*Docket:* **1784CV00936-BLS2**
*Parties:* **BAY COLONY PROPERTY DEVELOPMENT COMPANY and WILLIAM E. LOCKE, JR.**
**v. HEADLANDS REALTY CORPORATION; PROLOGIS LOGISTICS SERVICES INC.; AMB PROPERTY II, L.P.; AMB PROPERTY CORPORATION; and PROLOGIS, INC.**
*Date:* **June 7, 2017**
*Judge:* **Kenneth W. Salinger, Justice of the Superior Court**

MEMORANDUM AND ORDER DENYING DEFENDANTS' MOTION TO DISMISS AND DENYING PLAINTIFFS' CROSS-MOTION TO STRIKE

Bay Colony Property Development Company and William E. Locke, Jr., claim that Defendants hired them to plan, coordinate, and supervise the development of two different properties in Pennsylvania. They allege that Defendants promised to pay Bay Colony two percent of the development costs (the "Base Fee") plus ten percent of the profits (the "Incentive Fee") for its work on one site, and promised to pay the same percentage amounts to Locke for his work on the other site. Plaintiffs allege they have not been paid and are owed part of the Base Fees and all of the Incentive Fees for the two projects. Plaintiffs assert claims for breach of contract, unjust enrichment, and declaratory judgment as to enforceability of the alleged contracts.

Defendants have moved to dismiss on the ground that all claims are time barred. They argue that the statutory limitations period began to run on October 29, 2010, when AMB Property Corporation ("AMB") sent a letter disputing whether it had any binding contract with Bay Colony. If that were correct, then all claims would be time barred—whether the Massachusetts six-year limitations period or the Pennsylvania four-year limitations period controlled—because this action was not filed in Middlesex Superior Court until November 14, 2016, more than six years later.

The Court concludes that it may consider the October 2010 letter in deciding the motion to dismiss, but that it must DENY the motion because that letter did not put Plaintiffs on notice of any actual or anticipated breach of contract.

1. Considering the 2010 Letter. Plaintiffs ask the Court to strike or at least disregard the October 29, 2010, letter that is attached to Defendants' motion to dismiss. They argue that the Court may not consider this letter without converting



the motion to dismiss into a motion for summary judgment because Plaintiffs did not attach the letter to, reference the letter in, or rely on the letter in drafting the complaint. The Court disagrees.

The authenticity of this letter and the fact that it was sent to Plaintiffs are not in dispute, as Plaintiffs acknowledged at oral argument.

It is therefore permissible and appropriate for the Court to consider the letter in deciding Defendants' motion to dismiss. When deciding a motion to dismiss under Rule 12(b)(6), a court may consider "documents the authenticity of which is not disputed by the parties" without converting the motion into one for summary judgment. [1] Town of Barnstable v. O'Connor, 786 F.3d 130, 141 n.12 (1st Cir. 2015), quoting Watterson v. Page, 987 F.2d 1, 3 (1st Cir. 1993); accord, e.g., SFM Holdings, Ltd. v. Banc of America Securities, LLC, 600 F.3d 1334, 1337 (11th Cir. 2010); cf. Smaland Beach Ass'n, Inc. v. Genova, 461 Mass. 214, 228 (2012) (judicial construction of federal rules of civil procedure applies to parallel state rules). No affidavit authenticating the document is needed because the authenticity of the copy provided by Defendants has been conceded. See City of Boston v. Roxbury Action Program, Inc., 68 Mass. App. Ct. 468, 469 n.3, rev. denied, 449 Mass. 1101 (2007) (summary judgment record).

2. No Actual Breach or Unequivocal Repudiation. The October 29, 2010, did not trigger the statute of limitations, however, because it did not constitute a breach of the contractual terms alleged in the complaint, did not put Plaintiffs on notice of an actual breach of contract, and was not an unequivocal repudiation of any future contractual obligations.

This letter put Defendants on notice that "AMB disputes that there is any binding agreement between it and [Bay Colony] with respect to either project. But the letter does not assert that AMB was refusing to pay any amounts that Bay Colony

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[1] This makes perfect sense. If the rule were otherwise, a defendant could instead attach an undisputed document to their answer and seek judgment on the pleadings based on that document. Since a Rule 12(c) motion for judgment on the pleadings is subject to the same standard as a Rule 12(b)(6) motion to dismiss, see Boston Med. Ctr. Corp. v. Secretary of the Exec. Office of Health and Human Svcs., 463 Mass. 447, 450 (2012), such a motion for judgment on the pleadings would be indistinguishable from Defendants' motion to dismiss in this case.



claims it was owed for services rendered. Instead, AMB wrote that "[w]e will respond in writing to you shortly detailing AMB's position." The letter went on to direct Bay Colony and Locke not to do any further work on either project, and not to have any contact with AMB except through its legal counsel.

Defendants are not entitled to dismissal of this action on the ground that the termination of any contractual arrangement between AMB and Plaintiffs triggered the statute of limitations. The complaint does not allege that AMB had no right to terminate the alleged contract. As a result, nothing in the complaint suggests that contract termination was in and of itself a contract breach that would start the limitations period.

Nor are Defendants entitled to dismissal on the ground that the October 2010 letter constituted a repudiation of AMB's future contractual obligations and thus gave rise to a claim for breach of contract.

It is not at all clear that Plaintiffs could have brought a claim under Massachusetts law for anticipatory breach of contract, even assuming that this letter was an unequivocal repudiation. [2] "With few exceptions, ... 'Massachusetts has not generally recognized the doctrine of anticipatory repudiation, which permits a party to a contract to bring an action for damages prior to the time performance is due if the other party repudiates.' " KGM Custom Homes, Inc. v. Prosky, 468 Mass. 247, 253 (2014), quoting Cavanagh v. Cavanagh, 33 Mass. App. Ct. 240, 243 (1992), rev. denied, 413 Mass. 1107 (1992). One of the exceptions applies where there has been "an actual breach accompanied by an anticipatory breach." Cavanagh, supra, at 243 n.5; accord Parker v. Russell, 133 Mass. 74 (1882) (where defendant promised to support plaintiff for his entire life, and stopped doing so, plaintiff could sue for past and future damages). For example, if a defendant has an alleged obligation to make period payments to the plaintiff, refuses to pay the amounts currently owed, and makes "a clear and unequivocal repudiation" of its obligation to make future payments, "the statute of limitations begins to run from the date of the repudiation"

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[2] Plaintiffs raise this argument under Massachusetts law. Defendants have not, at those point, asserted or made any showing that the claims asserted in this action are instead governed by Pennsylvania law.

with respect to both past and future damages. Callender v. Suffolk Cty., 57 Mass. App. Ct. 361, 364 (2003). But the complaint does not allege, and the letter proffered by Defendants does not reveal, any actual breach of contract as of October 2010.

On the other hand, if AMB had unequivocally repudiated its alleged future contractual obligations, Defendants could have sued immediately on a quantum meruit or unjust enrichment theory. See Cavanagh, supra, at 243 n.5. Where one party contracts to provide services in exchange for future compensation, and the other party refuses to make any further payments, the party that provided the services and is seeking payment is "entitled to treat the contract as rescinded" and bring an action in quantum meruit without waiting for the time when the compensation was supposed to be paid. Johnson v. Stan; 321 Mass. 566, 569-570 (1947).

In this case, however, none of Plaintiffs claims is time-barred (assuming, as Defendants do, that the Massachusetts six-year statute of limitations applies) because the October 29, 2010, letter was not a "clear and unequivocal repudiation" of Defendants' alleged obligation to pay the Base Fees and Incentive Fees claimed by Plaintiffs. Cf. Callender, 57 Mass. App. Ct. 364.

AMB did not assert in the 2010 letter that it would not pay any part of the amounts that Plaintiffs claim they are owed. Instead, it merely stated that AMB "disputes that there is any binding agreement" and that AMB would explain its position in more detail later on.

This letter is not a repudiation of the alleged contract because it is not "a definite and unequivocal manifestation of intention [not to render performance]" (bracketed material in original). Coviello v. Richardson, 76 Mass. App. Ct. 603, 609 (2010), quoting Thermo Electron Corp. v. Schiavone Constr. Co., 958 F.2d 1158, 1164 (1st Cir. 1992); see also Nortek, Inc. v. Liberty Mut. Ins. Co., 65 Mass. App. Ct. 764, 766 & 769-770 (2006) (statute of limitations on contract claim did not begin to run when insurer responded to question about retrospective premiums by stating "that it would investigate the situation and get back to insured, because insurer took no "final or definitive position" as to whether insured must pay disputed amount).



ORDER

Defendants' motion to dismiss the complaint is DENIED. Plaintiffs' cross-motion to strike exhibit B to the motion to dismiss is also DENIED.

Kenneth W. Salinger, Justice of the Superior Court