SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD Justice

PART 35

Index Number : 650821/2011
V.C. VITANZA SONS INC.
vs.
TDX CONSTRUCTION CORPORATION
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE 10-12-2012
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Motion sequence 001 is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that the motion (sequence number 001) of defendant TDX Construction Corporation to dismiss the complaint is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.; and it is further

ORDERED that counsel for defendant shalal serve a copy of this order with notice of entry within twenty (20) days of entry on counsel for plaintiff.

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

Dated: 3/30/2012

J.S.C.
HON. CAROL EDMEAD

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

----------X

V.C. VITANZA SONS INC.,

Plaintiff,

-against- Index No. 650821/11

TDX CONSTRUCTION CORPORATION,

Defendant.

----------X

HON. CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

In this action, plaintiff V.C. Vitanza Sons Inc. (Vitanza), a subcontractor, seeks to recover for extra work on a public improvement project from defendant TDX Construction Corporation (TDX), a construction manager. TDX moves, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the complaint, based upon documentary evidence and for failure to state a cause of action.

BACKGROUND

The following facts are taken from the complaint. Vitanza alleges that, on July 17, 2007, the New York City Housing Authority (NYCHA) entered into a requirements contract (hereinafter the Prime Contract) for construction management services with TDX. In accordance with the Prime Contract, NYCHA issued a work order to TDX effective March 16, 2010, whereby TDX was to supply and oversee the performance of certain labor and services and/or furnish certain materials, equipment and/or structures for the construction of the Wise Towers Heating Upgrade, Contract 7066-H1 in Manhattan.

On March 16, 2010, Vitanza and TDX entered into a subcontract (hereinafter the Subcontract) pursuant to which Vitanza was to perform the work specified therein for the price of

$2,536,490.00. On March 23, 2010, TDX notified Vitanza that it should proceed with the work specified in the Subcontract. Thereafter, Vitanza commenced performance of the work. During the course of Vitanza's performance of the work, TDX changed and altered Vitanza's work as specified in the Subcontract and added extra work which was neither specified nor required by the Subcontract. Vitanza alleges that it fully completed the extra work, but TDX refuses to pay Vitanza for the extra work. According to Vitanza, TDX's failure to pay Vitanza for the extra work constitutes a breach of the Subcontract. Vitanza seeks to recover $593,390.73, plus interest from TDX.

TDX moves to dismiss the complaint, arguing that the Subcontract required Vitanza to submit to the dispute resolution mechanism in the Prime Contract. By way of background, TDX explains that, pursuant to the Prime Contract, a subcontractor such as Vitanza would present its invoices for partial payments to TDX, TDX would review and present them to NYCHA, and if NYCHA approved the invoices, NYCHA would issue payment (Hayum Affirm. in Support, Exh. 2, Arts. 11.6.8, 42.4.4, 42.8.3).

TDX bases its argument on article 29 of the Prime Contract, entitled "Resolution of Disputes," which provides:

> 29.2 The CM [TDX] shall only consult with NYCHA when a Subcontractor requests interpretation of the contract documents (i.e. submits an RFI) that may result in either an extension of time to the subcontract or may result in an increase in the amount payable to the Subcontractor. The CM shall promptly give written notice to NYCHA of any dispute or claim that may or does arise during performance of work, assist in the resolution of any such dispute or claim in accordance with NYCHA's directions, and make recommendations regarding the settlement of such disputes and claims.
>
> 29.3 The CM shall analyze in detail all claims and disputes originating with a Subcontractor. The CM shall make recommendations to NYCHA regarding claims

and disputes as indicated by such analysis and submit same to NYCHA for approval, with all documentation in connection therewith. The CM shall assist NYCHA in handling any dispute resolution matters, in accordance with such procedures that NYCHA promulgates from time to time. The CM shall also make recommendations and render assistance regarding labor disputes and all other disputes between or among the Subcontractors.

29.4 The decision of NYCHA regarding the dispute shall be *final and binding on all parties. Any party may seek review of NYCHA's decision solely in the form of a challenge, in a court of competent jurisdiction of the State of New York, that resides in the City and County of New York, pursuant to Article 78 of the Civil Practice Law and Rules*. Such review by the court shall be limited to the question of whether or not NYCHA's decision was made in violation of lawful procedure, was affected by an error of law, or was arbitrary or capricious or an abuse of discretion. No evidence or information shall be introduced or relied upon in such proceeding that was not presented to NYCHA by the CM [emphasis supplied]

(*id.*).

TDX also points to the Subcontract, which states in the introductory paragraphs, in relevant part, that:

> **Every term and condition set forth herein that are made applicable to the CM [TDX], except for the CM's fee agreement, are incorporated by reference into this Agreement and shall be binding upon the Contractor [Vitanza] to the same extent that the CM is bound thereby. This includes all dispute resolution mechanisms in Prime Contract Article 29 and jurisdiction and choice of law under Prime Contract Article 60** [emphasis in original]

(*id.*, Exh. 4). In addition, TDX relies upon section 8– modifications of compensation; changes in the work, which provides that:

> **Contractor's attention is called to Prime Contract Articles 26, 28 and 30 which provides for Changes to the Work and payment for extra work, if any. Contractor agrees to comply exclusively with such provisions, or shall be deemed to have waived any claim of extra work** [emphasis in original][1]

(*id.*).

[1]Article 26 of the Prime Contract governs contract changes. Article 28 of the Prime Contract provides methods for calculating payments for approved extra work.

Based upon these provisions, TDX points out that the Subcontract incorporates "all dispute resolution mechanisms in Prime Contract Article 29." According to TDX, article 29 of the Prime Contract requires any party seeking review of a NYCHA payment decision to do so solely in the form of an Article 78 proceeding. TDX further contends that plaintiff's failure to follow this procedure constitutes an abandonment of its claim. Additionally, TDX maintains that, although some cases hold that incorporation by reference provisions in construction contracts do not apply to limit a plaintiff's dispute resolution options, those contracts contained non-specific language only incorporating the terms and conditions of another contract.

TDX also contends that Vitanza did not perform the extra work in conformance with the terms and conditions of the Subcontract. As argued by TDX, Vitanza was required to obtain an approved change order or written contract modification or amendment in advance. TDX asserts that, on June 22, 2010, Vitanza submitted a change request to TDX, seeking $560,790.08 over and above the base contract price, claiming that it had to perform additional work to offset piping around structural columns (*id.*, Exh. 6). TDX reviewed the change request and forwarded it to NYCHA with an explanation that it believed that the request was justified because neither the drawings nor specifications addressed the structural columns (*id.*, Exh. 7). NYCHA denied the change request on the basis that the work was not "additional" within the meaning of the applicable contracts (*id.*, Exh. 8). NYCHA also responded to Vitanza's claim that the drawings and specifications did not show the structural columns, citing to the following provision incorporated into the Subcontract:

> Item A – Bidders are urged to visit the site of the proposed work to become fully acquainted with existing conditions before bidding. The contract drawings and specifications are intended to provide sufficient details as to the scope and quality of

> work required to permit bidding. The plans and specifications are not intended to be all inclusive of the extent of work involved

(*id.*, Exh. 9). TDX claims that Vitanza subsequently filed a notice of claim with TDX, which was forwarded to NYCHA (*id.*, Exh. 10). According to TDX, on December 7, 2010, NYCHA advised TDX that it once again rejected Vitanza's claim. On January 3, 2011, TDX wrote to Vitanza, advising it of the rejection, and reminded it that "[i]n accordance with the terms and conditions of the contract, you are advised that NYCHA's decision is final and binding on all parties. However, the decision is or may be reviewable directly upon your application. Please refer to Article 29 of the contract with respect to dispute resolution" (*id.*, Exh. 11). TDX asserts that Vitanza never instituted an Article 78 proceeding against NYCHA; rather, Vitanza waited several months and brought this action against TDX. Finally, TDX argues that its failure to pay Vitanza does not constitute a breach of the Subcontract, because article 29.4 of the Prime Contract provides that the decision of NYCHA regarding a payment dispute shall be final and binding, not just on TDX, but "on all parties."

In opposition, Vitanza argues first that TDX's motion should be denied because it failed to submit an affidavit from an individual with personal knowledge. Second, Vitanza contends that the complaint sets forth a legally cognizable claim for relief. Third, Vitanza maintains, relying upon *Bussanich v 310 E. 55th St. Tenants* (282 AD2d 243 [1st Dept 2001]), that incorporation clauses in a construction subcontract only bind a subcontractor as to prime contract provisions relating to the scope, quality, character, and manner of the work performed by the subcontractor. Thus, according to Vitanza, the dispute resolution procedure in article 29 does not relate to the scope, quality, character, and/or manner of the work performed by Vitanza. Fourth,

with regard to the language in article 29.4 that "[t]he decision of NYCHA shall be final and binding on all parties," Vitanza submits that the Prime Contract does not define the term "parties"; the only other use of the term "parties" appears in the following provision:

> 64.1 In addition to the authority of NYCHA to order extra work pursuant to Article 26 hereof or omit certain work pursuant to Article 33 hereof, this Agreement may be modified from time to time in a writing signed by both *parties* in order to carry out and complete more fully and perfectly the Work agreed to be performed under this Agreement, provided, however, in no event shall such modification exceed the cost limitation approved by the Bureau of the Budget [emphasis added]

(Hayum Affirm. in Support, Exh. 2). Fifth, Vitanza submits that TDX's failure to demonstrate compliance with article 29 of the Prime Contract requires denial of the motion, since TDX failed to develop a written record relative to Vitanza's claims. Sixth, Vitanza argues that TDX's motion is premature, because discovery has not yet been conducted.

In reply, TDX responds that (1) the unambiguous documentary evidence provides a complete defense to Vitanza's claims, (2) the Subcontract specifically incorporates the dispute resolution procedure in article 29 of the Prime Contract, (3) Vitanza never sought review of NYCHA's decision in an Article 78 proceeding, and the time for it to do so has long run, and (4) Vitanza has failed to show what discovery is needed to defeat the motion.

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must "accept the fact as alleged in the complaint as true, accord plaintiffs 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]). "Allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary

evidence are not presumed to be true and accorded every favorable inference" (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000] [internal quotation marks and citation omitted]). "Where the parties submit extrinsic evidence in connection with a CPLR 3211 (a) (7) motion to dismiss the complaint and the court declines to treat the motion as one for summary judgment under CPLR 3211 (c), the appropriate standard of review 'is whether the proponent of the pleading has a cause of action, not whether he has stated one'" (*IIG Capital LLC v Archipelago, L.L.C.*, 36 AD3d 401, 402 [1st Dept 2007], quoting *Leon*, 84 NY2d at 88).

Dismissal pursuant to CPLR 3211 (a) (1) is appropriate where "'the documentary evidence which forms the basis of the defense . . . [is] such that that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim'" (*Reid v Gateway Sherman, Inc.*, 60 AD3d 836, 837 [2d Dept 2009], quoting *McCue v County of Westchester*, 18 AD3d 830, 831 [2d Dept 2005]). Contracts constitute "documentary evidence" pursuant to CPLR 3211 (a) (1) (Siegel, NY Prac § 259 [5th ed]).

Initially, the court rejects Vitanza's contention that TDX's motion should be denied because it failed to submit an affidavit from an individual with personal knowledge of the facts. A motion made pursuant to CPLR 3211 (a) (1) contemplates that the defense will be established by the "documentary evidence" alone and without reference to evidence derived from affidavits (*id.*). Moreover, although Vitanza argues that the complaint states a legally cognizable claim, the issue is whether Vitanza's breach of contract claim is conclusively refuted by documentary evidence.

"An alternative dispute resolution agreement, like an arbitration agreement, must be

> clear, explicit and unequivocal . . . and must not depend upon implication or subtlety . . . . [P]arties consenting to arbitration surrender many of their normal rights under the procedural and substantive law of the State, and it would be unfair to infer such a significant waiver on the basis of anything less than a clear indication of intent"

(*Thomas Crimmins Contr. Co. v City of New York*, 74 NY2d 166, 171 [1989] [internal quotation marks omitted]). While such an agreement may be incorporated by reference, that reference must "clearly show such an intent" (*Matter of Aerotech World Trade v Excalibur Sys.*, 236 AD2d 609, 611 [2d Dept], *lv denied* 90 NY2d 812 [1997]; *see e.g. ADC Constr. v Empire City Subway Co.*, 290 AD2d 229, 230 [1st Dept 2002] [although interference agreement did not contain an arbitration clause, it expressly stated that it was made pursuant to section of contract with city that required contractor to take steps to prevent delay and promote dispute resolution, and if that did not result in settlement, dispute was subject to arbitration]; *Matter of JGA Constr. Corp. v Burns Elec. Co.*, 145 AD2d 945, 946 [4th Dept 1998] [contractor and subcontractor expressly and unambiguously agreed to arbitrate where subcontract stated that where subcontract was inconsistent with a provision of the subcontract, the subcontract governed]).

Where an agreement does not show such an intent, the rule is that "incorporation clauses in a construction subcontract, incorporating prime contract clauses by reference into a subcontract, bind a subcontractor only as to prime contract provisions relating to the scope, quality, character, and manner of the work to be performed by the subcontractor" (*Bussanich*, 282 AD2d at 244; *see also Waitkus v Metropolitan Hous. Partners*, 50 AD3d 260, 261 [1st Dept 2008]).

Thus, in *General Ry. Signal Corp. v Comstock & Co.* (254 AD2d 759 [4th Dept 1998], *lv dismissed* 93 NY2d 881 [1999]), the Court held that, because "[n]owhere in the subcontract is

there a clear, explicit, and unequivocal agreement to arbitrate . . . the terms of the subcontract do not meet the rigid standards necessary to establish an explicit commitment by plaintiff to submit its claims against [defendant] to alternative dispute resolution, as provided in the prime contract . . ." (*id.* at 760). Similarly, in *Navillus Tile, Inc. v Bovis Lend Lease LMB, Inc.* (74 AD3d 1299 [2d Dept 2010]), the Court held that "the general incorporation of the Prime Contract and the PPB Rules into the Subcontract, without any explicit reference to their respective ADR provisions, was insufficient to incorporate those ADR provisions into the Subcontract, including the ADR provision in article 29 of the Prime Contract requiring 30-day notice of a dispute" (*id.* at 1302).

Here, the Subcontract contains a clear and express intent to submit disputes to alternative dispute resolution. The Subcontract explicitly states that "[e]very term and condition . . . are incorporated by reference into this Agreement and shall be binding upon the Contractor. *This includes all dispute resolution mechanisms in Prime Contract Article 29*" (Hayum Affirm. in Support, Exh. 4 [emphasis added]). Article 29.4 of the Prime Contract states that "[t]he decision of NYCHA regarding the dispute shall be final and binding on all parties" and that "[a]ny party may seek review of NYCHA's decision solely in the form of a challenge . . . pursuant to Article 78 of the Civil Practice Law and Rules. Such review by the court shall be limited to the question of whether or not NYCHA's decision was made in violation of lawful procedure, was affected by an error of law, or was arbitrary or capricious or an abuse of discretion" (*id.*, Exh. 2). Thus, the agreement to submit to the alternative dispute mechanism does not "depend upon implication or subtlety" (*Thomas Crimmins Contr. Co.*, 74 NY2d at 171).

Although Vitanza claims that TDX's failure to pay its claim constitutes a breach of the

Subcontract, article 29.4 of the Prime Contract, incorporated by reference into the Subcontract, provides that the decision of NYCHA regarding a payment dispute is final and binding "on all parties" (Hayum Affirm. in Support, Exh. 2). Therefore, Vitanza was required to file an Article 78 proceeding challenging NYCHA's payment decision.

Laquila Constr. v New York City Tr. Auth. (282 AD2d 331 [1st Dept], *lv denied* 96 NY2d 721 [2001]) is instructive. There, the plaintiff was hired by the defendant New York City Transit Authority to excavate new subway lines (*id.*). The contract provided that disputes were to be resolved by the defendant's chief engineer with subsequent judicial review limited in scope to whether or not any determination by the chief engineer was "arbitrary, capricious or so grossly erroneous to evidence bad faith" (*id.*). A dispute arose which was submitted to the chief engineer and resolved against the plaintiff (*id.*). Instead of seeking review by CPLR Article 78, the plaintiff brought a plenary action which pleaded causes of action for breach of contract and quantum meruit (*id.* at 332). The First Department held that "it has been clear since at least 1993 that the contract clause providing for dispute resolution by defendant's Chief Engineer is not against public policy, is enforceable and requires dismissal of this complaint" (*id.*).

The same result is warranted in this action. Here, rather than challenging NYCHA's decision in an Article 78 proceeding, Vitanza brought a plenary action seeking recovery for breach of contract against TDX. In sum, Vitanza failed to follow the alternative dispute resolution mechanism incorporated by reference into the Subcontract, and is foreclosed from pursuing another remedy (*see Cal-Tran Assoc., Inc. v City of New York*, 43 AD3d 727 [1st Dept 2007] [construction contract entered into between plaintiff and city unambiguously precluded plaintiff from commencing plenary action for damages upon default determination]; *Excel*

Group, Inc. v New York City Tr. Auth., 28 AD3d 708, 710 [2d Dept 2006] [contractor was required to pursue alternative dispute resolution in parties' contract and contractor's failure to follow that procedure foreclosed contractor from pursuing any other remedy]). Accordingly, the complaint must be dismissed.

Finally, Vitanza's request for discovery is denied. CPLR 3211 (d) provides that "[s]hould it appear from affidavits submitted in opposition to a motion made under subdivision (a) or (b) that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion. . ." Vitanza has failed to show a basis for discovery. The unambiguous contract language of the Subcontract and Prime Contract conclusively disposes of Vitanza's claim.

CONCLUSION

Accordingly, it is

ORDERED that the motion (sequence number 001) of defendant TDX Construction Corporation to dismiss the complaint is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: _____

ENTER:

_____
Hon. Carol Robinson Edmead, J.S.C.

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ORDERED that counsel for defendant shalal serve a copy of this order with notice of entry within twenty (20) days of entry on counsel for plaintiff.

Dated: March 30, 2012

ENTER:

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD