Airflex Indus., Inc. v Parco Constr. Corp.
2019 NY Slip Op 33164(U)
October 21, 2019
Supreme Court, New York County
Docket Number: 650947/2019
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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AIRFLEX INDUSTRIAL, INC.,

Plaintiff,

-against-

PABCO CONSTRUCTION CORP., THE RELATED COMPANIES, INC., RELATED COMPANIES and its subsidiaries and affiliates D/B/A RELATED and/or RELATED COMPANIES, THE RELATED COMPANIES, L.P., HUDSON YARDS CONSTRUCTION LLC, ERY RETAIL PODIUM LLC and ERY DEVELOPER LLC,

Defendants.

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DECISION AND ORDER
Index No.: 650947/2019

Motion Sequence No.: 001

O. PETER SHERWOOD, J.:

Under motion sequence 001, defendants The Related Companies, Inc. ("Related") and its susbsidiaries, Hudson Yards Construction LLC ("Hudson Yards"), ERY Developer LLC ("Developer"), and ERY Retail Podium LLC ("Retail Podium") (collectively "defendants" or "Owner") move to dismiss the amended verified complaint ("Complaint") pursuant to CPLR 3211(a)(1) and (a)(7) based on documentary evidence and for failure to state a claim.

I. BACKGROUND

As this is a motion to dismiss, the following facts are taken from the Complaint and are accepted as true.

Plaintiff Airflex Industrial, Inc. ("Airflex") is a family-owned corporation engaged in the fabrication and installation of specialty products for high-end construction projects (Complaint ¶¶ 1-2 [Doc. No. 14]). Pabco Construction Corp. ("Pabco") is a New York corporation engaged in furnishing and installing exterior wall systems, interior drywall, and acoustical ceilings for high rise residential buildings and commercial spaces (*id.* ¶4). Pursuant to the trade contract between Hudson Yards and Pabco, entered into on October 7, 2015 (the "Trade Contract"), Hudson Yards served as the executive construction manger of the subject project (*id.*). Related is the primary owner and developer involved in the Hudson Yards neighborhood redevelopment which has been touted as the largest private real estate development in United States history (*id.* ¶12). Upon

information and belief, Related is the owner of real property within Hudson Yards, including 550 West 34th Street and 20 Hudson Yards (the "Property") (*id.* ¶13).

This suit arises from defendants' failures to pay for work performed by Airflex on a construction project referred to as "Hudson Yards – Retail Podium & Overbuild" (hereinafter, the "Project") (*id.* ¶14). Related employees were directly involved in the Project and several individuals with Related email addresses corresponded with Airflex and Pabco throughout the project (*id.*). Related wholly owns or has complete control over other defendants (*id.* ¶15). Owner, entered into a contract with Pabco wherein the latter agreed to provide construction work and services for certain of Owner's projects, including the Property (*id.* ¶29). Pabco and Airflex subsequently discussed Airflex's ability to work as a subcontractor on the Project with Pabco providing Airflex with plans and specifications of Airflex's proposed work (*id.* ¶30). Airflex relied on Pabco's plans and specification in calculating its bid for the Project (*id.* ¶31). On or about May 15, 2015, Airflex made a proposal to perform services on the Project and entered into two written subcontractor purchase orders with Pabco dated June 22, 2015 ("2015 Agreements") (*id.* ¶¶32–33). Pursuant to the 2015 Agreements', Airflex was to perform work relating to fabrication and installation of wall and other panels, and an aluminum ladder support system at a price of $10 million. (*id.* ¶34). On or around December 2015, Pabco pulled this work from Airflex without warning as the Owner expressed dissatisfaction with the initial architect's designs and decided to put the required work out for new bids despite the 2015 Agreements with Airflex (*id.* ¶35). Airflex made a new proposal for the work but was rejected (*id.* ¶36). Owner, Pabco, and Airflex did not discuss Airflex's proposal (*id.*). On or around March 1, 2016, Pabco closed out the 2015 Agreements through a "Final Payment" to Airflex for $173,067.31 for Airflex's services in connection with the 2015 Agreements (*id.* ¶37). The final amount paid to Airflex for services under the 2015 Agreements was $329,279.41 (*id.*). Airflex and Pabco then entered into a new contract for the Project (*id.* ¶38).

On or about February 26, 2016, Airflex entered into a new Subcontractor Purchase Order ("Contract" or "Purchase Order") with Pabco for services to be performed on the Project, whereby Airflex would furnish or furnish and install, (i) specified louvers, (ii) panels, (iii) a stainless steel canopy, and (iv) a rain-screen support system for the Project ("Scope of Work") (*id.* ¶39). In exchange, Airflex was to be paid $3,552,836.00 (*id.* ¶40). The Subcontractor Sum for the Contract (the "Contract Price") was never reduced by mutual agreement or otherwise (*id.* ¶41). Pabco did

not make a mistake as to the Contract Price when entering into this Agreement and Pabco was not entitled to any offset or reduction as a result of the Final Payment to Airflex for previous services rendered under the 2015 Agreements (*id.* ¶¶42–43). During the term of the Contract, defendants directed Airflex to perform additional substantive work for which Airflex was to be paid pursuant to the Contact (the "Extra Work") (*id.* ¶44). Throughout the Project, defendants directed Airflex to expedite completion of its work, increase its workforce, and incur overtime expenses and costs (*id.* ¶45). Further, throughout the Project, Airflex's Scope of Work was changed due to delays, obstacles to performance, and non-confirming conditions caused by parties over whom defendants had control, and Airflex routinely corrected other subcontracts' non-conforming work (*id.* ¶¶46–47). Airflex had direct dealings with both Pabco and Owner over payment disputes and alleges that it is owed millions of dollars for Extra Work performed at Owner's request (*id.* ¶¶48–49).

Because of Pabco's inexperience, mismanagement, and failure to provide timely field dimensions, the Project schedule, and Airflex's anticipated fabrication and installation, was significantly delayed (*id.* ¶¶50–53). Due to these delays, Airflex was directed to expedite work, incurring overtime costs and expenses (*id.* ¶52). Despite AirFlex's offer to send a field supervisor to help Pabco's field measurements, Pabco rejected the help, thereby causing further delays (*id.* ¶54). Failures to provide structural materials and plans sufficient to support Airflex's work led to further delays and caused Airflex to take on Extra Work outside of the agreed upon scope of work such as developing, furnishing, and installing "sub-steel" structures to support Airflex's steel canopy and undertaking a major louver redesign to satisfy last minute changes (*id.* ¶¶60–117). Pabco and Owner have failed to pay Airflex for the Extra Work or the overtime expenses incurred (*id.* ¶¶75–78, 99–104, 108–117).

As against Owner, plaintiff has alleged two causes of action: (i) unjust enrichment, and (ii) quantum meruit (*id.* ¶¶128–141).

II. LEGAL STANDARD

To succeed on a motion to dismiss pursuant to CPLR § 3211 (a) (1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of the plaintiff's claims (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180, 182 [1st Dept 2006]). A motion to dismiss pursuant to CPLR § 3211 (a) (1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a

defense as a matter of law" (*McCully v. Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept. 2009]). The facts as alleged in the complaint are regarded as true, and the plaintiff is afforded the benefit of every favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (*see e.g. Nisari v Ramjohn*, 85 AD3d 987, 989 [2nd Dept 2011]).

CPLR § 3211 (a) (1) does not explicitly define "documentary evidence." As used in this statutory provision, "'documentary evidence' is a 'fuzzy term', and what is documentary evidence for one purpose, might not be documentary evidence for another" (*Fontanetta v John Doe 1*, 73 AD3d 78, 84 [2nd Dept 2010]). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*id.* at 86, citing Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3211:10, at 21-22). Typically that means "judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are 'essentially undeniable,'" (*id.* at 84-85).

On a motion to dismiss a plaintiff's claim pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see*, *Campaign for Fiscal Equity v State*, 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]).

III. ARGUMENTS

A. Defendants' Memorandum of Law in Support of Motion to Dismiss

1. Plaintiff's Quasi-Contract Claims Should Fail as a Matter of Law

Citing caselaw, defendants argue that 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" (*Clark-Fitzpatrick, Inc. v Long Island Railroad Co.*, 70 NY2d 382, 388 [1987] [contractor's quasi-contract claim for damages against owner dismissed as the court held it is impermissible "to seek damages in an action sounding in quasi contract where the suing party has fully performed on a valid written agreement, the existence of which is undisputed, and the scope of which clearly covers the dispute between the parties"]). This rule applies to subcontractors "whose work on a project is governed by a written subcontract" (*Kaback Enterprises, Inc. v Time, Inc.*, 27 AD3d 278 [1st Dept 2006]). If the plaintiff's rights and obligations are governed by a valid and enforceable contract, it may not seek to expand or modify its rights by resort to quasi-contractual claims (*Metro. Elec. Mfg. Co. v Herbert Constr. Co.*, 12 AD2d 758, 759 [2d Dept 1992]).

In *Palma Realty Assocs. Ltd. v Bldg Oceanside LLC*, (59 Misc3d 1206 [A] [Sup. Ct. NY Cty. 2018]) a sub-subcontractor entered into a sub-subcontract with another subcontractor in connection with a construction project and later sued the subcontractor, prime contract, and project owner in a payment dispute (*id.* at 2–3). The owner successfully moved to dismiss the complaint arguing that the existence of a contract between the sub-subcontractor and the subcontractor barred any quantum meruit liability against the owner (*id.* at 3). In its holding, the court stated that the "existence of an express agreement … governing a particular subject matter precludes recovery in quasi-contract for events arising out of the same subject matter" (*id.*).

Here, defendants argue Airflex entered a subcontract with Pabco which governs Airflex's rights and obligations with respect to the Project, including its claims for additional compensation (Defendants Memorandum of Law in Support, at 9 [Doc. No. 33]). Defendants contend that, because Airflex has admitted the subcontract constitutes a valid and enforceable agreement and asserted breach of contract claims against Pabco thereunder, its causes of action against the defendants are duplicative of Airflex's contract-based claims and must be dismissed with prejudice (*id.*; *Clark-Fitzpatrick, Inc.*, 70 NY2d at 388; *Palma Realty Assocs. Ltd.*, 59 Misc3d 1206(A) at *2–3).

Finally, defendants argue the subcontract incorporates by refence a provision from the Trade Contract which expressly forbids Airflex from bringing this lawsuit against Related, ECM, Developer, and Owner (*see* Wallace Aff., Ex. 4, § 14.2(c); Ex. 5, § 2.1.2). The Subcontract states that neither "Owner, the Component Owners, Lender, Architect, General Contractor or ECM shall have any obligation to pay or to see that payment of any monies is made to any Subcontractor…"

(Wallace Aff., Ex. 4 § 14.2(c); Ex. 5, § 2.1.2). Consequently, Airflex may not proceed with its claims against the motion defendants.

2. Defendants Do Not Own the Subject Project or Premises

Defendants also argue Airflex's quasi-contract claims hinge on allegating defendants have benefitted from Airflex's work on the Project (Defendants Memorandum of Law in Support, at 9). Airflex cannot recover under this theory because "neither Related, ECM, nor Developer owned the Project or the Premises" and, consequently, could not have accepted any benefits or been unjustly enriched at Airflex's expense (*id.*). Defendants also argue that, "as a matter of public record," Related, ECM, and Developer are not the Project's "owner" (Wallace Aff., Exs. 2, 3). Consequently, plaintiff's third and fourth causes of action should be dismissed against defendants Related, ECM, and Developer (Defendants' Memorandum of Law in Support, at 9–10).

B. <u>Plaintiff's Memorandum of Law in Opposition</u>

1. The Quasi-Contract Claims Are Sufficiently Stated

Without first addressing whether its quasi-contract claims are barred, plaintiff argues it has alleged facts showing Related was wrongly enriched at plaintiff's expense and that it is against equity and good conscience for Related to retain those benefits (Plaintiff's Memorandum in Opposition, at 4 [Doc. No. 45]). Airflex has stated a valid quantum meruit claim by alleging facts showing it performed the services in good faith, Related accepted those services, and there was an expectation plaintiff would be compensated for the value of the services (*id.*). The complaint specifically pleaded Related received millions of dollars in services beyond the scope of the Contract with Pabco (Complaint ¶¶19, 21, 27, 49, 74, 76, 99, 102, 108, 112, 131, 137). Plaintiff argues that defendant Related's motion does not dispute that it retained the benefits of the services and that Airflex performed them in good faith (Plaintiff's Memorandum in Opposition, at 4–5). Further, Related directly ordered and occasionally threatened Airflex to perform the Extra Work, while simultaneously promising to pay for the Extra Work demanded (*id.* at 5). Plaintiff performed the Extra Work with the expectation that it would be compensated (Complaint ¶¶24–25, 44, 134, 138). Given these allegations, the claims can proceed against Related despite a lack of contractual privity (Plaintiff's Memorandum in Opposition, at 5; citing *Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516–18 [2012]).

Plaintiff further maintains that "when a property owner knowingly receives and accepts the benefits of extra work in the performance of a contract orally directed by the owner, ... the owner

is equitably bound to pay the reasonable value of the benefits, notwithstanding the provision of the contract that any extra work must be supported by a written authorization signed by the owner" (citing 22A NY Jr 2d *Contracts* 367). Such is the case here as Related orally directed Airflex throughout the Project to (i) fabricate, design and install a brand new louver system, (ii) expedite its work, (iii) add work force, (iv) not slow down or stop working in anticipation of change order approval, and (v) expect payments on all outstanding orders for costs, equipment, and extra work performed (Complaint ¶¶15, 18, 22–23, 44–48, 52–59, 63–64, 68–73, 84–88, 90–96, 101, 107–108, 111, 129–131, 136). Plaintiff argues it relied on Related instructions and was caused to act at Related's whim (Plaintiff's Memorandum in Opposition, at 6; citing *Phillips International Investments LLC v Pektor*, 117 AD3d 1, 4 [1st Dept 2014])

2. The Trade Contract Does Not Preclude Quasi-Contract Claims Against Related

Plaintiff next argues its agreement with Pabco does not preclude its claims against Related (Plaintiff's Memorandum in Opposition, at 6). Plaintiff concedes it does not have contractual privity with Related but asserts that its quasi-contract claims do not require such privity (*Georgia Malone*, 19 NY3d at 517). Plaintiff also argues Related's reliance on *Palma Realty Assoc. Ltd.* is misplaced as there, unlike here, the complaint acknowledged the agreement between the subcontractor and general contractor "contained specific terms and conditions obligating it to provide equipment and machinery" to the general contractor and, in turn, that the general contractor has a specific obligation to pay (59 Misc3d 1206[A]). Further, in *Palma*, there were no specific, well-pled allegations that the owner had: (i) induced the subcontractor to perform work beyond the contract's scope, (ii) promised to pay for such work, (iii) had work performed at its demand, and (iv) had frequent and direct dealings with the subcontractor (Plaintiff's Memorandum in Opposition, at 7). Here, because of the repeated dealings between Airflex and Related, the fact that the Airflex-Related relationship was not remote, and the Trade Contract's scope, *Palma* supports denial of Related's motion. The cases cited in support of the claim that the Trade Contract precludes Airflex from suing Related are off-base as each concerns contract claims brought against an entity with which the plaintiff lacked privity (Compare *E. States Elec. Contractors, Inc. v William L. Crow Constr. Co.*, 153 AD2d 522, 523 [1st Dept 1989] *and Braun Equip. Co., Inc. v Borelli Associates et al.*, 220 AD2d 312 [1st Dept 1995] *with Georgia Malone & Co. Inc.*, 19 NY3d 511 *and Mandarin Trading v Wildenstein*, 16 NY3d 173 [2011]).

3. The Claims Against All Related Defendants Should Proceed

Plaintiff argues defendants' claim that they are not the technical "owner" of the Project should be rejected (Plaintiff's Memorandum in Opposition, at 8–9). The Hudson Yards Development Project is marketed, branded, sold, and held out as a Related Companies development and, as the complaint points out, each of the Related defendants operate from the same principal address, have overlapping management and executives, the Related Companies website markets Hudson Yard Development Project, the Related Company's employees worked on the Project and communicated with Airflex, and defendants ERY Developer, LLC and ERY Retail Podium, LLC are wholly owned subsidiaries of the Related Companies (Complaint ¶¶9–11, 14, 15, 18, 25). Further, the Pabco-Airflex contract refers to the Related Companies as "Owner" (M. Kornfeld Affirmation, Ex. 4). Plaintiff concludes by arguing that, because Related Companies wholly own and exercise full control over all defendants, dismissing any of the defendants at this stage would be improper and should be denied (Plaintiff's Memorandum in Opposition, at 9; citing *Bd. of Managers of Arches at Cobble Hill Condo v Hicks & Warren, LLC*, 18 Misc3d 1103(A) [Sup. Ct. Kings Cty. 2007]).

IV. DISCUSSION

Where, as here, there is a valid and enforceable written contract that governs the parties' relations, recovery in quasi-contract (either unjust enrichment or *quantum meruit*) for events arising out of the same subject matter ordinarily is precluded (*Clark-Fitzpatrick, Inc.*, 70 NY 2d at 388). The subject matter of plaintiff's claim is governed by the Trade Contract. That contract is incorporated by reference into the Purchase Order between Pabco and Airflex (Attached as Exhibit 4 and 5, respectively, of Wallace Aff. [Doc. No. 37]). Accordingly, the claims in quasi-contract must be dismissed.

Moreover, the Trade Contract bars these claims. Section 14.1(i) of the Trade Contract states that nothing therein creates a relationship of contract or agency between any Owner, Component Owner, ECM, General Contractor, or Subcontractor. It also provides that the Owner, Components Owners, ECM, and General Contractor have no obligation to supervise or deal with Subcontractors or their employees (Wallace Aff. Ex. 4 § 14.1[i]). Section 14.2(c) states the Owner, Component Owners, Lender, Architect, General Contractor, or ECM have no obligations to pay or see that payment is made to subcontractors "except as may otherwise be required by applicable law" (Wallace Aff. Ex. 4 § 14.2[c] [emphasis added]). Airflex has cited no law requiring

defendants to arrange their affairs otherwise. Consequently, a dismissal of these defendants pursuant to CPLR 3211(a)(1) is proper. Plaintiff's breach of contract claims against Pabco, which are not at issue on this motion, survive.

Accordingly, it is hereby,

ORDERED that the motion to dismiss by defendant *The Related Companies, Inc*. and its subsidiaries and affiliates, *Hudson Yards Construction LLC, ERY Developer LLC* and *ERY Retail Podium LLC* is GRANTED in its entirety and the complaint as to said defendants is DISMISSED; and it is further

ORDERED that the claims against Pabco Construction Corp., which is not a party to this motion, shall continue.

This constitutes the decision and order of the court.

DATED: October 21, 2019

E N T E R,

O. PETER SHERWOOD J.S.C.