

Pope Contr., Inc. v New York City Hous. Auth.
2021 NY Slip Op 32397(U)
November 9, 2021
Supreme Court, New York County
Docket Number: Index No. 656939/2019
Judge: Margaret A. Chan
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MARGARET CHAN PART 49M

Justice

-----X

POPE CONTRACTING, INC.

Plaintiff,

- v -

NEW YORK CITY HOUSING AUTHORITY,

Defendant.

-----X

INDEX NO. 656939/2019

MOTION DATE _____

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88

were read on this motion to/for DISMISSAL.

In this breach of contract action, defendant New York City Housing Authority (“NYCHA”) moves to dismiss plaintiff Pope Contracting, Inc.’s (“Pope”) verified amended complaint in its entirety pursuant to CPLR 3211(a)(1) and (a)(7). Plaintiff opposes the motion and cross-moves to file a late notice of claim. The Decision and Order is as follows:

BACKGROUND

In October 2015, NYCHA awarded Pope a contract (“Sheepshead Contract”) for roof repairs at the Sheepshead Bay Houses for the sum of \$17,504,260.53 (NYSCEF # 61).

In April 2017, Pope commenced an action against NYCHA claiming that NYCHA breached the Sheepshead Contract by not paying certain payment requisitions, leading to a decrease in Pope’s capitalization and loss of profits. As a result, Pope was unable to secure sufficient bonding to bid on other contract work (NYSCEF # 54). NYCHA asserted counterclaims for liquidated damages and a breach of the Sheepshead Contract resulting from Pope’s abandonment of the work (NYSCEF # 55).

On February 14, 2019, the parties entered into a Settlement Agreement that resolved the 2017 litigation (NYSCEF # 56). The Settlement Agreement specifically states in the recitals that it “is made in compromise of dispute claims in the [2017 Litigation]” and that “Pope and NYCHA are working toward final payment to Pope in the normal course and under the [Sheepshead Contract], but issues remain that

prevent closing out the [Sheepshead Contract] and are not alleged or addressed in the [2017 litigation]" (NYSCEF # 56 at 1). The items listed are:

“(i) Contract Schedule of Values item nos. H3-A (ACM Removal Main Roof), H3-B (ACM Removal Bulkhead/Motor Roof), H3-C (ACM Removal Community Center Roofs), H3-D (ACM Removal Roof Drains), and H-5 (ACM Removal Misc. Sealants) (collectively, "ACM Removal Items"); (ii) Pope's proposed change order submitted on January 8, 2019 which seeks additional compensation for "Base Flashing Motor Room," "Base Flashing Bulkhead," "Caulking Door Frame," "Drain Flashing," "Fan Flashing," "Stair Pitch Pocket," "Temporary Roofing," "Fascia Gravel Stop Flashing," and "Vent Stack Flashing"(the" Proposed Change Order"); and (iii) retainage under the Contract ("Retainage") (ACM Removal Items, Proposed Change Order, and Retainage, collectively, the "Outstanding Items)" (*id.*).

Paragraph 9 of the Settlement Agreement is titled “Assurances,” and states that the parties “will continue to negotiate in good faith to attempt to resolve the Outstanding Items and close out the Contract in normal course...” (*id.*, ¶ 9).

Paragraph 6 of the Settlement Agreement is titled “Complete Agreement” and states that “[t]his agreement, including the Stipulation, constitutes the entire agreement between the Parties and supersedes all prior agreements and undertakings of the Parties, whether written or oral, with regard to the matters set forth herein” (*id.*, ¶ 6).

Prior to, and separate from the Settlement Agreement, NYCHA informed Pope in January 2019 that it would take a credit of \$385,115.76 against Pope based on its alleged overbilling for quantities of asbestos containing material (“ACM”) claimed to have been disposed but not reflected on the ACP-21 forms issued by the New York City Department of Environmental Protection (NYSCEF # 67). In response, Pope submitted a proposed change order on January 8, 2019, seeking an additional \$511,175.26 for ACM abatement and disposal for amounts exceeding the ACP-21 forms. Pope claims that NYCHA rejected the proposed change order on April 5, 2019 (NYSCEF #69 at 2)

On May 30, 2019, Pope sent NYCHA a letter claiming its entitlement to \$511,175.26 and rejecting NYCHA’s claimed \$385,115.76 credit (NYSCEF # 80). Pope claims that this letter constitutes its Notice of Claim. NYCHA responded on July 3, 2019, asking for more information, but did not outright deny Pope’s claim (NYSCEF # 81). Pope responded to the request for more information on July 22, 2019 (NYSCEF # 82). NYCHA denied Pope’s claims by letter on September 27, 2019

on the basis that Pope failed to timely file notice of claim, amongst other reasons (NYSCEF # 70 at 1).

Pope therefore initiated this action in November 2019. Plaintiff's amended complaint alleges causes of action for: 1) breach of contract; 2) breach of the implied covenant of good faith and fair dealing; 3) fraud; 4) promissory estoppel; and 5) unjust enrichment (NYSCEF # 53).

DISCUSSION

In deciding a motion to dismiss pursuant to CPLR 3211(a), the court must liberally construe the pleading, accept the alleged facts as true, and accord the non-moving party the benefit of every possible favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 570 [2005]). “The court must determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon*, 84 NY2d at 88).

Breach of Contract Claim (First Cause of Action)

Here, the parties dispute which agreement controls the disposition of Pope's breach of contract claim. Pope claims that the Settlement Agreement supersedes the Sheepshead Contract. NYCHA claims that the Settlement Agreement did not vitiate the Sheepshead Contract and that Pope failed to comply with the notice provisions of the Sheepshead Contract, necessitating dismissal of Pope's breach of contract claim. NYCHA is correct.

“[W]hen parties set down their agreement in a clear, complete document, their writing should ... be enforced according to its terms” (*W.W.W. Assocs., Inc. v Giancontieri*, 77 NY2d 157, 162 [1990]; *see South Rd. Assocs., LLC v Intl. Bus. Machines Corp.*, 4 NY3d 272, 277 (2005)). And, “[e]xtrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous, which is an issue of law for the courts to decide” (*Greenfield v Phillis Records, Inc.*, 98 NY2d 562, 569 [2002]). A written contract should be read as a whole to give each clause its intended purpose, and “[p]articlar words should be considered, not as if isolated from the context, but in the light of the obligations as a whole and the intention of the parties as manifested thereby” (*Matter of Stravinsky*, 4 AD3d 75, 81 [1st Dept 2003] [internal citation and quotation omitted]; *Duane Reade, Inc. v Cardtronics, LP*, 54 AD3d 137, 144 [1st Dept 2008]). In accordance with these principles, a court should interpret a contract “so as to give full meaning and effect to material provisions” and so as not to “render any portion meaningless” (*Beal Savings Bank v Sommer*, 8 NY3d 318, 324-325 [2007], quoting *Excess Ins. Co. Ltd. v Factory Mut. Ins. Co.*, 3 NY3d 577, 582 [2004]).

The Settlement Agreement plainly states in the recitals and paragraph 9 that the agreement “is made in compromise of dispute claims in the [2017 Litigation]” and that “Pope and NYCHA are working toward final payment to Pope in the normal course and under the [Sheepshead Contract], but issues remain that prevent closing out the [Sheepshead Contract] and are not alleged or addressed in the [2017 litigation]” (NYSCEF # 56 at 1). The Settlement Agreement specifically identified asbestos mitigation work as being left out.

Pope’s proposed interpretation of the Settlement Agreement is simply untenable and prioritizes the language of “Complete Agreement” in paragraph 6 at the expense of all other terms in the Settlement Agreement. To read the Settlement Agreement as Pope proposes would ignore the recital and paragraph 9, which states that the parties “will continue to negotiate in good faith to attempt to resolve the Outstanding Items and close out the Contract in normal course...” (*id.*, ¶ 9). The “normal course” here is through the Sheepshead Contract. Paragraph 9 of the Settlement Agreement is merely an agreement to attempt negotiation, nothing more. As such, the Sheepshead Contract controls.

The Sheepshead Contract states that “if [Pope]... claims compensation for any damages sustained by reason of any act or omission of [NYCHA]...[Pope] shall, within twenty (20) days after such claim shall have arisen, file with [NYCHA] written notice of intention to make a claim” (NYSCEF # 64, § 33[a]). The “filing by [Pope] of a notice of claim... shall be a condition precedent (unless such condition is waived by [NYCHA] in writing) to the settlement of any claim or to [Pope’s] right to resort to any proceeding or action to recover thereon” (*id.*, ¶ 33[b]).

NYCHA argues that Pope’s claim arose on January 8, 2019; Pope argues that its claim arose on April 5, 2019. Pope provided notice of its claims on May 30, 2019. Thus, even using Pope’s claim accrual date, pursuant to the plain terms of the Sheepshead Contract, Pope failed to provide timely notice to NYCHA of its underpayment claims within the requisite 20 days.

Pope’s argument that Public Housing Law (“PHL”) § 157 and General Municipal Law (“GML”) § 50-e should apply and that the notice window should be 90 days is flawed as it requires a finding that the Settlement Agreement controls a disposition here. However, as the Sheepshead Contract controls and has an unambiguous claims procedure, Pope’s contention that a 90-day window should apply cannot be sustained.

Pope’s further argument that NYCHA waived its right to assert that Pope did not timely file a notice of claim is also incorrect. Section 57 of the Sheepshead Contract explicitly states that “[n]o act done or permitted to be done by any member, officer, agent or employee of [NYCHA] at any time shall be deemed to be a waiver of any provision of the [Sheepshead Contract], excepting only a resolution of

the members of [NYCHA] providing expressly for such waiver” (NYSCEF # 64, § 57). The combination of Sheepshead Contract § 33 notice provision and § 57 waiver and estoppel clause act as a complete answer to Pope’s argument that there are triable issues of fact as to whether NYCHA waived compliance with the notice provision (*see A.H.A. Gen. Const., Inc. v New York City Hous. Auth.*, 92 NY2d 20, 33 [1998]).

Furthermore, the notice of claim provision of the Sheepshead Contract is a strict condition precedent and “neither prior dealings among the parties nor actual knowledge by [NYCHA] of plaintiff’s claims and alleged damages relieve[s] plaintiff of the obligation to serve a timely and sufficiently detailed notice of claim” (*S.J. Fuel Co., Inc. v NYCHA*, 73 AD3d 413 [1st Dept 2009]). Additionally, the parties’ participation in settlement negotiations does not waive the notice provision (*see Hi-Tech Constr. & Mgt. Servs. Inc. v Housing Auth. Of the City of NY*, 125 AD3d 542, 543 [1st Dept 2015] [“Defendant’s defense of this litigation and participation in settlement negotiations did not constitute a waiver of [notice provision], nor was defendant estopped from moving for dismissal on that ground”]).

Pope’s only potential breach of contract claim here is a breach of NYCHA’s obligation in the Settlement Agreement “to negotiate in good faith to attempt to resolve the Outstanding Items and close out the Contract in normal course...” (NYCHA # 5, ¶ 9). Pope claims that NYCHA “breached the Settlement Agreement by failing to negotiate in good faith and make any additional payments for the Outstanding Items” (NYSCEF # 53, ¶¶ 33-34). However, paragraph 9 of the Settlement Agreement is merely an agreement to agree and is unenforceable (*see Yan’s Video, Inc. v Hong Kong TV Video Programs, Inc.*, 133 AD2d 575, 578 [1st Dept 1987] [agreement to “negotiate in good faith” upon terms and conditions to be negotiated is unenforceable agreement to agree]).

As the Sheepshead Contract controls and Pope failed to file a notice within twenty days of its claim accruing, as required, and there is no actionable breach of the Settlement Agreement, Pope’s first cause of action must be dismissed.

Breach of Implied Covenant of Good Faith and Fair Dealing (Second Cause of Action)

Pope’s second cause of action for breach of the implied covenant of good faith and fair dealing must be dismissed as it is merely a substitute for a nonviable breach of contract claim (*Triton Partners LLC v Prudential Securities Inc.*, 301 AD2d 411, 411 [1st Dept 2003]).

Promissory Estoppel and Unjust Enrichment Claims (Third and Fourth Causes of Action)

Pope's third and fourth causes of action must be dismissed because 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" (*Clark-Fitzpatrick, Inc. v Long Is. R. Co.*, 70 NY2d 382, 389 [1987]). As discussed above, the Sheepshead Contract controls disposition of this matter and it covers the entirety of the dispute between the parties. Pope's claims are quasi-contractual in nature and must be dismissed because of the existence of the Sheepshead Contract (*see ID Beauty S.A.S. v Coty Inc.*, 164 AD 1186, 1186 [1st Dept 2018] ["promissory estoppel claim is barred by the alleged existence of a contract"]; *Goldstein v CIBC World Markets Corp.*, 6 AD3d 295, 296 [1st Dept 2004] ["a claim for unjust enrichment... may not be maintained where a contract exists between the parties covering the same subject matter"]).

Fraud Claim (Fifth Cause of Action)

Pope's fifth cause of action is for fraud. Pope claims that NYCHA "fraudulently induced Plaintiff to enter into the Sheepshead Contract by claiming that, in lieu of Plaintiff charging the appropriate price per unit for asbestos removal, Plaintiff should charge a deflated price and Defendant would increase the price per unit to ensure the total cost remained the same" (NYSCEF # 53, ¶ 42). CPLR 3016 requires that "[w]here a cause of action... is based upon... fraud... the circumstances constituting the wrong shall be stated in detail" (CPLR 3016[b]).

Pope does not plead with the requisite specificity to maintain a cause of action for fraud. Pope does not identify any dates on which misrepresentations occurred, or individuals or representatives who made any misrepresentations (*Raytheon Co. v AES Red Oak, LLC*, 37 AD3d 364, 365 [1st Dept 2007] ["the allegation of an oral misrepresentation did not particularize when or by whom it had been made"]). Furthermore, Pope has no basis to allege that it was fraudulently induced to enter into the Settlement Agreement as it contains a clear integration clause (*see General Bank v Mark II Imports, Inc.*, 293 AD2d 328, 328 [1st Dept 2002] [fraud claim barred as a matter of law by integration clause]). As such, Pope's fifth cause of action for fraud must be dismissed.

Prematurity Argument

Pope argues that NYCHA's motion to dismiss is premature, claiming that the disputes at issue here require discovery for a full resolution. However, the documentary evidence presented and Pope's own arguments necessitate dismissal of Pope's complaint. The documentary evidence presented here is clear: the

Sheepshead Contract controls disposition of this matter and Pope failed to timely submit a notice of claim. Even utilizing Pope’s own date for claim accrual necessitates dismissal on this ground. No discovery is needed to resolve the claims at issue here. As such, Pope’s prematurity argument is rejected.

Pope’s Cross-Motion For Leave to File Late Notice of Claim

Pope cross-moves for leave to file late notice of claim pursuant to GML § 50-e(5). However, the GML does not apply to contract-based claims against NYCHA, and the Sheepshead Contract does not make any references to the GML. Pope supplies no basis for substituting the GML’s late notice provision in place of the clear and unambiguous notice provision in the Sheepshead Contract. As such, there is no basis to grant Pope’s cross-motion and it is denied.

Accordingly, it is ORDERED that NYCHA’s motion to dismiss is granted and Pope’s complaint is dismissed in its entirety; it is further

ORDERED that Pope’s cross-motion for leave to file late notice of claim is denied; it is further

ORDERED that NYCHA file notice of entry upon Pope within fifteen (15) days of issuance of this Order; it is further

ORDERED that the Clerk of the Court enter judgment as written.

This constitutes the Decision and Order of the court.

11/9/2021
DATE


MARGARET A. CHAN, J.S.C.
MARGARET CHAN, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT REFERENCE