

WDF Inc. v Mar-Sal Plumbing & Heating Inc.

2024 NY Slip Op 31438(U)

April 22, 2024

Supreme Court, New York County

Docket Number: Index No. 653520/2018

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DEBRA A. JAMES

PART 59

Justice

-----X

WDF INC.,

Plaintiff,

- v -

MAR-SAL PLUMBING & HEATING INC.,

Defendants.

-----X

INDEX NO. 653520/2018

MOTION DATE 10/02/2023

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 83, 84, 101, 102, 103, 104, 106, 108, 109, 110, 111, 113 were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 002) 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 105, 107, 112, 114 were read on this motion to/for JUDGMENT - SUMMARY.

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of the defendant Mar-Sal Plumbing & Heating Inc. for summary judgment dismissing the complaint (causes of action for breach of contract and sounding in promissory estoppel) is DENIED (motion sequence number 001); and it is further

ORDERED that the motion of the plaintiff WDF Inc. for summary judgment on its complaint is DENIED (motion sequence number 002); and it is further

ORDERED that, as the Note of Issue was filed on July 28, 2022 (NYSCEF Document Number 39), counsel are directed to confer with

the Clerk of Trial Assignment Part 40 on the date set for mediation and/or trial.

DECISION

In this action alleging breach of contract and promissory estoppel public works construction project, both parties move for summary judgment.

On September 19, 2013, defendant Mar-Sal Plumbing & Heating Inc. ("Mar-Sal"), a plumbing and heating subcontractor, submitted to plaintiff WDF Inc. ("WDF"), as the prime contractor, a proposal for plumbing work in connection with WDF's bid on a project of non-party Dormitory Authority of the State of New York. (NYSCEF Document Number 45).

On December 20, 2013, WDF was awarded the project by the non-party Dormitory Authority of the State of New York, but Mar-Sal did not commence the plumbing work despite attending the pre-construction kickoff meeting. WDF asserts that it was ultimately forced to complete the plumbing work without Mar-Sal and alleges that as a result of Mar-Sal's breach of the plumbing subcontract, it incurred significantly greater cost in carrying out its contract with the Dormitory Authority.

Mar-Sal argues that it did not commence the work because WDF provided additional drawings that expanded the scope of the plumbing work beyond what was initially proposed by Mar-Sal. WDF contends that the additional drawings were merely detailed

specifications for the work, which had been already proposed by Mar-Sal, and that the additional drawings did not expand the scope of work. WDF also submits the letter to Joseph Krajczewski, WDF vice president of operations, dated May 12, 2014, signed by Mar-Sal president Salvatore Marullo, which states

“Unfortunately Mar-Sal Plumbing & Heating Inc. cannot proceed with this project. We discovered there where (sic) many mistakes done with the pricing of this project and our previous estimator under priced it, we are truly sorry for any inconvenience this may caused (sic) your company but for this reason we choose to pull back from this agreement.”

It is undisputed that there was no signed written contract between the parties.

However, there are issues of fact whether Mar-Sal’s attendance at a pre-construction kick off meeting and participation in the vetting process were “unequivocally referable” to the unsigned construction agreement to perform the plumbing work, which partial performance would remove same from the purview of the statute of frauds. See HPP Ice Rink, Inc v New York Islanders, 251 Ad2d 249 (1st Dept 1998).

Moreover, as with the Letter of Intent that was the subject of the opinion of the First Department, Appellate Division in Bed & Beyond Inc v IBEX Constr, LLC, (52 AD3d 413, 414 [1st Dept 2008]), the statement that “A formal contract will be forwarded shortly”, in the Letter of Intent that WDF sent to Mar-Sal, does

not amount to an express reservation of rights. Nonetheless, as this court finds there is an ambiguity as to the scope of work thereunder, there remains a question of fact as to the terms of such binding agreement. See Blume v Jacobowitz, 212 AD3d 403 (1st Dept 2023).

In addition, there are numerous triable issues on the claim sounding in promissory estoppel, as to whether Mar-Sal “made a clear and unambiguous promise, upon which [plaintiff] reasonably relied, to its detriment” (Bunkoff Gen Contrs v Dunham Elec, 300 AD2d 976, 978 [3d Dept 2002]).

As to the claim for damages, WDF does not come forward with evidence that establishes the extent that Mar-Sal’s failure to complete the plumbing work in accordance with its bid proposal decreased WDF’s return under its contract with non-party owner Dormitory Authority, and therefore no summary monetary judgment is warranted. See Spilman v Matyas, 212 AD3d 859, 860 (2d Dept 2023).

Debra A. James

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<u>4/22/2024</u>			<u>DEBRA A. JAMES, J.S.C.</u>	
DATE				
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE