

**New York Structural Biology Ctr. v Caldwell
Wingate Co., LLC**

2013 NY Slip Op 32059(U)

August 30, 2013

Supreme Court, New York County

Docket Number: 102572/10

Judge: Anil C. Singh

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. ANIL C. SINGH
SUPREME COURT JUSTICE
PRESENT:
Justice

PART 61

Index Number : 102572/2010
NEW YORK STRUCTURAL BIOLOGY
vs.
CAULDWELL WINGATE
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO.
MOTION DATE
MOTION SEQ. NO.

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).
Answering Affidavits — Exhibits No(s).
Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum opinion.

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 8/30/13

HON. ANIL C. SINGH
SUPREME COURT JUSTICE
J.S.C.

- 1. CHECK ONE: CASE DISPOSED, NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED, DENIED, GRANTED IN PART, OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER, SUBMIT ORDER, DO NOT POST, FIDUCIARY APPOINTMENT, REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 61

-----x
NEW YORK STRUCTURAL BIOLOGY CENTER,

Plaintiff,

Index No. 102572/10

- against -

CAULDWELL WINGATE COMPANY, LLC,

Defendant.

-----x
CAULDWELL WINGATE COMPANY, LLC,

Third-Party Plaintiff,

Third-Party
Index No. 590748/10

- against -

HENICK-LANE, INC.,

Third-Party Defendant.

-----x
HENICK-LANE, INC.,

Fourth-Party Plaintiff,

Fourth-Party
Index No. 591004/10

- against -

NEW YORK STRUCTURAL BIOLOGY CENTER,

Fourth-Party Defendant.

-----x

ANIL C. SINGH, J.S.C.:

Motions designated Sequence Numbers 003 and 004 are consolidated for disposition.

In Motion Sequence Number 003, defendant/third-party plaintiff, Cauldwell Wingate Company, LLC ("Cauldwell"), seeks to renew its motion for (1) summary judgment dismissing the third-party counterclaims of third-party defendant/fourth-party plaintiff Henick-Lane, Inc. ("Henick"), and (2) summary judgment as to liability on its third-party claim for contractual

indemnification against Henick. Cauldwell also moves, pursuant to 22 NYCRR 130-1.1, for an award of attorneys' fees, expenses, and sanctions against Henick.

In Motion Sequence Number 004, plaintiff/fourth-party defendant, New York Structural Biology Center ("Structural Biology"), moves, pursuant to CPLR 3212, for summary judgment dismissing the fourth-party Complaint.

BACKGROUND

This action arises out of a construction and renovation project at 89 Convent Avenue, New York, New York (the "subject premises"). Plaintiff, Structural Biology, leases the subject premises and adjacent land, pursuant to a long-term lease with the City University of New York, and operates a biomedical research center. The biomedical research center consists of a facility that houses an advanced cluster of high-field research magnets (Phase I) and a protein production facility (Phase II). The project contemplated the renovation of the existing facility and construction of a new Cryo-Electron Microscopes ("CEMS") facility (Phase III) on the adjacent land.

By Construction Management Agreement, dated April 1, 2005, Structural Biology retained Cauldwell to serve as construction manager for the project. Cauldwell agreed, among other things, to "perform and complete, or cause to be performed and completed, whichever is applicable, all the Work" for the renovation and construction project (Construction Management Agreement,

Cauldwell Not of Mot, Exh B, Art II, §2.1). The agreement defines the term "Work" to mean:

"[A]ll that is necessary or required to be done, performed or furnished, in order to construct and complete the Project pursuant to and in strict conformance with the Contract Documents, and all work incident thereto or as is usually performed in connection therewith or as is reasonably inferable therefrom, free of all material defects, and to complete the Project to the point of readiness for installation of [Structural Biology's] equipment, and [Structural Biology's] operation and occupancy, provided, however, if the Contract Documents are incomplete or contain errors or omissions or do not comply with applicable Laws, 'Work' shall include all that is necessary or required to be done, performed or furnished in order to construct the Project in compliance with Law and to correct any defect, error or omission. 'Work' shall include but not be limited to the employment and/or furnishing of all necessary labor, materials, equipment, supplies, tools, scaffolding, transportation, insurance, applicable taxes, temporary facilities and all other things and services necessary for the full performance and completion of the Project in accordance with the Contract Documents and the complete correction of any construction defects, errors or omissions. 'Work' shall also include all administration, accounts, record-keeping, notification and other obligations of [Cauldwell] under this Agreement"

(*id.*, Art. I).

By Subcontractor Agreement, dated March 31, 2004, Cauldwell retained Henick to install a heating, ventilation, and air-conditioning system ("HVAC system") at the Phase III facility for the contract price of \$588,500.00. By reason of additions and

deductions to the work required, the contract price was adjusted to \$666,121.00. The Subcontractor Agreement expressly states that all work performed by Henick will be governed by the terms contained therein and by the terms of the Subcontract Terms and Conditions annexed thereto as Exhibit A (see Subcontractor Agreement, Cauldwell Not of Mot, Exh C, §1). The Subcontractor Agreement also states that any changes must be in writing signed by both parties (Not of Mot, Exh C, §2).

Section 3 of the Subcontractor Agreement states, in part:

"Unless noted otherwise above, [Henick] shall submit an invoice after completion of all Work, which shall be paid by [Cauldwell] within seven (7) days of [Cauldwell's] receipt of payment from [Structural Biology]. [Henick] understands and agrees that [Cauldwell] shall have no liability or responsibility for any reason whatsoever for any amounts due or claimed to be due to [Henick] except to the extent that [Cauldwell] has actually received funds from [Structural Biology] designated for disbursement to [Henick]"

(*id.*, §3). In addition, §5 states that the scope of the Work will be subject to change only by additions, deletions, or revisions thereto by Cauldwell, and that Henick will be notified of such changes by receipt of a Subcontract Change Order (*id.*, §5).

Section 8, entitled "Indemnity", states, in part:

"To the fullest extent permitted by law, [Henick] agrees to indemnify, hold harmless and defend [Cauldwell] from and against any of the following ...

8.3 [A]ny claim, demand, cause of action, loss, expense or liability on account of ... damage to or loss of property (including the property of [Structural Biology] arising directly or indirectly out of the acts or omissions of [Henick] or its subcontractors, suppliers or agents, or the employees of any thereof, in the performance of the work ...

8.5 Any such indemnification obligation by [Henick] shall include any expenses and attorneys' fees incurred by [Cauldwell] for legal action to enforce [Henick's] indemnification obligations under this [section]"

(*id.*, §8).

Subcontract Terms & Conditions (Exhibit A to the Subcontractor Agreement), states, in part:

- "1.1 [Henick] guarantees to both [Cauldwell] and [Structural Biology] that all Work performed by [Henick] shall be in accordance with the provisions of this SUBCONTRACT and all specifications and drawings referred to in this SUBCONTRACT.
- 1.2 [Henick] guarantees to both [Cauldwell] and [Structural Biology] that all materials, equipment and supplies furnished by [Henick] for the Work shall be new and will be and remain free from defects in materials and workmanship for one (1) year after acceptance of the Work by [Cauldwell].
- 1.3 Any portion of the Work which is rejected by [Cauldwell] or [Structural Biology] for failure to conform with this SUBCONTRACT shall be promptly corrected or replaced by [Henick] at [Henick's] expense
- 2.2 [Henick] assumes all risks associated with the above representations, and regardless of the expense and difficulty of performing the Work, [Henick] will fully complete the Work without further expense to [Cauldwell] or [Structural

Biology].

- 7.0 [Henick] shall give [Cauldwell] written notice within seven (7) calendar days after the happening of any event which [Henick] believes may give rise to a claim by [Henick] for (i) an increase in the SUBCONTRACT price or (ii) additional time for performance. [Henick] shall continue performance of the Work during the time any claim by [Henick] hereunder is pending. [Cauldwell] shall not be bound to any adjustments in the SUBCONTRACT price or schedule unless expressly agreed to by [Cauldwell] in writing"

(Subcontract Terms & Conditions, Cauldwell Not of Mot, Exh C).

The Subcontractor Supplemental Conditions (Exhibit C to the Subcontractor Agreement) provides, in part:

"9. Guarantee of Work. (a) If during any guarantee or warranty period Construction Manager shall give [Henick] written notice of any defects or non-conformances hereunder, [[Henick] shall have twenty (20) days in which to cure, or commence to cure and diligently pursue the cure of, the objectionable condition, unless a shorter period is required given the nature of the defect or non-conformance. Any such cure shall be performed in a manner and at a time approved by [Cauldwell]. If [Cauldwell] is required to incur any expense relating directly or indirectly to nonconformity or defects in the Work, all such expenses shall be the sole obligation of [Henick] and shall be reimbursed to [Cauldwell] upon demand, [Henick] hereby acknowledging that [Cauldwell] may be required to incur substantial expense if correction Work is required, provided, that [Structural Biology] shall not be entitled to reimbursement for sums not reasonably incurred"

(Subcontractor Supplemental Conditions, Cauldwell Not of Mot, Exh C).

Henick installed the HVAC system in 2006. Upon receipt of a final invoice, Cauldwell paid Henick the subcontract balance of \$5,175.00. In addition, on November 20, 2006, Henick executed a Final Waiver and Release of Lien for Payment acknowledging receipt of full payment for all services furnished to Cauldwell in connection with the installation of the HVAC system at the facility (Not of Mot, Exh D). The Final Waiver and Release of Lien for Payment states, in part:

"[Henick] has received in full all payments (plus applicable retention) due through the date of this instrument for all labor, materials, equipment and services furnished to Cauldwell Wingate in connection with the above referenced project. ... [Henick] guarantees to Cauldwell ... that the work furnished by [Henick] on the project is, and shall be lien free, that [Henick has] no right to any mechanic's lien, stop notice, bond right, equitable claim, or right to a fund, or any other rights or claims with respect to the project"

(*id.*).

The submissions reveal that within the first year after Henick installed the Phase III HVAC system, problems arose, including inadequate cooling in the summer, inadequate heating in the winter, humidity control, excessive air noise, and unacceptable air turbulence in critical spaces. Cauldwell contacted Henick to repair the system. Henick requested that Carrier, the equipment supplier, replace certain equipment.

Carrier voluntarily replaced some of the equipment. In 2007 and 2008, Henick also purchased other equipment and performed other work in an effort to repair the HVAC system.

On July 20, 2009, Henick sent Cauldwell an email regarding the repair/replacement work on the Phase III facility HVAC system. The email stated, in part:

"[W]e have made purchases for new equipment and associated materials, and expended a tremendous amount of labor on behalf of the client and in good faith-under the assumption that only if culpable, Henick ... would make a respectable contribution to the total costs required. We stepped up to the plate and showed a willingness to accept responsibility if, in fact, our workmanship was the cause of the problems. It is obvious that Henick ... is not the reason why problems occurred or why they continue. In summary we have delivered everything (and more) as stated in our letter. We felt it was wise to hire the commissioning agent who was already present on behalf of Structural Biology to assist us, and he knows and will confirm for the record, that Henick ... can not be made the culpable party. As of today we are no longer paying for Mike Whalen's service. Our pre-heat coils will be completed today and tested.

Henick ... has never walked away from a problem, and we have always fessed up to our mistakes. This one is NOT clearly ours at all, and the time has come for others to pony up. We will be submitting a formal Request for Equitable Adjustment in the coming weeks"

(Cauldwell Not of Mot, Exh M). The submissions do not include a Request for Equitable Adjustment.

Structural Biology asserts that the problems with the Phase III HVAC system persisted, and that it had to retain an outside

HVAC specialist to determine the cause of, and solution for, the defects. Structural Biology further asserts that the findings of the outside HVAC specialist revealed Cauldwell's failure to adequately manage the original installation, start-up, operational performance verification, and final adjustment and balancing process of the Phase III HVAC system, including failure to submit start-up and operational testing data, as required by the Construction Management Agreement. Structural Biology claims that Cauldwell rejected repeated demands for reimbursement for the expenses incurred in engaging the outside HVAC specialist. This action ensued.

The Complaint alleges causes of action against Cauldwell for breach of the Construction Management Agreement through the installation of a defective HVAC system for the Phase III facility (first cause of action), breach of the express and implied warranties and guarantees in the Construction Management Agreement (second cause of action), and negligence in its performance under the terms of the Construction Management Agreement (third cause of action).

Cauldwell filed an amended answer and third-party complaint, essentially denying the allegations in the Complaint and asserting third-party claims for contribution or indemnification against Henick.

Henick answered, generally denying the allegations in the third-party complaint, asserting numerous affirmative defenses,

and alleging counterclaims for breach of contract (first counterclaim) and unjust enrichment (second counterclaim). Henick claims that the repair work it performed on the Phase III HVAC system was not part of the original Subcontractor Agreement, but rather, was part of a "2008 Agreement" with Cauldwell, the performance of which caused it to incur expenses in excess of \$225,000.00. Henick further claims that Cauldwell was unjustly enriched by failing to compensate it for the expenses incurred. Cauldwell filed a response, denying the allegations in Henick's counterclaims, and requesting judgment dismissing them.

Henick also commenced a fourth-party action against Structural Biology alleging breach of the "2008 Agreement" (first cause of action), and unjust enrichment (second cause of action). Structural Biology answered, denying the allegations in the fourth-party complaint and asserting several affirmative defenses.

Structural Biology and Cauldwell both sought summary judgment dismissing Henick's breach of contract and unjust enrichment claims. Cauldwell also sought summary judgment on its third-party claim for contractual indemnification against Henick.

By Orders, dated November 23, 2011, this Court (Singh, J.) denied the motions for summary judgment as premature, with leave to renew after discovery (Not of Mot, Exh A). Thereafter, the parties completed discovery, producing documents and conducting examinations before trial.

Cauldwell now seeks to renew its motion for summary judgment dismissing Henick's third-party counterclaims for breach of contract and unjust enrichment, and summary judgment on its third-party claim for contractual indemnification against Henick. Cauldwell also seeks attorneys' fees, expenses and sanctions against Henick. Structural Biology seeks to dismiss Henick's fourth-party claims for breach of contract and unjust enrichment.

DISCUSSION

It is well settled that 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 demonstrate the absence of any material issues of fact (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, *supra*). Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to defeat summary judgment (*id.*).

As stated, Henick bases its third-party counterclaims and fourth-party claims for breach of contract and unjust enrichment on the 2008 work it performed in repairing the Phase III HVAC system. Henick claims, in essence, that Structural Biology and

Cauldwell agreed to compensate it for the more than \$225,000.00 it incurred in performing said repairs, and that Structural Biology and Cauldwell were unjustly enriched by their failure to provide compensation. However, at oral argument held on July 3, 2013, Henick withdrew its third-party counterclaim and fourth-party claim for breach of contract, leaving only the claims for unjust enrichment.

A cause of action for unjust enrichment requires a showing that the plaintiff has bestowed a benefit, and that the defendant will obtain such benefit without adequately compensating the plaintiff therefor (*Tarrytown House Condominiums, Inc. v Hainje*, 161 AD2d 310, 313 [1st Dept 1990]). In order to succeed on such claim, the plaintiff must show that the other party was enriched at the plaintiff's expense, and that it is against equity and good conscience to permit the other party to retain what is sought to be recovered (*Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415, 421 [1972]).

Henick claims that Structural Biology was unjustly enriched in excess of \$225,000 as a result of the additional equipment it purchased and additional work it performed in attempting to fix the Phase III HVAC system. Specifically, Henick argues that the Subcontractor Agreement was a design specification agreement, not a performance specification agreement, and that, as such, it was compelled to follow the design specification without any deviation. Henick argues that it fully complied with the design

specifications provided by Cauldwell and Structural Biology, but that the specifications were defective and misleading, causing the Phase III HVAC system to malfunction. Henick further contends that in 2006, it completed the work on Phase III HVAC system contemplated by the Subcontractor Agreement, and that the additional work it performed, and the expenses it incurred, at the request of Cauldwell and Structural Biology were the result of the defective design specifications and outside the scope of the Subcontractor Agreement. Henick also maintains that Structural Biology damaged the Phase III HVAC system by failing to maintain it.

In seeking summary judgment, Cauldwell and Structural Biology argue that Henick's warranty required it to correct deficiencies in the HVAC system. The movants also contend that Henick's efforts to repair the system in 2008 did not provide any additional benefits.

On review of the submissions, the Court concludes that Cauldwell and Structural Biology have established entitlement to summary judgment dismissing Henick's claims for unjust enrichment. The submissions demonstrate that Structural Biology hired Cauldwell to serve as construction manager for the construction and renovation project, and that Cauldwell hired Henick to install a functioning HVAC system. The Subcontractor Agreement includes express guarantees to Cauldwell and Structural Biology for Henick's work on the HVAC system. However, at an

examination before trial ("EBT") held on April 30, 2012, Henick's vice president Gregg Rothman testified that Henick went to the Phase III facility "[n]umerous amount of times" during the first year after the HVAC system was installed to troubleshoot problems with the system (Rothman EBT, Cauldwell Not of Mot, Exh N, pp. 178-179). Henick installed new equipment, some of which were not covered by warranties from the supplier (*id.*, p. 345). The submissions support the position that Henick performed repair work within the scope of its express guarantees with Cauldwell and Structural Biology, and did not provide any additional benefits.

Henick fails to raise any triable issues of fact to show that Cauldwell and Structural Biology were unjustly enriched at Henick's expense, or that it is against equity and good conscience to permit Cauldwell or Structural Biology to retain what is sought to be recovered (*see Paramount Film Distrib. Corp. v State of New York, supra*). The conclusory assertion that design defects in Structural Biology's specifications caused the Phase III HVAC system to malfunction is insufficient to defeat summary judgment. In fact, Gregg Rothman testified that during the repair work, Henick never informed Cauldwell or Structural Biology that the problems with the HVAC system were caused by defects in the design specifications (Rothman EBT, Cauldwell Not of Mot, Exh N, pp. 162-164). Furthermore, Gregg Rothman could not confirm the existence of the formal Request for Equitable Adjustment that was promised in the July 20, 2009 email (*id.*, p.

375). Absent any evidentiary proof to establish the existence of triable issues of fact, the branch of the motion that seeks summary judgment dismissing the claims for unjust enrichment must be granted.

Cauldwell also seeks summary judgment on its third-party claim for contractual indemnification against Henick. "A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co., Inc.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]). An indemnification provision, as any contractual provision, may be enforced on a motion for summary judgment where it is clear and unambiguous (*Omansky v Whitacre*, 55 AD3d 373 [1st Dept 2008]).

Here, the Subcontractor Agreement required Henick to indemnify Cauldwell against all claims arising from its performance of HVAC services (Subcontractor Agreement, Cauldwell Not of Mot, Exh C). The parties clearly expressed their unequivocal intention to have Henick assume the entire risk of any liability arising from its performance of HVAC work at the Structural Biology facility. As stated, Structural Biology seeks to recover damages from Cauldwell for breach of the Construction Management Agreement through the installation of a defective HVAC system for the Phase III facility. Structural Biology's claims against Cauldwell relate to the work performed by Henick on the

HVAC system. Thus, Cauldwell is entitled, under the language of the indemnification provision, to indemnification from Henick for any liability to Structural Biology. Thus, the branch of Structural Biology's motion that seeks summary judgment on its third-party claim for contractual indemnification is also granted.

Cauldwell's request for attorneys' fees, expenses, and sanctions against Henick is denied (see 22 NYCRR 130-1.3). Accordingly, it is


ORDERED that the motion for summary judgment by Cauldwell Wingate Company, LLC is granted to the extent that the third-party counterclaims of Henick-Lane, Inc. are dismissed, and Cauldwell Wingate Company, LLC is awarded judgment on its third-party claim for contractual indemnification against Henick-Lane, Inc., and it is otherwise denied; and it is further

ORDERED that the motion for summary judgment dismissing the fourth-party complaint of Henick-Lane, Inc. is granted; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: Aug 30, 2013

ENTER:



 J. S. C.

HON. ANIL C. SINGH
SUPREME COURT JUSTICE