

**1461-1469 Third Ave. Owner LLC v Lux Group
Holdings Ltd**

2023 NY Slip Op 33253(U)

September 19, 2023

Supreme Court, New York County

Docket Number: Index No. 652652/2022

Judge: Barry Ostrager

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**SUPREME COURT OF THE STATE OF NEW
YORK NEW YORK COUNTY**

PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

-----X	INDEX NO. 652652/2022
1461-1469 THIRD AVE. OWNER LLC,	MOTION DATE
Plaintiff,	MOTION SEQ. NO. 001
- v -	
LUX GROUP HOLDINGS LTD, and RON SHEMESH,	
Defendants.	DECISION + ORDER ON MOTION

-----X
HON. BARRY R. OSTRAGER

The Court heard oral argument on September 19, 2023, via Microsoft Teams, on the motion by plaintiff 1461-1469 Third Ave. Owner LLC (“Owner” or “plaintiff”) to dismiss the counterclaims filed by defendants Lux Group Holdings Ltd (“Lux”) and its principal Ron Shemesh. In accordance with the September 19, 2023 transcript of proceedings, and as set forth herein, the motion is granted in part and denied in part.

This action by Owner relates to its construction of a luxury high-rise condominium building at its property located at 1461-1469 Third Avenue, NY, NY (the “Property”). Owner retained defendant Lux, a furniture and home furnishings manufacturing company, and its principal to complete work at the Property pursuant to a written contract, as amended (“the Contract”, NYSCEF Doc. Nos. 33 and 34). Owner has asserted claims for breach of contract against Lux and fraud against the principal, seeking damages in excess of \$5 million (NYSCEF Doc. 1). Defendants have asserted eight counterclaims in their Answer (NYSCEF Doc. No. 24). Owner seeks to dismiss the first seven of the eight counterclaims pursuant to CPLR 3211(a)(1) and (7) based on documentary evidence and failure to state a cause of action.

The standard for such a motion is well established. Under CPLR § 3211(a)(7), this Court is tasked with determining whether, after affording the pleadings a liberal construction and accepting the allegations in the Complaint as true, “the facts as alleged fit within any cognizable legal theory ... Under CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” *Leon v Martinez*, 84 NY2d 83, 87-88 (1994) (citations omitted).

The Court grants in part and denies in part plaintiff Owner’s motion to dismiss defendants’ counterclaims. The motion is procedurally proper. While it is true that plaintiff stipulated to allow defendants’ new counsel to amend the Answer to assert counterclaims (NYSCEF Doc. No. 21), plaintiff did not unambiguously waive its right to respond to the counterclaims with a motion to dismiss. As to the merits of the eight counterclaims asserted, the Court holds as follows.

The Court denies dismissal of the First Counterclaim sounding in breach of contract. The claim has been adequately pled, including allegations of notice, and issues exist as to whether exceptions exist to the waiver clause in the parties’ Contract that fall within the scope of the exceptions in *Corinno Civetta Constr. Corp. v. City of New York*, 67 N.Y.2d 297 (1986).

The Court dismisses the Second Counterclaim entitled “Time Impact Claim.” The essence of the claim is that the Owner’s conduct contributed to delays that caused defendants to incur damages. The claim falls within the breach of contract claim and is dismissed as duplicative.

The Court dismisses the Third Counterclaim for Account Stated. This is not a case where the defendant contractor sent bills that were not disputed but were simply not paid. In any event,

any claims properly based on an account stated theory can be asserted in the context of the breach of contract counterclaim.

The Court denies dismissal of the Fourth Counterclaim alleging a breach of the New York Prompt Payment Act. Issues exist as to whether the terms of the Prompt Payment Act (“PPA”) and the Contract are at odds with one another and which takes precedence. The documentary evidence fails to establish as a matter of law at the pleading stage that no claim under the PPA has been stated.

The Court denies dismissal of the Fifth Counterclaim sounding in unjust enrichment. Liberally construing the pleadings, the Court finds that the counterclaim states a claim beyond the four corners of the written Contract. Defendants allege that plaintiff Owner misrepresented and falsely marketed the Project and billed as if luxury products had been supplied by Lux but asked Lux to use (and paid Lux less for) inferior products. Defendants argue that Owner was able to use Lux’s reputation for luxury goods to secure a higher price for itself and that Owner retained the benefit of Lux’s work and international reputation and the additional profit from the sale of the residential units, at the expense of Lux, and that the benefit to Owner was unjust. The claim has been adequately stated at the pleading stage and is not clearly barred by the terms of the written Contract.

The Court grants dismissal of the Sixth Counterclaim for *quantum meruit*. That claim, to recover the value of work performed, is barred by the existence of the written Contract as it falls directly within the scope of the Contract.

The Court denies dismissal of the Seventh Counterclaim alleging a wrongful termination of the Contract. Liberally construing the pleadings, the Court finds that a claim has been stated.

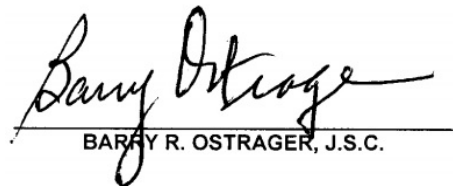
Neither the Owner’s claim of compliance with the contractual notice provisions, nor any of its other arguments, irrefutably establish a defense to the counterclaim as a matter of law.

Plaintiff’s counsel confirmed during the oral argument that it was not seeking to dismiss the Eighth Counterclaim alleging a breach of the New York Trust Fund Act.

Plaintiff shall reply to the remaining counterclaims (the First, Fourth, Fifth, Seventh, and Eighth) within twenty days.

Counsel shall proceed with discovery and schedule depositions as soon as reasonably possible. The Note of Issue deadline is January 5, 2024. A Status Conference is scheduled for November 30, 2023 at 10:00 a.m. via Microsoft Teams. Counsel are urged to pursue a consensual resolution of the case and notify the Court via efiled letter if a referral to ADR is requested.

Dated: September 19, 2023


BARRY R. OSTRAGER, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE