

Mascon Restoration, Inc. v Granite Group, LLC

2008 NY Slip Op 30452(U)

February 14, 2008

Supreme Court, New York County

Docket Number: 0603599/2007

Judge: Richard B. Lowe

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Index Number : 603599/2007
MASCON RESTORATION, INC.

INDEX NO. _____

vs
GRANITE GROUP, LLC

MOTION DATE 1/28/08

Sequence Number : 001

MOTION SEQ. NO. _____

DISMISS

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No


Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

MOTION IS DENIED IN ACCORDANCE WITH SUPREME COURT'S DECISION

FILED
FEB 20 2008
NEW YORK COUNTY CLERK'S OFFICE

Dated: 2/14/08



RICHARD D. LOVETTE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56

-----X
MASCON RESTORATION, INC.

Plaintiff,

Index No: 603599/07

-against-

DECISION AND ORDER

GRANITE GROUP, LLC, HEIGHTS HQ, LLC,
NEW YORK COMMUNITY ANK, and "JOHN
DOES No. 1" through "JOHN DOES No. 5",

Defendant.

-----X
RICHARD B. LOWE III, J:

This dispute arises out of a construction project, in which Defendant Heights HQ ("Heights") is the owner of property and Defendant Granite Group, LLC ("Granite") is the contractor. The project included a subcontracting agreement (the "Subcontract") between Plaintiff Mascon Restoration, Inc. ("Mascon") and Granite Group, LLC ("Granite"). Mascon brings five causes of action, including breach of contract and quantum meruit. Granite moves pursuant to CPLR 3211(a)(7) to dismiss the second cause of action for quantum meruit.

DISCUSSION

To state a claim in quantum meruit, a plaintiff must allege its good faith performance of services, the defendant's acceptance of those services, an expectation of compensation for the services, and the reasonable value of those services (*Skillgames, LLC v Brody*, 1 AD3d 247, 252 [1st Dept 2003], citing *Freedman v Pearlman*, 271 AD2d 301, 304 [2000]). Furthermore, under the rubric of *Clark-Fitzpatrick, Inc. v Long Is. R. R. Co.*, a cause of action sounding in quantum meruit is barred if there exists a written contract fully detailing all applicable terms and

conditions of the agreement between the parties (70 NY2d 382, 388-89 [1987]). “It is impermissible [] to seek damages in an action sounding in quasi contract where the suing party has fully performed on a valid written agreement, the existence of which is undisputed, and the scope of which clearly covers the dispute between the parties (*id.*, citing *Soviero Bros. Contr. Corp. v City of New York*, 286 AD 435 [1st Dept 1955]).

To be sure, there are exceptions to the rule in *Clark-Fitzpatrick*, *supra*. A plaintiff may plead quantum meruit as an alternative to breach of contract if (1) the validity of the contract is disputed (*Farash v Sykes Datatronics, Inc.*, 59 NY2d 500, 503-504 [1983]), or (2) where the defendant wrongfully has prevented the plaintiff's performance of a written agreement (*Randall v Guido*, 238 AD2d 164, 164 [1st Dept 1997]).

Here, Granite argues that because a valid and enforceable contract exists, as pleaded by Mascon, the claim for quantum meruit must fail. Mascon argues that it is permitted to plead in the alternative, and that because it is not undisputed that the Mascon fully performed under the purported subcontractor agreement, dismissal is premature.

Although Mascon cites several cases for the proposition that a claim for quantum meruit is permitted to go forward where the defendant's breach of contract prevented the plaintiff from fully performing, Mascon fails to allege that its full performance was prevented by Granite's breach. Indeed, Mascon states that it “fully intends to demonstrate that it fully performed” (Rothman Affirmation, at 3). Moreover, each of the cases cited by Mascon is inapplicable. While not alleged here, full performance was prevented by the defendant's breach in each of the cases cited by Mascon (*Martin Iron & Constr. Co. v Grace Indus., Inc.*, 14 AD3d 495, 496 [2d Dept 2005] [after defendant's breach of contract, plaintiff was permitted to abandon any claim on

or under the contract and sue in quantum meruit]; *MCK Bldg. Assocs. v St. Lawrence Univ.*, 301 AD2d 726 [3d Dept 2003] [defendant breached because contract was terminated prior to completion, therefore, quantum meruit is appropriate]; *MMG Group, Inc. v Planned Mgmt. Constr. Corp.*, 294 AD2d 284 [1st Dept 2002] [defendant breached its contract with plaintiff]; *Paterno & Sons, Inc. v New Windsor*, 43 AD2d 863, 864 [2d Dept 1974] [defendant's failure to make periodic payments due under the contract constituted a breach, thus, entitling plaintiff to regard the contract as terminated]). Accordingly, because Mascon fails to allege that the defendant's breach of contract prevented Mascon from fully performing, Mascon offers no basis to apply the exception it cites. Furthermore, because Mascon fails to allege that any other exception applies, Mascon fails to allege sufficient grounds to plead in the alternative.

"Endeavoring to enforce one's right to damages under a valid contract that expressly governs the subject at issue is simply irreconcilable with rescinding or 'unmaking' it from beginning and suing in quantum meruit; because plaintiff 'chose not to rescind the agreement,' his recovery was limited by terms of his express contract" (*Reilly v Natwest Mkts. Group Inc.*, 181 F3d 253, 264 [2d Cir 1999] [internal quotation marks and citations omitted]).

Additionally, Mascon attempts to insulate its cause of action for quantum meruit from the preclusive effect of the *Clark-Fitzpatrick*, *supra*, by not incorporating the allegations that Mascon fully performed under the contract (*see* Compl ¶ 11 ["Mascon entered upon the performance of the Subcontract, and duly performed all of the terms and conditions thereof on its part to be performed."]). Although it offers no basis in law to support its argument, Mascon urges the Court to read each cause of action in isolation. However,

[o]n a motion to dismiss a complaint for failure to state a cause of action, *the*

complaint must be liberally construed in the light most favorable to the plaintiff. The court must accept the facts alleged *in the complaint*, and reasonable inferences therefrom, as true, and determine whether the facts as alleged fit within any cognizable legal theory; in doing so, the court may consider affidavits submitted by the plaintiff to remedy any defects *in the complaint*.

(*N.Y. State Ass'n of Tobacco & Candy Distribs. v City of New York*, 3 Misc. 3d 876, 880 [Sup Ct New York County 2003] [emphasis added]). Just as the court in *Arts4All, Ltd. v Hancock* reasoned that “[i]t would be overly formalistic to dismiss the first cause of action on the ground that it does not repeat and reallege [certain] paragraphs,” here, it would be overly formalistic to ignore the allegations under the breach of contract cause of action, but not repeated and not alleged under the quantum meruit cause of action (5 AD3d 106, 110 [1st Dept 2004] [citing CPLR 3026]). Under these circumstances, the Court finds that by alleging that it has fully performed under its breach of contract cause of action, Mascon brings its quantum meruit cause of action within the ambit of *Clark-Fitzpatrick, supra*. Accordingly, dismissal of the quantum meruit cause of action is warranted.

Moreover, Mascon speculates that Granite seeks to first dismiss the quantum meruit claim, then argue that Mascon failed to fully perform on the Subcontract to prevail in dismissing the breach of contract cause of action (see Rothman Affirmation, at 5 [“Granite is apparently seeking to dismiss the quantum meruit claim so that it can then attempt to demonstrate that the subcontract was not completed without having to face being sued in quantum meruit in the event that plaintiff is able to demonstrate that it [Mascon] did not fully complete as a result of Granite’s breach of the subcontract”). Thus, Mascon indicates that if it fails to prove full performance, it will attempt to prove that performance was not fully completed because of Granite’s breach. In order to prove either argument, Mascon must set forth allegations to support its argument. To

that end, alleging that Mascon fully performed and that Granite prevented Mascon from fully performing is wholly inconsistent. Accordingly, the internal inconsistency in pleading both breach of contract and quantum meruit further militates dismissal of the quantum meruit cause of action.

CONCLUSION

Therefore, based on the foregoing, it is hereby

ORDERED that defendant's motion to dismiss is granted, and the second cause of action is dismissed.

Dated: February 14, 2008

ENTER:



J.S.C.

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