

Plaintiff,

OPINION

v.

KAREN VASSALLO, et al.,

Defendants.

CECCHI, District Judge.

I. INTRODUCTION

This matter comes before the Court on the motion (ECF No. 21) of Plaintiff RJR Mechanical, Inc. (“Plaintiff”) for summary judgment on all nine of the affirmative defenses pleaded in the Answer (ECF No. 6, hereinafter, “Ans.”), or alternatively to strike those defenses, as well as the cross-motion (ECF No. 25) of Defendants Karen Vassallo (“Karen”), Harry Vassallo (“Harry”), and Coastal Sun Metals, Inc. (“CSM,” together, “Defendants”) for judgment on the pleadings or alternatively summary judgment. The Court has considered the submissions made in support of and in opposition to the instant motions. The motions are decided without oral argument pursuant to Fed. R. Civ. P. 78(b).¹ For the reasons set forth below, Defendants’ motion is DENIED, and Plaintiff’s motion is GRANTED in part and DENIED in part.

¹ The Court considers any new arguments not presented by the parties to be waived. See Brenner v. Local 514, United Bhd. of Carpenters & Joiners of Am., 927 F.2d 1283, 1298 (3d Cir. 1991) (“It is well established that failure to raise an issue in the district court constitutes a waiver of the argument.”).

will also discuss the contents of the (operative) Amended Complaint (ECF No. 5, hereinafter, “Compl.”) and the Answer.

A. Factual Background

Plaintiff is a New York corporation that operates as a heating, ventilation, and air conditioning contractor. (ECF No. 21-1, hereinafter “Pl.’s 56.1,” ¶¶ 1-2). Plaintiff’s president is Roy Leibowitz (“Leibowitz”). Defendants Harry and Karen Vassallo are a married couple residing in New Jersey. (Pl.’s 56.1 ¶ 3; Compl. ¶ 8; Ans. ¶ 8). Defendant CSM is a New Jersey corporation, of which Harry is a shareholder. (Pl.’s 56.1 ¶ 4). Plaintiff claims both Harry and Karen controlled CSM, while Defendants contend Harry was the sole shareholder, and Karen was never a shareholder, director, officer, or employee of CSM. (Pl.’s 56.1 ¶ 4; ECF No. 25-2, hereinafter “Defs.’ 56.1,” ¶¶ 4, 31). During the relevant time period, Harry worked for Coastal Sheet Metal Corp. (“Coastal”), a sheet metal contractor (not to be confused with CSM), although the parties disagree about whether Harry was “officially” the president of Coastal. (Pl.’s 56.1 ¶¶ 5-6; Defs.’ 56.1 ¶¶ 5-6).

According to the Amended Complaint, Harry and Karen secretly formed CSM, which has the same initials as Coastal Sheet Metal, as part of a plan to steal Coastal’s receivables by directing some of Coastal’s customers to make checks payable to “CSM,” then depositing these checks into CSM’s bank account. (Compl. ¶ 13). Harry and Karen allegedly covered up the diversion of these checks by intercepting Coastal’s mail and omitting transactions from Coastal’s records. (Id.).

on February 12 and 27, 2001, and one that Plaintiff made payable to “Coastal Sheet Metal” in July 2001. (Pl.’s 56.1 ¶¶ 9, 11-21; Defs.’ 56.1 ¶¶ 9, 11-21). Plaintiff contends it intended these checks as payment for work Coastal performed as Plaintiff’s subcontractor on a construction project at the State University of New York Health Sciences Center (“the Project”), located in Brooklyn, New York. (Pl.’s 56.1 ¶¶ 11-16). According to Plaintiff, Harry instructed Roy Leibowitz—Plaintiff’s president—to make the two February checks payable to “CSM,” and deposited all three checks in CSM’s bank account. (Id. ¶¶ 9, 17, 20). Allegedly, Leibowitz agreed to give Harry these checks because Harry “misrepresented to [Plaintiff] that he was the owner of Coastal and/or that he had the authority to direct the manner in which [Plaintiff] should make payments to Coastal,” and that Harry was collecting payment for the work Coastal did on the Project. (Compl. ¶¶ 37-40). Plaintiff claims Leibowitz did not know CSM was a company separate from Coastal or that Harry was using it to divert Coastal’s receivables. (Pl.’s 56.1 ¶ 10).

In 2004, Coastal sued Plaintiff in Supreme Court, New York County. (Pl.’s 56.1 ¶ 22). Coastal alleged Plaintiff had failed to pay the outstanding \$397,818.74 it owed for Coastal’s subcontracting work on the Project. (Certification of John R. Altieri, ECF No. 25-3, hereinafter “Altieri Cert.,” Ex. C). On January 30, 2009, a jury in that action awarded Coastal \$185,681.12 on a verdict sheet indicating the award was “for the work [Coastal] performed pursuant to the terms of the contract between the plaintiff Coastal and the defendant RJR (‘contract work’), and the additional work authorized by defendant RJR (‘extra work’)[.]” (Altieri Cert. Ex. D).

Relevant to the defenses at issue in the present motions, Defendants contend Leibowitz was “involved with the diversion of the three checks.” (Harry Vassallo Certification, ECF No. 25-6, hereinafter “Vassallo Cert.” ¶ 23). According to Harry Vassallo, Leibowitz agreed to make the three checks payable to CSM even though Leibowitz knew Plaintiff owed no money to CSM. (Id. ¶¶ 7-8). Defendants identify a discrepancy between Leibowitz’s records and those of Plaintiff’s employee, Larry Karpman (“Karpman”): Leibowitz’s list of checks paid to Coastal includes the three checks at issue, while Karpman’s does not.² (Id. ¶ 20). On the other hand, Harry Vassallo also indicates he told Leibowitz the three checks would be credited to Plaintiff’s account with Coastal (id. ¶ 8), and asserts that the three checks were in fact credited to that account, “so [Plaintiff] never lost money due to the checks.” (Id. ¶¶ 8, 23).

Harry also claims CSM paid several checks to Leibowitz totaling \$10,000 beginning in April and May of 2001, possibly (it is unclear from Defendants’ submissions) in connection with negotiating a reduction of \$50,000 in the contract price owed to Coastal for its work on the Project. (Vassallo Cert. ¶ 22). Defendants also submit an excerpt of Leibowitz’s testimony from the trial between Coastal and Plaintiff, in which Leibowitz testified he received three to four checks for doing Coastal’s paperwork on evenings and weekends, but could not remember whether the checks came from CSM as opposed to Coastal. (Altieri Decl. Ex. M.). This trial testimony indicates

² According to Defendants’ 56.1 statement, it is the other way around: Leibowitz’s list omits the three checks while Karpman’s list includes them. (Defs.’ 56.1 ¶ 39 (citing Vassallo Cert. ¶ 20)).

Coastal and Plaintiff, wherein the employee testified Leibowitz told him one of Coastal's invoices was "overstated; that Harry and himself – he, in turn, allowed Coastal to bill more than what we're entitled to bill. In other words, it's like an exaggerated bill[.]" (Altieri Cert. Ex. I).

B. Procedural History

Plaintiff commenced this action on March 23, 2012 (ECF No. 1), and filed the Amended Complaint on July 5, 2012. (ECF No. 5). In the Amended Complaint, Plaintiff brings four claims, apparently asserting each against all three defendants: unjust enrichment (Count One), tortious interference with contract (Count Two), fraud (Count Three), and civil violation of the federal Racketeer Influenced and Corrupt Organizations Act ("civil RICO") (Count Four). (*Id.*).

Defendants answered on July 18, 2012. (ECF No. 6). The answer lists nine "Separate Defenses" that appear to be affirmative defenses:

1. Failure to state a claim upon which relief can be granted (First Defense);
2. Statute of limitations (Second Defense);
3. "Lack of Jurisdiction" (Third Defense);
4. Unclean hands (Fourth Defense);
5. "The answering party was not guilty of any negligence, wrongdoing or breach of duty as claimed" (Fifth Defense);
6. Contributory or comparative negligence pursuant to N.J.S.A. 2A:15-5.1, *et seq.* (Sixth Defense);
7. "Lack of privity between the parties" (Seventh Defense);

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.