

330 Grand LLC v Modular Steel Sys., Inc.
2019 NY Slip Op 32570(U)
August 27, 2019
Supreme Court, New York County
Docket Number: 656162/2018
Judge: Gerald Lebovits
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT:	<u>HON. GERALD LEOVITS</u>	PART	IAS MOTION 7EFM
	<i>Justice</i>		
-----X		INDEX NO.	<u>656162/2018</u>
330 GRAND LLC,		MOTION DATE	<u>02/12/2019</u>
Plaintiff,		MOTION SEQ. NO.	<u>001</u>
- v -			
MODULAR STEEL SYSTEMS, INC.,			
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
 were read on this motion to/for DISMISSAL OF CAUSES OF ACTION

Meister Seelig & Fein LLP (Howard S. Koh of counsel), for plaintiff.
Joseph, Terracciano & Lynam, LLP (Janine T. Lynam of counsel), for defendant.

Gerald Lebovits, J.

This case arises out of a dispute between a land owner and a service provider regarding an alleged breach of contract for design and engineering services. Plaintiff 330 Grand LLC, a Delaware corporation, owns real property at 330 Grand Street (Block 408, Lot 24), New York, New York. Defendant Modular Steel Systems (“MSS”) is a Pennsylvania corporation and manufacturer of modular units. The parties signed a standard service agreement on March 30, 2018.

Plaintiff alleges that defendant breached the contract by not completing the design and engineering work and by not reserving a time slot in defendant’s production schedule. Alternatively, plaintiff alleges that plaintiff unjustly enriched defendant by paying for work that defendant did not perform. Plaintiff seeks the return of \$170,000, plus statutory interest and costs, and attorney fees.

In motion sequence 001, defendant moves under CPLR 3211 (a) (1) & 3211 (a) (7) to dismiss plaintiff’s causes of action.

Background

MSS manufactures and ships modular units to be assembled into buildings. 330 Grand and MSS signed a service agreement on March 30, 2018, for MSS to make floor plans for 330

Grand's project. MSS and Sheryl Hempel, principal of 330 Grand, had a prior ongoing project for building another property, 201 East Broadway.

The agreement provides that compensation shall not exceed \$100,000 for design and engineering services and \$100,000 for a production reservation fee and deposit. The production reservation fee is to be paid to MSS "upon Owner[']s acceptance of engineering and design work." (Agreement ¶ 5.) The agreement also provides that "billing will be on a monthly basis based on work completed." (*Id.*) The production reservation/deposit fee serves to reserve a "production block," or time slot in MSS's manufacture schedule. (Davidson's 1st Aff ¶ 10; Cmpl ¶ 12.) In the event that 330 Grand would make a subsequent agreement to hire MSS to manufacture the modules, the \$100,000 fee would act as a deposit to pay for the price of the modules. (Agreement at 1.)

The agreement further provides for termination by either party with 14 days written notice if either party should "fail substantially to perform hereunder through no fault of the party initiating such termination . . . [or] for convenience and without cause at any time." (Agreement ¶ 11.) 330 Grand would pay for the services rendered until the date of termination. (*Id.*)

The agreement also requires the Service Provider (MSS) to "manag[e] the design and engineering services, consult with 330 Grand LLC and JTD Builders¹, attend project meetings, and communicate with members . . . and report to 330 Grand LLC and JTD Builders." (Attachment to Agreement "Exhibit B" ¶ 1.)

On April 18, 2018, plaintiff wire-transferred \$180,000 to defendant. (Exhibit E.) Defendant send plaintiff two invoices each for \$100,000: one for the engineering services, and for the production reservation fee. (Exhibit E.) The design and engineering invoice is stamped paid in full on April 18, 2018. The production reservation fee invoice shows it is paid \$80,000 of the \$100,000; 330 Grand retained \$20,000 as a retainer. (Plaintiff's Memorandum of Law at 2-3.) The invoices are dated March 20, 2018.

On April 24, 2018, Jonathan Davidson, MSS's representative, sent an email to Hempel providing files of the 3-units-per-floor layout. (Exhibit F.) On June 19, 2018, Davidson forwarded the April 24 email to Jon Stouffer, MSS's representative. (Exhibit F.)

On June 20, 2018, Hempel sent an email to Stouffer stating that "[t]he 330 Grand redesign was submitted to and approved by the architect some time ago. It reduced the modules per floor from 7 to 3. Any further adjustments being made?" (Exhibit C.)

On July 31, 2018, an email exchange between Stouffer and Hempel shows that Stouffer requested a finished floor plan layout for MSS's engineers. (Exhibit 2.) Hempel responded that the ground floor and the stair placement within the duplex are not yet finalized. Stouffer replied to urge Hempel for the completed floor plans by the end of the week, stating, "[w]e are quickly running out of time and I'll have to drop a large project into production in front of 330 . . . if we can't get it moving this week." (Exhibit 2.)

¹ JTD Builders is a general contractor that works with 330 Grand.

On August 10, 2018, a Think! Architect and Design² representative emailed Stouffer and Davidson, “[p]er Sheryl’s request, please see attached final floor plans for 330 Grand Street . . . for your use.” (Reply Exhibit B.) Attached to the email are three floor plan images with the architect’s signature block labeled the “cellar floor plan,” “the first floor plan,” and “the typical floor.”³

In Davidson’s affidavit, he states that on August 17, 2018, Hempel was notified that “MSS has a production block for the 330 Grand project in 2018.” (Davidson’s 1st Aff ¶ 10.)

On September 18, 2018, 330 Grand terminated the agreement by letter and requested the return of \$170,000. (Cmpl ¶ 19.)

I. Defendant’s CPLR 3211 (a) (1) Motion

330 Grand pleads breach of contract. In motion #001, defendant seeks to dismiss plaintiff’s breach of contract cause of action under CPLR 3211 (a) (1). Defendant’s motion is denied.

For a court to grant a motion under CPLR 3211 (a) (1), defendant’s documentary evidence must disprove plaintiff’s allegations “conclusively establishing a defense as a matter of law.” (*Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 433 [1st Dept 2014].) The court accepts as true the plaintiff’s complaint and “any submissions in opposition to the dismissal motion” to determine if the plaintiff pleaded a sufficient cause of action. (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002].) Email correspondence can constitute documentary evidence but affidavits cannot. (*Art & Fashion Grp. Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014].)

Breach of Contract

Plaintiff asserted four arguments for breach of contract.

330 Grand alleges breach of contract for MSS’s failure to provide the contracted-for design and engineering services for the 330 Grand project. MSS asserts the June 20, 2018, email is evidence that the contract was fulfilled. In the email, Hempel wrote that the architect approved the redesign. But the service agreement provides for payment upon the owner’s (330 Grand) satisfaction with the design and engineering work, not the architect. Hempel alleges that the June 20 email states merely that the architect approved reducing the number of modules per floor. (Hempel’s Aff ¶ 7.)

Additionally, the July 31 email chain between Stouffer and Hempel implies that as of July 31, the design and engineering plans were still incomplete. Further, Davidson asserts that the July 31 email shows the design and engineering plans could not be completed because 330 Grand had not provided the necessary “survey, foundation design and stair location” information.

² The architect provides services for 330 Grand.

³ MSS provided this email to the court to refute allegations by 330 Grand and the architect that MSS had forged the architect’s signature block onto floor plan files. (Davidson’s 2nd Aff ¶ 13.)

(Davidson's 2nd Aff ¶ 4.) Therefore, the court is unpersuaded that the June 20 email conclusively refutes 330 Grand's allegation that MSS failed to provide the contracted-for design and engineering services.

Moreover, MSS asserts that the paid invoices constitute documentary evidence of MSS's fulfillment of the contractual obligations. 330 Grand paid \$180,000 on April 18, 2018, yet the July 31 emails reveal that the project was still incomplete. Further, Hempel alleges 330 Grand prepaid in response to MSS's claim that it needed substantial payment to allocate resources and to reserve a time slot in MSS's schedule for the 330 Grand project. (Hempel's Aff ¶ 5.) MSS does not provide documentary evidence that conclusively refutes 330 Grand's allegations that MSS failed to provide the design and engineering services.

330 Grand alleges breach of contract for MSS's failure to provide design and engineering services for the roof or the building's foundation. MSS asserts that the July 31 email exchange reveals that Hempel had not yet provided the information to be able to accomplish these services. (Davidson's 2nd Aff ¶ 4.) However, the email does not mention the roof or the foundation. Further, MSS's assertions about the July 31 email concedes that the roof and building's foundation were incomplete as of July 31. Therefore, MSS has not established a defense as a matter of law to 330 Grand's allegations.

330 Grand alleges breach of contract on the basis that MSS did not reserve the contracted-for time slot in MSS's production schedule from the phrase "I'll have to drop a large project into the production in front of 330" in the July 31 email exchange. Davidson's alleges that Hempel was informed on August 17, 2018, that MSS had a production block reserved for 330 Grand. (Davidson's Aff ¶ 10.) But an affidavit does not constitute documentary evidence, and MSS does not offer any documentary evidence that MSS reserved a production block for 330 Grand's project. Therefore, MSS has not established a defense as a matter of law to the allegation that MSS did not reserve the contracted-for time slot in MSS's production schedule.

330 Grand alleges breach of contract for MSS's failure to perform contracted-for tasks such as "manag[ing] the design and engineering services, consult[ing] with JTD Builders, attend[ing] project meetings, communicat[ing] with . . . and report[ing] progress to 330 Grand." (Plaintiff's Memorandum of Law at 2.) Davidson alleges that Hempel visited MSS on four or five occasions and that he went to the architect's offices and visited Hempel twice. (Davidson's 2nd Aff ¶ 8.) Once again, an affidavit does not constitute documentary evidence, and MSS did not provide any other evidence documenting these meetings. Therefore, MSS has not established a defense as a matter of law to the allegation that MSS did not perform the contracted-for tasks.

II. Defendant's CPLR 3211 (a) (7) Motion

330 Grand pleads unjust enrichment/quantum meruit. Defendant seeks to dismiss plaintiff's unjust-enrichment cause of action under CPLR 3211 (a) (7). Defendant's motion is granted.

For a court to grant a motion under CPLR 3211 (a) (7) the complaint must not have "any cause of action cognizable at law." (*Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1977].)

Against a motion for dismissal, plaintiff is "accord[ed] . . . the benefit of every possible favorable inference." (511 W. 232nd Owners Corp., 98 NY2d at 152.) In determining whether a cause of action exists, the facts alleged in the complaint should be accepted as true as well as any information submitted to oppose the motion. (Id.)

Unjust Enrichment/Quantum Meruit


Breach of contract and unjust enrichment may be pleaded in the alternative. (CPLR 3014; *Auguston v Spry*, 282 AD2d 489, 491 [2nd Dept 2001].) But when parties are in privity of a valid contract on the same subject matter of the unjust-enrichment/quantum-meruit claim, a simultaneous unjust-enrichment/quantum-meruit claim may not be pleaded. (*Cox v NAP Constr. Co., Inc.*, 10 NY3d 592, 607-608 [2008].)

330 Grand pleads unjust enrichment as an alternative pleading. (CPLR 3014.) MSS argues that 330 Grand's unjust-enrichment claim is duplicative of the breach-of-contract claim. MSS asserts that a valid contract covered the scope of the dispute and therefore, that the unjust-enrichment claim is required to be dismissed. (Defendant's Reply Memorandum of Law at 4.) 330 Grand concedes that there is a valid existing contract; they pleaded breach of contract in the alternative in case the contract is deemed invalid. (Cmpl ¶ 25; Plaintiff's Memorandum of Law at 9.) Because there is no dispute about the existence of a valid contract on the subject matter of the quantum-meruit claim, the defendant's CPLR 3211 (a) (7) motion is granted.

Accordingly, it is

ORDERED that defendant's motion to dismiss plaintiff's breach-of-contract claim under CPLR 3211 (a) (1) is dismissed and that defendant's motion to dismiss plaintiff's unjust-enrichment claim under CPLR 3122 (a) (7) is granted.

8/27/2019
DATE


GERALD LEBOVITS, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE