

**JDS Fourth Ave. JV II LLC v Largo 613 Baltic St.
Partners LLC**

2022 NY Slip Op 31379(U)

April 26, 2022

Supreme Court, New York County

Docket Number: Index No. 651948/2020

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. ANDREW BORROK PART 53

Justice

-----X

JDS FOURTH AVENUE JV II LLC, JDS CONSTRUCTION GROUP, LLC, JDS FOURTH AVENUE DEVELOPER LLC

Plaintiff,

INDEX NO. 651948/2020

MOTION DATE 10/21/2021

MOTION SEQ. NO. 003

- v -

LARGO 613 BALTIC STREET PARTNERS LLC, MAXX LLC,

Defendant.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92

were read on this motion to/for DISMISS.

Upon the foregoing documents, Largo 613 Baltic Street Partners LLC’s (**Largo**) motion to dismiss the causes of action for breach of contract (third), promissory estoppel in the alternative (fourth) and unjust enrichment in the alternative (fifth) is denied.

This action concerns the parties’ investment and development of a property located at 613 Baltic Street, Brooklyn, New York (the **Property**), on which an 11-story apartment building now stands (the **Project**). Fourth Avenue JV LLC, an entity that is owned equally by Baltic Fourth LLC and JDS Fourth Avenue LLC (**JDS Fourth**) owns the Property (NYSCEF Doc. No. 20). Initially, JDS Fourth had just one member, JDS Fourth Avenue JV II LLC (**JDS Fourth II**) (NYSCEF Doc. No. 1, ¶ 22). JDS Fourth Avenue Developer LLC (**JDS Developer**) was the developer for the Project and JDS Construction Group LLC (**JDS Construction**) was the general contractor for the Project (*id.*, ¶ 35).

Largo made an equity investment in the Project pursuant to an Amended and Restated Limited Liability Company Agreement of JDS Fourth Avenue LLC (the **LLC Agreement**; NYSCEF Doc. No. 14), dated October 26, 2015, by and between JDS Fourth II and Largo. Per the LLC Agreement, JDS Fourth II received a 51% membership interest in JDS Fourth and Largo received a 49% interest. JDS Fourth II was designated as the company's managing member. The LLC Agreement gave Largo limited rights, including the right to receive distributions of profit to the extent such profits existed. Section 9.3 of the LLC Agreement provided that members could not transfer their interests in JDS Fourth without obtaining the other parties' consent and that any such transfers were void (NYSCEF Doc. No. 14, § 9.3).

While the Project was ongoing, JDS Construction hired Maxx LLC (**Maxx**) as a subcontractor to supply and install windows and terrace doors at the Property. JDS Construction entered into a Contractor Agreement dated June 9, 2016 with Maxx (the **Contractor Agreement**), by which Maxx guaranteed its workmanship for one year, and represented that it had sufficient manpower and equipment to complete its work in accordance with the schedule set forth in the agreement.

On May 26, 2020, the plaintiffs commenced the instant action alleging claims for: (i) breach of the LLC Agreement (JDS Fourth against Largo) for the invalid transfer of its ownership interest in JDS Fourth, (ii) a declaratory judgment that the Largo's transfer of its ownership interest was void, (iii) breach of contract (JDS Construction against Maxx) for failure to perform in accordance with the terms of the Contractor Agreement, (iv) fraudulent inducement (JDS Developer against Largo) regarding a purported loan by JDS Developer to Largo in the amount of \$925,119.39 and in the alternative (v) unjust enrichment (JDS Developer against Largo).

In its Decision and Order dated July 7, 2021 (NYSCEF Doc. No. 55), the Court dismissed the plaintiffs' claims for breach of the LLC Agreement (first), fraudulent inducement (fourth) and unjust enrichment (fifth) against Largo without prejudice. The Court held that the plaintiffs failed to allege any damages stemming from Largo's purported invalid transfer of its ownership interest in JDS Fourth, and that the fraudulent inducement was improper because allegations of a false promise are redundant of a claim for breach of contract (*id.* at 7). The Court also disqualified the Kasowitz Benson Torres law firm from representing Plaintiffs based upon its prior representation of JDS Fourth, which created a conflict of interest (*id.* at 9).

On August 27, 2021, Plaintiffs filed an amended complaint (NYSCEF Doc. No. 69), which asserted the two surviving claims for a declaratory judgment regarding Largo's transfer of ownership interest (first) and Maxx's breach of the Contractor Agreement (second), plus a new claim for breach of contract on JDS Developer's purported loan of \$925,119.39 to Largo (third), and in the alternative, promissory estoppel (fourth) and unjust enrichment (fifth).

Largo now files its motion to dismiss the third, fourth and fifth claims in the amended complaint relating to the purported loan between JDS Developer and Largo in the amount of \$925,119.39.

On a motion to dismiss, the pleading is to be afforded a liberal construction and the court must accept the facts as alleged as true, according plaintiffs the benefit of every possible inference, to determine whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d, 87-88 [1994]). The Court must determine "whether the pleader has a cause of action

rather than on whether he has properly stated one” (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]).

A motion pursuant to CPLR § 3211(a)(1) to dismiss a complaint on the ground that a defense is founded on documentary evidence should only be granted “where the documentary evidence utterly refutes [the] plaintiff’s factual allegations, and conclusively establishing a defense as a matter of law” (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). Although factual affidavits that “do no more than assert the inaccuracy of plaintiffs’ allegations” may not be considered documentary evidence for the purposes of a 3211(a)(1) motion to dismiss, emails may qualify as documentary evidence where they provide “essentially undeniable” support for the motion (*Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc, Inc.*, 120 AD3d 431, 432 [1st Dept 2014]; *Art & Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014]).

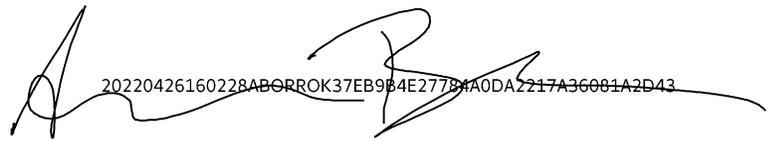
In the instant matter, the emails attached to Mr. Ben-Nun’s affirmation (NYSCEF Docs. No 82-84) do not conclusively refute, as a matter of law, the plaintiffs’ allegations that this distribution was intended to be a loan. There is simply not enough context in the emails for the court to determine whether there were additional oral terms agreed upon by the parties for this “distribution” to be paid back by Largo at some future point, as alleged in the amended complaint (NYSCEF Doc. No. 69, ¶ 57). Perhaps the only thing that is clear from the emails is the urgency with which Largo needed the funds from JDS Fourth. Accordingly, Largo’s motion to dismiss the breach of contract claim (third) is denied.

Accepting the facts in the well pled complaint as true, both of the plaintiffs’ quasi-contractual, alternative causes of action to the breach of contract claim, specifically promissory estoppel (fourth) and unjust enrichment (fifth) are sufficiently pled, and it would be premature to dismiss these causes of action at this stage, since the plaintiffs are entitled to plead alternative and inconsistent causes of action (*Winick Realty Group LLC v Austin & Associates*, 51 AD3d 408 [1st Dept 2008]).

Largo’s remaining contentions are unavailing.

Accordingly, it is

ORDERED that Largo’s motion to dismiss the causes of action for breach of contract (third), promissory estoppel (fourth) and unjust enrichment (fifth) in the amended complaint is denied.



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4/26/2022
DATE

ANDREW BORROK, J.S.C.

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