Danco Elec. Contrs., Inc. v Dormitory Auth. of the State of N.Y.
2017 NY Slip Op 30960(U)
May 8, 2017
Supreme Court, New York County
Docket Number: 450633/2013
Judge: Eileen Bransten

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 3

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DANCO ELECTRICAL CONTRACTORS, INC.,

Plaintiff,

-against-

DECISION/ORDER
Index No. 450633/2013
Motion Date: 11/15/2016
Mot. Seq. No. 001

DORMITORY AUTHORITY OF THE STATE OF NEW YORK,

Defendant.

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BRANSTEN, J.

This action arises from a contract dispute between Plaintiff Danco Electrical Contractors, Inc. ("Danco") and Defendant Dormitory Authority of the State of New York ("Dormitory Authority") regarding construction "change orders" on a public works project (the "Project") for which Defendant Dormitory Authority hired Plaintiff Danco to be the primary electrical contractor. Plaintiff alleges that Defendant has paid $8,144,550 on a total contract value of $9,360,064, but still owes Plaintiff $1,215,514 plus an additional sum for the reasonable value of its expenses on the Project.

Presently before the Court is Defendant Dormitory's motion for partial summary judgment. For the following reasons, the Court grants in part and denies in part Defendant's motion.

I. Background

On or about April 11, 2006, Defendant Dormitory Authority contracted with Plaintiff Danco to complete certain electrical work on the campus of Brooklyn College (the "Project"). Complaint ("Compl.") ¶¶ 2, 3. The initial contract price was $7,495,416.00. *Id.* ¶ 3.

The Complaint alleges that, as a result of additions to, or deductions from, the work required to be performed on the Project, the contract price was adjusted upwards. Compl. ¶ 7. According to the Complaint, the parties agreed upon a final sum of $9,360,064, of which Defendant has paid all but $1,215,514. *Id.* ¶¶ 7-9. Plaintiff asserts that the $1,964,648 increase in contract price was a result of Change Order Proposals it submitted to Defendant seeking payment for "Extra Work"—construction work beyond that which was explicitly set forth in the initial contract. *Id.* ¶ 7.

The relevant contract provisions governing Change Orders and Extra Work are contained in the Project's "General Conditions," a document incorporated by reference into the parties' contract, which outlines the requirements for each contractor performing work on the Project on behalf of Defendant. *See* NYSCEF No. 36, Affidavit of Charles Bartlett ¶¶ 9, 10, Ex. 2 (the "General Conditions").

Section 8.01(A) of the General Conditions provides in relevant part that "no claims for Extra Work shall be allowed unless such Extra Work is ordered by [Defendant] via a written Notice to Proceed." General Conditions § 8.01(A). Section 8.01(A) further states that, in the event of a dispute over whether certain work constitutes Extra Work or the

compensation due for Extra Work, Defendant "may order the Contractor to perform the Extra Work and proceed under the Dispute Article." *Id.*

The Dispute Article, Article 11 of the General Conditions, provides the following:

> A. If the Contractor claims that any Work that the Contractor has been ordered to perform will be Extra Work, or that any action or omission of the Owner is contrary to the terms and provisions of the Contract and will require the Contractor to perform Extra Work, the Contractor shall
>
> . . .
>
> 2. File with the Owner within fifteen (15) working days after being ordered to perform the Work claimed by the Contractor to be Extra Work or within fifteen (15) working days after commencing performance of the Work, whichever date shall be earlier, or within fifteen (15) working days after the said action or omission on the part of the Owner occurred, a written notice of the basis for the Contractor's claim, including estimated cost, and request for a determination thereof.
>
> . . .
>
> B. No claim for Extra Work shall be allowed unless the same was done pursuant to a written order of the Owner. The Contractor's failure to comply with any or all parts of this Article shall be deemed to be:
>
> 1. a conclusive and binding determination on the part of the Contractor that said action or omission does not involve Extra Work and is not contrary to the terms and provisions of the Contract,
>
> 2. a waiver by the Contractor of all claims for additional compensation or damages as a result of said order, Work, action or omission.

General Conditions § 11.01.

Furthermore, section 11.03(A) of the General Conditions states that

> Any decision or determination of the Consultant, Owner or Owner's Representative shall be final, binding and conclusive on the Contractor unless the Contractor shall, within ten (10) working days after said decision, make and deliver to the Owner a written verified statement of the Contractor's contention that said decision is contrary to a provision of the Contract.

General Conditions § 11.03(A).

Through the instant motion, Defendant disputes Plaintiff's entitlement to additional payment for fifty-six specific Change Orders, arguing generally that Plaintiff waived its right to seek additional payment by violating the above-referenced provisions of the General Conditions.

Notably, the parties' papers on the instant motion are devoid of material factual disputes regarding performance under the above-referenced provisions.[1] As such, all that remains for the Court to determine on the instant motion for summary judgment is whether, given the undisputed facts, Plaintiff's claims are barred as a matter of law.

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[1] The Court notes that the only "denials" in Plaintiff's responsive Rule 19-A Statement are a series of categorical denials that Plaintiff was "notified" of the specific Change Orders at issue in this action. *See, e.g.*, Plaintiff's Rule 19-A Statement ¶¶ 6, 8, 10, 12, 14, 16 . . . 96. In support of each denial, Plaintiff cites to the affidavit of Plaintiff's principal Danny Ramnarian at ¶¶ 70-77, in which Ramnarian argues that Defendant's notifications were not presented in the proper form under Section 2.03 of the General Conditions.

Upon review, the Court concludes paragraphs 70-77 of the Ramnarian Affidavit do not contradict Defendant's relevant factual allegations; rather, the Affidavit raises Defendant's violation of Section 2.03 as a potential legal defense against Defendant's motion for summary judgment. As such, the Court deems the factual assertions in Defendant's Rule 19-A Statement to be admitted in their entirety.

The Court will address Plaintiff's argument with respect to Section 2.03 of the General Conditions in Section III of this Decision, below.

II. Standard of Review

Summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established the absence of any material issues of fact, requiring judgment as a matter of law. *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 503 (2012) (citing *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986)). Once this showing has been made, the burden shifts to the opposing party to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). When deciding a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-movant. *Branham v. Loews Orpheum Cinemas, Inc.*, 8 N.Y.3d 931, 932 (2007). However, mere conclusions, unsubstantiated allegations or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman*, 49 N.Y.2d at 562; *see also Ellen v. Lauer*, 210 A.D.2d 87, 90 (1st Dep't 1994) ("[it] is not enough that the party opposing summary judgment insinuate that there might be some question with respect to a material fact in the case. Rather, it is imperative that the party demonstrate, by evidence in admissible form, that an issue of fact exists . . .") (citations omitted).

III. Discussion

Defendant moves for partial summary judgment pursuant to CPLR § 3212, seeking dismissal of Count Two with respect to thirty-nine of the forty Change Orders at issue, as well as all sixteen of the Change Orders at issue in Count Three. Defendant further moves for dismissal of counts Four through Six in their entirety.

With regard to Count Two, Defendant argues that Plaintiff waived its right to challenge thirty-five of the thirty-nine referenced Change Orders by failing to strictly comply with the verification, timeliness, and "Notice to Proceed" provisions set forth in the General Conditions. Defendant argues that there is no dispute that Defendant complied with its obligations under the remaining four Change Orders by paying Plaintiff the requested amounts.

With Regard to Count Three, Defendant similarly argues that Plaintiff's claims for Extra Work on each of the sixteen addressed Change Orders must be dismissed due to Plaintiff's failure to meet the verification requirement of the General Conditions with respect to each claim.

Defendant further argues that Counts Four through Six must be dismissed for duplicativeness and failure to state a claim.

The Court will address Defendants' arguments individually below.

A. Whether Plaintiff Waived its Right to Submit Certain Claims for Extra Work

Defendant first argues that Plaintiff is barred from claiming entitlement to payment for Extra Work on thirty-five of forty Change Order Proposals at issue in Count Two, and all sixteen Change Order Proposals at issue in Count Three, because Plaintiff did not follow three particular procedures set forth in the General Conditions governing requests for (and disputes about) Extra Work payments. First, Defendant contends that Plaintiff waived its entitlement to additional pay for Extra Work on twenty-nine Change Orders at issue in Count Two, and Sixteen Change Orders at issue in Count Three, when it failed to submit its Extra Work requests or disputes in "verified" form.[2] Second, Defendant contends that Plaintiff waived its right to Extra Work pay on five other Change Orders at issue in Count Two by performing the relevant work without first receiving a written "Notice to Proceed."[3] And third, Defendant contends the one request for Extra Work made pursuant to a Notice to Proceed was nonetheless submitted in an untimely manner.[4]

According to Defendant, because the verification, timeliness, and Notice to Proceed requirements were "conditions precedent" to Plaintiff's ability to obtain additional pay for Extra Work on a given Change Order, failure to follow these requirements resulted in a waiver of its rights to receive such additional Extra Work pay.

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[2] The Twenty-nine referenced Change Order Proposals in Count Two are numbered 46R, 53, 61, 73, 81, 85, 91, 94, 99, 147, 149, 152, 153, 157, 163, 167, 182, 197, 199, 200, 201, 206, 210, 211, 212, 213, 215, 219, and 223; the sixteen referenced Change Order Proposals in Count Three are numbered 24, 54, 97, 125, 133, 148, 155, 159, 161, 162, 174, 181, 193, 202, 203 and 208.
[3] These five referenced Change Order Proposals are numbered 95, 214, 216, 217, and 218.
[4] The referenced Change Order Proposal is numbered 224.

A condition precedent is "an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises." *MHR Capital Partners LP v. Presstek, Inc.*, 12 N.Y.3d 640, 645 (2009). Where a condition precedent is established, it "must be literally performed; substantial performance will not suffice." *MHR Capital Partners LP v. Presstek, Inc.*, 12 N.Y.3d 640, 645, 912 N.E.2d 43, 47 (2009).

"[A] contractual duty ordinarily will not be construed as a condition precedent absent clear language showing that the parties intended to make it a condition." *Unigard Sec. Ins. Co. v. N. River Ins. Co.*, 79 N.Y.2d 576, 581 (1992). The Court of Appeals has recognized the use of terms such as "if," "unless" and "until" in a contract as "unmistakable language" establishing a condition precedent. *MHR Capital Partners LP v. Presstek, Inc.*, 12 N.Y.3d 640, 645 (2009). A condition precedent may also be shown where the contract explicitly sets forth that a party's failure to comply with specific provisions will result in a waiver of rights under those provisions. *Morelli Masons, Inc. v. Peter Scalamandre & Sons, Inc.*, 294 A.D.2d 113, 113 (1st Dep't 2002).

The Court of Appeals has noted that public policy supports strict compliance with conditional notice and reporting requirements in contracts governing public works projects, because such requirements "provide public agencies with timely notice of deviations from budgeted expenditures or of any supposed malfeasance, and allow them to take early steps to avoid extra or unnecessary expense, make any necessary adjustments, mitigate damages

and avoid the waste of public funds." *A.H.A. Gen. Const., Inc. v. N.Y. City Hous. Auth.*, 92 N.Y.2d 20, 33 (1998).

In following this public policy, the First Department has consistently dismissed contractors' claims for extra work payments where the contractor failed to strictly comply with notice and reporting requirements in seeking additional pay for their work. *See Morelli Masons, Inc. v. Peter Scalamandre & Sons, Inc.*, 294 A.D.2d 113, 113 (1st Dep't 2002); *Pettinelli Electric Co. v. Bd. of Ed. of the City of New York*, 226 A.D.2d 176, 176 (1st Dep't 1996); *A.I. Smith Electrical Contractors, Inc. v. City of New York*, 181 A.D.2d 542, 542 (1st Dep't 1992). Furthermore, the Second Department has recently held that, where a public construction contract required the contractor to "verify" all of its requests for additional payment to avoid waiver of rights to that payment, failure to verify such requests constituted waiver and justified the court's dismissal of the contractor's claims for additional payment. *See Schindler Elevator Corp. v. Tully Const. Co.*, 139 A.D.3d 930, 931-32, (2nd Dep't 2016).

Regarding the twenty-nine Change Order Proposals submitted in unverified form, the Court concludes that Plaintiff's failure to "verify" constituted a waiver of Plaintiff's right to seek additional payment on those Extra Work requests.

The situation at bar is analogous to the one presented in the Second Department case *Schindler Elevator Corp. v. Tully Const. Co.*, 139 A.D.3d 930 (2nd Dep't 2016). In *Schindler Elevator*, the defendant entered into a contract with the City of New York Department of Sanitation ("the City") to construct a garage. *Id.* at 931-32. The defendant

then entered into a subcontract with the plaintiff, pursuant to which the plaintiff was to install five elevators in the garage. The plaintiff sued the defendant to recover damages allegedly incurred as a result of delays in the performance of the work. *Id.*

The primary contract between the defendant and the City, which was incorporated by reference into the parties' own contract, stated in Article 11.1.2 that "within forty-five (45) Days from the time such damages are first incurred, and every thirty (30) Days thereafter for as long as such damages are incurred, verified statements of the details and amounts of such damages, together with documentary evidence of such damages" must be submitted. *Id.* at 932. Additionally, Article 11.2 of that contract stated that failure "to strictly comply with the requirements of Article 11.1.2 shall be deemed a conclusive waiver by the Contractor of any and all claims for damages for delay arising from such condition." *Id.*

In dismissing the plaintiff's claims for extra work under Article 11, the court noted that the letters and emails relied upon by the plaintiff "did not strictly comply with the contractual notice requirement, since they did not contain verified statements of the amount of delay damages allegedly sustained by the plaintiff." *Id.* The court further noted that "the defendant's actual knowledge of the delay and the claims did not relieve the plaintiff of its obligation to serve a proper notice of claim, and the defendant's alleged breach of the subcontract did not excuse the plaintiff from complying with the notice requirements under the circumstances of this case. *Id.*

Similarly here, Section 11.03(A) of the General Conditions states that any decision or determination made by Defendant "shall be final, binding and conclusive on the [Plaintiff] Contractor unless the Contractor shall, within ten (10) working days after said decision, make and deliver to [Defendant] a verified written statement of the Contractor's contention that said decision is contrary to a provision of the Contract." General Conditions § 11.03. Furthermore, Section 11.01(B) states that "the Contractor's failure to comply with any or all parts of this Article shall be deemed to be . . . a conclusive and binding determination on the part of the Contractor that said order, Work, action or omissions does not involve Extra Work and is not contrary to the terms and provisions of the contract." General Conditions § 11.01(B).

These provisions are nearly identical to those considered by the *Schindler Elevator* court and found to be express "conditions precedent," obligating the contractor to strictly comply with its notice and reporting requirements. *See Schindler Elevator Corp.*, 139 A.D.3d at 931-32.

The General Conditions' provisions governing the Notice to Proceed and timeliness requirements contain similar conditional language. Regarding the Notice to Proceed requirement, Section 8.01(A) of the General Conditions contains conditional language prohibiting any claims for Extra Work "unless such Extra Work is ordered by [Defendant] via a written Notice to Proceed." General Conditions § 8.01(A). *See MHR Capital Partners LP v. Presstek, Inc.*, 12 N.Y.3d 640, 645 (2009) (noting that the term "unless" in a contract is "unmistakable language" establishing a condition precedent). And regarding

the timeliness requirement, Sections 11.01(A)(2) and 11.01(B) require Plaintiff to submit requests for Extra Work payment within 15 days of commencing performance on the Project or have its silence deemed "a conclusive and binding determination on the part of the Contractor that said action or omission does not involve Extra Work and is not contrary to the terms and provisions of the Contract". *See Morelli Masons, Inc. v. Peter Scalamandre & Sons, Inc.*, 294 A.D.2d 113, 113 (1st Dep't 2002) (holding that a contract provision constitutes a "conditions precedent" where it explicitly sets forth penalty for failure to comply).

As such, the provisions of the General Conditions governing verification and timeliness of dispute, as well as the receipt of a Notice to Proceed, constitute conditions precedent which must be strictly performed. *See Morelli Masons, Inc.*, 294 A.D.2d at 113.

Furthermore, the undisputed facts show that Plaintiff failed to strictly perform under these provisions of the General Conditions. For example, Plaintiff concedes that the twenty-nine Change Order Proposals addressed in Count Two, and all sixteen Change Order Proposals addressed in Count Three, were not submitted to Defendant in "verified" form as required by General Conditions Section 11.03(A). *See* Defendant's Rule 19-A Statement ¶¶ 7-95; Plaintiff's Rule 19-A Statement ¶¶ 7-95; *see also* Ramnarian Affidavit ¶ 46 (listing the relevant unverified emails and letters submitted to Defendant).

Plaintiff further concedes that it did not receive a Notice to Proceed prior to requesting additional pay on five additional Change Orders referenced in Count Two. *See* Defendant's Rule 19-A Statement ¶¶ 98, 99, 100, 103, 106; Plaintiff's Rule 19-A Statement

¶¶ 98, 99, 100, 103, 106. Plaintiff concedes it did not submit Change Order Proposal 224 within the fifteen-day window established by General Conditions Section 11.01(A)(2). *See* Defendant's Rule 19-A Statement ¶ 110; Plaintiff's Rule 19-A Statement ¶ 110.

Accordingly, Plaintiff waived its right to collect additional pay for Extra Work based on the fifty-one above-referenced Change Order Proposals. *See Morelli Masons, Inc. v. Peter Scalamandre & Sons, Inc.*, 294 A.D.2d 113, 113 (1st Dep't 2002); *Schindler Elevator Corp.*, 139 A.D.3d at 931-32 (2nd Dep't 2016).

Plaintiff's arguments in opposition are of no avail. First, Plaintiff argues that it should not be penalized for failing to strictly comply with the General Conditions because, while it admittedly did not "verify" its communications as required by Article 11, the unverified letters and emails were nonetheless sufficient to put Defendant on notice of its opposition to each of Defendant's payment decisions.

However, as noted above, Defendant's "actual knowledge" of Plaintiff's position concerning Extra Work does not relieve Plaintiff of its obligation to comply with Article 11's strict notice and verification requirements. *See Schindler Elevator Corp.*, 139 A.D.3d at 932. While such a result may seem harsh, the Court must nonetheless enforce the express conditions of Article 11 as the will of the parties. *See Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co.*, 86 N.Y.2d 685, 691 (1995) ("Though the court may regret the harshness of such a condition, as it may regret the harshness of a promise, it must, nevertheless, generally enforce the will of the parties unless to do so will violate public policy.").

Second, Plaintiff argues that it should not be penalized for failing to submit its communications to Defendant in the form mandated by Article 11 when Defendant itself failed to submit *its* communications to Plaintiff in the form set forth by a different provision of the General Conditions, Section 2.03.

Section 2.03 states as follows:

> Any notice to the Contractor from the Owner relative to any part of the Contract shall be in writing and service considered complete when said notice is mailed to the Contractor at the last address given by the Contractor, or when delivered in person to said Contractor or the Contractor's authorized representative.

General Conditions § 2.03. According to Plaintiff, many of *Defendant's* communications regarding the Change Order Proposals at issue were sent by e-mail or fax, violating Section 2.03's mail-or-hand-delivery requirement. Plaintiff argues that it would be inequitable to penalize only Plaintiff for failing to strictly comply with Section 11.03(A) or 11.01(B) when Defendant was guilty of similar violations regarding Section 2.03.

However, unlike Sections 11.03(A) and 11.01(B), Section 2.03 does not constitute an "express condition" requiring strict compliance. Indeed, as Defendant points out, Section 2.03 is devoid of any of the conditional language or explicit penalties for failure to comply that are hallmarks of contractual "conditions precedent." Thus, substantial compliance is sufficient to meet Section 2.03's requirements. *See Peter Scalamandre & Sons, Inc. v. FC 80 Dekalb Assocs., LLC*, 129 A.D.3d 807, 809 (2nd Dep't 2015) (holding that, where contractual provision was not a condition precedent setting forth the

consequences of a failure to strictly comply, substantial compliance with the provision will suffice).

Here, undisputed evidence shows that Defendant substantially complied with Section 2.03. For example, the affidavit of Charles Bartlett submitted in support of Defendant's motion asserts that Defendant actually sent Plaintiff each of the relevant Change Orders and rejections of Plaintiff's payment requests, *albeit* via e-mail and fax rather than mail or hand-delivery. *See* Bartlett Affidavit ¶¶ 25-34, 36-53, 65-80. Plaintiff does not contest its receipt of these communications, asserting only that Defendant did not send the communications in compliance with Section 2.03. *See* Ramnarian Affidavit ¶¶ 71, 73, 75, 76.

Based on this evidence, the Court concludes that the communications in question were sufficient to put Plaintiff on notice of Defendant's position and thus satisfied Defendant's obligation to "substantially comply" with the requirements of Section 2.03. *See Peter Scalamandre & Sons, Inc., LLC*, 129 A.D.3d, 809. Accordingly, Defendant's failure to mail or hand-deliver its communications to Plaintiff pursuant to Section 2.03 does not excuse Plaintiff's failure to "verify" its communications to Defendant pursuant to Sections 11.03(A) and 11.01(B).[5] *See id.*

Plaintiff's claims for additional Extra Work payment on the referenced fifty-one Change Order Proposals are therefore dismissed.

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[5] The Court reiterates that this conclusion is necessitated by the clear language of the General Conditions, regardless of the harshness or seeming inequity of the result. *See Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co.*, 86 N.Y.2d 685, 691 (1995).

B. Whether Defendant is Entitled to Summary Judgment on Change Order Proposal Numbers 63, 195, 207, and 209

Defendant argues that summary judgment should be granted in Defendant's favor on Change Order Proposals numbered 63, 195, 207, and 209 because Defendant concedes that it owes Plaintiff the amounts requested on those Change Order Proposals, and thus no disputes remain as to those claims. However, Defendant's concession of liability on these Change Order Proposals does not entitle it to summary judgment on those Change Order Proposals—rather, had Plaintiff moved for summary judgment, such a concession would likely have led to a finding of summary judgment *for Plaintiff* on entitlement to payment on these four claims.

While the Court has the authority to search the record and grant summary judgment in favor of the non-movant under CPLR 3212(b), *Dunham v. Hilco Const. Co.*, 89 N.Y.2d 425, 429 (1996), the Court declines to exercise its discretion to do so on the instant motion. As Plaintiff points out, the full extent of Plaintiff's entitlement to payment under these conceded claims would be subject to a determination at trial on Count One, Plaintiff's claim for entitlement to moneys outstanding on the contract, in any event.

Accordingly, Defendant's motion for summary judgment on Change Order Proposals numbered 63, 195, 207, and 209 is denied.

C. The Complaint's Other Causes of Action

1. Quantum Meruit (Count Four) and Unjust Enrichment (Count Six)

Defendant argues that Plaintiff's claims for *quantum meruit* and unjust enrichment is barred by the existence of a contract governing the parties' relationship regarding performance of work on the Project.

In New York, "[t]he 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." *Clark-Fitzpatrick, Inc. v. Long Island R. Co.*, 70 N.Y.2d 382, 388 (1987). Furthermore, while specific amounts claimed as payment "Extra Work" are by their nature not explicitly incorporated into the original contract price, claims for payment on Extra Work are nonetheless considered "contractual" rather than "quasi-contractual" where the contract sets forth specific procedures for claiming entitlement to such additional payments. *A.H.A. Gen. Const., Inc. v. N.Y. City Hous. Auth.*, 92 N.Y.2d 20, 33 (1998) (Dismissing subcontractor's claim for unjust enrichment premised on failure to pay for Extra Work where Plaintiff failed to meet contractual requirements as to its claims of Extra Work).

Here, Counts Four and Six seek an additional $3,649,465.23 beyond the stated contract price to compensate Plaintiff for the "reasonable value" of the time and material it expended on the project. *See* Complaint ¶¶ 26, 36. However, as the Complaint alleges and the documentary evidence shows, the parties' relationship regarding all work on the Project—including both (a) items of work described explicitly in the Contract and (b)

additional items of work constituting Extra Work—are governed exclusively by the Contract and the General Conditions incorporated by reference therein. *See* NYSCEF No. 36, Affidavit of Charles Bartlett Ex. 1 (the Contract), Ex. 2 (the General Conditions); *see also* Complaint ¶¶ 4-5.

Because Plaintiff's entitlement to payment on the Project is thus premised entirely on compliance with the Contract and General Conditions, Plaintiff is not entitled to pursue quasi-contractual relief regarding its work on the Project. *See Clark-Fitzpatrick, Inc.*, 70 N.Y.2d 382 (1987).

Accordingly, Counts Four and Six for *quantum meruit* and unjust enrichment are dismissed. *See id.*

2. Account Stated (Count Five)

Finally, Defendant argues that Count Five for account stated must be dismissed because Plaintiff's entitlement to payment under the Contract and General Conditions remains in dispute.

A claim for account stated is shown "where a party to a contract receives bills or invoices and does not protest within a reasonable time." *Russo v. Heller*, 80 A.D.3d 531, 532 (1st Dep't 2011). "An account stated assumes the existence of some indebtedness between the parties, or an express agreement to treat a statement of debt as an account stated." *Simplex Grinnell v. Ultimate Realty, LLC*, 38 A.D.3d 600, 600 (2nd Dep't 2007). Thus, a defendant may make a *prima facie* case for summary judgment on a plaintiff's

claim for account stated by showing a dispute of fact as to whether any such debt exists. *Id.* And, in any event, "a cause of action alleging an account stated cannot be utilized simply as another means to attempt to collect under a disputed contract." *Id.*

Like Counts Four and Six, Count Five seeks payment for the reasonable value of goods and services provided to Defendant in the course of its work on the Project, without regard to the amounts promised to Plaintiff in the Contract or General Conditions. Complaint ¶¶ 30-33 (alleging account stated for cost of "labor, equipment, and materials"); cf. Complaint ¶¶ 23-29 (alleging *quantum meruit* for cost of "work and materials"). Thus, while not labelled as such, Count Five appears to assert a claim for quasi-contractual relief identical to those asserted through Counts Four and Six.

As discussed in Section III.C, however, Plaintiff's claims for relief premised on its work on the Project are limited to the remedies explicitly provided under the Contract and General Conditions. *See Clark-Fitzpatrick, Inc. v. Long Island R. Co.*, 70 N.Y.2d 382, 388 (1987) (precluding quasi-contractual claims where contract governed relevant aspects of parties' relationship). Accordingly, Count Five is dismissed. *See id.*

IV. Conclusion

For the foregoing reasons, Defendants' motion for summary judgment is granted in part and denied in part.

Accordingly, it is

ORDERED that Count Two is dismissed to the extent that it is premised on Change Order Proposals numbered 24, 46R, 53, 54, 61, 73, 81, 85, 91, 94, 95, 97, 99, 125, 133, 147, 148, 149, 152, 153, 155, 157, 159, 161, 162, 163, 167, 174, 181, 182, 193, 197, 199, 200, 201, 202, 203, 206, 208, 210, 211, 212, 213, 214 215, 216, 217, 218, 219, 223 and 224; and it is further

ORDERED that Defendant's Motion for Summary Judgment with respect to claims premised on Change Order Proposals numbered 63, 195, 207, and 209 is denied; and it is further

ORDERED that Counts Three through Six are dismissed in their entirety.

Dated: May 8, 2017
New York, New York

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Hon. Eileen Bransten, J.S.C.