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

PRESENT: BARBARA R. KAPNICK Justice

PART 39

TADCO CONSTRUCTION

- v -

DORMITORY AUTHORITY

INDEX NO. 600039/07

MOTION DATE

MOTION SEQ. NO. 001

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

FILED
OCT 15 2010
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION

NYS SUPREME COURT
RECEIVED
OCT 14 2010
MOTION SUPPORT OFFICE

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

Dated: 10/12/10

BARBARA R. KAPNICK J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 39

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TADCO CONSTRUCTION CORP.,

Plaintiff,

- against -

DORMITORY AUTHORITY OF THE STATE OF NEW YORK,

Defendant.

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DECISION/ORDER
Index No. 600039/07
Motion Seq. No. 001

BARBARA R. KAPNICK, J.:

In this action, plaintiff TADCO Construction Corp. ("TADCO") has asserted six breach of contract claims, three unjust enrichment claims, and one claim for breach of the implied covenant of good faith and fair dealing against defendant Dormitory Authority of the State of New York ("DASNY") for events arising out of a construction contract.

Background

On or about May 4, 2004, TADCO entered into a written contract with DASNY whereby TADCO agreed to perform certain construction work in connection with a marina rehabilitation project (known as "Seawall Bulkhead Rehabiliation") located at Kingsborough Community College ("the Project"). Pursuant to the Contract, TADCO agreed to perform all work and furnish all supplies and materials for the Project for the contract price of $1,436,642.00, subject to

adjustments for extra work or alterations to or deductions from the work.

Before construction started, TADCO determined that fixing the floating dock system would only extend the life of the dock by a few years, and that replacing the dock, although more expensive, would give the dock a significantly longer lifespan. It presented this information to DASNY, who apparently said that it would not entertain an increase in costs for the repair of the dock, and that it would only approve replacement of the dock if it did not increase the contract price. TADCO responded by telling DASNY that it intended to proceed with its plan to replace the dock "under protest," and that it would seek compensation for the increased costs of this plan later, by submitting a change work order.

When TADCO submitted the change work order compensation request form to DASNY for the cost of the replacement dock in the amount of $155,040.00, DASNY refused to pay it, arguing that TADCO had chosen to replace the dock system on its own initiative and that DASNY had repeatedly told TADCO that it would not approve a change in contract price if TADCO chose to proceed with the installation of the new dock system.

In June of 2005, DASNY and TADCO held a meeting in order to

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discuss TADCO's assertions that it was entitled to compensation for this work and other change order claims TADCO had submitted. During the ensuing year, attorneys for both TADCO and DASNY continued to discuss a potential resolution of their claims. However, these discussions ultimately broke down, partially because DASNY claims that TADCO never submitted the required back-up documentation.

TADCO now alleges that defendants' failure to pay these extra amounts constitutes a breach of their Contract.

Specifically, the six breach of contract claims include a claim for $8,229.20 for alleged extra work, materials and equipment regarding concrete restoration (first cause of action); $155,040.00 for extra and changed work performed and the extra and changed materials and equipment furnished, including the new floats (second cause of action); $14,779.05 for extra coating work on the sheet piles on the marina bulkhead and extra materials and equipment in connection therewith (third cause of action); $9,950.26 for failure to pay escalated material costs due to steel price escalation generally (fourth cause of action); an undetermined sum for failure to pay escalated material costs due to steel price escalation specifically for the new floats (fifth cause of action); and

$16,631.95 for failure to pay the remainder of the retainage on the Contract (sixth cause of action).

TADCO further asserts that if it is not entitled to damages for its claims under a breach of contract theory, in the alternative, it should be entitled to recover for the alleged extra work done based on a theory of unjust enrichment.

The unjust enrichment claims include a claim for $188,018.51 for extra and changed work performed and extra and changed materials and equipment furnished (eighth cause of action), $16,631.95 for the remaining price to be paid on the contract (ninth cause of action), and $204,650.46 for the combination of extra work performed and the remaining price to be paid on the Contract (tenth cause of action). The seventh cause of action for breach of the implied warranty of good faith and fair dealing was dismissed for the reasons stated on the record on June 16, 2010.

Defendant DASNY now moves for an order pursuant to CPLR 3212 granting summary judgment to DASNY on all the causes of action except the sixth on the grounds that: (i) plaintiff's claims are barred by evidentiary proof; (ii) plaintiff's claims have no basis in fact or in law; and (iii) no outstanding disputed, material

issue of fact exists that would preclude judgment in favor of DASNY.[1]

Discussion

Breach of Contract Claims

As to the first cause of action regarding the concrete restoration work, DASNY notes that upon receipt of TADCO's change work order DASNY referred the order to the Project's architect - Hoffmann Architects - for review. By letter dated October 12, 2005 from Hoffman Architects to DASNY's project manager, John Kelly, the architect determined that the work was not in fact extra work but rather work performed under the allowances stipulated in TADCO's Contract. DASNY further contends that the architects stated that TADCO had not provided any documentation that would warrant an increase to the quantities set forth in the Contract.

TADCO responded to the architect's letter in its Change Order Memorandum dated December 22, 2005. The memorandum itemized the extra concrete restoration work performed by TADCO and set forth detailed calculations to demonstrate that the work performed was in excess of the stipulated allowances provided for in the contract,

[1] DASNY has not moved for summary judgment on the sixth cause of action for retainage since it acknowledges that retainage is owed to TADCO, but it cannot make payment until the lien filed against the contract balance by a third party (a law firm) claiming to be owed money by TADCO and DASNY is removed.

and thus constituted extra work for which TADCO claims it is entitled to additional compensation.

At the very least, plaintiff contends that the Memorandum creates a triable issue of fact as to whether the work performed by TADCO constitutes extra work for which it is entitled to be paid.

However, DASNY points out that the project architect performed a walk-through with TADCO on September 20, 2005, and TADCO was unable to identify the extra work it had performed. TADCO then several months later attempted to submit detailed calculations of the alleged extra work.

Of significance here is "Division 3 - Concrete, Section 03700 - Concrete Restoration" of the project Specifications which provides in relevant part that:

> 1.01 C: The architect will determine the actual locations and amounts of work necessary for these items and will direct the Contractor during construction. The actual contract amount will then be adjusted up or down utilizing unit prices provided in the base bid.

> It is established that the contractor cannot recover for additional work required by the architect or engineer in charge of construction where the contract gives the architect or engineer authority to determine the manner of performing the contract (citations omitted). In general, the parties are free to leave certain determinations to the judgment of the engineer and, where this has been done, the determination of the engineer is

> final as a matter of law, absent a showing of fraud or bad faith (citations omitted).

Savin Bros. v State of New York, 62 AD2d 511, 516 (4th Dep't 1978).

While TADCO has alleged general bad faith in DASNY's refusal to make payment, it has not set forth any evidence suggesting that the architect acted in bad faith in determining that this work was not extra work. Instead, TADCO simply disagrees with the conclusion of the architect. Since the contract clearly left it up to the architect to determine what concrete restoration work constituted extra work, and the architect determined that this work did not qualify as extra work, that portion of defendant's motion seeking to dismiss plaintiff's first cause of action is granted.

As to TADCO's third cause of action (regarding the alleged extra work it did on sheet pile coating), DASNY contends that payment was denied in 2005 because the engineering sub-consultant to Hoffman Architects, Olko Engineering ("Olko") and DASNY determined that 1) there were no holes blasted through the sheet piles and the surface preparation was stipulated by the manufacturer of the epoxy coating; 2) the "tight mill scale" did not have to be removed and 3) the linear feet of sandblasting and coating of sheet piles was reduced because TADCO did not begin sandblasting work until August 2005, by which time sediment had backfilled the area east of the travel lift which prevented work from being performed on that portion of the Project.

TADCO, on the other hand, claims that on September 19, 2005, it submitted a change order claim for extra coating work that was required due to changed conditions at the Project site. Specifically, TADCO contends that extra man hours to perform the work was required as a result of a directive issued by Olko concerning work relating to the coating of the sheet piles. As stated in the letter from TADCO's coating subcontractor, National Surface Technology, dated September 15, 2005, it needed "an additional 48 man hours to re-blast and coat the balance remaining [in the travel lift area] according to the engineer's directive."

Defendant has submitted to the Court as evidence of its position a memo from Olko, stating that it determined that this work was not in fact extra work.

However, DASNY has not shown that the Contract gave Olko the sole authority to make such a binding determination, and TADCO has alleged Olko's determination was incorrect. Therefore, there appear to be questions of fact which preclude the granting of summary judgment on the third cause of action at this time.

TADCO's second cause of action alleges a breach of contract on DASNY's part for failing to pay for the increased costs associated with the replacement of the floating dock.

Plaintiff contends that (i) DASNY's engineers approved the plans for the replacement of the floating dock, and (ii) DASNY agreed to reimburse TADCO for the cost of the replacement dock during their subsequent negotiations but then ultimately refused to do so. Plaintiff further relies on the fact that DASNY engaged in talks with TADCO in an attempt to resolve the claim and that the talks seemed to come close to an agreement before they ultimately broke down. Plaintiff argues that, during these talks, DASNY agreed to pay TADCO compensation for the new dock system, and the only question that was being debated when the talks broke down was how much compensation would be paid.

DASNY contends that it did not request TADCO to do this work, or approve of it.

> [T]he general rule is that where the contract is for construction of an entire work at a stipulated price the contractor cannot recover for additional work or expense caused by unforeseen difficulties or casualties. (citations omitted). Recovery cannot be had for extra work which actually falls within the contract or the plans and specifications (citations omitted), but recovery may be had for work outside the contract where the contractor was in fact specifically ordered to do work not within the scope of that called for by the contract (citations omitted).

Savin Bros. v State of New York, supra at 516.

TADCO does not allege that DASNY directed it to replace the dock. Instead, Frank DeMartino, the President of TADCO, states in his Affidavit sworn to on March 15, 2010 in opposition to defendant's motion, as follows:

> 28. The 7/19/04 Proposal also set forth the escalated costs of the float replacement materials....Not surprisingly, the replacement materials were much more expensive than the repairs materials...
>
> 29. DASNY balked at paying the escalated replacement costs set forth in the 7/19/04 Proposal. However, it did not disagree that the floats needed to be replaced, and there was no question that it wanted them replaced.
>
> 30. Accordingly, rather than formally agreeing to or rejecting the proposal outright, DASNY permitted TADCO to proceed with replacing the floats in lieu of repairing them with the understanding that TADCO would submit a change work order claim for the escalated costs later (along with other change order claims for other work performed on the Project).

Mr. DeMartino goes on to assert that proceeding in this manner (i.e., proceeding with work without a signed change order agreement in place with the understanding that the contractor would submit a claim for a change order later) is not uncommon on construction projects, that it had been done numerous times during this Project, and that, therefore, TADCO was acting in good faith when it performed the work and had reason to expect compensation. However, it has not shown that it ever proceeded in this manner after *specifically* being told that it would not be reimbursed for the work if it chose to proceed.

Defendant refers this Court to the Meeting Minutes from a meeting held on August 12, 2004 where TADCO discussed its plan to replace the dock with DASNY:

> DASNY stated that they will not entertain an escalated price for repair of floating docks. Replacement of docks will be approved, if there is no increase in contract price.
>
> TADCO stated that they will be providing new floats but proceeding under protest due to escalations in material prices. TADCO to seek dispute resolution.

The facts in this case are similar to those found in *Bond v. Stewart*, 58 A.D. 615 (1st Dep't 1901). In that case, a contractor was unable to acquire the beams he needed for his construction project. He instead purchased larger, more expensive beams, and then attempted to receive reimbursement from the financer of the project for the increased cost of the beams. The financer refused to pay for the additional cost, and a lawsuit ensued. The court determined:

> The fact that the architect permitted plaintiff to substitute heavier beams, at his own option, did not render the defendants liable for the additional cost of such heavier beams.... the defendants, through their agent, permitted him to furnish a different beam than that called for by the contract, and of course it was at his expense, in the absence of a specific agreement that the additional expense would be borne by the defendants.
>
> *Bond v Stewart, supra at* 616.

TADCO's own claims make it clear that it chose to proceed with the dock replacement plan after being told by DASNY that it would not agree to any changes in the original contract plan that would result in increased costs. It has not asserted that DASNY ordered it to do this extra work; it has only asserted that DASNY's engineers gave approval to the drawings. Because the work was not ordered by DASNY, TADCO voluntarily substituted materials in the project at its own discretion, and the costs of that choice are not recoverable. As such, this Court is constrained to grant summary judgment dismissing the second cause of action.

As to plaintiff's fourth cause of action, TADCO submitted documentation to DASNY stating that the increased cost of steel rebar caused by steel price escalation was $9,950.26. DASNY made its own calculations as to the rebar cost increase TADCO suffered as a result of the escalation of steel prices, and approved $2,060.72 for its claim as indicated in Change Order 008 ("CO 008"). TADCO contends that it is entitled to the remaining $7,889.54, because it used more steel than DASNY calculated. DASNY asserts that TADCO never provided documentation showing the actual amount of steel used by TADCO, provided by the supplier or the original bid price for the steel.[2]

[2] Plaintiff contends that it provided DASNY with the information requested.

However, the 2004 legislation which allowed state agencies such as DASNY to pay contracts for extraordinary steel price escalations in existing contracts, also gave DASNY the authority to make its own determination as to the actual cost increase associated with steel price escalation, and only requires it to pay what it determines to be the actual increased costs due to steel price escalation. Accordingly, that portion of defendant's motion seeking summary judgment on the fourth cause of action is also granted, except that defendant is directed to pay TADCO the $2,060.72 it agrees it owes, if not already paid.

As to TADCO's fifth cause of action, DASNY claims that TADCO has not produced any documentation showing what extra steel costs, if any, are attributable to the new floats, nor does the Complaint state any amount of damages. TADCO's subcontract with Bellingham Marine for the replacement of the floating dock simply provides a fixed price of $300,000 for the new floats.

DASNY argues that TADCO elected to proceed with the installation of the floating dock at a higher cost and cannot now claim escalated prices for the reinforced steel in addition to its floating dock claim, given that it has provided no documentation for those escalated costs.

It does not appear that the legislation in question entitles TADCO to reimbursement for any cost increases associated with materials not contemplated by the original Contract and acquired at the contractor's discretion. The replacement of the floating dock, including the steel used therein, was done at TADCO's discretion and was not required by the original Contract. Therefore, summary judgment must be granted to defendant on the fifth cause of action.

Unjust Enrichment Claims

TADCO alleges in the eighth, ninth, and tenth causes of action, that it is entitled, in the alternative, to recovery on the basis of unjust enrichment for the remainder of the price to be paid on the Contract as well as the alleged extra work and materials it provided during the Project.

It should be noted initially that the ninth cause of action alleges that TADCO is entitled to recover from DASNY for the remaining price of the Contract that has yet to be paid. Because DASNY has already acknowledged that it owes TADCO the remainder of the price of the Contract, and has not moved to dismiss the sixth cause of action for that relief, the ninth cause of action is redundant and must be dismissed.

TADCO's tenth cause of action simply aggregates the amount it seeks in the eighth cause of action with the amount it seeks in the ninth cause of action, and is therefore also duplicative. Thus, the tenth cause of action is also dismissed.

Finally, as to the eighth cause of action, plaintiff seeks recovery of the amount due for extra work performed.

However,

> [t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter (citations omitted). A "quasi contract" only applies in the absence of an express agreement, and is not really a contract at all, but rather a legal obligation imposed in order to prevent a party's unjust enrichment (citations omitted)...

Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co., 70 NY2d 382, 388 (1987).

TADCO's eighth cause of action includes claims for concrete restoration work, the acquisition of the new floating dock system, coating work on sheet piles and the effect of the escalation of steel prices on steel rebar and on the new floating dock system. TADCO contends that the claims it seeks to recover for are allegedly extra work and thus are not covered by the Contract.

However, as discussed above, the Contract for the Project covered all of these claims, and thus plaintiff cannot avoid the

outcome of the motion on the breach of contract claims by now seeking to recover under an unjust enrichment theory.

TADCO, however, alleges that it is at least entitled to compensation under a theory of unjust enrichment for the purchase of the new floating dock system because DASNY has expressly conceded that the replacement of the dock was not within the scope of the Contract.

In order for this unjust enrichment claim to be successful, TADCO must show the following:

> "(1) the performance of the services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services" (citations omitted).

Joan Hansen & Co. v. Everlast World's Boxing Headquarters Corp., 296 AD2d 103, 108 (1st Dep't 2002).

TADCO has alleged that DASNY received the benefit of the new dock system, that DASNY accepted the new dock system, and that TADCO expected to be compensated for the new dock system.

However, as discussed above, the choice to replace the dock rather than to repair it as contemplated by the Contract was a discretionary decision made by TADCO, and TADCO knew it was doing

the work "under protest" and would have to go to dispute resolution to try to recover the additional sums sought.

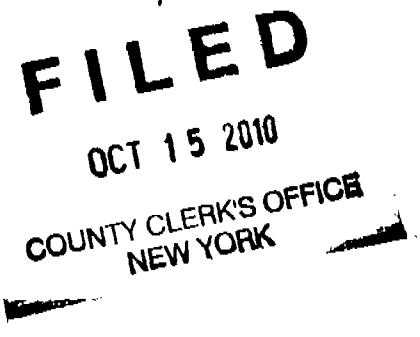
Based on all the evidence submitted and discussed herein, TADCO cannot claim that this work was done outside the parameters of the controlling Contract. Nor can TADCO show on this motion for summary judgment, that, while their work may have been done with good intentions, that it was done "in good faith" with a "reasonable expectation" of compensation.

Accordingly, the eighth cause of action must be dismissed in its entirety.

Counsel shall appear for a conference in IA Part 39, 60 Centre Street, Room 208 on November 10, 2010 at 10:30 a.m. to discuss with this Court how to proceed on the remaining two causes of action.

This constitutes the decision and order of this Court.

Dated: October 12 2010



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