

Builders Group 1 LLC v Wy Mgt. LLC

2019 NY Slip Op 30296(U)

February 5, 2019

Supreme Court, New York County

Docket Number: 652025/2014

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

-----X

BUILDERS GROUP 1 LLC,

Plaintiff,

- v -

WY MANAGEMENT LLC,

Defendant.

INDEX NO. 652025/2014

MOTION DATE 04/23/2018

MOTION SEQ. NO. 004

DECISION AND ORDER

-----X

MASLEY, J.:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184

were read on this motion to/for PARTIAL SUMMARY JUDGMENT

In motion sequence number (Motion) 004, plaintiff makes its second motion, pursuant to CPLR 3212, for an order granting it partial summary judgment on its first and fifth causes of action in its amended complaint.

As relevant for Motion 004, defendant is a developer that entered into certain letter agreements with plaintiff, a contractor business, in connection with two projects to build new luxury hotels: the NYLO Nyack project (NYLO), the subject of plaintiff's first cause of action; and the Metloft Bronxville project (Metloft), the subject of plaintiff's fifth cause of action. Letter agreements for NYLO and Metloft (together, Projects) were signed in 2013 by the parties.

In its amended complaint, plaintiff seeks damages of \$240,852.39 for breach of the July 2013 letter agreement for NYLO for mobilization work and other services allegedly performed by plaintiff and invoiced to defendant. Plaintiff also seeks damages of \$350,000 for breach of the July 2013 letter agreement for Metloft for various services plaintiff allegedly performed and invoiced to defendant.

Justice Jeffrey Oing previously denied plaintiff's earlier motion for summary judgment (Motion 003) in which it sought, among other things, the same relief (judgment as to liability) against defendant for counts one and five (NYSCEF Doc. No. [Doc] 112). On that record, Justice Oing found that summary judgment was precluded by issues of fact (*id.*).

Here, plaintiff asserts that the letter agreements (Docs 140, 144 [NYLO]; Doc 154 [Metloft]) for the Projects are enforceable contracts, that plaintiff performed under those contracts by providing on-site facilities and services, such as mobilization and mobile office costs. Plaintiff submits invoices it sent to defendant for alleged costs incurred and services rendered, and asserts that those invoices were not paid in full (*e.g.* Docs 141, 151-153, 156).

Letter Agreements and Invoices

The first NYLO letter agreement, dated May 3, 2013 (Original Letter) (Doc 140) is plaintiff's cost proposal for various contractor services for the NYLO hotel, which totaled \$14 million and included a \$240,000 "mobilization fee" (*id.*). The Original Letter was modified, by letter dated July 10, 2013 (Revised Letter), and plaintiff's proposed costs for NYLO were increased to \$14.5 million (Doc 144). The Revised Letter, signed by

plaintiff and defendant, states that defendant's "written acceptance will constitute an owner stipulated sum contract" (*id.*).

Plaintiff here submits the following invoices in connection with NYLO: (1) an unpaid \$240,000 for "Mobilization," dated May 13, 2013 (Doc 141); (2) paid invoices for various mobile office expenses spanning May 31, 2013 to July 30, 2013 (Doc 151 [\$3,333.49]) and September and October 2013 (Doc 152 [\$1,850.93]); and (3) an unpaid \$852.39 invoice for mobile office expenses for November 2013 (Doc 153).

Apart from mobile office costs, plaintiff asserts it performed under the Original Letter and Revised Letter (together, NYLO Letters) by preparing proposals, schedules, and projections, analyzing/reviewing drawings, and identifying/contacting potential subcontractors (*e.g.* Docs 139 [affidavit of plaintiff's principal], 145 [7/18/13 meeting minutes], 146-148 [NYLO projections]). Plaintiff's principal, George Filiolia, states that plaintiff's general conditions, insurance, and fees for NYLO were \$18,655.34, \$5,036.94, and \$12,844.20, amounting to \$282,573.29 with the mobilization fee (Doc 157). Filiolia further states that defendant paid only \$5,184.42, leaving a balance of \$277,388.87 (*id.* ¶¶ 28, 30).

The Metloft letter agreement (Metloft Letter), dated May 22, 2013, is a cost proposal signed by defendant on July 3, 2013 (Doc 154). The Metloft Letter provides for a \$15,000 retainer, work costs at an hourly rate, and certain fees calculated by percentages (*id.*). The Metloft Letter states that, "[u]pon acceptance of this contract, a retainer of \$15,0000.00 is required," and a hand-written note initialed by defendant's principle states "[t]he only payment until construction loan is the initial \$15,000" (*id.*).

Plaintiff included its "sample A1A Document A-133" agreement with the Metloft Letter and refers to the A1A agreement for "details" as to the fee percentage costs (*id.* [stating "see contract for details" about 1% "Preconstruction Fee" and 3% general "Fee"]).

Plaintiff submits a single unpaid invoice for Metloft: a \$350,000 bill for "Mobilization Fee," dated July 12, 2013 (Doc 156). Apart from that fee, Figliolia asserts plaintiff is owed \$75,236.40 for Metloft work, plus a 1% fee of actual costs, \$596.40; he states that defendant paid only the \$15,000 retainer (Doc 157). Thus, plaintiff asserts that defendant breached the Metloft Letter in failing to tender \$60,236.40 (\$75,236.40 less the \$15,000 retainer, plus the \$596.40 fee).

Discussion

Discovery is now complete and the court has all documents submitted by the parties before it on this motion, the second such motion by which plaintiff seeks an order awarding it partial summary judgment on liability for the first and fifth causes of action.

Plaintiff now contends that it is entitled to partial summary judgment for breach of the NYLO Letters and Metloft Letter on the basis that those agreements are legally enforceable contracts under which plaintiff performed by providing certain pre-construction services and incurring various costs (i.e., those related to on-site facilities and "mobilization" costs) and which defendant breached by refusing to tender payment for those assorted costs.

Plaintiff's submissions in support of its motion for partial summary judgment are insufficient to establish *prima facie* entitlement as to either the first or fifth cause of

action. Plaintiff has not met its burden of demonstrating that the NYLO Letters or Metloft Letters are valid, enforceable contracts under which plaintiff performed its obligations, or that defendant's alleged breach of those contracts caused plaintiff to sustain injuries.

The NYLO Letters and Metloft Letter, while plainly contracts, manifest the parties' mutual assent to plaintiff's proposals for contractor services on the Projects. Nothing within the four corners of the NYLO Letters or Metloft Letter obligates plaintiff to perform any work or tender any services in connection with the Projects; rather, the letters are plain, unambiguous agreements reflecting the parties' consent to plaintiff's price proposals and conditions. The letter agreements require plaintiff, at most, to adhere to its offered costs and conditions when the formal AIA agreements, explicitly contemplated in each of the letter agreements, would have been executed (Docs 140 [anticipating AIA construction manager guaranteed maximum price contract], 144 [anticipating AIA stipulated sum contract], 154 [anticipating an AIA contract, and specifically attaching a sample AIA A-133 contract for defendant's review]). The letters do not obligate plaintiff to actually perform any of the services in the letter agreements, and there are no executed AIA documents for the Projects submitted to the court.

Defendant's obligations under the NYLO Letters and Metloft Letter are similarly limited. The Revised Letter, which supersedes the Original Letter, requires defendant to tender payment at the rates and terms proposed by plaintiff when the AIA contract anticipated is executed and the NYLO project commences. The Metloft Letter, likewise, locked in costs and conditions for the Metloft Project pending execution of an AIA

contract and commencement of the Metloft project. The Metloft Letter further required defendant to tender a \$15,000 retainer fee to plaintiff upon acceptance of the proposal, and the parties agree that the retainer sum was paid. As to the retainer, the Metloft Letter also includes a hand-written note of defendant's principal, the authenticity of which is uncontested, stating that the retainer fee is "[t]he only payment until construction loan" (Doc 154).

Accordingly, plaintiff's motion for partial summary judgment is denied. Further, the court exercises its power under CPLR 3212 (b) and, upon searching the record, awards summary judgment to defendant and the first and fifth causes of action are dismissed. Plaintiff cannot, as a matter of law, prevail at trial on those breach of contract claims absent an agreement obligating performance of the alleged services—for instance, the AIA contracts contemplated in the letters—and there are no such contracts for the Projects before the court on this motion. Thus, under the letter agreements alone, the services are premature as a matter of law.

Nevertheless, plaintiff's remaining claims concerning the Projects may proceed, as pleaded in its amended complaint, under the alternative theories of quantum meruit and unjust enrichment.

In any event, there is no construction of the NYLO Letters or Metloft Letter under which plaintiff can establish prima facie entitlement to judgment for breach of contract. A valid, enforceable contract must contain "a manifestation of mutual assent to essential terms" of the agreement (*Cobble Hill Nursing Home, Inc. v Henry and Warren Corp.*, 74 NY2d 475, 483 [1989]). Thus, these letter agreements are enforceable only to the

extent that the essential terms are reflected, but these terms evince only agreed-upon rates and conditions for the execution of formal AIA contracts in the future, not actual performance of any services.

Alternatively, even if the court were to find, as plaintiff contends, that the NYLO Letters and Metloft Letter reflect the parties' entire intended agreement as to the Projects, partial summary judgment would be precluded by issues of fact as to whether the services performed by plaintiff are qualifying obligations under the letter agreements. Plaintiff's submissions do not eliminate factual inconsistencies and rely heavily on the self-serving statements of plaintiff's principal, Figliolia; meanwhile, defendant's submissions in opposition raise numerous factual controversies. Thus, credibility determinations to resolve factual issues would, in that alternative scenario, necessitate a trial on whether the services rendered are within the scope of the contracts.

Accordingly, it is

ORDERED that the motion of plaintiff for partial summary judgment is denied; and it is further

ORDERED that partial summary judgment is granted in favor of defendant against plaintiff to the extent that the first and fifth causes of action in the amended complaint are dismissed in their entirety; and it is further

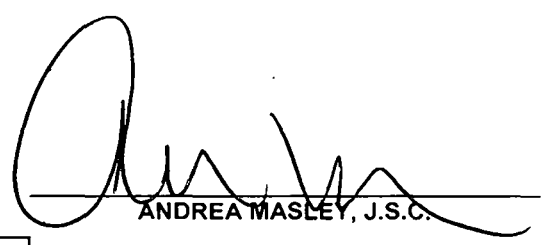
ORDERED that the remaining claims are severed and continue against defendant; and it is further

ORDERED that the parties shall appear for trial in Part 48, Room 242 at 60 Centre Street, on 7:30 at 3:00 pm and it is further

ORDERED that any motions in limine must be served no later than 30 days from the date on which this order is entered on NYSCEF; and it is further

ORDERED that the parties shall appear for a pre-trial conference on 3/14/19 By PHONE at 3:00 pm

25 /2019
DATE


ANDREA MASLEY, J.S.C.

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE