SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

----------X

ADAM SNOW FRAMPTON, AIA,

Plaintiff, Decision and order

- against - Index No. 514314/2019

AXIOM CONSTRUCTION CORP.,
and SAMUEL KIM,

Defendants, August 25, 2022

----------X

PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved seeking to amend the complaint pursuant to CPLR §3025. The defendant has cross-moved pursuant to CPLR §3211 seeking to dismiss the complaint. The motions have been opposed respectively. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

According to the Complaint, on September 25, 2018 the plaintiff Adam Snow Frampton the owner of property located at 172 Putnam Avenue in Kings County entered into a contract with defendant Axiom Construction Corp. The contract required the defendant to substantially complete a one family home at the premises within one year. The price for the work was agreed upon at $977,000.71. The plaintiff paid the defendant $232,998.37 and on March 22, 2019 cancelled the contract. The plaintiff requested a return of money which had not been earned and no such return ever took place. The plaintiff initiated this lawsuit and alleged causes of action for breach of contract, conversion,

unjust enrichment, an accounting, fraud and a claim for trust fund diversion. The plaintiff has now moved seeking to amend the complaint to assert a cause of action for trust fund diversion and conversion against Samuel Kim, Axiom's principal. That motion is opposed and the defendants have moved seeking to dismiss some of the original causes of action.

Conclusions of Law

It is well settled that a request to amend a pleading shall be freely given unless the proposed amendment would unfairly prejudice or surprise the opposing party, or is palpably insufficient or patently devoid of merit (Adduci v. 1829 Park Place LLC, 176 AD3d 658, 107 NYS3d 690 [2d Dept., 2019]). The decision whether to grant such leave is within the court's sound discretion and such determination will not lightly be set aside (Ravnikar v. Skyline Credit-Ride Inc., 79 AD3d 1118, 913 NYS2d 339 [2d Dept., 2010]). Therefore, when exercising that discretion the court should consider whether the party seeking the amendment was aware of the facts upon which the request is based and whether a reasonable excuse for any delay has been presented and whether any prejudice will result (Cohen v. Ho, 38 AD3d 705, 833 NYS2d 542 [2d Dept., 2007]).

The defendants argue that there is no case that "ever allowed a Lien Law claim to proceed based on an owner suing a contractor for essentially a refund" (see, Memorandum in Reply,

page 5 [NYSCEF Doc. #34]). However, in Roos v. King Construction, 179 AD3d 857, 116 NYS3d 344 [2d Dept., 2020]) the court acknowledged that "the plaintiff sought cost-of-completion damages and the return of a payment in the sum of $50,000 that, according to the plaintiff, constituted diverted trust funds" (id). The court did hold that "the plaintiff's own submissions raise triable issues of fact as to whether, and to what extent, trust funds may have been diverted by the defendants" (id). In any event, the possibility of asserting a trust fund diversion claim was not in doubt (see, also, 610 Park 8E LLC v. Best & Company Inc., 61 Misc3d 1225(A), 111 NYS3d 807 [Supreme Court New York County 2018]). The case of Teves v. Greenspan, 159 AD3d 1105, 72 NYS3d 191 [3rd Dept., 2018] is instructive. In that case "plaintiff thereafter commenced this action against defendants alleging, among other things, that they failed to deposit and hold in trust $43,333.22 that was advanced on the home construction contract and diverted a portion of these trust funds for expenditures that were unrelated to the project, in contravention of the Lien Law" (id). The court held that "pursuant to Lien Law article 3-a, payments received by a contractor from an owner for a home improvement contract prior to the substantial completion of work pursuant to said contract must be deposited into a trust account" (id). The court did not limit the availability of a diversion of trust fund claim only to cases

where subcontractors are involved. Thus, "Lien Law article 3-A mandates that once a trust comes into existence, its funds may not be diverted for non-trust purposes" (Ippolito v. TJC Development LLC, 83 AD3d 57, 920 NYS2d 108 [2d Dept., 2011]). The defendants argue that rule is only true where the funds are intended for subcontractors. However, as in this case, where there are no subcontractors then the plaintiff cannot move alleging a trust diversion claim. The defendants cite to Langston v. Triboro Contracting Inc., 44 AD3d 365, 843 NYS2d 49 [1st Dept., 2007]. That case held that "the primary purpose of Lien Law article 3-A is to ensure that those who have expended labor and materials to improve real property at the direction of an owner or a general contractor receive payment for the work actually performed...Thus, the issue, in deciding whether there has been a diversion of trust funds, is not whether the funds have been deposited in a bank, but whether the funds have actually been used to pay subcontractors, suppliers and laborers" (id). However, that opinion was distinguished in Ippolito (supra) where the court explained that "case is readily distinguishable from the facts presented here. In Langston, the plaintiff's claim was solely 'that he is entitled to return of the money paid to defendant simply because the money, paid over time with checks, admittedly was never deposited into an escrow account in a bank, as required by Lien Law § 71-a(4), but instead

was immediately cashed' (id. at 365, 843 N.Y.S.2d 49). Here, the plaintiffs' claim relates to the alleged diversion of trust funds, not the mere manner in which the funds were handled" (id). Thus, the language in Langston (supra) concerning "subcontractors, suppliers and laborers" did not foreclose the possibility of a trust diversion claim if those workers are absent. Rather, a trust diversion claim is possible whenever a homeowner's funds are diverted, even if by the contractor himself/herself. Indeed, it makes little sense to permit a homeowner to claim diversion of trust funds where the contractor fails to pay subcontractors but to forbid such claims where the contractor actually diverts the funds themselves. The argument that in the second scenario there are no subcontractors who will make claims against the homeowner does not alter the reality that trust funds have been diverted. It really does not matter if the contractor diverted them by simply not utilizing them for the work they were supposed to perform or failed to pay subcontractors. Moreover, Lien Law §71(2)(f) states that a lien law trust applies to any "payment to which the owner is entitled pursuant to the provisions of section seventy-one-a of this chapter" (id). Lien Law §71-a(4)(a) states that "under a home improvement contract, payments received from an owner by a home improvement contractor prior to the substantial completion of work under the contract shall be deposited within five business

days thereafter by the recipient in an escrow account in a bank, trust company, savings bank, or state or federal savings and loan association, located in this state...Such deposit or deposits shall remain the property of such owner except as otherwise provided herein" (id). Thus, there is no question the claims of trust diversion are valid against Axiom and Kim. While it is true the plaintiff could have filed this claim against Kim sooner, the defendants have failed to demonstrate any prejudice in this regard. Consequently, the motion seeking to amend the complaint to add and enlarge this cause of action is granted. The motion seeking to dismiss this cause of action is denied.

Turning to the motion seeking to add a conversion claim against Kim and to dismiss the conversion claim altogether, where a conversion claim arises from the same circumstances as the breach of contract claim then such conversion claim is duplicative (Connecticut New York Lighting Company v. Manos Business Management Company Inc., 171 AD3d 698, 98 NYS3d 101 [2d Dept., 2019]). "To determine whether a conversion claim is duplicative, courts look both to the material facts upon which each claim is based and to the alleged injuries for which damages are sought" (Medegua LLC v. O'Neill and Partners LLC, 2022 WL 2916475 [S.D.N.Y. 2022]). In this case the breach of contract claim essentially asserts the defendants owe the plaintiff a refund for money the plaintiff paid wherein no work had been

performed by the defendants. The conversion claim seeks a return of funds the plaintiff gave to the defendants in anticipation of the work being performed. Thus, the conversion claim relies upon the same facts as the breach of contract claim and seeks the same damages. Therefore, "if Plaintiff were to recover on each claim, it 'would in effect be paid twice'" (id).

The plaintiff argues that "because Frampton has pled that the Defendants wrongfully and intentionally exercised dominion over Frampton's Deposit and diverted the Deposit for their own gain, the conversion claim is not duplicative of the breach of contract claim" (see, Memorandum in Support and in Opposition, page 8 [NYSCEF Doc. #32]). However, both claims at their core seek a return of the funds. Thus, the plaintiff has essentially failed to present any basis for distinguishing between the two claims. Consequently, the conversion claim is dupliactive of the conversion claim and the motion seeking to dismiss the claim is granted. Further, the motion seeking to amend the complaint in this regard is denied.

Concerning the remaining causes of action, first, such motion is timely. The motion seeking to dismiss the third claim for unjust enrichment is granted. It is well settled that a claim of unjust enrichment is not available when it duplicates or replaces a conventional contract or tort claim (see, Corsello v. Verizon New York Inc., 18 NY3d 777, 944 NYS2d 732 [2012]). As

the court noted "unjust enrichment is not a catchall cause of action to be used when others fail" (id). since a viable claim for breach of contract remains, the claim for unjust enrichment is not proper.

Concerning the cause of action for an accounting, the motion seeking to dismiss that cause of action is granted. It is well settled that "the right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest" (see, Palazzo v. Palazzo, 121 AD2d 261, 503 NYS2d 381 [2d Dept., 1986]). In this case there is no confidential relationship. Rather, the relationship is one whereby there is a claim of money owed. Consequently, the cause of action seeking an accounting is dismissed as well.

Lastly, the motion seeking to dismiss the claim for fraud is granted. It is well settled that to succeed upon a claim of fraud it must be demonstrated there was a material misrepresentation of fact, made with knowledge of the falsity, the intent to induce reliance, reliance upon the misrepresentation and damages (Cruciata v. O'Donnell & Mclaughlin, Esqs,149 AD3d 1034, 53 NYS3d 328 [2d Dept., 2017]). These elements must each be supported by factual allegations containing details constituting the wrong alleged (see, JPMorgan

Chase Bank, N.A. v. Hall, 122 AD3d 576, 996 NYS2d 309 [2d Dept., 2014]).

Concerning the fraud claim, Paragraph 71 of the Proposed Amended Complaint alleges that "upon information and belief, Axiom knowingly and fraudulently inflated the percent of work performed on the Project" (id). That allegation does not specifically allege any representations or omissions at all that could constitute fraud. First, the allegation is entirely conclusory merely noting that the defendants materially misrepresented the work performed. However, no facts whatsoever are presented detailing the misrepresentations. The Proposed Amended Complaint does not provide any accompanying information such as who made the material misrepresentations, when they were made, in what context they were made and how such statements were misrepresentations and how there was reliance upon them. Thus, pursuant to CPLR §3016(b) to plead fraud the complaint must "sufficiently detail the alleged conduct" and contain fact that "are sufficient to permit a reasonable inference of the alleged conduct" (Pludeman v. Northern Leasing Systems Inc., 10 NY3d 486, 860 NYS2d 422 [2010]). There are absolutely no facts supporting allegations of fraud contained in the Proposed Amended Complaint. The allegations merely contain conclusions that fraud was committed without explaining, with the detail required, how such fraud occurred. Thus, a complaint that alleges fraud "absent

specific and detailed allegations establishing a material misrepresentation of fact, knowledge of falsity or reckless disregard for the truth, scienter, justifiable reliance, and damages proximately caused thereby, is insufficient to state a cause of action for fraud" (Old Republic National Title Insurance Company v. Cardinal Abstract Corp., 14 AD3d 678, 790 NYS2d 143 [2d Dept., 2005]).

Moreover, where a claim to recover damages for fraud "is premised upon alleged breach of contractual duties and the supporting allegations do not concern misrepresentations which are collateral or extraneous to the terms of the parties agreement, a cause of action sounding in fraud does not lie" (McKernin v.Fanny Farmer Candy Shops Inc., 176 AD2d 233, 574 NYS2d 58, [2nd Dept., 1991]).

In this case, the fraud claim is wholly duplicative of the breach of contract claim.

Therefore, based on the foregoing the motion seeking to dismiss the fraud claim is granted.

Thus, the only claims that remain are breach of contract against Axiom and a trust fund diversion claim against Axiom and Kim.

So ordered.

ENTER:

DATED: August 25, 2022
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC