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SHORT FORM ORDER

COPY

INDEX No. 06-28168
CAL No. 12-00881CO

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN
Justice of the Supreme Court

MOTION DATE 5-1-12
ADJ. DATE 7-31-12
Mot. Seq. # 004 - MG;CASEDISP

PALACE ELECTRICAL CONTRACTORS, INC.,

Plaintiff,

- against -

WILLIAM FLOYD UNION FREE SCHOOL DISTRICT, BOARD OF EDUCATION - WILLIAM FLOYD UNION FREE SCHOOL DISTRICT, and JOHN DOE #1 through JOHN DOE #25, these names being fictitious and unknown to plaintiff, the parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in the public funds and/or lien upon the property and the buildings known as and by William Floyd Union Free School Districts,

Defendants.

FOLEY & ASSOCIATES, P.C.
Attorney for Plaintiff
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Upon the following papers numbered 1 to 31 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 26; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 28 - 30; Replying Affidavits and supporting papers __; Other memoranda of law 27, 31; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the defendants William Floyd Union Free School District, and Board of Education - William Floyd Union Free School District for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is granted; and it is further

ORDERED that the Court *sua sponte* dismisses as moot the claims against the defendants John Doe # 1 through John Doe # 25.

This is an action to recover damages for monies allegedly due under a contract. In February 2002, the plaintiff, Palace Electrical Contractors, Inc. (Palace), entered into a written contract with the defendant, William Floyd Union Free School District (the School District), to perform electric work for construction projects at the William Floyd Elementary School (WFE School project) and the William Paca Junior High School (JHS project). In its complaint, Palace alleges that the contract called for its work to commence on February 18, 2002, and terminate by October 3, 2005, that the School District directed it to accelerate and/or delay its work outside of the existing or modified work schedules resulting in additional costs and financial charges, and that the defendants failed to pay the additional costs. The complaint sets forth four causes of action for breach of contract, foreclosure of lien, payment of its notice of claim, and quantum meruit, respectively.

The defendants now move for summary judgment on the grounds that Palace failed to timely serve a notice of claim pursuant to Education Law 3813 (1), and that the action is barred by the applicable one-year statue of limitations (Education Law 3813 [2-b]). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

In support of the motion, the School District submits, among other things, the pleadings, the subject notice of claim, the affidavit of its plant facilities manager, the deposition transcripts of Palace's project manager and assistant project manager, the contract between the parties, and various contract-related documents. The Court notes that the deposition transcripts are certified but unsigned, and that the School District has failed to submit proof that the transcripts were forwarded to the witnesses for their review (*see* CPLR 3116 [a]). However, the Court may consider the unsigned deposition transcripts submitted in support of the motion as the plaintiff has not raised any challenges to their accuracy (***Rodriguez v Ryder Truck, Inc.***, 91 AD3d 935, 937 NYS2d 602 [2d Dept 2012]; ***Zalot v Zieba***, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]; *see also* ***Bennet v Berger***, 283 AD2d 374, 726 NYS2d 22 [1st Dept 2001]; ***Zabari v City of New York***, 242 AD2d 15, 672 NYS2d 332 [1st Dept 1998]).

In his affidavit in support of the motion, Herbert Hodge (Hodge), the School District's plant facilities manager, swears that Palace completed all of its work except the close out documents for the WFE School project by March 31, 2004, and he attaches a copy of Palace's Application and Certificate for Payment (Payment Application) number 19 as evidence thereof. He indicates that, on April 27, 2004, Palace's project manager, George Dhaim (Dhaim), signed and submitted an affidavit to the surety for the projects requesting release of the retainage for the WFE School project, which states: "There are no outstanding claims or items in dispute under the contract to date." He states that Palace completed its close out documents for the WFE School project by August 6, 2004. Hodge further swears that, on

February 11, 2005, Dhaim signed and submitted an affidavit to the surety for the projects requesting final payment for the projects which states: "There are no outstanding claims or items in dispute under the contract to date," that Palace completed its close out documents for the JHS project by the end of February 2005, and that Place submitted its Final Payment Application number 27, on May 11, 2005. He indicates that Palace served the subject notice of claim on October 1, 2005, more than four months after the completion of its work under the contract, and commenced this action on October 4, 2006, more than one year after it completed said work.

Education Law 3813, entitled "Presentation of claims against the governing body of any school district or certain state supported schools," provides in pertinent part:

> 1. No action or special proceeding, for any cause whatever, except as hereinafter provided ... against the district or any such school, or involving the rights or interests of any district or any such school shall be prosecuted or maintained against any school district, board of education ... unless it shall appear by and as an allegation in the complaint or necessary moving papers that a written verified claim upon which such action or special proceeding is founded was presented to the governing body of said district or school within three months after the accrual of such claim, and that the officer or body having the power to adjust or pay said claim has neglected or refused to make an adjustment or payment thereof for thirty days after such presentment. In the case of an action or special proceeding for monies due arising out of contract, accrual of such claim shall be deemed to have occurred as of the date payment for the amount claimed was denied.
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> 2-b. Except as provided in subdivision two of this section and, notwithstanding any other provision of law providing a longer period of time in which to commence an action or special proceeding, no action or special proceeding shall be commenced against any entity specified in subdivision one of this section more than one year after the cause of action arose ...

A review of the contract-related documents reveals that the defendants have established their prima facie entitlement to summary judgment herein. In determining whether a notice of claim is timely pursuant to Education Law 3813, a denial of payment is deemed to occur upon an express refusal to pay, or when a party "should have viewed [its] claim as having been constructively rejected " (***Zurich Am. Ins. Co. v. Ramapo Cent. School Dist.***, 63 AD3d 729, 879 NYS2d 585 [2d Dept 2009]; *see also* ***East Hampton Union Free School Dist. v Sandpebble Builders, Inc.***, 90 AD3d 821, 935 NYS2d 616 [2d Dept 2011]; ***Greece Cent. School Dist. v Garden Grove Landscape***, 90 AD3d 1568, 935 NYS2d 777 [4th Dept 2011]; ***Oriska Ins. Co. v Board of Educ.***, 68 AD3d 1190, 890 NYS2d 171 [3d Dept 2009]; ***Angelo Capobianco, Inc. v Brentwood Union Free School Dist.***, 53 AD3d 634, 862 NYS2d 561

[2dDept 2008]; ***Matter of Hawthorne Cedar Knolls Union Free School Dist. v Carey & Walsh, Inc.***, 36 AD3d 810, 828 NYS2d 221 [2d Dept 2007]).

It is undisputed that Palace submitted a sworn affidavit to the surety for the projects seeking final payment under the contract on February 11, 2005, which stated that there were "no outstanding claims or items in dispute under the contract to date," that the surety consented to final payment to Palace on February 16, 2005, and that Palace served its notice of claim on October 18, 2005, more than eight months later. A review of the record reveals that the delays and accelerations allegedly attributable to the defendants occurred no later than January 14, 2005, that Palace did not seek payment for the additional costs it is allegedly owed before filing its notice of claim, and that Palace is an experienced electrical contractor. The Court finds that the defendants have established that Palace constructively knew that any claim for additional costs made by it after February 11, 2005, would have been rejected by the School District. In addition, the Court finds that Palace's filing of a Final Payment Application on May 11, 2005, which indicates that close out documents for the project have been completed, is further proof that Palace constructively knew that any claim for additional costs would be rejected by the School District.

In opposition to the defendants' motion, Palace submits the affidavit of Dhaim, its project manager, who swears that "[t]he affidavit that I signed stating that 'There are no outstanding claims or items in dispute under the contract to date' was correct at the time I signed it, as we had not determined or computed and submitted a claim as of those dates." He indicates that the affidavit language does not "say that we are waiving our rights to pursue such a claim at a later date."[1]

Palace fails to raise a triable issue of fact regarding the dates of completion of the projects, and the dates that it filed close out documents and Payment Applications which establish that it should have viewed any further claims made to be constructively rejected because the School District would deny any further applications for payment pursuant to the contract between the parties. The service of its notice of claim for additional costs on October 18, 2005, more than three months after May 11, 2005, when Palace constructively knew that any demand for payment would be rejected, was untimely pursuant to Education Law 3813 (1). In addition, the commencement of this action against the School District on October 4, 2006, more than one year after May 11, 2005, was untimely and is barred by the statute of limitations pursuant to Education Law 3813 (2-b). Accordingly, Palace's First, Second, and Third Causes of Action for breach of contract, foreclosure of its lien, and payment of its notice of claim respectively are dismissed.

The Court now turns to Palace's Fourth Cause of action for quantum meruit. In general, "[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" (***Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.***, 70 NY2d 382, 521 NYS2d 653 [1987]). It is well settled that a

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[1] The Court notes that Dhaim's affidavit contains a notarized verification instead of a simple notarized signature. In addition, Palace's opposition papers do not include an affidavit of service. However, it is clear that the School District received the opposition, and the Court deems Dhaim's affidavit admissible under the circumstances. In addition, the Court notes that the original and two duplicate copies of the School District's reply memorandum do not include an affidavit of service and it has not been considered in the determination of this motion.

party may not 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 (***Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.***, *supra*; ***General Sec. Property & Cas. Co. v American Fleet Mgt., Inc.***, 37 AD3d 345, 830 NYS2d 136 [1st Dept 2007]; ***Aviv Const., Inc. v Antiquarium, Ltd.***, 259 AD2d 445, 687 NYS2d 344 [1st Dept 1999]; ***Leroy Callender, P.C. v Fieldman***, 252 AD2d 468, 676 NYS2d 152 [1st Dept 1998]). Here, it is undisputed that Palace has fully performed on a valid written agreement, which provides a specific procedure for requests for additional monies claimed to be due and owing from the School District (***Zito v Fischbein, Badillo, Wagner & Harding***, 35 AD3d 306, 831 NYS2d 25 [1st Dept 2006]; ***Aviv Const., Inc. v Antiquarium, Ltd.***, *supra*).

The contract between the parties dated February 12, 2002, in its General Conditions of the Contract for Construction, Article 3 (K), provides in pertinent part that:

> The Contractor shall monitor the progress of its work for conformance with the requirements of the construction schedule and shall promptly advise the [School District] of any delays or potential delays. In the event any progress report indicates any delays, the Contractor shall propose an affirmative plan to correct the delay, including overtime and/or additional labor, if necessary. In no event shall any progress report constitute an adjustment in the Contract Time, any Milestone Date or the Contract Sum unless any such adjustment is agreed to by the [School District] and authorized pursuant to Change Order.

Palace's notice of claim served on October 18, 2005, sets forth the basis of its claim against the School District in paragraph 5, which states "Palace furnished labor and materials to perform electrical contracting work on said public improvement. Said labor and materials were furnished pursuant to the agreement between Palace and [the School District] referred to herein as the "Palace/WFUFSD Contract. In the course of the prosecution of its work, Palace was directed to substantially accelerate the completion time for the work to be done in accordance with the contract. Palace was thereupon obligated to pay additional labor charges and material costs ... " It is undisputed that Palace did not submit any requests for adjustments to the contract sum herein, and the School District did not authorize any additional payments pursuant to change orders, regarding the additional costs sought in this action. The School District has established that Palace 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. Accordingly, Palace's Fourth Cause of Action sounding in quantum meruit is dismissed.

Finally, the Court notes that Palace has not prosecuted this action against the defendants John Doe # 1 through John Doe # 25 and, in any event, the potential claims against them are moot in light of the Court's determinations herein.

Dated: NOVEMBER 13, 2012.

Daniel Martin
J.S.C.

__X__ **FINAL DISPOSITION** _____ **NON-FINAL DISPOSITION**