New York State Court of Claims

M/A-COM v. THE STATE OF NEW YORK and THE NEW YORK STATE OFFICE FOR THE CHIEF INFORMATION OFFICER/OFFICE FOR TECHNOLOGY, # 2009-015-194, Claim No. 116420, Motion No. M-76621

Synopsis — In a dispute arising out of a contract for the installation of a Statewide wireless network service, Court granted dismissal motion to the extent certain causes of action were redundant of the breach of contract action.

Claimant(s): M/A-COM, INC. and TYCO ELECTRONICS CORPORATION
Defendant(s): THE STATE OF NEW YORK and THE NEW YORK STATE OFFICE FOR THE CHIEF INFORMATION OFFICER/OFFICE FOR TECHNOLOGY
Judge: FRANCIS T. COLLINS

Defendant moves for dismissal of the claim against The New York State Office For The Chief Information Officer/Office For Technology ("OFT") and for dismissal of claimant's second through eighth causes of action pursuant to CPLR 3211 (a) (1), (2), (5), (7) and (8).

The instant dispute arises from a contract between M/A Com, Inc. ("M/A-Com") and the State of New York "acting through the Office for Technology" (the "Contract") for the installation of a Statewide Wireless Network ("SWN") (see defendant's Exhibit B, Master Agreement). According to the Contract, the SWN, once operational, would constitute "an essential part of New York State's critical infrastructure to support homeland security in the aftermath of the global events of September 11th, 2001..." (defendant's Exhibit B, Master Agreement, p. 3). As set forth in the Contract, the SWN was intended to "provide an integrated, land mobile radio communications network that will be utilized by public safety and public service agencies in New York State to more effectively and efficiently coordinate the day-to-day delivery of governmental services . . ." and "more effectively and efficiently coordinate deployment of all levels of public safety resources during disaster and emergency situations in order to ensure public health, safety and welfare, to enable public service and public safety entities . . . to better respond to and protect the citizens of New York State. . ."

Claimants' Allegations With Regard To The Contract Work

Claimants allege that the Contract required M/A-Com to initially design and construct the SWN in the two-county primary regional build-out (PRB) area composed of Erie and Chautauqua counties. According to the claim:

> "12. ... After the construction and testing of the PRB was completed, the State would then determine whether or not to accept the PRB (after which the State would have the option of building out the rest of the State). Under the Master Agreement, the State did not have to make payments to M/A-COM unless and until the State accepted the PRB. During the course of building out the PRB, at OFT's request, M/A-COM also began building out the SWN in the New York City metropolitan region (the "Metro 21 System") (defendant's Exhibit A, ¶ 12).
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> 13. Unfortunately for M/A-COM, it substantially completed the PRB at the same time that the State became aware of its unprecedented $25 billion budget deficit. Facing a potential $2 billion expenditure for the SWN, termination of the Master Agreement presented the State with a convenient opportunity not only to avoid future billions of dollars in payments, but also to seek a $50 million windfall by drawing down on a standby letter of credit issued in connection with the Master Agreement" (defendant's Exhibit A, Claim,¶ 13).

Claimants allege that initial delays in the build-out of the PRB resulted from the actions of OFT in failing to develop reasonable lease terms for the antennae tower sites, in failing to coordinate the needs of disparate user groups, and in rejecting M/A-Com's environmental reviews for arbitrary reasons. Another factor contributing to the delay, according to the claim, was the State's request in late 2006 that M/A-Com begin the build-out of the SWN in the New York City region concurrently with the PRB. With respect to the New York City build-out, the claimants allege:

> 39. OFT upgraded the Metro 21 System by installing state-of-the-art Alcatel microwave technology at a cost of more than $15 million to M/A-COM. Such installation enabled the State Police to communicate in New York City over the legacy M/A-COM Enhanced Digital Access Communication System ("EDACS"), until the SWN was operational. M/A-COM has still not been paid by OFT for the cost to upgrade Metro 21 or for its ongoing expenses to maintain the system (defendant's Exhibit A, Claim,¶ 39).

Claimants allege that given the added burden of simultaneously upgrading the Metro 21 system alongside the PRB, OFT agreed to a new timetable to build-out the PRB. In this regard, it is alleged that the parties drafted a change order in November 2006 providing for the acceleration of the New York City SWN build-out and, if accepted by OFT, permitting payments for the New York City regional build-out "in advance and independent of acceptance of the PRB and/or the SWN Final Engineering Design..." (Defendant's Exhibit A, Claim, ¶ 38). Claimants allege that while OFT agreed to the new timetable, it failed to sign a change order proposed by claimants. As set forth above, claimants allege that M/A Com has not been paid for its work in connection with the Metro 21 system.

With respect to the PRB build-out, claimants allege that because of numerous delays caused by OFT this portion of the SWN work fell behind schedule. Notwithstanding this fact, M/A-Com agreed to OFT's request to begin operational testing of the system within the PRB in September 2007.

According to the allegations in the claim, the initial testing identified needed improvements and/or adjustments (defendant's Exhibit A, Claim, ¶ 44) and additional testing was performed in April 2008. On April 10, 2008 OFT allegedly reiterated in correspondence to M/A-Com its expectation of the PRB's acceptance on July 29, 2008 and the potential expansion of the PRB to include Niagara County (defendant's Exhibit A, Claim, ¶ 45).

The claim alleges that in May 2008 "when the New York State budget office was projecting a cumulative [budget] deficit of $21.5 billion over the following three (3) years, OFT announced it had hired [an outside consulting firm] as an independent consultant to verify and validate analysis of the testing results and network construction..." (defendant's Exhibit A, Claim, ¶ 47). Throughout May and June 2008 it is alleged that the M/A-Com engineers worked to address issues identified in the April testing and that M/A-Com certified the PRB was ready for operational testing on July 1, 2008 (defendant's Exhibit A, Claim, ¶ 48). However, OFT allegedly insisted on conducting a systems integration test (SIT) before additional operational tests despite the fact that no such tests were contemplated by the Contract. Additionally, OFT allegedly refused to permit M/A-Com personnel to witness or otherwise participate in the SIT (defendant's Exhibit A, Claim ¶ 49). Claimants allege that OFT evaluated the system as though it were a hand-held system rather than the mobile system contemplated in the Contract and considered the system and equipment flawed "when it failed to perform as a handheld system" (defendant's Exhibit A, Claim, ¶ 50).

On August 29, 2008 OFT issued a default letter to M/A-Com outlining 19 purported deficiencies in the system and declaring a violation of the warranty provisions of § 12.19 (A) - (C) of the Request For Proposals (RFP). The letter provided M/A-Com 45 days in which to cure the default (defendant's Exhibit A, Claim ¶ 54). Despite the fact that M/A-Com was allegedly not in default, it attempted to address the purported technical issues or demonstrate why the purported deficiencies were not based on contractual obligations (defendant's Exhibit A, Claim, ¶ 59). On October 15, 2008, M/A-Com sent a "cure" letter to OFT noting that all of the alleged deficiencies had been cured and/or were not required under the Contract (defendant's Exhibit A, Claim,¶ 62). Thereafter, OFT notified M/A-Com that further operational testing was postponed. By letter dated January 14, 2009 OFT notified M/A-Com that it was terminating the Contract based on its failure to cure the 19 deficiencies outlined in its prior correspondence.

Draw-Down Of The Standby Letter Of Credit

In compliance with requirements contained in the Contract between the parties an irrevocable standby letter of credit (SLOC) in the amount of $50 million dollars was issued on September 21, 2005 for the benefit of the State by BNP Paribas, and guaranteed by M/A-Com's parent company, Tyco Electronics . The stated purpose of the SLOC was to "irrevocably indemnify the Beneficiary in connection with New York State Comptrollers Contract # C000102 . . . for the design and build-out of a statewide wireless network (SWN) (claimants' Exhibit A, SLOC, ¶ 2). The SLOC provided the following:

> "4. Irrevocable Obligation: The full aggregate U.S. $50,000,000.00 Initial obligation of Issuer and any other subsequent amount reinstated under this SLOC are the individual obligations of Issuer

> and are in no way contingent upon any other agreement or reimbursement from Customer/Applicant with respect thereto" (claimant's Exhibit A, SLOC ¶ 4).

Funds were available to the State as beneficiary of the SLOC upon presentation of a draft accompanied by a certificate signed by the Director of the New York State Office for Technology, and acknowledged by a notary, stating:

> " 'The undersigned hereby draws the amount of $_____(United States Dollars) against Issuer Standby Letter of Credit BNP Paribus L/C . . . which represents amounts due to us according to the terms of the contract between the New York State Office for Technology and M/A Com, Inc. ("Customer/Applicant") under the agreement bearing New York State Comptrollers Contract No. C000102, dated September 19, 2005, for the design, build and maintenance of a statewide wireless network' "(claimant's Exhibit A, SLOC, ¶ 7).

The SLOC also contained a merger clause which provides as follows:

> "10. Merger And Incorporation: This SLOC sets forth in full the terms and conditions of our undertaking. References in this SLOC to other agreements, contracts, documents or instruments are for identification purposes only and shall not modify, annul, amplify or affect in any other way whatsoever the terms and conditions hereof or cause such agreements, contracts, documents or instruments to be deemed incorporated herein" (claimant's Exhibit A, SLOC, ¶ 10).

Pursuant to a Letter Of Credit Agreement between BNP Paribus (the bank issuing the SLOC) and M/A-Com, M/A-Com agreed to reimburse the bank for each payment made by the bank on account of drafts drawn on the SLOC.

Claimants allege that OFT "raided" the SLOC on January 14, 2009, the date it terminated the Contract, by drawing down the entire $50 million available thereunder and depositing the money into the General Fund (defendant's Exhibit A, Claim, ¶¶ 80-82).

The Alleged Defamatory Statements

Claimants allege that beginning on August 29, 2008 OFT repeatedly made false and defamatory statements about M/A-Com in an effort to build public support for termination of the SWN Contract. Claimants allege that in addition to the defamatory statements contained in the January 14, 2009 termination letter, M/A-Com was the subject of the following defamatory statements:

> "a. In an OFT press release dated January 15, 2009, Melodie Mayberry- Stewart falsely stated that 'MA-COM has failed to demonstrate the reliability of their Open Sky technology, especially its network and subscriber radios, which are the core of the system' and that 'we have given M/A-COM every opportunity to remediate existing deficiencies.'
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> b. In that same press release, OFT stated that '[M/A-Com] has failed to deliver a satisfactory and acceptable public safety communications network and is in default of the contract.'
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> c. State Comptroller Thomas DiNapoli, in a press release dated January 15, 2009, stated 'After several rounds of failed testing, it has become apparent that New York is not much closer to a statewide wireless network than it was when this whole process started years ago. We cannot afford to spend $2 billion on a system that doesn't work.'
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> d. On or around February 1, 2009, Joan Sullivan, New York's Executive Deputy Comptroller for Operations stated in an interview with a Milwaukee news station, 'We really concluded here that [M/A-Com's wireless system is] not working. Unless something changes dramatically, we need to pull the plug.' " (defendant's Exhibit A, Claim, ¶ 84).

It is also alleged that "on December 17, 2008, defendants made false and defamatory statements regarding M/A-COM and Tyco Electronics to their customers and potential customers during a closed Executive Session of the SWN Advisory Council" (defendant's Exhibit A, Claim, ¶ 122).

The Causes Of Action Alleged In The Claim

Claimants allege causes of action for breach of contract (first claim for relief), unjust enrichment regarding the work performed on the PRB and the Metro 21 System (second claim for relief), unjust enrichment regarding draw-down of the SLOC (third claim for relief), breach of the covenant of good faith and fair dealing (fourth claim for relief), conversion with regard to the draw-down of the SLOC (fifth claim for relief), business defamation (sixth claim for relief), imposition of a constructive trust with regard to the funds allegedly drawn from the SLOC and deposited into the State's General Fund (seventh claim for relief), and a declaration that the Contract was terminated for convenience pursuant to the terms of the Contract thereby entitling the claimants to payment in accordance with the Contract terms relative thereto (eighth claim for relief).

The request for relief includes a request for monetary damages in the amount of $111 million, comprised of the alleged improper $50 million draw-down of the SLOC and $61 million expended on the build-out of the PRB. It also includes a request for an order enjoining the defendants from spending the monies obtained from the SLOC, which were allegedly deposited into the State's general fund, and imposing a constructive trust until the instant litigation is resolved; enjoining the defendants from drawing upon a second $50 million from the SLOC; and declaring that the termination of the Contract was for convenience, not cause, and that "[d]efendants must provide Claimants with payment according to the formula set forth [in the Contract]" (defendant's Exhibit A, p. 36).

The Parties' Arguments

In support of its dismissal motion, the State argues, first, that OFT is not a proper party to this action because it has no existence independent of the State itself.

Next, defendant contends that the second, third and fifth claims alleging unjust enrichment and conversion are barred by the doctrine which holds that the existence of a valid contract precludes claims for unjust enrichment and conversion absent a duty arising independently of the contract itself. Defendant contends that the fourth claim based upon the alleged breach of the implied covenant of good faith and fair dealing should be dismissed as redundant of the breach of contract claim.

Defendant contends that the sixth claim for relief is subject to dismissal as the alleged defamatory statements made by the Director of OFT and the State Comptroller on January 15, 2009 as well as the statement made by the Executive Deputy Comptroller for Operations on February 1, 2009, were protected by the absolute privilege provided an individual who is entrusted by law with administrative or policy-making responsibilities, citing, inter alia, Stukuls v State of New York (42 NY2d 272 [1977]). Claimants have agreed to withdraw the claim with respect to the alleged defamatory statements posted on OFT's website on August 29, 2008 and with respect to the unspecified statements allegedly made in the closed Executive Session on December 17, 2008 (see claimant's Memorandum Of Law, p.1, n 1). As a result, defendant's motion is moot to the extent it argued that the claim was time-barred with respect to the August 29, 2008 statement and failed to state a cause of action with respect to the unspecified statements made in a closed Executive Session.

Lastly, defendant argues that the seventh and eighth claims for relief are equitable in nature and outside the scope of this Court's limited jurisdiction. Defendant contends in this regard that the seventh claim requesting the imposition of a constructive trust on the $50 million proceeds allegedly withdrawn from the SLOC and deposited into the State's general fund is an equitable remedy for which this Court lacks subject matter jurisdiction. Defendant likewise argues that the eighth claim requesting a declaration that the Contract termination was for convenience, not cause, is an equitable claim and must be dismissed for the same reason.

In opposition to the motion, claimants argue that OFT is a proper party to the action because "OFT was the party who signed the Master Agreement, and did so while acting as an agency of the State" (claimants' Memorandum of Law, p. 17).

Claimants argue that their unjust enrichment causes of action (claimants' second and third claims for relief) are not duplicative of their breach of contract claim. With respect to the second claim for unjust enrichment relating to the work performed within the PRB and to upgrade the Metro 21 system in New York City, claimants contend that the existence of a dispute regarding whether or not the Metro 21 work was covered by the Contract requires denial of

the motion. In this regard, claimants point to footnote "2" in the defendant's Memorandum of Law in which it reserved its right to raise as a defense the lack of approval by the Comptroller for any changes to the Contract involving the expansion of the PRB and the addition of the Metro 21 upgrade to the scope of the Contract. Notably, claimants do not dispute that the unjust enrichment claim is duplicative of the breach of contract claim with regard to the work performed on the PRB. Rather, claimants' argument centers on the contention that dismissal of the unjust enrichment claim regarding the Metro 21 upgrade is not appropriate where the defendant has expressed its intention to defend this claim on the ground that the work was performed without a change order or the approval of the Comptroller.

With respect to the third claim for relief alleging unjust enrichment arising out of the State's draw-down of the full $50 million SLOC, claimants assert that the SLOC is an independent contract between the claimant and the bank and, as such, the unjust enrichment claim is not duplicative of the breach of contract claim. As there was no privity between the claimants and the State on the SLOC, claimant argues that there is no duplication. For the same reason, claimants argue that the fifth claim for conversion of the SLOC funds is not duplicative of the breach of contract claim.

Next, claimants argue that the fourth claim for breach of the implied covenant of good faith and fair dealing is not duplicative of the breach of contract claim because "[c]laimants have alleged a considerable list of grievances based on the State's bad faith and often malevolent conduct, which may not have violated an express term of the contract, but which in fact support a claim for breach of the covenant of good faith and fair dealing" (claimants' Memorandum of Law, p. 9).

With respect to the sixth claim for business defamation, claimants argue that statements made by public officials to the press are not protected by absolute privilege because their comments were public and not made during the performance of an essential part of their duties. Claimants contend that, "[a]t best, these statements to the press might be subject to qualified privilege" (claimants' Memorandum of Law, p. 13). Claimants argue that the statements were made, not because they were true, but to support the State's pretextual decision to terminate the Contract due to the State's budgetary crisis. Accordingly, claimants contend that the allegations in the claim asserting malice (defendant's Exhibit A, Claim, ¶ 124) are sufficient to defeat any qualified privilege requiring denial of the defendant's motion. Notably, the defendant argues, for the first time in reply, that the failure of the claimant to set forth the total sum claimed as damages on the defamation claim, as required by Court of Claims Act 11 (b), is a jurisdictional defect requiring dismissal.

Lastly, claimants contend that the jurisdiction of the Court of Claims extends to equitable relief where it is incidental to a claim for money damages. Conceding that the imposition of a constructive trust is equitable in nature, claimants argue:

> "[b]ecause Claimants' primary claim for relief is for the return of these funds in the form of money damages, the Court may apply equitable considerations and enjoin the use of those funds. The requested relief is clearly incidental to the damages sought, since Claimants are asking the Court to merely segregate the funds that were improperly misappropriated by the State" (claimants' Memorandum of Law, p. 15).

With respect to the claimants request for a declaration that the Contract was terminated for convenience, not cause, claimants argue that "[i]f Claimants are ultimately correct that the State improperly terminated the contract, then the State's termination was necessarily undertaken for convenience, and accordingly . . . it would be appropriate for the Court to calculate and award damages pursuant to a Termination For Convenience" (claimants' Memorandum of Law, p. 16). Defendant makes the point in reply that if claimants succeed on their breach of contract cause of action, corresponding breach of contract damages may be awarded.

The Claim Against The New York State Office For The Chief Information Officer/Office For Technology

The Court of Claims has exclusive jurisdiction over actions for money damages against the State or its agencies where the State is the real party in interest (NY Const, art VI, § 9; Court of Claims Act § 9; Morell v Balasubramanian, 70 NY2d 297 [1987]; Monreal v New York State Dept. of Health, 38 AD3d 1118 [2007]). With few exceptions not applicable here, the State is the only properly named defendant in the Court of Claims. OFT was created as an office within the executive department (State Technology Law § 102 [1]). Its functions, powers and

duties include coordinating the advancement of technology to improve government efficiency and assisting the State in developing policies, plans and programs for the acquisition and deployment of technology (State Technology Law § 103 [1] [2]). While the powers conferred include the authority to enter into contracts (State Technology Law § 103 [17]), OFT has none of the attributes of an independent, autonomous body capable of being sued in its own name. There is no statutory authority for OFT to sue or be sued nor does the enabling legislation provide OFT the authority to borrow money, or to issue bonds, notes or incur other obligations (compare Prime Energy Solutions, Inc. v State of New York, 20 Misc 3d 750 [2008]; Public Authorities Law § 1855 [State Energy Research and Development Auth.]; Public Authorities Law § 354 [Thruway Authority]; Public Authorities Law § 1005 [Power Authority]). The lack of fiscal autonomy and the absence of specific statutory authority for OFT to sue and be sued in its own name indicate that, in the instant matter, the State is the real party in interest and, as such, the only properly named defendant in the Court of Claims (Matter of Plumbing, Heating, Piping & A.C. Contrs. Assn. v New York State Thruway Auth., 5 NY2d 420 [1959]). Defendant's motion dismissing the claim against OFT is therefore granted.

The Second, Third and Fifth Claims For Unjust Enrichment And Conversion

Recovery for unjust enrichment "is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned" (IDT Corp. v Morgan Stanley Dean Witter & Co., 12 NY3d 132, 142 [2009]). Where there is a valid and enforceable written contract governing a particular subject matter, quasi-contractual recovery on a theory of unjust enrichment is ordinarily precluded for events arising out of the same subject matter (Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382 [1987]; see also Goldman v Metropolitan Life Ins. Co., 5 NY3d 561 [2005]). On this basis, defendant contends that the claimants' second and third claims for unjust enrichment are subject to dismissal based on the existence of a valid contract covering the same subject matter.

Claimants' second claim for relief seeks damages for work performed in connection with the PRB as well as upgrading the Metro 21 system in New York City. Claimants do not dispute the existence of a valid contract covering the work performed on the PRB but argue that the work performed on the SWN in New York City (the Metro 21 system) was "extra-contractual" thereby giving rise to a claim for unjust enrichment (claimants' Memorandum of Law, p. 5).

Review of the Master Agreement submitted in support of defendant's motion to dismiss pursuant to CPLR 3211 (a) (1) makes no mention of the New York City region or upgrading the Metro 21 system. Indeed, the only mention in the Master Agreement of specific geographical boundaries is the reference to the PRB comprised of Erie and Chautauqua counties. While it is apparent from the Master Agreement that additional regions were proposed by M/A-Com in its bid proposal and contemplated by the Master Agreement, neither the bid proposal nor any other documentary evidence was submitted which establishes that the New York City region was among them. As a result, the defendant has failed to establish its entitlement to dismissal of the unjust enrichment cause of action relative to the Metro 21 upgrade through submission of documentary evidence.

With respect to the work performed in the PRB, however, the Master Agreement clearly covered this work, and claimants do not contend otherwise. Accordingly, the unjust enrichment claim with respect to the PRB is dismissed.

As the defendant has also moved for dismissal of the unjust enrichment cause of action pursuant to CPLR 3211(a) (7) the Court turns its attention to the allegations in the claim. On a motion to dismiss a claim pursuant to CPLR 3211 (a) (7) the court is required to "accept the facts as alleged in the [claim] as true, accord [claimants] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (Leon v Martinez, 84 NY2d 83, 87-88 [1994]; see also Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]). Thus, the determination is made by reference to whether "the proponent of the pleading has a cause of action, not whether he has stated one" (id. at 88).

The unjust enrichment claim for the work performed on the Metro 21system is based on the following facts alleged in the claim:

> "38. . . In November 2006, the parties drafted a change order providing that 'the build-out of the SWN NYC region (NYC) will be accelerated and built out concurrently with the PRB.' The change order further noted that if OFT accepted the system, OFT would begin payments for the New York City Region 'in advance and independent of acceptance of the PRB and/or the SWN

> Final Engineering Design...' A key purpose for the change order was identified as 'immediate homeland security needs in NYC Metropolitan area.'
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> 39. OFT upgraded the Metro 21 System by by installing state-of-the-art Alcatel microwave technology at a cost of more than $15 million to M/A-COM. Such installation enabled the State Police to communicate in New York City over the legacy M/A-COM Enhanced Digital Access Communication System ("EDACS"), until the SWN was operational. M/A-COM has still not been paid by OFT for the cost to upgrade Metro 21 or for its ongoing expenses to maintain the system.
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> 40. Given the considerable added burden on M/A-COM to simultaneously upgrade the Metro 21 System alongside the PRB, and substantial delays engendered by OFT's conduct, M/A-COM and OFT engaged in discussions to modify the original implementation timetable for the PRB.
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> 41. OFT agreed to a new timetable for the build-out of the PRB to accommodate the additional scope. However, consistent with OFT's lack of accountability, it refused to sign a change order recognizing that agreement, even though it was presented with a change order signed by M/A-COM in November 2006. To this day, OFT has not signed that change order even though the New York State Police currently rely on the upgraded Metro 21 System for wireless communications in New York City" (defendant's Exhibit A, Claim, ¶¶ 38-41).

Assuming these allegations are true and according the claimants the benefit of every favorable inference, the allegations in the claim allege nothing more than an acceleration of the Contract work in the New York City region for which the State refused to sign a change order. Thus, the only possible conclusion is that the work performed on the Metro 21 System was controlled by the terms of the Contract.

The process for changing or amending the Contract is set forth clearly in the Contract (defendant's Exhibit B, Master Agreement, pp. 23-24). The Contract provides that "[a]ny alteration of the scope or terms of this Master Agreement requires a formal Contract amendment which must be executed in the same manner as the original Master Agreement" (defendant's Exhibit B, Master Agreement, p. 24). Changes or amendments over $25,000 require the approval of the New York State Comptroller (id.). Thus, to the extent the contract requirements for the SWN build-out in New York City were accelerated, this constituted no more than a change or amendment controlled by the terms of the Contract.

The law is settled that "[a] contractor cannot bring a quantum meruit claim for extra payments beyond the original contract price where there exists a contract governing how payment for extra work will be determined" (Aviv Constr. v Antiquarium, Ltd., 259 AD2d 445, 446 [1999]; see also Charles T. Driscoll Masonry Restoration Co., Inc. v County of Ulster, 40 AD3d 1289, 1291 [2007] ["the contract's specific requirement for the use of written change orders precludes the award of damages beyond the contract price and any written changes thereto"]). Accordingly, "[t]he contract's notice and documentation requirements for extra work . . . are conditions precedent to [claimant's] recovery and the failure to strictly comply is deemed a waiver of such claims"(1) (F. Garofalo Elec. Co. v New York Univ., 270 AD2d 76, 80 [2000]; cf. Kingsley Arms, Inc. v Sano Rubin Constr. Co., Inc., 16 AD3d 813 [2005] [failure to strictly comply with the notice of claim provisions in contract constituted waiver]). Inasmuch as the only possible inference to be drawn from the allegations in the claim is that the work performed on the SWN in New York City was governed by a written contract, any claim for accelerated work must be determined within the analytical framework of a breach of contract claim.

Neither Schwartz v Pierce (57 AD3d 1348 [2008], lv denied 12 NY3d 707 [2009]) nor Goldman v Simon Prop. Group, Inc. (58 AD3d 208 [2008]), cited by claimants, require a different result. In both cases, there was a bonafide dispute regarding the existence of a contract thereby allowing the case to proceed on both a contract theory as well as a quantum meruit theory of recovery. Here, by contrast, no dispute exists as to the existence of a contract. Indeed, claimants' first claim for relief alleges the defendant breached the Contract in failing to compensate them for the work performed in both the PRB and New York City region. Rather, claimants' contention that the work on the Metro 21 System was extra-contractual is supported only with the allegation that the defendant failed to sign a change order. As set forth above, however, the Contract provided the procedure for changes and amendments to the Contract. Claimants may not evade the requirements governing changes or amendments to the Contract by merely re- casting their claim in the rubric of unjust enrichment. Accordingly, defendant's motion for dismissal of the claimants' second claim for relief is granted pursuant to CPLR 3211 (a) (7).

Claimants' third claim for relief alleges unjust enrichment arising out of the State's $50 million draw-down of the SLOC. This cause of action is based on the allegation in the claim that "OFT was not entitled to the proceeds of the SLOC because M/A-COM has not committed any 'breach, default or [caused any] damages under the Contract' " (defendant's Exhibit A, p. 30, ¶ 105, quoting Official RFP Updates, Modifications, Clarifications And Answers to Questions, Question No. 224, dated August 30, 2002). Defendant's argument in support of dismissing this cause of action is similarly based on the contention that the existence of a contract between the parties precludes a claim for unjust enrichment (see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., supra). In opposition, claimants cite First Commercial Bank v Gotham Originals (64 NY2d 287 [1985]) for the principle that an "issuing bank's obligation to honor drafts drawn on a letter of credit by the beneficiary is separate and independent from any obligation of its customer to the beneficiary [on the underlying contract]..." (Id. at 294). In the Court's view, however, it is for precisely this reason that the claims for unjust enrichment and conversion must fail.

Commercial letters of credit provide the beneficiary with a guaranteed means of payment from a creditworthy third party (the issuer) in lieu of relying solely on the financial status of a buyer or borrower (the applicant) (Nissho Iwai Europe v Korea First Bank, 99 NY2d 115, 119 [2002]). They have historically been used "to assure predictability and stability in mercantile transactions by diminishing a seller's risk of nonpayment and a buyer's risk of nondelivery due to insufficient funds" (id.). These letters of credit are used as a substitute for money and are payable upon the beneficiary's certification of performance of the underlying agreement (id.).

Unlike commercial letters of credit, standby letters of credit provide security in the event of a default under a separate agreement. As made clear by the Court of Appeals in Nissho Iwai Europe (supra):

> "A letter of credit serving this objective is referred to as a 'standby' letter of credit because it is payable only upon proof of the applicant's nonperformance or default .... Stated another way, a commercial letter of credit substitutes as the primary means of payment, while a standby letter of credit is used secondarily after the beneficiary fails to obtain payment from the applicant" (Id. at 119-120 [citations omitted]).

Letters of credit, including the SLOC at issue here, typically involve three relationships:

> "[T]he underlying contract between the customer and the beneficiary; the agreement between the bank and its customer, by which the letter of credit is issued in exchange for the customer's promise to reimburse the bank; and, the letter of credit itself, which represents the financial institution's commitment to honor drafts presented by the intended beneficiary upon compliance with the terms and conditions specified in the instrument (Mennan v J.P. Morgan & Co., 91 NY2d 13, 20 [1997]).

The fundamental principle governing all letter of credit transactions is the doctrine of independent contracts which provides:

> "the issuing bank's obligation to honor drafts drawn on a letter of credit by the beneficiary is separate and independent from any obligation of its customer to the beneficiary under the sale of goods contract and separate as well from any obligation of the issuer to its customer under their agreement .... Stated another way, this principle stands for 'the fundamental proposition that all parties [to a letter of credit transaction] deal in documents rather than with the facts the documents purport to reflect' ... Thus, the issuer's obligation to pay is fixed upon presentation of the drafts and the documents specified in the letter of credit. It is not required to resolve disputes or questions of fact concerning the underlying transaction" (First Commercial Bank v Gotham Originals, 64 NY2d 287 at 294-295 [internal citations omitted]; see also UCP art. 4).

Pursuant to its express terms, the SLOC "is subject to the Uniform Customs and Practices for Documentary Credits (1993 revision) International Chamber of Commerce Publication 500 [UCP], and as to matters not addressed by the UCP 500, shall be governed by the Laws of the State of New York." The independence principle is set forth in article 3 of the UCP as follows:

> "A. Credits by their nature, are separate transactions from the sales or other contract(s) on which they may be based and banks are in no way concerned with or bound by such contract(s), even if any reference whatsoever to such contract(s) is included in the Credit. Consequently the undertaking of a bank to pay, accept and pay Draft(s) ... is not subject to claims or defenses by the Applicant resulting from his relationships with the Issuing Bank or Beneficiary.
>
> B. A Beneficiary can in no case avail himself of the contractual relationships existing between the banks or between the Applicant and the Issuing Bank."(2)

Application of the independence principle requires payment by the issuer on a proper demand by the beneficiary even though the beneficiary may have breached the underlying contract with the applicant (see 3 White & R. Summers, Uniform Commercial Code § 26-2 [5th ed.]). Letters of credit are strictly construed so as to severely restrict the justifications for an issuing bank's refusal to honor the credit "thereby assuring the reliability of letters of credit as a payment mechanism" (Nissho Iwai Europe v Korea First Bank, 99 NY2d at 121). Thus, with limited exceptions not applicable here (see UCC § 5-109), a beneficiary's demand for payment must be honored where it is in strict compliance with the specifications of the letter of credit. Conversely, it may not be honored where the presentation fails to meet the precise specifications for a valid draw (see J.P. Doumak, Inc. v Westgate Fin. Corp., 4 AD3d 62 [2004]).

With these precepts in mind, it is clear that the allegation in the claim that "OFT was not entitled to the proceeds of the SLOC, because M/A-COM has not committed any 'breach, default or [caused any] damages under the Contract' " forms no basis for an unjust enrichment claim against the State as beneficiary of the SLOC (defendant's Exhibit A, Claim, ¶ 105). Payment on the SLOC was an independent obligation of the issuing bank to the State notwithstanding the claimants' allegation that the State breached the underlying Contract. The SLOC required only a certification by the State as beneficiary thereunder that the amount drawn "represents amounts due us according to the terms of the contract between the New York State Office for Technology and M/A-COM, Inc..." (claimants' Exhibit A, SLOC, p.2). If no amounts were in fact due, claimants' recourse lies in their claim for breach of contract, not unjust enrichment, which is in all respects redundant of their breach of contract claim (see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co. supra). As a result, claimant's third claim for relief alleging unjust enrichment arising out of the draw-down of the SLOC must be dismissed.

Claimants' fifth claim for relief alleging conversion arising out of the draw-down of the SLOC fails for similar reasons. "It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated..." (Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d at 389; see also Lantzy v Advantage Bldrs., Inc., 60 AD3d 1254 [2009]; Gruet v Care Free Hous. Div. of Kenn-Schl Enters., 305 AD2d 1060 [2003]; Fourth Branch Assoc. Mechanicville v Niagara Mohawk Power Corp., 235 AD2d 962 [1997]). Here, no tort cause of action arises from the alleged wrongful draw-down of the SLOC because the applicant is not a party thereto and the damages sought arise from the alleged breach of the underlying Contract. On facts analogous to those in the case at bar, the Court in Fertico Belgium S.A. v Phosphate Chems. Export Assn. (100 AD2d 165, 173-174 [1984]), stated:

> "[S]ince [the applicant] was not a party to the letter of credit and had no rights thereunder except to seek to enjoin honor of a draft in a case of 'fraud in the transaction', a situation not applicable here, or to look to the bank for damages if it paid in violation of the terms of the letter, its action for fraud and conversion in drawing on the letter of credit is fatally flawed... It is limited to such rights as are derived from the underlying sales transaction.

Here, as in Fertico, no tort duty to the claimants exists independent of the underlying contractual obligations. Accordingly, claimants' fifth claim for conversion must be dismissed.

As set forth above, the SLOC is subject to the UCP and, with respect to matters on which the UCP is silent, New York law governs. This is in accord with recent revisions to article 5 of the UCC. While UCC § 5-102 (4) formerly precluded application of the UCC where a letter of credit by its terms was made subject to the UCP, in 2000 this section was repealed. The combined effect of the revised UCC § 5-103 (c) and § 5-116 (c) requires, with some exceptions, the application of the UCP in the event of a conflict with the UCC. According to the express terms of the SLOC, matters as to which the UCP is silent, such as the remedies for a wrongful honor, dishonor or fraud, are controlled by New York law. Under New York law, the remedies for a wrongful honor or dishonor of a letter of

credit are set forth in the UCC § 5-111. If the presentation appears on its face to strictly comply with the conditions of the letter of credit, but a document is forged or there is fraud by the beneficiary as to the issuer or applicant, the applicant may move to temporarily or permanently enjoin the issuer from honoring the presentation (UCC § 5-111 [b]; see e.g Takeo Co. v Mead Paper, 204 AD2d 123 [1994]). No indication appears in the motion papers submitted that any such relief was sought.

Giving the claim the benefit of every possible favorable inference as is required on a motion pursuant to CPLR 3211 (a) (7) (see Leon v Martinez, supra) it must be determined whether the claimants have any cause of action in relation to the draw-down of the SLOC funds.

Pursuant to UCC § 5-110 (a) (2) the beneficiary warrants to the applicant the following:

> (a) If its presentation is honored, the beneficiary warrants:
>
> * * *
>
> (2) To the applicant that the drawing does not violate any agreement between the applicant and beneficiary or any other agreement intended by them to be augmented by the letter of credit.

As noted in the official comment to this section,

> "In most cases the applicant will have a direct cause of action for breach of the underlying contract. This warranty has primary application in standby letters of credit or other circumstances where the applicant is not a party to an underlying contract with the beneficiary. It is not a warranty that the statements made on the presentation of the documents presented are truthful nor is it a warranty that the documents strictly comply under Section 5-108 (a). It is a warranty that the beneficiary has performed all the acts expressly and implicitly necessary under any underlying agreement to entitle the beneficiary to honor."

Claimants' allegation that the draw-down of the SLOC violated the underlying agreement falls squarely within the coverage of the warranty provided by UCC § 5-110 (a) (2). While no breach of warranty cause of action was specifically alleged in the claim, the facts alleged give rise to such a cause of action (see defendant's Exhibit A, ¶ 93).(3)

The Fourth Claim For Relief Based Upon The Implied Covenant Of Good Faith And Fair Dealing

Under New York law, all contracts imply a covenant of good faith and fair dealing (511 West 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 153 [2002]). The covenant "embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract promises . . . which a reasonable person in the position of the promisee would be justified in understanding were included" (id. [internal quotation marks and citations omitted]). "No obligation can be implied, however, which would be inconsistent with other terms of the contractual relationship" (Murphy v American Home Prods. Corp., 58 NY2d 293, 304 [1983]). A cause of action for breach of the implied covenant of good faith and fair dealing is properly dismissed where it is duplicative of the breach of contract claim in that both claims arise from the same facts (Logan Advisors, LLC v Patriarch Partners, LLC, 63 AD3d 440 [2009]; Cerberus Intl., Ltd. v BancTec, Inc., 16 AD3d 126 [2005]; Parker E. 67th Assoc.v Minister, Elders & Deacons of Refm. Prot. Dutch Church of City of N.Y., 301 AD2d 453 [2003], lv denied 100 NY2d 502 [2003]; Empire State Bldg. Assoc. v Trump, 247 AD2d 214 [1998], lv denied 92 NY2d 885 [1998]). Here, the facts which give rise to the claim for breach of the implied covenant of good faith and fair dealing also form the basis for the breach of contract claim. As the facts which form the basis for this claim are subsumed in the first claim for breach of contract, these claims are duplicative. On this basis, the fourth claim must be dismissed.

The facts in Richbell Info Servs. v Jupiter Partners (309 AD2d 288 [2003]), cited by claimants, are inapposite. There, the Court recognized the tension between a good faith limitation on the exercise of a contractual right and using the implied covenant of good faith and fair dealing to create new duties that negate explicit rights under the contract (Id. at 302; cf. Maxon Intl. v International Harvester Co., 82 AD2d 1006 [1981] [where defendant did precisely what the contract permitted, any question of bad faith was irrelevant]). The Richbell Court held that the

alleged malevolent exercise of a contractual right for self gain did not create new duties negating explicit contract rights. Rather, the plaintiff sought the "imposition of an entirely proper duty to eschew this type of bad faith targeted malevolence in the guise of business dealings" (Id. at 302). However, in Richbell, the breach of contract claim was based solely upon the alleged breach of the implied covenant of good faith and fair dealing. No breach of contract claim based upon the same facts was asserted. Here, claimants allege that the termination of the contract for cause was pretextual and not due to the claimants' conduct in failing to perform its obligations under the Contract. In the Court's view, claimants' fourth claim for relief is no more than a duplication of the breach of contract claim and is subject to dismissal on this basis.

The Sixth Claim For Relief Alleging Business Defamation

Defendant contends that it is immune from suit for defamation because the statements made by Melodie Mayberry-Stewart, the Director of OFT, in a press release on January 15, 2009 are protected from suit by the cloak of absolute immunity. Defendant asserts this same argument with regard to the statements made by Thomas DiNapoli, the State Comptroller, in a press release dated January 15, 2009 and statements made by Joan Sullivan, the Executive Deputy Comptroller for Operations, in an interview on February 1, 2009.(4)

An absolute privilege "exists to protect those who bear the greatest burdens of government or those to whose official functioning it is essential that they be insulated from the harassment and financial hazards that may accompany suits for damages by the victims of even malicious libels or slanders" (Stukuls v State of New York, 42 NY2d 272, 278 [1977]). The privilege thus serves to "ensure that public officials will be free to speak their minds openly and bluntly as is required for the proper performance of their duties, without subjecting themselves to the possibility of vexatious and burdensome lawsuits" (Clark v McGee, 49 NY2d 613, 618 [1980]). Although the privilege is a product of strong public policies, countervailing considerations such as the right of an individual to defend his or her character require that the privilege be narrowly confined to the types of situations in which the protection is necessary (Id. at 618).

Two criteria must be met for the privilege to apply. First, the official must be a "principal executive of State or local government or . . . [otherwise] entrusted by law with administrative or executive policy-making responsibilities of considerable dimension" (Stukuls v State of New York, 42 NY2d at 278). Second, the allegedly defamatory statements must have been made during the performance of an essential part of the speaker's public duties (Clark v McGee, 49 NY2d at 620). Here, both criteria are met.

OFT was created within the Executive Department to, among other things, "act as the official state planning and coordinating office for the advancement of technology to improve government efficiency and effectiveness" (State Technology Law § 103 [1]). The Director is head of the office and, according to the statute, "shall serve as the chief technology officer for the state of New York" (Technology Law § 102 [2]). The introductory paragraphs of the Contract state that a statewide wireless network is "an essential part of New York State's critical infrastructure to support homeland security in the aftermath of the global events of September 11, 2001" (defendant's Exhibit B, p.3). Toward this end, the State acting through OFT entered into the Contract at a projected $2 billion dollar cost to the State. The statutory scheme establishes that the Director of OFT is entrusted with both administrative and policy-making responsibilities of considerable dimension and import thereby fulfilling the first criteria set forth above.

Moreover, the alleged defamatory statements made by the Director of OFT directly related to the performance of her public duties. The statements allegedly made indicated that M/A-Com failed to deliver an acceptable public safety communications network. The fact that an operational SWN was deemed an essential part of New York's critical infrastructure, together with the legitimate public interest in homeland security, leads this Court to conclude that the statements made by the Director of OFT were an essential part of her duties thereby entitling the State to absolute immunity. To the extent the claim may be read to include a cause of action for defamation based upon statements in the letter from OFT terminating the Contract, the conclusion is the same - the State is immune from liability.

Likewise, the Court of Appeals held in Ward Telecom. & Computer Servs. v State of New York, 42 NY2d 289 [1977]) that the office of the State Comptroller is entitled to an absolute privilege with respect to alleged defamatory statements contained in an audit report that was released to the press because the power to examine and audit is essential to the effective discharge of the responsibilities vested in the office. Although the report was not prepared by the Comptroller himself, the Court held that "the absolute privilege of the executive head of department extends to those of subordinate rank who exercise delegated powers" (Id. at 292). Thus, the Comptroller and those to whom

he has entrusted the responsibilities of his office (see Executive Law § 41) are of sufficient rank to warrant, in appropriate circumstances, application of an absolute privilege.

The alleged defamatory statements allegedly made by the Comptroller and the Executive Deputy Comptroller for Operations - both to the effect that the State could not afford to spend $2 billion on a SWN that was not working - were an essential part of the speakers' public duties. In analogous circumstances the privilege of absolute immunity has been applied, for example, to shield the State from suit arising from statements made by a Deputy Commissioner for Enforcement of the New York State Department of Taxation and Finance regarding an alleged violation of State tax laws in the sale of cigarettes (Ruda v State of New York, 279 AD2d 463 [2001]); to shield the State from suit for statements made in an investigatory report prepared by the Office of the State Inspector General (Firth v State of New York, 12 AD3d 907 [2004]) and to shield the State from suit for defamation arising out of the investigation, prosecution and disclosure of the activities of the claimant by an Assistant Attorney General (Gautsche v State of New York, 67 AD2d 167 [1979]; see also; Schell v Dowling, 240 AD2d 721 [1997] [Commissioner of the Nassau County Department of Health was immune from suit for allegedly defamatory statements concerning the handling of a tuberculosis incident by the former director of the communicable disease unit]). Here, the Comptroller and his Deputy were commenting upon the propriety of a $2 billion expenditure for a statewide wireless network system that, to their understanding, did not work as planned. Such commentary was directly related to the discharge of the duties of the Comptroller and his Deputy. Accordingly, the privilege of absolute immunity protects the State from suit for the alleged defamatory statements made by both the Director of OFT as well as the State Comptroller and his Deputy.

This conclusion is fully supported by the policy rationale for the rule which "serves to ensure that public officials will be free to speak their minds openly and bluntly as is required for the proper performance of their duties, without subjecting themselves to the possibility of vexatious and burdensome lawsuits" (Clark v McGee, 49 NY2d at 618-619) . Both the critical nature of the project as well as the substantial potential cost to the State warrant the application of absolute immunity in this case.

Lastly, defendant contends in its reply Memorandum of Law that the claim for business defamation fails to set forth the total amount claimed as damages for this cause of action. With certain exceptions not applicable here, the pleading requirements of Court of Claims Act § 11 (b) require that a claim state the total sum claimed as damages. The business defamation claim in this case fails to meet this requirement and is therefore jurisdictionally defective (Kolnacki v State of New York, 8 NY3d 277 [2007], rearg denied 8 NY3d 994 [2007]). Accordingly, claimants' sixth claim for relief must be dismissed.

Claimants Seventh Claim For The Imposition Of A Constructive Trust

Allegedly fearful that the State will be unable to return the monies wrongfully drawn from the SLOC, claimants request in their seventh claim for relief the imposition of a constructive trust. Defendant contends that this Court lacks jurisdiction with respect to this cause of action.

The law is clear that "[a]s a court of limited jurisdiction, the Court of Claims has no jurisdiction to grant strictly equitable relief" (Madura v State of New York, 12 AD3d 759, 760 [2004], lv denied 4 NY3d 704 [2005], citing Ozanam Hall of Queens Nursing Home v State of New York, 241 AD2d 670, 671 [1997] and Psaty v Duryea, 306 NY 413 [1954]). While the jurisdiction of the Court of Claims is limited to actions seeking money damages, "in determining claims for money damages against the State, the Court of Claims may apply equitable considerations and perhaps, to some extent, may grant some sort of incidental equitable relief" (Psaty v. Duryea, 306 NY 413, 417 [1954]; Ozanam Hall of Queens Nursing Home v State of New York, 241 AD2d 670 [1997]). "Thus, in determining the subject matter of the Court of Claims, the threshold question is '[w]hether the essential nature of the claim is to recover money, or whether the monetary relief is incidental to the primary claim' " (Madura v State of New York, 12 AD3d 759, 760 [2004], quoting Matter of Gross v Perales, 72 NY2d 231 [1988]; see also City of New York v State of New York, 46 AD3d 1168 [2007]). Here, it is clear that claimants' request for the imposition of a constructive trust is an equitable remedy for which this Court lacks jurisdiction.

A constructive trust may be imposed " '[w]hen property has been acquired in such circumstances that the holder of the legal title may not in good conscious retain the beneficial interest' " (Sharp v Kosmalski, 40 NY2d 119, 121 [1976]). It is "the formula through which the conscience of equity finds expression" (Beatty v Guggenheim Exploration Co., 225 NY 380, 386 [1919]). As stated by the Court of Appeals in Sharp (supra):

> In the development of the doctrine of constructive trust as a remedy available to courts of equity, the following four requirements were posited: (1) a confidential or fiduciary relation, (2) a promise, (3) a transfer in reliance thereon and (4) unjust enrichment (emphasis added) (Sharp v Kosmalski, 40 NY2d at 121; see also Furnace v Comins, 263 AD2d 856 [1999]).

As this Court is not a court of equity, the cause of action for the imposition of a constructive trust must be dismissed (cf. Parsa v State of New York, 64 NY2d 143 [1984] [a cause of action for money had and received is a contract implied in law for which the Court of Claims has jurisdiction pursuant to Court of Claims Act § 9 [2]).

Even if jurisdiction reposed in the Court of Claims for the imposition of a constructive trust, the facts alleged fail to state such a cause of action. The allegation that the draw-down of the SLOC was wrongful and that the "severe budget crisis" of the State warrants this relief fails to fulfill the necessary criteria for a constructive trust cause of action. No allegation is made that the State breached a confidential or fiduciary relationship and the existence of a contract alone fails to satisfy this necessary element of a constructive trust cause of action (see Northeast Gen. Corp. v Wellington Adv., 82 NY2d 158 [1993]). "If the parties ... do not create their own relationship of higher trust, courts should not ordinarily transport them to the higher realm of relationship and fashion the stricter duty for them" (Id. at 162). The relationship between the parties here is alleged to be no more than an arms length commercial relation as to which no fiduciary duty can be inferred from the allegations in the claim (cf. EBC I, Inc. v Goldman, Sachs & Co. (5 NY3d 11, 19-20 [2005]). The facts alleged simply fail to give rise to a constructive trust claim.

Claimants Eighth Claim For Declaratory Relief

Claimants eighth cause of action seeking a declaration that the Contract termination was for convenience, and not for cause, must be dismissed as " '[a] cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract' " (Main Evaluations v State of New York, 296 AD2d 852, 853 [2002], lv. denied 98 NY2d 762 [2002], quoting Apple Records v Capitol Records, 137 AD2d 50, 54 [1988]; see Automated Ticket Sys. v Quinn, 90 AD2d 738 [1982], affd 58 NY2d 949 [1983]; James v Alderton Dock Yards, 256 NY 298 [1931]; Niagara Falls Water Bd. v City of Niagara Falls, 64 AD3d 1142, 2009 Slip Op 05417 [2009]; Olsen v New York State Dept. of Envtl. Conservation, 307 AD2d 595 [2003], lv. denied 1 NY3d 502 [2003]). Here, claimants cause of action for breach of contract makes resort to a declaratory judgment unnecessary.

Based on the foregoing, defendant's motion to dismiss the claim is granted to the following extent:

> The claim is dismissed against The New York State Office Of The Chief Information Officer/Office For Technology;
>
> Claimants' second, fourth, fifth, sixth, seventh and eighth claims for relief are dismissed; and
>
> Claimants' third claim for relief is dismissed except to the extent sufficient facts are alleged to form the basis for a breach of warranty claim pursuant to UCC § 5-110 (a) (2).

September 2, 2009
Saratoga Springs, New York

FRANCIS T. COLLINS
Judge of the Court of Claims

Footnotes

1. Moreover, the Contract at issue in this case provides the following:

"No statement, promise condition, understanding, inducement or representation, oral or written, expressed or implied, which is not merged and incorporated expressly by reference herein shall be binding or valid against the Parties. This Contract shall not be changed, modified or altered in any manner except by an instrument in writing duly executed by authorized representatives of both Parties hereto, including, for the State, required State approvals as evidenced on the signature pages set forth in this document" (defendant's exhibit B, p. 7, art. 2.03).

While General Obligations Law § 15-301 [1] prohibits oral modification of contracts containing such clauses, this statutory requirement of a writing may be avoided by proof of either partial performance of the oral modification, which must be "unequivocally referable to the oral modification" or equitable estoppel based upon conduct which is "not otherwise ...compatible with the agreement as written" (Phoenix Corp. v U.W. Marx, Inc., 64 AD3d 967, 968, quoting Rose v Spa Realty Assoc., 42 NY2d 338, 343, 344 [1977]; see also G&S Custom Homes v Holtz, 179 AD2d 1025 [1992]).

2. UCC § 5-103 (d) codifies the independence principle and similarly provides that "Rights and obligations of an issuer to a beneficiary or a nominated person under a letter of credit are independent of the existence, performance, or nonperformance of a contract or arrangement out of which the letter of credit arises or which underlies it, including contracts or arrangements between the issuer and the applicant and between the applicant and the beneficiary.

3. The court does not view the merger clause in the SLOC to preclude such a claim since, unlike the issuer in Mennen v J.P. Morgan & Co.(91 NY2d 13 [1997]), the applicant was not a party to the SLOC.

4. Claimants have withdrawn their claim with respect to statements posted on the OFT's website on August 29, 2008 and statements made in a closed executive session of the SWN advisory council on December 17, 2008.