Entech Eng'g, PC. v Leon D. Dematteis Constr. Corp.

2018 NY Slip Op 31732(U)

March 23, 2018

Supreme Court, New York County

Docket Number: 651219/14

Judge: David B. Cohen

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58
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ENTECH ENGINEERING, PC.,

Plaintiff,

-against-

Index No. 651219/14

LEON D. DEMATTEIS CONSTRUCTION CORPORATION, TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA and NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY,

Defendants.

---X
DAVID COHEN, J.

Motion sequence Nos. 003 and 004 are consolidated for disposition. In motion sequence No. 003, defendants Leon D. DeMatteis Construction Corporation (DeMatteis) and Travelers Casualty and Surety Company of America (Travelers) move, pursuant to CPLR 3212 (a), for summary judgment dismissing the first through the fourth, and the sixth and eighth causes of action in the complaint. In motion sequence No. 004, plaintiff Entech Engineering, P.C. (Entech), which has now withdrawn its fourth, fifth, sixth, seventh, and eighth causes of action, moves for summary judgment against DeMatteis on its second cause of action (breach of contract), or in the alternative, on its first cause of action (quantum meruit) and its third cause of action (account stated).

Inasmuch as Entech and DeMatteis had an express contract governing the matter at issue here, the claim for quantum meruit fails. *Douglas Ellman, LLC v East Coast Realtors, Inc.*, 149 AD3d 544, 544 (1st Dept 2017), citing *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382,

388 (1987). Inasmuch as Entech pleads its account stated claim in the alternative to its contract claim, the claims are duplicative, and the account stated claim is dismissed. *See Palmeri v Wilkie Farr & Gallagher, LLP,* 152 AD3d 457, 459 (1st Dept 2017).

This action arises from a construction project in which DeMatteis contracted with the New York City School Construction Authority (SCA) to build four schools. DeMatteis, the general contractor, contracted with Entech for the latter to provide a site safety manager (SSM) for the project. The contract between DeMatteis and Entech (Contract) provides that DeMatteis would pay $77.00 per hour, and time and a half for hours worked in excess of eight per day, and for work performed on Saturdays and Sundays. DeMatteis payed that rate regularly at some times, and sporadically, at others. By September 10, 2010, Entech completed its services, and a balance of $206,160.22 remained due to it. In April 2011, the SCA demanded Entech's payrolls and related documents in order to calculate the final amount to be paid to DeMatteis. At that time, the SCA and DeMatteis discovered that Entech had subcontracted with nonparty Hirani Engineering & Land Surveying, P.C. (Hirani) to provide the SSM for a fee of $50 an hour.

The SCA contract provides that SCA would pay DeMatteis for labor "directly employed at the site." Accordingly, SCA paid DeMatteis $50 per hour on Entech's invoices. The sum that Entech seeks to recover, here, is the difference between the amount that SCA paid DeMatteis for Entech's (and Hirani's) work and the amount set forth in the Contract. Entech's position is that it provided managerial, supervisory, and other services which entitle it to the price provided for in the Contract, and that the SCA's refusal to pay DeMatteis that sum is a matter between the SCA and DeMatteis.

The Contract requires Entech to "[p]rovide full time Site Safety Manager with relative

experience." Bayat affidavit, exhibit 4. It does not bar Entech from contracting with another company to provide the SSM

DeMatteis argues, however, that Entech cannot prevail, for the following two reasons: (1) the Contract states, below the signature line, "'Reimbursable' by SCA Change Order'" (Lipkis affidavit, exhibit 4 at 1). This phrase refers to certain payments to be made by SCA, after completion of the work. (2) Rider C to the Contract provides, in relevant part:

> "The [SUB-SUBCONTRACTOR] [SUPPLIER] [VENDOR] having received, read and examined the PRINCIPAL CONTRACT DOCUMENTS as described below agrees to assume all the obligations of the CONTRACTOR under the PRINCIPAL CONTRACT and of the SUBCONTRACTOR relevant to the WORK to be performed, and the materials or equipment to be furnished hereunder, and shall be bound by, and comply, with all the terms, provisions, and conditions of the PRINCIPAL CONTRACT DOCUMENTS imposed upon the CONTRACTOR in relation to the subject matter of this Contract or purchase order."

Id. at 2. The provision in the SCA contract, upon which DeMatteis relies, provides:

> "The Contractor shall contract only with SCA approved Subcontractors in accordance with the requirements specified in the Information for Bidders. The Contractor shall not permit any Subcontractor to commence Work without the prior written approval of such subcontractor by the SCA. The Contractor shall submit to the SCA a written request for Subcontractor approval for all proposed Subcontractors in the form provided by the SCA."

Lipkis, affirmation in opposition, exhibit G at 19.

DeMatteis's argument fails, because Entech was not a sub-subcontractor, supplier, or vendor, and because, in any event, "'[u]nder New York law, 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.'" *Waitkus v Metropolitan Hous.*

Partners, 50 AD3d 260, 261 (1st Dept 2008), (affirming the dismissal of an indemnification claim, based on a main contract to which third party defendant was not a signatory), quoting *Bussanich v 310 E. 55th St. Tenants,* 282 AD2d 243, 244 (1st Dept 2001); *see also* (*Beys Gen. Constr. Corp. v Hill Intl., Inc.* 92 AD3d 407, 407 (1st Dept 2012) (subcontractor not bound by documentation requirements in main contract, incorporated by reference); *Matter of Wonder Works Constr. Corp. v R.C. Dolner, Inc.,* 73 AD3d 511 (1st Dept 2010) (subcontractor not bound by arbitration clause in prime contract, incorporated by reference). The "Reimbursable" phrase, which appears on the Contract, pertains solely to conditions governing payments by SCA to DeMatteis. The quoted provision of the SCA contract is also silent as to the manner in which DeMatteis is to perform its work. Even if the requirement to obtain approvals of personnel could be considered a feature of the work, the paragraph would be inapplicable to Entech, because the "Information for Bidders, compliance with which is required when contracting with subcontractors," is not included in either the Contract, or the contract between the SCA and DeMatteis. Accordingly, neither of these provisions is incorporated into the Contract.

The tenth affirmative defense in DeMatteis's second amended answer alleges fraud, in that Entech falsely represented to DeMatteis that the SSM whom Entech would provide would be an Entech employee. However, while reciting that this misrepresentation was to DeMatteis's "detriment," DeMatteis alleges no damages resulting from that detriment, a necessary element of a claim for fraud. *Lama Holding Co. v Smith Barney,* 88 NY2d 413, 421 (1996). Accordingly, the tenth affirmative defense does not prevent Entech from obtaining summary judgment.

Finally, the only claim that Entech raised against Travelers pertains to the lien discharge bond that Travelers issued, "bonding off" Entech's mechanic's lien. Inasmuch as Entech has

withdrawn its eighth cause of action, which sought to foreclose on that lien, the claim against Travelers is dismissed. Entech does not oppose such dismissal.

Accordingly, it is hereby

ORDERED that, in motion sequence No. 003, the motion for summary judgment of defendants Leon DeMatteis Construction Corporation and Travelers Casualty and Surety Company of America is granted to the extent that the first and third causes of action are dismissed, and the complaint is dismissed as against Travelers Casualty and Surety Company of America with costs and disbursements to said defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs, and the motion is otherwise denied; and it is further

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

ORDERED that, in motion sequence No. 004, the motion for summary judgment of plaintiff Entech Engineering, P.C. is granted, and the Clerk of the Court is directed to enter judgement in favor of plaintiff and against defendant Leon D. DeMatteis Construction Corporation in the amount of $206,160.22, together with interest at the statutory rate from the date of September 10, 2010 until the date of entry of judgment, as calculated by the Clerk, and thereafter, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

Dated: 3-23-2018

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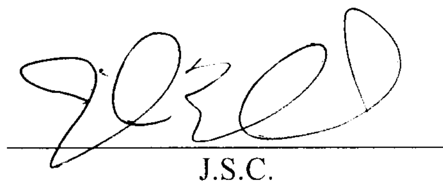

J.S.C.

HON. DAVID B. COHEN
J.S.C.