

**American Built Contr. v New York Kitchen &
Bathroom Corp.**

2012 NY Slip Op 31885(U)

June 29, 2012

Supreme Court, New York County

Docket Number: 108249/10

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

AMERICAN BUILT CONTRACTING,

INDEX NO. 108249/10

Plaintiff,

MOTION SEQ. NO. 001

- against -

RECEIVED

NEW YORK KITCHEN & BATHROOM CORP,

JUL 16 2012

Defendant.

MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

The following papers, numbered 1 to 5, were read on this motion by plaintiff for summary judgment, pursuant to CPLR 3212.

FILED	EXHIBITS NUMBERED
	1
	2,3
	4,5

Notice of Motlon/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo)

JUL 17 2012

Replying Affidavits (Reply Memo)

Cross-Motion: Yes No

NEW YORK
COUNTY CLERK'S OFFICE

American Built Contracting (plaintiff) brings this action for breach of contract and unjust enrichment against New York Kitchen & Bathroom Corp. (defendant), seeking alleged due and owing unpaid monies in the amount of \$26,183.42 in connection with a subcontracting agreement wherein defendant hired plaintiff to perform certain renovation work on a private construction project, located at 7 Iden Avenue, Larchmont, New York ("the premises"). Before the Court is plaintiff's motion, pursuant to CPLR 3212, for summary judgment against the defendant. Defendant has responded in opposition to the motion, and plaintiff has filed a reply.¹

BACKGROUND

The following facts are undisputed. Defendant is a general contractor who was under contract with the owners of a single-family home located at the premises, to perform renovation work. Plaintiff was hired by the defendant, pursuant to a subcontractor agreement, to perform

¹ The Court notes that while defendant submits the affirmation of C. Jaye Berger in opposition to plaintiff's motion and in support of defendant's cross-motion, there is no notice of cross-motion. As such, there is no cross-motion before the Court to consider.

work on the renovation project at the premises. On or about June 9, 2008, plaintiff entered into three contracts with defendant to perform renovation work on the powder room, boys bathroom, and master bathroom (collectively "the contracts") (Paterno Affidavit, ¶¶ 2-3). According to the contracts, in exchange for its services, the plaintiff would be paid \$8,500 for renovating the powder room, \$11,000 for the boys bathroom, and \$12,000 for the master bathroom (Subcontractor Agreement, exhibit A). The contracts stipulate, in relevant part:

"All 'scope of work' shall be completed by 8/25/08, the subcontractor shall employ persons of competence and skill to complete the project in 6 weeks, the work shall commence by 7/07/08, if the subcontractor fails to complete the work as agreed herein, the Contractor may declare the Subcontractor in default by providing written notice to the Subcontractor by registered mail. Upon compliance with the contract terms plaintiff would receive a total of a 31, 500 for its services. Last payment will be issued upon completion of this agreement, and contracted services have been deemed acceptable by New York Kitchen & Bathroom" (*id.*).

On an unspecified date the owner of the premises terminated defendant's employment, and as a result plaintiff was unable to continue working. Plaintiff, upon performing work on the premises, has only received payment in the amount of \$8,500, and claims that a balance of \$26,183.42 is owed under the contracts (Affirmation in Support, ¶ 7). Defendant concedes that it did enter into a subcontractor agreement with plaintiff in which defendant agreed to pay plaintiff in exchange for its services. However, defendant contends that plaintiff is not entitled to payment because it failed to perform its services in a timely and competent manner, in violation of the contracts.

Plaintiff commenced the instant action to recover the remaining amount of monies it is allegedly owed under the contracts, asserting causes of action sounding in breach of contract and unjust enrichment. Plaintiff's first, second, and third causes of action seek damages for the alleged nonpayment for plaintiff's work in the following amounts: \$8,500 for the powder room, \$11,000 for the boys bathroom, and \$12,000 for the work performed on the master bathroom.

Plaintiff's fourth cause of action seeks damages for unjust enrichment in the total amount of \$31,500, as defendant was paid for plaintiff's work on the premises yet defendant has failed to render payment to plaintiff. Plaintiff also seeks interest, costs and attorney's fees. In its answer defendant asserts a counterclaim for breach of contract and raises the affirmative defenses of, *inter alia*, unclean hands and failure to state a cause of action.

In support of its motion plaintiff submits, *inter alia*, an affidavit from Leslie Newman (Mr. Newman) (Newman Affidavit), the owner of the premises, which discusses the renovation work performed by plaintiff and why defendant was terminated from the project, and an affidavit of its owner Wayne Paterno (Mr. Paterno), which discusses plaintiff's performance under the contracts and the amount owed for the work it performed. Plaintiff argues that it is entitled to judgment as a matter of law on its cause of action for breach of contract and unjust enrichment, including interest and attorney's fees, on the basis that there are no material issues of fact and defendant's counterclaim and affirmative defenses lack merit. Plaintiff contends that it performed all its obligations pursuant to the contracts and the renovation work was done to the satisfaction of the owner of the premises.

Plaintiff points to the Newman Affidavit, in which Mr. Newman states that plaintiff performed renovation work on all three rooms mentioned in the contracts and that defendant was paid for all the work performed by plaintiff, despite terminating his contractual agreement with the defendant (Newman Affidavit, ¶¶ 4-5). Mr. Newman also maintains that he terminated the agreement with defendant because he was dissatisfied with defendant's management of the project and its employees, but the termination was not due to the work done by plaintiff (*id.* at ¶ 7). Plaintiff contends that defendant breached their agreements by failing to pay plaintiff for the services it has rendered, and presently plaintiff has only received \$8,500 in payment. Consequently, defendant has been unjustly enriched and as such plaintiff seeks judgment in the amount of \$26,183.42, plus interest, costs and attorneys fees.

In opposition to plaintiff's motion defendant submits an affidavit of its President, Perry Hiiman (Mr. Hiiman). Defendant concedes that it entered into the contracts with plaintiff and hired plaintiff as a subcontractor to perform certain renovation work. However, defendant maintains that plaintiff breached the agreements by failing to complete the work in a timely and competent matter, which caused defendant to be fired from the project without being paid for its services (Answer, ¶¶ 14, 18, 19). According to defendant, plaintiff is before the Court with unclean hands and has also failed to comply with discovery demands, including producing plaintiff for deposition to prove its damages (*id.* at ¶ 13).

Furthermore, defendant argues that summary judgment should be denied as there are triable issues of fact concerning the alleged breach of contract and the amount of damages due to plaintiff. Specifically, Mr. Hiiman contends that there are questions of fact concerning whether plaintiff breached the contract by failing to perform its services in a timely and competent manner, and whether plaintiff's work played a role in defendant's termination from the project (Hiiman Affidavit, ¶¶ 5-6). If plaintiff's performance played a role in defendant's termination, defendant avers that there are questions of fact regarding whether this relieves defendant's obligation to pay plaintiff (*id.* at ¶ 9). Additionally, defendant maintains that it is also owed money as the owners of the renovated premises have failed to pay defendant for its services in the amount of \$27,869.26 (*id.* at ¶ 7; Affirmation in Opposition, exhibit C). Defendant further argues that summary judgment is premature because plaintiff has failed to provide the discovery necessary to determine exactly how much, if any, defendant owes plaintiff.

STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party

moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212[b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY 3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also* CPLR 3212[b]). When deciding the motion, the Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

DISCUSSION

The Court finds that plaintiff has established its entitlement to judgment as a matter of law on its breach of contract claim. "The elements of a breach of contract claim are the formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damages" (*Flomenbaum v New York Univ.*, 71 AD3d 80, 91 [1st Dept 2009]). Here it is undisputed, and indeed the defendant has conceded, that the parties had a contract for the performance of renovation work on a private construction project, that plaintiff did renovation work on the premises, and that a balance is still owed to plaintiff. Plaintiff has therefore made out its prima facie case on its breach of contract claim, and it is incumbent upon the defendant to proffer admissible evidence sufficient to raise a triable issue of fact (*see Zuckerman v City of New York.*, 49 NY2d 557, 562 [1980]; *Castle Oil Corp. v Bokhari*, 52 AD3d

762 [2d Dept 2008]).

Defendant claims there is an issue of fact regarding whether or not its termination from the project was due to plaintiff's failure to perform its services in a timely and competent manner. However, defendant has failed to proffer evidence in admissible form that would establish that plaintiff's delay in completing its work constituted a material breach of the contracts and was a possible cause for the defendant's termination. There is also nothing before the Court which demonstrates that the contracts made "time of the essence," and that plaintiff breached its contracts by failing to complete its work on the specified date. "Specification of a particular time frame within the language of the contract by itself is not determinative of whether a delay would constitute a material breach of the agreement, nor does the mere designation of a date upon which a thing is to be performed alone bring about such a result" (*Burgess Steel Products Corp. v Modern Telecommunications Inc.*, 205 AD2d 344, 346 [1st Dept 1994], see *Urban Archeology Ltd. v Dencorp Investments, Inc.*, 12 AD3d 96, 103 [1st Dept 2004]). This is especially true in construction contracts where delays are common and may be attributed to factors beyond the control of any one party.

Defendant also failed to submit proof, in the form of expert testimony or affidavit, that plaintiff's renovation work was done in an incompetent manner or that the workmanship was poor. "A contract provision committing a matter to the judgment of one party requires that party to exercise its judgment reasonably and in accordance with good faith, that power cannot be exercised in a arbitrary manner" (*The City of New York v 611 West 152nd Street, Inc.*, 273 AD2d 125, 126 [1st Dept 2000]; *Edgewater Constr. Co. v 81 & 3 of Watertown.*, 252 AD2d 951, 952 [4th Dept 1998]). Further, defendant did not meet its burden of demonstrating that the plaintiff failed to substantially comply with the requirements of the contracts, nor was evidence provided that the plaintiff willfully departed from its contractual obligations. Therefore, the Court finds defendant's claim that plaintiff failed to render its services in a timely and competent manner in

breach of the contracts to lack merit.

Defendant further claims that plaintiff failed to complete the work it contracted to perform, in breach of the contracts, and as a result should not be paid. However, plaintiff's failure to fully complete the renovation work does not preclude plaintiff from recovering money for the work it performed. "The plaintiff's recovery is not based upon any finding of complete performance. . . though there may be defects and omissions in the complete performance of the contractor's stipulated obligation, there may be recovery upon proof of substantial performance where omissions and defects are trivial and innocent" (*Nieman-Irving & Co. v Lazenby.*, 263 NY 91, 94 [1933]; see *Edgewater Constr. Co. v 81 & 3 of Watertown.*, 252 AD2d 951, 952 [4th Dept 1998] ["Contractual obligations may be subject to the precept that substantial compliance is sufficient, provided that departures from the specifications of the agreement were neither willful nor substantial in the view of the entire project"]).

The Court finds that defendant has failed to present any evidentiary materials sufficient to raise a triable factual issue in opposition, and accordingly the plaintiff is entitled to summary judgment on its causes of action for breach of contract (see *Pennie & Edmonds v F.E.I., Ltd.*, 161 AD2d 475, 475 [1st Dept 1990]; *Otterbourg*, 147 AD2d at 334; *Hartz Mountain Corp. v Allou Distributors, Inc.*, 173 AD2d 440, 440 [2d Dept 1991]).

Plaintiff, however, has not established its entitlement to summary judgment on its claim for unjust enrichment. In order to prevail on a claim of unjust enrichment in New York, "the plaintiff must show that the other party was enriched, at plaintiff's expense, and that 'it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered'" (*Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 [1st Dept 2011], quoting *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]); see *Nakamura v Fujii*, 253 AD2d 387, 390 [1st Dept 1998]). Furthermore, the existence of a valid contract typically precludes the availability of quasi contractual remedies, such as quantum meruit and unjust

enrichment, for events arising out of the same subject matter (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382 [1987]; *IIG Capital LLC v Archipelago, L.L.C.*, 36 AD3d 401 [1st Dept 2007]). However, "where there is a bona fide dispute as to the existence of a contract or where the contract does not cover the dispute in issue, plaintiff may proceed upon a theory of quantum meruit or unjust enrichment, and will not be required to elect his or her remedies" (*IIG Capital LLC*, 36 AD3d at 405).

Here, there are express contracts that fully detail the applicable terms and conditions that govern the relationship between the two parties. Further, defendant has conceded to the existence of said contracts, and the dispute between the parties regarding whether defendant has an obligation to pay plaintiff for the services it has provided is sufficiently covered within the scope of the contracts. Accordingly, the plaintiff cannot recover under a claim for unjust enrichment, and this cause of action is dismissed.

In light of the Court's decision, defendant's counterclaim against the plaintiff for breach of contract is hereby dismissed.

CONCLUSION

Upon the foregoing, it is

ORDERED that plaintiff's motion for summary judgment is granted to the extent that plaintiff is granted judgment on its breach of contract claim, and the portion of plaintiff's motion seeking judgment on its unjust enrichment claim is denied and that cause of action is dismissed; and it is further,

ORDERED that defendant's counterclaim for breach of contract is dismissed; and it is further,

ORDERED that the issue of the amount of damages to which plaintiff is entitled pursuant to its breach of contract claim is referred to a Special Referee to hear and determine; and it is further,

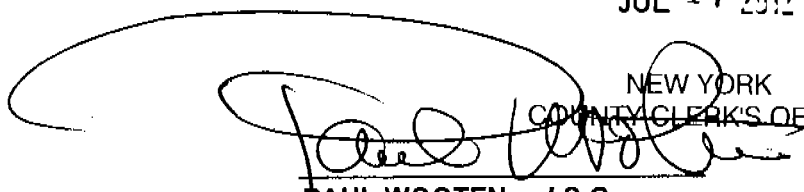
ORDERED that a copy of this order with notice of entry shall be served on the Special Referee Clerk of the Motion Support Office (Room 119) to arrange a date for the reference to a Special Referee, and it is further,

ORDERED that plaintiff shall serve a copy of this Order with Notice of Entry upon all parties, the County Clerk, and the Clerk of the Trial Support Office, who are directed to enter judgment accordingly, within 45 days of entry.

FILED

This constitutes the Decision and Order of the Court.

JUL 17 2012

NEW YORK
COUNTY CLERK'S OFFICE

PAUL WOOTEN J.S.C.

Dated: 6-29-12

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