

MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 2

NOVA STAR ELECTRIC CORP., x

Plaintiff,

INDEX NO. 24978/05

- against -

MOTION SEQ. NO. 3

GRANITE HALMAR CONSTRUCTION
COMPANY, INC., ST. PAUL FIRE AND
MARINE INSURANCE, FEDERAL
INSURANCE COMPANY and TRAVELERS
CASUALTY AND SURETY COMPANY,

BY: WEISS, J.

DATED: March 4, 2008

Defendants.

x

The defendants have moved for partial summary judgment dismissing (1) those parts of the first and fifth causes of action which are for "mobilization" expenses, (2) that part of the second cause of action which is for extra work, (3) the sixth cause of action for recovery in quantum meruit, (4) and the seventh cause of action to recover on a payment bond.

In or about December 2002, defendant Granite Construction Northeast, Inc. f/k/a Granite Halmar Construction Co., Inc. (Granite) entered into a contract with the National Railroad Passenger Corporation (Amtrak) whereby the former obligated itself to perform work on the First Avenue and Long Island City East River Tunnel ventilation shafts and facilities. Defendant Granite and plaintiff Nova Star Electric Corp. (Nova Star) signed a letter of intent expressing their intention of entering into a subcontract

whereby plaintiff Nova Star would perform electrical work on the project at a price of \$29,369,383. Plaintiff Nova Star began to work pursuant to the letter of intent, but the parties could not reach an agreement on the terms of a subcontract and/or Nova Star could not supply requisite bonds and, on or about July 14, 2003, defendant Granite directed Nova Star to terminate its work. The parties' attempt to reach a settlement concerning the amount Granite owed to Nova Star failed. On or about November 18, 2005, the plaintiff began this action by the filing of a summons and a complaint asserting six causes of action sounding in breach of contract, quantum meruit, and suretyship.

Those branches of the defendants' motion which are for summary judgment dismissing those parts of the first and fifth causes of action which are for "mobilization" expenses are denied. The plaintiff alleges that defendant Granite promised a 4% "mobilization" payment in the amount of \$1,174,775.30 which remains unpaid. ("Mobilization" involves preliminary work on a construction project such as gathering equipment and ordering materials.) On the other hand, the defendants allege that the plaintiff agreed in the letter of intent not to seek payment for mobilization expenses incurred before the execution of a formal subcontract. The letter of intent expressly provided: "Nova Star therefore agrees that any costs incurred by Nova Star *** prior to the award of a contract to Granite Halmar, or prior to execution of a formal subcontract

agreement between Granite Halmar and Nova Star, will be at Nova Star's exclusive risk. Nova Star will not seek reimbursement for these costs for any reason ***." The defendants allege that the parties never executed a formal subcontract because the plaintiff could not furnish a performance bond. Summary judgment is precluded by an issue of fact pertaining to whether the letter of intent is an enforceable agreement. (See, Alster v Fitzgerald & Fitzgerald, P.C., 39 AD3d 678.) Even assuming that the letter of intent amounts to an enforceable contract, the conflicting allegations of the parties have created an issue of fact concerning whether they modified the clause pertaining to mobilization costs by words or course of conduct. (See, Barsotti's, Inc. v Consolidated Edison Co. of New York, Inc., 254 AD2d 211.) Finally, the defendants failed to establish here that the claim for mobilization expenses should be dismissed for spoliation of evidence. (See, Squitieri v City of New York, 248 AD2d 201.)

That branch of the defendants' motion which is for summary judgment dismissing that part of the second cause of action which is for extra work is denied. Plaintiff Nova Star alleges that defendant Granite required the performance of extra work having a value of \$34,921.47. Summary judgment is precluded by an issue of fact created by the conflicting evidence in the record concerning whether the plaintiff performed "extra work" for which it was not compensated. (See, Flour City Architectural Metals,

Inc. v Sky-Lift Corp., 223 AD2d 494.)

That branch of the defendants' motion which is for summary judgment dismissing the sixth cause of action which seeks to recover in quantum meruit is denied. The existence of a valid and enforceable written contract ordinarily precludes recovery on a quantum meruit basis. (See, EBC I, Inc. v Goldman Sachs & Co., 5 NY3d 11; Clark-Fitzpatrick, Inc. v Long Island R. Co., 70 NY2d 382.) A letter of intent or an agreement to agree which leaves material terms of a proposed contract for future negotiation is unenforceable. (See, Maffea v Ippolito, 247 AD2d 366; Andor Group, Inc. v Benninghoff, 219 AD2d 573.) In the case at bar, defendant Granite made the letter of intent subject to the terms and conditions to be expressed in an anticipated subcontract between the parties, and the defendant did not adequately show here that none of these terms and conditions to be agreed upon were not material. Moreover, the letter of intent leaves open the amount of the performance bond to be given by Nova Star and the work schedule to be followed, and there is some evidence in the record that the parties expected that the price to be paid to the subcontractor would be adjusted in future negotiations. Under the circumstances, there is an issue of fact concerning whether the letter of intent was merely an unenforceable agreement to agree or was an agreement sufficiently certain and specific as to be enforceable. (See, Alster v Fitzgerald & Fitzgerald, P.C., supra.) There is an issue

of fact concerning whether the letter of intent was expected to be a binding agreement or was a preliminary understanding between the parties looking to future negotiations concerning material unresolved matters. (See, Anderson v Source Equities, Inc., 43 AD2d 921.)

That branch of the defendants' motion which is for summary judgment dismissing the seventh cause of action which seeks to recover on a payment bond is granted. Plaintiff Nova Star did not provide the sureties and Amtrak with a notice of claim as required by section 4 of the payment bond. There must be compliance with applicable conditions precedent before a surety's obligations under a bond can mature. (See, U.S. Fidelity and Guar. Co. v Braspetro Oil Services Co., 369 F3d 34.) A third party beneficiary such as plaintiff Nova Star is strictly bound by the terms of a surety's payment bond and, in the case at bar, the plaintiff breached a condition precedent to recovery by not complying with the notice clause. (See, Lynbrook Glass and Architectural Metals Corp. v Elite Associates, Inc., 225 AD2d 525.) Moreover, contrary to its contention, the plaintiff's seventh cause of action is not brought under the federal Miller Act (40 USC § 3131 et seq.), which provides a federal cause of action to recover on a payment bond (see, F. D. Rich Co., Inc. v U. S. for Use of Indus. Lumber Co., Inc., 417 US 116) and which provides an alternative remedy to state remedies. (See, Harsco Corp. v Gripon

Const. Corp., 301 AD2d 90.) The complaint makes no mention of the Miller Act, and the plaintiff did not bring its seventh cause of action "in the name of the United States for the use of the person bringing the action. (See, 40 USC § 3133[b][3][A].) The plaintiff cannot avoid the dismissal of its seventh cause of action by arguing that it had only to meet the less restrictive notice requirements of the federal act. In any event, the plaintiff failed to assert the seventh cause of action within the limitations period provided by the Miller Act (see, 40 USC § 3133[b][4]; U.S. v Nat. Union Fire Ins. Co. of Pittsburgh, PA, 1999 WL 294730 [n.o.r.]), and the federal courts have exclusive jurisdiction over claims brought under the Miller Act. (See, U.S. for Use of B & D Mechanical Contractors, Inc. v St. Paul Mercury Ins., 70 F3d 1115; U.S. for Use of Owens-Corning Fiberglass Corp. v Brandt Const. Co., 826 F2d 643.)

The remaining branches of the defendants' motion are denied.

Short form order signed herewith.

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J.S.C.