STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

AJAY GLASS & MIRROR CO., INC.,

Plaintiff, DECISION AND ORDER

v. INDEX No. 2005/02962

AASHA G.C., INC., BARRY HALBRITTER and HUNT CONSTRUCTION GROUP, INC.,

Defendant.

I find that the Statute of Frauds is not applicable, because the writings that are alleged to make up the contract do not, by their very terms, make performance within a year impossible. Kron v. Hargler Fabrics, Inc., 91 N.Y.2d 362, 366 (1998); D & N Boenang, Inc. v. Kirsch Beverages Inc., 63 N.Y.2d 449, 455 (1984); and esp. Freedman v. Chemical Construction Corp., 43 N.Y.2d 260, 265 (1977). While it is true that where the documents alleged to support the creation of a contractual relationship have terms clearly encompassing performance over the course of many years, then the court must find that the statute is implicated. Shirley Polykoff Advertising, Inc. v. Houbigant, Inc., 43 N.Y.2d 921 (1978), which was decided as a companion matter with Freedman. But, in this case, the time-line for Ajay's performance contained in the documents it alleges make up the contract refers only to an 8½ month term. Accordingly, the

statute does not apply.[1] In any event, Hunt's invocation of the Statute of Frauds is procedurally infirm. The failure to plead the Statue of Frauds as an affirmative defense to a breach of contract claim precludes a defendant from relying upon it. Miranco Contracting Inc. v. Perel, 29 A.D.3d 873 (2d Dept. 2006); see CPLR 3018[b]; CPLR 3211[e]; Matter of Sheldon E. Goldstein, P.C., 276 A.D.2d 321, 322 (1st Dept. 2000); see also, Admae Enters. v. Smith, 222 A.D.2d 471 (2d Dept. 1995), and esp. Raoul v. Olde Village Hall, Inc., 76 A.D.2d 319 (2d Dept. 1980). Here, a review of the nine affirmative defenses pled by defendant reveals that none of them assert the Statute of Frauds.

Even if the statute applied, however, by reference to the terms of the General Contract requiring payment at the end of a multi-year construction project of which Ajay's work was only a part, as urged by Hunt, the writings alleged to support the existence of the contract are satisfactory under General Obligations Law §5-701(a)(1). There are two aspects to this analysis: First, whether the signed or unsigned writings alleged to constitute the contract may be considered together to show

[1] Hunt refers to language in the Prime Contract, incorporated in the owner's subsequent contract with AASHA, and in turn AASHA's sub-subcontract with plaintiff, calling for, as conditions precedent for final payment to plaintiff, Hunt's receipt of final payment for the owner, which by the terms of the Prime Contract would not occur until the end of a 440 day project. But Hunt refers to no language in any of the writings relied on to support the creation of a contract as between Hunt and plaintiff of a similar kind.

that a contract was entered into, and second, whether those writings themselves constitute an agreement or only an agreement to agree.

On the first point it is clear that the "agreement may consist of signed and unsigned writings, 'provided that they clearly refer to the same subject matter or transaction.'" Ruppert v. Ruppert, 245 A.D.2d 1139, 1140 (4th Dept. 1997)(citing Crabtree v. Elizabeth Arden Sales Corp., 305 N.Y. 48, 55 (1953)). See Marks v. Cowden, 226 N.Y. 138, 145 (1919). Furthermore, "parole evidence is admissible to show the connection between the writings and the defendant's agreement to them." Western New York Land Conservancy, Inc. v. Town of Amherst, 4 A.D.3d 889, 890 (4th Dept. 2004); see also, Ruppert, 245 A.D.2d at 1140-41. When "the signed and unsigned writings, when read together, provide all essential terms of the contract and clearly refer to the same transaction," American Linen Supply Co. v. Penn Yan Marine Manufacturing Corp., 172 A.D.2d 1007, 1008 (4th Dept.)(quoted in Ruppert, 245 A.D.2d at 1141), the court may find the existence of an enforceable contract.

Hunt fails in meeting its initial burden in the face of these documents to show that it "did not intend to be bound until a more formal agreement was completed, or that plaintiff must have so understood." Cole v. Macklowe, 40 A.D.3d 396, 397 (1st Dept. 2007). Defendant points to no parole evidence, nor to

language in these documents, containing in so many words a reservation of its right not to be bound, id. 40 A.D.3d at 397 ("there is no reservation of any right not to be bound").[2] Compare The River Glen Assoc., LTD v. Merrill Lynch Credit Corp., 295 A.D.2d 274 (1st Dept. 2002); Trade & Industry Corp. V. Euro Brokers Investment Corp., 222 A.D.2d 364, 366-67 (1st Dept. 1995). "'[T]he mere fact that the parties contemplate memorializing their agreement in a formal document does not prevent their informal agreement from taking effect prior to that event.'" Cole v. Macklowe, 40 A.D.3d at 397 (quoting V'Soske v. Barwick, 404 F.2d 495, 499 (2d Cir. 1968)). Accordingly, in the face of the documents relied on by plaintiff, and Hunt's conduct subsequent to the telephone conversation in which it allegedly

[2] At oral argument, on a question directed to this point, Hunt refered to two documents. First, Hunt contends that its July 31st letter, the "welcome aboard" letter, references a right not to be bound. But that letter, written by Hunt's Project Executive, contains only one reference to a subcontract agreement ("Within ten[10] days of receipt of Subcontract Agreement . . ."), and otherwise is written to govern the required form of "submittals," and otherwise to underscore "the very fast nature of this project," and "the rapid nature of this project." No language in the letter suggests that Hunt was reserving a right not to be bound, or reasonably would put Ajay on notice of the same. Second, Hunt referred to the letter of Ajay's principal, Stathopoulos, dated September 30, 2003, in which he urges completion of the subcontract documents and warns of a shut down unless he gets an agreement signed. But this letter contains no language suggesting Ajay's awareness of any state of facts under which Hunt would not be bound (except in regard to payment of invoices), and even refers to their "original agreement, upon which the contract was awarded to our firm," and the time lines therein. These writings do not avail Hunt.

told plaintiff that the subcontract was awarded to it, which fully recognized the existence of the subcontract award to Ajay (both in communications to Ajay and to others connected with the project), Hunt fails in its initial burden of proof to show the non-existence of a binding contractual relationship between it and plaintiff. Indeed, contrary to Hunt's argument, the multiple writings of Hunt and its representatives, one of which is unsigned but was confirmed in two subsequent writings and is likely to turn up in signed form in discovery as it is completed, are of the same kind held sufficient to satisfy the Statute of Frauds in Ladenburg Thalmann & Co., Inc. v Tim's Amusements, Inc., 275 A.D.2d 243, 246-47 (1st Dept. 2000)("note or memorandum need not be prepared or signed with the intention of evidencing the agreement, and it may come into existence subsequent to the execution of the agreement")("Levine's letter to Feinberg confirms that an agreement to pay Ladenburg existed.")[3]

[3] This is not a case in which plaintiff "re[lies] almost entirely upon . . . unexecuted agreements prepared by plaintiff himself." Stephen Pevner, Inc. v. Ensler, 309 A.D.2d 722 (1st Dept. 2003). See Armored Motor Service of America, Inc. v. First Fed. Sav. and Loan Ass'n of Rochester, 138 A.D.2d 954 (4th Dept. 1988)(distinguishing Crabtree because, in that case, "all the essential terms of the agreement were contained in memoranda either signed by, or chargeable to [e.q., prepared by], the defendant")(bracketed material supplied); Brause v. Goldman, 10 A.D.2d 328, 334-35 (1st Dept. 1960)("where the writing has been prepared by one other than the party to be charged, there is no assurance that the document represents an accurate rendering of a mutually agreed upon understanding rather than the one party's latest round of proposals in the negotiation process."), aff'd. 9 N.Y.2d 620 (1961); Solin Lee Chu v. Ling Sun Chu, 9 A.D.2d 888,

Assuming just for the sake of argument that Hunt met its initial burden, plaintiff more that raises an issue of fact on the discrete issue whether it and Hunt entered into an agreement in July. At the very least, plaintiff submits admissible evidence of a Type I preliminary agreement of the kind recognized in Teachers Ins. & Annuity Ass'n. of Am. v. Tribune Co., 670 F. Supp. 491, 499 (S.D.N.Y.1987) (Leval, J.). As recently summarized by (now) Circuit Judge Wesley in Tractebel Energy Marketing, Inc. v. AEP Power Marketing, Inc., 487 F.3d 89 (2d Cir. 2007):

> Judge Leval carefully identified two types of preliminary agreements that exist under New York law. 670 F. Supp. at 498; see also Adjustrite Sys., Inc. v. GAB Bus. Servs., Inc., 145 F.3d 543, 547-48 (2d Cir.1998) (applying the Tribune preliminary agreement framework); Arcadian Phosphates, Inc. v. Arcadian Corp., 884 F.2d 69, 71-72 (2d Cir.1989) (same). The first type of preliminary agreement ("Type I") exists "when the parties have reached complete agreement (including the agreement to be bound) on all the issues perceived to require negotiation," although they may "desire a more elaborate formalization of the agreement." Tribune, 670 F. Supp. at 498. A Type I agreement is enforceable. Id. The second type of preliminary agreement ("Type II") "does not commit the parties to their ultimate contractual objective but rather to the obligation to negotiate the open issues in good faith." Id.

Id. 487 F.3d at 98 n.4. The Appellate Divisions in New York have

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889 (1st Dept. 1959)(courts should not "permit the unsigned document prepared by the plaintiff to serve as a portion of the requisite memorandum" under Crabtree, for to do so "would open the door to evils the Statute of Fraud was designed to avoid"). Here, the writings relied on to charge Hunt are the writings of Hunt itself which confirm the award of the subcontract to Ajay.

embraced the Tribune analysis, Cole v. Macklowe, 40 A.D.3d 396 (1st Dept. 2007)(citing Adjustrite); Richbell Information Services, Inc. V. Jupiter Partners, L.P., 309 A.D.2d 288, 298 (1st Dept. 2003)("Even where the parties acknowledge that they intend to hammer out details of an agreement subsequently, a preliminary agreement may be binding" - citing Tribune); The River Glen Assoc., LTD v. Merrill Lynch Credit Corp., 295 A.D.2d 274 (1st Dept. 2002), and the multi-factor test devised in the federal courts to determine whether a preliminary agreement exists, Warwick Assoc. V. FAI Ins. Limited, 275 A.D.2d 653, 654 (1st Dept. 2000)("taking into consideration the various relevant factors" of Adjustrite). These cases also may be viewed as coming within the rubric of Goodstein Constr. Corp. v. City of New York, 67 N.Y.2d 990 (1986). See 180 Water Street Assoc., L.P. v. Lehman Bros. Holdings, Inc., 7 A.D.3d 316 (1st Dept. 2004); SNC, LTD v. Kamine Eng. And Mech. Contr. Co., Inc., 238 A.D.2d 146 (1st Dept. 1997)(also citing Tribune); Trade & Industry Corp. V. Euro Brokers Investment Corp., 222 A.D.2d 364, 367 (1st Dept. 1995); Long Island Lighting Co. v. County of Suffolk, 166 A.D.2d 556 (2d Dept. 1990).

For the reasons stated in Tractebel Energy Marketing, Inc. v. AEP Power Marketing, Inc., 487 F.3d at 98 n.4, I would hold that the writings and conduct of the parties here raise an issue of fact whether there was "not merely a preliminary agreement but

an enforceable contract." Id. At the very least, however, plaintiff raises an issue of fact that it was a Type I agreement which also is enforceable. Id.

Hunt's effort to avoid the force of all this by reference to it's procurement of a three party compensation arrangement involving what appears to be a shell company owned by the Oneida Nation's Chief's brother, allegedly pursuant to the Nation's "policy" to extend preferences to Oneida member owned subcontractors, however, succeeds. Despite a loose reference to the AASHA agreements in one of Hunt's documents as an assignment, there was no assignment by the very terms of the AASHA's subcontract with Hunt and AASHA's sub-subcontract with plaintiff. In any event, an assignment would not without more release Hunt from the terms of its subcontract with plaintiff. Skrabalak v. Rock, 208 A.D.2d 1100, 1102 (3d Dept. 1994); Toroy Realty Corp. v. Ronka Realty Corp., 113 A.D.2d 882, 883 (2d Dept. 1985)("the assignor cannot relieve himself of all obligations under the contract absent a release or novation"); John W. Cowper Co., Inc. v. CDC-Troy, Inc., 50 A.D.2d 1076 (4th Dept. 1975); Iorio v. Superior Sound, 49 A.D.2d 1008 (4th Dept 1975). There is no evidence of a release, but Hunt's motion papers establish as a matter of law that, on these facts, a novation occurred. A.L.I., Restatement (Second) of Contracts §280.

Plaintiff has suggested in its memorandum that the pleadings

are such that the court simply may consider whether an "assignment" occurred by virtue AASHA's subcontract with Hunt and the execution of a sub-subcontract between AASHA and plaintiff, without reaching the question whether a novation occurred. At the same time, plaintiff briefs the novation issue, as did Hunt. Because the whole point of Hunt's summary judgment motion is to show that the relationship between the parties must be governed by AASHA's written contracts with both Hunt and plaintiff, and that no obligations that may have arisen between Hunt and plaintiff in July 2003 survived execution of the AASHA contracts in December, the failure to include novation as a defense on the answer does not by itself require a denial of Hunt's motion. Rogoff v. San Juan Racing Ass'n, 54 N.Y.2d 883, 885 (1981); DCA Advertising, Inc. v. The Fox Group, Inc., 2 A.D.3d 173, 174 (1st Dept. 2003).

Turning to the merits, plaintiff's contention that its principal did not subjectively intend, by executing the AASHA sub-subcontract, to relieve Hunt of its obligations under the contract it contends was formed in July, is belied by the AASHA contract documents themselves. The rule is: "A novation will not discharge obligations created under a prior agreement unless it was so intended, and this question may be determined from the writings and conduct of the parties [citations omitted] or, in certain cases, from the documents exclusively." Water Street

Development Corp. v. City of New York, 220 A.D.2d 289, 290 (1st Dept. 1995). Here, the question may be determined from a review of the contract documents exclusively. Plaintiff's contract with AASHA, which plaintiff concedes was executed for the purpose of facilitating payments withheld by Hunt to the date of its execution, specifically provided in express terms that it "retroactively" applied to all work performed by plaintiff on "the Project" (a defined term ¶ 1), see ¶ 29, that plaintiff must look to AASHA for all payments, ¶¶6-7, and that the sub-subcontract "merg[ed]" "[a]ll previous proposals, promises and understandings relating to the subject matter of their Sub-subcontract, whether written or oral, [which] are null and void and have been replaced by the terms and conditions contained in the Sub-subcontract. ¶24. This is the language of novation, i.e., of extinguishing any claim plaintiff might have by virtue of the earlier alleged agreement. Globe Food Services Corp. v. Consolidated Ed. Co. of N.Y., Inc., 184 A.D.2d 278, 279 (1st Dept. 1992); Northville Indus. Corp. v. Fort Neck Oil Terms. Corp., 64 N.Y.2d 930 (1985), affing for the reasons stated in 100 A.D.2d 865, 866-67, 867 (2d Dept. 1984).[4] Despite Mr.

[4] The language used here is certainly the more definitive language such as that contained in contracts held to have such an effect as a matter of law, e.g., "a revocation and cancellation of the prior agreement" (Mallad Constr. Corp. v. County Fed. Sav. & Loan Assn., 32 N.Y.2d 285, 289 [1973]), "supersedes" any prior agreement (Citigifts, Inc. v. Pechnik, 112

Stathopoulos's protestations to the contrary on this motion, plaintiff as "one who asserts to a written contract is conclusively presumed to know its contents such that there can be no question of fact as to his understanding of its terms." Id. 100 A.D.2d at 867. "A novation has four elements, each of which must be present in order to demonstrate novation: (1) a previously valid obligation; (2) agreement of all parties to a new contract; (3) extinguishment of the old contract; and (4) a valid new contract." Callanan Industries, Inc. v. Micheli Contracting Corp. 124 A.D.2d 960, 961 (3d Dept. 1986). Hunt establishes as a matter of law on these facts each of the four elements, and plaintiff fails to raise an issue of fact.

The question underlying plaintiff's submissions on this motion, however, is whether the AASHA agreements were a sham. First, as Hunt has aptly described them in its own litigation against the Nation pending in an Oneida County term of Supreme Court, AASHA was a mere pass-through shell operation which, although by reference to contract documents "ostensibly managed other subcontractor's work," instead, "[i]n reality, AASHA merely passed paperwork back and forth between Hunt and AASHA's

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A.D.2d 832, 833 [1985] affd., 67 N.Y.2d 774 [1986]), "in lieu of and shall supersede" any prior agreements (Northville Indus. Corp. v. Fort Neck Oil Terms. Corp., 100 A.D.2d 865, 866 [1984] aff'd, 64 N.Y.2d 930, 931 [1985]).

Globe Food Services Corp. v. Consolidated Ed. Co. of N.Y., Inc., 184 A.D.2d at 279.

subcontractors (sub-subcontractors to Hunt)." Hunt Constr. Group, Inc. V. The Oneida Indian Nation, Complaint ¶44 (Sup. Ct. Oneida Co. Index #CA2007-01444). Plaintiff in this action alleges without contradiction that AASHA was interposed merely to comply with the Nation's requirement or policy to give preference to Oneida Nation member-owned contractors in exchange for an 8% "commission," that no AASHA employees or representatives were ever at the work site, that AASHA was owned by the Oneida Nation Chief's brother, who did not even himself perform any work, leaving the payment routing (i.e., from Hunt to its subcontractors through AASHA) to an outside consulting firm which merely forwarded Ajay's periodic payment requisitions to Hunt together with AASHA's invoice containing an 8% "markup," and that throughout the project Hunt communicated directly with plaintiff and not through AASHA except in connection with the payment requisitions. Plaintiff also alleges without contradiction that it executed the sub-subcontract agreement with AASHA in January 2004, some six months after it was awarded the subcontract by Hunt the previous summer, only as an accommodation to Hunt, who withheld payments until the three-party payment arrangement was formalized into a sub-subcontract. Notably, the submittal procedures set forth in Hunt's July 31st letter required submission directly to Hunt, "without exception."

There is a sham exception to the parole evidence rule which

permits plaintiff to adduce "evidence which negates the existence of a binding contract . . . , not to contradict or vary its terms, 'but to destroy the written instrument as one unfit to represent the engagement of the parties.'" Adirondack Bank v. Simmons, 210 A.D.2d 651, 654 (3d Dept. 1994)(quoting 58 N.Y. Jur.2d Evidence and Witnesses §609). This is different from other permissible uses of parole evidence to establish fraud or illegality. W.L. Christopher, Inc. v. Seamen's Bank for Sav., 144 A.D.2d 809 (3d Dept. 1988)(and concurring opn of Levine, J.). Nevertheless,

> While New York courts have held that parol evidence is admissible to show that a contract is not a contract but a sham, "that principle is predicated on proof of the intention of the parties that the entire contract was to be a nullity, not as here that only certain provisions of the agreement were not to be enforced ... but that other provisions were to be enforcible." Bersani v. General Accident Fire & Life Assurance Corp., 36 N.Y.2d 457, 461, 369 N.Y.S.2d 108, 112, 330 N.E.2d 68, 72 (1975). See also Kirtley v. Abrams, 299 F.2d 341, 345 (2d Cir.1962) (although parol evidence is admissible to show that "there never was any agreement such as the writing purported to be," parol evidence is inadmissible to vary certain terms of a written agreement); Meinrath v. Singer Co., 482 F.Supp. 457, 460 (S.D.N.Y.1979) (Weinfeld, J.), aff'd mem., 697 F.2d 293 (2d Cir.1982) (although parol evidence is admissible to prove fraud, proof must be offered to show intention of the parties that the entire contract was to be a nullity and not that certain provisions were not to be enforced).

Happy Dack Trading Co., Ltd. v. Agro-Industries, Inc., 602 F.Supp. 986, 992 (S.D.N.Y. 1984). See Cole v. Macklowe, 40 A.D.3d at 396-97. But the exception is designed to show that, in

reality, there was no contract at all. "Such proof does not recognize the contract as ever existing as a valid agreement, and is received, from the necessity of the case, to show that that which appears to be is not, and never was, a contract." Thomas v. Scutt, 82 N.Y. 133, 137-38 (1891). See Davis v. Davis, 266 A.D.2d 867 (4th Dept. 1999). Here, of course, plaintiff acknowledges the agreement, and took advantage of, inter alia, its payment terms. Indeed, in this litigation, plaintiff is suing AASHA on the agreement. As stressed at oral argument, no party in this or other litigation elsewhere arising out of this project has argued that the AASHA contracts are illegal or otherwise against public policy. The conduct of the parties "demonstrate that the . . . [entirety of the agreement] was not regarded by the parties as a nullity." Bersani v. General Accident Fire & Life Assurance Corp., 36 N.Y.2d at 461. Accordingly, to the extent plaintiff's submissions in opposition to Hunt's motion invoke the sham exception to the parole evidence rule, they are unavailing.

The motion for summary judgment is granted.

SO ORDERED.

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KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: October 5, 2007
Rochester, New York