SHORT FORM ORDER

Index Number: 00158-2008

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

***Present*: HON. EMILY PINES**
J. S. C.

Original Motion Date: 08-31-2010
Motion Submit Date: 09-21-2010
Motion Sequence .: 001 MG
CASEDISP

[x] FINAL DISP
[ ] NON - FINAL DISP

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ENVIRONMENTAL TECHNOLOGY GROUP, INC.,

Plaintiff,

-against-

GANNETT FLEMING PROJECT DEVELOPMENT CORP.,

Defendant.
---X

Attorney for Plaintiff
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PO Box 1144
Sound Beach, New York 11789

Attorney for Defendant
L'Abbete, Balkan, Colavita & Contini, LLP
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ORDERED, that the motion (motion sequence no. 001) by defendant pursuant to CPLR §3212 for summary judgment is granted and this action is dismissed.

Plaintiff commenced this action against defendant seeking recovery for damages for breach of contract by the filing of a Summons and Verified Complaint on January 7, 2008 and issue was joined by defendant's service of a Verified Answer dated March 20, 2008. Subsequently, plaintiff was granted leave to amend the Complaint and served an Amended Complaint dated April 6, 2010 which added a cause of action sounding in quantum meruit, and defendant served a Verified Answer dated April 20, 2010. The action arises out of an agreement between the parties dated April 25, 2005 and captioned "TerraSure Associate Program MASTER SERVICES AGREEMENT" (the "Agreement"). Pursuant to the Agreement, plaintiff agreed to provide environmental assessment and remediation services for defendant for property located in Queens, New York (the "subject premises"). Plaintiff alleges that

defendant failed to compensate it in accordance with the terms of the Agreement, and the amount of $514,212.41, remains due and owing. The first cause of action seeks damages based upon a breach of contract and the second cause of action seeks recovery based upon a theory of quantum meruit.

Defendant now moves for an Order, *inter alia,* granting summary judgment dismissing the Complaint in its entirety. Defendant argues that plaintiff's claim is barred pursuant to the Agreement because (1) invoices were submitted more than 90 days after the services were provided, in violation of the explicit terms of the Agreement; (2) plaintiff performed work after defendant directed it in writing to cease work; and (3) the parties entered into a Release and Waiver in January 2007 which resolved plaintiff's claims. With regard to the claim sounding in quantum meruit, defendant argues that such is barred because there was a written agreement between the parties.

Specifically, defendant relies on the following provisions of the Agreement which it asserts bars plaintiff's recovery:

Article 13

13.5 Services Provider[1] shall provide documentation to support its invoices and will cooperate with GFPDC in responding to GFPDC's client's request for invoice documentation. GFPDC will not be responsible for invoices received later than 90 calendar days after the work is performed or costs are incurred.

Article 16

16.1 GFPDC may increase or decrease the Services Provider's work at any time or direct the Services Provider to alter the Work. However, Services Provider shall make no changes in the Work unless directed in writing by GFPDC. All changes in the Work made by Services Provider without GFPDC's prior written approval shall be at Services Provider's risk and Services Provider waives all claims for additional compensation. Services Provider waives all claims for additional compensation. Services Provider shall have no claim against GFPDC for reduced work or for work eliminated from the Scope of Work.

ARTICLE 27

27.1 GFPDC shall have the unrestricted right, and without having to show default on the part of Services Provider, to suspend, postpone, terminate or reduce the Work or any part of the Work by providing written or verbal notice to Services Provider and such action by GFPDC shall not be a breach of this Agreement.

[1] Service provider is the plaintiff herein.

> 27.2 In the event of such suspension, postponement or termination, Services Provider shall immediately stop the work as directed by GFPDC and submit an invoice for work and materials purchased for the job.
>
> 27.3 In the event that GFPDC terminates this Agreement or amends it by decreasing the work, the Services Provider shall have no claim against GFPDC for loss of profits or damages of any kind relating to the decreased work.

Defendant annexes to its motion papers the invoices for which plaintiff seeks payment. Plaintiff explains that certain of these invoices (#'s 431-439 inclusive, 443-445 inclusive, and 455-456 inclusive) were for work performed beyond the 90 day period and as such were barred by the plain language of the parties' Agreement as set forth above. Therefore, the motion for summary judgment should be granted and these claims dismissed.

Next, defendant argues that plaintiff is barred from recovery for any claims for work performed after January 31, 2007, since it was advised in writing, on that date, to terminate its work. Here, defendant annexes invoices for work performed after plaintiff was notified to cease work (#'s 436, 437, 439, 445, 454, 456 and 457) and argues that pursuant to Section 16.1 of the Agreement, plaintiff cannot recover on these claims.

Finally, defendant asserts that the remainder of plaintiff's claims are barred by the January 2007 Release and Waiver (the "Waiver"). The Waiver provided that defendant would pay plaintiff the sum of $301,000.00 in full payment of plaintiff's services through June 1, 2006. In the Waiver, plaintiff acknowledged that this payment represented the "current amount agreed to be due" to plaintiff in accordance with the parties' Agreement and, notably that the Waiver constituted a "settlement of all claims, back charges and extras for the work performed under contract" between the parties. The Waiver continued to state that:

> Subcontractor formally and irrevocably releases and waives in writing any and every lien, action, charge or claim of any nature whatsoever that it has, or that any of Subcontractor's material suppliers or subcontractors may at any time be entitled to have against Owner, or GFPDC in connection with all construction, maintenance, testing, improvements or repair work heretofore performed by Subcontractor at the Work Premises.

Here, defendant refers to invoices #436, 437 and 439, which include work performed prior to June 1, 2006, for which it argues plaintiff was paid and released defendant from liability pursuant to the

Waiver. Again, defendant urges the Court to recognize that these claims are barred and must be dismissed.

Since there is a written Agreement between the parties, defendant also requests that the cause of action sounding in unjust enrichment be dismissed.

Plaintiff opposes the motion by affirmation of counsel with exhibits and a memorandum of law. Although plaintiff's counsel captions his affirmation as in opposition to the motion for summary judgment and in support of cross-motion for summary judgment, no notice of cross-motion was filed in accordance with CPLR §2215. In opposition, plaintiff submits an affidavit by William Seevers ("Seevers"), president of plaintiff. Seevers explains that plaintiff has been involved in the environmental cleanup of the subject premises since 2001 and acknowledges the execution of the Agreement with defendant in 2005.[2] Seevers asserts that any delay in submitting invoices was due to the fault of defendant and refers to correspondences from defendant's president, Donald Morosky ("Morosky"), dated December 2005 through August 2006 wherein he challenges certain payments sought by plaintiff. Seevers claims that defendant sought to "re-write" the Agreement in its favor and reduce the amount paid to plaintiff. Seevers admits that even after defendant request plaintiff cease work at the site, plaintiff "continued to monitor the site to the extent necessary to be able to properly certify that all activities at the site were performed in full accordance with the Investigation Work Plan." Seevers affidavit at ¶20.

Plaintiff argues that it asserts a valid cause of action for breach of contract which must not be dismissed and further that it was the fault of defendant which caused the late submission of the invoices for payment. Plaintiff also submits an affidavit by Charlaine Apsel ("Apsel"), its bookkeeper, who states that many of the invoices defendant claims were untimely were actually resubmissions that were presented timely but not paid pending resolution of billing rates. She states that none of the original submissions were rejected as untimely. Plaintiff urges the Court to deny the motion for summary judgment in its entirety.

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[2] Seevers refers to a provision in the Agreement regarding a cost reduction sharing incentive, but admits that the parties were never able to reach an agreement regarding the share, and thus, this provision did not take effect.

In reply, defendant's counsel submits an affirmation wherein he alleges that the parties did agree to negotiate reduced billing rates, pursuant to Work Order No. 39-020 dated May 11, 2005, which is annexed to the moving papers. Further, defendant points out that the correspondences submitted by plaintiff to support its position were all dated prior to the execution of the Waiver, which released all claims through June 1, 2006. Plaintiff cannot seek payment for claims that were released pursuant to the Waiver. Lastly, plaintiff cannot recover on a quasi-contract theory since there was a valid Agreement between the parties governing the same subject matter.

Based on the foregoing, defendant seeks dismissal of the Complaint in its entirety.

It is well settled that to obtain summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. ***Goldberger v. Brick & Ballerstein, Inc.,*** 217 A.D.2d 682, 629 N.Y.S.2d 813 (2d Dept. 1995) (internal citations omitted). The burden then shifts to the party opposing the motion to come forward with proof in admissible form demonstrating there are genuine issues of material fact which preclude the granting of summary judgment. ***Zayas v. Half Hollow Hills Cent. School Dist.,*** 226 A.D.2d 713, 641 N.Y.S.2d 701 (2d Dept. 1996). However, if the movant fails to meet its prima facie burden, the Court need not consider the sufficiency of the opposition papers. ***McMahan v. McMahan,*** 66 A.D.3d 970, 886 N.Y.S.2d 825 (2d Dept. 2009). "It is not up to the court to determine issues of credibility or the probability of success on the merits, but rather to determine whether there exists a genuine issue of fact." ***Triangle Fire Protection Corp. v. Manufacturer's Hanover Trust Co.,*** 172 AD2d 658, 570 NYS2d 960 (2d Dept. 1991). A motion for summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility." ***Scott v. Long Island Power Auth.,*** 294 AD2d 348, 741 NYS2d 708 (2d Dept. 2002).

The Second Department has oft held that a written agreement that is "complete, clear, and unambiguous" on its face must be enforced according to the plain meaning of the terms contained therein. ***Johnston v. MGM Emerald Enterprises, Inc.,*** 69 A.D.3d 674, 893 N.Y.S.2d 176 (2d Dept. 2010). ***See also, Lobacz v. Lobacz,*** 72 A.D.3d 653, 897 N.Y.S.2d 516 (2d Dept. 2010); ***M & R Rockaway, LLC v. SK Rockaway Real Estate Co.,*** 74 A.D.3d 759, 902 N.Y.S.2d 621 (2d Dept.

2010). However, before "a plaintiff may secure redress for the breach of an agreement, the promise may by the defendant must be sufficiently certain and specific so that the parties' intentions are ascertainable. Thus, an agreement to agree, which leaves material terms of a proposed contract for future negotiations is unenforceable." ***Andor Group, Inc., v. Benninghoff,*** 219 A.D.2d 573, 631 N.Y.S.2d 79 (2d Dept. 1995).

A "valid release constitutes a complete bar to an action on a claim which is the subject of the release." ***Littman v. Magee,*** 54 A.D.3d 14, 860 N.Y.S.2d 24 (1st Dept. 2008)(internal quotations omitted). Where the language of the release clearly and unambiguously covers the subject matter of the latter action, the action must be dismissed. ***Luxury Travel Coach v. 4020 Assoc., Inc.,*** 241 A.D.2d 443, 663 N.Y.S.2d 977 (2d Dept. 1997). The Courts have recognized that a "'release will be set aside by a court only for duress, illegality, fraud or mutual mistake.'" ***Seff v. Meltzer, Lippe, Goldstein & Schlissel,*** 55 A.D.3d 592, 865 N.Y.S.2d 323 (2d Dept. 2008); ***quoting, Shklovskly v. Khan,*** 273 A.D.2d 371, 709 N.Y.S.2d 208. ***See also, Haynes v. Garez,*** 304 A.D.2d 714, 758 N.Y.S.2d 391 (2d Dept. 2003).

Regarding a claim for unjust enrichment, a plaintiff cannot prevail on such cause of action where it is established that there is a valid contract between the parties governing the same subject matter. ***Whitman Realty Group, Inc. v. Galano,*** 41 A.D.3d 590, 838 N.Y.S.2d 585 (2d Dept. 2007). ***See also, Marc Contracting, Inc., v. 39 Winfield Assoc., LLC.,*** 63 A.D.3d 693, 880 N.Y.S.2d 346 (2d Dept. 2009); ***Yenrab, Inc. v. 794 Linden Realty, LLC.,*** 68 A.D.3d 755, 892 N.Y.S.2d 105 (2d Dept. 2009).

In the case at bar, defendant has met its prima facie burden of demonstrating entitlement to summary judgment dismissing the Complaint. The plain language of the Agreement between the parties bars plaintiff's recovery based on claims submitted longer than 90 days from performance of the work at issue. Further, the Waiver, executed by plaintiff and for which it received more than $300,000.00, released defendant from liability for payment for items up to June of 2006. Additionally, it is undisputed that defendant directed plaintiff to cease work on the project, in writing, on more than one occasion, yet plaintiff admittedly continued to work.

In opposition, plaintiff has failed to raise a triable issue of fact warranting a trial. Although

plaintiff argues that defendant caused the delay in the submission of the invoices, such is not supported by the record. Instead, plaintiff's submissions are largely, if not wholly, dated post-execution of the Waiver. Seevers testified at his examination before trial that he executed the Waiver and it has not been challenged on the basis of fraud, duress, mutual mistake or illegality. Although Seevers stated in his deposition that he believed that the Waiver released payment for claims for "invoiced services", such interpretation is belied by the plain language of the document which provided that it was payment for "subcontractor's services" through June 1, 2006. Additionally, Seevers admitted in his examination before trial that plaintiff was directed to stop work on the project.

Based on the foregoing, plaintiff's motion for summary judgment dismissing the first cause of action for breach of contract is granted. The second cause of action sounding in unjust enrichment is also dismissed as a valid contract between the parties governs the subject matter. ***Whitman, supra.*** This action is therefore dismissed in its entirety.

This constitutes the ***DECISION*** and ***ORDER*** of the Court.

Dated: 2/1/10
Riverhead, New York

Emily Pines
EMILY PINES
J. S. C.

[x] FINAL DISP
[ ] NON - FINAL DISP