SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: **HON. BARRY R. OSTRAGER** **PART** **IAS MOTION 61EFM**

Justice

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AURORA ELECTRIC INC.,

Plaintiff,

- v -

SIEMENS INDUSTRY, INC., and LIBERTY MUTUAL INSURANCE COMPANY,

Defendants.

INDEX NO.	653335/2019
MOTION DATE	
MOTION SEQ. NO.	001

DECISION + ORDER ON MOTION

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HON. BARRY R. OSTRAGER

Before the Court is the pre-answer motion by defendants Siemens Industry, Inc. ("Siemens") and Liberty Mutual Insurance Company ("Liberty") to dismiss the First, Third, Fourth and Fifth causes of action asserted by plaintiff Aurora Electric, Inc. ("Aurora") in its Amended Complaint (NYSCEF Doc. No. 16) pursuant to CPLR § 3211(a)(1) and (7) based on documentary evidence and failure to state a cause of action. Extensive oral argument was held via Skype on June 25, 2020, at which time the Court granted the motion with respect to the Third, Fourth and Fifth causes of action but reserved as to the First. The motion does not seek dismissal of the Second cause of action, which sounds in breach of contract against Siemens, or the Sixth cause of action against Liberty related to its payment and performance bond. For the reasons stated below, the motion to dismiss is granted with respect to the Third, Fourth and Fifth causes of action and denied with respect to the First cause of action.

The action relates to the East Side Access Project, a major construction project to create train tunnels from Long Island City to Grand Central Station to ease congestion in Penn Station by re-routing some Long Island Railroad trains so they arrive at Grand Central Station rather than Penn Station. Non-party WDF, Inc. was the HVAC contractor. WDF had a contract with defendant Siemens related to certain control systems for that work**.** Siemens, in turn,

subcontracted with plaintiff Aurora for the related electrical work (NYSCEF Doc. No. 24). Defendant Liberty Mutual issued a payment and performance bond for the work.

Aurora had commenced an earlier action against Siemens and Liberty related to its work, which also named as defendants WDF and the bonding company The Service Insurance Company ("Service") (*Aurora Electric Inc. v Siemens Industry, Inc., et al.,* Index No. 652370/19, hereafter "Action 1"). Aurora had commenced Action 1 seeking, in part, to enjoin the termination of Aurora's contract based on a claimed default and to enjoin payments by Service and Siemens under the payment and performance bonds.

Action 1 was resolved by a Stipulation placed on the record in open court on May 1, 2019 (NYSCEF Doc. No. 112). There the parties agreed that Aurora would perform certain additional work under specific terms and conditions and that the parties would negotiate Change Order 2 detailing some of the additional work and providing for additional payments for that work. As particularly significant to this motion, with respect to the dispute regarding electrical layout drawings, the parties agreed in their Stipulation "to reserve all rights and defenses with respect to that dispute for later negotiation or resolution in the matter in accordance with their contract." (May 1, 2019 Transcript "TR", p 4, lines 1-4). Further, with respect to the dispute overall, the parties agreed that the "action will be withdrawn by Aurora ***without prejudice to renew.*** The parties have agreed to allow this Court to retain jurisdiction on further conflicts or issues that arise out of the matter that we're discussing here today." (TR p 4, lines 5-9, emphasis added). The Stipulation also provided that: "The parties will work in good faith to expeditiously resolve two outstanding change order issues and any other change order issues that may arise in accordance with the terms of the [parties'] subcontract." (TR, p 4, lines 17- 20).

The parties' express reservation of rights was specifically acknowledged and confirmed by the Court, along with the fact that the Stipulation had left open certain issues yet to be

resolved by the parties: "The transcript will reflect that the Court agrees that if as and when you need judicial resolution of any disputes with respect to which the parties have reserved rights, the case will automatically be referred to me." (TR p 5, lines 19-23).

Because the parties were unable to resolve the issues left open in their Stipulation, Aurora commenced this action against Siemens and Liberty by filing a new Complaint on June 6, 2020, about one month after the Stipulation had been signed, and an Amended Complaint not long after. In the Amended Complaint (NYSCEF Doc. No. 16), Aurora asserted six causes of action: (1) Fraud in the inducement against Siemens, claiming Siemens had made misrepresentations during the contract negotiations regarding the labor and materials Aurora would need to complete the work; (2) Breach of contract against Siemens regarding the parties' Subcontract, their Interim Agreement and the Stipulation of Settlement filed in Action 1; (3) Declaratory judgment against Siemens that Siemens' prior Notice of Default dated March 6, 2019 was withdrawn and that Aurora had the right to additional payment under Change Order 2 and the So-Ordered Stipulation in Action 1; (4) *Quantum meruit* against Siemens as an alternative to the contract-related claim; (5) Declaratory judgment against Siemens that the Parties' Subcontract is null and unenforceable based on Siemens' substantial increase in the scope of work, multiple changes to drawings, dramatic changes to the working conditions, and lack of working drawings, all of which constituted a cardinal change to the Subcontract; and (6) a claim against Liberty related to the Bond.

At the conclusion of the June 25 oral argument, the Court dismissed the two declaratory judgment claims as duplicative of the contract claim. *See Ness v Pactera Tech*, 173 AD3d 635, 636 (1st Dep't 2019) (modifying trial court to dismiss declaratory judgment claim where issues could be raised under breach of contract cause of action). The Court also dismissed the *quantum meruit* claim pursuant to well-established law: "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 Is. R.R. Co.,* 70 NY2d 382, 388 (1987) (citations omitted).

The sole remaining issue is whether defendants are entitled to dismissal of the First cause of action against Siemens sounding in fraud in the inducement. There Aurora alleged that Siemens had knowingly misrepresented to Aurora the scope of work and amount of labor and materials Aurora would need to complete the job through statements by John Mardosa, Siemens' Project Representative, and drawings (¶¶ 89-91), and that Aurora had justifiably relied on Seimens' representations as an essential part of the contract negotiations and suffered damages as a result (¶¶ 92-93). The allegations suffice to survive dismissal at the pleading stage. Under CPLR § 3211(a)(7), after affording the pleadings a liberal construction and accepting the allegations in the Amended Complaint as true, the Court need only determine whether "the facts as alleged fit within any cognizable legal theory ... Under CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law …." *Leon v Martinez,* 84 NY2d 83, 87-88 (1994) (citations omitted). The Court finds Aurora is entitled to proceed with discovery on its claim.

During oral argument, when asked what relief Aurora might obtain under the fraud cause of action that was not available under the contract claim, Aurora asserted it would be entitled to rescission should it prevail, which would relieve both Aurora and the bonding company of any further obligations under the contract. This statement of the law is correct. *Sabby Healthcare Master Fund Ltd. v Microbot Med. Inc.,* 180 AD3d 529, 531 (1st Dep't 2020) (affirming decision after trial granting the right to rescission of the parties' contract based on fraudulent inducement). The Court rejects defendants' argument that Aurora is barred from seeking rescission because it reaffirmed the contract in the Stipulation resolving Action 1. As the above-

quoted excerpts from the transcript of proceedings make clear, the parties left open several issues for further negotiations and resolution, and Aurora expressly reserved all rights. Nor can it be said that Aurora delayed unreasonably in demanding rescission, as this action was commenced one month after the Stipulation in Action 1 after the parties' efforts to resolve open issues failed.

Accordingly, it is hereby

ORDERED that the motion by defendants Siemens Industry, Inc. and Liberty Mutual Insurance Company to dismiss certain causes of action asserted by plaintiff Aurora Electric, Inc. in its Amended Complaint pursuant to CPLR § 3211(a)(1) and (7) is granted to the extent of directing the Clerk to sever and dismiss the Third, Fourth and Fifth causes of action, and is denied with respect to the First cause of action; and it is further

ORDERED that defendants shall efile an Answer to the Amended Complaint by July 20, 2020. A compliance conference is scheduled for September 15, 2020 pursuant to the PC Order.

Dated: June 30, 2020

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