

Sapp v Clark Wilson, Inc.
2019 NY Slip Op 30361(U)
February 5, 2019
Supreme Court, Kings County
Docket Number: 12230/15
Judge: Peter P. Sweeney
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At an IAS Part 73 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 5th day of February, 2019.

P R E S E N T:

HON. PETER P. SWEENEY,

Justice.

-----X

DIANNA SAPP, EARL KING, SYBIL GILL,
TAMEAKE MACKLIN, JASMINE CHEVRES,
VALENCIA HALLSALUM, HOLANKIA SALDANA,
MIRLA CRUZ, CHARLENE FISHER, NADINA BROWN,
CHARMAINE BURKETT, EVELYN COLON,
LENO YARDE, MARCIA GRAHAM, JANICE FORD,
ROCHELLE DIAZ-MOORE, IRENE DOWDY,
RAVAN HUDDLESTON, AMANDA ALBERT,
TRESSA BELFONTE, TAZZNEE WILCOX,
TYQUAISA DAVIS, CHASIDY JULES,
ANNMARIE GREAVES, AND CHAUNTEL GEARY,

Plaintiffs,

- against -

Index No. 12230/15

CLARK WILSON, INC., WE CARE INC.,
WE ALWAYS CARE INC., THE NEW YORK CITY
DEPARTMENT OF HOMELESS SERVICES, AND
CAMBA INC.,

Defendants.

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The following papers numbered 1 to 13 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____

1-4, 5-7

Opposing Affidavits (Affirmations) _____

8-9

Reply Affidavits (Affirmations) _____

10, 11, 12, 13

MS
#12
#13
#15

Upon the foregoing papers, defendant We Always Care, Inc. (WALC) moves, pursuant to CPLR 3212, for partial summary judgment on its first, second and/or third cross claim against defendant New York City Department of Homeless Services (DHS) in its December 27, 2016 answer in this action (the Sapp action) as well as its December 14, 2016 answer originally submitted in relation to the action entitled *Mayorquin et. al. v Clark Assoc., Inc., et al.* (Index No. 5794/16) (the Mayorquin action). WALC further moves for partial summary judgment as to damages on its aforementioned first, second and/or third cross claims in the amount of \$12,923,561.28. Finally, WALC moves, pursuant to CPLR 3212 (g), for an order directing a hearing as to additional damages on its first, second and/or third cross claims in the two actions. DHS cross-moves for summary judgment dismissing WALC's cross claims against it.

Background Facts and Procedural History

The plaintiffs in the now consolidated Sapp and Mayorquin actions are former homeless individuals who reside at several apartment buildings owned by certain corporate defendants in these actions (the owner defendants). In or about 2001, the owner defendants began to participate in a Neighborhood Based Cluster Transitional Residence Program (the Cluster Program) whereby they leased a block of apartments to the service provider, defendant We All Care Inc. (WAC). Thereafter, WAC entered into a contract with DHS under which DHS paid WAC to provide housing in the apartment buildings, as well as other social services, to homeless individuals (i.e. clients) designated by DHS. WAC then used

a portion of the money it received from DHS for rental payments to the owner defendants for the apartments in which the former homeless individuals resided.

In 2007, DHS instituted a policy change whereby all service providers participating in the Cluster Program were required to be non-for-profit entities. Accordingly, WAC began to sublease the apartments to a non-profit entity known as Church Avenue Merchants Block Association, Inc. (CAMBA). Thereafter, CAMBA acted as the service provider and was paid to do so pursuant to a contract with DHS. In or about September or October 2014, CAMBA stopped operating as the service provider and was replaced by WALC. Upon replacing CAMBA, WALC began to provide services to the former homeless individuals residing in the apartment buildings and entered into contract negotiations with DHS regarding its payment for these services. On June 19, 2015, DHS and WALC entered into a contract for these services.

After DHS and WALC entered into the contract, the New York City Human Resources Administration (HRA) submitted the contract to the Comptroller of the City of New York for registration. In this regard, New York City Charter § 328 (a) provides that “[n]o contract or agreement executed pursuant to this charter or other law shall be implemented until (1) a copy has been filed with the Comptroller and (2) either the Comptroller has registered it or thirty days have elapsed from the date of filing, whichever is sooner.” However, on February 23, 2016, HRA advised the Comptroller that it was withdrawing the contract from the registration process. Subsequently, HRA resubmitted the

contract to the Comptroller. However, on April 27, 2016, HRA advised the Comptroller that it was again withdrawing the resubmitted contract. To date, the contract has not been registered by the Comptroller.

In 2015, after the defendant owners commenced summary eviction proceedings against them, plaintiffs commenced the Sapp action which alleged, among other things, that the defendant owners, in concert with WAC and WALC, created an illusory tenancy to deprive them of their rights to the apartments under the Rent Stabilization Code. Subsequently, other occupants of the buildings commenced the Mayorquin Action in which they raised the same claims as the plaintiffs in the Sapp action. As noted above, the two actions were subsequently consolidated under the instant index number.¹

In its answers to the Sapp and Mayorquin complaints, WALC interposed various cross claims against DHS. In particular, in its first cross claim, WALC alleged that DHS breached the June 19, 2015 contract between the parties by failing to pay some \$13,913,765.00 that was due for services WALC provided to DHS's clients. In its second cross claim, WALC alleged that it was entitled to \$13,913,765.00 for services rendered to DHS's clients under the theory of quantum meruit. In its third cross claim, WALC alleged that DHS promised to pay it for social services rendered to DHS's clients, that WALC reasonably relied upon this promise and provided these clients with \$13,913,765,00 in services, and that DHS is

¹In a decision and order dated October 10, 2018, this court determined that the plaintiffs were not entitled to the protections of the Rent Stabilization Code.

barred by the doctrine of promissory estoppel from refusing to pay for these services. The instant motions are now before the court.

WALC's Cross Claims Against DHS

WALC moves for summary judgment under its breach of contract cross claim against DHS. In so moving, WALC points to the undisputed facts that the parties entered into a contract dated June 19, 2015, whereby WALC agreed to provide services to DHS clients residing in the apartment buildings, that WALC performed these services beginning in October 2014, and that DHS has failed to pay it for these services as required under the contract. In further support of its motion for summary judgment on its breach of contract cross claim, WALC maintains that, although the Comptroller never registered the contract, this does not preclude it from enforcing the contract against DHS. With respect to this last point, WALC raises several arguments.

In this regard, WALC points to the affidavit of Vincent Pullo, the Agency Chief Contracting Officer for the New York City Department of Social Services, which DHS attached to its own cross motion papers. In particular, Mr. Pullo avers that, on January 15, 2016, HRA submitted the contract to the Comptroller and on February 23, 2016, some 39 days later, HRA advised the Comptroller that it was withdrawing the contract. WALC further notes that Mr. Pullo states that on March 23, 2016, HRA resubmitted the contract to the Comptroller and that on April 27, 2016, some 35 days later, HRA withdrew the contract. Under the circumstances, WALC maintains that, by operation of New York City Charter

§ 328 (a), the contract became valid without being registered inasmuch as more than 30 days elapsed after both the January 15 and February 23, 2016 filings without any objection being filed by the Comptroller or the withdrawal of the contract by HRA. WALC further contends that the court should disregard Mr. Pullo's June 18, 2018 supplementary affidavit in which he avers that the correct filing and refiling dates of the contract were January 26 and April 1, 2016. Specifically, WALC argues that this new claim presents a feigned issue of fact designed to avoid the consequences of his prior sworn statement.

Alternatively, WALC argues that there was no requirement that the underlying contract be registered by the Comptroller inasmuch as it was an "emergency services contract" pursuant to New York City Charter §§ 328 (d) and 315. In support of this argument, WALC points to provisions in the contract which refer to the need to provide "emergency housing," "emergency shelter," as well as the need to provide "immediate" shelter.

In further support of its argument that the failure to register the contract does not bars its enforcement, WALC maintains that DHS is precluded from claiming that the lack of registration renders the contract unenforceable. In this regard, WALC points to the Court of Appeals ruling in *Kooleraire Serv. & Installation Corp. v Board of Education*, (28 NY2d 101 [1971]), which stands for the proposition that a party to a contract cannot rely on the failure of another to perform a condition precedent where it has frustrated or prevented the occurrence of the condition. According to WALC, this is exactly what occurred in this case

inasmuch as DHS is relying upon the Comptroller's failure to perform a condition precedent (i.e. registration) where DHS/HRA's own actions in withdrawing the contract on two separate occasions prevented the required registration. In this regard, WALC contends that the Comptroller would have registered the contract but for HRA's withdrawals. In particular, WALC notes that New York City Charter §§ 328 (b) and (c) only allow the Comptroller to refuse to register the contract if there is inadequate funding for the contract or there is reason to believe that there is possible corruption involving the contract or proposed contractor. WALC maintains that neither of these circumstances are present in the instant matter.

WALC also argues that HRA and/or DHS had no authority to withdraw the contract after it had been submitted to the Comptroller. In this regard, WALC notes that there is no language in New York City Charter § 328 which confers this power upon an agency that files contracts with the Comptroller. WALC also points to the Court of Appeals decision, *Matter of DeFoe v New York City Dept. of Transp.* (87 NY2d 754 [1996]), which WALC contends supports its argument regarding the lack of authority to withdraw contracts.

WALC also contends that, even if the failure to register the contract precludes it from enforcing the same, it is entitled to summary judgment under its quantum meruit and promissory estoppel cross claims against DHS. In support of this argument, WALC notes that it performed services for DHS based upon the promise that it would be compensated for these services, that DHS accepted these services, and that WALC had an expectation that it would be compensated at that time.

As a final matter, WALC contends that it is entitled to summary judgment against DHS under an account stated claim. In this regard, WALC maintains that it billed DHS for its services in accordance with the terms of the contract on a monthly basis. WALC further avers that DHS received and reviewed these bills and then re-sent them to WALC with DHS's determination as to what WALC was due. In further support of its motion for summary judgment under its account stated claim, WALC submits a copy of a summary of these monthly reconciliation statements which indicate the net amount due each month. According to WALC, these statements indicate that an uncontested balance is due in the amount of \$12,923.56.28.

In opposition to WALC's motion for summary judgment on its breach of contract cross claim, and in support of its own cross motion to dismiss this claim, DHS submits two supplemental affidavits by Mr. Pullo in which he avers that, contrary to the claim in his original affidavit, the contract was submitted to the Comptroller on January 26, 2016 and April 1, 2016 (i.e., within 30 days of the dates on which the contract was withdrawn). In further support of this contention, Mr. Pullo attaches copies of "Advice of Award" documents which were returned to HRA by the Comptroller and are stamped "received" January 26, 2018 and April 1, 2016 by the Comptroller. Mr. Pullo also submits copies of HRA memos dated January 1, 2016 and March 23, 2016 which he sent to the Comptroller that state he is submitting the contracts to the Comptroller. In this regard, Mr. Pullo avers that his initial claim regarding the submission dates of the contract were incorrectly based

on these memos. Under the circumstances, DHS argues that there is no merit to WALC's claim that the contracts automatically became valid pursuant to New York City Charter § 328 (a) since, on both occasions, they were withdrawn less than 30 days after they were filed with the Comptroller.

In further support of its cross motion, and in opposition to WALC's motion, DHS points to long standing case law which holds that municipal contracts that are not registered in compliance with procurement regulations are invalid and unenforceable even if the municipality has benefitted from the contract. In addition, DHS argues that WALC's reliance upon cases which stand for the proposition that a party to a contract cannot rely on the failure of another to perform a condition precedent where it has frustrated or prevented the occurrence of the condition is misplaced. In particular, DHS maintains that, unlike in the cases cited by WALC, in the instant matter, there was a statutory basis under New York City Charter § 328 (c) for the refusal to register the contract. Specifically, under this provision, the Comptroller may object to a contract if "there is sufficient reason to believe that there is possible corruption in letting of the contract or that the proposed contractor is involved in corrupt activity." According to DHS, the Comptroller had such concerns with the instant contract and would have objected had it not been withdrawn by HRA. In support of this contention, DHS submits Mr. Pullo's affidavit, in which he avers that after submitting the contract the first time, the Comptroller contacted HRA and requested additional information and documentation concerning poor physical condition of the buildings and plans to

remediate and correct enforcement agency violations. In addition, Mr. Pullo states that the Comptroller specifically requested that a renewal option be removed from the contract. According to Mr. Pullo, HRA withdrew the contract the first time because it was unable to obtain a letter amendment to the contract removing the renewal option before the expiration of the 30th day after the contract had been submitted. Mr. Pullo further avers that, after submitting the contract the second time, the Comptroller contacted HRA and requested additional information concerning numerous outstanding issues regarding WALC's integrity as a vendor. Specifically, Mr. Pullo notes that the Comptroller cited multiple conflicts of interest among individuals mentioned in contracting documentation. Further, Mr. Pullo states that both HRA and the Comptroller began to suspect a lack of arms' length dealing between WALC and WAC due to overlap among the individuals who operated these entities, and also questioned whether or not WALC was actually a non-profit corporation. In support of Mr. Pullo's assertions, DHS submits copies of emails exchanged between Mr. Pullo and the Comptroller's office in which numerous objections and issues were raised with respect to the contract. DHS also notes that in an April 18, 2016 e-mail, the Comptroller specifically advised HRA to "[p]lease provide a response on the status of the above or exercise the option to withdraw the contract if additional time is required [close of business] Wednesday, April 20th or unfortunately the contract will be returned." Accordingly, DHS maintains that this was the reason the contract was withdrawn the second time rather than any attempt by it to frustrate the Comptroller from registering the contract.

In further support of its cross motion for summary judgment, and in opposition to WALC's motion, DHS argues that there is no merit to WALC's claim that the underlying contract was an "emergency contract" under New York City Charter §§ 328 (d) or 315. In this regard, DHS notes that such emergency contracts have certain earmarks which readily reveal whether or not procurement is by emergency. Specifically, DHS points out that under New York City Procurement Policy Board Rules, emergency contracts must have prior approval of the Comptroller and Corporation Counsel. Here, the contract was never submitted for prior approval. Further, the instant contract contained a pre-solicitation report, which is not contained in emergency contracts. Similarly, WALC submitted an extensive proposal as part of the contract procurement process, which also would not have been done as part of an emergency contract. Finally, DHS notes that emergency contracts do not require public hearings. Here, public hearings were scheduled as part of the procurement of the instant contract.

DHS also argues that there is no merit to WALC's argument that HRA lacked the authority under the New York City Charter to withdraw the contract. In this regard, DHS cites to the case of *Nefesh v City of N.Y. Dept. Of Empl.* (254 AD2d 76 [1988]), wherein the Appellate Division, First Department held that the New York City Department of Employment timely withdrew a contract from the Comptroller within 30 days of filing.

With respect to WALC's quantum meruit and promissory estoppel cross claims, DHS maintains that these claims must fail under applicable case law which holds that, where work

is done for a municipality pursuant to a defective or unenforceable contract, no recovery may be had by a vender under an equitable theory. According to DHS, WALC may not circumvent the legislative requirement that the contract be registered by seeking to collect for the work performed under the contract under the theories of quantum meruit or promissory estoppel. As a final matter, DHS argues that there is no basis for any account stated claim against it inasmuch as there was no valid contract between DHS and WALC.

Findings and Rulings

New York City Charter § 328 (a) provides in pertinent part that,

“[n]o contract or agreement executed pursuant to this charter or other law shall be implemented until (1) a copy has been filed with the Comptroller and (2) either the Comptroller has registered it or thirty days have elapsed from the date of filing, whichever is sooner, unless an objection has been filed pursuant to subdivision c of this section.”

New York City Charter § 328 (c) states that

“[t]he Comptroller may, within thirty days of the date of filing of the contract with the Comptroller’s office, object in writing to the registration of the contract, if in the Comptroller’s judgment there is sufficient reason to believe that there is possible corruption in the letting of the contract or that the proposed contractor is involved in corrupt activity.”

Further, New York City Charter § 328 (d) provides that “[t]he requirements of this section shall not apply to: (1) an emergency contract awarded pursuant to section three hundred fifteen.” Finally, New York City Charter § 315 states in pertinent part that “in the case of

unforeseen danger to life, safety, property or a necessary service, an emergency procurement may be made with the prior approval of the Comptroller and corporation counsel.”

“Chapter 13 of the New York City Charter establishes the rules for procurement of New York City Contracts. Section 328 provides for the registration of City contracts by the Comptroller and authorizes the Comptroller to object to the registration of a contract within 30 days of the date of filing of such contract with the Comptroller’s office” (*Matter of DeFoe Corp. v New York City Dept. of Transp.*, 87 NY2d 754, 760 [1996]).

Further, “[a]lthough a contract has been awarded by a municipal agency, such contract is not effective until it has been registered” (*id.*). Thus, as a general rule, contracts that do not meet the requirements of Chapter 13 of the New York City Charter are not legally binding and otherwise unenforceable (*Gianatasio v City of New York*, 159 AD3d 659, 660 [2018]). This is true even where the municipal agency has accepted services performed under an unauthorized contract or benefits from such services (*Garrison Protective Serv., Inc. v Office of the Comptroller of the City of New York*, 92 NY2d 732, 736-737 [1999]).

However, in certain situations, the Comptroller’s failure to register the contract does not preclude its enforcement. In particular, if the Comptroller fails to object to the contract within 30 days of its filing, the contract automatically becomes valid by operation of New York City Charter § 328 (a). Further, if the municipality, without justification, fails to submit the contract to the Comptroller for registration, the municipality may not rely upon the lack of registration as a defense against the enforcement of the contract (*Koolerair Serv. & Installation Corp.*, 28 NY2d at 101). Similarly, the Comptroller has no authority to oppose

a submitted contract other than under the bases set forth in New York City Charter § 328 (b) and (c) and the Comptroller's refusal to register a contract on an unauthorized basis will not prevent enforcement of the contract (*Matter of the Comptroller of the City of New York v Mayor of the City of New York*, 7 NY3d 256, 267 [2006]).

Turning first to WALC's motion for summary judgment under its breach of contract claim, the court finds no merit to WALC's argument that the underlying contract constituted an emergency services contract pursuant to New York City Charter §§ 328 (d) and 315 that did not require registration by the Comptroller. In this regard, it is clear from the parties' own conduct that the contract was not an emergency services contract given the undisputed fact that, on two separate occasions, HRA filed the contract with the Comptroller for certification. Had this been an emergency services contract, no such filing would have taken place inasmuch as New York City Charter § 328 (d) explicitly exempts emergency service contracts from the registration process. The court also notes that the prior approval of the Comptroller and Corporation Counsel was not sought or granted as is required for emergency service contracts under New York City Charter § 315. Further, as DHS points out and WALC does not dispute, other indicia clearly demonstrate that the underlying contract was not an emergency services contract. In particular, a public hearing was conducted with respect to the instant contract, which would not have occurred with an emergency contract, and the contract contained a pre-solicitation report, which is not contained in emergency contracts.

Also without merit is WALC's argument that DHS and HRA lacked the authority to withdraw the contract after it had been filed with the Comptroller. In support of this argument, WALC relies upon the Court of Appeals decision, *Matter of DeFoe Corp. v New York City Dept. of Transp.* (87 NY2d 754 [1996]). In *DeFoe*, the trial court ruled the municipal agency lacked the authority under New York City Charter § 328 to withdraw a contract once it had been submitted to the Comptroller. However, the trial court further concluded that the defendant waived any objection to the agency's withdrawal of the contract by subsequently working with the agency "to eliminate any hurdles that might impede the contract's registration and the subsequent resubmission of the contract to the Comptroller for registration" (*id.* at 759). Although the Appellate Division affirmed the lower court ruling, and the Court of Appeals ultimately affirmed the Appellate Division, given the trial court's finding of waiver, neither appellate court ever reached the issue of whether or not a municipal agency has the authority to withdraw a filed contract under the New York City Charter. Further, subsequent Appellate Division authority indicates that municipal agencies may withdraw contracts filed with the Comptroller as long as the withdrawal takes place within 30 days of filing (*Matter of Nefesh v City of N.Y. Dept. of Empl.*, 254 AD2d 76 [1998]). Moreover, it is apparent from WALC's Chief Executive Officer Yechezkel S. Tabak's own June 6, 2018 affidavit that WALC worked with DHS/HRA in an attempt to alleviate the Comptroller's conflict of interest concerns before the contract was withdrawn the second time as occurred in the *DeFoe* case.

Turning to the issue of whether or not DHS/HRA withdrew the contracts more than 30 days after they were filed with the Comptroller, WALC correctly notes that, according to Mr. Pullo's own May 10, 2018 affidavit, the contract was first filed on January 15, 2016 and withdrawn 39 days later on February 23, 2016, and the contract was resubmitted on March 23, 2016, and withdrawn 35 days later on April 27, 2016. Thus, given the dates set forth in Mr. Pullo's own affidavit, there was no need to register the contract under New York City Charter § 328 (a) (2) since, on both occasions, the contract was not withdrawn or objected to by the Comptroller within 30 days of filing. However, with leave of the court, Mr. Pullo submitted supplemental affidavits in which he maintains that he was mistaken regarding the dates on which the contracts were filed with the Comptroller. In this regard, Mr. Pullo states that his prior claim that the contract was filed on January 15 and March 23, 2016, was based upon two memoranda with these dates which HRA sent to the Comptroller regarding the submission of the contract. Mr. Pullo further states that the actual filing dates for the contract was January 26 and April 1, 2016 and submits copies of the Comptroller's date-stamped documents as well as an Agency Chief Contracting Officer spreadsheet which indicated that the contract was filed with the Comptroller on January 26 and re-filed on April 1, 2016. Under the circumstances, there is an issue of fact as to whether or not the contracts were withdrawn more than 30 days after filing. In this regard, there is no merit to WALC's argument that the court should reject Mr. Pullo's supplemental affidavits as presenting a feigned issue of fact regarding the filing dates. In particular, Mr. Pullo's affidavit adequately

explains that the change in filing dates is due to a mistake on his part as opposed to a feigned issue designed to avoid the consequences of his prior sworn statement. Further, Mr. Pullo's new claim regarding the filing dates is supported by the Comptroller's date-stamped documents (*Matter of Nefesh*, 254 AD2d at 76).

The court next turns to WALC's argument that DHS is precluded from claiming that the failure to register the contract prevents its enforcement inasmuch as DHS's own actions in withdrawing the contract from the Comptroller is what caused the Comptroller from performing the condition precedent of registration. In this regard, as previously noted, WALC primarily relies upon the Court of Appeal's ruling in *Koolerair Serv. & Installation Corp.* (28 NY2d at 101) in support of this argument. In *Koolerair*, the plaintiff and the New York City Board of Education entered into a contract whereby the plaintiff agreed to perform HVAC work at a school. The contract contained a provision that it would not be binding unless the Comptroller endorsed/registered the contract and certified that there were sufficient funds to pay the amount due. After the defendant performed work on the project, the Board of Education rescinded the contract and, at the Board's request, the Comptroller withheld registration notwithstanding the fact that there were sufficient funds to cover the contract costs. Ultimately, the defendant brought suit against the Board of Education, and after a bench trial, the trial court ruled that, under the terms of the contract, the lack of the Comptroller's endorsement required the dismissal of plaintiff's claims. Notably, the trial court never addressed the issue of whether or not the Board of Education was justified in

directing the Comptroller to withhold registration.² A divided Appellate Division subsequently upheld the trial court ruling. However, the Court of Appeals subsequently reversed this ruling and remitted the matter to the Supreme Court for a determination regarding whether or not the Board was justified in directing the Comptroller's Office to withhold registration.

Applying the facts in *Koolerair* to the instant case, one obvious difference concerns who objected to the contract. In particular, in *Koolerair*, the city agency objected to the contract and induced the Comptroller to withhold registration. In the instant matter, as evidenced by Mr. Pullo's affidavit as well as the email exchanges between the Comptroller and DHS/HRA, it was the Comptroller who raised concerns regarding the contract and induced DHS/HRA to withdraw the contract on two separate occasions based upon these concerns. Indeed, as noted above, in one email, the Comptroller advised DHS/HRA that if they did not respond to its request for additional information or withdraw the contract, the Comptroller would reject the contract. Moreover, the issue in *Koolerair* was whether or not the municipal agency was justified in inducing the Comptroller to refrain from registering the contract. In particular, inasmuch as that issue was never litigated before the trial court, the Court of Appeals remitted the case for a determination on that issue. In the instant matter, there is an issue of fact as to whether or not DHS/HRA and the Comptroller were

²In this regard, the Board's answer alleged its conduct was justified inasmuch as the plaintiff made false statements in its prequalification application. However, this issue was not litigated during the bench trial.

justified in preventing the registration of the contract. Specifically, according to Mr. Pullo's affidavits, registration was withheld over legitimate concerns regarding the poor physical condition of the buildings and plans to remediate enforcement agency violations, as well as questions regarding WALC's integrity as a vendor. In this regard, Mr. Pullo averred that the Comptroller noted conflicts of interests among individuals mentioned in the contracting documentation as well as the lack of arms' length dealing between the non-profit WALC and WAC. Contrary to WALC's claim, if credited by the trier of fact, these issues would provide a sufficient reason to believe that there is possible corruption in letting the contractor for purposes of New York City Charter § 328 (c).

Under the circumstances, WALC's motion for summary judgment against DHS under its first cross claim (breach of contract) must be denied.

Turning to DHS's cross motion to dismiss WALC's breach of contract cross claim, Mr. Pullo's own May 10, 2018 affidavit creates an issue of fact as to whether the contracts were filed with the Comptroller more than 30 days before they were withdrawn. If it is ultimately determined that this was the case, then by operation of New York City Charter § 328 (a), the contract would be fully enforceable notwithstanding the fact that it was not registered by the Comptroller. Further, although Mr. Pullo subsequently submitted (with the court's permission) supplemental affidavits in which he avers that the contracts were actually filed later than he indicated in his original affirmation, this merely creates an issue of fact regarding the actual filing dates. In this regard, Mr. Pullo had first hand knowledge

regarding the contracts and his original sworn statement regarding these dates was based on HRA documents. Thus, Mr. Pullo's original claim was clearly intentional, and not a typo or scrivener's error that can be nullified by a subsequent affidavit.

Moreover, there is also an issue of fact as to whether DHS/HRA and the Comptroller were justified in preventing the contract from being registered. In this regard, although Mr. Pullo states in his affidavit that it withdrew the contract on two occasions after it was submitted to the Comptroller based upon concerns over building violations as well as questions regarding WALC's integrity as a vendor, this claim is contradicted by other evidence before the court. In particular, WALC's Chief Executive Officer and Executive Director, Yechezkel S. Tabak submits his own affidavit in which he denies Mr. Pullo's claims regarding the condition of the buildings and WALC's integrity as a vendor. Further, Mr. Tabak's claims are supported by certain DHS documents indicating that WALC submitted a Corrective Action Plan for the violations prior to the first withdrawal of the contract which was approved by DHS. In addition, WALC submits a "Responsibility Determination" document dated January 8, 2016 in which Mr. Pullo certified that WALC "has the capacity in all respects to perform fully the contract requirements and the business integrity to justify the award of public tax dollars, and is therefore a responsible contractor." Under the circumstances, there is clearly an issue of fact as to whether DHS/HRA and the Comptroller were justified in withdrawing the contract based upon building violations and

WALC's integrity as a vendor. Accordingly, DHS's motion to dismiss WALC's breach of contract cross claim is denied.

With respect to WALC's quantum meruit and promissory estoppel cross claims, the Court of Appeals held long ago that:

“Where the Legislature provides that valid contracts may be made only by specified officers or boards and in a specified manner, no implied contract to pay for benefits furnished by a person under an agreement which is invalid because it fails to comply with statutory restrictions and inhibitions can create an obligation or liability of the city. In [a] similar case this court has given emphatic warning that equitable powers of the courts may not be invoked to sanction disregard of statutory safeguards and restrictions” (*Seif v City of Long Beach*, 286 NY 382, 387-388 [1941], *rearg denied* 287 NY 836 [1942]).

Thus, it is well-settled that defendants who perform services for the City under a contract which does not meet the requirements of the Procurement Policy Board and Chapter 13 of the New York City Charter may not seek compensation for these services under equitable theories such as quantum meruit and promissory estoppel (*Gianatasio*, 159 AD3d 659 [2018]; *Casa Wales Hous. Dev. Fund Corp. v City of New York*, 129 AD3d 451 [2015], *lv denied* 26 NY3d 917 [2016]). Accordingly, those branches of WALC's motion which seek summary judgment under their second and third cross claims are denied and that branch of DHS's cross motion which seeks summary judgment dismissing these cross claims is granted.

Turning to WALC's account stated claim,

“[a]n account stated is an agreement between [the] parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance. An agreement may be implied where a defendant retains bills without objecting to them within a reasonable period of time, or makes partial payment on the account” (*Branch Serv. Inc. v Cooper*, 102 AD3d 645, 646 [2013]).

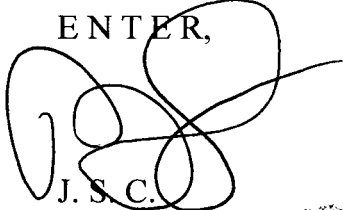
Here, WALC has failed to present any evidence that it sent bills or invoices to DHS for services rendered or that DHS retained any bills without objecting to them, or that DHS made partial payments on the account. In this regard, the documents which WALC relies upon were not bills or invoices that it sent to DHS for payment. Rather, these documents are printouts taken from DHS's own computer system which set forth the number of days shelter services were received by families on a monthly basis. Further, inasmuch as any payment was contingent upon the procurement requirements set forth under Chapter 13 of the New York City Charter, no agreement can be implied whereby DHS agreed to pay the amounts set forth in the documents. Accordingly, WALC's motion for summary judgment against DHS under its account stated cross claim is denied and DHS's cross motion to dismiss this claim is granted.

Summary

In summary, WALC's motion for summary judgment under its first, second, and third cross claims against DHS is denied. Those branches of WALC's motion which seek an order setting its damages at \$12,923.561.28 and directing a hearing on additional damages are also

denied. DHS's cross motion for summary judgment dismissing WALC's cross claims against it is denied with respect to the first (breach of contract) cross claim and granted with respect to WALC's quantum meruit, promissory estoppel, and account stated cross claims.

This constitutes the decision and order of the court.

ENTER,


J. S. C.
Hon. Peter P. Brancato, J.S.C.

Hon. Peter P. Brancato, J.S.C.

KINGS COUNTY CLERK
FILED

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