

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

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

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**PINK SHIRT CONSTRUCTION, INC.,**

Plaintiff,

**DECISION & ORDER  
Index No. 59290/2017  
Sequence No. 1**

-against-

**MR. WHITE, LLC, JEFFREY WHITE,  
KELLY RHEEL and ANDREW DUNLEAVY,**

Defendants.

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**WOOD, J.**

The following documents were read in connection with defendants' motion:

- Defendants' Notice of Motion, Counsel's Affirmation, Exhibits, Memorandum of Law.
- Plaintiff's Counsel's Affirmation in Opposition, Memorandum of Law, Exhibits.
- Defendants' Reply Memorandum of Law.

Plaintiff ("Pink Shirt") commenced this action asserting three causes of action for breach of contract, tortious interference with contract, and unjust enrichment/quantum meruit, arising from a written agreement dated March 1, 2017, between Marc Biddle of Pink Shirt, and defendant Jeffrey White. Pink Shirt agreed to provide work, labor and services for the construction of a restaurant.

Defendants now seek an order dismissing certain claims in the Complaint pursuant to CPLR 3211(a)(7). Pink Shirt opposes.

Based upon the foregoing, the motion is decided as follows:

A motion to dismiss pursuant to CPLR 3211(a)(7), which requires that "upon a motion to dismiss [for failure to state a cause of action], the sole criterion is whether the subject pleading states

a cause of action, and if, from the four corners of the complaint, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, then the motion will fail. The court must afford the pleading a liberal construction, accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory”<sup>1</sup> (Esposito v Noto, 90 AD3d 825 [2d Dept 2011]; (Sokol v Leader, 74 AD3d 1180 [2d Dept 2010]); (Bua v Purcell & Ingraio, P.C., 99 AD3d 843, 845 [2d Dept 2012] lv to appeal denied, 20 NY3d 857 [2013]). However, this does not apply to legal conclusions or factual claims which were either inherently incredible or flatly contradicted by documentary evidence (West Branch Conservation Assn. v County of Rockland, 227 AD2d 547 [2d Dept 1996]). Moreover, if the court considers evidence submitted by a defendant in support of a motion to dismiss under CPLR 3211 (a) (7), a court may “freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint,” and if the court does so, “the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one” (Leon v Martinez, 84 NY2d 83, 88 [1994]; Uzzle v Nunzie Ct. Homeowners Ass'n, Inc., 70 AD3d 928, 930 [2d Dept 2010]); Greene v Doral Conference Ctr. Assoc., 18 AD3d 429, 430 [2d Dept 2005]). Thus, affidavits and other evidentiary material may also be considered to “establish conclusively that plaintiff has no cause of action” (Simmons v Edelstein, 32 AD3d 464, 465 [2d Dept 2006]). The court may also consider further affidavits where a meritorious claim lies within inartful pleadings (Lucia v Goldman, 68 AD3d 1064, 1065 [2d Dept 2009]). More succinctly, under CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, but if the court considers evidentiary material, the criterion then becomes “whether the proponent of the pleading has a cause of action”

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<sup>1</sup>Internal citations omitted.

(Sokol v Leader, 74 AD3d 1180; Marist College v Chazen Env'tl. Serv. 84 AD3d 11181 [2d Dept 2011]). Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus (Dee v Rakower, 112 AD3d 204 [2d Dept 2013]). Here, White paid \$132,416.54 to Pink Shirt, including a deposit of \$50,000 upon the execution of the contract. According to White, he requested an accounting of the deposit, Pink Shirt failed and/or refused to provide the accounting, and other problems with the work being provided by Pink Shirt, caused White to terminate the contract.

Firstly, it is axiomatic that a breach of a contract claim cannot be maintained against a defendant who was not a party to the agreement in question (Black Car & Livery Ins., Inc. v H & W Brokerage, Inc., 28 AD3d 595 [2d Dept 2006]). Upon this court's review of the contract, Jeff White, Kelly Rheel, and Andrew Dunleavy, are named as owners. However, only White signed the contract, individually, the others did not sign the contract in any capacity. Generally, a third party may sue as a beneficiary on a contract made for his benefit, but an ordinary construction contract—i.e., one which does not expressly state that the intention of the contracting parties is to benefit a third party—does not give third parties who contract with the promisee the right to enforce the latter's contract with another. They are generally considered mere incidental beneficiaries (Board of Managers of Riverview at College Point Condominium III v. Schorr Bros. Dev. Corp., 182 AD2d 664, 665 [2d Dept 1992] ).

Under these circumstances, Pink Shirt has not made out a cause of action for breach of contract, as against Mr. White LLC, Kelly Rheel and Andrew Dunleavy, as they were not signatories to the Contract, and there is no sufficient evidence that they were intended third party beneficiaries. There is no indication that White was signing the contract on behalf of anyone other than himself.

Pink Shirt's second cause of action for tortious interference is also dismissed. A breach of

contract claim does not give rise to a separate cause of action in tort unless the defendant breached a legal duty that is separate and apart from its contractual obligations (Old Republic National Title Ins. Co. v Cardinal Abstract Corp., 14 AD3d 678 [2d Dept.2005]). The cause of action alleging tortious interference with a contract is dismissed, as the allegations in support of this cause of action “are devoid of a factual basis and are vague and conclusory” (Black Car & Livery Ins., Inc. v H & W Brokerage, Inc., 28 AD3d 595 [2d Dept 2006]). Defendants point out that Pink Shirt alleges that it hired subcontractors to perform the work in the contract, that defendants knew that it hired said subcontractors and that based upon defendants conversations with the subcontractors, the subcontractors continued to work without Pink Shirt. Defendants argue that plaintiff fails to allege that the subcontractors breached their contract with Pink Shirt, that defendants procured that breach or that the contract would not have been breached, but for defendants’ conduct. In light of the foregoing, Pink Shirt has not demonstrated a cause of action for tortious interference.

Moving to the third cause of action for unjust enrichment and quantum meruit, to prevail on unjust enrichment it must be shown that the other party was enriched, at that party’s expense, and that it is against equity and good conscience to permit the other party to retain what is sought to be recovered (Old Republic Natl. Tit. Ins. Co. v Luft, 52 AD3d 491 [2d Dept 2008]). A valid and enforceable written contract covering a particular subject matter ordinarily precludes recovery in quasi-contract for events arising out of the same subject matter (Hamlet at Willow Creek Dev. Co., LLC v Ne. Land Dev. Corp., 64 AD3d 85, 102 [2d Dept 2009]). Giving the pleadings and the required liberal construction, as the court must, defendants’ motion to dismiss the cause of action for unjust enrichment as against Mr. White LLC, Kelly Rheel and Andrew Dunleavy is denied; but granted as to Jeffrey White. With regard to quantum meruit, “a claimant must establish (1) the

performance of the services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services ” (Ross v DeLorenzo, 28 AD3d 631, 635 [2d Dept 2006]). Here, Pink Shirt’s pleadings permissibly plead its quantum meruit claim, but it is duplicative of the breach of contract claim as to White, and is dismissed as to him.

All matters not herein decided are denied. This is the Decision and Order of the court.

Accordingly, for the stated reasons, it is hereby


ORDERED, that defendants’ motion to dismiss is granted in part and denied in part; and it is further

ORDERED, that plaintiff shall serve a copy of this order with Notice of Entry upon defendant within 10 days of entry, and file an affidavit of service within 5 days of service in accordance with NYSCEF protocol; and it is further

ORDERED, that the parties are directed to appear in the Preliminary Conference Part on

*Dec. 4, 2017* at *9:30* at the Westchester County Courthouse in room 811.

**Dated: November 2, 2017**  
**White Plains, New York**

  
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**HON. CHARLES D. WOOD**  
**Justice of the Supreme Court**

To: All parties By NYSCEF