing them off but without collecting balances due. In support of this contention, the Company

submits its accounts receivable for 2014 and 2015 (NYSCEF Doc. Nos. 173-174) which show millions of dollars in accounts receivable in the respective columns for over 120 days, many for invoices dated during 2011 and 2012. The Company also submits a spreadsheet of utility billing it ultimately wrote off, representing more than $5.5 million (NYSCEF Doc. No. 175).

The Company also alleges that Mr. Licata violated the non-solicitation and non-compete provision of the Consulting Agreement by attempting to set up a competing business and soliciting the Company's employees to come work for the competing business. This plan allegedly came to light on December 7, 2015 during a confrontation between Mr. Licata and Mr. Cuzzi. Employees of the Company who witnessed the altercation stated that Mr. Licata said he was leaving the Company and taking the supervisors with him (Colon Aff., NYSCEF Doc. No. 186, exh. 1; McCann Aff., NYSCEF Doc. No. 188, exh. 1; Ficken Aff., NYSCEF Doc. No. 190, exh. 1). Following this confrontation, the Company sent the Termination Notice to Mr. Licata, which state that he was terminated for Extreme Cause.

After the Termination Notice was sent, the Company continued to make payments under the Promissory Note. By letter dated August 2, 2016, the Consultant notified the Company that it had failed to make its payment due July 31, 2016 and that failure to make the payment within 30 days would constitute an event of default (NYSCEF Doc. No. 161). By letter dated September 22, 2016, the Consultant notified the Company that an event of default had occurred and that it was declaring the entire balance of the Promissory Note due and payable (NYSCEF Doc. No. 162). The Consultant also attached a spreadsheet of payments made and balances due under the

Promissory Note, which reflected that, with the exception of a couple months, payments had continued to be made to July 2016 (*id.*).

Discussion

On a motion for summary judgment pursuant to CPLR 3212, a movant must tender proof in admissible form sufficient for the court to direct judgment in its favor as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once such a showing has been made, the party opposing summary judgment produce evidence in admissible form to establish the existence of material issues of fact requiring a trial (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

It is not disputed that the Company made payments to the Consultant until July 2016. Several payments were made after the Company discovered Mr. Licata's alleged fraud with respect to the utility billings and the alleged violation of the non-solicitation and non-compete provision of the Consulting Agreement. Under these circumstances, the Company cannot now assert that it was fraudulently induced to execute the Promissory Note and that it its ratified obligations are void. Summary judgment on the cause of action for the Company's default under the Promissory Note must be granted. However, the Company's obligations under the Promissory Note may be subject to substantial set-off if the Company can prove that Mr. Licata was fired or could have been fired for Cause or Extreme Cause.

As discussed above, on the record before the court, an issue of fact also remains as to whether Mr. Licata was terminated or whether he resigned. Therefore, the Company's cross-motion to

amend its answer based on Mr. Licata's alleged resignation must be granted (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]).

It is accordingly hereby ORDERED that the Consultant and Mr. Licata's motion for partial summary judgment is granted solely to the extent of granting judgment on the cause of action for the Company's default under the Promissory Note and dismissing the Company's counterclaim for recission of the Promissory Note; and it is further

ORDERED that the Company's cross motion to file an amended answer is granted and the Company shall file its amended answer within 20 days of the date of this order; and it is further

ORDERED that the parties shall appear for a pretrial conference on March 31, 2022 at 11:30am.

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1/19/2022
DATE

ANDREW BORROK, J.S.C.

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