Hayner Hoyt Corp. v Nayana, Inc.
2017 NY Slip Op 32677(U)
December 22, 2017
Supreme Court, Tompkins County
Docket Number: 2012-0289
Judge: Eugene D. Faughnan
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At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Tompkins County Courthouse, Ithaca, New York, on the 27th day of October, 2017.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : TOMPKINS COUNTY

THE HAYNER HOYT CORPORATION,

Plaintiff,

-vs-

NAYANA, INC.

Defendants.

DECISION AND ORDER

Index No. 2012-0289
RJI No. 2017-0305-M

APPEARANCES:

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EUGENE D. FAUGHNAN, J.S.C.

This matter arises upon a motion dated June 30, 2017 submitted by Nayana, Inc. ("Defendant") seeking Summary Judgment pursuant to CPLR §3212 dismissing The Hayner Hoyt Corporation's ("Plaintiff's") complaint. Defendant argues that Plaintiff failed to satisfy a condition precedent to suit and as such, the complaint must be dismissed. Defendant argues that the condition precedent was not applicable and that there are significant questions of fact which preclude a summary finding.

Defendant contracted with Plaintiff to serve as a general contractor to construct a hotel in Clay, New York. Plaintiff alleges that the initial contract price was $5,574,721 but that it was changed to 5.5 million dollars because of the limit of Defendant's available financing. The Plaintiff alleges that the parties had an oral agreement for the payment of the $74,721 difference. On or about October 11, 2006, the parties entered into a written contract for the construction of the hotel for 5.5 million dollars. The construction contract included several documents including an AIA A101-1997 Standard Form Agreement ("Standard Agreement"), an AIA A201-1997 General Conditions contract ("General Conditions"), and an addendum to AIA A101-1997 ("Addendum") which modified some of the terms of the Standard Form Agreement. In addition, the parties entered into a number of "change orders" which altered the total cost of construction. The parties agree that the project was substantially completed on or about May 1, 2008.

The Plaintiff submitted sixteen requests for payment during the course of construction. All but four were paid. Plaintiff alleges that one was partially satisfied and three of the requests for payment were not satisfied at all. Specifically, Plaintiff submitted a request for payment dated October 19, 2007 for $524,259 but was paid $436,557.79 leaving a balance due of $87,701.21. The three other submissions of November 26, 2007 ($56,342), December 20, 2007 ($36,316) and May 2, 2008 ($3,760) were never paid. In short, Plaintiff alleges entitlement to $258,840.21 plus interest. Plaintiff refers to these applications as applications #13-16 respectively.

Plaintiff commenced this action by the filing of a Verified Summons and Complaint dated March 30, 2012. Plaintiff's causes of action sound in breach of contract, *quantum meruit*, account stated and unjust enrichment. The Plaintiff granted Defendant an indefinite extension to serve an answer. Following several years of discussions between the parties, Plaintiff demanded an answer and the issue was joined on or about June 28, 2017 with the service of an answer by Defendant.

Defendant seeks a summary finding dismissing the complaint alleging that the Plaintiff failed to satisfy a condition precedent to suit by failing to submit its claim for non payment to the project architect as required by the contracts. Defendant further argues that since the claims arise pursuant to written contracts, recovery under the theories of *quantum meruit*, account stated and unjust enrichment are barred. Plaintiff responds that the claim provisions do not apply to change orders, and that its claims for payment arose after the project was completed and the architect was divested from authority. Plaintiff further argues that Defendant has failed to meet its burden on summary judgment as it has failed to submit proof of when the final payment was due. In addition, Plaintiff asserts that discovery is required and there are material questions of fact that preclude a summary finding.

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law" *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" *Id.* at 851. The Court's "function on a summary judgment motion is to view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference, and determine whether there is any triable issue of fact outstanding" *Boyce v. Vazquez*, 249 AD2d 724, 726 (3rd Dept. 1998); see *Barlow v. Spaziani*, 63 AD3d 1225, 1226 (3rd Dept. 2009); *Boston v. Dunham*, 274 AD2d 708, 709 (3rd Dept. 2000).

Breach of Contract Claim

Defendant alleges that Plaintiff failed to satisfy a condition precedent to suit by failing to make a claim to the architect pursuant to General Conditions §4.3. The Court must first consider whether a condition precedent exists.

"Whether a condition precedent exists under the terms of a contract is a matter of law for the court to decide" *Mullany v. Munchkin Enters., Ltd.*, 69 A.D.3d 1271, 1274 (3rd Dept. 2010); *see Rooney v. Slomowitz*, 11 AD3d 864, 865 (3rd Dept. 2004). " [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. North Riv. Ins. Co.*, 79 NY2d 576, 581 (1992).

§4.3.1 of the General Conditions defines a "claim" as, among other things, "a demand or assertion by one of the parties seeking, as a matter of right...payment of money...with respect to the terms of the Contract". "Claims by either party must be initiated within 21 days after the occurrence if the event giving rise to such claim or within 21 days after the claimant first recognizes the condition giving rise to the claim, whichever is later. Claims must be initiated by written notice to the Architect and the other party" (Gen. Cond. §4.3.2). "Claims...shall be referred initially to the Architect for decision. An initial decision by the Architect shall be required as a condition precedent to mediation, arbitration or litigation of all Claims between the Contractor and Owner arising prior to the date final payment is due..." (Gen. Cond. §4.4.1). Claims are distinct from applications for payment which are governed by Article 5 of the Standard Agreement as modified by the Addendum. As with claims, applications for payment must be submitted to the architect. (Gen. Cond. and Addendum Article 5).

In the present matter, the language of General Conditions §4.4.1 is clear and unambiguous that prior to commencing any litigation, claims must be referred to the architect for an initial decision. The unpaid applications of November 26, 2007, December 20, 2007 and May 2, 2008 and the

unpaid balance of the October 19, 2007 application represent claims that could have been submitted pursuant to General Conditions §4.3 as they represent demands, as of right, for the payment of money. However it is undisputed that Plaintiff did not submit claims for the lack of payment for the aforementioned applications. As submission of the claims was a condition precedent to litigation and the Plaintiff admittedly made no claims, the Court finds that the Defendant has made a *prima facie* showing for summary judgment with regard to the breach of contract cause of action.

In response to Defendant's motion, Plaintiff argues that the applications for payment were made with regard to change orders which are governed by General Conditions §7.2.1 and are not subject to the claims process of General Conditions §4.3 *et seq*. Plaintiff asserts that the general provisions regarding claims is superceded by the specific provisions regarding change orders contained in General Conditions §7.2.1. General Conditions §7.2.1 provides:

> A Change Order is a written instrument prepared by the Architect and signed by the Owner, Contractor and Architect, stating their agreement upon all of the following:
> 1. change in the Work;
> 2. the amount of the adjustment, if any, in the Contract Sum; and
> 3.the extent of the adjustment, if any, in the Contract Time.

Plaintiff asserts that since there is agreement on the scope of work and price, there is no need for any dispute resolution provision. However, that could easily be said of the contract as a whole. In signing the contract, the parties agreed on the scope of work and price. Yet disputes do arise and General Conditions provides a procedural step to attempt to resolve disputes short of litigation. Notably, General Conditions §7.2 *et seq* provides no dispute resolution procedure independent of §4.3. Plaintiff further argues that "change orders" are not specifically referenced in General Conditions §4.3.1. However, §4.3.1 specifically references "seeking, as a matter of

right, adjustment or interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract". The Court finds §4.3.1 sufficiently broad to encompass an claim for payment with regard to change orders.

The Plaintiff next asserts that pursuant to *County of Rockland, infra, and Liebhafsky, infra* an architect's authority to render decisions under an AIA contract only exists during the course of construction. However, the Court finds that this assertion overstates the holding in those cases. In *Rockland*, the Court held that the agreement between the parties specifically limited the role of the architect as the "Owner's representative during construction" and as such, his authority ceased upon substantial completion of the project. *County of Rockland v Primiano Constr. Co.*, 51 NY2d 1, 21 (1980). Similarly, in *Liebhafsky*, the Court found that the terms of the contract did not vest the architect with authority to arbitrate disputes with discharged contractors. *Liebhafsky v. Comstruct Associates, Inc.*, 62 NY2d 439, 441 (1984). In other words, the role of the architect is defined by the contract between the parties. *See Ostberg v. Dragan Litric*, 80 AD3d 518, 519 (1st Dept. 2011).

With regard to the contract between these parties, General Conditions §4.2.1 provides in relevant part that: "[t]he Architect will provide administration of the Contract...(1) during construction, (2) until final payment is due and (3) with the owners concurrence, from time to time during the one-year period for correction of Work described in Paragraph 12.2". Therefore, the architect's authority is limited to during construction and until the final payment is due. However, as relevant to this matter, it does not extend for a one year period, as that specifically relates to correction work as described in Paragraph 12.2.

In light of the foregoing, the Court now turns to the question of when Plaintiff's claims for payment accrued. Plaintiff submits that applications #13-16 were submitted on or about October 19, 2007, November 26, 2007, December 20, 2007 and May 2, 2008 respectively. The parties agree that the project was substantially completed on May 1, 2008. Pursuant to Addendum

§5.1.3, if the "Application for Payment is received by the Architect not later than the twenty-fifth day of the month, the Owner shall make payment to the Contractor not later than the tenth day of the following month. If the Application for Payment is received by the architect after the application date fixed above, payment shall be made by the Owner not later than fifteen days after the Architect receives the Application for Payment". Therefore, applications #13-16 were due to be paid on November 10, 2007, December 11, 2007, January 10, 2008 and May 17, 2008. When those payments were not fully paid, the Plaintiff's claim accrued, triggering the right to submit a claim pursuant to General Conditions §4.3. Since the Architect's authority to address claims ended when the final payment was due, his authority ended May 17, 2008.

Therefore, the Court concludes that the Plaintiff failed to submit claims to the architect with regard to applications for payment #13-15 pursuant to General Conditions §4.3 even though those claims accrued well before the date final payment was due. The submissions of those claims was a condition precedent to litigation pursuant to General Conditions §4.4.1. Therefore, the first cause of action, as it pertains to applications for payment #13-15 is dismissed. However, the Court concludes that Plaintiff was not required to submit a claim to the architect with regard to application for payment #16, since the architect's authority expired on the date its claim accrued. Hence, the Defendant's motion to dismiss the first cause of action, as it pertains to application for payment #16 is denied.

Quantum Meruit, Unjust Enrichment

In Plaintiff's second and fourth causes of action, it seeks damages on the theory of *quantum meruit*, unjust enrichment. These causes are pled with regard to the entire amount of the project alleged to be due. Plaintiff seeks damages of $258,840.21 under each theory of recovery. Of significance is the fact that of the amount claimed, $184,119.21 represents unpaid requests for payment under the contracts and $74,721 represents non payment pursuant to the oral agreement reached between the parties. Defendant argues that Plaintiff may not utilize theories of *quantum*

meruit, unjust enrichment where a valid and enforceable contract exists.

"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" *IMS Engrs.-Architects, P.C. v. State of New York*, 51 AD3d 1355, 1358 (3rd Dept. 2008), *lv denied* 11 NY3d 706 (2008), *quoting Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 NY2d 382, 388 (1987). "A party cannot recover under a theory of *quantum meruit* where a valid and enforceable written contract governs the subject matter involved in the dispute" *Aquatic Pool & Spa Servs., Inc. v. WN Weaver St., LLC*, 129 AD3d 872, 874 (2nd Dept. 2015); *see Parker Realty Group, Inc. v. Petigny*, 14 NY3d 864, 865-866 (2010); *Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 NY2d 382, 388 (1987); *Metropolitan Switch Bd. Mfg. Co., Inc. v. B & G Elec. Contrs., Div. of B & G Indus., Inc.*, 96 AD3d 725, 726 (2nd Dept. 2012). Likewise, "a party cannot recover damages for unjust enrichment based on conduct or events governed by a written agreement" *Tompkins Fin. Corp. v. John M. Floyd & Assocs., Inc*, 144 AD3d 1252, 1256 (3rd Dept. 2016).

In the present matter, the parties do not dispute the presence of a valid and enforceable contract. Additionally, it is undisputed that Plaintiff's application for payments #13-16 arose out of that contract. Therefore, the Court concludes *quantum meruit* and unjust enrichment are inapplicable with regard to those claims, and the Plaintiff's second and fourth causes of action are dismissed with regard to applications for payment #13-16.

The Court reaches a different conclusion with regard to the parties' oral agreement for the payment of the $74,721. The Court acknowledges that this "side agreement" was for the same project governed by the contract. However, the $74,721 was not part of the contract price contained in the agreements nor was it a change order. The parties entered into the oral contract separate and apart from the written agreement allegedly to assist the Plaintiff in getting his financing. The Defendant does not deny the existence of the oral agreement. The Court concludes that the parties oral agreement is not governed by the valid and enforceable

contract and as such, the theories of *quantum meruit* and unjust enrichment are properly advanced by the Plaintiff. The Defendant failed to address the applicability of the Plaintiff's second and third causes of action to the parties' oral agreement and therefore has failed to sustain its burden. Therefore, the application for summary judgment with regard to Plaintiff's second and third cause of action, with regard to the parties oral agreement is denied.

Account Stated

The plaintiff's fourth cause of action alleges entitlement to judgement for an account stated. "An account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due *Whiteman, Osterman & Hanna, LLP v. Oppitz*, 105 AD3d 1162, 1163 (3rd Dept. 2013) [internal quotation marks and citations omitted]. However, "a claim for an account stated may not be utilized simply as another means to attempt to collect under a disputed contract" *Martin H. Bauman Assoc. v. H & M Intl. Transp.*, 171 AD2d 479, 485 (1st Dept. 1991).

In the present matter, the parties have a valid an enforceable contract. The parties' rights and responsibilities are defined by that contract. The Court has determined that Plaintiff failed to satisfy a condition precedent to suit with regard to applications for payment #13-15. Allowing the Plaintiff to pursue a claim upon an account stated with regard to applications for payment #13-15 would effectively allow them to avoid the agreed upon procedure in the parties' agreement.

With regard to application for payment #16, the terms of the parties' agreement define the responsibilities of the parties and the Court has already determined that it is not barred by the terms of the agreement. In light of the agreement, this claim properly sounds in breach of contract for the first cause of action. However, the Defendant has failed to sustain its burden, as the proponent of summary judgment, with regard to the oral agreement for Defendant to pay the Plaintiff $74,721. Defendant has offered no proof disputing the oral agreement or whether an account stated was tendered or rejected.

Therefore, with regard to the Plaintiff's third cause of action, the Court grants Defendant's motion for summary judgment with regard to applications for payment #13-16 but denies it with regard to the alleged oral agreement to pay $74, 721.

This constitutes the **DECISION AND ORDER** of the Court. The transmittal of copies of this Decision and Order by the Court shall not constitute notice of entry (see CPLR 5513).

Dated: December 22, 2017
Ithaca, New York

HON. EUGENE D. FAUGHNAN
Supreme Court Justice