SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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THE GEORGETOWN COMPANY, LLC;
GEORGETOWN 19TH STREET PHASE I, LLC;
GEORGETOWN 19TH STREET DEVELOPMENT, LLC;
and IAC/GEORGETOWN 19TH STREET LLC,

Plaintiffs,

-against-

IAC/INTERACTIVECORP; HTRF VENTURES, LLC;
and IAC 19TH STREET HOLDINGS, LLC,

Defendants.

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DECISION AND ORDER

Index No.: 651304/2016
Motion Sequence No. 003

O. PETER SHERWOOD, J.:

Plaintiffs commenced this action seeking a declaration that they are entitled to one half of a $35 million fee paid to defendants for the sale of certain land rights to a third party. Plaintiffs also assert an unjust enrichment claim. Defendants make this pre-answer motion to dismiss the complaint on the ground that, pursuant to various agreements between the parties, plaintiffs are not entitled to a share of the $35 million fee.

Factual and Procedural Background[1]

In 2002, defendant IAC/InterActiveCorp (IAC), and plaintiff The Georgetown Company, LLC (The Georgetown Company) began working on a plan to develop IAC's new headquarters (the Headquarters Project), to be located at 10th Avenue and 18th Street, New York, New York, zoning lots 12 and 54 (the Property). The lots were owned by non-party Responsive Realty, LLC (Responsive). Responsive also owned lots 20 and 29, which were close by. The Georgetown Company is a privately held real estate investment and development company. IAC is a media and internet company focused on the areas of search, applications, online dating, media, and ecommerce. Plaintiff Georgetown 19th Street Phase I, LLC (Georgetown Phase I) is an affiliate of The Georgetown Company, and is the managing member and 100% economic owner of plaintiff IAC/Georgetown 19th Street, LLC (IAC/Georgetown). IAC/Georgetown is also owned by defendant IAC 19th Street Holdings, LLC (IAC 19th Street Holdings). Plaintiff Georgetown 19th

[1] On this motion to dismiss pursuant to CPLR 3211 (a) (1) and (7), the facts are taken from the amended complaint (see Gildin affirmation, exhibit 2).

Street Development, LLC (Georgetown 19th Street Development) is an affiliate of The Georgetown Company. Defendant HTRF Ventures, LLC (HTRF) is an affiliate of IAC.

In order to effectuate the Headquarters Project, on March 9, 2004, the parties entered into several agreements. IAC/Georgetown entered into a lease for the Property (the Ground Lease) with Responsive. IAC/Georgetown then sublet the Property to HTRF, pursuant to a written lease.

Georgetown 19th Street Development, as developer of the Headquarters Project, and defendant HTRF, as owner of the Headquarters Project, entered into an agreement (the Development Agreement). Paragraph 2.10 of the Development Agreement provides:

> "Throughout all phases of the Project, Developer and Developer's Affiliates shall, at Owner's request and expense (but without any fees to Developer or Developer's Affiliates in addition to the payments set forth in this Agreement), provide Owner with such assistance and cooperation as may be reasonably requested by Owner to assist Owner in obtaining (a) financing for the construction of the Project and Owner's Work and permanent financing with respect to the Building, on such terms and conditions as shall be acceptable to Owner, and (b) any tax abatements, grants, loans, tax-exempt bond financing or other incentives and benefits available by the State of New York, the City of new York or any other government agency, including financing that may be available under the so-called 'New York Liberty Bond Program.'"

(Development Agreement, attached as Exhibit 4 to Gildin aff.).

Georgetown Phase I and IAC 19th Street Holdings also entered into a letter agreement (Letter Agreement) which stated that if either party (or its affiliates) obtained a right to purchase or lease "other property" near the IAC headquarters, the other party, at its option, may "participate . . . in such transaction on an equal economic and control basis" (Letter Agreement, attached as Exhibit 3 to Gildin affirmation). Paragraph 2 of the Letter Agreement provided, in relevant part:

> "Each IAC Entity and Georgetown Entity agrees if it now has or hereafter obtains any right or option to purchase or lease other property (or any interest in any other property) located within the same square block as the Land [the IAC Headquarters], or within the same five square blocks immediately adjacent to the Land (any and all such property is hereafter referred to 'Adjacent Property'), IAC or an IAC Entity designated by IAC, or Georgetown or a Georgetown Entity designated by Georgetown, as applicable, shall have the right to participate with such IAC Entity or Georgetown Entity in such transaction on an equal economic and control basis"

(*id.*).

When the Ground Lease and Sublease were executed in 2004, the applicable zoning laws limited the size of the buildings that could be built on the Property, and other properties in the area (the High Line area). Thereafter, plaintiffs worked with the City of New York to change the zoning regulations. The zoning changes sought were not needed for the Headquarters Project, but were sought so that both plaintiffs and defendants could increase the marketability of the area, and profit therefrom. Plaintiffs predicted that once the Headquarters Project was completed, with the building to be designed by world famous architect Frank Gehry, it would be a catalyst for further development in the High Line area. Plaintiffs claim they were uniquely situated to create value for themselves and defendants, because they had expertise and familiarity with the intricacies of the existing zoning regulations, and had the skill and foresight to craft a zoning proposal for lots 12, 54, 20 and 29.

In June 2005, plaintiffs successfully lobbied the City of New York to enact revisions to the applicable zoning regulations. As a result, the new zoning regulations included a special provision allowing for certain advantages for lots 20 and 29, if they merged with lots 12 and 54, creating a new single zoning lot. The special provisions permitted the following: merger of lots 12, 54, 20 and 29 into a single zoning lot, thus, allowing the purchase of "a development metric knows as floor area ratio" (FAR)[2] from the City of New York at a below market price; merger of the four lots into a single lot allowing the size of the development envelope[3] for which a building could be built on lot 20 to substantially increase; and, after the merger, permitting the use of the FAR of all 4 lots to be used, collectively, on lots 20 and 29. However, none of these advantages were available until the lots were actually merged.

Plaintiffs state that after the new zoning regulations were enacted, they undertook other efforts in connection with lots 20 and 29, including engaging architects and contractors, developing

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[2] FAR is the ratio of building floor area compared to the area of the lot. The higher the FAR, the more floorspace the building can have. For example, if the lot size is 10,000 square feet and has a FAR of 1, the building can only have 10,000 square feet. If the same lot has a FAR of 2, the building can have 20,000 square feet of allowable floor area.

[3] A development envelope, also referred to as a building envelope, is the maximum three-dimensional space on a zoning lot within which a structure can be built, as permitted by applicable height, setback and yard controls.

pro formas, collaborating with hotel and restaurant experts, meeting with stakeholders, and conducting environmental studies. Plaintiffs state that defendants did not pay them for this work since it was not required under the Development Agreement, and was separate and apart from the Headquarters Project.

In 2013-2014, non-party Related Companies (Related) offered to purchase lots 20 and 29 from Responsive (the Related Transaction), on the condition that these lots were also part of the new rezoning scheme, and it could obtain additional FAR rights for those lots. To effectuate the Related Transaction, Responsive, as owner, IAC/Georgetown, as tenant, and HTRF, as subtenant agreed to the merger of lots 12, 54, 20 and 29 for zoning purposes. Responsive, IAC/Georgetown and HTRF then sold their right to purchase FAR rights, at a discount, for use on the newly-merged lot. Related paid $35 million to IAC/Georgetown and HTRF, for those rights (as well as certain other air rights) pursuant to an agreement (the Rights Fee Agreement"). The $35 million, which is the subject of this litigation, is currently being held in escrow.

In 2016, plaintiffs commenced this action seeking a declaration that they are entitled to 50% of the $35 million pursuant to the Letter Agreement and Rights Fee Agreement, or, in the alternative, a declaration that under the principals of equity they are entitled to an equitable amount of the $35 million, with the amount to be determined at trial. Plaintiffs filed an amended complaint on June 9, 2017, making the equitable claim one for unjust enrichment. Plaintiffs claim that they performed significant lobbying work on the zoning changes under which defendants received a benefit.

Defendants now make this pre-answer motion to dismiss pursuant to CPLR 3211 (a) (1) (documentary evidence) and (a) (7) (failure to state a cause of action). Defendants argue that on March 9, 2004, IAC, or its affiliates, and The Georgetown Company, or its affiliates, entered into four interrelated agreements to memorialize the terms for the Headquarters Project. Defendants argue that the parties entered into the Development Agreement which designates Georgetown 19th Street Development, *as HTRF's agent*, to be responsible for managing and coordinating all aspects of the Headquarters Project. Defendants note that paragraph 2.10 of the Development Agreement states that Georgetown 19th Street Development, as developer, was required "without any fees to [Georgetown 19th Street Development] or [its] Affiliates in addition to the payments set forth in [the Development Agreement]," to provide HTRF, as owner, with "assistance and cooperation . .

. in obtaining . . . incentives and benefits made available by the State of New York, the City of New York or any other government agency . . ." (Development Agreement, § 2.10). In exchange for all its services, HTRF paid Georgetown 19th Street Development a fee of $4.5 million. Defendants argue, therefore, that plaintiffs are not entitled to a portion of the $35 million fee, since all the work they performed was covered, and paid for, under the Development Agreement.

Defendants further note that, in 2004, the parties also entered into an agreement under which IAC 19th Street Holdings and Georgetown Phase I created IAC/Georgetown (tenant of the Property) (the Operating Agreement, attached as Exhibit 5 to Gildin aff). Defendants content the Operating Agreement reserved to IAC 19th Street Holding the control of all major decisions concerning the Headquarters Project. Therefore, according to defendants, Georgetown Phase I was not permitted to make any major decisions, including the transfer of any interest owned by IAC/Georgetown, without the prior written consent of IAC 19th Street Holdings. According to defendants, all the actions taken by plaintiffs, including the rezoning work, were subject to defendants' approval and were part and parcel of the Headquarters Project. Therefore, plaintiffs have already been paid for their development work and are not entitled to an additional payment from the $35 million fee from Related.

Defendants note that pursuant to the Ground Lease, IAC/Georgetown obtained the right to use up to 150,000 square feet of the floor area allowed under the then current zoning regulation to construct the IAC headquarters. In addition, the Ground Lease also provided that the leased property "includes the right (but not the obligation) of Tenant to utilize . . . additional Floor Area," not exceeding two times the "Lot Area" of the leased premises (as defined in the zoning regulation) that might later be obtained "pursuant to zoning change or otherwise, at any time during the Term" of the Ground Lease (Ground Lease, attached as Exhibit 6 to Gildin aff, ¶ 5.1). Defendants argue this provision makes clear that any enhanced development rights that might later arise from a change in the zoning law, e.g., enhanced FAR, belonged to IAC/Georgetown, as tenant, when it entered into the Ground Lease with Responsive.

Defendants note that, pursuant to the Sublease, HTRF, as subtenant, assumed all the rights and obligations of IAC/Georgetown under the Ground Lease, including the right to utilize any FAR rights belonging to IAC/Georgetown under the Ground Lease (Sublease, attached as Exhibit 7 to Gildin aff, ¶ 2[b]). Defendants argue they were the owners of any and all FAR rights which

were bound to lots 12 and 54 as of 2004. Therefore, in 2014, when IAC/Georgetown and HTRF relinquished their rights to FAR for lots 12 and 54, they were relinquishing a pre-existing right, not a newly obtained right to "other property," as contemplated by the Letter Agreement.

Defendants argue the Sublease also gave HTRF unilateral control and decision-making power over actions affecting the Headquarters Project, including whether to allow the Property to be merged with an adjacent parcel for zoning purposes, and whether to dispose of any future FAR rights. Therefore, according to defendants, although IAC/Georgetown was a party to the Related Transaction, it was merely consenting to the transaction in a ministerial fashion, as agent for HTRF, since HTRF had exclusive decision-making authority over the Related Transaction.

In sum, defendants argue that, pursuant to the terms of the four documents described above, the FAR rights which were conveyed as part of the Related Transaction were not newly acquired rights to "other property" as contemplated by the Letter Agreement. Rather, as of 2004, defendants were the sole owners of all present and future FAR for lots 12 and 54. Therefore, plaintiffs were not entitled to any proceeds from the sale of the FAR. Further, plaintiffs' unjust enrichment claim must be dismissed because, pursuant to the terms of the Development Agreement, plaintiffs have been paid for their work.

In opposition, plaintiffs argue that, beginning in 2002, plaintiffs anticipated the new IAC headquarters would be a catalyst for other development in the High Line area. In that spirit, plaintiffs and defendants agreed to share in the benefit of any development in the immediate vicinity that would be triggered by the new headquarters. Plaintiffs note that, as initially conceived, both sides planned to invest in the Headquarters Project as equal partners, co-owning the headquarters building and equally sharing in the profits. However, in 2003, IAC requested a different deal structure to avail itself of several tax benefits and tax-exempt Liberty Bond financing. In order to ensure IAC/Georgetown would receive the funds it would have earned as an equal partner as the owner of the Headquarters Project, IAC agreed that IAC/Georgetown, with Georgetown Phase I as its 100% economic member, would lease the land from Responsive, and then sublease it to HTRF. Plaintiffs note that they and defendants agreed that the difference between the rent IAC/Georgetown would receive from HTRF, and the rent IAC/Georgetown paid to Responsive would equal the profits that the parties projected Georgetown Phase I would have

made as 50% owner of the building.[4] These agreements were memorialized in the Development Agreement, the Ground Lease and the Sublease documents.

Plaintiffs argue that these documents concern only the Headquarters Project on lots 12 and 54, and had no effect on the plaintiffs' or defendants' rights with respect to adjacent lots/properties. According to plaintiffs, the Letter Agreement addressed the rights and obligations of The Georgetown Company, IAC, and their affiliates, including the right to participate equally in any transaction flowing from the rights that either The Georgetown Company or IAC might have to obtain or purchase any interest in "other property."

Plaintiffs argue that, prior to the 2005 change in the zoning regulations, neither they nor defendants had the right to purchase FAR for use on adjacent properties. Thus, the new zoning regulations created a right to purchase an interest in "other property," specifically the FAR rights for use on lots 20 and 29. Plaintiffs argue that even under the new zoning regulations, none of the advantages were available, unless and until, the four lots merged into a single lot. Plaintiffs contend defendants did not have any rights prior to the lots' merger, much less the ability to convey rights, pursuant to the new zoning regulations. Therefore, in 2014, when Related purchased the adjacent lots, and conditioned its purchase on acquiring the FAR rights from lots 12 and 54, that transaction triggered the right to purchase an interest in "other property"; namely the right created by the new zoning regulations to buy below market FAR to be used in the development of lots 20 and 29.

Plaintiffs argue further that, contrary to defendants' argument that the FAR rights were not "other property" because the Ground Lease and Sublease gave defendants the exclusive right to use, retain or otherwise dispose of the FAR rights, the Ground Lease and Sublease did not give defendants unilateral control over the FAR rights. Rather, the Ground Lease and Sublease gave defendants the unilateral right to utilize the leased property with the then-existing FAR connected to lots 12 and 54, but not the right to transfer the newly-created below-market FAR connected to the newly merged lot. Plaintiffs contend that if defendants' claims were true, there would have been no need to merge the four lots into one, and defendants could have merely transferred the

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[4] In addition to the fixed rent and additional rent HTRF is obligated to pay directly to the Responsive, as landlord, HTRF is also obligated to pay IAC/Georgetown $60 million in additional rents, over the term of the Ground Lease and Sublease (Sublease § 3).

FAR connected to lots 12 and 54 to Related. However, since that is not what happened, it is clear that the new zoning regulations required a merger of the lots to trigger the right to purchase the below market value FAR for use on lots 20 and 29.

Plaintiffs also argue that while the Development Agreement obligated them to develop the IAC headquarters building, the zoning work and their effort to obtain enhanced FAR rights were separate from the Headquarters Project, and not contemplated under the Development Agreement. The Development Agreement requires Georgetown 19th Street Development to "assist . . . in obtaining all necessary zoning and other approvals . . . required for the Project" (Development Agreement, ¶ 2.6). However, their work in obtaining the zoning regulations change was not part of the Headquarters Project, so, was not covered under the Development Agreement. Plaintiffs argue that at the very least, the language of the Development Agreement is ambiguous and discovery is required.

Plaintiffs content their claim survives because of the Letter Agreement, which allows that. Upon the merger of the four lots, HTRF, IAC/Georgetown, and Responsive obtained the right to purchase the newly-created FAR, which is an interest in any "other property". Even if their work is not covered under the Letter Agreement, plaintiffs argue they are entitled to pursue their unjust enrichment claim because defendants have been unjustly enriched by plaintiffs' rezoning work resulting in the enhanced FAR rights. Therefore, they are entitled to an equitable share of the $35 million fee.

In reply, defendants argue the Letter Agreement does not contemplate the Related Transaction, and therefore, plaintiffs do not have the right to participate with "equal economic and control basis" in that transaction (Letter Agreement). According to defendants, the Letter Agreement does not address, this scenario - where lots 12 and 54 were merged with adjacent lots as a result of a zoning change, or where IAC/Georgetown and HTRF relinquished some of their property rights as part of that merger. Defendants also argue the Letter Agreement contemplates a "purchase or lease," not a relinquishing, or sale, of its right to below-market FAR as part of a merger of four adjacent lots. Defendants contend that the word "participate," as contemplated by the Letter Agreement, means "to take part in" or "engage in" real estate development, not the sale of property rights. Defendants assert the Letter Agreement should be enforced pursuant to its

terms, and not be rewritten to create a new right for plaintiffs to share in the economic proceeds of a sale of property rights.

Defendants argue the new zoning regulations and merger of the four lots did not give them the right to purchase FAR for use on lots 20 and 29. Rather, the new zoning regulations merely permitted them to purchase FAR on their property and transfer those FAR to another subarea of the merged lots. Thus, defendants did not obtain or sell an interest in "other property," but their own.

Finally, defendants argue that since plaintiffs are claiming the parties are bound by the terms of the Letter Agreement, their claim for unjust enrichment must be dismissed as duplicative of their contract claim.

Discussion

In considering a CPLR 3211 (a) (7) pre-answer motion to dismiss a complaint for failure to state a cause of action, a "court must accept all of the allegations in the complaint as true, and, drawing all inferences from those allegations in the light most favorable to the plaintiff, determine whether a cognizable cause of action can be discerned therein, not whether one has been properly stated" (*see MatlinPatterson ATA Holdings LLC v Federal Express Corp.*, 87 AD3d 836, 839 [1st Dept 2011] citing *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634, 636 [1976]). However, "allegations consisting of bare legal conclusions, as well as factual claims inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration" *(Caniglia v Chicago Tribune-N.Y. News Syndicate*, 204 AD2d 233, 233-234 [1st Dept 1994]).

Although defendants label their motion to dismiss one for dismissal for both failure to state a cause of action and based on documentary evidence (*see* CPLR 3211 [a] [1] [7]), defendants do not argue that plaintiffs have not properly plead a cause of action sounding in declaratory judgment (breach of contract) or unjust enrichment (*see* CPLR 3211 [a] [7]). Rather, they argue that pursuant to the terms of the various agreements between the parties, plaintiffs are not entitled to the relief sought. Therefore, the court will analyze the motion as one based upon CPLR 3211 (a) (1), documentary evidence.

To prevail on a pre-answer motion to dismiss pursuant to CPLR 3211 (a) (1), defendant must allege that its defense is fully founded upon documentary evidence. Moreover, the documentary evidence offered in that defense "must. . . resolve[] all factual issues as a matter of

law, and conclusively dispose[] of the plaintiff's claim" (*Teitler v Pollack & Sons*, 288 AD2d 302, 302 [2nd Dept 2001]). The facts alleged in the complaint are regarded as true, and the plaintiff is afforded the benefit of every favorable inference (*see Leone v Martinez*, 84 NY2d 83, 87-88 [1994]). Documentary evidence within the meaning of CPLR 3211 (a) (1), must be "unambiguous and of undisputed authenticity" (*Fontanetta v Doe I*, 73 AD3d 78, 86 [2d Dept 2010], citing David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 21–22). "A CPLR 3211(a)(1) motion may be granted 'only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law'" (*Natoli v NYC Partnership Hous. Dev. Fund Co., Inc.*, 103 AD3d 611, 612 [2d Dept 2013], quoting *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

First Cause of Action - Declaratory Judgment on Rights to the Escrow Funds

Here, plaintiffs seek a declaratory judgment declaring that, pursuant to the Letter Agreement, they are entitled to share equally in the $35 million fee paid to IAC/Georgetown and ITRF by Related. The court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed (*see* CPLR 3001). The fundamental rule of contract interpretation is that agreements are to be construed in accord with the parties' intent and "[t]he best evidence of what parties to a written agreement intend is what they say in their writing" (*Slamow v Del Col*, 79 NY2d 1016, 1018 [1992]). Whether a contract is ambiguous is a question of law for resolution by the court (*see Riverside S. Planning Corp. v CRP/Extell Riverside*, LP, 60 AD3d 61, 66 [1st Dept 2008], affd 13 NY3d 398 [2009]). In accordance with these principles, a court should interpret a contract "so as to give full mean and effect to the material provisions" (*Bed Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007] quoting *Excess Ins. Co. Ltd. v Factory Mut. Ins. Co.*, 3 NY3d 577, 582 [2004]).

Here, giving the plaintiffs the benefit of every favorable inference of the allegations in the amended complaint, plaintiffs have sufficiently alleged that, pursuant to the terms of the Letter Agreement, in 2005 when the City of New York agreed to amend its zoning regulations to permit the merger of lots 12, 54, 20 and 20, and, upon that merger, IAC, (or its affiliate ITRF), obtained a "right or option to purchase . . . any other property (or any interest in any other real property) located within the same square block as the Land" (Letter Agreement). Moreover, IAC's (or its

affiliate HTRF's) transfer of its newly acquired right to purchase below market FAR triggered plaintiffs' "right to participate with [defendants] in such transaction on an equal economic and control basis . . ." (*id.*)

In opposition, defendants merely raise issues of fact regarding the intent of parties at the time they entered into various agreements. With respect to enforcing the Letter Agreement, defendants argue that, pursuant to the clear meaning of the Ground Lease and Sublease, any potential new FAR rights were bound to lots 12 and 54 at the time the parties entered into the Ground Lease and the Sublease, and therefore, not a newly-acquired right to "other property" as contemplated by the Letter Agreement. However, it does appear that the right to purchase the below market FAR was not triggered until lots 12 and 54 were merged with lots 20 and 29 for zoning purposes. Further, the FAR rights available for purchase on the merged lot could only be used, collectively, on either lot 20 or 29. Therefore, there is a question of fact regarding the applicability of the term "other property" as used in the Letter Agreement. Thus, at this stage of litigation, defendants' reliance on the Ground Lease, Sublease, and Letter Agreement does not conclusively refute plaintiffs' opposing factual allegations. At the very least, there is a question of fact regarding the parties' intent in using the terms of the Letter Agreement, "a right or option to purchase . . . any other property (or interest in any other real property) located within the same square block as the Land" (Letter Agreement).

Interestingly, defendants also raise an issue of fact regarding the intent of the parties regarding the Letter Agreement's use of the ambiguous term "participate." On a motion to dismiss, the court cannot determine whether the parties intended "participate" to mean "to take part in" or "engage in" real estate development, as argued by defendants, or "to share in" the proceeds of a sale, as argued by plaintiffs.

Further, defendants have not demonstrated, as a matter of law, that the terms of the Ground Lease and Sublease granted them the sole right to transfer the FAR that belonged to a newly-merged lot. Notably, the newly-merged lot, and its associated FAR, did not exist in 2004, when the Ground Lease and Sublease were executed. Further, there is nothing in the Ground Lease and Sublease which expressly gave defendants the unilateral right to use, retain, or otherwise dispose of the newly-acquired FAR.

Finally, defendants' contention that plaintiffs merely acted as their agent in the Related Transaction has not been demonstrated as a matter of law. Plaintiffs submit the affirmation of their counsel, Jeffrey Lenobel, who states he was actively involved in negotiating the Related Transaction and plaintiffs were never directed to consent to the transaction, in a ministerial fashion nor, by defendants.

Accordingly, defendants' documentary evidence does not utterly refute plaintiffs' allegations regarding its rights under the Letter Agreement conclusively as a matter of law (*see McCully v Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept 2009]; *see generally McCarthy v Young*, 57 AD3d 955, 955 [2nd Dept 2008] [Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately prove its claim is not part of the analysis of a pre-discovery CPLR 3211 motion to dismiss]).

Second Cause of Action – Declaratory Judgment as to Unjust Enrichment

The elements of a cause of action to recover for unjust enrichment are "(1) the defendant was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (*Mobarak v Mowad*, 117 AD3d 998, 1001 [2nd Dept 2014]). The "essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (*Sperry v Crompton Corp.*, 8 NY3d 204, 215 [2007] quoting *Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415, 421 [1972]). Notably, although the existence of a valid and enforceable contract generally precludes quasi-contractual recovery, where a bona fide dispute exists as to the existence, or applicability, of a contract, the plaintiff may proceed on both breach of contract and quasi-contract theories (*see Nakamura v Fujii*, 253 AD2d 387, 390 [1st Dept 1998]).

Defendants argue that this claim must be dismissed because all the work performed by plaintiffs was done pursuant to paragraph 2.10 of the Development Agreement, in which Georgetown 19th Street Development agreed, at HTRF's request and expense, to provide it with assistance obtaining financing, and in securing any tax abatements or incentives, for the Headquarters Project. However, it is not clear how the Development Agreement, which was entered into for the purposes of constructing IAC's headquarters, covers the work performed by plaintiffs on the zoning changes. There is no dispute the zoning changes were not necessary for

the Headquarters Project. As plaintiffs note, the terms of the Development Agreement specifically refer to the "Project," meaning the construction of the IAC headquarters. Notably, recital E of the Development Agreement defines the word "Project" as the "demolition of the Existing Building," and the "planning and construction" of the IAC headquarters (see Development Agreement). Accordingly, defendants' documentary evidence does not utterly refute plaintiffs' unjust enrichment allegations conclusively or as a matter of law (*see McCully v Jersey Partners, Inc.*, 60 AD3d at 562).

Moreover, while there is no dispute regarding the validity of the Letter Agreement or the other various documents executed by the parties, there is a bona fide dispute regarding the applicability of the Letter Agreement to facts of this case. Should it be determined that the Letter Agreement does not apply, that does not necessarily preclude plaintiffs from seeking to recover damages under the theory of unjust enrichment (*see Nakamuar v Fuji*, 253 AD2d at 390).

Accordingly, it is

ORDERED that defendants' motion to dismiss is denied; and it is further

ORDERED that defendants are directed to serve an amended answer to the amended complaint within 20 days after service of a copy of this order with notice of entry and it is further

ORDERED that counsel are directed to appear for a preliminary conference on Tuesday, October 2, 2018 at 9:30 AM in Part 49, Courtroom 252, 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.

DATED: August 21, 2018

E N T E R,

O. PETER SHERWOOD
J.S.C.