Centennial El. Indus., Inc. v New York City Dept. of Citywide Admin. Servs.
2018 NY Slip Op 31055(U)
May 11, 2018
Supreme Court, New York County
Docket Number: 153706/2015E
Judge: Alexander M. Tisch
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 52

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CENTENNIAL ELEVATOR INDUSTRIES, INC., DECISION AND ORDER

Plaintiff, Index No. 153706/2015E

- against -

THE NEW YORK CITY DEPARTMENT OF CITYWIDE ADMINSTRATIVE SERVICES and THE CITY OF NEW YORK,

Defendants.

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ALEXANDER M. TISCH, J.

This action arises out of a 2005 contract for the modernization and maintenance of elevators at 280 Broadway in New York County. Plaintiff seeks additional compensation for costs attributed to delays on the project and for extra work it performed.

Defendants City of New York (City) and New York City Department of Citywide Administrative Services (DCAS), with whom plaintiff contracted with, now move, pursuant to CPLR 3212, for summary judgment. Plaintiff opposes the application. For the reasons set forth below, the motion is granted.

Background

On or about April 19, 2005, DCAS awarded contract no. CT85620050030465 (Contract) to plaintiff for project no. PW316ELEV. The project involved the modernization and maintenance of five geared traction passenger elevators and the automation and replacement of one geared traction service elevator. In Section 14200, Elevator Modernization Technical Specifications, Part 2.03(B) of the Contract, plaintiff agreed to provide full preventive maintenance and equipment coverage for the elevators while the work was being performed until final acceptance. Plaintiff also agreed to provide full comprehensive preventive maintenance services for all six elevators for 12 months after completion and acceptance of the work.

Article 8 of the Contract provides that "time for performance of the Work under the Contract shall be computed from the date specified" in a written notice to commence signed by the Commissioner. By letter dated April 19, 2015 (Order to Commence), DCAS set April 21, 2005, as the commencement date for the work and April 20, 2007, or 730 consecutive calendar days from April 21, as the completion date.

The Contract included several notice provisions regarding claims. Article 11 (Notice of Conditions Causing Delay and Documentation of Damages Caused by Delay) requires plaintiff to give defendants notice of "any condition which is causing or may cause a delay in the completion of the Work, including conditions for which the Contractor may be entitled to an extension of time." Article 11.1.1 states in pertinent part that "[w]ithin seven (7) Days after the commencement of such condition, the Contractor must notify the Engineer in writing of the existence, nature and effect of such condition upon the approved progress schedule and the Work."

Article 11.1.2 reads as follows:

> "If the Contractor shall claim to be sustaining damages for delay, by reason of any act or omission of the City or its agents, it shall submit to the Commissioner within forty-five (45) Days from the time such damages are first incurred, and every thirty (30) Days thereafter for as long as such damages are incurred, verified statements of the details and the amounts of such damages, together with documentary evidence of such damages. The Contractor may submit any of the above statements within such additional time as may be granted by the Commissioner in writing upon written request therefor. Failure of the Commissioner to respond in writing to a written request for additional time within thirty (30) Days shall be deemed a denial of the request. On failure of the Contractor to fully comply with the foregoing provisions, such claims shall be deemed waived and no right to recover on such claims shall exist. Damages that the Contractor may claim in any action arising under or by reason of this Contract shall not be different from or in excess of the statements made and documentation provided pursuant to this article."

Article 11.2 states:

> "Failure of the Contractor to strictly comply with the requirements of Article 11.1.1 may, in the discretion of the Commissioner, be

> deemed sufficient cause to deny any extension of time on account of delay arising out of such condition. Failure of the Contractor to strictly comply with the requirements of Articles 11.1.1 and 11.1.2 shall be deemed a conclusive waiver by the Contractor of any and all claims for damages for delay arising from such condition and no right to recover on such claims shall exist."

Article 30 (Notice and Documentation of Costs and Damages; Production of Financial Records) sets forth additional requirements. Article 30.1 states:

> "If the Contractor shall claim to be sustaining damages by reason of any act or omission of the City or its agents, it shall submit to the Commissioner within forty-five (45) Days from the time such damages are first incurred, and every thirty (30) Days thereafter for as long as such damages are incurred, verified statements of the details and the amounts of such damages, together with documentary evidence of such damages. The Contractor may submit any of the above statements within such additional time as may be granted by the Commissioner in writing upon written request therefor. Failure of the Commissioner to respond in writing to a written request for additional time within thirty (30) Days shall be deemed a denial of the request. On failure of the Contractor to fully comply with the foregoing provisions, such claims shall be deemed waived and no right to recover on such claims shall exist. Damages that the Contractor may claim in any action or dispute resolution procedure arising under or by reason of this Contract shall not be different from or in excess of the statements and documentation made pursuant to this article."

The Contract also contains a broad dispute resolution clause in Article 27 (Resolution of Disputes). It provides as follows:

> "27.1. All disputes between the City and the Contractor of the kind delineated in this article that arise under, or by virtue of, this Contract shall be finally resolved in accordance with the provisions of this article and the PPB Rules. The procedure for resolving all disputes of the kind delineated herein shall be the exclusive means of resolving any such disputes
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> . . .
>
> 27.1.2. This article shall apply only to disputes about the scope of work delineated by the Contract, the interpretation of Contract documents, the amount to be paid for Extra Work or disputed work performed in connection with the Contract, the conformity of the Contractor's Work to the Contract, and the acceptability and quality

> of the Contractor's Work; such disputes arise when the Engineer makes a determination with which the Contractor disagrees."

Articles 27.4 (Presentation of Disputes to Commissioner), 27.5 (Presentation of Dispute to the Comptroller), and 27.7 (Petition to the Contract Dispute Resolution Board) describe a three-step process by which a claim could be resolved. Article 27.7.6 (Finality of Contract Dispute Resolution Board Decision) states in part that "[t]he Contract Dispute Resolution Board's decision shall be final and binding on all parties" and that any party may seek judicial review of that decision in an Article 78 proceeding. With regard to potential actions, Article 56.1 states that "[a]ny claim . . . against the City for damages for breach of Contract shall not be made or asserted in any lawsuit, unless the Contractor shall have strictly complied with all requirements relating to the giving of notice and of information with respect to such claims, as herein before provided."

By letter dated November 19, 2014, DCAS issued plaintiff "'Substantial Completion' and 'Final Acceptance' of all 'Work' assigned under the Contract." DCAS issued the letter "[i]n consideration of [plaintiff's] waiver herein of any and all claims for costs or expenses relating to elevator maintenance, builder's risk premiums, any increase in wages and benefits or any overhead and profit relating thereto for the period of October 27, 2013 through midnight on October 26, 2014."

Shortly thereafter, plaintiff filed a Notice of Dispute with DCAS dated December 5, 2014. Plaintiff sought to recoup (1) increased costs for the modernization work; (2) increased costs for maintenance work and for maintaining a builder's risk insurance policy; and (3) costs stemming from change order work for computer software installation. On January 7, 2015, DCAS denied the Notice of Dispute, in part, on the ground that the first two categories sought delay damages, or damages for work that was not completed by the original completion date. A claim for delay damages, DCAS noted, was outside the scope of the dispute resolution procedure articulated in Article 27.1. DCAS stated that if plaintiff was inclined to file a Notice of Claim with the Office

of the Comptroller, it would recommend denial of the claim based on plaintiff's failure to follow the notice requirements set forth in Article 11. In addition, plaintiff agreed that it would not seek damages for delays allegedly caused by defendants as per Article 13.10 (No Damages for Delay). Finally, plaintiff had agreed to waive all claims for interim maintenance costs for the period from October 26, 2013 to October 26, 2014 as stated in the letter deeming the project substantially complete. As to the third claim for extra work, DCAS considered that work as contracted-for work. Plaintiff also failed to provide proof that the labor hours expended on the extra work claim were fair or reasonable.

On April 2, 2015, plaintiff presented the dispute to the Comptroller in accordance with Article 27.5. The Notice of Claim provided a following breakdown of damages: (1) $77,031.54 for costs associated with the modernization portion of the work secondary to delays; (2) $202,349.11 for maintenance costs from March 13, 2008 through October 31, 2014; (3) $38,597.00 for builder's risk insurance premiums; and (4) $4,148.88 for costs associated with the computer software installation work.

On July 31, 2015, plaintiff filed a petition with the Contract Dispute Resolution Board (CDRB) contesting DCAS' determination.[1] It set forth the same categories of damages as described in the Notice of Claim. DCAS answered the petition and argued for dismissal. DCAS asserted that plaintiff sought delay damages which fell outside the dispute resolution provision in Article 27.1.2 and that plaintiff failed to comply with the recordkeeping provision set forth in Article 28. The CDRB issued a memorandum decision that denied and dismissed the petition. It determined that plaintiff's first three items were "in effect, delay claims" and that such claims were

[1] Article 27.7 of the Contract allowed plaintiff to petition the CDRB in the event the Comptroller did not settle or adjust the claim, and in its verified complaint, plaintiff alleged that the Comptroller did not settle the claim. According to the CDRB's memorandum decision, the Comptroller deemed plaintiff's modernization, maintenance and insurance policy claims as delay claims. Because such claims fell outside the dispute resolution provision in the Contract, the Comptroller dismissed them. The Comptroller dismissed the fourth claim for extra work as time-barred because plaintiff failed to timely file a notice of dispute within 30 days of DCAS' determination.

outside the scope of the dispute resolution process. The fourth item for extra work was precluded under Article 25 because plaintiff never obtained DCAS' approval to submit a written change order. In addition, plaintiff failed to comply with Article 28 by submitting contemporaneous written statements listing the employees and materials used to perform the extra work. Failure to follow those provisions resulted in a waiver of the extra work claim.

Plaintiff commenced the instant action by filing a summons and complaint on April 16, 2015 and asserted nine causes of action seeking recovery under breach of contract, quasi-contract and tort. Plaintiff alleges that DCAS repeatedly delayed the project by nearly seven years which caused plaintiff to incur additional expenses. It seeks a total of $318,124.78 in damages. Defendants answered the complaint and asserted 11 affirmative defenses.

The Parties' Contentions

Defendants move for summary judgment on the ground that plaintiff waived its right to recover delay damages because it failed to comply with the notice provisions in Articles 11, 30 and 56. Submitted in support of the motion is the affidavit of Michael Rogozin (Rogozin), DCAS' Executive Director for Engineering Design who supervised the project. He conducted a search of DCAS' records and determined that plaintiff did not provide DCAS with monthly detailed and verified statements or documents of its delay damages. Defendants contend the extra work claim is precluded by a final and binding decision from the CDRB. As to the remaining causes of action, defendants argue they are duplicative of the breach of contract action or lack merit.

Plaintiff submits the motion is premature as defendants filed the motion before depositions have been held and only four days after defendants exchanged documentary discovery. Plaintiff argues that additional discovery would likely yield relevant evidence on its claims. It also argues that an issue of fact exists as to the scope of the Contract based on the denials contained in defendants' verified answer. As to defendants' waiver argument, plaintiff tenders the affidavit of Vice President John O'Sullivan (O'Sullivan), who avers that defendants were aware of plaintiff's

claims. Defendants and plaintiff met bi-weekly to discuss the 2,785-day delay, which O'Sullivan attributed to defective drawings provided by defendants' consultants, and plaintiff's increased costs. Defendants instructed plaintiff to request 13 time extensions, and each request contained verified statements "clearly excepting continuing maintenance and insurance costs." The Certificate of Completion and Acceptance, signed by Rogozin on September 8, 2015, indicates that the delays were not caused by plaintiff. O'Sullivan also states that Rogozin and others assured him that "a change order would be executed to compensate" plaintiff for these expenses. He states that plaintiff justifiably believed defendants would issue the change order and pay for plaintiff's services "in good faith." Defendants, though, failed to execute a change order. Annexed to O'Sullivan's affidavit are approved time extension requests, payment requisitions with certified payroll reports, and insurance premiums. O'Sullivan described plaintiff's damages in detail in a letter dated September 20, 2014 and sent to Rogozin's attention.[2]

Analysis

It is well settled that the movant on 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 issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and the pleadings and other proof such as affidavits, depositions and written admissions (*see* CPLR 3212). The "facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted])." Once movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*id.*, citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The "[f]ailure to make [a] prima facie showing [of

[2] Plaintiff provided two different versions of the September 20, 2014 letter. The first, annexed to the verified complaint and signed by O'Sullivan, sought $318,124.78 in damages. The second, annexed to O'Sullivan's affidavit, was signed by Payroll Manager Emanuel Bacolas. That letter sought $313,146.12 in damages.

entitlement to summary judgment] requires a denial of the motion, *regardless of the sufficiency of the opposing papers*" (*id.*).

The court addresses each cause of action separately below.

A. First Cause of Action (Breach of Contract)

To sustain a cause of action for breach of contract, plaintiff must prove the existence of a contract, plaintiff's performance, defendant's breach, and damages (*see Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Defendants separate the breach of contract claim into two parts: (1) costs for modernization, maintenance and insurance premiums due to delay, and (2) costs on the extra work claim for computer software installation.

1. The Delay Damages Claims

No-damage-for-delay clauses relieve a contractee from liability for damages sustained by a contractor because of delays in the performance of a contract (*see Corinno Civetta Constr. Corp. v City of New York*, 67 NY2d 297, 306 [1986], citing *Kalisch-Jarcho, Inc. v New York*, 58 NY2d 377 [1983]). Such exculpatory clauses are valid, enforceable and not against public policy "if the clause and the contract of which it is a part satisfy the requirements for the validity of contracts generally" (67 NY2d at 309 [citations omitted]). A contractor, though, is not precluded from seeking delay damages for "(1) delays caused by the contractee's bad faith or its willful, malicious, or grossly negligent conduct, (2) uncontemplated delays, (3) delays so unreasonable that they constitute an intentional abandonment of the contract by the contractee, and (4) delays resulting from the contractee's breach of a fundamental obligation of the contract" (*id.*). Based on the allegations in the complaint, plaintiff seeks delay damages.

Article 11.1.1 requires plaintiff to provide defendants with written notice of a delay within 45 days after it began. The notice must include contemporaneous documentation in support. The failure to comply with the notice provision would result in waiver of the claim. Defendants raised plaintiff's noncompliance with this provision as a seventh affirmative defense.

Contractual notice provisions similar to Article 11 which "require the contractor to promptly notice and document its claims" are "conditions precedent to suit or recovery, not . . . exculpatory clauses" (*A.H.A. Gen. Constr. v New York City Hous. Auth.*, 92 NY2d 20, 30-31 [1998]). "[A] condition precedent is 'an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises'" (*MHR Capital Partners LP v Presstek, Inc.*, 12 NY3d 640, 645 [2009], quoting *Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 690 [1995]). "Express conditions precedent must be literally performed; substantial performance will not suffice" (12 NY3d at 645). Defendants have demonstrated that plaintiff waived its right to pursue delay damages by failing to comply with the contractual notice provisions (*see Hi-Tech Constr. & Mgt. Servs. Inc. v Housing Auth. of the City of N.Y.*, 125 AD3d 542, 542 [1st Dept 2015], *lv denied* 26 NY3d 908 [2015]; *Dart Mech. Corp. v City of New York*, 68 AD3d 664, 664 [1st Dept 2009]; *F. Garofalo Elec. Co. v New York Univ.*, 270 AD2d 76, 80 [1st Dept 2000], *lv dismissed* 95 NY2d 825 [2000]; *Lasker-Goldman Corp. v City of New York*, 221 AD2d 153, 154 [1st Dept 1995], *lv dismissed* 87 NY2d 1055 [1996]; *Naclerio Contr. Co. v Envtl. Protection Admin.*, 113 AD2d 707, 710 [1st Dept 1985]). Article 11.1.2 unambiguously states that "[o]n the failure of the Contractor to fully comply . . . such claims shall be deemed waived." Rogozin found no record of any correspondence from plaintiff that comports with the Article 11 and Article 30 requirements (*see Huff Enters. v Triborough Bridge & Tunnel Auth.*, 191 AD2d 314, 317 [1st Dept 1993], *lv denied* 82 NY2d 655 [2003]).

Plaintiff first argues that a question of fact exists whether the maintenance portion of its work was included in the Contract. The argument, though, lacks merit as defendants admitted in their verified answer to having entered the Contract with plaintiff. Such statements in a party's pleading amount to judicial admissions (*see Madison 96th Assoc., LLC v 17 E. 96th Owners Corp.*, 120 AD3d 409, 410 [1st Dept 2014]).

Next, plaintiff argues the motion should be denied as premature. CPLR 3212(f) permits the court to deny a motion for summary judgment or order a continuance when it appears from "affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated." The information must be within the exclusive knowledge of the party moving for summary judgment (*see Voluto Ventures, LLC v Jenkens & Gilchrist Parker Chapin LLP*, 44 AD3d 557, 557 [1st Dept 2007]). Although incomplete discovery may, in some circumstances, warrant denial of the motion (*see Ali v Effron*, 106 AD3d 560, 560 [1st Dept 2013]), defendants' motion is predicated, in part, on plaintiff's failure to follow the contractual notice provisions. Thus, knowledge of whether plaintiff supplied the requisite documentation in a timely manner is within its possession.

Plaintiff contends that its noncompliance with the notice provisions is excused because defendants, who had actual knowledge of the claims, obstructed plaintiff's performance under the Contract. Plaintiff relies on *Whitmyer Bros., Inc. v State* (63 AD2d 103 [3d Dept 1978], *affd* 47 NY2d 960 [1979]) in support. In *Whitmyer*, the court excused strict compliance with a contract's notice provision pertaining to an extra work claim because there was extensive correspondence between the parties that discussed the issue (*id.* at 107). O'Sullivan provides DCAS' approval of 13 time extension requests; its attendance at the bi-weekly meetings; and the Certificate of Substantial Completion to show that defendants had actual knowledge of the delay and the extra work claim. However, the notice provisions require the submission of "contemporaneous statements and documentation of its actual damages" (*A.H.A. Gen. Constr.*, 92 NY2d at 30). Although the time extension requests contained verified payroll reports, they did not include "details and the amounts of such damages, together with documentary evidence of such damages" as specified in Article 11.1.2. In each request, plaintiff also acknowledged it had to "prepare and furnish a verified itemized statement of claims in accordance with the terms of the contract" and that it would submit the claims "at the time of request for an extension of time for a substantial or

final payment." These statements in plaintiff's time extension requests plainly conflict with the language contained in Article 11.1.2. Moreover, defendants' actual knowledge is insufficient (*see Schindler El. Corp. v Tully Constr. Co., Inc.*, 139 AD3d 930, 932 [2d Dept 2016]). Finally, plaintiff asserts that defendants did not address their breach of the Contract. However, defendants' alleged breach does not "estop [them] from relying on plaintiff's failure to comply with the notice of claim provisions" (*S.J. Fuel Co., Inc. v New York City Hous. Auth.*, 73 AD3d 413, 414 [1st Dept 2010]). To the extent plaintiff relies on *Ryder Bldg. Co. v City of Albany* (187 AD 868 [3d Dept 1919]), that case is inapposite. Defendants granted plaintiff numerous time extensions to perform the work, and the Contract described the method by which plaintiff could recoup its increased costs. O'Sullivan describes no other facts by which plaintiff's noncompliance may be excused. Summary judgment on the breach of contract claim seeking delay damages is granted.

2. The Extra Work Claim

Defendants argue that the doctrine of res judicata bars plaintiff from asserting an extra work claim for $4,148.88. The CDRB issued a final and binding decision on the matter, and plaintiff did not timely challenge the determination.

It is well settled that "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (*O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981], citing *Matter of Reilly v Reid*, 45 NY2d 24, 29-30 [1978]). Public policy in the State of New York favors arbitration and alternative dispute resolution (*see Westinghouse Elec. Corp. v New York City Tr. Auth.*, 82 NY2d 47, 53 [1993]). Res judicata applies to arbitration awards (*see Waverly Mews Corp. v Waverly Stores Assoc.*, 294 AD2d 130, 132 [1st Dept 2002]).

Pursuant to Article 27.1.2, the dispute resolution procedure applies to disputes about "the amount to be paid for Extra Work or disputed work in connection with the Contract." According to Article 27.7.6, the CDRB's decision is final and binding. Defendants have shown that the extra

work claims in this action and before the CDRB are identical (*see Fajemirokun v Dresdner Kleinwort Wasserstein, Ltd.*, 27 AD3d 320, 321 [1st Dept 2006], *lv denied*,7 NY3d 705 [2006]).

Plaintiff does not dispute that Article 27 is a valid dispute resolution provision. Nevertheless, it argues that res judicata is inapplicable because the CDRB lacked documentary and testimonial evidence to make an informed decision. Article 27.7.6, though, states that plaintiff may challenge the CDRB's determination by commencing an Article 78 proceeding within four months of the date of the decision. Similar provisions providing for judicial review are valid (*see Skanska Tunneling v City of New York*, 247 AD2d 344, 344 [1st Dept 1998], *appeal dismissed* 92 NY2d 844 [1998]). Because plaintiff did not timely commence an Article 78 proceeding, it may not contest the CDRB's decision in this action. In addition, "the commencement of a subsequent proceeding simply to cure defects in the proof and to improve the quality thereof is not a distinction which precludes the application of res judicata" (*Matter of Freddolino v Village of Warwick Zoning Bd. of Appeals*, 192 AD2d 839, 840 [3d Dept 1993]). Plaintiff has not shown how the additional documents, such as the substantial completion data sheet or performance evaluations, bear on whether it complied with Articles 25 and 28. Summary judgment on the breach of contract claim for costs associated with computer software installation work is granted.

B. Second Cause of Action (Account Stated)

Plaintiff's second cause of action is for an account stated based on invoices delivered to and retained by defendants.

"An account stated is an agreement between the parties to an account based upon prior transactions between them with respect to the correctness of the separate items composing the account and the balance due, if any, in favor of one party or the other" (*Shea & Gould v Burr*, 194 AD2d 369, 370 [1st Dept 1993] [internal quotation marks and citation omitted]). The cause of action "exists where the party to a contract receives bills or invoices and does not protest within a reasonable time" (*Russo v Heller*, 80 AD3d 531, 532 [1st Dept 2011] [internal quotation marks

and citation omitted]). Plaintiff must plead the precise amount of the balance due (*see Digital Ctr., S.L. v Apple Indus., Inc.*, 94 AD3d 571, 573 [1st Dept 2012]).

Defendants argue that allegations in the complaint negate the existence of an account stated. Plaintiff had alleged that it was "informed verbally . . . that DCAS was not entertaining any requests for reimbursement." Oral protestations, though, are insufficient to refute the existence of an account stated (*see Miller v Nadler*, 60 AD3d 499, 499 [1st Dept 2009]), and defendants present no evidence of when they rejected the invoices presented to them.[3]

Defendants also argue the claim merely restates the breach of contract claim and must be dismissed. "[A] claim for an account stated may not be utilized simply as another means to attempt to collect under a disputed contract" (*Martin H. Bauman Assoc. v H & M Intl. Transp.*, 171 AD2d 479, 485 [1st Dept 1991]). In addition, "allegedly unfulfilled contractual conditions precedent to defendant's payment obligation negate any inference of an implied agreement . . . that the amounts claimed in plaintiff's invoices were then due" (*Enviroclean Servs., LLC v CEM, Inc.*, 12 AD3d 1042, 1043-1044 [4th Dept 2004]). Defendants have demonstrated that the account stated cause of action is predicated upon the same facts as the breach of contract cause of action and seeks the same damages (*see Hagman v Swenson*, 149 AD3d 1, 7 [1st Dept 2017]).

Plaintiff argues that defendants failed to disprove the existence of an account stated because Rogozin presented no evidence of when defendants were first notified of the account. It contends that additional discovery will likely reveal internal DCAS communications discussing the account. Plaintiff, though, fails to address defendant's assertion that the account stated claim duplicates its first cause of action. The argument pertaining to discovery amounts to nothing more than speculation as plaintiff is the party in possession of when it first presented defendants with the account. Summary judgment on the second cause of action is warranted.

[3] Defendants do not refer to any specific invoices presented to them for payment.

C. Third Cause of Action (Breach of the Implied Covenant of Good Faith and Fair Dealing)

In its third cause of action, plaintiff alleges that defendants breached the implied covenant of good faith and fair dealing by refusing to remit payment for the work. Defendants argue the claim duplicates the breach of contract claim and that plaintiff failed to comply with several contractual notice provisions to preserve its claims.

"Implicit in every contract is a promise of good faith and fair dealing that is breached when a party acts in a manner that . . . would deprive the other party of receiving the benefits under their agreement" (*Sorenson v Bridge Capital Corp.*, 52 AD3d 265, 266 [1st Dept 2008], *lv dismissed* 12 NY3d 748 [2009]). The implied covenant will be enforced "only to the extent it is consistent with the provisions of the contract" (*Phoenix Capital Invs. LLC v Ellington Mgt. Group, L.L.C.*, 51 AD3d 549, 550 [1st Dept 2008]). To the extent the claim "merely restates [a] breach of contract claim," it will be dismissed (*Brook v Peconic Bay Med. Ctr.*, 152 AD3d 436, 438 [1st Dept 2017]).

Defendants have shown that the third cause of action arises out of the same facts and seeks the same damages as the breach of contract cause of action (*id.*). DCAS' denial of plaintiff's Notice of Dispute was consistent with the terms set forth in Articles 11 and 27 of the Contract. Plaintiff in opposition contends that defendants' unreasonable interference prevented it from receiving the benefits of the Contract. The argument, though, addresses whether defendants breached the implied covenant and not whether the claim is duplicative of the breach of contract claim. The third cause of action is dismissed.

D. Fourth Cause of Action (Conversion)

Plaintiff's fourth cause of action alleges that defendants converted plaintiff's services without payment. A cause of action for conversion arises when "someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006], citing *State of New York v Seventh Regiment Fund*, 98 NY2d 249,

259 [2002]). A claim for conversion is redundant of a breach of contract where plaintiff fails to plead independent facts sufficient to give rise to tort liability (*see Kopel v Bandwidth Tech. Corp.*, 56 AD3d 320, 320 [1st Dept 2008]). Plaintiff's fourth cause of action duplicates its breach of contract claim. Because plaintiff failed to address this cause of action, it is dismissed.

E. Fifth Cause of Action (Negligent Misrepresentation)

Plaintiff's fifth cause of action is based upon plaintiff's reliance on Rogozin's statements that defendants would compensate plaintiff for its increased costs incurred between March 13, 2008 and October 31, 2014. Defendants argue the negligent misrepresentation claim is meritless, is not pled with particularity, and is duplicative of the breach of contract claim.

A negligent misrepresentation claim requires a plaintiff to show "(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 180 [2011], quoting *J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007], *rearg denied* 8 NY3d 939 [2007] [internal quotation marks omitted]). "In the commercial context, the duty to speak with care exists when 'the relationship of the parties, arising out of contract or otherwise, [is] such that in morals and good conscience the one has the right to rely upon the other for information'" (*Kimmell v Schaefer*, 89 NY2d 257, 263 [1996], quoting *International Prods Co. v Erie R.R. Co.*, 244 NY 331, 338 [1927], *cert denied* 275 US 527 [1927]). An arm's length business relationship ordinarily does not give rise to special relationship (*see US Express Leasing, Inc. v Elite Tech. (NY), Inc.*, 87 AD3d 494, 497 [1st Dept 2011]). The claim fails where a plaintiff does not plead a breach of a duty independent from a party's contractual obligations (*see Board of Mgrs. of Soho N. 267 W. 124th St. Condominium v NW 124 LLC*, 116 AD3d 506, 507 [1st Dept 2014]).

Defendants have shown that plaintiff failed to plead or articulate any facts showing that they had duty separate from the Contract. O'Sullivan's conclusory statements that plaintiff

reasonably relied on Rogozin's representation fails to cure this deficiency. Similarly, plaintiff has not demonstrated that a fiduciary relationship existed between the parties, and the absence of a fiduciary relationship is fatal to a negligent misrepresentation claim (*see Sebastian Holdings, Inc. v Deutsche Bank AG*, 78 AD3d 446, 447 [1st Dept 2010]). Summary judgment on the fifth cause of action is granted.

F. Sixth Cause of Action (Fraud)

Plaintiff alleges that defendants knowingly misrepresented that they would compensate plaintiff and that plaintiff justifiably relied upon this misrepresentation to its detriment. Defendants argue the claim is duplicative of the breach of contract claim and is not pled with particularity. To sustain a claim for fraud, "plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]). Plaintiff must plead these elements with specificity (*see* CPLR 3016). Plaintiff need not provide "unassailable proof of fraud" (*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 492 [2011]), but must set forth the incidents complained of in sufficient detail (*see Lanzi v Brooks*, 43 NY2d 778, 780 [1977]). A cause of action for fraud is duplicative of a breach of contract claim where a plaintiff fails to plead a duty distinct from the breach (*Mañas v VMS Assoc., LLC*, 53 AD3d 451, 453 [1st Dept 2008], citing *First Bank of the Am. v Motor Car Funding, Inc.*, 257 AD2d 287, 291 [1st Dept 1999]). "[W]hen the only fraud alleged is that the defendant was not sincere when it promised to perform," the fraud claim must be dismissed (53 AD3d at 453).

Defendants have established that plaintiff failed to allege a duty separate from the breach of contract. Plaintiff relies on the same facts as the breach of contract claim and seeks the same amount of damages. O'Sullivan's conclusory statement that plaintiff justifiably relied on

Rogozin's representation that DCAS would execute a change order amounts to nothing more than an insincere promise to perform, which is insufficient. The sixth cause of action is dismissed.

G. Seventh Cause of Action (Breach of Fiduciary Duty)

Plaintiff in its seventh cause of action alleges that defendants breached their fiduciary duty by failing to pay for plaintiff's services despite assuring plaintiff they would do so. "To state a claim for breach of fiduciary duty, a plaintiff must allege the existence of a fiduciary relationship, misconduct by the other party, and damages directly caused by that party's misconduct" *Castellotti v Free*, 138 AD3d 198, 209 [1st Dept 2016]). "[A] fiduciary relationship arises between two persons when one of them is under a duty to act or give advice for the benefit of another upon matters within the scope of the relation" (*Oddo Asset Mgt. v Barclays Bank PLC*, 19 NY3d 584, 593-594 [2012], *rearg denied* 19 N.Y.3d 1065 [2012] [internal quotation marks and citation omitted]). The existence of a duty is essential (*see Marmelstein v Kehillat New Hempstead: The Rav Aron Jofen Community Synagogue*, 45 AD3d 33, 36 [1st Dept 2008], *affd* 11 NY3d 15 [2008]). It may not be imposed unilaterally (*id.* at 37). Whether a fiduciary relationship exists involves a fact-specific inquiry (*EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19 [2005]). "[A]n arms-length business relationship does not give rise to a fiduciary obligation" unless there is an agreement "providing for a relationship of trust, or special circumstance indicating the same," exists (*Apogee Handcraft, Inc. v Verragio, Ltd.*, 155 AD3d 494, 496 [1st Dept 2017], *lv denied* — NY3d —, 2018 NY Slip Op 68572 [2018] [internal quotation marks and citations omitted]). Plaintiff must plead the claim with particularity (*see Stang LLC v Hudson Sq. Hotel, LLC*, 158 AD3d 446, 446 [1st Dept 2018]).

A claim for breach of fiduciary duty also requires "the violation of some duty due to an individual, which duty is a thing different from a mere contractual obligation" (*see Batas v Prudential Ins. Co. of Am.*, 281 AD2d 260, 264 [1st Dept 2001] [internal quotation marks and citation omitted]). The claim is duplicative of a breach of contract claim when they are based upon

the same facts and seek the same damages (*see Chowaiki & Co. Fine Art Ltd. v Lacher*, 115 AD3d 600, 600 [1st Dept 2014]). Defendants have established that the seventh cause of action duplicates the first cause of action for breach of contract. Plaintiff in opposition failed to set forth any facts sufficient to show that a fiduciary relationship existed or that defendants assumed a duty separate from the Contract. Summary judgment on the seventh cause of action is granted.

H. Eighth (Quantum Meruit) and Ninth (Unjust Enrichment) Causes of Action

Plaintiff asserts two quasi-contract claims as its eighth (Quantum Meruit) and ninth (Unjust Enrichment) causes of action. Defendants argue the two claims are precluded by the existence of the Contract.

To prevail on a claim for quantum meruit, plaintiff must show "(1) the performance of services in good faith; (2) the acceptance of the services by the person to whom they are rendered; (3) an expectation of compensation therefor; and (4) the reasonable value of the services" (*Kramer v Greene*, 142 AD3d 438, 442 [1st Dept 2016] [internal quotation marks and citations omitted]). Unjust enrichment is "the receipt by one party of money or a benefit to which it is not entitled, at the expense of another" (*Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 473 [1st Dept 2010]). To state a claim for unjust enrichment, "plaintiff must show that (1) the other party was enriched; (2) at that party's expense; and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered" (*Kramer*, 142 AD3d at 442 [internal quotation marks and citation omitted]). Plaintiff may plead both breach of contract and quasi-contract as alternative theories of recovery where "there is a bona fide dispute as to the existence of a contract, or where the contract does not cover the dispute at issue" (*Hochman v LaRea*, 14 AD3d 653, 654-655 [2d Dept 2005]). However, where a valid and enforceable written contract governing the subject matter exists, plaintiff is precluded from recovery on a quasi-contract claim (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]). Although plaintiff contends that it is inequitable to permit defendants to benefit from plaintiff's work, the eighth and ninth causes

of action are precluded by the existence of the Contract. The eighth and ninth causes of action are dismissed.

I. Dismissal of the Complaint against DCAS

Finally, defendants argue in a footnote that the complaint should be dismissed against DCAS because it is not a party amenable to suit. New York City Charter § 396 states that "[a]ll actions and proceedings for the recovery of penalties for the violation of any law shall be brought in the name of the City of New York and not in that of any agency, except where otherwise provided by law." In their verified answer, defendants admitted that DCAS is an agency of the City, and the statement constitutes a formal admission (*Madison 96th Assoc., LLC*, 120 AD3d at 410). As such, DCAS is not a legal entity capable of being sued (*see Toth v New York City Dept. of Citywide Admin. Servs.*, 119 AD3d 431, 431 [1st Dept 2014], *lv denied* 24 NY3d 908 [2014]). Plaintiff did not oppose this facet of the motion, and the complaint against DCAS is dismissed.

Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed.

This constitutes the decision and order of the court.

Dated: May 11, 2018

Alexander M. Tisch, A.J.S.C.

HON. ALEXANDER M. TISCH