SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

WALSH ELECTRICAL CONTRACTING, INC.,

Plaintiff(s),

-against-

AURORA CONTRACTORS, INC.

Defendant(s).

DECISION/ORDER

DCM PART 21

HON. ORLANDO MARRAZZO, JR.

Index No.: 152521/2017

Motion No. 1

The following numbered 1 to 3 were fully submitted on 20th day of March 2018

	Papers Numbered
Defendant's Notice of Motion to Dismiss, with Supporting Papers and Exhibits, dated, January 22, 2018	1
Plaintiff's Affirmation in Opposition with Supporting Papers and Exhibits, dated, March 13, 2018	2
Defendant's Reply, dated March 19, 2018	3

Defendant moves for an order pursuant to CPLR § 3211 (a)(1) and (7), dismissing the complaint against the defendant. As is set forth below, defendant's motion is denied.

Defendant Aurora, as a general contractor, entered into a construction contract with the owner for a construction project known as FedEx Ground Facility located at 46-06-57th Avenue, Maspeth, New York. Thereafter, Defendant Aurora entered

into a subcontract with the plaintiff herein to furnish the labor, materials and equipment necessary to perform electrical work at the project.

Article 6 of the Subcontract sets forth the dispute resolution procedures for addressing disputes between plaintiff and defendant Aurora arising out of and/or relating to the subcontract.

§6.1.2 of the subcontract provides that

> Any notice of claims for damages, extra or additional compensation or an extension of time must be made to the Contractor in writing within five (5) days from the date of commencing to sustain or suffer such damages or from the receipt of an instruction to proceed with any claimed extra or additional work. The Subcontractor must submit to the Contractor a verified, detailed statement of the alleged damage, estimated loss or costs sustained, together with documentary evidence of the claim, including the reason for any requested time extension, and the following information: the date on which the condition giving rise to the request began; the length of the time extension the Subcontractor is requesting or anticipates needing; and an explanation of what Work impacted by the condition causing the alleged delay. If the Subcontractor fails to make such claim within the time and accordance with the foregoing provisions, then <u>such claim shall be deemed waived and the Subcontractor shall have no right to recover upon it.</u>

§6.2 of the subcontract provides, "[c]ompletion of the dispute resolution procedure shall be a <u>condition precedent</u> to the right of [Plaintiff] to commence or continue any legal action against [Defendant Aurora]." Defendant Aurora asserts that the complaint should be dismissed because plaintiff allegedly failed to comply with two provisions of the parties' subcontract.

§6.6 of the Subcontract requires that

> In disputes involving solely the Contractor and the Subcontractor, at the sole and exclusive option of the Contractor, all claims, disputes and other matters in question between the Subcontractor and the Contractor arising out of or related to the Subcontract or the breach thereof, except as specifically governed by the foregoing provisions, and except for claims that have been waived by the making and acceptance of Final payment, may be mediated by the parties in accordance with the Construction Industry Mediation Rules of the American Arbitration Association then in effect and/or decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association in effect.

Defendant Aurora alleges that in the complaint, plaintiff alleges causes of action against defendant Aurora arising from the electrical work that plaintiff purportedly furnished under the Subcontract about the Project. However, defendant alleges that plaintiff failed to comply by serving defendant Aurora with the contractual notice of claim requirement as specified in §6.1.2 of the Subcontract.

Defendant Aurora further alleges that plaintiff failed to adhere to §6.6 of the Subcontract that created a contractual requirement that plaintiff participate in mandatory mediation prior to commencing litigation.

In short, defendant Aurora alleges that both provisions are express conditions precedent to bringing this action and that plaintiff's failure in satisfying these condition precedents requires this court to dismiss the complaint.

It is well settled that on a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must "accept the facts as alleged in the

complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v. Martinez,* 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511; *see Green v. Gross & Levin, LLP,* 101 A.D.3d 1079, 1080–1081, 958 N.Y.S.2d 399).

Further it is well settled that "[a[motion pursuant to CPLR 3211(a)(1) to dismiss the complaint on the ground that the action is barred by documentary evidence may be granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law. (*Goshen v. Mutual Life Ins. Co. of N.Y.,* 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858, 774 N.E.2d 1190; *see Green v. Gross & Levin, LLP,* 101 A.D.3d at 1080–1081, 958 N.Y.S.2d 399) *See, Stathakos v Metropolitan Transit Authority Long Island Railroad*, 109 AD3d 979, 971 NYS3d 557 [App Div. 2nd Dept. 2013].) If the evidence submitted in support of the motion is not "documentary," the motion must be denied (CPLR 3211[a][1]; *see Prott v. Lewin & Baglio, LLP,* 150 A.D.3d 908, 55 N.Y.S.3d 98). To constitute documentary evidence, the evidence must be "unambiguous, authentic, and undeniable" (*Granada Condominium III Assn. v. Palomino,* 78 A.D.3d 996, 997, 913 N.Y.S.2d 668); (*See also, Phillips v Taco Bell Corp.*, 152 AD3d 806, 60 NYS3d 67 [App Div. 2nd Dept. 2017].)

On a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the complaint must be construed liberally, the factual allegations must be deemed to be true, and the nonmoving party must be given the benefit of all favorable inferences (*see Leon v. Martinez*, 84 N.Y.2d 83, 87, 614 N.Y.S.2d 972, 638 N.E.2d 511). "In opposition to such a motion, a plaintiff may submit affidavits to remedy defects in the complaint and preserve inartfully pleaded, but potentially meritorious claims" (*Cron v. Hargro Fabrics*, 91 N.Y.2d 362, 366, 670 N.Y.S.2d 973, 694 N.E.2d 56). While a court may consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR 3211(a)(7) (*see Sokol v. Leader*, 74 A.D.3d 1180, 1181, 904 N.Y.S.2d 153), it must be kept in mind that a motion pursuant to CPLR 3211(a)(7) is not a motion for summary judgment unless the court elects to so treat it under CPLR 3211(c), after giving adequate notice to the parties (*see Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 635, 389 N.Y.S.2d 314, 357 N.E.2d 970). "Where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate" (*Rabos v. R & R Bagels & Bakery, Inc.*, 100 A.D.3d 849, 851–

852, 955 N.Y.S.2d 109; *see* *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 274–275, 401 N.Y.S.2d 182, *See also, Christ The Rock World Restoration Church Int. Inc., v Evangelical Christian Credit Union,* 153 A.D.3d 1226, 62 N.Y.S.3d 396 [App Div. 2nd Dept. 2017].)

Here, a close reading of the Subcontract reveals that the type of claim at issue here is plaintiff's claims over defendant Aurora's failure to pay submitted invoices. Contractually speaking under the terms of the subcontract this claim is not subject to the requirement that a notice of claim be served on defendant Aurora as a condition precedent prior to commencing litigation.

In pertinent part Section 6.1.2 provides that "[a]ny notice of claim for damages, extra or additional compensation, or an extension of time must be made" to defendant and that such a claim must contain "a verified detailed statement of the alleged damage, estimated loss or costs sustained, together with documentary evidence of the claim…" Plaintiff's claims related to the Subcontract are not ones that pertain to damages, extra compensation, or any extension of time as set forth in Section 6.1.2. Rather, the trust of Plaintiff's claims arising under the Subcontract are for non-payment of invoices for work that plaintiff allegedly completed prior to defendant's purported termination of the Subcontract. Thus, as a matter of fact the subject matter of this claim did not contractually obligate plaintiff to serve defendant

Aurora with a notice of claim. Therefore, plaintiff's failure to serve defendant Aurora with a notice of claim is not a basis to dismiss this action.

As to the issue of mandatory mediation, defendant Aurora relies on Section 6.6 of the Subcontract, which provides that claims between the parties may be mediated by the parties in accordance with the Construction Industry Mediation Rules of the American Arbitration Association then in effect and/or decided by the arbitration in accordance Construction Industry Arbitration Rules of the American Arbitration Association then in effect. This mediation provision is not mandatory, it is written as may, optional, and as such is not a condition precedent to pursue prior to commencing a lawsuit.

Clearly, defendant Aurora has no legal basis that would legally entitle them an order granting them the dismissal of the complaint. Accordingly, defendant Aurora's motion to dismiss is denied.

This constitutes the decision and order of the court.

Dated: March 22, 2018
Staten Island, New York

Orlando Marrazzo, Jr.,
Justice, Supreme Court