

**Summit Rest. Repairs & Sales, Inc. v New York City
Dept. of Educ.**

2020 NY Slip Op 33214(U)

September 30, 2020

Supreme Court, New York County

Docket Number: 651845/2012

Judge: Andrew Borrok

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

SUMMIT RESTAURANT REPAIRS & SALES, INC., Plaintiff, - v - NEW YORK CITY DEPARTMENT OF EDUCATION, Defendant. INDEX NO. 651845/2012 MOTION DATE 01/30/2020 MOTION SEQ. NO. 007 008

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 382, 384, 393, 394, 395, 396, 397

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 383, 385, 386, 387, 388, 389, 390, 391, 392

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

Upon the foregoing documents, and for reasons set forth on the record (R. Portas, Ct. Reporter, 9/30/2020), the plaintiff's motion for summary judgment (seq. no. 007) is denied and the defendant's motion for summary judgment (seq. no. 008) is granted.

As stated on the record, pursuant to an order dated March 15, 2012 issued by the Hon. Richard Velasquez, the parties were directed to have any disputed items under the dispute resolution provisions of the parties' contract (NYSCEF Doc. No. 311; NYSCEF Doc. No. 249). In any event, and for the avoidance of doubt, even if the parties had not been so-ordered, the parties'

contract (NYSCEF Doc. No. 311) provided for an **exclusive** dispute resolution mechanism in Section 4.62, and to the extent that the plaintiff seeks to recover for any claims in this action that were not raised before the Disputes Resolution Officer (**DRO**) as required by Section 4.62, those claims are dismissed for failure to exhaust administrative remedies.

Inasmuch as the plaintiff has already brought claims to the DRO pursuant to Section 4.62, the DRO issued a conclusive, final and binding decision dated June 22, 2012 (NYSCEF Doc. No. 297), and the plaintiff's sole remedy to challenge the DRO's decision was via an Article 78 proceeding, which the plaintiff did and which action was discontinued with prejudice without any reservation of right (NYCSEF Doc. No. 133). As is well-settled, a "stipulation of discontinuance with prejudice has the same preclusive effect as a judgment on the merits" (*Schwartzreich v EPC Carting Co.*, 246 AD2d 439, 441 [1st Dept 1998]).

Inasmuch as the plaintiff challenges the liquidated damages upheld by the DRO determination, the plaintiff cannot relitigate the issue of liquidated damages to the extent this was already addressed by the DRO and in the Article 78 proceeding which was discontinued with prej. In any event, per the contract, to avoid the liquidated damages charge due to a manufacturing problem, the plaintiff had to submit a letter from the manufacturer stating that the part was on order (NYSCEF Doc 311, § 2.10). For example, the plaintiff submitted a backorder purportedly from Robert Munder of Hobart Service claiming that Summit's repair work was delayed because parts were on backorder, but according to Mr. Lopresti, a Hobbart Service manager, nothing

about the letter was true. There was no Mr. Munder who worked for Hobbart and the parts were not on backorder:

... the backorder letter ... did not come from Hobbart Service, and there was no Hobart Service employee named Robert Munder. Also, as indicated in Ms. Brockmeyer's response, the parts references in the letter were not on backorder but were readily available.

(NYSCEF Doc. No. 388, ¶4).

Finally, although liquidated damages and actual damages can be mutually exclusive when they are duplicative, here the damages provisions are plainly not duplicative (*North Hempstead v Sea Crest Constr. Corp.*, 119 AD2d 744, 746 [2d Dept 1986]). The liquidated damages and the actual damages address two distinctly different categories of damages. The liquidated damages, which were set at \$100/day when Summit failed to perform within the specified time limits addressed delays in performance, and the actual damages provided for in Article II provided for damages in the event of early termination amounting to the difference in the contract price for the uncompleted portion of the contract and the cost to the contracting entity of completing the contract. Per the terms of the contract, “[t]he rights and remedies of the entity hereunder **shall be in addition to, and not in lieu of**, any rights and remedies the entity has pursuant to this contract or by operation of law” (NYSCEF Doc. No. 311, Art. II [emphasis added]). In other words, the defendant is not precluded from recovering liquidated damages because the contract also contains a clause allowing for the recovery of actual damages in the event of early termination.

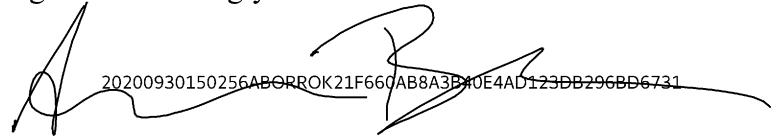
Accordingly, it is

ORDERED that the plaintiff's motion for summary judgment (seq. no. 007) is denied; and it is further

ORDERED that the defendant's motion for summary judgment is granted and the complaint is dismissed; and it is further

ORDERED that the parties are directed to order a copy of the transcript and submit it to Part 53 to be so-ordered; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.


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9/30/2020
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: