SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

FLEET FINANCIAL GROUP, INC.,	:	
	:	
Plaintiff,	:	
	:	
-against-	:	Index No. 700480/12
	:	
THE LESSARD ARCHITECTURAL GROUP, INC. a/k/a THE LESSARD ARCHITECTURAL GROUP, INC., P.C., LESSARD GROUP, INC., LESSARD DESIGN, INC., and L DESIGN GROUP, INC.,	:	
	:	
Defendants.	:	
	:	
THE LESSARD ARCHITECTURAL GROUP, INC. a/k/a THE LESSARD ARCHITECTURAL GROUP, INC., P.C.,	:	
	:	
Third-Party Plaintiff,	:	
	:	
-against-	:	
	:	
RICHARD XIA, JIQING YUE, X & Y DEVELOPMENT GROUP, LLC and SAMUEL DEVELOPMENT GROUP, LLC,	:	
	:	
Third-Party Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS BY PLAINTIFF AND THIRD-PARTY DEFENDANTS

MORRISON COHEN LLP
909 Third Avenue
New York, NY 10022
(212) 735-8600

Attorneys for Plaintiff and Third-Party Defendants

Of Counsel: Mary E. Flynn
Jay R. Speyer
Christopher A. Villanti

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Plaintiff Fleet Financial Group, Inc. ("Fleet" or "Plaintiff") and Third Party Defendants Richard Xia ("Xia"), Jiqing Yue ("Yue"), X & Y Development Group, LLC ("X & Y") and Samuel Development Group, LLC ("Samuel Development", together with Xia, Yue and X & Y, the "Third Party Defendants"), by their attorneys, Morrison Cohen LLP, respectfully submit this memorandum of law in support of their motion, pursuant to CPLR 3211(a)(1), 3211(a)(2), 3211(a)(4) and 3211(a)(7), to dismiss each of the counterclaims set forth by Defendant-Third Party Plaintiff The Lessard Architectural Group, Inc. a/k/a The Lessard Architectural Group, Inc., P.C. ("Lessard") in its Answer, each of the causes of action set forth by Lessard in its Third Party Complaint, and the counterclaim set forth by Defendant Lessard Group, Inc. ("Lessard Group") in their entirety, with prejudice.[1]

PRELIMINARY STATEMENT

This action concerns a dispute between the parties arising out of an agreement between Fleet, a New York entity, and Lessard, a Virginia architectural firm, for the provision of certain architectural, design and construction services related to real property owned by X & Y that is located at 42-23, 42-25 and 42-27 Union Street, Flushing, New York 11355 (the "Property"). Lessard already has a lien foreclosure action pending in this Court before Justice Taylor (the "Lien Foreclosure Action") in which it is seeking to recover damages in the amount that it claims it is due pursuant to such agreement. Fleet's complaint in the Action sets forth claims against Lessard, Lessard Group, Lessard Design, Inc. and L Design Group, Inc. (against whom the claims have been discontinued) for breach of contract, fraud in the inducement, negligent misrepresentation and professional negligence arising out of Lessard and/or Lessard

[1] All capitalized terms not otherwise defined herein shall have the same meaning as set forth in the accompanying affirmation of Jay R. Speyer.

Group's failure to complete, or perform satisfactorily, certain architectural services pursuant to the parties' agreement. In the Lessard Answer and Third Party Complaint, Lessard sets forth nearly identical counterclaims and third party claims for the following: (1) breach of contract; (2) unjust enrichment; (3) breach of intellectual property rights, including a request for preliminary and permanent injunctive relief and statutory damages; (4) intentional misrepresentation and fraud; and (5) contractual indemnification. Lessard Group sets forth one counterclaim against Fleet, which closely mimics the claims for breach of intellectual property rights set forth in Lessard's Answer and Third Party Complaint. Fleet and Third Party Defendants respectfully submit that these counterclaims and third party claims asserted by Lessard and Lessard Group, should be dismissed in their entirety.

As detailed below, dismissal is warranted based on several separate and independent grounds. First, Lessard's breach of contract, unjust enrichment and fraud claims should be dismissed pursuant to CPLR 3211(a)(1), (a)(4) and (a)(7) as it is clear that these claims relate to, and seek the recovery of, the same debt that is currently at issue in the Lien Foreclosure Action in flagrant violation of Real Property and Proceedings Law Section 1301(3). Pursuant to well settled New York law, and as already recognized by Justice Taylor and the Second Department when Lessard sought to maintain both the Lien Foreclosure Action and a separate action against Fleet and Third Party Defendants in Virginia, Lessard is precluded from maintaining duplicative actions based on the same debt without leave of the Court in which the foreclosure action is pending. Lessard violated RPAPL 1301 by failing to obtain such leave or to disclose the existence of the Lien Foreclosure Action in its pleadings. Second, Lessard's claims for unjust enrichment must be dismissed as such claims cannot stand where, as here, there is an express agreement between the parties that governs the compensation that Lessard was to receive

for its services. Third, the claims by Lessard and Lessard Group for breach of intellectual property rights are preempted by the federal Copyright Act and subject to the exclusive jurisdiction of federal courts. Not only does the Court lack subject matter jurisdiction over such claims, but the claims fail as a matter of law regardless. Fourth, Lessard's conclusory claims for fraud and intentional misrepresentation must also be dismissed because such claims are duplicative of Lessard's breach of contract claims and, in any event, Lessard fails to plead such causes of action with the requisite particularity. Finally, Lessard's bare-bones claim for contractual indemnification must be dismissed pursuant to CPLR 3211(a)(1) and (a)(7). Pursuant to New York law, which governs the Agreement as it is a construction contract, and the language of the Agreement itself, it is clear that the indemnification provisions in the Agreement, do not cover claims between the parties or allow for the recovery of attorneys' fees in connection with legal actions between the parties. Even if such recovery were otherwise allowed, which it is not, Lessard's indemnification claims still fail as a matter of law because Lessard fails to plead, as it cannot, that the indemnification provisions at issue have even been triggered.

Accordingly, for the reasons set forth herein and in the accompanying affirmation, together with the exhibits annexed thereto, the claims asserted by Lessard and Lessard Group should be dismissed and the Motion should be granted in its entirety.

STATEMENT OF FACTS

The relevant allegations and facts at issue in connection with the Motion are set forth in detail in the accompanying Affirmation of Jay R. Speyer, dated July 2, 2012 (the "Speyer Aff."), which is incorporated herein by reference, together with the exhibits annexed thereto. The facts and allegations will not be repeated herein, but will be discussed in the context of the legal arguments which follow.

ARGUMENT

I.

FLEET AND THIRD PARTY DEFENDANTS MEET THE APPLICABLE STANDARDS WITH RESPECT TO THE SEPARATE AND INDEPENDENT GROUNDS FOR DISMISSAL SET FORTH HEREIN

Fleet and Third Party Defendants set forth separate and independent legal grounds in support of their motion to dismiss the various causes of action and counterclaims asserted by Lessard and Lessard Group in this action. As set forth below, several of the claims are subject to dismissal pursuant to CPLR 3211(a)(7) because the pleadings fails to state a cause of action cognizable at law even when liberally construed and assuming the allegations in the pleading as true, except for those flatly contradicted by documentary evidence or that are inherently incredible. See 7 Weinstein-Korn-Miller, N.Y. CIV. PRACTICE ¶ at 3211.36 (2d ed. 2005). A grounds for dismissal of the intellectual property claims is that this Court lacks subject matter jurisdiction thus warranting dismissal pursuant to CPLR 3211(a)(2). Dismissal of several of Lessard's claims is also warranted pursuant to CPLR 3211(a)(4) and/or based on documentary evidence pursuant to CPLR 3211(a)(1).[2]

Dismissal pursuant to CPLR 3211(a)(1) is appropriate "where documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." Goldman v. Metropolitan Life Ins. Co., 5 N.Y.3d 561, 571, 807 N.Y.S.2d 583, 586 (2005); Leon v. Martinez, 84 N.Y.2d 83, 88, 614 N.Y.S.2d 972, 974 (1994); see Beal Sav. Bank v. Sommer, 8 N.Y.3d 318, 834 N.Y.S.2d 44 (2007) (dismissing breach of contract action where contract provisions precluded claims). A motion under CPLR 3211(a)(1) is essentially the same kind of hearing as upon a summary judgment motion when proof outside the pleadings is submitted, and

[2] The relevant standards for dismissal pursuant to CPLR 3211(a)(2) and (a)(7) are not discussed at length herein as they are self-evident and well known. For the sake of efficiency, Fleet and the Third Party Defendants thus only address at length the legal standards with respect to CPLR 3211(a)(1) and (a)(4) herein.

similar standards govern what constitutes "documentary evidence" and the amount of proof required to raise a triable issue for trial. Weinstein-Korn-Miller, N.Y. CIV. PRACTICE at ¶ 3211.06. The term "documentary evidence" has broad application under the section, and there are no specific limits as to the form or character of the documents. Id.

Allegations consisting of bare legal conclusions and setting forth factual claims which are inherently incredible or flatly contradicted by documentary evidence are not entitled to any of the standard considerations afforded to a plaintiff on a motion to dismiss (i.e., an assumption that all material allegations of the pleading are true and the benefit of reasonable inferences that can be drawn therefrom). Sterling Fifth Assocs. v. Carpentille Corp., 9 A.D.3d 261, 261-62, 779 N.Y.S.2d 485, 486 (1st Dep't 2004); Robinson v. Robinson, 303 A.D.2d 234, 235, 757 N.Y.S.2d 13, 15 (1st Dep't 2003) ("the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts"). Where there is a complete defense as to any cause of action based on documentary evidence, proving that a party does not have and/or cannot prove a viable cause of action, the claim must be dismissed. See Kaufman v. International Business Machines Corp., 61 N.Y.2d 930, 474 N.Y.S.2d 721 (1984).

"Pursuant to CPLR 3211(a)(4), a court has broad discretion as to the disposition of an action when another action is pending and may dismiss one of the actions where there is a substantial identity of the parties and causes of action." See Simonetti v. Larson, 44 A.D.3d 1028, 1028, 845 N.Y.S.2d 369, 370-371 (2d Dep't 2007) (citations omitted). With respect to the identity of the parties, "[s]ubstantial, not complete, identity of parties is all that is required to invoke CPLR 3211(a)(4) . . . [and] generally is present when at least one plaintiff and one defendant is common in each action." See, e.g., Ferolito v. Vultaggio, Index No. 100568/11,

N.Y. Misc. LEXIS 3073, at *12 (Sup. Ct. New York Co. June 24, 2011) (citations omitted). To warrant dismissal, the two actions need only be "sufficiently similar and the relief sought . . . substantially the same." See Simonetti, 44 A.D.3d at 1029, 845 N.Y.S.2d at 371 (citations omitted). "It is not necessary that the precise legal theories presented in the first action also be presented in the second action[.]" See Cherico, Cherico & Assocs. v. Midollo, 67 A.D.3d 622, 886 N.Y.S.2d 914 (2d Dep't 2009) (citations omitted). Indeed, the "critical element is that both suits arise out of the same subject matter or series of alleged wrongs." See Cherico, 67 A.D.3d at 622, 886 N.Y.S.2d at 914 (citations omitted); JC Mfg., Inc. v. NPI Electric, Inc., 178 A.D.2d 505, 506, 577 N.Y.S.2d 145, 146 (2d Dep't 1991) (affirming dismissal of certain counterclaims and third-party claims because the "pleadings in both actions show that both are based on the same contractual agreements and arise out of the same actionable wrongs").[3] As CPLR 3211(a)(4) is applicable to situations where competing actions arise out of the same subject matter or series of wrongs, "a motion made pursuant to CPLR 3211(a)(4) should be granted where an identity of parties and causes of action in two simultaneously pending actions raises the danger of conflicting rulings relating to the same matter." See, Ferolito, 2011 NY Slip Op 31700U, at * 8, 2011 N.Y. Misc. LEXIS 3073, at * 9.

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[3] According to a well known treatise, to demonstrate similarities in causes of action for purposes of CPLR 3211(a)(4):

> It need not be shown that [the actions] pursue the same theories. A plaintiff can unreasonably burden a defendant with a series of suits emanating from a single wrong merely by basing each suit on a different theory of recovery. The criterion should invite a two-pronged inquiry: (1) do both suits arise out of the same actionable wrong or series of wrongs? and (2) as a practical matter, is there any good reason for two actions rather than one being brought in seeking the remedy?

7B Siegel, Practice Commentaries, McKinney's Consolidated Laws of N.Y., CPLR C3211:15, at 29 (2005).

II.

LESSARD'S CLAIMS FOR BREACH OF CONTRACT, UNJUST ENRICHMENT AND FRAUD ARE BARRED AS IT ALREADY HAS A LIEN FORECLOSURE ACTION PENDING IN THIS COURT AND MAY NOT PROCEED WITH TWO DIFFERENT ACTIONS TO COLLECT ON THE SAME DEBT

Lessard's causes of action for breach of contract, unjust enrichment and intentional misrepresentation/fraud, all of which seek the recovery of the purported value of its services that were provided to Plaintiff (see Speyer Aff., Ex. C ¶¶ 84, 108-19, 125-35, 139-64, 176-86; Ex. D ¶¶ 2, 25-35, 40-51, 55-80, 92-102), are precluded based upon well settled New York law due to the existence of the lien foreclosure action that is currently pending in this Court. (See id. at ¶ 13; Ex. H.) RPAPL § 1301 provides as follows, in relevant part:

> 2. The complaint shall state whether any other action has been brought to recover any part of the mortgage debt, and, if so, whether any part, has been collected.
>
> 3. While the action is pending or after final judgment for the plaintiff therein, no other action shall be commenced or maintained to recover any part of the mortgage debt, without leave of the court in which the former action was brought.

RPAPL § 1301 (2012). Such statute is applicable to mechanic's lien foreclosure actions. N.Y. Lien Law § 43 (2012). Accordingly, dismissal of Plaintiff's First, Second and Fourth Causes of Action, as well as its First, Second and Fourth Counterclaims, all of which are precluded by RPAPL 1301, is warranted pursuant to CPLR 3211(a)(1), (a)(4) and (a)(7).

As Lessard expressly conceded in its papers in the Lien Foreclosure Action when it moved to stay such action in favor of the Virginia Action it had previously commenced, it is axiomatic that "a party may not maintain separate actions for breach of contract and lien foreclosure arising out of the same debt/transaction." (Speyer Aff. ¶¶ 15-16; Ex. J, Seiden Aff. at ¶¶ 7, 32.) Specifically, in its affirmation in support of its Stay Motion pending the resolution of

the Virginia Action[4] that Lessard later nonsuited, Lessard expressly stated as follows:

> . . . It is respectfully submitted that as RPAPL § 1301(3) prohibits Lessard from *maintaining* two (2) actions to collect on the same debt from XY Defendants . . .

(Id., Ex. J at ¶ 28.) (Emphasis in original.) This principle is well settled pursuant to New York law. See Aurora Loan Servs., LLC v. Spearman, 68 A.D.3d 796, 890 N.Y.S.2d 124 (2d Dep't 2009) (complaint dismissed pursuant to RPAPL 1301(3) due to pendency of foreclosure action). Where, as here, a foreclosure action is pending and the party seeking to foreclose does not obtain court approval to bring other claims on the mortgage debt while the foreclosure action is pending, dismissal is appropriate. See Security National Servicing Corp. v. Liebowitz, 281 A.D.2d 615, 722 N.Y.S.2d 69 (2d Dep't 2001) (dismissal warranted pursuant to RPAPL 1301(3) as plaintiff did not obtain court approval prior to bringing claims on the mortgage debt while a foreclosure action was already pending); see also Westnine Associates v. West 109th Street Associates, 247 A.D.2d 76, 78, 677 N.Y.S.2d 557, 558 (1st Dep't 1998) (reflecting lower court decision to dismiss guarantee action where foreclosure action was pending on the same debt).

Notwithstanding that it cannot maintain two actions to recover on the same debt at the same time, Lessard, as it did before with respect to the Lien Foreclosure Action and Virginia Action, now seeks to litigate claims concerning the same debt, and seeking the same damages, at the same time, in violation of well settled law. Here, there can be no doubt that Lessard seeks to recover the same exact damages in connection with its breach of contract, fraud and misrepresentation, and unjust enrichment claims as it is seeking to recover in the Lien

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[4] As the complaint, affirmation and decisions in the Lien Foreclosure Action are not only appropriate documentary evidence, but also matters of public record, the Court may take judicial notice of such documents. See Siwek v. Mahoney, 39 N.Y.2d 159, 163, 383 N.Y.S.2d 238, 240 (1976) ("[d]ata culled from public records is, of course, a proper subject of judicial notice"); Starbare II Partners, L.P. v. Sloan, 243 A.D.2d 309, 663 N.Y.S.2d 35 (1st Dep't 1997) (Court took judicial notice of a publicly recorded document); Brandes Meat Corp. v. Cromer, 146 A.D.2d 666, 667, 537 N.Y.S.2d 177, 178 (2d Dep't 1989) ("this court may ... take judicial notice of matters of public record").

Foreclosure Action. Indeed, it expressly states that such causes of action are to recover, in whole or in part, the value of the services it alleges were provided to Fleet. (Speyer Aff., Ex. C ¶¶ 84, 108-19, 125-35, 139-64, 176-86; Ex. D ¶¶ 2, 25-35, 40-51, 55-80, 92-102.) Accordingly, the relief being sought is the same. Allowing both proceedings to proceed, especially where the issues in both are similar, (see Speyer Aff. Ex. C, ¶¶ 84, 100-02, 105-12, 116-19, 124, 126-31, 133, 139-64, 176-80; Ex. D, ¶¶ 2, 17-19, 22-29, 33-35, 40, 42-47, 49, 55-80, 92-102; Ex. H. ¶¶ 30-56), and the relief being sought by Lessard in this action is duplicative of the relief it seeks in the Lien Foreclosure Action is further inappropriate due to the risk of inconsistent judgments.

The circumstances at issue here are exactly those to which RPAPL 1301 was intended to be applicable. The policy rationale underlying RPAPL §1301(3) is that the plaintiff must elect its remedy and cannot proceed with two actions to collect a given debt at the same time. See Dollar Dry Dock Bank v. Piping Rock Builders, Inc., 181 A.D.2d 709, 710, 581 N.Y.S.2d 361, 362-363 (2d Dep't 1992) ('the purpose of RPAPL [1301] is to avoid multiple suits to recover the same mortgage debt and confine the proceedings to collect the mortgage debt to one court and one action"). The aim and "legislative purpose is to avoid inappropriate duplicative and vexatious litigation by the same party." Central Trust Co. v. Dann, 85 N.Y.2d 767, 772, 628 N.Y.S.2d 259, 262 (1995). Lessard has not sought leave from Justice Taylor to maintain this action. (Speyer Aff., ¶ 21.) Further, it has failed to state in its counterclaims or Third Party Complaint that it previously commenced an action to recover on the same debt (i.e., the Lien Foreclosure Action"), in violation of RPAPL § 1301(2). (Id.) Accordingly, consistent with such rationale, Lessard's counterclaims and third party claims for breach of contract, fraud, and unjust enrichments must be dismissed pursuant to CPLR 3211(a)(1), (a)(4) and (a)(7).

III.

LESSARD FAILS TO STATE A CLAIM FOR UNJUST ENRICHMENT

Lessard's claims for unjust enrichment (i.e., its Second Counterclaim and Second Cause of Action) must be dismissed as a matter of law pursuant to CPLR 3211(a)(1) and (a)(7). Such claims do not lie if there is an express contract between the parties. Indeed, the legal principle that unjust enrichment claims are improper and must be dismissed where, as here, there was a valid and enforceable written contract governing the subject matter, is beyond reproach. As the Court of Appeals has stated:

> 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 A "quasi contract" only applies in the absence of an express agreement, and is not really a contract at all, but rather a legal obligation imposed in order to prevent a party's unjust enrichment. Indeed, we have stated that: "Quasi contracts are not contracts at all, although they give rise to obligations more akin to those stemming from contract than from tort. The contract is a mere fiction, a form imposed in order to adapt the case to a given remedy ... Briefly stated, a quasi-contractual obligation is one imposed by law where there has been no agreement or expression of assent, by word or act, on the part of either party involved. The law creates it, regardless of the intention of the parties, to assure a just and equitable result."

Clark-Fitzpatrick, Inc. v. Long Island R. Co., 70 N.Y.2d 382, 388-389, 521 N.Y.S.2d 653, 656 (1987) (Citations omitted); see Corsello v. Verizon New York, Inc., 18 N.Y.3d 777, 790, 944 N.Y.S.2d 732, 740 (2012) ("unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim"); IDT Corp. v. Morgan Stanley Dean Witter & Co., 12 N.Y.3d 132, 142, 879 N.Y.S.2d 355, 361 (2009) (quasi-contractual claim of unjust enrichment ordinarily precluded where the parties executed a valid and enforceable agreement governing the subject matter); Barker v. Time Warner Cable, Inc., 83 A.D.3d 750, 923 N.Y.S.2d

118 (2d Dep't 2011) (dismissal of unjust enrichment claim affirmed where unjust enrichment claim arose out of same subject matter governed by contract); Johnson v. Stanfield Capital Partners, LLC, 68 A.D.3d 628, 629, 891 N.Y.S.2d 383, 385 (1st Dep't 2009) (a party may not recover under quasi-contractual theories where the relationship at issue is governed by a contract); Steven Strong Dev. Corp. v. Wash. Med. Assocs., 303 A.D.2d 878, 882, 759 N.Y.S.2d 186, 190-91 (3d Dep't 2003) (without adequately pleading that the contract is unenforceable, recovery based upon unjust enrichment is not available); see also McGimpsey v. J. Robert Folchetti & Assocs., LLC, 19 A.D.3d 658, 659, 798 N.Y.S.2d 498, 500 (2d Dep't 2005) (unjust enrichment claim properly dismissed since "existence of the ... agreement precluded recovery in quasi-contract for events arising out of the same subject matter").

The documentary evidence plainly demonstrates that the parties entered into an agreement dated May 22, 2009, and that this agreement covered the compensation arrangement between Lessard and Fleet.[5] (Speyer Aff., Ex. B). Lessard claims in its pleadings that the parties' compensation arrangements are covered by their agreement. (See id., Ex. C ¶¶ 84, 100-02, 105-15, 127, 140-53; Ex. D ¶¶ 2, 17-19, 22-32, 43, 55-69.) Further, Lessard, in the unjust enrichment claim specifically seeks the value of services which it also claims is due pursuant to the parties' agreement. (See id., Ex. C ¶¶ 85, 100-02, 105-19, 154-64; Ex. D ¶¶ 3, 17-19, 22-35, 70-80.) Dismissal of the unjust enrichment claim is thus appropriate.

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[5] The rule that 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, applies with equal force to non-signatories to the agreement. Vitale v. Steinberg, 307 A.D.2d 107, 111, 764 N.Y.S.2d 236, 239 (1st Dep't 2003) ("the existence of the . . . agreement, an express contract governing the subject matter of plaintiff's claims, also bars the unjust enrichment cause of action as against the individual defendants, notwithstanding the fact that they [are] not signatories to that agreement"); see Bellino Schwartz Padob Adver. v Solaris Mktg. Group, 222 A.D.2d 313, 635 N.Y.S.2d 587 (1st Dep't 1995); Danica Plumbing & Heating LLC v. AMOCO Constr. Corp., 18 Misc. 3d 1137A, 1137A, 859 N.Y.S.2d 893, 893 (N.Y. Sup. Ct. Kings Co. 2008) ("This prohibition against quasi-contractual claims where a written contract exists applies not only to the parties that are in privity of contract, but also to noncontracting parties as well").

IV.

THE INTELLECTUAL PROPERTY CLAIMS SHOULD BE DISMISSED PURSUANT TO CPLR 3211(a)(2) AND (a)(7); THE COURT LACKS SUBJECT MATTER JURISDICTION OVER SUCH CLAIMS AND THEY FAIL AS A MATTER OF LAW

Lessard's counterclaim and third party claim, and Lessard Group's counterclaim, for breach of intellectual property rights, injunctive relief[6] and unspecified statutory damages should be dismissed pursuant to both CPLR 3211(a)(2) and (a)(7).

The Court should dismiss such claims pursuant to CPLR 3211(a)(2) because it "has not jurisdiction" over them. CPLR 3211(a)(2)(2012) There is no subject matter jurisdiction because claims concerning infringement/misappropriation of intellectual property are preempted by the federal Copyright Act (17 U.S.C. § 301) and subject to the exclusive original jurisdiction of federal courts. See 28 U.S.C § 1338 (2012). New York courts recognize such preemption and have, in turn, dismissed such claims, even those that are based on breach of contract or that seek injunctive relief, due to lack of subject matter jurisdiction. Giumenta Corp. v. Desktop Solutions Software, Inc., No. 07-32277, 2012 N.Y. Misc. LEXIS 1643, at ** 2-8 (Sup. Ct. Suffolk Co. Apr. 9, 2012) (counterclaims, including those for misappropriation of intellectual property, breach of contract and injunctive relief relating to the use of intellectual property, dismissed for lack of subject matter jurisdiction as such claims were "predicated upon [the] alleged misappropriation, transfer and unauthorized copying of ... intellectual property" including intellectual property contained on a website); JFA Inc. v. Docman Corp., No. 106739/2009, 2010 N.Y. Misc. LEXIS 4556, at ** 8-9 (Sup. Ct. N.Y. Co. Sep. 21, 2010) (counterclaims alleging intellectual property infringement dismissed due to the Copyright Act's complete preemption of such common law causes of action); Gordon v. Albums, Inc., 19 Misc. 3d 295, 851 N.Y.S.2d

[6] Neither Lessard nor Lessard Group has submitted any evidentiary support in support of, much less yet made a motion in connection with, any claim for injunctive relief. To the extent that such a motion is made in the future, Plaintiff and Third Party Defendants reserve their right to oppose such motion at the appropriate time.

857 (Sup. Ct. Suffolk Co. 2008) (claims, including that for injunctive relief based on alleged continuous use of plaintiff's intellectual property by defendants, dismissed as such claims sought to vindicate rights in the distribution and reproduction of intellectual property and were thus preempted by the Copyright Act and subject to exclusive federal jurisdiction).[7] Intellectual property claims, such as those set forth by Lessard and Lessard Group, "which seek protection of rights equivalent to those exclusively protected by the federal Copyright Act, are preempted by federal statute" and must be dismissed. Giumenta Corp., 2012 N.Y. Misc. LEXIS 1643, at * 4; see JFA Inc., 2010 N.Y. Misc. LEXIS 4556, at * 9 (claims dismissed where "the nature of the allegations in [the] counterclaims ... [were] related to federal law and subject to the jurisdiction of the federal court").

Under the Copyright Act, "a state law claim is preempted by federal copyright law if two conditions are satisfied: (1) the subject matter of the work in which the state law rights are asserted comes within the subject matter of the copyright laws; and (2) the state law rights asserted in the work are equivalent to the exclusive rights protected by the federal copyright laws. See 17 U.S.C. § 301 (2012); Universal City Studios, Inc. v. T-Shirt Gallery, Ltd., 634 F. Supp. 1468, 1474-75 (S.D.N.Y. 1986) (citation omitted); Editorial Photocolor Archives, Inc. v. Granger Collection, 61 N.Y.2d 517, 522-23, 463 N.E.2d 365, 367-68, 474 N.Y.S.2d 964, 966–67 (1984); JFA Inc., 2010 N.Y. Misc. LEXIS 4556, at * 9 ("[t]he Copyright Act exclusively governs a claim for purposes of preemption when (1) particular work to which the claim is being applied falls within the type of works protects by the Copyright Act ... (and (2) the claim seeks to vindicate legal or equitable rights that are equivalent one of a bundle of exclusive rights already

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[7] Moreover, even if New York law did not apply in this case, which it does, the same result would be reached because Virginia utilizes the same test as New York to determine whether or not a state claim is preempted by the federal Copyright Act. See, e.g., Rosciszewski v. Arete Assocs., Inc., 1 F.3d 225, 228–30 (4th Cir. 1993); Wigand v. Costech Techs., Inc., No. 3:07CV440-HEH, 2008 U.S. Dist. LEXIS 743, at ** 23–25 (E.D. Va. Jan. 4, 2008); Microstrategy, Inc. v. Netsolve, Inc., 368 F. Supp. 2d 533, 535–36 (E.D. Va. 2005).

protected by the Copyright Act") (citation omitted).

In connection with the first condition, the subject matter of copyright consists of any "original works of authorship fixed in any tangible medium of expression" and expressly includes "architectural works." See 17 U.S.C. § 102(a) (2012); see also Universal City, 634 F. Supp. at 1475. With regard to the second condition, "'a state right is equivalent to copyright if the state right is infringed by the mere act(s) of reproduction, performance, distribution or display.'" Giumenta Corp., 2012 N.Y. Misc. LEXIS 1643, at ** 6-7 (quoting Universal City, 634 F. Supp. at 1475).

In the present case, it is clear that the vague intellectual property claims of Lessard and Lessard Group are preempted by the Copyright Act and must be dismissed.[8] The drawings, specifications, and other instruments of service which form the bases of such claims constitute the type of "architectural works" that come within the subject matter of federal copyright. See 17 U.S.C. § 102(a) (2012); (see Speyer Aff., Ex.C ¶¶ 86, 120–23, 165–75; Ex. D ¶¶ 4, 36–39, 81–91; Ex. E ¶¶ 86, 118–30.) Likewise, the rights which were allegedly infringed upon by Plaintiff and Third-Party Defendants are equivalent to the rights protected by federal copyright law. The allegations merely involve the wrongful reproduction, misappropriation, and/or use of its instruments of service. Giumenta, 2012 N.Y. Misc. LEXIS 1643, at ** 6–7; (Speyer Aff., Ex. C ¶¶ 86, 120–21, 170; Ex. D ¶¶ 4, 36–37, 86; Ex. E ¶¶ 86, 118, 125.) Further, to the extent that such claims are based, in part, on the parties' agreement and also seek injunctive relief, (see Speyer Aff., Ex. C ¶¶ 86, 120-23, 165-68, 171-75; Ex. D ¶¶ 4, 36-39, 82-

[8] Lessard and Lessard Group allege that their intellectual property rights are protected by an unspecified statute that bars the use of their intellectual property by Fleet and Third Party Defendants, and seeks unspecified statutory damages in connection with same, in addition to monetary damages and injunctive relief. (See Speyer Aff., Ex. C ¶¶ 86, 120, 169, Prayer for Relief; Ex. D ¶¶ 4, 36, 85, Prayer for Relief; Ex. E ¶¶ 87, 118, 124, Prayer for Relief.) Plaintiff and Third Party Defendants submit that Lessard and Lessard Group have failed to identify the statute at issue in an attempt to avoid dismissal as it is clear that the only potentially applicable statute is the Copyright Act.

84, 87-91; Ex. E ¶¶ 86-87, 120-23, 126-30), it is well settled that dismissal is still appropriate preemption still applies. See Giumenta Corp. 2012 N.Y. Misc. LEXIS 1643, at ** 2-8; Gordon, 19 Misc. 3d at 297, 299-300, 851 N.Y.S.2d at 858-861. Thus, it is apparent that Lessard's infringement claims are precisely the type of claims that are preempted by the Copyright Act.

Even if the Court did have jurisdiction over the relevant infringement claims, which it does not, Lessard and Lessard Group, nonetheless, fail to state a claim for intellectual property infringement under the Copyright Act. To establish a claim for infringement under the Copyright Act, a party must demonstrate: (1) ownership over the allegedly infringed material; and (2) that the alleged infringers violated one of the copyright owner's exclusive rights under §106(3) of the statute which deals with distribution of the work "to the public by sale or other transfer of ownership or by rental, lease, or lending." See 17 U.S.C. § 106(3)(2012); see also Myplaycity, Inc v. Conduit, Ltd., No. 10 Civ. 1615 (CM), 2012 U.S. Dist. LEXIS 47313, at * 35 (S.D.N.Y. Mar. 30, 2012); Zappa v. Rykodisc, Inc., 819 F. Supp. 2d 307, 315 (S.D.N.Y. 2011). The infringement claims clearly fail the second prong of this test. Although Lessard and Lessard Group allege that Plaintiff and Third-Party Defendants are wrongfully using its instruments of service, (see Speyer Aff., Ex. C ¶¶ 86, 120, 170; Ex. D ¶¶ 4, 36, 86; Ex. E ¶¶ 86, 118, 125), these allegations are conclusory as there is no factual detail at all as to the circumstances involved in the alleged wrongful use nor exclusive right to sell or transfer to the public at issue. (Speyer Aff., Ex. C ¶¶ 86, 120–23, 165–75; Ex. D ¶¶ 4, 36–39, 81–91; Ex. E ¶¶ 86, 118–30.)

V.

LESSARD FAILS TO STATE VALID CAUSES OF ACTION FOR INTENTIONAL MISREPRESENTATION AND FRAUD

Lessard's claims for intentional misrepresentation and fraud (i.e., the Fourth Counterclaim in its Answer and the Fourth Cause of Action in the Third Party Complaint, which

are virtually identical and completely identical in substance) must also be dismissed because they are deficient as a matter of law. Not only are Lessard's claims barred because it fails to allege a representation or breach of duty collateral to the Contract (or to seek any damages other than what it claims it is entitled to for breach of contract), but such claims are also barred based upon the integration clause of the Revised Contract. Additionally, even if its fraud claims were otherwise sufficient to state a cause of action, which they are not, the fraud claims must be dismissed based upon a failure to plead particularity as required pursuant to well settled law. Dismissal is thus appropriate pursuant to 3211(a)(1) and (a)(7).

A. Lessard's Fraud Claim Is Duplicative Of Its Contract Claim And Is Based On Alleged Misrepresentations Superseded By The Contract

Under well-established New York law, to state a valid cause of action sounding in fraud, one must allege a breach of duty or misrepresentation extraneous or collateral to the contract between the parties. Yenrab, Inc. v. 794 Linden Realty, LLC, 68 A.D.3d 755, 757, 892 N.Y.S.2d 105, 109 (2d Dep't 2009) ("where '[a] claim to recover damages for fraud is premised upon an alleged breach of contractual duties and the supporting allegations do not concern representations which are collateral or extraneous to the terms of the parties' agreement, a cause of action sounding in fraud does not lie'") (citations omitted); Coppola v. Applied Elec. Corp., 288 A.D.2d 41, 42, 732 N.Y.S.2d 402, 403 (1st Dep't 2001) (fraud claim was properly dismissed where the "claimed fraud was not collateral or extraneous to the contract" and plaintiff "failed to plead a breach of duty separate from a breach of the contract"); Americana Petroleum Corp. v. Northville Indus. Corp., 200 A.D.2d 646, 647, 606 N.Y.S.2d 906, 908 (2d Dep't 1994) (to plead a valid cause of action sounding in fraud, "plaintiff must allege a breach of duty which is collateral or extraneous to the contract between the parties"); Hoydal v. New York, 154 A.D.2d 345, 346, 545 N.Y.S.2d 823, 824 (2d Dep't 1989) (a cause of action will "sound in tort rather

than in contract only when . . . the cause of action is entirely independent of contractual relations between the parties" and plaintiff alleges a "breach of duty extraneous to, or distinct from, the contract between the parties").

Dismissal of fraud claims is appropriate where "the alleged misrepresentations did not result in any loss independent of the damages allegedly incurred for breach of contract." Goldner v. Possilico, 7 A.D.3d 666, 669, 776 N.Y.S.2d 818, 820 (2d Dep't 2004); see Financial Structures Limited v. UBS AG, 77 A.D.3d 417, 419, 909 N.Y.S.2d 45, 47 (1st Dep't 2010) (dismissal warranted where "the fraud cause of action [is] duplicative of the breach-of-contract cause of action, inasmuch as it is based on the same facts that underlie the contract cause of action, is not collateral to the contract, and does not seek damages that would not be recoverable under a contract measure of damages"); Yenrab, Inc., 68 A.D.3d at 757-758, 892 N.Y.S.2d at 109 (dismissal of fraud and fraudulent misrepresentation claims warranted where based on the same underlying facts as breach of contract and the alleged misrepresentation amounted to nothing more than a misrepresentation of an intent to perform under the contract)[9]; see also Church of South India Malayalam Congregation of Greater New York v. Bryant Installations, Inc., 85 A.D.3d 706, 707, 925 N.Y.S.2d 131, 132 (2d Dep't 2011) (plaintiff not entitled to default judgment where fraud claim "did not result in any loss independent of the damages

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[9] In Yenrab, Inc., the Second Department stated as follows:

> "[A]lthough an agent for a disclosed principal may be held liable to a third party where the agent has committed fraud ... a cause of action to recover damages for fraud will not arise when the only fraud charges related to a breach of contract." Additionally, although "a misrepresentation of material fact, which is collateral to the contract and serves as an inducement for the contract, is sufficient to sustain a cause of action alleging fraud", "a mere misrepresentation of an intention to perform under the contract is insufficient to allege fraud."

(Citations omitted). Yenrab, Inc., 68 A.D.3d at 757-758, 892 N.Y.S.2d at 109

allegedly incurred for breach of contract").[10] Where, as is the case here, there is no allegation of any "material misrepresentation concerning [an] intention to satisfy a fee obligation collateral or extraneous to the agreement, and the damages that [are sought for fraud and misrepresentation] are the same as the damages recoverable for breach of contract," the fraud/misrepresentation claim should be dismissed. Goldberg & Connolly v. Romano Enterprises of New York, Inc. 78 A.D.3d 772, 772, 910 N.Y.S.2d 383, 384 (2d Dep't 2010).

Here, Lessard's claims of fraud do not allege a representation or breach of duty collateral or extraneous to the Revised Contract. Rather, the following alleged misrepresentations serve as the basis for its fraud and misrepresentation claims:

- Xia and Fleet misrepresented that Fleet was the owner of the Property prior to the parties' entry into their agreement[11] in an attempt to disguise a purported attempt not to pay for the services specified in the contract. (Speyer Aff., Ex. C ¶¶ 126, 128, 130, 177, 179, 180; Ex. D ¶¶ 42, 44, 46, 93, 95, 96.)

- Xia and Fleet made representations that they would be able to pay for the services rendered under the contract and without disclosing that Fleet did not have the financial wherewithal to meet its obligations pursuant to the contract. (Speyer Aff., Ex. C ¶¶ 127, 128, 178, 179, 180; Ex. D ¶¶ 43, 44, 94, 95, 96.)

- Xia and Fleet continued to misrepresent that Fleet would pay for the services rendered pursuant to the contract in an attempt to prevent Lessard from suspending such services. (Speyer Aff., Ex. C ¶¶ 127, 128, 129, 182; Ex. D ¶¶ 43, 44, 45, 98.)

Further, the relief it seeks in connection with these claims is its purported damages related to Fleet's alleged breach of contract. (Speyer Aff., Ex. C, Prayer for Relief, Ex. D, Prayer for Relief.)

Thus, Lessard improperly tries to transform contractual representations – that it

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[10] It is clear that Lessard's claims for punitive damages, which it alleges as part of its fraud claims, must also be stricken upon the dismissal of the fraud claims. See Goldner, 7 A.D.3d at 668, 776 N.Y.S.2d at 820.

[11] Notably, the parties' agreement, which supersedes any representations outside of the agreement, provides that Fleet is "the Architect's client identified as the Owner" for the Project. (Speyer Aff., Ex. B at 1.)

would pay for the services rendered – and its identification as the owner (which it explicitly states relates to Fleet's ability to pay pursuant to the contract) – into purported fraudulent misrepresentations. As New York law does not recognize fraud claims as valid if based on contractual representations, Lessard fails to plead allegations independent of and collateral to Fleet's obligations and representations related to the parties' agreement, Lessard's fraud and misrepresentation claims are fatally defective.

Moreover, to the extent Lessard seeks to rely on any alleged oral or written representations outside of or extraneous to the Agreement (general as such claims are) in an attempt to fabricate some alleged basis for its fraud/misrepresentation claim, New York law clearly precludes it from doing so in light of the integration clause of the agreement. The Agreement specifically provides as follows:

> This Agreement represents the entire and integrated agreement between the Owner and Architect and supersedes all prior negotiations, representations or agreements, either written or oral. This Agreement may be amended only by written instrument signed by both Owner and Architect.

(Speyer Aff., Ex. B § 1.4.1.) New York courts have long held that specific disclaimers of reliance on oral representations bars any fraud claims. Danann Realty Corp. v. Harris, 5 N.Y.2d 317, 320-21, 184 N.Y.S.2d 599, 602 (1959) (a specific disclaimer of reliance on any oral representations "destroys the allegations in plaintiff's complaint that the agreement was executed in reliance upon these contrary oral representations"); Citibank, N. A. v. Plapinger, 66 N.Y.2d 90, 95, 495 N.Y.S.2d 309, 312 (1985) ("the substance of defendants' guarantee forecloses their reliance on the claim that they were fraudulently induced to sign the guarantee by [an alleged] oral promise"); Goldberg v. KZ 72nd, 171 A.D.2d 525, 567 N.Y.S.2d 249 (1st Dep't 1991) (a disclaimer of reliance on oral representations bars any claim of fraud based on alleged oral

representations).

As the agreement between the parties supersedes all prior representations, either written or oral, and no amendment to the agreement is valid unless in writing and signed by the parties, then Lessard cannot reasonably or justifiably rely upon any such oral or written representations to support a fraud claim. Without reasonable or justifiable reliance on the purported misrepresentation, an essential element of the fraud claim is missing and the claim is legally defective. Danann Realty, 5 N.Y.2d at 322, 184 N.Y.S.2d at 603. Accordingly, because Lessard fails to allege any misrepresentation outside of the agreement, seeks the same damages it does for breach of contract, and alleges that the fraud arises from Fleet's intention to mislead Lessard into believing it would meet its payment obligations pursuant to the parties' agreement, Lessard cannot and does not plead a valid claim for fraud.

B. Lessard's Fraud Claims Are Also Barred Because It Fails To Plead Such Alleged Fraud With The Requisite Particularity

Even if the above grounds were insufficient to bar Lessard's fraud claims, which they are not, such claims are also barred because Lessard fails to provide the required particularity for such claims pursuant to CPLR 3016. CPLR 3016(b) provides, in relevant part, that "[w]here a cause of action ... is based upon ... fraud ... the circumstances constituting the wrong shall be stated in detail." CPLR 3016(b) (2012). It is well settled that mere conclusory allegations of fraud will not suffice under such rule. See Precision Concepts, Inc. v. Bonsanti, 172 A.D.2d 737, 569 N.Y.S.2d 124 (2d Dep't 1991); Glassman v. Catli, 111 A.D.2d 744, 489 N.Y.S.2d 777 (2d Dep't 1985). Indeed, among the items that must be plead with particularity are the "specific misstatements" that are alleged to constitute the wrong as well as the specific dates on which such misstatements were made. Moore v. Power Corp, LLC, 72 A.D.3d 660, 661, 897 N.Y.S.2d 723, 725 (2d Dep't 2010); Daly v. Kochanowicz, 67 A.D.3d 78, 90, 884 N.Y.S.2d 144,

153 (2d Dep't 2009) (dismissal affirmed against certain defendants where fraud claim "not pleaded with sufficient particularity ... as there [were] no allegations concerning specific misrepresentations, who made such misrepresentations and when they were made"); McGovern v. T.J. Best Building and Remodeling, Inc., 245 A.D.2d 925, 927, 666 N.Y.S.2d 854, 856 (fraud claim dismissed as plaintiff failed to "demonstrate[] with any degree of particularity who said what and when"); New York Fruit Auction Corp. v. City of New York; 81 a.D.2d 159, 161-162, 439 N.Y.S.2d 648, 651 (1st Dep't 1981) aff'd, 56 N.Y.2d 1015, 453 N.Y.S.2d 640 (1982) (complaint held to be deficient as factual details were not pleaded "as to the time and place" of the alleged misrepresentations). To satisfy 3106(b), a claimant must allege sufficient facts to "connect their alleged losses with the alleged fraudulent misrepresentation dates" and plead each of the elements of fraud with particularity, in order to inform each defendant of their specific rules in the incidents at issue. Glassman, 111 A.D.2d at 745, 489 N.Y.S.2d at 778; Rabouin v. Metropolitan Life Ins. Co., 307 A.D.2d 843, 763 N.Y.S.2d 576 (1st Dep't 2003). Lessard has not met this standard and dismissal of its claim is thus warranted on this basis along.

Lessard's conclusory fraud/misrepresentation claims do not allege sufficient detail to withstand a motion to dismiss. Among other things, Lessard does not plead any of the following: (1) the timing, much less specific date and time, of any of the alleged misrepresentations[12]; (2) to whom the alleged misrepresentations were made; and (3) in what manner and via what means the misrepresentations were made. (Speyer Aff., Ex. C ¶¶ 87, 101-02, 124, 126-30, 176-77; Ex. D ¶¶ 5, 18-19, 40, 42-46, 92-93.) Further, it does not provide anything more than conclusory statements as to the alleged knowledge of Fleet and Xia that the alleged misrepresentations were false or as to its reliance on such alleged misrepresentations in

[12] Lessard alleges only that certain purported misrepresentations were made "before the parties entered into a contract" and that Fleet and the third party defendants "continued to knowingly make false representations." (Speyer Aff., Ex. C ¶¶ 177, 182; Ex. D ¶¶ 93, 98.)

order to demonstrate that it was such misrepresentations that caused them to enter into the contract and allegedly sustain damages. (Id., Ex. C ¶¶ 87, 101-02, 124, 126-30, 135, 176-86; Ex. D ¶¶ 5, 18-19, 40, 42-46, 51, 92-102.) Accordingly, Lessard's fraud claims must be dismissed based on its failure to plead such allegations with sufficient particularity.

VI.

LESSARD'S CLAIMS FOR CONTRACTUAL INDEMNIFICATION ARE BARRED BASED UPON THE LANGUAGE OF THE CONTRACT ITSELF

Lessard's contractual indemnification claims must be dismissed pursuant to CPLR(a)(1) and (a)(7). As set forth below, Lessard's indemnification claim is precluded based upon the Agreement and pursuant to well settled law. Although it appears that Lessard has deliberately attempted to keep these allegations vague, likely in an attempt to avoid the very dismissal sought in this Motion, it is clear based upon the allegations that it contends that it is entitled to be indemnified because Fleet allegedly breached the parties' agreement.[13] Such allegations cannot stand.

A. New York Law Governs The Parties' Agreement

New York law governs the construction of the agreement between Lessard and Fleet as the choice of law provision in the agreement itself is void pursuant to New York law. Notwithstanding that the Agreement related to a project in New York City and that pursuant to New York law, the architects working on the project were required to be licensed in New York (see N.Y. Education Law § 7302 (2012)), the Agreement provides that it "shall be governed and construed in accordance with the laws of the Commonwealth of Virginia, without reference to its

[13] Lessard notably fails to attach any agreement to the Complaint, although it does clearly state that the May 22, 2009 agreement governs.

conflict of laws principles. (Speyer Aff., Ex. B § 1.3.4.3.)[14] Such choice of law provision, however, is deemed void pursuant to New York law as the contract is, by its own terms, a construction contract. Section 757 of the General Business Law provides as follows, in relevant part, with respect to construction contracts such as the one at issue here:

> The following provisions of construction contracts shall be void and unenforceable:
>
> 1. A provision, covenant, clause or understanding in, collateral to or affecting a construction contract ... that makes the contract subject to the laws of another state or that requires any litigation, arbitration or other dispute resolution proceeding arising from the contract to be conducted in another state.

N.Y. Gen. Bus. Law § 757 (2012). As the Agreement is a construction contract, New York law governs.[15]

It is clear on its face that the Agreement is a construction contract. Indeed, Lessard concedes as much in its counterclaims and third party complaint. In its counterclaim and Third Party Complaint, Lessard specifically states that "[o]n or after May 22, 2009, Fleet entered into a binding contract with LAG to render construction services with respect to the Property." (Emphasis provided.) (Speyer Aff., Ex. C ¶ 188; Ex. D ¶ 104.) Among other things, Section 1.5 of the Agreement dealing with compensation confirms this fact as it demonstrates that the

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[14] The Agreement also provides that Virginia courts were to have sole jurisdiction over any dispute arising under it. (Speyer Aff., Ex. B § 1.3.4.3.) However, when Lessard nonsuited its claims in the Virginia Action (see id. Ex. M), the parties entered into a subsequent agreement providing that any further claims would be brought in New York courts. (Id. Ex. N.)

[15] New York also has a strong public policy interest in ensuring that its law governs the work of architects conducted in connection with real property in New York, see N.Y. Educ. Law § 7302 ("[o]nly a person licensed or otherwise authorized to practice under this article shall practice architecture or use the title "architect"), especially where the architects are to be responsible for reviewing applicable New York laws, codes and regulations as part of their job responsibilities, (see Speyer Aff., Ex. B § 1.2.3.6). Even if General Business Law § 757 did not apply, which it does, the agreement should be interpreted pursuant to New York law because New York has a fundamental public policy interest in ensuring that the contract is interpreted pursuant to New York law in order to protect its citizens as the Property is located in New York, the architects were required to be licensed in New York, New York regulations had to be met in order for approvals to be granted for the work performed and the architects were required to perform in a manner consistent with the degree and skill of other architects located within New York.

services to be performed by Lessard included construction related services such as providing a "Permit Set Construction Documents" and "Final Construction Documents" as well as "Construction Administration Services" and "Construction Observation Services." (Id., Ex. B § 1.5.1.) Further, General Business Law § 756 provides that a construction contract is defined as follows:

> As used in this article: 1. "Construction contract" means a written or oral agreement for the construction, reconstruction, alteration, maintenance, moving or demolition of any building, structure or improvement, or relating to the excavation of or other development or improvement to land, and where the aggregate cost of the construction project including all labor, services, materials and equipment to be furnished, equals or exceeds one hundred fifty thousand dollars.

N.Y. Gen. Bus. Law § 756 (2012). Here, there is no doubt that the Agreement covered services to be provided with respect to construction related to the development of land and the cost of the anticipated services clearly exceeded $150,000. For all of these reasons, New York law governs the agreement between the parties.

B. It Is Clear The Indemnification Provisions Cited By Lessard Do Not Cover Claims Between The Parties Or Allow For The Recovery Of Attorneys' Fees In Connection With Such Claims

Pursuant to well settled New York law, it is clear that the language of the agreement between the parties bars Lessard's contractual indemnification claims because the indemnification provisions do not require Fleet to indemnify Lessard for claims between the parties, nor any attorneys' fees that may result therefrom. "It is well settled in New York that a prevailing party may not recover attorneys' fees from the losing party except where authorized by statute, agreement or court rule." U.S. Underwriters Ins. Co. v. City Club Hotel, LLC, 3 N.Y.3d 592, 597, 789 N.Y.S.2d 470, 472 (2004); see Chapel v. Mitchell, 84 N.Y.2d 345, 348, 618 N.Y.S.2d 626, 627 (1994) (recognizing the fundamental principle, embodied by the

American rule, that "the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser"); Hooper Assocs., Ltd. v. AGS Computers, Inc., 74 N.Y.2d 487, 491, 549 N.Y.S.2d 365, 366 (1989) (rule that parties are responsible for their own legal fees is well understood); Braithwaite v. 409 Edgecombe Ave. HDFC, 294 A.D.2d 233, 234, 742 N.Y.S.2d 280, 281 (1st Dep't 2002) (Court denied claim for attorneys' fees as claim lacked "the necessary basis in statute, court rule or agreement between the parties").

Based upon this longstanding "American Rule", New York courts consistently have rejected claims for prevailing party attorneys' fees under indemnification clauses unless the parties make it "unmistakably clear" in their agreement that the prevailing party in a dispute shall be awarded such fees. As the Court of Appeals held in the seminal case on the matter:

> Inasmuch as a promise by one party to a contract to indemnify the other for attorney's fees incurred in litigation between them is contrary to the well-understood rule that parties are responsible for their own attorney's fees, the court should not infer a party's intention to waive the benefit of the rule unless the intention to do so is unmistakably clear from the language of the promise.

(Emphasis provided.) Hooper, 74 N.Y.2d at 492, 549 N.Y.S.2d at 367[16]; see Mount Vernon City School District v. Nova Casualty Co., 78 A.D.3d 1028, 910 N.Y.S.2d 922 (2d Dep't 2010); Sequa Corp. v. Gelmin, 851 F. Supp. 106, 110 (S.D.N.Y. 1994) (Court held that the determination of whether a broad indemnification clause applies to claims between the parties "turns on the purpose of the indemnification agreement as unmistakably evidenced by the language of the agreement and the surrounding facts and circumstances"). Indeed, the Hooper standard is exceedingly strict. See Gotham Partners, L.P. v. High River Limited Partnership, 76 A.D.3d 203, 207, 906 N.Y.S.2d 205, 207-208, (1st Dep't 2010) (reversing award of attorneys'

[16] As the Hooper Court recognized, "[o]ne method of providing for attorney's fees in actions between the parties is to provide for payment as a form of liquidated damages." Hooper, 74 N.Y.2d at 491 n.2, 549 N.Y.S.2d at 366 n.2. The parties here neither provided for liquidated damages nor included a prevailing party attorneys' fees provision for contract claims between the parties in this case.

fees pursuant to indemnification provision in an action between the parties to an agreement). As stated in Gotham Partners:

> For an indemnification clause to serve as an attorneys' fees provision with respect to disputes between the parties to the contract, the provision must *unequivocally* be meant to cover claims between the contracting parties rather than third-party claims ... The bottom line is that a contract provision employing the language of third-party claim indemnification may not be read broadly to encompass an award of attorneys' fees to the prevailing party based on the other party's breach of contract; the provision must explicitly so state. The *Hooper* standard requires more than merely an arguable inference of what the parties must have meant; the intention to authorize an award of fees to the prevailing party in such circumstances must be virtually inescapable.

Id. at 208-209, 906 N.Y.S.2d at 208-209.

Applying these bedrock principals, it is readily apparent that the indemnification and redress provisions in the May 22, 2009 do not contain unmistakably clear language evidencing the parties' intention to waive the American Rule to permit Lessard to recover from Fleet (or the Third Party Defendants) the attorneys' fees incurred in connection with any action between the parties. Section 1.2.2.11 of the May 22, 2009 construction services agreement provides as follows, in relevant part:

> In addition, the Owner agrees, to the fullest extent permitted by law, to indemnify and hold the Design Professional harmless from any loss, claim or cost, including reasonable attorneys' fees and costs of defense, arising or resulting from the performance of such services by other persons or entities and from any and all claims arising from modifications, clarification, interpretations, adjustments or changes made to the Contract Documents to reflect field changes or other conditions, except for claims arising from the sole negligence or willful misconduct of the Architect. If the Owner requests in writing that the Architect provide any specific Construction Administration Phase Services, and if the Architect agrees in writing to provide such services, then such services shall be considered a Change of Service as provided in Article 1.3.

(Speyer Aff., Ex. B § 1.2.2.11; Ex. C ¶ 188; Ex. D ¶ 104.) Further, the "Redress" section referred to in Attachment A to that contract, which is also cited by Lessard as the basis of its claim states as follows:

> To the fullest extent permitted by law, the Owner shall indemnify and hold harmless the Architect ... from and against all liabilities, claims, damages, losses, costs, and expenses, including, but not limited to, attorneys' fees:
>
> > (i) arising out of or resulting in whole or in part from the failure of Owner, any Subcontractor of Owner, or the officers, representatives, consultants, employees or agents of Owner to perform the construction of the Project in conformance with Architect's final construction documents;
> >
> > (ii) arising out of, or resulting in whole or in part from, any modification to the final construction documents that is not approved by the Architect; or
> >
> > (iii) arising out of, or resulting in whole or in part from any errors or omissions in the Construction Documents caused by inaccurate or incomplete information provided to the Architect.

(Id. Ex. B, at Attachment A; Ex. C ¶ 189; Ex. D ¶105.) Such provisions clearly do not unmistakably evidence that they are applicable to claims between the parties. Rather, it is clear pursuant to the plain meaning of such provisions that they are only applicable to third party claims. See Hooper, 74 N.Y.2d at 493, 549 N.Y.S.2d at 367 ("[c]onstruing the indemnification clause as pertaining only to third-party suits affords a fair meaning to all of the language employed by the parties ... and leaves no provision without force and effect"); see Oscar Gruss & Son, Inc. v. Hollander, 337 F.3d 186 (2d Cir. 2003) (Court held the broad indemnification provision clause applied only to claims by third parties because, when read with other provisions in the section, it was evident that the clause did not apply to suits between the parties).

> Words in a contract are to be construed to achieve the apparent purpose of the parties. Although the words might "seem to admit of a larger sense, yet they should be restrained to the particular occasion and to the particular object which the parties had in view." (Citation omitted.) This is particularly true with indemnity contracts. When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed ... The promise should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances.

Hooper, 74 N.Y.2d at 491-492, 549 N.Y.S.2d at 367. Here, the provisions make it clear that the parties only intended that indemnification would be triggered in connection with third party claims. Indeed, that is the only reasonable conclusion that can be drawn—the right to indemnification applies only to third party claims and does not require that Fleet indemnify Lessard for substantive claims between the parties.

Here, as in Hooper, the provisions concerning indemnification do not contain language clearly permitting Lessard to recover from Fleet (or the Third Party Defendants) the attorneys' fees incurred in an action between the two or, for that matter, to recover any other losses, etc. resulting from an action between the parties. To the contrary, the clause is "... typical of those which contemplate reimbursement when the indemnitee is required to pay damages on a third-party claim." Hooper, 74 N.Y.2d at 492, 549 N.Y.S.2d at 367 (Court held that indemnification provision did not apply to suits between the parties); see Sequa, 851 F. Supp. at 110-111 (same). Accordingly, Lessard's claims must be dismissed as a matter of law based on the plain meaning of the contract.

C. These Claims Are Also Barred Based On Additional Separate And Independent Grounds; The Claims Are Deficient As A Matter Of Law And Regardless Of Whether The Provisions At Issue Cover Intra-Party Claims, No Indemnification Is Warranted Here Based On The Plain Meaning Of Such Provisions

Lessard's indemnification claims are further barred because Lessard does not sufficiently plead that the indemnification provisions at issue have been triggered thus warranting the requested relief. Its conclusory allegations, (see Speyer Aff., Ex. C ¶¶ 187-91; Ex. D ¶¶ 103-07), are insufficient to adequately set forth a claim. As set forth above, Section1.2.2.11 only provides that the "Design Professional"[17] (not Lessard) would be held harmless from loss, claims or cost "arising or resulting from the performance of such services by other persons or entities and from any and all claims arising from modifications, clarification, interpretations, adjustments or changes made to the Contract Documents to reflect field changes or other conditions" with certain limitations. Further, the "Redress Provision" provides that the Architect will only be held harmless with respect to certain narrow matters arising from (1) the "failure of Owner ... to perform the construction of the Project in conformance with Architect's final construction documents", (2) "modification to the final construction documents that is not approved by the Architect"; and (3) "errors or omissions in the Construction Documents caused by inaccurate or incomplete information provided to the Architect." (Speyer Aff. Ex. C ¶¶ 188-89; Ex. D ¶¶ 104-05.) Lessard fails to plead that any of the above-referenced circumstances have occurred. Further, it only claims that "it shall be entitled to indemnification" as a result of "the breach of contract by Fleet." (Emphasis provided.) (Id., Ex. C ¶ 191; Ex. D ¶ 107.) The documentary evidence clearly refutes any claim for contractual indemnification by demonstrating that, even if indemnification could be warranted here, which it cannot, the

[17] Notably, "Design Professional" is undefined in the agreement. Regardless, Lessard is identified as the "Architect" in the agreement at issue. As there is no allegation, much less any basis, for any contention that Lessard is the "Design Professional" referred to in this provision, Lessard's claim for indemnification based on such provision must fail as a matter of law and pursuant to language in the contract itself.

necessary condition precedents to trigger such indemnification rights have not occurred. The courts do not hesitate to dismiss purported breach of contract claims pursuant to CPLR 3211(a)(1) where the language of the contract or other documentation contradicts the allegations in the complaint. See Structured Credit Partners, LLC v. PaineWebber, Inc., 306 A.D.2d 132, 760 N.Y.S.2d 316 (1st Dep't 2003); Valassis Commc'ns., Inc. v. Weimer, 304 A.D.2d 448, 449, 758 N.Y.S.2d 311, 312 (1st Dep't 2003). Accordingly, both its counterclaim and affirmative cause of action are thus defective as a matter of law.

Even if it had alleged that the circumstances exist, pursuant to the plain meaning of the provisions themselves, it is clear that the claims should still be dismissed based on CPLR 3211(a)(1) as there is no clearly no basis to apply the provisions to the facts at issue. It is axiomatic that courts are required to adjudicate the rights of parties to a contract "according to the unambiguous terms of the contract and therefore must give the words and phrases employed their plain meaning." Laba v. Carey, 29 N.Y.2d 302, 308, 327 N.Y.S.2d 613, 618 (1971) (Citations omitted); DDS Partners, LLC v. Celenza, 6 A.D.3d 347, 348, 775 N.Y.S.2d 319, 321 (1st Dep't 2004) ("when interpreting a contract, words and phrases used by the parties must be given their plain meaning"). Indeed, one of the most recognized and well-settled propositions of law is "... that a written agreement which is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." Masters v. 14-22 Leonard St. Assocs., LLC, 11 A.D.3d 380, 381, 784 N.Y.S.2d 38, 39-40 (1st Dep't 2004); see W.W.W. Assocs., Inc. v. Giancontieri, 77 N.Y.2d 157, 565 N.Y.S.2d 440 (1990).

Even if Virginia law were to apply to the construction of the agreement, which it does not as set forth above, the result would be the same. Indeed, as the Virginia Supreme Court has held:

> When interpreting a contract, we construe it as a whole. When its terms are clear and unambiguous, we give them their plain meaning. We harmonize its provisions and give effect to each of them when it reasonably can be done.

Ott v. Monroe, 282 Va. 403, 407, 719 S.E.2d 309, 311 (2011); see Environmental Staffing Acquisition Corp. v. B & R Construction Mgmt., Inc., 283 Va. 787, 793, 725 S.E.2d 550 (2012) ("[w]ords that the parties used are normally given their usual, ordinary and popular meaning."); Palmer & Palmer Co., LLC v. Waterfront Marine Construction, 276 Va. 285, 290, 662 S.E.2d 77, 81 (2008) (same). Further, even if Virginia law applied to this claim, which it does not, such law also dictates that "[t]he law will not insert by construction, for the benefit of a party, an exception or condition which the parties omitted from their contract by design or neglect" and that "a court must construe the words [of a contract] as written and not make a new contract for the parties." Bridgestone/Firestone, Inc. v. Prince William Square Associates, 250 Va. 402, 407, 463 S.E.2d 661, 663 (1995). Accordingly, based on either Virginia law or New York law, the indemnification claims cannot stand pursuant to the plain language of the agreement.

As noted above, Section 1.2.2.11 does not even cover Lessard, but rather covers the "Design Professional" pursuant to its plain terms. Further, Lessard claims that it terminated the agreement and does not allege that the purported indemnification coverage survives such termination. Regardless, it is clear from the provisions themselves that an indemnification obligation can only arise out of work done in connection with the Contract Documents, changes to work conditions, a failure to perform the construction of the project, modifications to the final construction documents and errors or omissions in the Construction Documents. Notwithstanding that there are no allegations concerning the foregoing nor any allegation that Contract or Construction Documents were actually finished by Lessard nor that construction is even underway on the project, it is clear that such matters have nothing to do with claims or

counterclaims in this action which deal with Fleet's allegations of professional negligence and other wrongful conduct by Lessard and Lessard's claims of nonpayment, fraud and infringement of intellectual property rights against Fleet.

Even were Lessard to otherwise state a cognizable claim for indemnification which is not refuted by the documentary evidence and well settled law, which it does not, it is clear from the provisions themselves that Lessard is not entitled to the indemnification it seeks. It cannot stretch the meaning of the provisions at issue beyond recognition to cover this action as this action does not concern any of the matters for which indemnification is allowed. Accordingly, dismissal of the indemnification claims is appropriate.

CONCLUSION

For the foregoing reasons, as well as those set forth in the accompanying affirmation and the exhibits annexed thereto, it is respectfully requested that this Court enter an Order, pursuant to CPLR 3211(a)(1), 3211(a)(2), 3211(a)(4), and 3211(a)(7), dismissing each of Lessard's counterclaims against Fleet, each of the causes of action set forth by Lessard in its Third Party Complaint, and the counterclaim set forth by Lessard Group, in their entirety, with prejudice, together with such other and further relief as the Court deems just and proper.

Dated: New York, New York
July 2, 2012

MORRISON COHEN LLP

By: _____
Mary E. Flynn
Jay R. Speyer
Christopher Villanti

909 Third Avenue
New York, NY 10022
(212) 735-8600

Attorneys for Plaintiff and Third Party Defendants