| **Medco Elec. Inc. v Dormitory Auth. of the State of N.Y.** |
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| 2018 NY Slip Op 31790(U) |
| April 4, 2018 |
| Supreme Court, New York County |
| Docket Number: 650742/2016 |
| Judge: Debra A. James |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. DEBRA A. JAMES** **PART** **59**

***Justice***

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MEDCO ELECTRIC INC.

Plaintiff,

- v -

DORMITORY AUTHORITY OF THE STATE OF NEW YORK,

Defendant.

**INDEX NO.** 650742/2016

**MOTION DATE** 05/19/2017

**MOTION SEQ. NO.** 002

**DECISION AND ORDER**

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The following e-filed documents, listed by NYSCEF document number 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 28, 29, 31, 32, 34

were read on this application to/for DISMISSAL.

ORDER

Upon the foregoing documents, it is

ORDERED that the motion is granted to the extent that the second, third, fourth, fifth and sixth causes of action are dismissed, and the claim for punitive damages is stricken, and is otherwise denied; and it is further

ORDERED that defendant is directed to serve an answer to the amended complaint within 10 days after service of a copy of this order with notice of entry pursuant to CPLR 3211(f).

DECISION

Defendant moves for an order pursuant to CPLR 3211 (a) (5) and (7) dismissing the verified first amended complaint, contending that: a) the action is barred in its entirety by the

statute of limitations; b) the tort causes of action (the fourth, fifth and sixth causes of action) are barred because plaintiff failed to serve a notice of claim, as required by statute; c) the amended complaint fails to state a cause of action; and d) the allegations of the amended complaint are insufficient to support a claim for punitive damages.

BACKGROUND

Plaintiff commenced this action claiming that defendant intentionally avoided issuing a determination that a construction project was substantially complete to hinder plaintiff's contractual right to payment for construction work.

The amended complaint alleges as follows:

On September 22, 2003, plaintiff Medco Electric, Inc. ("Medco") submitted a bid to defendant Dormitory Authority of the State of New York ("DASNY") to perform certain electrical work at St. Monica's Day Care Center at York College in Queens (the "project"). Medco was the successful bidder, and the parties entered into a written agreement whereby Medco would be paid the sum of $443,000 to perform the work specified in the contract (the "Contract Work").

Section 1.01 of the contract defines "Work" as "[t]he performance of all obligations imposed upon the Contractor by the Contract". "Substantial Completion" is defined as the "[s]tage of construction at which the Owner determines there is

a minimal amount of the Work to be completed, or Work to be corrected". "Extra Work" is defined as "[a]ny work in addition to the Work initially required to be performed by the Contractor pursuant to the Contract".

Section 3.01 of the contract provides that

> "[i]n the event any question arises between the Owner [DASNY] and Contractor [Medco] concerning the Contract, the decision of the Owner shall be a condition precedent to the right of the Contractor to receive any money or payment under the Contract".

Section 17.01D provides that,

"[a]fter the Owner has determined Substantial Completion of the Work, the Contractor shall submit to the Owner, for the Owner's approval, a detailed estimate of the value of the known remaining items of Work as set forth by the Owner and a schedule for completion of said items of Work". ***

"The Owner shall review that estimate and make the final determination". ***

"The Owner, when all the Work is Substantially Complete, shall pay to the Contractor the balance due the Contractor, less: 1) two (2) times the value of any remaining items of Work to be completed or corrected; and 2) an amount necessary to satisfy any and all claims, liens or judgments against the Contractor". ***

"As the remaining items of Work are completed and accepted by the Owner, the Owner shall pay the appropriate amount pursuant to the duly completed and submitted monthly requisitions". ***

> "The list of remaining Work items may be expanded to include additional items of corrective or completion Work until final acceptance as certified by the Owner's execution of 'Notification of Construction Completion'".

After the contract was executed, DASNY issued a series of directives (the "directives") for Medco to perform $120,412.54 worth of Extra Work. The original general contractor and project team included the DASNY project manager, and the

construction manager of the Velez Organization. This team issued the directives for the Extra Work. Medco contends that it complied with the provisions of the contract; properly submitted change orders for the additional work; and completed the physical work constituting the Extra Work.

Medco completed the physical work for which DASNY agreed to pay $443,000 by 2007.

DASNY cannot close a project - and thereby declare it to be Substantially Complete - until all change orders for a project are negotiated and registered. The Owner and the Contractor must negotiate the value of the change orders. The change orders are then transmitted to DASNY's Albany office for registration. Registration is an administrative act of finalizing and stamping the approved change orders and including them in DASNY's system for payment. After registration, DASNY mails a notice to the contractor advising the contractor that it has determined that the project is "Substantially Complete".

In early 2007, a new DASNY team was assigned to the project. Medco contends that DASNY never performed a final walk-through on the project, nor did DASNY ever sign off on the project.

The parties engaged in extensive negotiations relating to the change orders that were the subject of the Extra Work from 2007 to 2008. When the second general contractor was hired for

the project, the change orders were outstanding. The new project manager told Medco that Medco's documentation was insufficient, and that DASNY required certain documentation before it could approve the change orders. Specifically, the new project manager requested that Medco provide written confirmation to DASNY that DASNY had, in fact, directed Medco to perform the work set forth in the change orders.

Medco contends that it did not possess written directives for each change order because Medco was directed verbally and/or through DASNY's original construction manager, the Velez Organization, to perform certain change orders. Accordingly, Medco asked DASNY to attend a site visit so Medco could show the scope of the Extra Work, but DASNY refused. Further, DASNY told Medco that it could not process the change orders without the directives, as records and documentation relating to the change orders did not exist on DASNY's computer system.

Medco contends that it received letters from DASNY in September 2011, June 21, 2012, and January 17, 2013, stating that the job was still open and DASNY was trying to close it out. When it received the letters, Medco responded immediately, asking DASNY not to close out the project and requesting a site visit to demonstrate the Medco had done the work described in the change orders. DASNY never accepted Medco's repeated requests for such a visit.

After a flurry of email correspondence in April 2013, the Vice President of Medco, attended a meeting with a DASNY project manager, at DASNY's office on April 16, 2013. Medco contends that, at the meeting, it received several internal documents from DASNY showing that, contrary to DASNY's repeated representations that it could not process and evaluate the change orders without the directives, the change orders in question had, in fact, been processed and evaluated and existed in DASNY's system from 2004 through 2007. Further, that DASNY project manager promised that the issues regarding the change orders would be resolved and Medco would be paid.

On August 21, 2013, the Medco Vice President discussed the project with another DASNY representative, who told the Medco Vice President that he would refer the matter to a close out team to resolve the change order issues, close out the project and pay Medco.

The Lawsuit

Plaintiff commenced this action by filing a summons and complaint on February 12, 2016. The amended complaint alleges six causes of action: 1) breach of contract; 2) quantum meruit; 3) unjust enrichment; 4) fraud; 5) fraudulent concealment; and 6) constructive fraud. Medco seeks an award of compensatory and consequential damages, interest, and punitive damages.

## DISCUSSION

### Statute of Limitations

As discussed below, the causes of action for quantum meruit, unjust enrichment, fraud, fraudulent concealment, and constructive fraud must be dismissed pursuant to CPLR 3211 (a) (7) for failure to state a cause of action. Therefore, the analysis of the statute of limitations focuses exclusively on the sole remaining cause of action for breach of contract.

The six-year statute of limitations governing actions for breach of contract commenced by a contractor against an owner begins to run upon substantial completion of the work (Superb Gen. Contr. v City of New York, 39 AD3d 204 [1st Dept. 2007]). Where there are questions of fact as to when substantial completion occurred, it is reversible error for the court to dismiss the cause of action as time-barred (Trustees of Columbia Univ. in City of N.Y. v Gwathmey Siegel & Assoc. Architects, 167 AD2d 6 [1st Dept. 1991]).

To dismiss a cause of action pursuant to CPLR 3211 (a) (5), as barred by the statute of limitations, a defendant bears the initial burden of demonstrating, prima facie, that the time within which to commence the action has expired (Bailey v Peerstate Equity Fund, L.P., 126 AD3d 738, 740 [2nd Dept. 2015]). Only then does the burden shift to the plaintiff to raise a question of fact as to whether the statute of

limitations was tolled or was otherwise inapplicable, or whether it commenced the action or interposed the subject cause of action within the applicable limitations period (id.).

DASNY asserts that Medco's cause of action for breach of contract accrued in 2007 because Medco states in the amended complaint the physical work on the project was completed by that year. Accordingly, DASNY maintains that the entire action is time-barred because it was not commenced until 2016, approximately nine years after the date that work was completed. This argument is unconvincing, for it would require the Court to disregard the clear and unambiguous language in the parties' written agreement.

A fundamental tenet of contract law is that agreements are construed in accordance with the intent of the parties, and the best evidence of the parties' intent is what they express in their written contract (Schron v Troutman Sanders LLP, 20 NY3d 430 [2013]). In searching for the probable intent of the parties, the "fair and reasonable" meaning of the words controls (Sutton v East River Sav. Bank, 55 NY2d 550 [1982]). A complete, clear and unambiguous agreement must be enforced according to the plain meaning of its terms, without reference to extrinsic materials outside the four corners of the document (Goldman v White Plains Ctr. for Nursing Care, LLC, 11 NY3d 173 [2008]).

The parties' written agreement defines "Substantial Completion" as the "[s]tage of the construction at which the Owner [DASNY] determines there is a minimal amount of the Work to be completed, or Work to be corrected" (Section 1.01).

On its face, the provision required DASNY to make a unilateral determination as to whether Substantial Completion as defined by the contract had occurred. The agreement does not expressly state or imply that Medco and DASNY would jointly determine whether the Work was Substantially Complete, nor does it place the onus on Medco to make the determination. Rather, the provision states plainly that the determination must be made by DASNY.

DASNY argues that it is irrelevant whether DASNY ever made such a determination. As the verified complaint alleges that Medco completed all physical work by 2007, DASNY asserts that it was unnecessary for DASNY to make any determination.

DASNY's argument flies in the face of the clear and unambiguous language of the contract and would render the contractual provision meaningless. It is axiomatic that a contract should not be interpreted in a manner that would render any clause meaningless (RM 14 FK Corp. v Bank One Trust Co., N.A., 37 AD3d 272, 273 [1st Dept. 2007]).

In Matter of Bombardier Transp. (Holdings) USA, Inc. v. Telephonics Corp. (14 AD3d 358 [1st Dept. 2005]), the First

Department held that respondent's claim for unpaid work was not time-barred. The Court found that the claim accrued not when the work was complete, but when petitioner notified respondent that it would not issue a certificate of completion, which was a condition precedent to payment. Based on the unrebutted affidavit of respondent's vice-president, the claims accrued only when petitioner refused demand for payment.

The present matter is analogous to Bombardier. Here, the Substantial Completion provision is akin to a condition precedent, for a determination of Substantial Completion by DASNY was a necessary step before Medco could receive payment for the work. In addition, Section 3.01 of the contract states, "In the event that any question arises between the Owner and the Contractor concerning the Contract, the decision of the Owner shall be a condition precedent to the right of the Contractor to receive any money or payment under the Contract"

In D&L Assoc., Inc. v New York City School Constr. Auth. (69 AD3d 435 [1st Dept. 2010]), a general contractor commenced an action against the city's school construction authority, alleging a cause of action for breach of contract. The First Department held that certificates of substantial completion issued by the defendant fixed the date on which damages were ascertainable, and therefore when plaintiff's claim accrued (D&L Assoc., Inc., 69 AD3d at 435).

The facts of Koren-DiResta Constr. Co. v New York City School Constr. Auth. (293 AD2d 189 [1st Dept. 2002]), are on point with the facts of the present case. In Koren-DiResta Constr. Co., a contractor commenced an action seeking payment for extra work performed relating to a public-school construction project. The issue before the Court was when the work was substantially completed.

The construction contract in Koren-DiResta Constr. Co. expressly defined "substantial completion" as "the date certified by the Authority when construction is sufficiently complete, in accordance with the contract documents ..." (id. at 195-196). The defendant never certified the work as complete; the record contained no notice of "substantial completion" of the work as specified in the agreement; and the defendant did not assert that any such notice was ever given.

The Court held that defendant failed to abide by the contractual requirement to declare the project substantially complete. As a direct result of that omission, the Court found that the work was not substantially complete at the time plaintiff filed its notice of claim, which was therefore timely under the terms of the agreement between the parties (id., at 196).

DASNY relies primarily on two cases in support of its contention that the completion of the physical work is necessarily the date of substantial completion.

The first case cited by DASNY is State of New York v Lundin (60 NY2d 987 [1983]). The case is distinguishable in two fundamental respects. First, Lundin was a lawsuit by a construction project owner against a general contractor and architect for defective construction and design. By contrast, the present action is for non-payment, not defective construction. Second, the phrase "substantial completion" is a term of art, and Lundin does not involve the interpretation of that specific term.

Defendant's reliance on W&W Steel, LLC v Port Auth. of N.Y. & N.J. (142 AD3d 478 [1st Dept. 2016]), is also misplaced. There, the First Department held that admissions in the complaint, and in the papers attached to the complaint, established when the work was substantially completed. However, unlike the present matter, the W&W Steel agreement did not set any additional conditions precedent to commencing an action that would require a determination as to the accrual date.

DASNY has submitted no evidence of when, if ever, it determined that the work was Substantially Complete, so it has failed to meet its initial burden of demonstrating, prima facie, that the time within which to commence the action expired.

Plaintiff provides the affidavit of its Vice President. By such affidavit, the Vice President states that DASNY failed and refused to close the project, or to declare it Substantially Complete. He states further that DASNY disregarded his repeated requests to finalize outstanding change orders and provide Medco with a substantial payment requisition.

DASNY has submitted no affidavit to rebut the statements of plaintiff's Vice President.

On this record, the court finds that DASNY has failed to meet its initial burden of demonstrating, prima facie, that the time within which to commence the action for breach of contract expired as there are issues of fact regarding the date of Substantial Completion as defined by the contract.

Failure to State a Cause of Action

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the court must accept all facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (Lakhi Gen. Contr. Inc. v New York City Sch. Constr. Auth. (147 AD3d 917 [2nd Dept. 2017]).

The first cause of action is breach of contract. The essential elements of a cause of action for breach of contract are: 1) existence of a contract between the parties; 2)

performance by plaintiff; 3) defendant's breach of its contractual obligations; and 4) damages resulting from the breach (B&H Assoc. of NY, LLC v. Fairley, 148 AD3d 1097, 1098 [2nd Dept. 2017]).

The amended complaint alleges that Medco and DASNY entered into a binding written contract for Medco to do electrical work; Medco completed the work; DASNY failed to pay the contract balance; and Medco has sustained damages because of DASNY's breach. Such allegations are sufficient to state a cause of action for breach of contract.

The second cause of action is quantum meruit. The existence of a valid and enforceable written agreement governing the parties dispute precludes recovery in quasi-contract for events arising out of the same subject matter (MG W. 100 LLC v St. Michael's Prot. Episcopal Church, 127 AD3d 624, 626 [1st Dept. 2015). Accordingly, the quantum meruit claim is dismissed.

The third cause of action is unjust enrichment. The existence of a valid and enforceable written contract precludes an unjust enrichment claim (Diecidue v Russo, 142 AD3d 686 [2nd Dept. 2016]). Accordingly, the cause of action for unjust enrichment is dismissed.

The fourth cause of action is for fraud. The amended complaint alleges that, at the time the parties entered into the

contract and DASNY issued the directives to Medco, DASNY knew that cash flow constraints would prevent DASNY from paying Medco. Therefore, DASNY had no intention of paying for the work.

The crux of Medco's fraud claim is that DASNY never intended to honor a promise to pay Medco. A fraud cause of action is duplicative of a breach of contract claim when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract (Manas v VMS Assoc., LLC, 53 AD3d 451 [1st Dept. 2008]). Here, the court finds that plaintiff's general allegations that defendant entered into the contract while lacking the intent to perform are insufficient to support a cause of action for fraud.

The fifth cause of action is for fraudulent concealment. A cause of action for fraudulent concealment requires proof of the elements of fraud based on a misrepresentation, as well as an allegation that the defendant had a duty to disclose material information and that it failed to do so (P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V., 301 AD2d 373, 376 [1st Dept. 2003]). A fraudulent concealment claim must be based on a "special relationship or fiduciary obligation" (Gomez-Jimenez v New York Law Sch., 103 AD3d 13, 18 [1st Dept. 2012]).

Paragraphs 198 through 214 of the amended complaint set forth the fraudulent concealment claim. Medco alleges that the

true facts concerning the change orders were stored on DASNY's own, private computer system; Medco had no access to the system; Medco had no way of learning the true information concerning DASNY's possession, processing and registration of the change orders; and it was only by DASNY's representative's distribution of certain internal documents to Medco's Vice President in April 2013 that Medco discovered that DASNY had been fraudulently concealing the true facts regarding the processing of the change orders.

The construction agreement in issue here is an arm's-length business transaction between sophisticated parties. Accordingly, the fraudulent concealment claim is not based on a special relationship or fiduciary obligation and is dismissed.

The sixth cause of action is constructive fraud. The elements of a cause of action to recover for constructive fraud are the same as those to recover for actual fraud, with the crucial exception that the element of scienter on the part of the defendant - that it, knowledge of the falsity of his or her representation - is replaced by a requirement that the plaintiff prove the existence of a fiduciary or confidential relationship warranting his or her repose of confidence in the defendant and consequent relaxation of the care and vigilance he or she would ordinarily exercise under the circumstances (Levin v. Kitsis, 82 AD3d 1051 [2nd Dept. 2011]).

The allegations of constructive fraud are set forth in paragraphs 215 through 221 of the amended complaint. The claim alleges only that: 1) DASNY had exclusive and superior knowledge concerning its cash flow, the status of the change orders, and its ability to satisfy its contractual allegations; 2) Medco had no way to discover such facts; 3) DASNY knew that Medco was relying on DASNY's statements; and 4) if DASNY did not know of the falsity of its representations, its failure to know was the result of its own recklessness.

On its face, the cause of action for constructive fraud fails to allege that a fiduciary or confidential relationship existed between the parties. Accordingly, the constructive fraud claim is dismissed.

Failure to Satisfy Statutory Notice of Claim Requirement

It is unnecessary for the court to reach the issue of whether the causes of action for fraud, fraudulent concealment and constructive fraud must be dismissed for Medco's failure to satisfy a statutory notice of claim requirement, as the court has already determined that those causes of action must be dismissed for failure to state a cause of action. If the court were to reach the issue, however, the court would find that the causes of action should be dismissed because plaintiff was required to file a notice of claim.

DASNY contends that the fourth cause of action (fraud), fifth cause of action (fraudulent concealment), and sixth cause of action (constructive fraud) are tort causes of action that should be dismissed because Medco failed to file a notice of claim.

Section 1691 of the Public Authorities Law states in pertinent part:

> "Except in an action for wrongful death, an action against the authority ... founded on tort shall not be commenced more than one year and ninety days after the cause of action therefor shall have accrued, nor unless a notice of claim shall be served on an officer or employee of the authority ... within the time limited by, and in compliance with the requirements of, section fifty-e of the general municipal law".

General Municipal Law section 50-e requires that a timely notice of claim be served as a condition precedent to a tort action "against a public corporation, as defined in the general construction law" (General Municipal Law section 50-e[1][a]). It is well settled that a fraud claim may be dismissed where, as here, the plaintiff failed to file a timely notice of claim required by Section 50-e of the General Municipal Law (Berman v. Golden, 131 AD2d 416 [2nd Dept. 1987]).

Medco contends that none of its causes of action are subject to, or require, that a notice of claim be served upon DASNY, for the fraud claims in this matter are equitable in nature and, in part, quasi-contractual.

Only two of the causes of action alleged in the amended complaint - the quantum meruit claim and the unjust enrichment claim - are quasi-contractual. As discussed above, both of those causes of actions are dismissed because there is a valid, enforceable written agreement between the parties. Accordingly, the contractual relationship is necessarily the genesis of the fraud claims, so they cannot be equitable in nature or quasi-contractual.

Medco relies on Accredited Demolition Constr. Corp. v. City of Yonkers (37 AD2d 708 [2nd Dept. 1971]), to argue that its fraud claims are equitable in nature and quasi-contractual. However, the case is readily distinguishable, as it involved a quasi-contractual cause of action for common-law indemnification (37 AD2d at 709). No such claim is asserted in the present matter.

Here, the amended complaint fails to allege that a notice of claim was served on DASNY. Accordingly, the court finds that Medco failed to satisfy the statutory notice of claim requirement.

Punitive Damages

Punitive damages are not recoverable for ordinary breach of contract as their purpose is not to remedy private wrongs but to vindicate public rights (International Plaza Assoc., L.P. v. Lacher, 63 AD3d 527, 528 [1st Dept. 2009] (internal quotation

marks and citations omitted)). The sole remaining cause of action is breach of contract. Thus, the amended complaint merely alleges a private wrong and is insufficient to support a claim for punitive damages (Global Mar. Power, Inc. v Kustom Engines & Performance Eng'g, LLC, 108 AD3d 501, 502 [2nd Dept. 2013]).

4/4/2018
DATE

DEBRA A. JAMES, J.S.C.

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