

**Five Star Elec. Corp. v 86th St. Constructors Joint  
Venture**

2021 NY Slip Op 30894(U)

March 18, 2021

Supreme Court, New York County

Docket Number: 651499/2018

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

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FIVE STAR ELECTRIC CORP,

Plaintiff,

- v -

86TH STREET CONSTRUCTORS JOINT VENTURE,

Defendant.

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INDEX NO. 651499/2018

MOTION DATE 06/14/2019

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 62, 63

were read on this motion to/for DISMISS

ORDER

Upon the foregoing documents, it is

ORDERED that the motion to dismiss of defendant is granted to the extent that the fourth (breach of fundamental obligations of contract), fifth (breach by "change and abandonment" of contract), sixth (breach of "obligation to negotiate in good faith"), eighth (breach of material terms of contract), ninth (breach of fiduciary duty) and tenth (unjust enrichment) causes of action of the amended complaint are dismissed, and the motion is otherwise denied; and it is further

ORDERED that defendant is directed to serve an answer to the amended complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to post to NYSCEF a proposed preliminary conference order or a counter proposed preliminary conference order on April 19, 2021.

DECISION

It is hornbook law that "[w]hen a court rules on a CPLR 3211 motion to dismiss, it 'must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiff[] the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory'" (Whitebox Concentrated Convertible Arbitrage Ptnrs LP v Superior Well Servs, Inc, 20 NY3d 59, 63 [2012] [citations omitted]).

Here, the facts of neither the ninth cause of action for breach of fiduciary duty nor of the tenth cause of action for unjust enrichment, as alleged in the amended complaint, state cognizable claims. As to breach of fiduciary duty, plaintiff makes no factual allegations as to any special relationship between the parties to the subcontract (see GSCP VI EdgeMarc Holdings, LLC v ETC Northeast Pipeline, LLC, \_\_AD3d \_\_, 2021 NY Slip Op 01356 [1<sup>st</sup> Dept 2021]). With respect to unjust enrichment, plaintiff does not dispute the existence of a subcontract that governs the parties' dispute, which subcontract defendant acknowledges, and therefore such claim may not be

maintained (see Goldstein v CIBC World Markets Corp, 6 AD3d 295, 296 [1st Dept 2004]).

This courts finds that the fourth, fifth, sixth, and eighth causes of action are repetitive of the first, second, third, and seventh causes of action of the amended complaint that also sound in breach of contract, and therefore shall dismiss same (see Squire Records, Inc v Vanguard Recording Soc, Inc, 25 AD2d 190, 192 [1<sup>st</sup> Dept 1966]).

With respect to defendant's argument that plaintiff has not sufficiently pled that it provided timely written notice of claims, concededly a condition precedent under the subcontract, this court disagrees. The allegations of paragraphs 20 and 21 of the complaint suffice in that regard (see 1199 Housing Corp v International Fidelity Ins Co, 14 AD3d 383, 384 [1<sup>st</sup> Dept 2005]). As the First Department held in 1199 Housing Corp, with respect to the defense of failure to comply with a condition precedent of a contract, the pleading burden rests upon defendant. Moreover, this court never elected to notify the parties that it would treat defendant's motion for dismissal as one for summary judgment. Thus, it would be inappropriate for the court to order an immediate trial on the issue of timely notice, prior to joinder of issue pursuant to CPLR 3211(c).

Subcontract ¶4.1 provides, as a condition precedent to its rights to claim extra compensation and reimbursement for extra

work, that plaintiff submit to defendant verified, time and material records on a daily basis of all work performed under protest. On that basis, the first and second causes of action for breach of contract are cognizable.

As to the third cause of action for breach of contract arising from extra work and unknown delays, this court finds that such claim sufficiently asserts damages for delays that were not contemplated in either the subcontract or the Acceleration Agreement of April 11, 2016. Thus, this court finds that such cause of action seeks damages that are exceptions to the enforceability of the "no-damages-for delay" provisions of the subcontract, as set forth in Corinno Civetta Constr Corp v City of New York, (67 NY2d 297, 309-311 [1986]).

Subcontract ¶ 2.1 provides: "Any payment for work performed or materials supplied that has been properly invoiced and is more than seven (7) calendar days due shall bear interest at the rate set from time to time by the State Tax Commission." Such provision supports plaintiff's seventh cause of action seeking an award of interest for late payments.

*Debra A. James*  
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<u>3/18/2021</u> DATE			<u>DEBRA A. JAMES, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE