| **Bana Elec. Corp. v Bethpage Union Free School Dist.** |
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| 2007 NY Slip Op 33170(U) |
| October 2, 2007 |
| Supreme Court, Nassau County |
| Docket Number: 4494-05/ |
| Judge: Leonard B. Austin |
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No. 4494-05

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 14 NASSAU COUNTY

PRESENT:
HONORABLE LEONARD B. AUSTIN
Justice

Motion R/D: 001 - 11-3-06; 002 - 4-6-07
Submission Date: 7-30-07
Motion Sequence No.: 001,002/MOT D

x

BANA ELECTRIC CORPORATION,

Plaintiff,

- against -

BETHPAGE UNION FREE SCHOOL DISTRICT and SCHOOL CONSTRUCTION CONSULTANTS, INC.

Defendants.

x

COUNSEL FOR PLAINTIFF
Bender, Rotonda & Associates
1225 Franklin Avenue - Suite 335
Garden City, New York 11530

COUNSEL FOR DEFENDANT
Jaspan, Schlesinger & Hoffman, LLP
300 Garden City Plaza
Garden City, New York 11530

ORDER

The following papers were read on Defendants' motion for summary judgment dismissing the complaint and a default judgment on their counterclaim and Plaintiff's cross-motion for leave to serve a notice of claim *nunc pro tunc*:

Notice of Motion dated October 5, 2006;
Affidavit of Dr. Richard S. March sworn to on September 29, 2006;
Affidavit of Paul Adamo sworn to on September 28, 2006;
Affirmation of Laurel R. Kretzing, Esq. dated October 5, 2006;
Defendants' Memorandum of Law;
Notice of Cross-motion dated March 28, 2007;
Affidavit of Michael Bender sworn to on March 29, 2007;

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Affirmation of Susan Bender, Esq. dated March 28, 2007;
Plaintiff's Memorandum of Law;
Affirmation of Laurel R. Kretzing, Esq. dated June 4, 2007;
Affidavit of Paul Adamo sworn to on May 31, 2007;
Affidavit of Paul Adamo sworn to on June 18, 2007;
Affirmation of Susan Bender, Esq. dated July 28, 2007.

Defendants move for summary judgment dismissing the complaint and for leave to enter a default judgment on its counterclaim. Plaintiff cross-moves for leave to serve a notice of claim *nunc pro tunc.*

BACKGROUND

On or about April 29, 2003, Defendant Bethpage Union Free School District ("Bethpage") entered into a contract with Plaintiff Bana Electric Corporation ("Bana") to perform renovations and improvements to the electrical system at Central Boulevard Elementary School and John F. Kennedy Middle School.

On July 8, 2003, Bethpage entered into a contract with Defendant School Construction Consultants, Inc. ("Consultants") to provide construction management services in connection with construction and renovations being performed at Bethpage schools.

Bana asserts disputes arose regarding who was to furnish and install surface mounted raceway and associated wiring devises. Bana alleges the plans and specification called for another contractor to furnish and install these materials.

On June 16, 2003, Bana wrote to Consultants requesting a meeting to clarify who was to perform this work. By fax dated June 18, 2003, Consultants advised Bana that this work was within the scope of Bana's contract.

In response, by letter dated June 23, 2003, Bana indicated that they did not believe this work was within the scope of their contract and again requested a meeting to clarify the dispute.

Bana claims that it never received a response to its June 23, 2003. However, at the regularly scheduled job meeting held on July 3, 2003, Consultants' job representative advised the Bana representative that this work was within the scope of Bana's contract. Consultants and Bethpage claim to have made this determination after consulting with the project architect.

By letter dated July 15, 2003, Bana advised Bethpage and Consultants that it would proceed with this work under protest. Bana indicated the additional cost for the work would be approximately $198,000. On July 18, 2003, Consultants sent a copy of its July 15th letter back to Bana indicating the request was "Rejected" because the work was within the scope of Bana's contract.

Bana continued to request meetings to resolve the disputes regarding their responsibility to perform this work.

Bana performed this work and claimed it was additional work for which it is entitled to additional compensation of $218,271.19.

Bana submitted a claim for payment for this work a second time on February 4, 2005. By letter dated February 14, 2005, Consultants, acting on behalf of Bethpage, again rejected Bana's request for payment. Payment was rejected because Consultants and Bethpage assert that the work for which payment was sought was within the scope of Bana's contract.

This action was commenced on March 24, 2005. Plaintiff concedes that it never served a Notice of Claim upon Bethpage in accordance with Education Law §3813.

Bethpage and Consultants move to dismiss this action asserting Bana's failure to serve a Notice of Claim prior to the commencement of the action is fatal. Bana cross-moves for leave to serve a Notice of Claim *nunc pro tunc.* Bethpage also moves for leave to enter a default judgment on its counterclaim for liquidated damages.

## DISCUSSION

### A. Failure to File A Notice of Claim

Education Law §3813(1) provides that an action may not be maintained against a school district unless (1) a notice of claim is served upon the district within three months after the claim accrued; and (2) the school district has failed and refused to make adjustment or payment of the claim for 30 days after the claim was presented.

An action against a school district must be commenced within one year after the cause of action arose. Education Law §3813(2-b).

The court may extend the time to serve a notice of claim not exceed the time for the commencement of an action against the school district. Education Law §3813(2-a).

However, where the contract contains its own detailed grievance procedures that are inconsistent with Education Law §3813, those grievance procedures, and not Education Law §3813, are applicable. N. Picco & Sons Contracting Co., Inc. v. Board of Education of Bronxville School, 26 A.D.3d 317 (2nd Dept.), *lv. dism.*, 7 N.Y.3d 844 (2006); and Matter of Guilderland Cent. School Dist., 45 A.D.2d 85 (3rd Dept. 1974).

To constitute a waiver of the provision of Education Law §3813, the parties must contractually agree that the statutory provisions do not apply or the contract between the parties must contain detailed claims procedures that are clearly inconsistent with the provisions of the statute. Matter of Geneseo Cent. School, 53 N.Y.2d 306 (1981).

The General Conditions of the contract between Bethpage and Bana contain claims provisions and accrual of action provisions that are clearly inconsistent with Education Law §3813.

Articles 4.7 and 4.8 of the contract define claims and provide a procedure for presenting and adjusting claims.

Articles 4.7.1 defines a claim as all disputes regarding the interpretation of the agreement, payment of money or any other dispute or matters between the owner and the contractor arising out of or relating to the contract. This section requires claims to be in writing.

Article 4.7.2 requires all claims to be submitted to the architect for resolution.

Article 4.7.3 requires that claims be made within 15 days after the occurrence of the event given rise to the claim or within 15 days after the claimant first determines the existence of the claim, whichever is later.

Article 4.8 provides for the architect to resolve all disputes and claims. The decision of the architect is final, subject to arbitration.[1]

These provisions are clearly a substitute for the Notice of Claim provisions of Education Law §3813. Bana complied with these provisions. Bana's June 16, 2003 letter clearly advised Consultants that Bana believed that it was being required to do work that was beyond the scope of its contract. This letter indicated that Bana was advised that it was to perform this work during a June 11, 2003 walk through. Thus, Bana notified the Consultants within 15 days of the event giving rise to the claim of the existence of the claim.

Furthermore, although not in writing as required by Article 4.8.4, Bana was advised by Consultants that the architect had determined the disputed work was within the scope of the work included in its contract.

Paragraph 13.7 of the General Conditions contains a provision indicating when claims accrue for statute of limitations purposes. The relevant section, 13.7.1, states:

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[1] Article 4.9 provides for arbitration of all claims and disputes arising out of, related to or resulting from a breach of the contract. The parties have waived their right to submit this dispute to arbitration by participating in this litigation. See, Sherrill v. Grayco Builders, Inc., 64 N.Y. 2d 261 (1985).

> "1. **Before Substantial Completion.** As to acts or failures to act occurring prior to the relevant date of Substantial Completion, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than such date of Substantial Completion."

These provisions of the contract are also clearly inconsistent with the provisions of Education Law §3813.

The dispute herein arose prior to the date of substantial completion. Thus, based upon the aforementioned contractual provisions the cause of action accrued on the date the work was substantially completed. On July 27, 2006, the architect issued a certificate indicating the work of which Bana's contract was part was substantially completed at Central Boulevard Elementary School and John F. Kennedy Middle School as of October 31, 2005.

Thus, under the provisions of the contract, the cause of action accrued at the earliest on October 31, 2005. This action was commenced on March 24, 2005. Thus, the action is timely.

Since Education Law §3813 is not applicable to this action, Defendants' motion to dismiss for Plaintiff's failure to comply must be denied.

Since Bana complied with the contract provisions relating to claims and the commencement of the action, its motion for leave to serve a notice of claim *nunc pro tunc* should be denied as academic.

B. Non-Contract Cause of Action

Plaintiff also alleges causes of action in fraud, unjust enrichment and *quantum meruit.*

The fraud cause of action is premised upon allegations that Defendants did not intend to perform their contractual obligations. Where the fraud is based upon a statement of future intention, the Plaintiff must plead sufficient facts to establish that the promisor never intended to act upon the promise when it was made. Pope v. New York Property Ins. Underwriters Assoc., 112 A.D.2d 983 (1st Dept.), *aff'd.*, 66 N.Y.2d 857 (1985); and Fink v. Citizens Mortgage Banking Ltd., 148 A.D.2d 578 (2nd Dept. 1989). The court may not infer that a statement is false when made simply because the contract was not performed. Abelman v. Shoratlantic Development Co., Inc., 153 A.D.2d 821 (2nd Dept. 1989).

A cause of action for fraud cannot be based upon a breach of contract unless the Plaintiff can establish that the Defendant did not intend to fulfil its contractual obligations when in entered into the contract. Affiliated Credit Adjustors Inc. v. Carlucci & Legum, 139 A.D.2d 611 (2nd Dept.1988).

In this case, Plaintiff has not plead facts sufficient to sustain its fraud cause of action. Thus, Defendants' motion for summary judgment dismissing that action must be granted.

Plaintiff may not maintain an action for unjust enrichment or *quantum meruit* if the parties have a written agreement. See, Waldman v. Englishtown Sportswear, Ltd., 92

A.D.2d 833, 836 (1st Dept. 1983) which held that a party may not maintain an action for unjust enrichment if unless the contract between the parties has been abrogated, rescinded or otherwise found to be unenforceable; and Farm Automation Corp. v. Senter, 84 A.D.2d 757 (2nd Dept. 1981) which held that a party may not maintain an action for *quantum meruit* if the parties have a written contract.

Bana's cause of action alleges the existence of a written contract between the parties and defendants' breach of that contract. Bana asserts Bethpage breached the contract by directing Bana to perform work which was beyond the scope of its contract. Bana wants to be paid for this work. Bethpage asserts that the work Bana was performing was within the scope of Bana's contract. Thus, this action involves the interpretation of Bana's contract and the scope of the work encompassed by that contract.

Since this claim involves a written contract, the causes of action for unjust enrichment and *quantum meruit* must be dismissed.

C, Default Judgement

Defendants also move for leave to enter a default judgment on their counterclaim. The counterclaim seeks to recover liquidated damages of $500 per day because Bana did not complete its work within the contractually agreed upon time. The liquidated damage provision is contained in Article 8.3.5 of the Supplementary Conditions. Article 3.2 of the Standard Form Agreement requires the contractor to substantially complete its work "...not later than as stipulated in the contract

documents." Article 8.12 of the General Conditions states that substantial completion shall be the date certified by the architect in accordance with Article 9.8. Article 9.8.1 states that the work is substantially complete "...when the Work or designated portion therefor is sufficiently complete in accordance with the Contract Documents so the Owner can occupy or utilized the Work for its intended use."

The party seeking leave to enter a default judgment must prove service of the pleading upon which the default is sought proof of the claim and proof of the default. See, Siegel, *New York Practice 4th* §295; and CPLR 3215(f).

While Bethpage has established proof of the service of its answer containing a counterclaim and Bana's default in serving a reply, it has failed to submit sufficient and proper proof of its claim even though the answer with counterclaim was verified by Bethpage's Superintendent of Schools (CPLR 105[u]).[2]

The counterclaim alleges that Bana breached its contract by failing to substantially complete its work within the time established by the contract. To establish a cause of action for breach of contract, the pleader must prove the existence of a contract, consideration, performance, breach and damages resulting from the breach. Furia v. Furia, 116 A.D.2d 694 (2nd Dept. 1986). Since Bethpage has failed to establish the date upon which Bana was to substantially complete its work and/or that Bana had failed to substantially complete its work by that date, it has failed to establish that Bana

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[2]CPLR 3011 requires a Plaintiff to serve a reply to a counterclaim.

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has breached its contract. Since it has failed to establish an necessary element of its claim, its motion for leave to enter a default judgment must be denied.

In the Courts' discretion, Bana will be granted fifteen (15) days from the date of this order to serve its reply.

Accordingly, it is,

**ORDERED,** that Defendants' motion for summary judgment dismissing the complaint is **granted** to the extent of dismissing the second, third and fourth causes of action and, in all other respects is **denied**; and it is further,

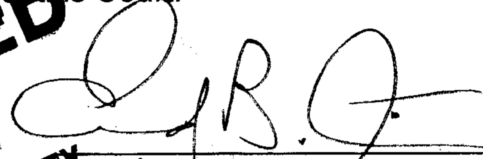
**ORDERED,** that Defendants' motion for leave to enter a default judgment on its counterclaim is **denied;** and it is further,

**ORDERED,** that Plaintiff shall serve a reply to the counterclaim within fifteen (15) days of the date of this order; and it is further,

**ORDERED,** that Plaintiff's cross-motion for leave to serve a notice of claim *nunc pro tunc* is **denied** as academic; and it is further,

**ORDERED,** that counsel for all parties shall appear for a status conference on November 21, 2007 at 9:30 p.m.

This constitutes the decision and order of this Court.



Dated: Mineola, NY
October 2, 2007

Hon. LEONARD B. AUSTIN, J.S.C.

ENTERED
OCT 04 2007
NASSAU COUNTY
COUNTY CLERK'S OFFICE