SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

RICHTER + RATNER CONTRACTING CORP.,	:	
	:	
Plaintiff,	:	Index No. 112469/2011
	:	
-against-	:	DECISION AND ORDER
	:	
ESTATE 4 CAPITAL, LLP, 50 VARICK LLC and COLONNADE GROUP, LLC,	:	Motion Sequence No. 001
	:	
Defendants.	:	

MELVIN L. SCHWEITZER, J.:

In this action, which arises out of the alleged termination of a purported construction management contract, plaintiff, Richter + Ratner Contracting Corp. (R+R), moves for an order awarding it summary judgment on liability and setting the matter down for an inquest on damages. Defendants, 50 Varick LLC (Varick), the property's owner and developer, and Colonnade Group, LLC (Colonnade), Varick's on-site representative, cross-move for an order granting them summary judgment dismissing the complaint.[1]

Background

Varick is an entity which was founded by named defendant, Estate 4 Capital (Estate 4),[2] a development group which specializes in renovating commercial buildings. Varick acquired a commercial condominium primarily comprising several upper floors of a building owned and occupied by Verizon. Varick intended to develop those floors into design studios with various

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[1] Defendants, on these applications, fail to distinguish between themselves or urge that Colonnade, as the owner's disclosed agent, cannot be held liable to R+R. *Savoy Record Co. v Cardinal Export Corp.*, 15 NY2d 1, 4 (1964); *Weinrib v Stinchfield*, 19 AD3d 482, 482-483 (2d Dept 2005). Accordingly, defendants will be treated as one for purposes of these applications.

[2] It is unclear on this record whether Estate 4 was ever served in this action, but it does not appear to be a party.

amenities. In the spring of 2010, Varick's architect issued requests for proposals (RFP) for the project's construction management services.

One such RFP, dated April 20, 2010, was sent to R+R, a construction company which had signed agreements with labor unions obligating it, if it did not wish to face "heavy" repercussions (Heiman ebt at 127), to use union labor for certain work, including HVAC (heating, ventilation, air conditioning), steel, and electrical work. The RFP contained separate lists of tasks, stated not to be exhaustive, for the project's preconstruction and construction phases and advised that the proposal should separately address (1) the preconstruction phase, which included demolition, abatement, and the project's design phase, which was evolving, and (2) the construction phase. The RFP further advised that the "[o]wner intend[ed] to enter into a contract at the completion of preconstruction." Shulman affirmation, exhibit 5. The contractor was to outline how it proposed to be paid for its preconstruction and construction services, "prior to the award of the final Construction Manager contract," and was also asked to provide its general conditions costs, such as insurance premiums. *Id.*

R+R and other firms submitted their proposals, but because Estate 4's principal, Massimiliano "Max" Senise (Senise), believed that those proposals included "crazy numbers," supplemental RFPs were issued to afford the contractors a better sense of the project. Altshuler aff, exhibit 3. R+R submitted, its May 2010 amended proposal and a proposed project schedule, which estimated the preconstruction and construction phases to take a total of 415 business days. *See* Heiman ebt at 28-31. By email of June 4, 2010, R+R's principal, Marc Heiman (Heiman), asked Senise whether a decision had been made. Senise responded that an entity, Structure Tone, had been appointed "construction manager" for the preconstruction phase, but that R+R would

"be more than welcome to participate at the tender when we will have to appoint the construction manager for the refurbishment works." Altshuler aff, exhibit 3.

It appears that, in the early fall of 2010, Varick became dissatisfied with Structure Tone. Greg Altshuler (Altshuler), a Colonnade principal, emailed Heiman asking him for R+R's prices for asbestos abatement and demolition.. Shulman affirmation, exhibit 6. Heiman responded with R+R's October 12, 2010 proposal for the "[e]ntire [a]batement" portion of the preconstruction work. *Id.* That proposal indicated that the abatement was to last about 10 weeks and was to cost $44,000, that the fee was to be 3%, and that the fee for insurance was to be 1.4%. Shulman affirmation, exhibit 8. For that work, Heiman proposed a $15,000 preconstruction fee for work performed through the end of 2010. Heiman also proposed a "Small Abatement" cost of $2,400 for the "[s]uper"[3] he had suggested, and that the balance would be worked out. *Id.* By mid-October 2010, R+R replaced Structure Tone in connection with the project's demolition and abatement work (Shulman affirmation, exhibit 9) and took over its role as the preconstruction phase's construction manager. Altshuler aff, ¶ 16; Heiman ebt, 51-52. The proposed fee of 3% was, "by 11/4," negotiated down to 2.75%. *See* Shulman affirmation, exhibit 8. R+R's October 2010 project schedule increased the preconstruction and construction phases to an estimated total of 467 business days. *Id.* at 33-34.

On November 11, 2010, Senise emailed Altshuler informing him of his belief that there was something wrong with the budget, that the cost of some items made no sense, and that "[go]ing" nonunion had to be considered. Shulman affirmation, exhibit 24. Senise requested that Altshuler ask Heiman to promptly prepare a nonunion budget. Altshuler replied that a number of

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[3] This fee appears to refer to a weekly field supervision fee. *See* Shulman affirmation, exhibit 26 at 7.

items seemed excessive, namely, the steel, HVAC, and the electrical work. He further advised that Senise's suggestion that the job be priced nonunion by R+R or another major contractor was impossible since they did not perform nonunion work, and that there were only union and nonunion contractors. That said, Altshuler indicated that he would have Hunter Roberts, a union contractor, price the structural work and try to find a nonunion contractor to provide an estimate for comparison.

By email of December 6, 2010, Altshuler asked Heiman to go over the pros and cons of using union versus nonunion labor, because Varick wished to consider the costs and savings associated with using nonunion labor on HVAC, steel, and electrical work, which were "large ticket items." Altshuler aff, exhibit 4. Heiman informed Altshuler that Varick would have a problem performing the job with nonunion labor because Verizon's labor union was in the building, and because he believed that nonunion workers were inept, required additional supervision, and that that would lead to increased fees (Heiman ebt at 109-114, 131-136), but Altshuler disagreed. *Id.* at 135; Altshuler aff, exhibit 4.

The next day, Heiman emailed Altshuler a filled in copy of the American Institute of Architects' (AIA) form A133, a standard form contract between an owner and a construction manager where the basis of payment was the cost of the work plus a fee with a guaranteed maximum price (GMP). That draft recited that R+R was Varick's construction manager for both the preconstruction and construction phases, and that R+R's preconstruction phase fee was $15,000 through the end of 2010, and that if the preconstruction phase were not finished by then, the fee would be equitably adjusted. The draft's fee for the construction phase was listed as 2.75% of the GMP, a price which was, according to the draft agreement, to be mutually agreed

upon by the owner and contractor. Shulman affirmation, exhibit 10, §§ 2.2.1, 4.1, 5.1.1. Heiman testified that neither that draft agreement, nor any iteration of it, was signed on behalf of Varick. Heiman ebt at 60-61. He further testified that the GMP was never set. *Id.* at 161-162.

Heiman phoned Altshuler in December 2010, seeking an explanation after learning from subcontractors that defendants had priced the work through Hunter Roberts. Altshuler allegedly denied it, and later blamed it on Senise's concerns. *Id.* at 97-102. On January 26, 2011, Senise, on behalf of Varick, wrote to Heiman thanking him for his work to date and indicating his satisfaction with it. Nevertheless, Senise stated that Heiman had been aware, from the beginning, that Varick had to contend with a challenging budget. Senise also indicated that, when R+R was hired, Varick had concerns about using union labor, but that Heiman had convinced Varick that using such labor had many advantages. Senise then informed Heiman that the project was substantially over budget, reducing the work's scope was not an option, and that if the project could not be brought within budget, the project would be terminated. Furthermore, Senise stated that he believed that the balance of the work had to be pursued with nonunion workers, and that if Heiman could not convince Varick that R+R could alter its approach to meet Varick's financial needs, R+R's services would be terminated. Shulman affirmation, exhibit 14.

On February 16, 2011, Heiman emailed Altshuler stating that

> "it is not fair to have us operating without any type of agreement or reasonable compensation/staff reimbursement. We have done the right thing for the Owner and I can't continue not knowing if another contractor is going to be brought in to test the waters ... You have to get to a number regardless and we have committed to do our share. We need a letter of intent [LOI] and to get a contract together. The only reason you wouldn't is if you have another agenda. If that is the case I have the right to know. Think about it from our perspective."

Altshuler aff, exhibit 5. What Altshuler responded is not revealed, but, beginning with February 2011, aside from the sums set forth in Heiman's October 12, 2010 proposal, as negotiated down, Varick began paying R+R a monthly $7,500 preconstruction fee which it continued to pay throughout the time R+R rendered services to R+R. *See* Shulman affirmation, exhibit 26.

By LOI, dated February 22, 2011, addressed to Varick, attention Altshuler, and executed by Heiman, R+R advised that it was the LOI's intent that a contract be entered into between R+R and Varick for the preconstruction and construction phases of the project. The LOI further set forth the preconstruction phase's services, which were not unlike those in the RFP, and recited that the parties did not intend for R+R to perform only preconstruction phase tasks, unless the construction phase failed to proceed or if R+R were terminated for cause. Moreover, the LOI indicated that the contract's forms would comprise AIA A121, a contract between owners and a construction manager with a GMP, and AIA A201, the general conditions, "as modified by the parties."[4] Shulman affirmation, exhibit 22. While not entirely clear, Heiman seemingly testified that A121 was an earlier version of A133, that the former document was mistakenly provided with the LOI, but that "it was always going to be the CM with the GMP" which "governed the relationship between Varick and R+R." Heiman ebt at 87. The LOI recited that "[e]xecution of this [LOI] w[ould] authorize [R+R] to proceed and w[ould] be binding until such time that a formal contract is executed, or an agreement to terminate services is reached." Shulman affirmation, exhibit 22. Additionally, the LOI indicated that, in the absence of a contract during

[4] No copy of either form has been provided on these applications.

the pricing stage, AIA A201, would govern. The LOI contained a blank space for Altshuler to sign on behalf of Varick.

By email of March 3, 2011 to Altshuler, with the LOI as its stated subject, Heiman commented that he had never heard back from him. Several emails then ensued between Altshuler and Heiman in response to Altshuler's request for a copy of the LOI's AIA exhibits. Heiman responded that he believed they were unnecessary for the LOI because "[we] didn't put a price in that they would tie into." *Id.*, exhibit 15. Whether R+R ever provided those exhibits is undisclosed, but Altshuler never signed the LOI, nor did defendants ever execute a contract, including one using AIA forms A121 and A201. By email of March 10, 2011, a Karen Kraker of R+R (*see* Altshuler aff, ¶ 35) informed another individual in connection with a burst pipe at the premises, that "at this time we do not have a signed Contract Agreement with the Owner. As soon as the Contract is finalized I will e-mail you a copy." Altshuler aff, exhibit 6.

Heiman testified that he had been aware in the period between April and June 2011 that the project had a "huge budget problem." Heiman ebt at 121-122. Sometime in the summer of 2011, and evidently by June of that year, Varick retained Gardiner and Theobold, Inc. (G&T) as its cost consultant/representative. Heiman ebt at 106-108. On July 19, 2011, Inspection & Valuation International, Inc. (IVI), an entity retained by the project's construction lender to consult on financing and to identify exposures to certain "non-market related risks," issued a project analysis report, after conducting a site inspection on July 11, 2011. *Id.*, exhibit 21 at 1.

IVI's report recited that the project had commenced on November 15, 2010 and had an expected completion date of September 12, 2012. Also reported was that the project was in its preliminary stage, that permits were in place for demolition work, which was underway, that

trade contracts existed only for the preliminary, nonstructural demolition and abatement work, which was almost finished, with some exceptions, as confirmed by the site visit, that the entire fifth floor had not yet been demolished because Verizon was still using it, and that no trade contracts had been issued for the majority of the work. Additionally, the report recited that: roof dunnage[5] had been constructed for the new Verizon emergency generator, which was in place, but not yet connected, to support the building's and Verizon's loads; the old generator remained in place; the cost of replacing the old generator was to be shared with Verizon; and that such work was to be contracted by Verizon. *See also id.*, exhibit H. IVI concluded that R+R's budget was inadequate to support the proposed commitments and did not sufficiently provide for contingencies. IVI, therefore, recommended that the budget be revised upward by about $5 million.

Meanwhile, G&T was tasked with the evaluation of proposals which Varick had received from contractors for the project's construction phase. Heiman ebt at 108. In June or July 2011, R+R became aware that G&T was reviewing budgets from other contractors. *Id.* at 114-115. In late July 2011, R+R provided G&T with its revised budget, which was, according to defendants, the highest of those submitted and included a mix of union and nonunion labor. *See* Altshuler aff, exhibit 7.

On August 18, 2011, Senise decided to terminate R+R the following day, obtain the steel contract through a nonunion entity which had submitted budgets, appoint the new contractor by early September, and to deal only with nonunion builders. Shulman aff, exhibit 25. On

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[5] "Structural support for a system within a building that is independent of the building's structural frame. An example would be the supports for an air-conditioning cooling tower." Dictionary of Construction.com.

August 19, Andrew Demming (Demming) of G&T emailed Senise that, as previously discussed, it was not a simple matter to terminate R+R because it had contracts to perform, evidently referring to the subcontracts it had obtained. *Id.* Demming further advised that there were several issues which could arise if R+R were terminated, including that, because Varick had no contract with R+R, Varick was open to legal claims, such as for lost profits. That day, Senise replied that R+R had to be terminated "now." *Id.*

On August 22, 2011, Heiman was advised that R+R would be terminated, and emailed Senise asking to speak to him, because R+R had worked for 10 months, met every obligation, and even performed services which were not "part of our agreement." *Id.*, exhibit 27. Senise replied that he appreciated the work performed by R+R, that he had given R+R several chances to come up with a workable nonunion quote, but that unfortunately, R+R's quote was the highest, and that revising the work's scope was not an option. *Id.*, exhibit 28. The next day, Demming wrote to David Jensen (Jensen) of the law firm the defendants ultimately retained, regarding several issues, and as relevant, about Varick's desire to terminate R+R and the clients' potential exposure. Demming explained to Jensen that there was no formal agreement with R+R, "only a LOI or some informal agreement which I have not seen yet." *Id.*, exhibit 32.

On August 28, 2011, Altshuler emailed a Thomas Porter, asking Porter to send him "a copy of the contract with [R+R]." *Id.*, exhibit 31. By email of August 31, 2011, to Jensen and Senise, Altshuler enclosed R+R's last "requisition." *Id.*, exhibit 30. Altshuler advised that it was important to know that R+R had handled the work outside the original demolition and abatement, and had been compensated for it by a weekly site supervision fee of $2,400 and by a 2.75% base

fee. Altshuler indicated that the "total value of the contract exceed[ed] $2.5M, of which 760K remain[ed]." *Id.*, exhibit 30.

R+R was admittedly compensated for all of the work it performed before it was terminated. Heiman ebt at 186. At the time of R+R's termination, the preconstruction work was still ongoing, although the initial abatement had been completed in about 10 weeks. *Id.* at 164; *see also* Shulman affirmation, exhibit 26 at 7 (in which R+R lists, among other things, its February through August 2011 monthly preconstruction fees). R+R submitted to Varick what was apparently its last payment application, dated September 19, 2011, which covered the work performed from June 10 through August 31, 2011. That application revealed that the "contract sum" had been approximately $2,500,000 and that about $651,000 of that sum remained outstanding and was attributable to unperformed asbestos abatement and demolition work. Shulman affirmation, exhibit 26. The contract sum, in essence, constituted the sum of the cost of the work, the general conditions, and R+R's fee. Hence, only a small portion of the $651,000 was attributable to any fee. In November 2011, R+R commenced this action.

The Pleadings

The complaint, verified by Heiman, asserts two causes of action, both of which seek at least $750,000 in lost profits. *See* Heiman ebt at 182. The first cause of action sounds in breach of contract and alleges that there was an agreement between R+R and the defendants under which R+R was retained for the entire project, including for the preconstruction and construction phases, and that the parties had intended to execute a written agreement which covered their rights in depth. The complaint further alleges that the preconstruction and construction services sometimes proceeded simultaneously, and lists the claimed construction services R+R provided.

The complaint also recites that, in February 2011, R+R performed additional construction work when defendants authorized R+R to award a trade contract for the rigging of a generator and the erection of steel on the roof for it, but due to design changes, defendants refused to permit R+R to go forward with the award. The contract was allegedly breached when it was terminated without cause.

The second cause of action is unidentified in the complaint[6] and is pleaded in the alternative. That cause of action alleges, without identifying the speaker, that the "defendants" made representations that R+R would be the project's construction manager, that such representations were false and known to be false by defendants when made, that such representations were made to procure R+R's reliance on them, and did, to R+R's detriment. Varick and Colonnade's amended answer denies the complaint's allegations and asserts, among other affirmative defenses, that R+R's claims are barred by the statute of frauds.[7]

The Motion and Cross-Motion

R+R seeks an order granting it summary judgment on liability and setting this matter down for an inquest. Its application is supported by Heiman's affidavit, in which he notes that the defendants authorized R+R to proceed with the preconstruction phase work without having a signed writing, and asserts, as to the construction phase, that "the defendants," at a late December 2010 meeting, "authorized R+R to continue as construction manager for the construction phase,"

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[6] It should be noted, however, that the actions's September 13, 2012 preliminary conference order and a June 12, 2013 order of ADR reference, both contained in the court's e-filing system, have inserted next to the preprinted words, "nature of case," breach of contract "or alternatively, misrepresentation."

[7] The amended answer also sets forth a counterclaim, which seeks damages arising from a mechanic's lien filed by R+R's steel subcontractor's subcontractor and from R+R's alleged failures to pay its subcontractors and obtain lien waivers, but neither side seeks any relief related to that counterclaim on the instant applications.

via a "handshake agreement," and that "[d]efendants" requested "R+R" to submit a draft contract for the balance of the project. Heiman aff, ¶ 26. Heiman characterizes the draft copy of AIA A133 (Shulman affirmation, exhibit 10) as the "Contract." Heiman aff, ¶¶ 26-28. Heiman contends that the "defendants" never objected to that contract or its terms, nor did they tell R+R to stop performing alleged construction phase management services, which he details in his moving affidavit. *Id.*, ¶¶ 30, 33, 34.

Additionally, Heiman maintains that defendants admitted that R+R performed construction phase work when Altshuler advised Jensen that R+R had managed work beyond the initial abatement and demolition, and further admitted that the value of the entire "contract" was more than $2.5M, with "760K remaining." *Id.*, ¶ 58-59; Shulman affirmation, exhibit 30. As further proof that a contract existed between it and defendants, R+R also refers to Altshuler's August 2011 email in which he asked for a copy of the contract with R+R. R+R memorandum of law, 13. R+R urges, in essence, that because defendants sought copies of the AIA forms referenced in the LOI and failed to indicate that there was no contract between the parties or that the material terms of the parties' agreement had not been addressed, and because the parties' conduct was consistent with the terms of the agreement, a construction management contract existed for the entire project.

Heiman also claims that defendants held R+R out as its construction manager for the entire project. In particular, Heiman observes that IVI's report's construction section, referencing the LOI, recites that R+R was the preconstruction phase construction manager and that an agreement was to be executed using AIA A121, where the compensation would consist of the cost of the work and the fees with a GMP. *Id.*, ¶ 41; Shulman affirmation, exhibit 21, § 5.2.

Heiman avers that IVI's conclusion that an agreement was to be executed was based on documentation submitted to IVI by the defendants. Heiman adds that R+R submitted the LOI for the "Owner's use, if necessary, to establish to its lender that a construction manager was formally on board." *Id.* at 10, n 4. Moreover, Heiman urges that the reason the defendants held R+R out as the project's construction manager was because they had, in fact, entered into a binding contract with R+R. Alternatively, R+R urges that it should be awarded summary judgment based on the equitable doctrine of promissory estoppel because it reasonably relied on defendants' unambiguous promise that it would be the entire project's construction manager and, thus, suffered a loss of profits.

Varick and Colonnade oppose the motion and cross-move for an order granting them summary judgment dismissing the complaint. Defendants contend that, assuming for argument's sake that the parties had entered into an oral agreement for construction management services for the entire project, this action must be dismissed as barred by the statute of frauds because, here where the project is still incomplete, the contract could not be performed within a year of its making.

Defendants further contend that they never entered into a contract with R+R for the construction phase. Altshuler observes that the RFP specifically set forth Varick's intent to enter into such a contract only at the completion of the preconstruction phase, which was "approaching completion" when R+R was terminated. Altshuler aff, ¶ 36. He further observes that R+R merely took over for Structure Tone, which Varick had "award[ed]" the construction manager "work for the preconstruction phase only." *Id.*, ¶ 14. Additionally, Altshuler asserts that

defendants never executed a written agreement, including AIA A133, the LOI, or any forms mentioned therein, for the construction phase.

Altshuler, relying on Senise's January 26, 2011 letter, avers that the defendants informed plaintiff that any contract for construction phase construction management services had to meet defendants' budget and could "not include union labor" (Altshuler aff, ¶¶ 29, 31), but that the various budgets submitted by R+R included union labor. Furthermore, defendants note that R+R was aware, starting in December 2010, that defendants were obtaining budgets from others, and was also aware that no type of agreement existed for the construction phase, as Heiman conceded, in his February 16, 2011 email.

Altshuler urges that R+R was performing preconstruction phase services from the time it was engaged until it was terminated. Altshuler aff, ¶¶ 34-36. Altshuler notes that the construction phase services allegedly performed by R+R and referenced in Heiman's moving affidavit and in the complaint were among the preconstruction phase services set forth in the RFP. Defendants maintain that R+R has failed to establish that an implied-in-fact contract existed, because R+R's performance of services, which was accepted by defendants, was simply that which related to the preconstruction phase for which it was engaged and fully paid. Defendants also reject R+R's contention that the parties had agreed on the contract's material terms, asserting that the GMP and whether to use union labor had never been determined.

As for R+R's second cause of action, which defendants appear to accept as one sounding in promissory estoppel, defendants assert that there was no clear agreement to hire R+R for the construction phase, nor can it claim that any reliance led to unconscionable injury, since the only profits sought by R+R were for services that it never performed. As to both causes of action,

defendants contend that R+R will be unable to establish any lost profits and that such claim is speculative because, during a construction project, including one that is incomplete, many factors can affect profitability, and that, therefore, the complaint must be dismissed.

In reply and in opposition to defendants' cross-motion, R+R asserts that the statute of frauds is inapplicable, because the completion of the project within a year was not an impossibility under the contract's terms, including because AIA A133, § 10.1.1, permitted the owner to terminate the contract for convenience and without cause before the GMP had been established. R+R disputes that it will be unable to establish lost profits, because the contract contemplated a 2.75% construction management fee on the agreed upon services and because R+R, a thriving, well-established entity, never, during Heiman's tenure, which began in 2005, suffered decreased or lost profits. Heiman ebt at 173-174. Also, relying on Heiman's deposition transcript, which was provided here by defendants, R+R claims that, at the end of 2010, it performed additional construction phase services for which it was paid, namely, work in connection with the upgraded generator to be installed by Verizon, unspecified "prepping" for the steel, "mechanical, electrical, [and] plumbing relocates," and "building the steel structure" and primary roofs. R+R reply memorandum, 8; Heiman ebt at 186.

In reply, defendants, without conceding that there was a contract with R+R for the construction phase, assert that since R+R is taking the position that AIA A133 governs, defendants must be granted summary judgment. Specifically, because the GMP had not been established when R+R was terminated, AIA A133 permitted R+R to recover only for the work it actually performed, irrespective of whether the construction phase had begun. *See* AIA A133, §§ 10.1.2, 10.1.3.

Discussion

On a summary judgment application, the movant has the initial burden of prima facie establishing its entitlement to the requested relief, by eliminating all material allegations raised by the pleadings. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985). The failure to do so mandates the denial of the application, "regardless of the sufficiency of the opposing papers." *Id.* at 853. Where the movant makes the necessary showing, the burden shifts to the other side to demonstrate the existence of a material fact. *Ferluckaj v Goldman Sachs & Co.*, 12 NY3d 316, 320 (2009).

Statute of Frauds

Turning to the threshold issue of whether R+R's action is barred by the statute of frauds, General Obligations Law § 5-701 (a) (1) renders unenforceable oral contracts, which by their terms cannot be performed within a year of their making. This provision has been limited to contracts "which by their very terms have absolutely no possibility in fact and law of full performance within one year." *D & N Boening v Kirsch Beverages*, 63 NY2d 449, 454 (1984). Even when the parties expect that the contract will go on after the year's end, and it is improbable that the contract work will be completed before that period, the statute of frauds is inapplicable, unless the contract, according to its terms' reasonable interpretation, mandates that it not be performed within a year. *Id.* at 455; *Freedman v Chemical Constr. Corp.*, 43 NY2d 260, 265 (1977); *North Shore Bottling Co. v Schmidt & Sons*, 22 NY2d 171, 175-176 (1968); *Gural v Drasner*, 114 AD3d 25, 28 (1st Dept 2013).

Here, defendants, in urging the bar of the statute of frauds, simply rely on estimates of the project's completion date in excess of a year and the fact that the project, which began over three

years ago, is still incomplete. However, since neither defendants nor R+R urges that the purported agreement "contained any provision which directly or indirectly regulated the time for performance, the agreement is not within the bar of subdivision 1." *Freedman v Chemical Constr. Corp.*, 43 NY2d at 265 (General Obligations Law § 5-701 [a] [1] is inapplicable to alleged oral agreement to pay plaintiff, at the completion of a $41 million construction project, for his services in obtaining the construction contract for defendant, even though it took three years to obtain that contract and another six years to complete the project).

R+R asserts that Varick's ability under AIA A133 § 0.1.1 to terminate the agreement for convenience and without cause before the GMP has been established also renders General Obligations Law § 5-701 (a) (1) inapplicable. *See North Shore Bottling Co. v Schmidt & Sons*, 22 NY2d at 176-177 (although parties may have envisioned that their agreement would last a long time, it was not within statute of frauds where the agreement permitted defendant to end it at any time); *Davis & Davis v S & T World Prods.*, 217 AD2d 645 (2d Dept 1995). However, R+R has, for the reasons which follow, failed to establish that its alleged agreement with defendants was governed by AIA A133.

Breach of Contract Cause of Action

The party which seeks to enforce a contract has "the burden to establish that a binding agreement was made and to prove the terms of that contract." *Allied Sheet Metal Works v Kerby Saunders, Inc.*, 206 AD2d 166, 169 (1st Dept 1994). "[M]utual assent is essential to the formation of informal contracts," and that assent is required to be manifested by one side to the other. *Porter v Commercial Cas. Ins. Co.*, 292 NY 176, 183 (1944) (internal quotation marks and citation omitted). A party's secret intent is of no effect in demonstrating mutual intent;

rather, "only overt acts [are] considered ..." *Id.* at 184 (internal quotation marks and citation omitted); *Brown Bros. Elec. Contrs. v Beam Constr. Corp.*, 41 NY2d 397, 399 (1977); *P.J. Carlin Constr. Co. v Whiffen Elec. Co.*, 66 AD2d 684, 684 (1st Dept 1978). In deciding whether there was a mutual intent to contract, the totality of the parties' deeds and words must be examined in light of all of the circumstances, the parties' situations, and the objectives they were attempting to achieve, without giving undue emphasis to any particular act or "other expression." *Brown Bros. Elec. Contrs. v Beam Constr. Corp.*, 41 NY2d at 399-400; *Gallagher v Long Is. Plastic Surgical Group, P.C.*, 113 AD3d 652, 653 (2d Dept 2014).

Without "mutual intent to be bound" there exists no contract. *Four Seasons Hotels v Vinnik*, 127 AD2d 310, 316 (1st Dept 1987). The existence of such intent "is a mixed question of law and fact," which means that the court decides the issue if it is determinable from the written instrument's language, and if it is not so determinable, then the issue is to be decided by the fact-finder from the "disputed evidence or inferences outside the written" instrument's words. *Id.; Gallagher v Long Is. Plastic Surgical Group, P.C.*, 113 AD3d at 653.

A writing might signify that the parties had intended to continue their negotiations, or, where they had reached agreement on all the issues considered material to them, leaving only those they consider immaterial, that a contract exists. *Four Seasons Hotels v Vinnik*, 127 AD2d at 317; *see also Flores v Lower E.* Side *Serv. Ctr., Inc.*, 4 NY3d 363, 368-369 (2005). When the parties have orally agreed to all of a contract's material terms and have merely to set them down in writing, a contract is formed, even if those terms are never set down in an executed writing, unless the parties had agreed that there would be no binding contract until a written instrument

was executed. *Matter of Municipal Consultants & Publs. v Town of Ramapo*, 47 NY2d 144, 148-149 (1979).

R+R has failed to establish that there was mutual intent to contract and that an oral contract existed by which it was appointed the entire project's construction manager. Specifically, Heiman's claim in his moving affidavit that R+R and defendants entered into a handshake oral agreement during a late December 2010 meeting at which defendants asked him to submit a draft agreement is wholly conclusory. He does not set forth any details as to the circumstances giving rise to this alleged agreement, such as who said what to whom. Moreover, Heiman's contentions in his affidavit regarding this late December 2010 agreement are undercut by his deposition testimony responding to questioning about his February 16, 2011 letter to Altshuler complaining of a lack of any agreement with defendants. *See* Heiman ebt at 78. Heiman responded that he did not need an agreement, asserted that there was an agreement by a course of conduct, and that there had been a meeting which occurred in December 2010 among him, Altshuler, and Senise at the Trump Soho, during which they wanted to look him in the eye and "officially" shake his hand "as we were now officially moving forward." *Id.* at 78-79. Heiman further testified that, "I don't remember the exact date but we defined it." However, when queried about that meeting, Heiman answered that it occurred because Senise was in town for another purpose, that although the project was discussed, he could not recall the specifics, and that no terms of the purported agreement were discussed there. *Id.* at 81-84.

Also, that the RFP indicated the defendants did not intend to award the construction phase contract until the preconstruction phase was completed, and that defendants, who were experiencing severe budgetary problems, were seeking quotes from other contractors, beginning

in December 2010, are inconsistent with Heiman's claim that R+R was awarded a contract for the construction phase. The same is true with respect to Senise's continuing and growing concerns, starting at least as early as November 2010, about the budget's size and the need to use nonunion labor. That Altshuler asked Heiman, on December 6, 2010, to provide the pros and cons of retaining nonunion labor, and that Heiman, the following day, issued A133, suggest, not that there was a contract, but that Heiman feared another entity might be appointed the construction phase's construction manager, and, thus, attempted to secure the work for R+R. Moreover, that defendants allegedly did not object to or ignored the AIA A133 form, does not, standing alone, constitute an overt act demonstrating the intent needed to form a contract.

That, after receiving the January 26, 2011 letter in which Senise advised that R+R would be terminated if it failed to meet defendants' budgetary needs,[8] Heiman, without meeting those needs, sent Altshuler the February 16, 2011 letter complaining of the lack of any agreement, and solicited his signature on the LOI, which Heiman sent him a few days thereafter, again point not to an agreement for the construction phase, but to Heiman's fear of losing the work to another entity.

To the extent R+R relies on the LOI for the existence of a contract, defendants never signed the LOI, which by its terms contemplated that its execution was necessary. *Cf. Silber v New York Life Ins. Co.*, 92 AD3d 436, 440 (1st Dept 2012), (internal quotation marks and

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[8] The court notes that a review of Heiman's deposition transcript, which was attached to Altshuler's opposing affidavit and was referred to by the parties for limited unrelated purposes, reveals testimony to the effect that, although the January 26 letter was signed by Senise, it was composed by Heiman as a tactic, albeit unsuccessful, to persuade union labor to consent to R+R using some nonunion labor. Heiman ebt at 139-150. Consequently, Heiman testified that the letter's references to the potential terminations of R+R and the project were fabrications. *Id.* at 148-150. However, neither Heiman's affidavit nor any of R+R's memoranda or exhibits on these applications refer to this portion of his testimony, and Heiman appears to have abandoned his claims that the letter was his work and that it contained his fabrications. *See* Heiman aff, ¶¶ 10, 31, 35; *see also* Shulman affirmation, ¶¶ 10, 22; R+R's memorandum of law in support at 6, 7, 8-9, 12.

citation omitted), ("[w]here the offer specified the ... mode of acceptance, an acceptance ... in any other manner [ ] is wholly nugatory and ineffectual"). Also, that defendants and/or others referred to R+R as the construction manager does not necessarily establish that R+R was appointed the construction phase's construction manager, especially since R+R was the construction manager for the preconstruction phase. Although Heiman contends Altshuler's statement that R+R performed work outside the "initial abatement/demolition" equates with an admission that R+R was retained as the construction phase's construction manager, Heiman overlooks that the preconstruction phase also included a design phase and that such work and demolition and abatement work were ongoing. *See also* Heiman ebt at 164 (preconstruction phase services were ongoing at the time R+R was terminated).

R+R's position that the project was into the construction phase and the work it was performing demonstrates it had been appointed the construction phase's construction manager, appears to be at odds with IVI's July 2011 report, which indicates the project was in its preliminary stage, that the fifth floor had not yet been demolished, that trade contracts existed only for the demolition and abatement work, and that no trade contracts had been issued for the balance of the work. Heiman's detailing in his affidavit and verified complaint of the alleged construction phase services R+R had rendered, are unavailing, since those acts were essentially those set forth in the RFP as preconstruction phase services. *See also* Shulman affirmation, exhibits 8 (R+R's October 12, 2010 proposal), 22 (LOI) (in which Heiman sets forth some of those alleged construction phase services as ones which R+R was to provide for the preconstruction phase).

As for R+R's claim in its reply memorandum that it performed other alleged construction phase work, a review of what appears to have been R+R's last two applications for payment seems to show that such work was largely preliminary preconstruction phase work, repairs, and/or involved preparatory work contracted by, and partially paid for by Verizon and required for its placement of its new generator. *See* Shulman affirmation, exhibit 21 at D003293- 003300; *id.*, exhibit 26. Specifically, the electrical work consisted of the disconnection of electricity on certain floors, the setting up of temporary lighting, fire alarm repairs, and work needed for the generator. The steel work was roof dunnage for Verizon's generator. The concrete work was "sample concrete flooring" in the "demo area." *Id.* at 5. The roofing work consisted mainly of the placement of flashing and work for the generator. In any event, the RFP seems to indicate that some construction work could occur and be paid for before the awarding of the construction phase's construction manager contract. *Id.*, exhibit 5, Fee proposal, b, 001549. The court notes in this connection that Heiman's statement, in his August 22, 2011 email to Senise, that R+R had met all of its obligations and "performed services that [we]re not even part of our agreement ..." (Shulman affirmation, exhibit 27), might well be an assertion that construction phase services were not a part of R+R's agreement with Varick.

Also, R+R's payment applications do not set forth contract sums reflecting the work that was to be performed for the entire project. As per R+R's September 2011 payment application, the only work remaining of the "original contract sum" was attributable to unperformed asbestos abatement and demolition, i.e. preconstruction phase work, rather than to construction phase work. Shulman affirmation, exhibit 26 at 2. Although it is not entirely clear, because Altshuler failed to address the significance of the contract amount and the part remaining, as discussed in

his August 31, 2011 email to Senise and Jensen, it may be that the $2,500,000 figure Altshuler mentioned as the contract amount was an approximation of the contract sum, and that his reference to the 760K remaining on the contract was a rough approximation of that portion of the contract sum on the remaining preconstruction phase work. *See* Shulman affirmation, exhibits 21 at 003293-003300 (R+R's payment application for work performed through June 9, 2011), and 26 (R+R's payment application for work from June 10 through August 31, 2011).

In light of the foregoing, R+R has failed to prima facie establish that it had a contract by which it was appointed the entire project's construction manager. Accordingly, the branch of its motion seeking summary judgment on liability on its first (breach of contract) cause of action must be, and hereby is, denied. The court notes, as observed by defendants, that even had R+R prima facie established that the terms of AIA A133 applied, defendants would have incurred no liability for lost profits. In this regard, AIA A133 § 10.1.2 provides that in the event of the agreement's termination before the GMP's establishment, the construction manager is entitled, in essence, to be paid "equitably," but not in excess of the agreement's stated amount for preconstruction phase services, for such services performed before receipt of the termination notice. If that termination occurs after the construction phase has begun and before the GMP has been established, the construction manager is not entitled to be compensated for lost profits on unperformed work. *See id.*, § 10.1.3.

Turning to the branch of defendants' cross-motion, which seeks an order granting them summary judgment dismissing R+R's breach of contract cause of action, Altshuler, although extensively involved in the project, including with respect to his company and Varick's relationship with R+R, provides an affidavit which is replete with claims as to what the

"defendants" and "plaintiff" did or did not do. He does not, however, address his personal discussions and/or meetings with Heiman, state what he personally did when presented with AIA A133 or the LOI, indicate what occurred after he requested copies of the AIA forms mentioned in that LOI, or address how or why the LOI, which defendants take the position was of no effect, came to be provided to their lender's consultant, IVI. Nor does Altshuler explain what he meant, after R+R's termination, when he requested a copy of R+R's "contract" and advised Jensen and Senise that 760K of it remained. Shulman affirmation, exhibits 30, 31. Altshuler's claim that R+R will be unable to establish lost profits because there are many variables which can affect them, is unavailing because it is well-settled that a defendant cannot obtain summary judgment by merely asserting that the plaintiff will be unable to prove its case. Rather, the party moving for summary judgment must affirmatively demonstrate the merit of its claim or defense. *Saryian v Ramana*, 305 AD2d 400, 400 (2d Dept 2003); *Bryan v 250 Church Assoc., LLC*; 60 AD3d 578, (1st Dept 2009).

While the evidence strongly points to the lack of a contract appointing R+R the construction manager for the construction phase, the branch of defendants' cross-motion which seeks an order granting them summary judgment dismissing R+R's breach of contract action must be denied because questions exist at least as to whether the oral agreement by which R+R was appointed the construction manager for the preconstruction phase work was terminable by defendants without cause, and, thus, whether R+R suffered lost profits on the preconstruction phase work that was outstanding when it was terminated. Altshuler does not specifically assert that R+R's hiring for the preconstruction phase construction manager position was only for as long as Varick desired. Moreover, R+R's payment applications, as seemingly buttressed by

Altshuler's email to Jensen and Senise advising of the amount of the "contract" and its balance (Shulman affirmation, exhibit 30), indicate a "contract sum" of about $2,500,000 and that, when R+R was terminated, the outstanding contract sum "balance" of approximately $651,000 related to preconstruction phase demolition and asbestos abatement work yet to be performed by R+R (*id.*, exhibit 26), thereby, raising the possibility that R+R suffered lost profits on that work.

Accordingly, this branch of defendants' cross-motion is denied. *See Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 (1st Dept 1987) (internal citation omitted) (because the remedy of summary judgment is drastic in that it "deprive[s] a party of his day in court," it "should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable ... "); *see also Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 (2004).

Promissory Estoppel Cause of Action

As for R+R's second cause of action, both sides seemingly agree, irrespective of earlier labels of misrepresentation, that this cause of action sounds in promissory estoppel. The parties are free to chart their own course. *Cullen v Naples*, 31 NY2d 818, 820 (1972). To establish such a claim, one must demonstrate an unambiguous and clear promise, the promisee's reasonable and foreseeable reliance thereon, and injury as a consequence of that reliance. *New York City Health & Hosps. Corp. v St. Barnabas Hosp.*, 10 AD3d 489, 491 (1st Dept 2004); *Ripple's of Clearview v Le Havre Assoc.*, 88 AD2d 120, 122 (2d Dept 1982). The purpose of the doctrine of equitable estoppel "is to prevent the infliction of unconscionable injury and loss upon one who has relied on the promise of another." *American Bartenders School v 105 Madison Co.*, 59 NY2d 716, 718 (1983). The doctrine is invoked in contract cases to prevent the bar of the statute of frauds.

However, an oral promise will not, as a general matter, be enforced in such cases "unless it would be unconscionable to deny it." *Steele v Delverde S.R.L.*, 242 AD2d 414, 415 (1st Dept 1997).

As previously discussed, R+R has failed to demonstrate that there was a clear and unambiguous agreement by which it was appointed the construction phase's construction manager. R+R either had an agreement with defendants to serve as the construction phase construction manager, or it did not. If it lacked such a contract it would not be entitled to lost profits on construction phase work it did not perform. Similarly, either the preconstruction phase agreement was terminable without cause, or it was not. If it was so terminable, R+R cannot seek to recover lost profits on unperformed work. If it was not so terminable, R+R has its contract remedy. Further, the statute of frauds is not a bar to R+R's claims. Moreover, because R+R was fully paid for the work it did perform, the circumstances are not "so egregious as to warrant the application of the doctrine of promissory estoppel." *Carvel Corp. v Nicolini*, 144 AD2d 611, 612-613 (2d Dept 1988); Saivest *Empreendimentos Imobiliarios E. Participacoes, Ltda v Elman Invs., Inc.*, 117 AD3d 447, 449 (1st Dept 2014); *WE Transp. v Suffolk Transp. Serv.*, 192 AD2d 601, 602 (2d Dept 1993).

Therefore, the branch of R+R's motion which seeks an order granting it summary judgment on liability on its second cause of action, is denied. Furthermore, because the doctrine of equitable estoppel is inapplicable under the circumstances of this case, the branch of defendants' cross-motion which seeks an order granting it summary judgment dismissing R+R's second cause of action is granted, and that cause of action is dismissed.

Accordingly, it is

ORDERED that plaintiff's motion for an order granting it summary judgment on liability is denied; and it is further

ORDERED that the cross-motion of defendants Varick LLC and Colonnade Group, LLC, which seeks an order granting them summary judgment dismissing this action, is granted solely to the extent that plaintiff's second cause of action (promissory estoppel) is dismissed.

Dated: September 16, 2014

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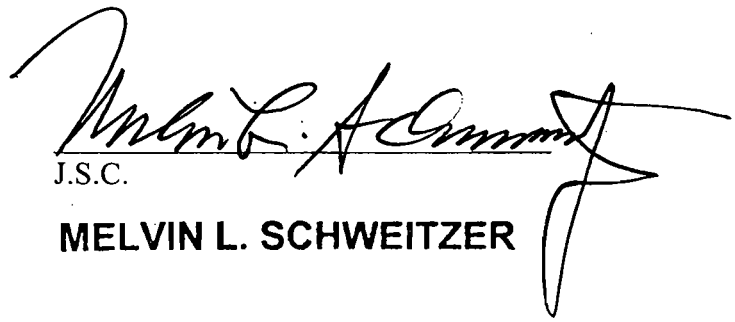

J.S.C.

MELVIN L. SCHWEITZER