SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION

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LAM PEARL STREET HOTEL LLC, Plaintiff, - v - GOLDEN PEARL CONSTRUCTION LLC, CNY GROUP LLC,KENNETH COLAO, STEVEN COLAO Defendants.	INDEX NO.	657487/2017
	MOTION DATE	Nov. 2, 2018
	MOTION SEQ. NO.	001 & 002

DECISION AND ORDER

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HON. BARRY R. OSTRAGER:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 41, 45, 47, 48, 49, 50, 51, 52, 60, 61, 66
were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 25, 26, 27, 28, 29, 30, 42, 46, 53, 54, 55, 56, 57, 58, 62, 63, 67, 68
were read on this motion to/for DISMISS.

HON. BARRY R. OSTRAGER:

Plaintiff Lam Pearl Street Hotel LLC ("Lam") is the owner and developer of a construction project located at 215 Pearl Street, New York, New York (the "Project"). Plaintiff retained Defendant Golden Pearl Construction LLC ("GPC") as the general contractor for the Project. Lam brought this action alleging breach of the covenant of good faith and fair dealing, fraudulent inducement, unjust enrichment, and conversion. Defendants move to dismiss the complaint pursuant to CPLR § 3211(a)(1) and (a)(7). Defendants' motions are both granted.

Background

In 2013, Lam and GPC entered into a written contract (the "Pearl Street Contract") whereby GPC would construct the Project for a sum of $54,274,840. The parties encountered

difficulties on the Project and ultimately entered into a Settlement Agreement and Termination Agreement that, *inter alia*, terminated the Pearl Street Contract, exchanged broad releases of claims, and provided for Lam to pay GPC $689,636.

Lam alleges that, pursuant to the Pearl Street Contract and applicable New York City Department of Buildings rules, GPC was required to procure "project-specific" insurance for the Project. Project-specific insurance would be dedicated solely to covering the Project rather than being split among GPC's various ongoing construction projects and, Lam alleges, would run with the life of the Project regardless of the contractor on the Project. GPC's first billing statement to Lam allegedly included the $1,138,103 insurance cost for the Project. Consistent with industry practice, Lam allegedly pre-paid the full insurance premium to GPC, which was intended to pay for all insurance costs for the duration of the Project.

Lam alleges that GPC instead used its "practice policy" which would cover the Project in addition to GPC's other ongoing construction projects. Practice policy premiums, such as GPC's, are purportedly refundable and only require a contractor to pay the premiums as projects proceed.

In agreeing to the Termination Agreement, which ended the parties' relationship with respect to the Project, Lam alleges that it relied upon GPC's representation that it had obtained project-specific insurance for the Project. Lam claims that GPC purposefully misrepresented information regarding the practice policy it had actually used to cover the Project, knowing that GPC would receive a refund of some portion of that $1,138,103 insurance premium if GPC's involvement with the Project terminated.

After the Pearl Street Contract was terminated pursuant to the Termination Agreement, the insurance carrier allegedly refunded $931,916 to GPC. GPC never informed Lam that it

received or retained a refund on the insurance premium. Lam subsequently obtained other insurance for the Project and commenced this action, despite broad releases in the Termination Agreement, to recover the refunded insurance premium and Defendants subsequently moved to dismiss the complaint.

Discussion

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction .... 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 N.Y.2d 83, 87-88 (1994).

GPC argues that the implied covenant of good faith and fair dealing cannot be used to circumvent the clear and unambiguous terms of the Termination Agreement to require GPC to pay the alleged refund to Lam. The Termination Agreement does not explicitly mention anything regarding insurance premiums, however, it does contain a broad, general release of GPC's liabilities as to Lam. The Termination Agreement states:

> Lam Pearl releases GPC and its officers, directors, members, agents, affiliates and subsidiaries from and against *any and all liabilities*, damages, promises, covenants, agreements, causes of action, judgments, claims, or determinations, in law or in equity, or any costs or expenses, inclusive of legal fees, *whether known or unknown arising out of or related to work performed* under the Trade Contracts, responsibility for ongoing operations including conditions at the Project site, and any warranties or guarantees of GPC under the Contract. (emphasis added).

Lam argues in opposition that it is not re-writing the Termination Agreement, but rather seeking the benefits to which it is entitled because GPC failed to disclose that it did not procure the legally required project-specific insurance.

"[W]hen parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms." *W.W.W. Assoc., Inc. v. Giancontieri*, 77

N.Y.2d 157, 162 (1990). "The meaning and coverage of a general release depends on the controversy being settled and upon the purpose for which the release was actually given." *Lefrak SBN Assoc. v. Kennedy Galleries, Inc.*, 203 A.D.2d 256, 257 (2d Dep't 1994).

Here, Lam entered into the Termination Agreement and Settlement Agreement—terminating the Pearl Street Contract and providing for a settlement payment to GPC—allegedly under the false belief that GPC had procured project-specific insurance in accordance with the Pearl Street Contract and applicable City of New York rules. Lam asserts that it pre-paid GPC for the purpose of purchasing project-specific insurance which would purportedly run with the life of the Project regardless of the general contractor working on the Project. There is evidence in the record indicating that Lam could have learned that GPC had used the pre-paid funds to cover GPC's practice policy instead of a project-specific insurance premium, but Lam contends it took no notice of the single sheet of paper indicating the type of insurance GPC purchased.

After the parties terminated their relationship, GPC allegedly received a premium refund of over $900,000. Lam, meanwhile, did not receive the project-specific insurance covering the life of the Project it claims it was led to believe GPC had procured before the parties entered into the Termination Agreement and Settlement Agreement. While these agreements do not explicitly address the insurance premium—and thus there is no breach of contract claim asserted—the agreements both contain broad releases of all claims, whether known or unknown, arising out of work performed for the Project. If the parties had intended to limit the scope of the release, particularly as to insurance related claims, the Termination Agreement would have stated such in explicit terms. Ultimately, however, the parties terminated their relationship and exchanged broad releases covering all claims related to the Project. For this reason, Plaintiff's breach of the

implied covenant claim is precluded by the release in the parties' Termination Agreement and must therefore be dismissed.

Plaintiff's other causes of action must be dismissed as well. Reformation is generally considered an extraordinary remedy designed to affect an alleged oral agreement of parties when the written agreement does not reflect the alleged oral agreement. *Chimart Associates v. Paul*, 66 N.Y.2d 570, 574 (1986). Here, reformation is an unnecessarily extraordinary remedy and the conduct complained of does not rise to the level of fraudulent inducement as alleged by Plaintiff that would call for reformation as a proper remedy.

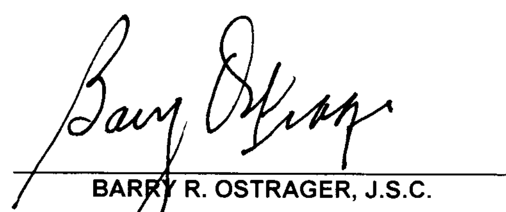
Plaintiff's unjust enrichment claim is dismissed because it is barred by the existence of the Termination Agreement and Settlement Agreement. *See Clark-Fitzpatrick Inc. v. Long Island Rail Road Co.*, 70 N.Y.2d 382, 388 (1987) ("The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter.").

Plaintiff's conversion claim is dismissed. "Conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession." *Colavito v. New York Organ Donor Network, Inc.*, 8 N.Y.3d 43, 49-50 (2006). Here, the subject monies were voluntarily paid by Lam to GPC to cover insurance premiums, and therefore the possession of the funds by GPC was authorized.

Finally, Defendants Kenneth Colao, Steven Colao, and CNY Group LLC ("CNY"), alleged principals of GPC, move to dismiss the Plaintiff's veil piercing theory of liability. Having dismissed all the underlying causes of action against GPC, this motion to dismiss is granted as well.

Accordingly, it is hereby

ORDERED that Defendants' motions to dismiss are granted. The Clerk is directed to dismiss the Defendants from the action and enter judgment accordingly.



11/7/2018
DATE

BARRY R. OSTRAGER, J.S.C.

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