SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. THOMAS B. LOWE, J. PART 56

Justice

E-FILE

Diontech

INDEX NO. 600321/08

MOTION DATE 4/22/08

- v -

MOTION SEQ. NO. 001

Nyc Housing

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
Mar 18 2009
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 3/16/09

HON. THOMAS B. LOWE, J.

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 56

----------X

DIONTECH CONSULTING, INC.,

Plaintiff,

-against- Index No. 600321/08

NEW YORK CITY HOUSING AUTHORITY and PMS CONSTRUCTION MANAGEMENT CORP., and ABC CORP., a fictitious name for the entity that provided a surety payment bond on the subject construction project,

Defendants.

----------X

RICHARD B. LOWE, III, J.:

This action arises out of a trade contract between PMS Construction Management Corp. (PMS) as construction manager and plaintiff Diontech Consulting, Inc. as trade contractor in connection with a project known as Lenox Road/Rockaway Parkway Houses, a public housing project owned and operated by defendant New York City Housing Authority (the Housing Authority). Plaintiff seeks to recover against the Housing Authority and PMS for alleged extra work and delay damages under theories of breach of contract and quantum meruit.

Motion Sequence Nos. 001 and 002 are consolidated for disposition. In Motion Sequence No. 001, the Housing Authority moves, pursuant to CPLR 3211 (a) (7), for an order dismissing the complaint as against the Housing Authority with prejudice. In Motion Sequence No. 002, PMS moves for an order (1) dismissing the first cause of action for quantum meruit as against PMS; (2) dismissing the second cause of action for breach of contract as against PMS to the extent that it seeks the recovery of delay damages; and (3) dismissing the third cause of action for recovery under a payment bond on the ground that no such bond exists.

BACKGROUND

On February 2, 2004, the Housing Authority entered into a "Requirements Contract for Construction Management/Build Services for Various Capital Construction Projects (the CM Agreement) with PMS (*see* Aff. of Meredith G. Mialkowski, Exh 2). Pursuant to the CM Agreement, the Housing Authority retained PMS as a construction manager in connection with a construction project for emergency roofing and asbestos abatement at Lenox Road/Rockaway Park Houses (the Lenox Project). The CM Agreement expressly states that PMS's services would include the "investigation, planning, pre-construction, construction, construction management, supervision and coordination of all work necessary and required for the [Lenox] Project, to effectuate its timely completion, in compliance with the Contract Documents and all applicable Laws" (CM Agreement, § 7.1).

As construction manager, PMS was responsible for all aspects of the Lenox Project, including soliciting public bids from qualified contractors, awarding and entering into contracts with them to perform the work, and coordinating and supervising the required work (*id.*, § 10.2). PMS was also responsible for issuing payment to its contractors, which includes reviewing and then approving or denying its contractors' requests for payment, performing a detailed estimate of the costs of the work to be performed under each proposed change order, negotiating a reasonable and acceptable cost for each proposed change order, and making payments for change orders (*see id.*, §§ 11.6.8, 11.6.1).

In its role as construction manager, PMS entered into a separate written contract with plaintiff (the Trade Contract) for emergency roofing and asbestos abatement at the Lenox Project in the amount of $499,777.00 (Complaint, ¶ 6). Plaintiff agreed to be bound by the terms

of all documents comprising the Trade Contract, which included, among other things, the Trade Contract, work specifications and drawings, scope of work, and general, supplementary, and special conditions (Trade Contract, § 1.1 [Mialkowski Aff., Exh 3]). Specifically, under the Trade Contract, plaintiff was required to "provide all labor, materials, equipment, tools, plant and services, and do all things necessary for the proper construction and completion of the Emergency Roofing and Asbestos Abatements work" (*id.*).

PMS and plaintiff were the sole contracting parties to the Trade Contract, which did not contain any provision under which the Housing Authority agreed to assume any obligation to plaintiff for work that plaintiff performed. To the contrary, the Housing Authority is merely identified as the owner of the premises, and plaintiff expressly "acknowledges that [the Housing Authority] is a third-party beneficiary of [plaintiff's] Work" (Trade Contract, §§1.1, 13.5).

The terms of the Trade Contract required that the work be commenced and completed within a period of 90 days, from approximately September 23, 2005 to December 22, 2005 (Complaint, ¶ 6). As set forth in its letters to plaintiff [*see* Mialkowski Aff., Exh 5), PMS directed plaintiff to suspend its work on the Trade Contract from December 15, 2005 through May 18, 2006. Plaintiff substantially completed its work under the Trade Contract in May 2007.

Plaintiff contends that, due to delays beyond its control, the Lenox Project was delayed at least 450 additional days, and that, as a result, it had to perform extra work (Complaint, ¶¶ 7-8). Plaintiff asserts that, on January 8, 2007, it submitted its itemized costs for extra work and delays in the amount of $623,854.64, and that on March 1, 2007, a verified notice of claim was served on the Housing Authority (*id.*, ¶¶ 9-10). Plaintiff contends that the Housing

Authority has never responded to or adjusted the claim (*id.*, ¶ 10).

Section 23 of the Trade Contract's General Conditions requires that plaintiff file a written notice of intention to make a claim with PMS within 10 calendar days after the claim arose under the Trade Contract:

> If the Contractor claims that any instructions of the CM or Authority, by drawings or otherwise, involve Extra Work entailing extra cost, or claims compensation for any damages sustained by reason of any act or omission of the CM or Authority, or of any other persons, or for any other reasons whatsoever, the Contractor shall, **within ten (10) days after such claim shall have arisen**, file with the CM written notice of intention to make a claim for such extra cost or damages, stating in such notice the nature and amount of the extra cost or damages sustained and the basis of the claim against the CM.
>
> **The filing by the Contractor of a notice of claim** ... within the time limited herein, **shall be a condition precedent** to the settlement of any claim or **to the Contractor's right to resort to any proceeding or action to recover thereon, and failure to do so** shall be deemed to be a conclusive and binding determination on the Contractor's part that he/she has no claim against the Authority for compensation for Extra Work or for compensation for damages, as the case may be, and **shall be deemed a waiver by the Contractor of all claims for additional compensation or for damages**

(Trade Contract, §§ 23 [a] and [b] [emphasis added]). Thus, compliance with the notice provision is a condition precedent to commencing an action for damages, and failure to file a notice of claim constitutes a waiver of any claim for additional compensation or damages.

Plaintiff asserts three causes of action against the Housing Authority, PMS and PMS's surety, seeking to recover damages for alleged extra work and delays under theories of breach of contract and quantum meruit.

In its first cause of action, plaintiff seeks to recover damages against the Housing

Authority and PMS in the amount of $623,854.64 based on quantum meruit. In the second cause of action, plaintiff seeks to recover damages against the Housing Authority and PMS in the amount of $623,854.64 based on breach of contract. In its third cause action, plaintiff seeks to recover payment from PMS and its surety in the amount of $623,854.64 based on PMS's alleged payment bond with its surety.

DISCUSSION

Breach of Contract

In its second cause of action against the Housing Authority and PMS, plaintiff seeks to recover damages for extra work and delay damages for breach of the Trade Contract. However, this cause of action must be dismissed because, in three separate Waivers and Releases of Lien executed by plaintiff on January 29, 2007, September 6, 2007 and November 15, 2007 (*see* Aff. of Michael R. Strauss, Exhs D, E and F), plaintiff has released the Housing Authority and PMS from those claims. The November 15, 2007 release provides:

> **[T]he undersigned [plaintiff] does hereby waive and release all liens, demands, claims or rights of lien of the undersigned** on the following described premises and improvements thereon or on the monies or other consideration due or to become due from the New York City Housing Authority ("NYCHA") or PMS on account of labor or materials or both furnished through the 15th day of November 2007 for PMS Construction Management Corp. ("PMS") for the premises known as Roofing Replacement Building-3 ("Project") ...
>
> In addition, the undersigned **[plaintiff] does hereby forever release, waive and discharge PMS and NYCHA from any all causes of actions, suits, debts, accounts, damages, encumbrances, judgments, claims and demands whatsoever in law or equity** which [plaintiff] and/or its successors and/or assignees ever had or now has against PMS or NYCHA, by reason of delivery of materials and/or the performance of work relative to the construction of the Project, but only for materials delivered and

> work performed through the 15th day of November, 2007
>
> [Plaintiff] hereby acknowledges that it has received payment in full, less retainage, for all deliveries of material to and/or for all work performed in connection with the Project through the 15th day of November, 2007 **and [plaintiff] hereby affirms that there are no outstanding claims against PMS or NYCHA in connection with this Project**

(Strauss Aff., Exh D [emphasis added]). The January 9 and August 16 releases are identical except for the dates through which plaintiff released the Housing Authority and PMS (*see* Straus Aff., Exh E [releasing the Housing Authority and PMS for materials and work performed through January 9, 2007]; Strauss Aff., Exh F [releasing the Housing Authority and PMS for materials and work performed through August 16, 2007]).

It is well settled that a "valid release constitutes a complete bar to an action on a claim which is the subject of the release" (*Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 98 [1st Dept 2006], *lv denied* 8 NY3d 804 [2007]). Moreover, "a valid release which is clear and unambiguous on its face and which is knowingly and voluntarily entered into will be enforced as a private agreement between parties" (*Skluth v United Merchants & Mfrs.*, 163 AD2d 104, 106 [1st Dept 1990], *appeal withdrawn* 79 NY2d 976 [1992] [dismissing complaint because valid and binding release barred plaintiff's claims]; *see also Appel v Ford Motor Co.*, 111 AD2d 731, 732 [2d Dept 1985] [enforcing terms of clear and unambiguous release even though it may have been obtained as a result of "hard bargaining"]).

Here, plaintiff executed three valid releases in favor of the Housing Authority and PMS. Each of the releases contained clear and unambiguous terms wherein plaintiff waived its rights and claims in connection with its work on the Lenox Project through January 9, August 16, and November 15, 2007, respectively. As plaintiff admits in the complaint (*see* Complaint,

¶ 10), it served PMS and the Housing Authority with a Notice of Claim on March 1, 2007, in which it alleges that it suffered damages arising out of extra work and delays for a 15-month period from December 2005 through March 2007 (*see* Mialkowski Aff., Exh 6). Plaintiff executed two releases after filing the Notice of Claim, for materials and work performed through August 16, 2007 and November 15, 2007. By executing these releases after serving its Notice of Claim, plaintiff unequivocally agreed to discharge claims and causes of action for extra work and delay damages that were in existence at the time plaintiff executed the releases, and accordingly, the releases negate plaintiff's Notice of Claim. Moreover, there is no doubt that plaintiff intended to release the Housing Authority and PMS from all claims for extra costs and delay damages related to materials and work performed on the Lenox Project through November 15, 2007, covering the entire period of damages plaintiff seeks to recover in the complaint. Accordingly, plaintiff's claims for extra work and delay damages are barred by the releases, and, therefore, its second cause of action for breach of contract against the Housing Authority and PMS must be dismissed.

Plaintiff's breach of contract claims must be also dismissed as against the Housing Authority and PMS because it failed to comply with the Trade Contract's notice requirements. Section 23 (a) of the Trade Contract's General Conditions required plaintiff to file a written notice of claim with PMS within 10 business days after its claim for damages arose, and the filing of a timely notice of claim is a condition precedent to commencing an action against PMS and/or the Housing Authority (*see* Trade Contract, § 23 [b] ["The filing by the Contractor of a notice of claim ... within the time limited herein, shall be a condition precedent to the settlement of any claim or to the Contractor's right to resort to any proceeding or action to

recover thereon"]).

Plaintiff admits that it did not submit its "itemized costs for extra work and delays" until January 8, 2007, and that it did not file its notice of claim with the Housing Authority until March 1, 2007 (*see* Complaint, ¶¶ 9-10). However, to the extent plaintiff claims extra work and damages in connection with the suspension of Trade Contract work, the latest possible date for plaintiff's claims to have accrued was on the last date of the suspension, which was May 18, 2006. Thus, plaintiff was required to file its notice of claim within 10 days, or by May 28, 2006. Because plaintiff failed to file a written notice of claim within the requisite time period, plaintiff is barred from commencing an action to recover damages and extra costs in connection with any suspension or delay of work on the contract (*see A.H.A. General Constr., Inc. v New York City Hous. Auth.*, 92 NY2d 20, 30-31 [1998] [notice of claim requirement in a public improvement contract was a "condition[] precedent to suit or recovery"]; *Mezzacappa Bros., Inc. v City of New York*, 29 AD3d 494, 495 [1st Dept], *lv denied* 7 NY3d 712 [2006] [holding that "strict compliance" with notice of claim provisions is required]; *see also Lasker-Goldman Corp. v City of New York*, 221 AD2d 153 [1st Dept 1995], *lv dismissed* 87 NY2d 1055 [1996]; *Huff Enters., Inc. v Triborough Bridge & Tunnel Auth.*, 191 AD2d 314 [1st Dept] *lv denied* 82 NY2d 655 [1993]).

Notice of claim provisions are enforceable against a contractor, even where, as here, the Housing Authority was not in privity of contract with the contractor. For instance, in *Promo-Pro Ltd. v Lehrer McGovern Bovis, Inc.* (306 AD2d 221 [1st Dept], *lv denied* 100 NY2d 628 [2003]), the Court affirmed the trial court's dismissal of the plaintiff trade contractor's complaint against the construction manager and the Housing Authority for, among other things,

failure to comply with the subcontract's notice of claim provision. The Court confirmed that "[c]ompliance with the notice of claim provision was an express condition precedent to the contractor's right to bring an action for recovery of change order payments and, under such provision, noncompliance clearly constituted a waiver of its claim" (*id.* at 222). The Court further found that "[t]here was no basis to distinguish the instant contract for public improvement, where the public agency was the owner but not a party to the contract, from those in which the public entity is a party with respect to the public policy underlying the notice of claim requirement" (*id.*).

Indeed, New York courts have repeatedly dismissed the claims of contractors that have failed to comply with notice provisions in public improvement contracts involving the Housing Authority (*see Bat-Jac Contr., Inc. v New York City Hous. Auth.*, 1 AD3d 128 [1st Dept 2003]; *S.J. Fuel Co. v New York City Hous. Auth.* [Sup Ct, NY County, March 21, 2007, Cahn, J., Index No. 402516/06]; *Kovachevich v New York City Hous. Auth.* [Sup Ct, NY County, Dec 19, 2000, Stallman, J., Index No. 113580/00], *affd* 290 AD2d 325 [1st Dept], *lv dismissed* 98 NY2d 692 [2002], *cert denied* 537 US 1212 [2003]).

In opposition to the motion, plaintiff suggests that it did not have to comply with the contractual written notice of claim requirements because PMS and the Housing Authority had "actual notice" of plaintiff's claims. Plaintiff fails, however, to demonstrate that the Housing Authority had actual notice of its claims.

Plaintiff's cause of action for breach of the Trade Contract must also be dismissed as against the Housing Authority on the independent ground that plaintiff fails to plead the existence of, and cannot demonstrate, any contract between plaintiff and the Housing Authority.

"It is well-established that a subcontractor may not assert a contractual claim against an owner with whom it is not in privity" (*Bubonia Holding Corp. v Jeckel*, 189 AD2d 957, 958 [3d Dept 1993] [affirming dismissal of a contractor's claim against an owner because there was no privity of contract]). In that case, the defendant owner had entered into a project development agreement with a company which was to act as the project manager for the research and design of a commercial building on defendant's property. The project manager contracted with plaintiff to provide sand and gravel. When the project manager failed to make payment, the plaintiff sued the owner. The Court dismissed the complaint, finding it "uncontroverted that plaintiff's sand and gravel agreement was solely with [the project manager]" (*id.* at 958; *see also Blitman Constr. Corp. v Ken Vil. Hous. Co.*, 91 AD2d 173 [1st Dept 1983] [dismissing plaintiff subcontractor's breach of contract claims because defendant supervising agency was not a party to the construction contract]; *Perma Pave Contr. Corp. v Paerdegat Boat & Racquet Club*, 156 AD2d 550 [2d Dept 1989] [dismissing subcontractor's claim for breach of contract against owner because there was no privity of contract]).

Here, plaintiff alleges that "on [or] about August 15, 2005, Diontech and PMS entered into a contract for 'Roofing Replacement & Asbestos Abatement' for a project known as and entitled 1145 Lenox Road-Rockaway Parkway" (Complaint, ¶ 6). Plaintiff's own assertion shows that the only parties to the Trade Contract were plaintiff and PMS, not the Housing Authority.

Moreover, there is no provision in the Trade Contract by which the Housing Authority agreed to assume any obligation to plaintiff for work performed pursuant to the contract. Indeed, the Housing Authority is merely identified as the owner of the premises, and

plaintiff expressly "acknowledges that [the Housing Authority] is a third-party beneficiary of [plaintiff's] work" (*see* Trade Contract, §§1.1, 13.5). Accordingly, because there is no privity of contract, plaintiff cannot assert a contractual claim against the Housing Authority.

Although plaintiff alleges that the Housing Authority was a "disclosed principal," and that PMS was the "disclosed agent acting at the direction of [the Housing Authority] in regard to the [Trade Contract]" (*see* Complaint, ¶¶ 17-18), this bare allegation is insufficient to impose liability upon the Housing Authority in light of the express terms of the Trade Contract, in which plaintiff affirmatively acknowledges that the Housing Authority is a third-party beneficiary. There is no provision in the Trade Contract to support plaintiff's allegation that PMS executed the Trade Contract as the Housing Authority's agent.

Courts have declined to impose liability on the Housing Authority under agency principles in construction management arrangements similar to the one involved here. In *Abax, Inc. v New York City Hous. Auth.* (Sup Ct, NY County, April 4, 2000, Gammerman, J., Index No. 604023/99, *affd* 282 AD2d 372 [1st Dept 2001]), the Housing Authority contracted with a construction manager for modernization work at a Housing Authority development. In turn, the construction manager contracted with plaintiff trade contractor to perform certain work at the development. The trade contractor commenced a lawsuit against both the construction manager and the Housing Authority for breach of contract. In dismissing the plaintiff trade contractor's breach of contract claims against the Housing Authority, the Court found:

> The plaintiff [trade contractor] has pointed to no language in the contract or any of the documents that indicate that the Housing Authority is a principal on the contract between [the construction manager] and the plaintiff, and it seems to me the plaintiff can't assert a contractual claim against the Housing Authority as the owner because there's no privity of contract between the plaintiff

and the Housing Authority

(*id.* at 13-14; *see also Bubonia Holding Corp. v Jeckel*, 189 AD2d at 959 ["The project development agreement makes clear that the project manager has no authority to enter into contracts on defendant's behalf. That entity's authority is limited to 'obtaining competitive bids for defendant's review on all major sub-trades and making recommendations' and 'preparing contract agreements between defendant and Contractor' [citation omitted]"]). Here, the documentary evidence clearly establishes that PMS was not an agent of the Housing Authority, but, rather, was an independent contractor that had separately contracted with plaintiff.

In an attempt to overcome the lack of contractual privity, plaintiff asserts in its opposition papers that the absence of a payment bond issued to PMS pursuant to the State Finance Law is conclusive proof that PMS is the Housing Authority's agent, or "shell corporation." This argument, however, completely ignores and cannot defeat the express provisions of the Trade Contract. Accordingly, there is no basis for holding the Housing Authority liable for breach of contract.

With respect to PMS, the breach of contract cause of action must also be dismissed as against it for the separate reason that, pursuant to the express terms of the Trade Contract, plaintiff is prohibited from asserting a claim for delay damages:

> Trade Contractor expressly agrees not to make and hereby waives, any claim for damages on account of any delay, obstruction or hindrance for any cause whatsoever, including but not limited to the aforesaid causes, and agrees that its sole right and remedy in the case of any delay, obstruction or hindrance shall be an extension of the time fixed for completion of the Work

(Trade Contract, § 11.1).

> NO DAMAGE FOR DELAY: Trade Contractor agrees to make

> no claim for damages for delay in the performance of this Contract occasioned by any act or omission to act of CM or NYCHA or any of its representatives, agents, trade contractors, and/or subcontractors, and agrees that any such claim shall be fully compensated for by an extension of time to complete performance of the Work as provided herein

(*id.*, ¶ 19.2 [Supplementary Conditions]).

> Except as otherwise provided in this Contract, the Contractor expressly agrees to make no claim or maintain any action against the CM or Authority for damages for suspension of or delay in the performance of this Contract occasioned by delays to or interruptions of the Work, and agrees that any such claim shall be fully compensated for by an extension of time to complete performance

(id., ¶ 14 [General Conditions]).

Such no-damage-for-delay clauses have repeatedly been held to be valid *(Corinno Civetta Constr. Corp. v City of New York*, 67 NY2d 297 [1986]; *Universal/MMEC, Ltd. v Dormitory Auth. of State of N.Y.*, 50 AD3d 352 [1st Dept 2008]; *Metropolitan Steel Indus., Inc. v Perini Corp.*, 23 AD3d 205 [1st Dept 2005]). While certain judicially established exceptions exist to enforceability of a no-damage-for-delay clause (*see Corinno Civetta Constr. Corp. v City of New York*, 67 NY2d at 309 ["Generally, even with such a clause, damages may be recovered for: (1) delays caused by the contractee's bad faith or its willful, malicious, or grossly negligent conduct, (2) uncontemplated delays, (3) delays so unreasonable that they constitute an intentional abandonment of the contract by the contractee, and (4) delays resulting from the contractee's breach of a fundamental obligation of the contract"]; *accord Trataros Constr., Inc. v New York City Hous. Auth.*, 34 AD3d 451 [2d Dept 2006]), the complaint is devoid of any allegation which would even suggest that plaintiff's delay claim falls within any recognized exception.

Moreover, despite plaintiff's new allegation in its opposition to the motion that it can satisfy the requirements of *Corrino Civetta*, it is clear that the delays plaintiff allegedly experienced were contemplated by the Trade Contract. Where, as here, a subcontract discusses a potential cause of delay, subsequent delays arising from that cause are considered to have been contemplated by the parties (*see Blau Mech. Corp. v City of New York*, 158 AD2d 373, 375 [1st Dept 1990] [court held that the parties had contemplated claimant's work may change during performance, because the contract gave contractee "the right ... to modify or change the contract, and ... set forth methods of payment for the extra work performed by the contractor" and therefore, delay damages were not recoverable]; *Visconti Corp. v LaBarge Bros. Co.*, 272 AD2d 948 [4th Dept], *lv denied* 95 NY2d766 [2000] [subcontract provision prohibiting claims arising from subsurface conditions on site was sufficient to establish that delays arising from unknown subsurface conditions were within the parties' contemplation at contract formation]).

Plaintiff's January 8, 2007 letter to PMS, in which plaintiff detailed the delays and subsequent costs it experienced (*see* Aff. of Dennis Mihalatos, Exh E), demonstrates that plaintiff's claim is predicated upon the performance of work by other contractors at the project, which was something within the specific contemplation of the parties at the time of the making of the Trade Contract:

> The award of more than one contract for the Project requires sequential or otherwise interrelated trade contractor operations, and will involve inherent delay in the progress of any individual trade contractor's work. Accordingly, the Construction Manager does not guarantee the unimpeded operations of any trade contractor. The Trade Contractor acknowledges these conditions, and understands that the Trade Contractor shall bear the risk of all delays caused by the presence or operations of other trade contractors engaged by the Construction Manager and/or NYCHA

(Trade Contract, Exh D, Special Conditions, ¶ 22).

"[W]here, as here, the conduct was specifically contemplated by the parties when they entered into the agreement," the no-damage-for-delay clause precludes recovery of delay damages (*North Star Contr. Corp. v City of New York*, 203 AD2d 214, 214-215 [1st Dept 1994]; *see also Matter of Teddy Giannopulos Gen. Contrs. v New York City Hous. Auth.*, 260 AD2d 253, 253 [1st Dept 1999] [denying petitioner's claims for delay damages where "all of the delays petitioner points to were of a type contemplated by the contract"]). Accordingly, the breach of contract cause of action must be dismissed as against PMS.

Quantum Meruit

Plaintiff's first cause of action seeking to recover damages in quantum meruit must also be dismissed as against both PMS and the Housing Authority. First, with respect to the Housing Authority, since there is no privity of contract, the Housing Authority cannot be held directly liable to plaintiff, a subcontractor, on a theory of implied or quasi-contract, unless the Housing Authority has, in fact, assented to such obligation, which it undisputedly has not:

> Where there is an express contract, as here, between the general contractor and the subcontractor, the owner of the subject premises may not be held directly liable to the subcontractor on a theory of implied or quasi-contract, unless he has in fact assented to such an obligation; the mere fact that he has consented to the improvements provided by the subcontractor and accepted their benefit does not render him liable to the subcontractor, whose sole remedy lies against the general contractor

(Contelmo's Sand & Gravel, Inc. v J & J Milano, Inc., 96 AD2d 1090, 1090 [2d Dept 1983]; *see also Perma Pave Contr. Corp. v Paedegat Boat & Racquet Club*, 156 AD2d at 551 [it is a firmly established principle that a property owner who contracts with a general contractor does not become liable to a subcontractor on a quasi contract theory unless it expressly consents to pay

for the subcontractor's performance"]).

In addition, because plaintiff has an express contract with PMS, plaintiff cannot recover from either PMS or the Housing Authority for the "reasonable value" of its labor and services provided pursuant to the Lenox Trade Contract based on quantum meruit. It is well settled that a claim based on quantum meruit is barred when the parties' agreement is governed by a written contract (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987] ["The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter"]; *Sheiffer v Shenkman Capital Mgt.*, 291 AD2d 295, 295 [1st Dept 2002] ["the existence of a valid and enforceable written contract governing the disputed subject matter precludes plaintiffs from recovering in quantum meruit"]).

Accordingly, because plaintiff has alleged the existence of a written contract governing its work, it may only recover for such work under that contract, and thus, its cause of action for quantum meruit must be dismissed as against PMS and the Housing Authority (*see e.g. Vitale v Steinberg*, 307 AD2d 107, 111 [1st Dept 2003] ["the existence of ... an express contract governing the subject matter of plaintiff's claims[] also bars the unjust enrichment cause of action as against the individual defendants, notwithstanding the fact that they were not signatories to that agreement"]; *Commercial Tenant Servs. v First Union Natl. Bank*, 305 AD2d 210, 211 [1st Dept 2003] ["The claim for unjust enrichment was properly dismissed since a valid contract exists governing the subject matter in dispute"]; *Abax, Inc. v New York City Hous. Auth.*, 282 AD2d 372, *supra* [claims for quantum meruit would not lie against the Housing Authority in the face of a valid contract between plaintiff and the Housing Authority's

construction manager governing the subject matter of the dispute]).

Recovery Under Payment Bond

In its third cause of action, plaintiff seeks recovery as against PMS under a labor and material payment bond allegedly provided by PMS and an unnamed surety company. In support of its motion to dismiss this cause of action, PMS submits the affirmation of Paul M. Stevens, PMS's president, in which Stevens avers that "PMS was not required to and in fact did not furnish a payment bond in connection with" the CM Contract, or in connection with the Lenox Project (Stevens Aff., ¶ 4).

In opposition to the motion, plaintiff argues that defendants violated State Finance Law § 137 by failing to require that PMS to provide a payment bond for the Lenox Project. However, in a case cited by plaintiff, the court held that there is no express private right of action under State Finance Law § 137, and that "[a] private right of action would be inconsistent with the legislative intent and the scheme behind State Finance Law section 137" (*Aldo Frustaci Iron Work, Inc. v Promotech, Inc.*, Sup Ct, NY County, October 24, 2001, Ramos, J., Index No. 601278/00, slip op at 11).

Accordingly, the third cause of action must be dismissed.

The court has considered the remaining arguments, and finds them to be without merit.

Accordingly, it is

ORDERED that the motion of defendant New York City Housing Authority to dismiss the complaint as against it (Motion Sequence No. 001) is granted, and the complaint is dismissed with costs and disbursements to defendant New York City Housing Authority as taxed

by the Clerk of the Court; and it is further

ORDERED that the motion of defendant PMS Construction Management Corp. to dismiss the complaint as against it (Motion Sequence No. 002) is granted and the complaint is dismissed with costs and disbursements to defendant PMS Construction Management Corp. as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: March 16, 2009

ENTER:

HON. [illegible] J.S.C.

FILED
Mar 18 2009
NEW YORK
COUNTY CLERK'S OFFICE