Universal Constr. Resources, Inc. v New York City Hous. Auth.
2018 NY Slip Op 32846(U)
November 5, 2018
Supreme Court, New York County
Docket Number: 652432/2017
Judge: John J. Kelley

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOHN J. KELLEY **PART** IAS MOTION 56EFM
Justice

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UNIVERSAL CONSTRUCTION RESOURCES, INC.

Plaintiff,

- v -

NEW YORK CITY HOUSING AUTHORITY,

Defendant.

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INDEX NO. 652432/2017

MOTION DATE

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56

were read on this motion to/for DISMISSAL

HON. JOHN J. KELLEY

The defendant in this case moves to dismiss the complaint in its entirety, arguing that the plaintiff failed to comply with contractual prerequisites for bringing its claim. The defendant also argues that the plaintiff failed to comply with New York Public Housing Law ("PHL") pre-suit and pleading provisions.

The parties entered into a contract for exterior restoration and roofing replacement at an eight-building public housing development in Staten Island. The plaintiff's complaint alleges six causes of action: (1) failure to pay acceleration costs; (2) delay in performance of the contract; (3) breach of contract; (4) breach of the duty of good faith and fair dealing; (5) unjust enrichment; and (6) account stated. The plaintiff seeks $10,108,532.05 in damages, $2,000,000 in consequential damages, interest, costs, and attorney's fees.

In determining a motion to dismiss, a court must accept as true all facts alleged in the complaint, and it must construe the complaint liberally to afford the plaintiff every possible favorable inference (*see Lawrence v Miller*, 11 NY3d 588, 595 [2008]). A motion to dismiss should be denied if the factual allegations, when taken together, state a cognizable cause of action (*see AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]).

The defendant seeks to dismiss the first three causes of action in the complaint for failing to comply with the contract's notice of claim provision. Under Section 23(a) of the contract, the plaintiff was required to serve a notice of claim "within 20 days after such claim shall have arisen" as a condition precedent to recovery. The contract also provides that a claim "shall have arisen" when the damages become "ascertainable." While the plaintiff filed numerous purported notices of claim, the defendant claims that they were untimely and that they do not sufficiently set forth actual breaches of the contract. However, the point at which the damages were "ascertainable" is clearly factual issue that cannot be resolved on a pre-answer motion to dismiss. The plaintiff has made detailed claims that state various times when it discovered that it was not being adequately compensated for their work in accordance with the contract. By contrast, the defendant has failed to submit an affidavit from anyone with personal knowledge of the progress of the work or when the plaintiff's damages were ascertainable. Accordingly, both the timeliness and sufficiency of the plaintiff's notices of claim are issues that have not been conclusively resolved. Discovery is necessary to determine when the plaintiff's damages were ascertainable and whether proper notice was given pursuant to the contract and the Public Housing Law.

Accordingly, the first three causes of action are permitted to go forward with one exception. As part of their third cause of action for breach of contract, the plaintiff seeks $427,465.31 in damages, representing fixed costs, overhead, and lost profits from items that the defendant unilaterally deducted from the contract's scope of work. The defendant argues that this claim is barred by the explicit terms of the contract. The Court agrees. It is well-settled that agreements are to be construed in accord with the parties' intent (*see Slatt v Slatt*, 64 NY2d 966, 967 [1985]). "The best evidence of what parties to a written agreement intend is what they say in their writing" (*Slamow v Del Col,* 79 NY2d 1016, 1018 [1992]). Thus, a written agreement that is complete, clear, and unambiguous on its face must be enforced according to the plain meaning of its terms (*see Greenfield v Philles Records, Inc.,* 98 NY2d 562, 569 [2002]). Here, the contract contains a work-omission clause that unambiguously gives the defendant the right to reduce the amount of work at their discretion. Section 8 of the contract states, "when work is omitted or reduced, in whole or in part, no right to compensation or damages for any loss or cost, including loss of profit, or for any claim or cause of action, shall accrue…for any work omitted or reduced." Thus, under the contract, the plaintiff only is entitled to receive payment for work "actually performed" and not for work that was reduced or omitted at the sole discretion of the defendant. By entering into the contract, the plaintiff agreed to bear the risk and potential costs associated with Section 8's general conditions. As a result, the plaintiff is not entitled to any compensation for costs, overhead and lost profit because of the defendant's reduction in scope.

Fourth, the defendant argues that the fourth and fifth causes of action, alleging a breach of the covenant of good faith and fair dealing and unjust enrichment, should be dismissed because they are duplicative of the first three causes of action. The Court agrees. 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 (*see Blanchard v Blanchard*, 201 NY 134, 138 [1911]; *see also, Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 382, 388 [1987] [affirming motion to dismiss a quasi-contract where the relationship between the parties was defined by a written contract, fully detailing all applicable terms and conditions]). A "quasi contract" only applies in the absence of an express agreement;

it is not really a contract at all, but rather a legal obligation imposed to prevent a party's unjust enrichment (*see Parsa v State of New York*, 64 NY2d 143, 148 [1984]). Here, there is an express, written contract between the parties, and neither party disputes that a contract was formed. The plaintiff failed to show an independent promise by the defendant that should be regarded as a separate obligation from the contract. The plaintiff cannot recover on a quasi-contract cause of action where both parties' obligations under the current agreement are clearly defined. Therefore, the plaintiff is limited to recovering damages on the breach of contract action. Accordingly, the fourth and fifth causes of action are dismissed.[1]

The Court agrees with the defendant that the sixth cause of action for account stated should be dismissed. An account stated exists where a party to a contract receives bills or invoices and does not protest within a reasonable time (*see Russo v Heller,* 80 AD3d 531, 533 [1st Dept 2011]); however, a cause of action alleging an account stated cannot be utilized simply as another means to attempt to collect under a disputed contract (*see Simplex Grinell v Ultimate Realty, LLC*, 38 AD3d 600 [2nd Dept 2007]; *see also Erdman Anthony & Assoc. v Barkstrom*, 298 AD2d 981 [4th Dept 2002]). The plaintiff has provided no evidence to support its claim of an account stated. The complaint does not reference any invoices or bills, nor have any been submitted as part of the record on this motion. Furthermore, the plaintiff is precluded by the terms of the contract from raising an account stated claim because it never submitted payment requisitions that were approved by the defendant. Since the defendant never approved any payment requisitions under the contract, there cannot be an account stated, as payment under the contract has clearly been disputed. While the plaintiff did send notice of claim to the defendant, the notices sought the same damages as a breach of contract claim and their validity was immediately disputed by the defendant. Accordingly, the sixth action for account stated is dismissed.

Finally, the defendant argues that the plaintiff's demand for attorney fees should be stricken from the complaint. It is well-settled that absent a statutory or contractual "fee-shifting" provision, even a prevailing party cannot recover attorney fees (*see Hunt v Sharp*, 85 NY2d 883, 885 [1995] [declining to award attorney fees to prevailing litigants where no exception to ordinary rule that each party bear its own attorney fees]). Here, the plaintiff fails to cite a statute or contractual provision that would allow it to recover attorney fees. Absent a contractual provision, the demand for attorney fees is stricken from the complaint.

Accordingly, the defendant's motion is granted to the extent that the fourth, fifth, and sixth causes of action are hereby dismissed. Additionally, the plaintiff's claims for attorney's fees, $2,000,000 in consequential damages, and $427,465.31in fixed costs, overhead and lost profits due to a reduction in the contract's scope are also dismissed. The motion is otherwise denied.

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[1] The plaintiff argues that, as part of the fourth cause of action, it has properly plead a claim for consequential damages in the amount of $2,000,000, resulting from the defendant's breaches of contract. Because the plaintiff failed to mention its claim for consequential damages in any of its purported Notices of Claim, it is barred from asserting that claim in its complaint pursuant to section 157(1) of the Public Housing Law.

The defendant shall file an answer to the complaint within 20 days of service of a copy of this decision with notice of entry. The parties shall appear for a preliminary conference on December 11, 2018 at 10:00 am in Room 311, 71 Thomas Street, New York, New York.

11/5/2018
DATE

JOHN J. KELLEY, J.S.C.
HON. JOHN J. KELLEY J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE