SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LYLE E. FRANK** **PART** **11M**

Justice

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VIKXS SERVICES, INC.,

Plaintiff,

- v -

HUDSON MERIDIAN CONSTRUCTION GROUP, 2401 THIRD AVENUE OWNER LLC,LIBERTY MUTUAL INSURANCE COMPANY

Defendant.

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INDEX NO. 150426/2023

MOTION DATE 04/19/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 29

were read on this motion to/for DISMISS.

Upon the foregoing documents, the motion for partial dismissal by defendants is granted.

Facts

Plaintiff VIKXS SERVICES, INC. is a subcontractor to defendant HUDSON MERIDIAN CONSTRUCTION GROUP (HMCG), which acted as the general contractor to the co-defendant 2401 THIRD AVENUE OWNER LLC. Plaintiff alleged that it had performed the scaffolding work contracted by HMCG but hasn't been paid accordingly. To seek recovery of the unpaid remuneration, plaintiff filed a mechanic's lien attached to the property of 2401 THIRD AVENUE OWNER. HMCG later filed a discharging bond against the mechanic's lien pursuant to Lien Law § 19(4). Plaintiff commenced the action and demanded foreclosure of the lien, claiming defendants failed to perform their duties under the contract. Defendants filed the motion to dismiss the first, third, fourth and fifth claim, claiming they are duplicative of the breach of contract claim or should be dismissed pursuant to Lien Law § 37(7).

Motion to dismiss general standard

On a motion to dismiss the court "merely examines the adequacy of the pleadings", the court "accept as true each and every allegation made by plaintiff and limit our inquiry to the legal sufficiency of plaintiff's claim." *Davis v Boeheim*, 24 N.Y.3d 262, 268 (internal citations omitted).

CPLR § 3211(a)(1)

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 N.Y.2d 83, 88 (emphasis added). "[S]uch motion may be appropriately granted only where the documentary evidence *utterly refutes* plaintiff's factual allegations." *Goshen v. Mut. Life Ins. Co.*, 98 N.Y.2d 314, 326 (emphasis added). A paper will qualify as "documentary evidence" only if it satisfies the following criteria: (1) it is "unambiguous"; (2) it is of "undisputed authenticity"; and (3) its contents are "essentially undeniable". *VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 A.D.3d 189, 193 [1st Dept. 2019]. "[T]he documentary evidence, i.e., the *affidavits* and *emails* of North Shore and Inter-Reco personnel, do not qualify as 'documentary evidence" for purposes of CPLR 3211 (a) (1)." *United States Fire Ins. Co. v. North Shore Risk Mgt.*, 114 A.D.3d 408, 409 [1st Dept. 2014]

CPLR § 3211(a)(7)

"In assessing a motion under CPLR 3211 (a) (7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" *Leon v. Martinez*, 84 N.Y.2d 83, 88. "What the Court of Appeals has consistently said is that evidence in an affidavit used by a defendant to attack the sufficiency of a pleading "will seldom if ever warrant the relief [the defendant] seeks unless [such evidence] establish[es] conclusively that plaintiff has no cause of action". *Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*,

115 A.D.3d 128, 134 [1st Dept. 2014]. "[T]he Court of Appeals has made clear that a defendant can submit evidence in support of the motion attacking a well-pleaded cognizable claim." *Id.*

Quantum Meruit and Unjust Enrichment (The Fourth and Fifth Count)

At issue here is whether the subcontract governs the disputed scaffolding work done by plaintiff. If so, the quasi-contract claims should be dismissed as duplicative of the breach of contract claim. Accordingly, the court will read the subcontract first.

Article 2.1 *Subcontract Documents* defines the constituents making up the subcontract, which includes the agreement signed by both plaintiff and HMCG, the exhibits annexed to the agreement and change orders. See NYSCEF Doc. No. 22, page 2. Put differently, the signed agreement, the exhibits and change orders are all parts of the entire contract, thus should be construed to make every part of the contract valid and enforceable. Article 2.2 delineates all annexed exhibits, and among which is Exhibit B, titled *Scope of Work*. It specifies the work must be performed by subcontractor: "This Subcontractor *shall* provide for the furnishing of… *scaffolding* for protection, *scaffolding* for creating work platforms, … as they become necessary for the performance of all **Façade Maintenance** for the **2401 3rd Avenue Project** in accordance with the *following Contract Documents* and the Additional Provision stated herein." See NYSCEF Doc. No. 26, page 1, Item B. This was signed by Victor Bober, the principal of plaintiff, on the same day as he signed the subcontract. Both the subcontract and Exhibit B are documentary evidence acknowledged by both parties.

The provision says two things here: first, providing scaffolding is part of subcontractor's work if it is necessary for the façade maintenance, the primary purpose of the subcontract. See NYSCEF Doc. No. 22, page 4. Second, the first point directly contradicts Bober's interpretation of the scope of work, which unreasonably zeros in on the title of the work *Furnish and Install the*

Façade Maintenance System, claiming installation of the BMU system is the only job contracted by both parties. See NYSCEF Doc. No. 21, ¶ 6. The interpretation misses the critical component of the provision requiring the work be done "in accordance with the Subcontract Documents", which include Exhibit B. See NYSCEF Doc. No. 22, Article 3.1. The construction approach was criticized by the Court of Appeals, which cautioned "(t)he meaning of a writing may be distorted where *undue force* is given to single words or phrases. The court reads the writing as a whole." *Empire Properties Corp. v. Manufacturers Trust Co.*, 288 N.Y. 242, 243. The court also emphasized that "(a) cardinal principle governing the construction of contracts is that the *entire contract* must be considered and, … That interpretation is favored which will make every part of a contract effective." *Rentways, Inc. v. O'Neill Milk & Cream Co.*, 308 N.Y. 342, 345.

Given the dynamic and complex nature of the construction project, the subcontract anticipates potential change to the contracted work and contains Article 9, titled *Changes in Work*, which reads in pertinent part that "'Changes in the work' within the general scope of the work consisting of additions, deletions or other revisions may be accomplished after execution of and without invalidating this Subcontract, by a 'Change Order'…". See NYSCEF Doc. No. 25, page 15. The above analysis tells that "the work within the general scope of the work" includes scaffolding, modification of which can be achieved through the device of change order. Article 9.2 continues to define change order as "a written instrument prepared and signed by Contractor and signed by Subcontractor, stating their agreement upon one or more of the following: change in the work; or the amount of the adjustment, if any, in the subcontract price…" *Id*. In other words, the change order is co-signed and acknowledged by both parties and acts as an amendment to the subcontract, detailing the change in the work, adjustment of the contract price and the extent of the adjustment. The change orders submitted by defendants fit neatly into the definition and they

contain signatures of both parties, the adjusted contract value, and a description of the change in work, which states in pertinent part that "this is a change order to VikXS Services Inc. for providing *temporary scaffolds* to aid with installing façade elements throughout the project." See NYSCEF Doc. No. 27. Notice that all three documents, the subcontract, Exhibit B and change orders, share the same project code: 18-0791, another prove that they are all parts of the same contract and interlocking with each other. These documents utterly refute plaintiff's allegations that "the scope of work refers exclusively to the installation of the BMU System, not the provision of temporary scaffolding" and "there was never any agreement that the terms of the BMU Subcontract would apply to the suspension scaffolding work." See NYSCEF Doc. No. 21, ¶ 6 & 7. Accordingly, the court adjudges that the subcontract and its annexes govern the disputed scaffolding work performed by plaintiff.

Since plaintiff cannot prove there is a bona fide dispute as to the application of the subcontract here, all the quasi-contract claims should be dismissed as duplicative of the breach of contract claim given the existence of a valid and enforceable contract governing the disputed subject matter (the Victor Bober affidavit and the email exchange between parties do not qualify as documentary evidence for purposes of CPLR § 3211(a)(1), thus not considered by the court). See *Apfel v. Prudential-Bache Sec., Inc.*, 81 N.Y.2d 470, 479 (Appellate Division *erred* in reinstating plaintiffs' unjust enrichment claim on a quasi-contract theory. The transaction is controlled by the express agreement of the parties and their rights and liabilities are to be determined *solely* on theories of breach of contract). Also see *Randall v. Guido*, 238 A.D.2d 164, 164 [1st Dept. 1997] (A party may assert causes of action in both breach of contract and quasi-contract where there is a bona fide dispute concerning existence of a contract or whether the

contract covers the dispute in issue or where one party wrongfully has prevented the other from performing the contract.)

Account Stated (The Third Count)

"To state a claim for an account stated, the plaintiff must plead that: '(1) an account was presented; (2) it was accepted as correct; and (3) debtor promised to pay the amount stated.'" *Nat'l Econ. Research Assocs. v. Purolite "C" Corp.*, 2011 U.S. Dist. LEXIS 24458, *6-7. The second and third elements "may be implied if 'a party receiving a statement of account keeps it without objecting to it within a reasonable time." *Id.*

Here, plaintiff did plead a sufficient account stated claim by alleging "Plaintiff duly *submitted* its invoices, requisitions, and change order to HMCG… for the funds due…including the amount currently in issue." "HMCG received the invoices and *failed to object* to said invoices within a reasonable amount of time." *Id.* at ¶ 29. These allegations are not objected by defendants.

But defendants sought to dismiss the claim as duplicative of the breach of contract one, claiming both claims sought the same damages. See NYSCEF Doc. No. 12, page 8, point II. A claim for an account stated is duplicative of a claim for breach of contract where there is an *enforceable* contract between the parties (*Dubinsky v Levine*, 200 AD3d 574, 574 [1st Dept 2021]). Put another way, "[a] claim for an account stated may not be utilized *simply* as another means to attempt to collect under a disputed contract." *Sabre Intern. Sec., Ltd. v Vulcan Capital Mgt., Inc.*, 95 AD3d 434, 438 [1st Dept 2012]. Also see *Estate of Nevelson v Carro, Spanbock, Kaster & Cuiffo*, 290 AD2d 399, 400 [1st Dept 2002] ["*It is not the theory* behind a claim that determines whether it is duplicative"]

Here, the account stated is simply pleaded in the alternative to collect the same damages as sought in the breach of contract claim. First, the above analysis shows there is an enforceable

contract governing the disputed work done by plaintiff. Second, plaintiff alleged that the account presented to HMCG includes "the amount currently in issue", which is supposed to refer to the damages sought in the immediately preceding breach of contract claim, i.e., the value of the work performed $176,513.70 and demobilization costs of $20,000. NYSCEF Doc. No. 1, ¶ 26 & 29. Therefore, the account stated claim is simply used as another way to recover the same damages, hence should be dismissed as a duplicative claim. See *St. George Outlet Dev., LLC v Casino Mech. Corp.*, 2020 N.Y. Misc. LEXIS 1838, *5 (the written Subcontracts include a procedure for change orders and that the Account Stated claim covers the *same issues and damages* as the Breach of Contract claim, the Second Counterclaim sounding in Account Stated must be dismissed as duplicative of the First Counterclaim).

To Foreclose Mechanic's Lien against All Defendants (The First Count)

At issue here is whether the foreclosure of mechanic's lien claim against the 2401 owner should be maintained after the lien had been bonded by contractor HMCG pursuant to Lien Law § 19(4). See NYSCEF Doc. No. 28. Plaintiff cited the First Department's 1972 opinion in *Harlem* and argued that since plaintiff "elected to bring this equitable action to enforce its lien, as it had a right to do", defendant 2401 Third Avenue "is a necessary party defendant" even after "a discharge of the lien" was obtained. *Harlem Plumbing Supply Co., Inc. v. Handelsman*, 40 A.D.2d 768, 768. Defendants disagreed, arguing the main support for the holding is a pure technical consideration and motion courts in New York County have deviated from *Harlem* and adopted the modern trend followed by the Second and Third Departments, relieving the property owner as the necessary party to the foreclosure claim after a discharging bond was filed.

It should be noted that *Harlem* is still good law, the legal basis for *Harlem* is Lien Law § 44(3) and the statute requires registered owners to be named as parties to the foreclosure action.

However, § 44(3) does not directly deal with the situation when a discharging bond is filed and the lien is unattached to the underlying property anymore, as are the facts in the present case. That task is assigned to Lien Law § 37(7), which unambiguously delineates the required parties in such an action and that includes "the *principal and surety* on the bond, the *contractor*, and all *claimants* who have filed notices of claim prior to the date of the filing of such summons and complaint." Accordingly, the first claim should be dismissed against the 2401 owner pursuant to CPLR § 3211(a)(1) as the owner is not a necessary party to the action anymore.

Based on the foregoing, it is hereby

ADJUDGED that defendants' motion to dismiss pursuant to CPLR § 3211(a)(1) & (a)(7) is granted in its entirety and it is further

ORDERED that the first cause of action is dismissed as against defendant 2401 Third Avenue Owner LLC only, and third, fourth and fifth causes of action against all defendants are dismissed.

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4/25/2023
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE

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