| **Zucker v Waldmann** |
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| 2015 NY Slip Op 30089(U) |
| January 23, 2015 |
| Supreme Court, Kings County |
| Docket Number: 503467/13 |
| Judge: Carolyn E. Demarest |
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At a Commercial Division Part 1, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 23rd day of January, 2015.

P R E S E N T:
HON. CAROLYN E. DEMAREST,
Justice.

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DANIEL ZUCKER,

Plaintiff,

- against -

RON WALDMANN, BASEL, LLC, and THE BASEL GROUP,

Defendants.

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**DECISION AND ORDER**

Index No. 503467/13

The following papers on this motion: Papers Numbered

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| Notice of Motion/Order to Show Cause/Petition/ Cross Motion and Affidavits(Affirmations)Annexed | 94-95 |
| Opposing Affidavits (Affirmations) | 98-99 |
| Reply Affidavits(Affirmations) | 101 |
| Affidavits(Affirmations) | |
| Other Papers (Memoranda of Law) | 96, 100 |

Plaintiff Daniel Zucker ("plaintiff") moves, pursuant to CPLR § 2221 (d)(2), to reargue this Court's Decision and Order, dated June 12, 2014 (the "Prior Decision"), insofar as this Court dismissed plaintiff's breach of contract and unjust enrichment claims as to both movants and dismissed the complaint against Basel, LLC ("Basel LLC") for lack of personal jurisdiction. Upon review of the arguments presented in this motion, the Court grants reargument, upon its finding that it misapprehended both the facts and the law with respect to the application of the Statute of Limitations to plaintiff's causes of action for breach of contract and unjust enrichment.

Upon reargument, the Prior Decision is modified to vacate the dismissal of these causes of action as barred by the Statute of Limitations, which was based upon the erroneous incorporation of the Preliminary Information Memorandum into the Investment Agreement, and denies dismissal of the breach of contract and unjust enrichment claims solely based upon the Statute of Limitations. In all other respects, the Court adheres to its original determinations except that the claim for unjust enrichment is restored as to defendant The Basel Group ("Basel Group").

**BACKGROUND**

Plaintiff brought causes of action for breach of contract against Basel LLC, for unjust enrichment against all defendants, and for fraud against all defendants[1]. In the Prior Decision, this Court granted defendant Basel LLC and Basel Group's motion to dismiss in its entirety[2]. Basel LLC is a limited liability company organized under the laws of the Republic of Georgia, with its sole place of business located in the City of Tbilisi in Georgia, and it is not registered to do business in New York. Basel Group is a limited liability company organized under the laws of the State of Delaware and is registered to do business in New York. According to plaintiff, beginning on or before late November 2005, while he was in the Republic of Georgia, he was approached by Ron Waldmann ("Waldmann"), who presented him with a business proposal, whereby he could gain a five percent interest in the profits of a business venture involving the development of certain real property on the grounds of the former Presidential Palace in the city of Tbilisi, in the country of Georgia (the "Property"). Plaintiff asserts that defendants

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[1] Plaintiff does not seek reargument of the dismissal of its fraud claim.

[2] Defendant Ron Waldmann was never served with the summons and complaint, and, therefore, he has not appeared or moved on his own behalf.

represented that they would develop the Property by constructing new residential and other structures thereon and otherwise improve the Property in order to ensure that this venture would be profitable to him and other investors.

Thereafter, Waldmann forwarded a written Investment Agreement, dated November 29, 2005 (the "Investment Agreement"), by facsimile, to plaintiff in New York. The Investment Agreement was between Basel LLC and plaintiff, as "Investor", and stated that plaintiff was investing $500,000 in the asset "Residences at Krtsanisi", for which he would receive five percent of "the ownership of the profits" of this asset. The Investment Agreement referenced a "Business Plan", which had been provided to plaintiff, which "include[d] the development of mainly residential and mixed use commercial real estate within the site." No specific time was mentioned in the Investment Agreement except that the funding and execution of the Agreement was to occur "the latest by December 5, 2005". Plaintiff signed the Investment Agreement with Basel LLC and forwarded it to Waldmann in Georgia, with a check for $500,000, dated December 5, 2005, made payable to Basel Group.

The "Business Plan" for the Property was disclosed in a Preliminary Information Memorandum for Townhouses & Villas at the Krtsanisi Governmental Residence dated October 2005 (the "Memorandum"), which set forth the intended Residential Development of townhouses, villas, and apartments on the Property, and indicated as to "Timing" with respect to each category, "Pre-sales to start first quarter 2006." However, following plaintiff's execution of the Investment Agreement, no development of the property occurred, and no pre-sales took place in the first quarter of 2006. According to plaintiff, he kept in touch with Waldmann by telephone every six months or so, beginning in 2006 and continuing through at least May 2012. He claims

that during these telephone conversations, Waldmann continually blamed the economic crisis and conditions in Georgia as the reasons why the property could not be sold, and, therefore, why no profits were forthcoming.

Plaintiff states that Waldmann met with him and another investor in Brooklyn in late 2009/early 2010 to provide an update on the Property. Plaintiff maintains that following this meeting, Waldmann resumed reporting to him through telephone conversations, still stating that the Property had not been developed. Plaintiff alleges that Basel LLC never provided him with a written accounting of any kind and never provided him with distributions of any profit. He further alleges that although, pursuant to the Investment Agreement, Basel LLC was obligated to develop and improve the Property by building residential and other structures thereon, it failed to develop or improve any portion of the Property.

In its Prior Decision, this Court dismissed plaintiff's breach of contract claim against Basel LLC as time-barred, having been brought more than six years from the time the cause of action accrued (*see* CPLR § 213 [2]). In calculating the time of accrual, the Court accepted defendant's argument that the contract was breached when no pre-sales occurred in the first quarter of 2006, relying upon the Memorandum, which the Court found to have been incorporated by reference into the Investment Agreement. The Court rejected plaintiff's argument that because there was no specific time period set forth in the Investment Agreement, a question of fact was raised as to what was a reasonable time within which Basel LLC should have developed the Property before a breach of contract could be said to have occurred. This Court also dismissed plaintiff's unjust enrichment claim against all defendants, finding that this claim was based on essentially the same facts as the breach of contract claim, and as such, was

also subject to the six-year statute of limitations and, thereby, time-barred (*see Maya NY, LLC v Hagler*, 106 AD3d 583, 585 [1st Dept 2013]). This Court also dismissed the unjust enrichment claim on the grounds that it was duplicative of the breach of contract claim (*see Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 289 [1987]).

The Court also dismissed the complaint against Basel LLC, pursuant to CPLR § 3211 (a)(8), for lack of personal jurisdiction. The Court found that Basel LLC, as a foreign limited liability company, is not amenable to suit in New York courts under CPLR § 301 because it has not "engaged in such a continuous and systematic course of 'doing business' here that a finding of its 'presence' in this jurisdiction is warranted" (*Landoil Resources Corp. v Alexander & Alexander Servs.*, 77 NY2d 28, 33 [1990]). The Court stated in its Prior Decision that Basel LLC does not maintain offices in New York, does not employ anyone in New York, and does not transact business in New York. The Court rejected plaintiff's argument, that Basel LLC was subject to New York jurisdiction through Basel Group because Basel Group held itself out as an agent of Basel LLC, since plaintiff did not allege that Basel Group and Basel LLC have a parent/subsidiary relationship or that they are alter egos of one another. The Court further found that long arm jurisdiction, pursuant to CPLR § 302 (a)(1), was not warranted because the complaint did not allege that defendants engaged in purposeful business activities or transactions in New York (*see Deutsche Bank Sec., Inc. v Montana Bd. Of Invs.*, 7 NY3d 65, 71 [2006], *cert denied* 549 US 1095 [2006]), nor were any aspects of the contract to be performed in New York. The Court further rejected plaintiff's contention that an oral agreement between the parties to litigate disputes in New York created a basis for personal jurisdiction because there was no forum selection clause in the Investment Agreement. The Court ruled that the Investment

Agreement was an unambiguous document, and therefore, parol evidence could not be admitted to add terms to the agreement (*see Emerald Equip. Sys., Inc. v Gearhart Bros. Servs.*, LLC, 115 AD3d 1187, 1188 [4th Dept 2014]).

**DISCUSSION**

A motion to reargue must be "based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR § 2221 [d][2]).

***Personal Jurisdiction***

Plaintiff argues that the Court misapprehended the law when it ruled that evidence of the alleged oral agreement between the parties to litigate disputes in New York was inadmissible because of the parol evidence rule. Plaintiff's position is that extrinsic evidence is admissible here because the Investment Agreement did not contain a merger clause. Plaintiff relies on *Canusa Corp. v A&R Lobosco, Inc.* to argue that where an agreement does not contain a merger clause, "extrinsic evidence is admissible as an aid to interpretation" (986 F Supp 723, 230 n. 5 [EDNY 1997]). Plaintiff's reliance on *Canusa* is misplaced because *Canusa,* a decision following trial, involved an ambiguous contract term and the Court permitted extrinsic evidence to elucidate the meaning of the term. In the instant action, the Investment Agreement is unambiguous and neither party has pointed to any term that is subject to multiple interpretations.

New York courts have held that in the absence of a merger clause, extrinsic evidence may be permitted where "surrounding circumstances strongly suggest that the contract was not an integrated one" (*Saxon Capital Corp. v Wilvin Associates*, 195 AD2d 429, 430 [1st Dept 1993]; *see also Milton Braten v Bankers Trust Co.*, 60 NY2d 155 [1983]). "In the absence of a merger

clause, as here, the court must determine whether or not there is an integration 'by reading the writing in light of surrounding circumstances, and by determining whether or not the agreement was one which the parties would ordinarily be expected to embody in the writing'" (*Milton Braten*, 60 NY2d at 162, quoting *Ball v Grady*, 267 NY 470, 472 [1935]). Both a reading of the Investment Agreement and a consideration of the surrounding circumstances lead to the conclusion that the Investment Agreement is a complete written instrument. There is no forum selection clause in the Investment Agreement and plaintiff does not allege an ambiguity in any term of the Investment Agreement. "When a written agreement is clear and unambiguous on its face, 'extrinsic and parol evidence is not admissible to create an ambiguity'" *(Innophos, Inc. v Rhodia, S.A.*, 38 AD3d 368, 369 [1st Dept 2007], quoting *Intercontinental Planning v Daystrom, Inc.*, 24 NY2d 372, 379 [1969]).

Moreover, particularly in a case involving foreign subject-matter, as here, the selection of a forum remote from the location of the Property would be a significant material term that would necessarily have been supplied in the written agreement and may not be established through parol evidence (*cf. Lorbrook Corp. v G&T Industries, Inc.*, 162 AD2d 69, 73 [3d Dept 1990]; *Hugo Boss Fashions, Inc. v Sam's European Tailoring, Inc.*, 293 AD2d 296, 297 [1st Dept 2002]). Such conclusion is all the more compelling in that, without such written submission to the jurisdiction of the courts of this State, there is no basis for the exercise of personal jurisdiction over Basel LLC. The United States Supreme Court has recently held, distinguishing specific jurisdiction, where the action relates directly to activity or an event within the state, from general personal jurisdiction over a business entity arising from activity unrelated to the subject of the suit, that, in order to satisfy constitutional Due Process, in the latter situation, the business entity

must be "essentially at home" in the forum state to be subject to the jurisdiction of that court (*Daimler AG v Bauman*, 134 S Ct 746, 754 [2014]; *Goodyear Dunlop Tires Operations, S.A. v Brown*, 131 S Ct 2846, 2853-2856 [2011]; *see also Paterno v Laser Spine Institute*, 2014 NY Slip Op 08054 [2014]). There has been no evidence adduced or facts alleged that Basel LLC is "at home" in New York or engages in any continuous business activity in New York. Without its express written consent to jurisdiction, either contractually, through a forum selection clause, or statutorily, by registering to do business, it cannot be involuntarily subjected to this Court's jurisdiction. Accordingly, the case must be dismissed against Basel LLC.

***Breach of Contract***

Plaintiff argues that the Court misapprehended the law when it ruled that plaintiff's claim for breach of contract against Basel LLC was time-barred based on its finding that the Memorandum, which stated that pre-sales would begin in the first quarter of 2006, was incorporated by reference into the Investment Agreement. Although this issue is rendered moot by dismissal against Basel LLC on jurisdictional grounds, the Court agrees that its Prior Decision was in error. Plaintiff correctly argues that the Memorandum was not an agreement between the parties and the language of the Investment Agreement did not express any intent to incorporate any terms of the Memorandum. It was therefore error to incorporate the Memorandum by reference into the Investment Agreement and to apply the representation that pre-sales would begin in the first quarter of 2006 as the accrual date of the alleged breach.

"New York law prohibits the incorporation of extrinsic writings into an agreement unless those writings are specifically incorporated by reference" (*ESPN, Inc. v Office of the Commissioner of Baseball*, 76 F Supp 2d 383, 404 [SDNY 1999]). "[T]he mere fact that a

contract refers to another contract does not mean that it has 'incorporated' the other contract" (*MBIA Insurance Corp. v Patriarch Partners III, LLC*, 842 F Supp 2d 682, 706 [SDNY 2012], quoting *Rosen v Mega Bloks Inc.*, 2007 WL 1958968, at *10 [SDNY July 6, 2007]). Under New York law, two essential elements must be satisfied before a document will be deemed to have been incorporated by reference into another instrument or agreement (*see Ryan, Beck & Co., LLC v Fakih*, 268 F Supp 2d 210, 223 [EDNY 2003]. First, the agreement must specifically reference and sufficiently describe the documents to be incorporated such that they may be identified beyond all reasonable doubt (*id.*, *see also Chiacchia v National Westminster Bank USA*, 124 AD2d 626, 628 [2d Dept 1986]). Second, "'it must be clear that the parties to the agreement had knowledge of and assented to the incorporated terms'" (*Ryan, Beck & Co., LLC* at 223, quoting *Painwebber v Bybyk*, 81 F3d 1193, 1201 [2d Cir 1996]). Although it is not disputed that the Memorandum is referenced in the Investment Agreement, there is no indication in the Investment Agreement of the significance or purpose for such reference, except to acknowledge that the Memorandum had been provided to plaintiff. It is further observed that the representation in the Memorandum that pre-sales would begin in the first quarter of 2006 is itself ambiguous and could not serve to establish an accrual date for a cause of action for the breach of a contract which had only been executed in December 2005.

Where a contract does not specify a time for performance, the parties have a reasonable time to perform and a breach can only occur after the expiration of such reasonable time (*see Bernstein v LaRue*, 120 AD2d 476, 477 [2d Dept 1986]). "The question of what is a reasonable time is a factual one to be determined upon a trial of the action" (*id.*). This Court's Prior Decision that the claim was barred by the Statute of Limitations was clear error and that portion

of the decision is hereby vacated.

***Unjust Enrichment***

With regard to this Court's dismissal of plaintiff's unjust enrichment claim, although plaintiff's claim for unjust enrichment as against Basel LLC is not viable due to lack of personal jurisdiction over that entity and because the breach of contract cause of action would provide a complete remedy at law, plaintiff may still have a viable claim against Basel Group, which is registered to do business in New York[3]. Basel Group, to which plaintiff paid the $500,000, is not a party to the Investment Agreement. "[A] claim for unjust enrichment does not depend on the existence of valid and enforceable written contracts between the parties, but rather arises from facts wholly independent of any contract upon which plaintiff sues" (*Sebastian Holdings, Inc. v Deutsche Bank*, 78 AD3d 446, 448 [1st Dept 2010]). Clearly, there is no contractual relationship between plaintiff and Basel Group. Plaintiff's unjust enrichment claim arises from the alleged fact that plaintiff was instructed by Waldmann to pay the $500,000 to Basel Group and that the funds were paid to Basel Group. Thus, "though [Basel Group] has not breached a contract [with plaintiff] nor committed a recognized tort, circumstances create an equitable obligation running from defendant [Basel Group] to the plaintiff" (*Corsello v Verizon*, 18 NY3d 777, 790 [2012]). Therefore, plaintiff has stated a viable cause of action for unjust enrichment against Basel Group. As with the breach of contract claim, the claim for unjust enrichment may not be dismissed as

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[3]The Prior Decision also dismissed plaintiff's unjust enrichment claim as duplicative of the breach of contract claim. Plaintiff now argues that the Court misapprehended the law and facts in finding that the unjust enrichment claim arose from the same facts as the breach of contract claim. This argument is only applicable to Basel LLC, which is the only defendant against which a breach of contract claim is alleged, and is rendered moot by the dismissal of all claims against Basel LLC and will not be further addressed.

time-barred because there is a question of fact regarding when the claim accrued[4] (*see Bernstein v LaRue*, 120 AD2d at 477). The Prior Decision is therefore modified to delete the dismissal of the unjust enrichment claim against Basel Group and the motion to dismiss that claim is denied.

**CONCLUSION**

Plaintiff's motion for reargument is granted. Upon reargument, defendants' motion to dismiss is denied only with respect to the cause of action against Basel Group alleging unjust enrichment.

With respect to plaintiff's breach of contract and unjust enrichment claims against Basel LLC, upon reargument, the Court vacates its Prior Decision finding the claims barred by the Statute of Limitations, but adheres to the Prior Decision dismissing all claims against Basel LLC for lack of personal jurisdiction.

This constitutes the decision and order of the Court.

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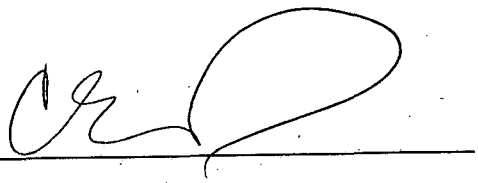

J.S.C.

HON. CAROLYN E. DEMAREST

[4] CPLR 213(1) provides a six-year statute of limitations for claims of unjust enrichment (*see Sirico v FGG Products, Inc.*, 71 AD3d 429, 434 [1st Dept 2010]).