SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. GERALD LEBOVITS PART IAS MOTION 7EFM
Justice

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INDEX NO. 656347/2016

COLONIAL SURETY COMPANY

Plaintiff,

MOTION SEQ. NO. 001

- v -

NEW YORK CITY HOUSING AUTHORITY,

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65

were read on this motion to/for DISMISSAL

In its pre-answer motion to dismiss, defendant, New York City Housing Authority, moves under CPLR 3211 (a) (1) to dismiss plaintiff Colonial Surety Company's complaint on the ground that plaintiff's claims are barred and waived based on documentary evidence. Plaintiff opposes defendant's motion.

Background

In June 2012, defendant awarded Pioneer General Construction Co., LLC (Pioneer), a contract, No. BW1202848, to perform the exterior restoration at Sumner Houses, a 13-building Housing Authority development in Brooklyn, New York (Original Scope of Work), in the amount of $3,946,925.20 (Contract). Under the Contract, Pioneer was required to complete the Original Scope of Work no later than July 19, 2014. As a condition of the Contract, Pioneer (the principal) obtained a performance and payment bond no. CSC-220274, dated on or around May 22, 2012, from plaintiff (the surety) for $3,946,925.20 (Performance Bond). The Performance Bond incorporated by reference the terms of the Contract, No. BW 1202848 to perform work on the exterior of "Summer Houses." (Exhibit 11 [sic].)

According to a letter dated February 20, 2014, defendant declared Pioneer in default of the Contract. By a separate letter dated February 20, 2014, defendant demanded that plaintiff, as surety for Pioneer, complete the remaining scope of work on the Contract. In June 2014, plaintiff entered into a contract with Akro General Contracting, Inc. (Akro), to complete Pioneer's remaining scope of work for $1,984,188.00 plus any amounts incurred with respect to any change orders (Completion Contract). According to defendant's Substantial Completion

Notification dated July 24, 2015, Akro substantially completed the Completion Contract on July 22, 2015. (Exhibit 12.)

Plaintiff brings this action against defendant to recover not less than $900,000 in damages, together with interest, costs, and disbursements, resulting from plaintiff's completion of Pioneer's Contract work. According to defendant, it is an assignee and subrogee of rights and claims against defendant in connection to the Contract. According to the complaint, plaintiff asserts that defendant unilaterally deleted more than $2.1 million of work under the Contract. Plaintiff asserts that defendant was obligated to equitably adjust the price to perform the remaining work under the Contract. Plaintiff wants compensation for claims for Change Order numbers 1, 2, and 3, in which defendant substantially reduced the scope of the work under the Contract. According to plaintiff, it submitted timely notice of claims under General Municipal Law § 50-e, notifying defendant of its claims.

Defendant now moves to dismiss on two grounds: (1) plaintiff and Pioneer failed timely to notify defendant, in writing, of the claims asserted in the complaint, and waived any rights Pioneer and plaintiff might have had to assert those claims, and (2) defendant determined that Pioneer defaulted on the Contract. Defendant argues that to seek damages related to the Contract, the contractor must first successfully challenge the default determination under CPLR Article 78. Defendant argues that neither Pioneer nor Colonial challenged the default determination under CPLR Article 78.

Defendant argues that the Contract applies equally to Pioneer and Colonial. Under the Performance Bond, Colonial agreed to fully perform and complete the work if Pioneer fails or neglects to fully perform. (Exhibit 11 at 2.)

Plaintiff opposes defendant's motion alleging that defendant has not met its burden of presenting documentary evidence to disprove the allegations in the complaint as a matter of law. Plaintiff argues that it should be compensated for additional costs incurred because once defendant deleted the scope of work, it increased the total cost to perform the remaining scope of work. Plaintiff alleges that defendant did not equitably adjust the price of the contract to account for the extra costs plaintiff incurred to complete the work. Plaintiff argues that defendant's deletion of the scope of work was not implemented until plaintiff received its final payment.[1] Plaintiff argues that it timely submitted a notice of claim to defendant within 20 days after it received a final payment. Plaintiff argues that it may bring this plenary action for damages.

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[1] According to a letter dated September 3, 2013, defendant reduced the Original Scope of Work by deleting all associated components of both the removals and installations of window caulking throughout all 13 buildings at Sumner Houses alleging numerous delays on the part of Pioneer. This resulted in a reduction in the Contract price from $3,946,925.20 to $1,893,125.20. According to the Change Orders dated July 1, 2014, and January 15, 2015, the Original Scope of Work was further reduced by deleting all the asbestos contaminated materials at windows and copings and replacement of new joint sealant materials; the Contract price was reduced from $1,893,125.20 to $1,884,613.20.

Discussion

Defendant's motion to dismiss is granted.

On a CPLR 3211 (a) (1) motion to dismiss, a defendant has the "burden of showing that the relied-upon documentary evidence 'resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim.'" (*Fortis Fin. Servs. v Fimat Futures USA, Inc.*, 290 AD2d 383, 383 [1st Dept 2002] [citations omitted]; *accord Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 88 [1994].) The documentary evidence must "be unambiguous and of undisputed authenticity." (*Fontanetta v Doe*, 73 AD3d 78, 86 [2d Dept 2010], quoting Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 21-22.)

Judicial records, mortgages, deeds, and contracts qualify as documentary evidence. (*Fontanetta*, 73 AD3d at 84.)

Affidavits, examination before trial (EBT) transcripts, emails, and medical records are not the type of documentary evidence acceptable under CPLR 3211 (a) (1). (*Id.* at 85; *accord Amsterdam Hosp. Group, LLC v Marshall-Alan Assocs., Inc.*, 120 AD3d 431, 433 [1st Dept 2014] ["The emails in this particular case, aside from being not otherwise admissible, are not able to support the motion to dismiss. The 'documentary evidence' here, unlike the emails in *Langer*, do not, standing on their own, conclusively establish a defense to the claims set forth in the complaint."] [internal citations omitted].) Affidavits and summary notes do not constitute documentary evidence within the meaning of the rule; they raise issues of credibility for a jury to decide. (*Art & Fashion Group Corp., v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014].) Letters do not qualify as "documentary evidence" under CPLR 3211 (a)(1). (*Granada Condo. III Assn. v Palomino*, 78 AD3d 996, 997 [2d Dept 2010].)

If a written agreement unambiguously contradicts the allegations supporting a litigant's cause of action for breach of contract, the contract itself constitutes documentary evidence warranting the dismissal of the complaint under CPLR 3211 (a) (1), regardless of any extrinsic evidence or self-serving allegations offered by the proponent of the claim. (*150 Broadway N.Y. Assoc.s, L.P. v Bodner*, 14 AD3d 1, 7 [1st Dept 2004].)

In support of its motion to dismiss, defendant submits the following documents: affirmation; summons and complaint; various letter notices to Pioneer; the Contract; periodic estimates for partial payment; notification of intent to default dated November 15, 2013; change order proposals reducing the scope of the work; the Performance Bond; the Completion Contract; substantial completion notification; Akro's proposal and invoices; various letters and invoices; Pioneer's notice of claim letter to defendant, dated February 18, 2015; notice of claim, dated March 11, 2016, from Meridian Consulting Group, LLC (plaintiff's consultant) to defendant.[2]

[2] In opposition to the motion, plaintiff, among other documents, submits a notice of claim document dated June 15, 2016, addressed to defendant.

The court relies on the Contract, the Completion Contract, and the March 11, 2016, notice of claim in determining defendant's motion.

Under Section 23 of Contract,

> "the Contractor shall within twenty (20) days after such claim shall have arisen, file with the Authority written notice of intention to make a claim for such extra cost or damages, stating in such notice the nature and amount of the extra cost or damages sustained and the basis of the Claim against the Authority." (Exhibit 2, Section 23 [a].)

If the contractor fails to file a notice of claim, it

> "shall be a condition precedent to the settlement of any claim or to the Contractor's right to resort to any proceeding or action to recover thereon, and failure to do so shall be deemed to be conclusive and binding determination on the Contractor's part that he/she has no claim against the Authority for compensation for Extra Work or for compensation for damages, as the cause may be, and shall be deemed a waiver by the Contractor of all claims for additional compensation or for damages." (Exhibit 2, Section 23 [b].)

A contractor's claim accrues when its damages are ascertainable. (*C.S.A. Contr. Co. v N.Y. City Sch. Constr. Auth.*, 5NY3d 189, 192 [2005] ["Although the determination of the date on which damages are ascertainable may vary based on the facts and circumstances of each particular case, it generally has been recognized that damages are ascertainable once the work is substantially completed or a detailed invoice of the work performed is submitted."] [internal quotation marks and citations omitted].)

Here, the work was substantially completed on July 22, 2015. (Exhibit 13.) Plaintiff submitted a notice of claim to defendant on March 11, 2016, close to a year after the work was substantially completed.

Plaintiff's argument that the accrual date for determining when its damages are ascertainable — 20 days from final payment, namely, on February 25, 2016 — is unpersuasive. Also, any documents that plaintiff attaches in opposition to the motion, such as emails, the court cannot consider. In any event, the emails do not qualify as notices of claim under the Contract.

Even if the court calculates the 20 days from the date that plaintiff submitted its invoice for the work performed, namely, November 25, 2015, to defendant, the notice of claim would still be untimely, by more than three months. (Exhibit S.)

Also, plaintiff's claim for equitable adjustment is also barred by Pioneer's default on the Contract. Under Article 20 (d) of the Contract:

> "The [Housing] Authority's determination that the Contractor is in default shall be conclusive, final, and binding on the parties and such a finding shall preclude the Contractor from commencing the plenary action for any damages relating to the Contract. If the Contractor protests the [Housing] Authority's determination, the Contractor may commence a lawsuit in a court of competent jurisdiction of the State of New York under Article 78 of the New York Civil Practice Law and Rules." (Exhibit. 2, Section 20 [d]).

The First Department has analyzed a similar provision as the Contract's Article 20 (d), in which the court held that the lower court "properly dismissed the complaint as against the City" because "the construction contract entered into between plaintiff and the City unambiguously precluded plaintiff from commencing a plenary action for damages upon a determination by the City that plaintiff had defaulted under the contract." (*Cal-Tran Assoc., Inc. v City of New York*, 43 AD3d 727, 727 [1st Dept 2007].) The *Cal-Tran* Court determined that "[p]laintiff's remedy was to commence a CPLR Article 78 proceeding challenging the determination of default, which it failed to do." (*Id.*)

Contract provisions similar to Article 20 (d) "ha[ve] already been reviewed and enforced by other Judges, both in this Court and the Appellate Division, First Department." (*Sound Beyond Elec. Corp. v The City of New York and John. J. Doherty as Commissioner of the Dept. of Sanitation of the City of New York*, 2011 WL 11074487, at *3 [[Sup Ct NY County 2011], *affd* 100 AD3d 412, 413 [1st Dept 2012] ["The construction contract entered into between plaintiff and the City unambiguously precluded plaintiff from commencing a plenary action for damages upon a determination by the City that plaintiff had defaulted under the contract. Plaintiff's remedy was to commence a CPLR article 78 proceeding challenging the determination of default, which it failed to do."] [internal quotation marks omitted].)

In *Sound Beyond Elec. Corp.*, the First Department reinforced its holding in *Cal-Tran Assoc.* and added that "quantum meruit, unjust enrichment, or fraudulent misrepresentation" claims were also barred by a similar contractual provision as Article 20 (d). (100AD3d at 413.)

Under the Performance Bond, all of Pioneer's obligations under the Contract apply to plaintiff because plaintiff agreed that "if requested to do so by [defendant] to fully perform and complete the Work to be performed under the Contract, pursuant to the terms, conditions, and covenants thereof, if, for any cause, [Pioneer] fails or neglects to so fully perform and complete such Work." (Exhibit 11, at 2.) Where a bond incorporates the terms contained in a contract between the owner (the bond's obligee) and the contractor (the bond's principal), the surety's liability on the bond is co-extensive with the contractor's liability on the contract. (*Babylon Assocs. v County of Suffolk*, 101 AD2d 207, 218 [2d Dept 1984].)

This court relies on the Contract and the Performance Bond to conclude that plaintiff is precluded from bringing a plenary action for damages related to the Contract.

Under Article 20 (d), Pioneer and plaintiff's remedy was to commence an CPLR Article 78 proceeding against defendant to protest the default determination. Article 20 (d) precludes plaintiff from brining a plenary action for damages related to the Contract.

For the reasons stated above, defendant's motion to dismiss is granted and the complaint is dismissed.

Accordingly, it is

ORDERED that defendant's motion to dismiss is granted; and it is further

ORDERED that defendant shall serve a copy of this decision and order with notice of entry on plaintiff and on the County Clerk's Office, which is directed to enter judgment accordingly.

8/21/2018
DATE

GERALD LEBOVITS, J.S.C.

CHECK ONE:	X	CASE DISPOSED			☐	NON-FINAL DISPOSITION	
	X	GRANTED	☐	DENIED	☐	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN			☐	FIDUCIARY APPOINTMENT	☐ REFERENCE