SHORT FORM ORDER

INDEX
NO.: 14790-04

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

MOTION DATE: 4-9-08
SUBMITTED: 5-15-08
MOTION NO.: 002-MOT D

EAST PORT EXCAVATING & UTILITIES CONTRACTORS, INC., on behalf of itself and all other persons similarly situated as trust fund beneficiaries of Lien Law trusts of which LIPSKY ENTERPRISES, INC., is trustee,

Plaintiffs,

-against-

LIPSKY ENTERPRISES, INC., COMMACK UNION FREE SCHOOL DISTRICT, CAROLINA CASUALTY INSURANCE COMPANY, BARRY LIPSKY, ERIC LIPSKY, AND "JOHN DOE ONE" THROUGH "JOHN DOE TEN",

Defendants.

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Upon the following papers numbered 1 to 26 read on this motion for summary judgment ; Notice of Motion and supporting papers 1-6 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 7-15; Replying Affidavits and supporting Papers 16-26 ; it is,

ORDERED that this motion by the defendants Lipsky Enterprises, Inc., Barry Lipsky, Eric Lipsky, and Carolina Casualty Insurance Company for summary judgment dismissing the complaint is granted solely to the extent that the first, third, sixth, and ninth causes of action are dismissed; and it is further

ORDERED that the motion is otherwise denied; and it is further

ORDERED that, on the court's own motion, the plaintiff is granted summary judgment dismissing the second and third counterclaims.

On September 18, 2003, the defendant Lipsky Enterprises, Inc. (hereinafter

"Lipsky"), entered into a contract with the defendant Commack Union Free School District to perform renovations and additions to the Sawmill Intermediate School, the Wood Park Primary School, and the Burr Intermediate School. Lipsky subsequently entered into three separate subcontracts with the plaintiff to perform the excavation work at the schools. Work at all three sites began in October 2003, before any of the subcontracts were signed. The plaintiff ran into problems almost immediately at the Sawmill Intermediate School and Wood Park Primary School. On November 3, 2003, the defendant Barry Lipsky and the project manager met with Steven Governale, the president of the plaintiff corporation. The meeting was memorialized in a letter dated November 6, 2003, from the project manager to Governale, which provides, in pertinent part, as follows:

> With all of the issues stated above having been discussed at length, we advised you that in lieu of a 3-Day Notice and/or Contract Default Letter, it was our intention to amicably relieve your burden by terminating your contract agreements (which you had not signed and returned as of the date of the meeting) for Wood Park Primary School and Sawmill Intermediate School. We directed you to direct all of your resources to completing the work at the Burr Intermediate School project only. You stated that you agreed with this decision and had no problem with Lipsky Enterprises terminating your contracts. In addition, we stated that you would be paid for all work in place (approved and accepted by the Project Architect, CM and Owner) which is in accordance with the specifications.

In order to receive payment for "work in place," Lipsky required that the plaintiff provide it with certain documents, including signed subcontracts for all three schools. Thus, although the plaintiff had ceased working at the Sawmill Intermediate School and at the Wood Park Primary School on November 5, 2003, and October 28, 2003, respectively, Governale signed the three subcontracts on December 17, 2003. However, on the subcontracts for the Sawmill Intermediate School and the Wood Park Primary School, he crossed out article 18 entitled "Termination for Convenience or Cause," and handwrote above it, "Termination was made by mutual agreement. Lipsky will pay negotiated amount for work performed." Lipsky also signed the subcontracts on December 17, 2003.

The plaintiff continued to perform excavation work at the Burr Intermediate School until Lipsky terminated that subcontract by a letter dated February 18, 2004, which provides, in pertinent part, as follows:

> Notice is hereby given that, pursuant to Article 18(a) of the Agreement between Lipaky Enterprises, Inc. ("Lipsky") and East Port Excavation & Utilities ("hereinafter, the Subcontractor")...for the performance of certain work for the Commack Union Free School District concerning the Additions and Alterations at the Burr Intermediate School ("hereinafter, the Project"), the Subcontract is hereby terminated for cause effective February 19, 2004.

* * *

> Please be advised that, in accordance with Article 13 of the Subcontract, Lipsky intends to perform all of the remaining Subcontract work and to charge all costs thereof to the Subcontractor, including Contractor's overhead, profit and actual attorneys fees.

Article 13 provides, in pertinent part, "Should Subcontractor fail in any respect to correctly prosecute the Work, supply required materials or fail to correct defective Work promptly, or fail as to any of the Subcontract requirements, Contractor may perform for Subcontractor and charge all costs to Subcontractor, including Contractor's overhead, profit and actual attorney's fees." In addition, article 18(a) ("Termination for Cause") provides, in pertinent part, "In the event of any such termination, the Contractor may take over the Work and prosecute same to completion by the Subcontract or otherwise for the account and at the expense of the Subcontractor and the Subcontractor and its Surety under both the Performance and Payment Bonds, shall be liable to the Contractor for all costs incurred by the Contractor."

Article 19 contains the following contractual statute of limitations:

> Any provision of the law to the contrary notwithstanding, no action or proceeding shall be commenced by the Subcontractor at law or in equity upon any cause of action whatsoever arising out of this Subcontract or relating in any way to the performance or breach thereof...unless such action or proceeding shall be commenced within six (6) months of the accrual of the cause of action, or within six (6) months after the Work of the Subcontractor has been substantially completed, or if not substantially completed within six (6) months after the Subcontractor last performed Work at the Project, whichever period is shorter. The subcontractor agrees and acknowledges that Subcontractor's failure to commence an action within such period of time shall constitute an absolute bar and complete defense to any action brought thereafter.

On March 5, 2004, the plaintiff filed a mechanic's lien in the amount of $248,028.39 for labor and materials furnished in connection with the Sawmill Intermediate School, the Wood Park Primary School, and the Burr Intermediate School projects. The plaintiff commenced this action on June 28, 2004. In its amended complaint, the plaintiff claims that it is owed $41,367.55 on the Sawmill Intermediate School project, $69,000 on the Wood Park Primary School project, and $259,878.34 on the Burr Intermediate School project, or $370,245.89, none of which has been paid. The amended complaint contains three causes of action for breach of contract and three for quantum meruit, a cause of action to foreclose the mechanic's lien, a cause of action on the labor and material bond issued to Lipsky by the defendant Carolina Casualty Insurance Company, and a cause of action for diversion of trust funds under Article 3-A of the Lien Law. The amended answer contains three counterclaims by Lipsky for breach of contract to recover its backcharges, which represent the actual costs of completing the three subcontracts.

The defendants Lipsky Enterprises, Inc., Barry Lipsky, Eric Lipsky, and Carolina Casualty Insurance Company now move for summary judgment dismissing the complaint.[1] They contend that the plaintiff's claims relating to the Sawmill Intermediate School and Wood Park Primary School are barred by the six-month contractual statute of limitations. They also contend that the plaintiff's claims relating to the Sawmill Intermediate School and Burr Intermediate School are barred by signed lien waivers evincing payments in excess of the amount demanded in the amended complaint. They further contend that the lien foreclosure claim cannot stand given that Lipsky has paid the plaintiff an amount greater than that demanded in the notice of lien. Since Lipsky's surety stands in Lipsky's shoes, they contend that all claims against the defendant insurance company must be dismissed. Finally, they content that the diversion-of-trust funds claim must be dismissed for failure to certify it as a class action.

In opposition, the plaintiff contends that summary judgment must be denied because the Sawmill Intermediate School and Wood Park Primary School subcontracts were terminated by mutual agreement, thereby rendering the contractual statute of limitations inoperative. The plaintiff also contends that the lien waivers do not represent payments that were actually made and that, in fact, it received no payments from Lipsky. The plaintiff further contends that Lipsky wrongfully terminated the Burr Intermediate School subcontract and is, therefore, not entitled to recover the cost of completing the project. Finally, the plaintiff contends that the payments Lipsky alleges it made have no bearing on the validity of the plaintiff's lien.

It is well settled that the parties to an agreement can mutually agree to terminate it by expressly assenting to its rescission while simultaneously entering into a new agreement dealing with the same subject matter (*see*, **Jones v Trice**, 202 AD2d 394, 395). A mutual agreement to abandon a contract discharges any obligations thereunder and renders the contract unenforceable (*see*, **AEB & Assocs. Design Group v Tonka Corp.**, 853 F Supp 724, 733). Whether a contract has been terminated or cancelled by mutual agreement is generally a question of fact for the jury when the evidence is conflicting (*see*, **Strychalski v Mekus**, 54 AD2d 1068, *see also*, **Matter of Rothko**, 43 NY2d 305, 324). In this case, however, the documentary evidence clearly establishes that the parties mutually agreed to terminate or abandon the Sawmill Intermediate School and Wood Park Primary School subcontracts and to pay the plaintiff for any work already performed thereunder. Those subcontracts are, therefore, no longer enforceable. Accordingly, the first and third causes of action, which seek to enforce those subcontracts, are dismissed.

Quantum meriut is the appropriate measure of damages under the Sawmill Intermediate School and Wood Park Primary School subcontracts . Although recovery in quantum meruit is generally barred when there is a valid and enforceable written contract covering the subject matter at issue (*see*, **Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.**, 70 NY2d 382, 388-389), when the contract has been terminated prior to completion, quantum meruit is the appropriate measure of damages (*see*, **MCK Building Assocs. v St. Lawrence Univ.**, 301 AD2d 726, 728). Since the Sawmill Intermediate School and Wood Park Primary School subcontracts are

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[1] The action was discontinued against the remaining defendant, the Commack Union Free School District, by a stipulation dated March 30, 2006.

unenforceable due to their termination by mutual agreement, the plaintiff is entitled to recover in quantum meruit for the work it performed thereunder.

The moving defendants contends that they are not liable to the plaintiff for any damages in connection with the Burr and Intermediate School and Sawmill Intermediate School subcontracts because Lipsky has already paid the plaintiff more money than is demanded in the amended complaint. In support thereof, the moving defendants rely on lien waivers signed by Governale in which he acknowledged receiving payments in the amount of $352,427 in connection with those two projects. The plaintiff admits that Governale signed the lien waivers in question and that Lipsky paid the plaintiff's suppliers $110,841.31. However, the plaintiff denies receiving any money directly from Lipsky, and there is no evidence in the record of any direct payments to the plaintiff (e.g., cancelled checks). The plaintiff contends that Governale signed the lien waivers in order to get paid, but that no payments were forthcoming except the payments to its suppliers.

The function of the court on a motion for summary judgment is issue finding and not issue determination (*see*, **Brown, Harris Stevens v Rosenberg**, 156 AD2d 249, 250). Viewing the evidence in the light most favorable to the plaintiff (*see*, **Spalt v Lager Assocs**., 177 AD2d 879, 881), the court is unable to determine as a matter of law that Lipsky paid the plaintiff and its suppliers $352,427. Although it is undisputed that Lipsky paid the plaintiff's suppliers $110,841.31, there is no evidence in the record of any direct payments to the plaintiff. Under these circumstances, court finds that there is a triable issues of fact as to whether the plaintiff actually received the payments to which the remaining lien waivers refer.

In view of the foregoing, summary judgment is denied as to the second, fourth, and fifth causes of action.

Unlike the Sawmill Intermediate School and Wood Park Primary School subcontracts, the Burr Intermediate School subcontract is still enforceable. A cause of action pursuant to a quasi-contract theory only applies in the absence of an express agreement (*see*, **Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.**, *supra* at 388). When there is no dispute as to the existence of a contract and the contract covers the dispute between the parties, the plaintiff may not proceed upon a theory of quantum meruit as well as seek to recover damages for breach of contract (*see*, **Alamo Contract Builders v CTF Hotel Co.**, 242 AD2d 643). Without in some manner removing the Burr Intermediate School subcontract from the picture in the normal fashion (i.e., rescission, abandonment, etc.) it is not possible to ignore it and proceed in quantum meruit (*see*, **SAA-A, Inc. v Morgan Stanley Dean Witter & Co.**, 281 AD2d 201, 203; **Unisys Corp. v Hercules Inc.**, 224 AD2d 365, 367). Since the plaintiff does not contend that the Burr Intermediate School subcontract is unenforceable, it cannot establish its claim for damages thereunder based on the theory of unjust enrichment (*see*, **Unisys Corp. v Hercules Inc.**, *supra* at 367). Accordingly, the sixth cause of action is dismissed.

The moving defendants contend that the lien foreclosure cause of action must be dismissed because Lipsky has already paid the plaintiff more money than is demanded in the notice of lien. In support thereof, they again rely on lien waivers signed by Governale in which he acknowledged receiving payments in the amount of $352,427. The amount demanded in the notice

of lien is $248,028.39, or $104,398.61 less. However, as previously discussed, the court is unable to determine as a matter of law that Lipsky actually paid the plaintiff $352,427, and there is a triable issue of fact regarding all but the $110,841.31 that was paid to the plaintiff's suppliers. Accordingly, summary judgment is denied as to the seventh cause of action.

Since Lipsky's surety is liable to the plaintiff to the same extent as Lipsky, summary judgment is denied as to the eighth cause of action against the surety.

The ninth cause of action for diversion of trust funds under Article 3-A of the Lien Law is deemed abandoned. The plaintiff never moved for class certification, as required by Lien Law § 77, and the plaintiff does not oppose the defendant's motion insofar as it seeks dismissal thereof. Accordingly, the ninth cause of action is dismissed.

A motion for summary judgment, irrespective of by whom it is made, empowers the court to search the record and award judgment where appropriate (*see*, CPLR 3212[b]; **Grimaldi v Pagan**, 135 AD2d 496). Although the plaintiff did not move for summary judgment on the counterclaims, a search of the record reveals that the plaintiff is entitled to summary judgment dismissing the second and third counterclaims for breach of the Sawmill Intermediate School and Wood Park Primary School subcontracts, respectively. The defendant seeks to recover the cost of completing those subcontracts after the plaintiff allegedly breached them. However, the documentary evidence clearly establishes that the Sawmill Intermediate School and Wood Park Primary School subcontracts were terminated by mutual consent and that Lipsky agreed to pay the plaintiff for any work already performed thereunder. Although the subcontracts provided for Lipsky to recover from the plaintiff its costs to complete the two projects if the plaintiff defaulted, as previously discussed, those subcontracts are no longer enforceable. Moreover, the parties' new agreement, which provides for the plaintiff to be paid for work performed, does not provide for any payments to Lipsky. Under these circumstances, the court finds as a matter of law that Lipsky is not entitled to recover from the plaintiff the cost of completing the Sawmill Intermediate School and Wood Park Primary School subcontracts. Accordingly, the second and third counterclaims are dismissed.

In sum, the first, third, sixth, and ninth causes of action are dismissed, as well as the second and third counterclaims.

HON. ELIZABETH HAZLITT EMERSON

DATED: July 9, 2008

J. S.C.