

**Alliance Tri-State Constr., Inc. v New York City
Hous. Auth.**

2021 NY Slip Op 32207(U)

October 28, 2021

Supreme Court, Kings County

Docket Number: Index No. 511291/21

Judge: Leon Ruchelsman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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ALLIANCE TRI-STATE CONSTRUCTION, INC.,
individually, and on behalf of all other
similarly situated New York Lien Law
Article 3-A trust beneficiaries,

Plaintiff, Decision and order

- against -

Index No. 511291/21

NEW YORK CITY HOUSING AUTHORITY, AWL
INDUSTRIES, INC., ROBERT PAVLOVICH,
FIDELITY AND DEPOSIT COMPANY OF
MARYLAND and JOHN AND JANE DOES 1-25,

Defendants, October 28, 2021

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PRESENT: HON. LEON RUCHELSMAN

The defendants have moved seeking to dismiss three causes of action of the complaint pursuant to CPLR §3211. The plaintiff opposes the motion. Papers were submitted by the parties and after reviewing all the arguments this court now makes the following determination.

On March 21, 2018 the defendant AWL a general contractor entered into a subcontract with the plaintiff. The subcontract required the plaintiff to provide roofing materials and labor for a construction project at 2410 Surf Avenue in Kings County. The contract provided the plaintiff would be compensated in the amount of \$1,650,000. As the project progressed the parties agreed to provide additional compensation in exchange for additional work. The plaintiff alleges they are owed at least \$255,000 and instituted this lawsuit seeking recovery of those sums owed. The complaint alleges eight causes of action

including proceeds from the lien discharge bond, breach of contract, trust fund diversion, breach of fiduciary duty, account stated, conversion, quantum meruit and unjust enrichment. The defendants have now moved seeking to dismiss the causes of action for breach of fiduciary duty, quantum meruit and unjust enrichment on the grounds they are duplicative of the remaining causes of action. The plaintiff opposes the motion arguing these causes of action may be pled in the alternative.

Conclusions of Law

It is well settled that "[a] motion to dismiss made pursuant to CPLR §3211[a][7] will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (see, e.g. AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]).

Concerning the fourth cause of action alleging a breach of fiduciary duty, it is well settled that when a claim for breach

of a fiduciary duty is merely duplicative of a breach of contract claim where they are based on the same facts and seek the same damage then the breach of fiduciary claim cannot stand (Pacella v. Town of Newburgh Volunteer Ambulance Corps, Inc., 164 AD3d 809, 83 NYS3d 246 [2d Dept., 2018]). In this case the cause of action alleging any breach of a fiduciary duty is identical to the breach of contract claim, namely that the defendants have failed to honor the terms of the subcontract and have not paid the plaintiff to sums owed. Consequently, the motion seeking to dismiss the fourth cause of action is granted.

Turning to the cause of action for quantum meruit, it is well settled that a plaintiff may file an action for quantum meruit as an alternative to a breach of contract claim (see, Thompson v. Horowitz, 141 AD3d 642, 37 NYS3d 266 [2d Dept., 2016]). "To be entitled to recover damages under the theory of quantum meruit, a plaintiff must establish: "(1) the performance of services in good faith, (2) the acceptance of services by the person or persons to whom they are rendered, (3) the expectation of compensation therefor, and (4) the reasonable value of the services rendered" (F and M General Contracting v. Oncel, 132 AD3d 946, 18 NYS3d 678 [2d Dept., 2015]).

In this case, the complaint alleges that "in the alternative that the Court rules that some or all of the labor and materials provided by Plaintiff to Defendants AWL and NYCHA for the Project


was not pursuant to a valid and enforceable contract, Plaintiff has conferred substantial benefits on Defendants AWL and NYCHA by providing labor and materials for the Project, the fair, just and reasonable value of the unpaid labor and materials being not less than \$255,600" (see, Verified Complaint, ¶96). Thus, even though there is a written contract entered between the parties the complaint alleges that additional work was performed and consequently, at this stage of the pleadings the quantum meruit cause of action is valid. Of course, discovery engaged between the parties will narrow and sharpen the issue and upon the conclusion of all discovery either party may file any substantive motion.

Turning to the motion seeking to dismiss the cause of action for unjust enrichment, it is well settled that a claim of unjust enrichment is not available when it duplicates or replaces a conventional contract or tort claim (see, Corsello v. Verizon New York Inc., 18 NY3d 777, 944 NYS2d 732 [2012]). As the court noted "unjust enrichment is not a catchall cause of action to be used when others fail" (*id.*). Consequently, the motion seeking to dismiss the claim of unjust enrichment is granted.

So Ordered.

ENTER:

DATED: October 28, 2021
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC