SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 15

ENTECH ENGINEERING, P.C.,

Plaintiff,

- against -

DEWBERRY ENGINEERS INC. and HARTFORD FIRE INSURANCE COMPANY,

Defendants.

DECISION AND ORDER

Index No. 653172/2015

MELISSA A. CRANE, J.:

This Court consolidates Motion sequence nos. 001, 003 and 004 for disposition.

In motion sequence no. 001, plaintiff EnTech Engineering, P.C. moves, pursuant to CPLR 3212, for summary judgment against defendants Dewberry Engineers, Inc. (Dewberry) and Hartford Fire Insurance Company (Hartford) (together, defendants). In motion sequence no. 003, defendants move, pursuant to CPLR 3212, for partial summary judgment dismissing so much of plaintiff's claims based upon increased unit rate prices. In motion sequence no. 004, defendants move, pursuant to CPLR 3212, for summary judgment dismissing the complaint in its entirety.

BACKGROUND

In 2013, the United States Department of Housing and Urban Development (HUD), through the Community Development Block Grant Disaster Recovery (CDBG-DR) Program under the Disaster Relief Appropriations Act of 2013 (Pub L 113-2, 127 US Stat 4 [113th Cong, 1st Sess, Jan. 29, 2013]), allocated $1,772,820,000 to nonparty City of New York (the City) for its recovery efforts following Hurricane Sandy and other major disasters (NY St Courts Elec Filing [NYSCEF] Doc No. 43, affirmation of plaintiff's counsel, exhibit 10, part 2 at 3). The

City's housing recovery initiative, called the "Build It Back" Program (the BIB Program) and administered through the Mayor's Office of Housing Recovery (HRO), encompassed two separate grant-based programs to benefit homeowners who had applied for assistance. The first, "NYC Houses," awarded grants to owners of single-family homes to reconstruct or rehabilitate their properties (*id.* at 35; NYSCEF Doc No. 107, Charles Aly [Aly] aff, ¶ 3). The second, "Multi-Family Building Rehabilitation," awarded grants, low-interest loans or offered credit to rebuild or rehabilitate multi-family rental homes (NYSCEF Doc No. 43 at 35). The federal funds disbursed to the City for the BIB Program subsequently rose to approximately $2.6 billion (NYSCEF Doc No. 148, Randy Persaud [Persaud] aff, ¶ 5).

On July 16, 2013, HRO, acting for the City, entered into a subrecipient agreement with nonparty New York City Economic Development Corporation (EDC), as "Subrecipient," in which EDC agreed to retain consultants to provide pre-construction, architectural and construction inspection services for the BIB Program (the EDC Contract) (NYSCEF Doc No. 43 at 32). The pre-construction services involved performing on-site assessments of the types of properties described above for storm-related damage, such as structural, electrical, plumbing and mold; confirming the presence of asbestos and lead paint; determining the scope and quality of any repairs already completed by a homeowner and assessing the remaining work needed to rehabilitate the property; performing environmental reviews and developing site-specific mitigation plans; developing cost estimates; completing feasibility reports to determine housing recovery activity; and completing appraisals to determine the pre-storm fair market value of each property (*id.* at 36-42). Under section 6.3 of the EDC Contract, HRO assumed oversight of programming, reporting, monitoring and compliance aspects of all contract services, and EDC retained responsibility for executing contracts and making payments (*id.* at 13).

Relevant to this action is section 11.4. This section states, in part, that "[t]he Subrecipient agrees that any construction or rehabilitation of structures containing residential units with assistance provided under this Agreement shall be subject to HUD Lead-Based Paint Regulations at 24 CFR 570.608, and 24 CFR Part 35, Subpart B" (*id.* at 22). The regulations, specific to CDBG-DR-assisted housing, require notification to owners of homes constructed before 1978 that their properties may contain lead paint (*id.*). The EDC Contract provides for audits and inspections. It states that the failure to comply with the audit requirements "shall constitute a violation of this Agreement and may result in the withholding of future Disbursements hereunder" (*id.* at 16). Additionally, section 5.2 (b) reads:

> "No Disbursement by the City of an improper or unauthorized request for Program Funds shall constitute a waiver of the City's right to: (i) challenge the validity of such payment; (ii) enforce all rights and remedies set forth in this Agreement; or (iii) take corrective or remedial administrative action including suspension or termination of the Subrecipient's funding under this Agreement"

(*id.* at 11). The no-waiver provision, set forth in section 13.6, reads:

> "Waiver. No Failure on the part of the City to exercise, and no delay in exercising, any right hereunder shall operate as a wavier [sic] thereof; nor shall any single or partial exercise by the City of any right hereunder preclude any other or further exercise thereof or the exercise of any other right. The remedies herein provided are cumulative and not exclusive of any remedy available to the City at law or in equity"

(*id.* at 26). Section 12.01 in Appendix C sets forth a choice-of-law provision and states that "[t]his Agreement … shall be governed by and construed in accordance with the Laws of the State of New York (notwithstanding New York choice of law or conflict of law principles) …" (*id.* at 118).

On July 17, 2013, EDC and Dewberry executed consultant contract no. 55660001 whereby Dewberry consented to perform the pre-construction services described in the EDC

Contract (the Dewberry Contract) (NYSCEF Doc No. 42, affirmation of plaintiff's counsel, exhibit 10, part 1 at 3, 48 and 51-52). Under section 1.7 of the contract's General Terms and Conditions, Dewberry "acknowledges that it has reviewed the City Contract and agrees to comply with the City Contract with respect to the Services" (*id.* at 11). Section 8.1 also states, in part, that the agreement shall be governed by and construed under New York law (*id.* at 26).

Article 4 discusses the retention and payment of subcontractors. In the event Dewberry subcontracted a portion of its work, then, under section 4.2.2, it was Dewberry's obligation to pay the subcontractor "for work that has been satisfactorily performed no later than thirty (30) days from the date of Consultant's receipt of payments from [EDC]" (*id.* at 17). Section 4.2.4 reads, in part, that "(i) there is no privity of contract between the Subcontractor and [EDC] … or the City" and that "(vii) all work and services performed under the subcontract shall strictly comply with the requirements of this Contract" (*id.* at 17-18).

On July 31, 2013, Dewberry and plaintiff executed a standard subconsultant agreement for plaintiff to perform lead risk assessments in one- to four-unit homes built prior to 1978 in the BIB Program (the EnTech Subcontract) (NYSCEF Doc No. 45, affirmation of plaintiff's counsel, exhibit 12 at 1 and 5). EnTech's work included performing on-site inspections using an "XRF" device, taking dust wipes, oil or paint chip samples, and drafting reports, as explained in exhibit B of the Entech Subcontract (*id.* at 5 and 7). With regards to contract performance, section 1.7 states:

> "The standard of care for Subconsultant's performance of the Services is the skill and diligence ordinarily exercised by professionals performing similar services. The Subconsultant has a duty to correct deficiencies in the Services without additional compensation. If Subconsultant does not correct the deficiencies in a prompt and timely manner, Consultant may correct, or have others correct, the deficiencies in Subconsultant's Services and Subconsultant is liable for costs. Consultant may deduct the costs form Subconsultant's compensation or invoice Subconsultant for

> the costs, or both. If Consultant invoices Subconsultant for the costs to correct a deficiency, Subconsultant must pay Consultant the full amount no more than 30 days after the invoice date"

(*id.* at 1). Importantly, under section 1.9, plaintiff agreed to perform its services in compliance with "federal, state, and local laws, statutes, codes, rules, regulations and the requirements of the authorities and agencies having jurisdiction over the Services or the Subconsultant" (*id.* at 2). The subcontract further states that lead risk assessments "will be conducted … in accordance with the requirements of 40 CFR 745.227 and HUD Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing; Chapter 5: Risk Assessments, 2012" (*id.* at 5). HRO would furnish a standardized risk assessment report template for all contractors to use but until such time, each subcontractor was to use their own template (*id.*).

A subcontract price of $708,440 was calculated on the estimated number of tasks for plaintiff to complete (*id.*). The contract set the unit price for each task as follows:

Line Item	**Unit Price**	**Est. Quantity**
Lead risk assessment and report	$550 per property	1200
Dust wipe sample	$10 per sample	1560
Soil sample	$12 per sample	750
Paint chip sample	$12 per sample	1320
XRF Device	$200 per unit per day	40

(*id.* at 7). Significantly, Exhibit C contains the following statement:

> "All costs associated with performing the subject services are included in the above unit prices. The subconsultant shall only invoice Dewberry for units in which the completed report has been transmitted to Dewberry. The above quantities are estimated and are not a guarantee. The subconsultant shall not invoice Dewberry in excess of $708,440 without prior authorization"

(*id.*). Section 1.5 also states that plaintiff "is required to obtain prior written approval from the Consultant of any increase in compensation … otherwise, Consultant is not required to increase Subconsultant's compensation … for additional services" (*id.* at 1).

The terms governing payment are found in Article 3, and provide in pertinent part:

> "3.3 Subconsultant agrees that:
> A. *Owner's payment to Consultant for Subconsultant's Services and expenses is a condition precedent to Consultant's duty to pay Subconsultant for Subconsultant's Services and expenses*;
> B. Consultant is obligated to pay Subconsultant only the amount the Owner pays Consultant for Subconsultant's Services and expenses;
>
> ...
>
> 3.4 In addition to the requirements of Section 3.3 of this Agreement, Subconsultant's completion of the Services in strict accordance with this Agreement and the Prime Agreement is a condition precedent to Consultant's duty to make final payment to Subconsultant for Subconsultant's Services and Expenses"

(*id.* at 2) (emphasis added).

The subcontract defines the term "Prime Agreement" as "[t]he agreement between Consultant and Owner, including attachments and amendments" (*id.* at 1). Importantly, Article 2 reads in part:

> "2.1 Subconsultant agrees to be bound to Consultant as Consultant is bound to Owner under the Prime Agreement for the performance of the Services ...
>
> 2.2 Subconsultant agrees that the Consultant's rights and remedies are cumulative under this Agreement and include, without limitation, all the rights and remedies of the Owner under the Prime Agreement.
>
> ...
>
> 2.4 Subconsultant agrees that if a term or condition of the Prime Agreement and this Agreement conflict, then the term or condition of the Prime Agreement applies to Subconsultant unless this Agreement imposes a greater requirement or burden on Subconsultant.
>
> 2.5 Subconsultant agrees that if the Prime Agreement requires Consultant to include a term or condition of the Prime Agreement textually in this Agreement, then those required terms and conditions are considered incorporated and textually included"

(*id.* at 2).

Regarding termination, section 6.3 (a) allows Dewberry to terminate the subcontract for cause if plaintiff "fails to perform its obligations under this Agreement, and does not effect a prompt and timely cure" (*id.* at 3). In the event Dewberry terminates the agreement for cause, then under section 6.4, Dewberry may perform those services and deduct its costs from any sum due to plaintiff (*id.*). Lastly, section 12.6 states that "Virginia law governs this Agreement, regardless of Virginia's choice of law rules" (*id.* at 4). The EnTech Subcontract was to take effect December 18, 2013 (*id.* at 5).

The parties do not dispute that plaintiff performed lead risk assessment services from December 2013 through April 2014, that it sought unit price increases above the contracted-for rates, or that Dewberry terminated plaintiff's services, purportedly for cause, by letter dated February 23, 2015. The parties, however, disagree on the events leading up to the termination.

Plaintiff's president, Susan Bayat (Bayat), avers that plaintiff initially deployed four certified lead paint risk assessors before increasing that number to 35, because Dewberry needed to complete more daily inspections. Plaintiff reasons this increase in assessors and work would not have occurred had Dewberry found problems with plaintiff's work (NYSCEF Doc No. 31, Bayat 9/9/18 aff, ¶¶ 25-26]). Dewberry personnel were also present at each site inspection (*id.*, ¶ 24). Bayat claims plaintiff prepared a sample report using a form Dewberry provided as a guide. Plaintiff then asked Dewberry to review its sample report, and that plaintiff relied on a "marked up" copy of this report as a template for both form and content on all future reports (*id.*, ¶¶ 27 and 30). When Dewberry later demanded changes to the reports, such as the inclusion of photographs and floor plans as reference points to show where lead paint was, plaintiff did not charge for this additional work (*id.*, ¶ 28). Bayat adds that Dewberry accepted each report without objection and never requested that plaintiff cease working (*id.*, ¶ 40).

By letter dated January 30, 2014, plaintiff proposed rate increases from $550 to $670 for each inspection and from $200 to $270 for the XRF devices per day rates to "support the need for increasing the number of assessors" (NYSCEF Doc No. 46, affirmation of plaintiff's counsel, exhibit 13 at 1). Dewberry's senior vice present, Douglas Frost (Frost) responded on February 14, 2014, writing, "[t]he city [sic] is willing to negotiate as long as you can demonstrate a reasonable approach and document how you end up at the unit rates you are requesting" (NYSCEF Doc No. 47, affirmation of plaintiff's counsel, exhibit 14 at 2). Meanwhile, plaintiff issued invoice no. 13121-01 dated February 11, 2014 to Dewberry for $115,186 based on the original subcontract prices (NYSCEF Doc. No. 54, affirmation of plaintiff's counsel, exhibit 21 at 1). The next three invoices – no. 13121-02 for $803,747, no. 13121-03 for $761,041, and no. 13121-04 for $130,450 – show that plaintiff billed Dewberry at $645 for each inspection and $230 per day for each XRF device (NYSCEF Doc No. 55, affirmation of plaintiff's counsel, exhibit 22 at 1; NYSCEF Doc No. 56, affirmation of plaintiff's counsel, exhibit 23 at 1; NYSCEF Doc No. 57, affirmation of plaintiff's counsel, exhibit 24 at 1). Dewberry has paid plaintiff $115,186 (NYSCEF Doc No. 31, ¶ 39), and $230,255.55 to nonparty Pine Environmental Services, LLC (Pine), the company that had supplied plaintiff with the XRF devices (*id.*, ¶ 4). Bayat maintains plaintiff has performed 1,899 inspections (*id.*, ¶ 31). Bayat avers that plaintiff and Dewberry discussed a methodology to address outstanding issues with plaintiff's work, but Dewberry terminated the subcontract without providing a written notice to cure (*id.*, ¶¶ 43-46). She claims plaintiff is entitled to $1,464,983 in damages (*id.*, ¶ 39).

Aly, a disaster project manager at Dewberry, observes that plaintiff's field work was deficient in several respects. He avers that plaintiff was unable to provide the 20 lead inspectors it had initially promised because it had misrepresented the number of certified lead inspectors in its employ, thereby causing HRO and Dewberry to organize a lead certification class (NYSCEF

Doc No. 107, ¶ 17). Plaintiff often submitted late reports or missed filing them (*id.*, ¶ 21). These issues arose within two months after plaintiff began its work (*id.*). Dewberry and HRO also shared concerns about the quality of plaintiff's work and the qualifications of its inspectors. For instance, in an email dated April 21, 2014, John F. Cope (Cope), Dewberry's lead and asbestos team leader, wrote that a report for "APP-005255" indicated a positive result for a dust wipe sample, but the report did not designate the location within the property from where the sample originated (NYSCEF Doc No. 114, Aly aff, exhibit G at 1). On another occasion, an EnTech inspector confirmed that a dust wipe sample was from a child-occupied residence, then later amended the statement to indicate that a sample had not been taken in the first instance (NYSCEF Doc No. 115, Aly aff, exhibit H at 1-2). Another inspector elected to take only dust wipe samples, but no readings with the XRF device (NYSCEF Doc No. 116, Aly aff, exhibit I at 1).

Aly further states that plaintiff had classified XRF readings from 0.6 to 0.99 as "negative" when the Performance Characterization Sheet for the XRF device indicated that readings within that range were "inconclusive" (NYSCEF Doc No. 107, ¶ 25). Dewberry raised this critical issue concerning the XRF readings to plaintiff on March 24, 2014, and subsequently directed plaintiff to revise those reports showing inconclusive results at its own cost so that the reports conformed to HUD regulations (NYSCEF Doc No. 120, Aly aff, exhibit M at 3). Aly explains that plaintiff was given several months to correct its reports by submitting floor plans depicting where within a property a positive reading for lead paint was (NYSCEF Doc No. 107, ¶ 35). Dewberry also agreed to accept XRF readings of 1.0 or more as "positive" for lead paint (*id.*). Although HRO ultimately accepted a number of the corrected reports, plaintiff failed to fix the balance of those that HUD rejected (*id.*). Dewberry directed another subconsultant to re-inspect those homes for which plaintiff did not fix the reports (*id.*).

Frost avers that it was apparent plaintiff was unable to deliver the number of assessors it had initially promised, that its assessors were not qualified and lacked training certificates or a New York State radiological license, and that plaintiff lacked a sufficient number of the XRF devices to perform (NYSCEF Doc No. 79, Frost 8/17/18 aff, ¶¶ 14-16). Dewberry ultimately paid for 28 of plaintiff's lead inspectors to attend an XRF certification class, but only 19 inspectors completed the class (*id.*, ¶ 15). Frost admits that after Dewberry paid the first invoice, HRO advised that it was rejecting a portion of plaintiff's work because of the deficiencies (*id.*, ¶ 19). He submits that "[a]fter months of efforts to remediate the extensive deficiencies, HRO directed Dewberry to have the defective [r]eports redone with another company" (*id.*, ¶ 21). Frost also maintains that neither HRO nor Dewberry ever approved plaintiff's request to increase the unit prices (NYSCEF Doc No. 177, Frost 10/11/18 aff, ¶ 14).

Christopher Golden (Golden) avers that he served as the program manager responsible for environmental, health and safety performance at HRO from September 2013 through April 2015 (NYSCEF Doc No. 132, Golden aff, ¶ 1). As such, he is intimately familiar with plaintiff's work on the BIB Program (*id.*, ¶ 2). Golden avers that federal regulations require identification of the location of a positive lead reading. Under HUD lead paint guidelines, the use of a floorplan to mark the location of the positive reading was permissible (*id.*, ¶ 13). He states that "HRO could neither accept deficient reports nor submit them to HUD" because the failure to properly identify a health hazard would subject the City to liability (*id.*, ¶ 5). To that end, at issue were the inconclusive XRF readings, insufficient test time readings, inadequate location identifiers for positive lead readings, and questionable certifications for plaintiff's lead inspectors (*id.*, ¶¶ 4 and 13; NYSCEF Doc No. 135, Golden aff, exhibit C at 7). Golden requested that plaintiff perform a quality control review of its own reports (*id.*, ¶ 6), the results of which showed that only 364 of 1,896 applications required further action (*id.*, ¶ 7). Plaintiff's in-depth

review of 50 of those reports showed that all 50 complied with federal regulation (*id.*). Dewberry's review of those same 50 reports, though, revealed that 21% required further action (*id.*). Dewberry then conducted a detailed, two-stage review of all of plaintiff's risk assessment reports to identify the deficiencies (*id.*, ¶ 9), the results of which Dewberry summarized in spreadsheets appended to Golden's affidavit. Golden avers that HRO and Dewberry allowed plaintiff significant time to cure the deficiencies with their reports, but ultimately, plaintiff's proposed methodology did not comply with federal protocols (*id.*, ¶ 17).

Persaud, an analyst at HRO, avers that to receive federal funds under the CDBG-DR Program, there must be compliance with federal guidelines (NYSCEF Doc No. 148, ¶¶ 5-6). Payment is also subject to HUD audit and review (*id.*). Persaud confirms that HUD's discovery of inaccurate information would result in a "clawback" of funds allocated to the City and its consultants, as is permissible under 24 CFR 200.410 (Collection of unallowable costs) and 24 CFR 200.344 (Post-closeout adjustments and continuing responsibilities) (*id.*, ¶¶ 8-9 and 14-15). Persaud further avers that "[n]either HUD nor HRO will provide funding for reports that do not comply with federal guidelines and regulations or pay for overstated invoices (*id.*, ¶ 25).

On March 6, 2017, plaintiff filed a supplemental summons and amended complaint together with a notice of pendency for a Notice of Mechanic's Lien for Public Improvement for $1,225,574.45 (NYSCEF Doc No. 33, affirmation of plaintiff's counsel, exhibit 1 [amended complaint]; NYSCEF Doc No. 34, affirmation of plaintiff's counsel, exhibit 2 [notice of pendency] at 1). The amended complaint pleads causes of action for (1) breach of contract; (2) account stated; (3) quantum meruit; (4) unjust enrichment; and (5) lien foreclosure under the Lien Law. Defendants assert 32 affirmative defenses, including the sixteenth defense for a set off, the twenty-sixth defense alleging plaintiff's own breach of contract and failure to complete

the work, and the thirty-first defense alleging that plaintiff failed to bill at the approved contract rates.

On March 28, 2019, this court heard oral argument on motion sequence nos. 001 through 004 and granted defendants' motion for summary judgment dismissing the fifth cause of action seeking to foreclose on the public improvement lien (NYSCEF Doc No. 194, oral argument tr at 65-67, citing *Matter of T.F. Demilo Corp. (Black Iron-Rebar & Lathing)*, 187 AD2d 404, 405 [1st Dept 1992]). A decision and order granting that application (motion sequence no. 002) was entered shortly thereafter (NYSCEF Doc No. 192 at 1).

THE PARTIES' CONTENTIONS

In moving for summary judgment, plaintiff argues that Dewberry breached the EnTech Subcontract when it terminated plaintiff's services without first furnishing a written notice to cure, as section 6.3 (a) of their agreement required. Additionally, plaintiff submits that, because it was constructively evicted from the work site, Dewberry cannot recover any costs it may have incurred for correcting plaintiff's allegedly defective work, and that Dewberry has either waived or is estopped from raising the allegedly defective work as a defense. Plaintiff claims it is also entitled to recover damages at the higher rates. Plaintiff further contends that, irrespective of the Virginia choice-of-law clause, New York law controls because the subject matter of the parties' agreement and the work performed thereunder, plaintiff's status as a New York entity, and the location of Dewberry's New York office dictates the application of New York law.

Defendants advance several arguments in opposition and in support of dismissal of the complaint. First, the EnTech Subcontract did not require the issuance of a formal notice to cure. Plaintiff was apprised of the defects with its work product nearly one year before the termination, yet plaintiff failed to implement a timely cure. Second, plaintiff admits that it performed 1,899 inspections, but it has billed for 2,143 inspections. According to the EDC Contract, HUD may

clawback any federal funds disbursed to the City if there was a failure to follow federal regulations. Plaintiff's work in this regard was deficient. Third, plaintiff failed to secure prior written approval for a unit rate increase. In addition, the EnTech Subcontract's "pay-when-paid" provision" bars plaintiff's claims because "Dewberry was not paid for EnTech's second, third and fourth [i]nvoices" (NYSCEF Doc No. 79, ¶ 22). Lastly, defendants contend that Virginia law governs this dispute based on the choice-of-law provision in section 12.6 of their agreement.

DISCUSSION

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]). Evidence in admissible form can support the motion (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), as well as 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 the 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 entitlement to summary judgment] requires a denial of the motion, *regardless of the sufficiency of the opposing papers*" (*Vega*, 18 NY3d at 503 [internal quotation marks and citation omitted, emphasis in original]).

At the outset, the mechanic's lien bond Hartford issued ensured payment of the now-dismissed public improvement lien (NYSCEF Doc No. 33, ¶ 35), not Dewberry's performance or payment obligations under the EnTech Subcontract. Because the court already dismissed the

fifth cause of action on the public improvement lien, the complaint against Hartford must be dismissed as well.

Next, the court rejects plaintiff's contention that the court should deny defendants' motions because they failed to submit the pleadings as CPLR 3212(b) requires. The court may overlook the error if the record, particularly in an e-filed case is sufficiently complete, as is the case here (*see Jones, LLP v Sitomer*, 139 AD3d 805, 806-807 [2d Dept 2016]; *Studio A Showroom, LLC v Yoon*, 99 AD3d 632, 632 [1st Dept 2011]).

The parties also disagree over which state's laws apply. Preliminarily, plaintiff's contention that the EnTech Subcontract incorporated the choice-of-law provisions from the EDC Contract and Dewberry Contract lacks merit. "[I]ncorporation clauses in a construction subcontract, incorporating prime contract clauses by reference into a subcontract, bind a subcontractor only as to prime contract provisions relating to the scope, quality, character and manner of the work to be performed by the subcontractor" (*Bussanich v 310 E. 55th St. Tenants*, 282 AD2d 243, 244 [1st Dept 2001]). The subcontract must contain clear language expressly incorporating provisions other than those governing the scope of a subcontractor's performance (*see Matter of Wonder Works Constr. Corp. v R.C. Dolner, Inc.*, 73 AD3d 511, 513-514 [1st Dept 2010] [staying arbitration where the subcontract did not expressly incorporate the arbitration provision]; *United States Steel Corp. v Turner Constr. Co.*, 560 F Supp 871, 873-874 [SD NY, 1983] [declining to enforce a forum selection clause where the subcontract did not contain an express reference to that clause in the prime contract]). Although section 2.4 of the Entech Subcontract states that the Dewberry Contract controls if the documents' terms conflict (NYSCEF Doc No. 45 at 2), that section applies only to inconsistent terms related to plaintiff's performance, as evidenced in the sections directly preceding section 2.4 in the subcontract.

Plaintiff's recitation to General Business Law § 757, raised for the first time at oral argument (NYSCEF Doc No. 94 at 68 and 70), is also unavailing. General Business Law § 757 of the Prompt Payment Act (General Business Law § 756 *et seq.*) reads in pertinent part as follows:

> "The following provisions of construction contracts shall be void and unenforceable:
> 1. A provision, covenant, clause or understanding in, collateral to or affecting a construction contract, with the exception of a contract with a material supplier, that makes the contract subject to the laws of another state or that requires any litigation, arbitration or other dispute resolution proceeding arising from the contract to be conducted in another state."

For the statute to apply, the contract at issue must qualify as a "construction contract," a term defined in General Business Law § 756 (1) as:

> "[A] written or oral agreement for the construction, reconstruction, alteration, maintenance, moving or demolition of any building, structure or improvement, or relating to the excavation of or other development or improvement to land, and where the aggregate cost of the construction project … equals or exceeds one hundred fifty thousand dollars. For the purposes of this article a construction contract shall not include … any such contract the purpose of which is the construction, reconstruction, alteration, repair, maintenance, moving or demolition of an individual one, two or three family residential dwelling …."

The definition of a construction contract is specific to the Prompt Payment Act (*see Science Applications Intl. Corp. v Environmental Risk Solutions, LLC*, 132 AD3d 1161, 1169 [3d Dept 2015] [concluding that the definitions for "construction contract," "contractor" and "subcontractor" in the Prompt Payment Act differed from the "separate definitions of the same terms in the Lien Law"]). Here, the stated purpose of the Dewberry Contract was to "accurately assess[ ] the level of damage incurred at a building and prepare estimates of the cost to complete rehabilitation or repair of the building" as part of the BIB Program (NYSCEF Doc No. 42 at 48). Because the Dewberry Contract does not contemplate "construction, reconstruction, alteration,

maintenance, moving or demolition," or the performance of that type of work, it does not constitute a construction contract under General Business Law § 756. Therefore, plaintiff has not shown that the EnTech Subcontract's choice-of-law provision is void and unenforceable under General Business Law § 757.

Ordinarily, a choice-of-law provision in a contract obviates the need to engage in a common-law conflict-of-laws analysis (*Ministers & Missionaries Benefit Bd. v Snow*, 26 NY3d 466, 476 [2015], *rearg denied* 26 NY3d 1136 [2016]). "[W]hen parties include a choice-of-law provision in a contract, they intend that the law of the chosen state – and no other state – will be applied" (*id.* at 476). Thus, "[i]t is the policy of the courts of New York to enforce choice-of-law clauses, provided that the law chosen has a reasonable relationship to the agreement and does not violate a fundamental public policy of New York" (*Hugh O'Kane Elec. Co., LLC v MasTec N. Am., Inc.*, 19 AD3d 126, 127 [1st Dept 2005]).

The location of a party's principal place of business in the foreign state ordinarily satisfies the reasonable relationship element (*see Hageman v Home Depot U.S.A., Inc.*, 45 AD3d 732, 734 [2d Dept 2007] [finding that Georgia had a reasonable relationship to the parties' agreement because the defendant maintained its principal place of business there]; *Finucane v Interior Constr. Corp.*, 264 AD2d 618, 620 [1st Dept 1999] [concluding that Oklahoma where the third-party defendant maintained its principal place of business had a reasonable relationship to the parties' contract]). While plaintiff has not challenged whether Dewberry is a Virginia corporation, defendants have not offered specific, admissible evidence to support this contention. Additionally, the court observes that defendants admitted Dewberry was formed in New York (NYSCEF Doc No. 35, ¶ 2). Thus, defendants have not established a reasonable relationship to Virginia.

Nevertheless, there is no need to engage in a conflict of laws analysis unless there is an actual conflict between the laws of New York and Virginia (*see TBA Global, LLC v Proscenium Events, LLC*, 114 AD3d 571, 571 [1st Dept 2014] [discussing whether there was an actual conflict between New York and Delaware law even though the agreements at issue contained Delaware choice-of-law clauses]). "The first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved" (*Matter of Allstate Ins. Co. [Stolarz-New Jersey Mfrs. Ins. Co.]*, 81 NY2d 219, 223 [1993]). For an actual conflict to exist, "the laws in question must provide different substantive rules in each jurisdiction that are 'relevant' to the issue at hand and have a 'significant *possible* effect on the outcome of the trial'" (*Elmaliach v Bank of China Ltd.*, 110 AD3d 192, 200 [1st Dept 2013], quoting *Finance One Pub. Co. Ltd. v Lehman Bros. Special Fin., Inc.*, 414 F3d 325, 331 [2d Cir 2005], *cert denied* 548 US 904 [2006]). Because the court can perceive no actual conflict, as discussed *infra*, a choice-of-law analysis is not required (*see J. Aron & Co. v Chown*, 231 AD2d 426, 427 [1st Dept 1996]). A party seeking to invalidate a choice-of-law clause must show that "its enforcement 'would be unreasonable, unjust or would contravene public policy, or that the clause is invalid because of fraud or overreaching'" (*Boss v Am. Express Fin. Advisors, Inc.*, 15 AD3d 306, 307-308 [1st Dept 2005], *affd* 6 NY3d 342 [2006] [internal citation omitted]). Plaintiff has not established that enforcement of the provision contravenes public policy, nor has it advanced any other ground to invalidate its enforcement.

A. First Cause of Action for Breach of Contract

The elements of a breach of contract cause of action in New York and Virginia are similar. To sustain a cause of action for breach of contract in Virginia, a plaintiff must prove "(1) a legally enforceable obligation of a defendant to a plaintiff; (2) the defendant's violation or breach of that obligation; and (3) injury or damage to the plaintiff caused by the breach of

obligation" (*MCR Fed., LLC v JB&A, Inc.*, 294 Va 446, 461, 808 SE2d 186, 195 [2017] [internal quotation marks and citation omitted]). To sustain a cause of action for breach of contract in New York, a 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]).

Both states employ similar approaches to interpret contract terms. Virginia courts "construe the contract as a whole" and give the words used their "usual, ordinary and popular meaning" (*Babcock & Wilcox Co. v Areva NP, Inc.*, 292 Va 165, 179, 788 SE2d 237, 244 [2016] [internal quotation marks and citations omitted]). A contract provision should not be interpreted so as to render another provision meaningless (292 Va at 198, 788 SE2d at 254 nn 32]). Where "the terms in a contract are clear and unambiguous, the contract is construed according to its plain meaning" (*Barber v VistaRMS, Inc.*, 272 Va 319, 329, 634 SE2d 706, 712 [2006]; *accord D.C. McClain, Inc. v Arlington County*, 249 Va 131, 135, 452 SE2d 659, 662 [1995]). In New York, a written agreement must be construed according to the parties' intent (*see Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). The document must be read as a whole to "to determine its purpose and intent" (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]), and the "particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties manifested thereby" (*Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 39 [2018], quoting *Kolbe v Tibbetts*, 22 NY3d 344, 353 [2013]). The words must also be given their plain meaning (*see Ellington v EMI Music, Inc.*, 24 NY3d 239, 244 [2014]). Thus, "when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms" (*W.W.W. Assoc.*, 77 NY2d at 162).

Plaintiff argues that Dewberry breached the EnTech Subcontract when it disregarded the termination procedures set forth in their agreement, relying on the principle that a termination clause in a contract must be enforced as written (*see A.S. Rampell, Inc. v Hyster, Co.*, 3 NY2d 369, 382 [1957]). Plaintiff submits that the termination notice was ineffective because Dewberry failed to furnish it with a written notice to cure. While contract provisions requiring prior written notice are routinely upheld (*see New Image Constr., Inc. v TDR Enters. Inc.*, 74 AD3d 680, 682 [1st Dept 2010] [finding that the defendants failed to serve a 14-day notice to cure and a written termination notice as called for in the contract]), in this instance, the argument is unpersuasive. As discussed earlier, a contract must be interpreted in accordance with its plain meaning (*see D.C. McClain*, 249 Va at 135, 452 SE2d at 662; *Ellington*, 24 NY3d at 244). All that was required of Dewberry, before it could terminate the subcontract for cause, was a showing that plaintiff failed to perform its contractual obligations and that plaintiff failed to effect a prompt and timely cure (NYSCEF Doc No. 45 at 3 [section 6.3 [a]). Thus, counter to plaintiff's position, the EnTech Subcontract did not require Dewberry to deliver a written notice to cure.

The termination provision in *Shen Valley Masonry, Inc. v S.P. Cahill & Assoc., Inc.* (57 Va Cir 189 [Cir Ct 2001]), a case plaintiff cites, is materially different than the one at issue. The provision in that action states, in relevant part, that "[i]f the Sub-Contractor in the Contractor's sole opinion persistently or repeatedly fails or neglects to carry out Work in accordance with this Agreement *and or* upon written notice thereof fails to immediately remedy such shortfalls, the Contractor may ... terminate the Sub-Contract" (*id.* at 199 [emphasis in original]). The court found the words "and or" were ambiguous and "can only be logically read to require written notification" (*id.*). The EnTech Subcontract does not contain similar language.

Nor are defendants estopped from raising plaintiff's performance as an affirmative defense. In Virginia, a party seeking to invoke the doctrine of equitable estoppel must show "(1)

a representation, (2) reliance, (3) change of position, and (4) detriment" (*Princess Anne Hills Civic League, Inc. v Susan Constant Real Estate Trust, Inc.*, 243 Va 53, 59, 413 SE2d 599, 603 [1992]). Each element must be proven by "clear, precise, and unequivocal evidence" (*id.*). As to the doctrine of promissory estoppel, a party must show "(1) a promise, (2) which the promisor should reasonably expect to cause action by the promisee, (3) which does cause such action, and (4) which should be enforced to prevent injustice to the promise" (*Mongold v Woods*, 278 Va 196, 202, 677 SE2d 288, 292 [2009] [internal quotation marks and citation omitted]).

In New York, equitable estoppel is imposed "as a matter of fairness … to prevent someone from enforcing rights that would work injustice on the person against whom enforcement is sought and who, while justifiably relying on the opposing party's actions, has been misled into a detrimental change of position" (*Matter of Shondel J. v Mark D.*, 7 NY3d 320, 326 [2006]). A party seeking to invoke the doctrine must show "(1) conduct which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intent that such conduct (representation) will be acted upon; and (3) knowledge, actual or constructive, of the true facts" (*Health-Loom Corp. v Soho Plaza Corp.*, 272 AD2d 179, 181 [1st Dept 2000] [internal quotation marks and citation omitted]). "The elements of a promissory estoppel claim are: (i) a sufficiently clear and unambiguous promise; (ii) reasonable reliance on the promise; and (iii) injury caused by the reliance" (*Castellotti v Free*, 138 AD3d 198, 204 [1st Dept 2016]).

Absent from plaintiff's papers is evidence of a clear and unambiguous promise or representation that plaintiff's performance was satisfactory or acceptable under the terms of the EnTech Subcontract (*see Butler v Fairfax County Sch. Bd.*, 291 Va 32, 41, 780 SE2d 277, 282 [2015]; *Condor Funding, LLC v 176 Broadway Owners Corp.*, 147 AD3d 409, 411 [1st Dept 2017]). The evidence suggests that defendants promptly raised issues with plaintiff's work

product and continued to identify and alert it to additional deficiencies when they were found. Defendant's conduct on insisting that plaintiff's work conform to federal regulations and HUD guidelines was consistent with the performance provisions set forth in the EnTech Subcontract (*see Eujoy Realty Corp. v Van Wagner Communications, LLC*, 22 NY3d 413, 421 [2013]).

Likewise, plaintiff cannot establish the reliance element for estoppel to apply (*see Butler*, 291 Va at 41, 780 SE2d at 282; *Gad v Almod Diamonds Ltd.*, 147 AD3d 417, 418 [1st Dept 2017]). While silence or conduct can form the basis of an estoppel claim, (*see Deep Woods Holdings LLC v Pryor Cashman LLP*, 145 AD3d 447, 449 [1st Dept 2016]; *Dominick v Vassar*, 235 Va 295, 299, 367 SE2d 487, 489 [1988] [stating that silence in the absence of a duty to speak cannot create an estoppel]), that is not the case here. Plaintiff makes much of the fact that Dewberry requested additional manpower, trained plaintiff's inspectors, accompanied its inspectors on site visits, provided plaintiff with a sample report template, had daily access to plaintiff's work product, and reviewed only 1% of plaintiff's reports (NYSCEF Doc No. 170, Bayat 10/10/18 aff, ¶¶ 4-7). But, under sections 1.9 and 2.1 of the EnTech Subcontract, plaintiff agreed to perform in compliance with all applicable federal rules and regulations. Thus, any alleged reliance on Dewberry's conduct did not excuse plaintiff from ensuring that it fulfilled these separate, independent contractual obligations.

Moreover, plaintiff has not shown that defendants waived plaintiff's poor performance as an affirmative defense. In Virginia, a "[w]aiver is an *intentional* relinquishment of a known right" (*Virginia Polytechnic Inst. & State Univ. v Interactive Return Serv., Inc.*, 267 Va 642, 651, 595 SE2d 1, 6 [2004] [internal quotation marks and citation omitted]). A party may waive a contractual right (*see RMBS Recovery Holdings, I, LLC v HSBC Bank USA, N.A.*, 297 Va 328, 827 SE2d 762, 769 [2019]). The waiver may be express, i.e. in writing, or "*impliedly by inconsistent conduct*" (*id.*). Proof of an implied waiver also requires clear and convincing

evidence (*id.*). A waiver in New York is the "intentional relinquishment of a known right" (*Matter of Professional Staff Congress-City Univ. of N.Y. v New York State Pub. Empl. Relations Bd.*, 7 NY3d 458, 465 [2006] [internal quotation marks and citation omitted]). A waiver must be "clear, unmistakable and without ambiguity" (*id.*). Although courts generally enforce contractual no-waiver provisions (*see Awards.com v Kinko's, Inc.*, 42 AD3d 178, 188 [1st Dept 2007], *affd* 14 NY3d 791 [2010]), "the existence of a nonwaiver clause does not in itself preclude waiver of a contract clause" (*Dice v Inwood Hills Condominium*, 237 AD2d 403, 404 [2d Dept 1997]).

Here, defendants' insistence that plaintiff fulfill federal standards in reporting the presence of lead paint, as required under the EnTech Subcontract, belies any claim of waiver of the performance provisions or the no-waiver clause in their agreement. As such, issues of fact preclude granting plaintiff summary judgment. The unambiguous language of the EnTech Contract required plaintiff to comply with all federal rules and regulations, and indicated that the failure to do so could result in termination (*see D.C. McClain, Inc.*, 249 Va at 142, 452 SE2d at 665 [concluding that the defendant was "justified in terminating the contract with McClain because it failed to construct the bridge in a diligent and timely manner as required by the contract"]). Consequently, the court denies plaintiff's motion for summary judgment on its first cause of action.

Turning to the dispute over EnTech Subcontract's pay-when-paid provision, New York and Virginia appear to diverge as to whether the provision is enforceable. As an initial matter, the court reject's plaintiff's contention that pay-when-paid provisions are null and void under Virginia Code Annotated §§ 11-4.1:1 and 43-3 (C).[1] The two statutes were added or amended on

[1] Virginia Code Annotated § 11-4.1:1 states, in part, that "[a] provision that waives or diminishes a subcontractor's ... right to assert payment bond claims or his right to assert claims for demonstrated

April 15, 2015 (*see* Virginia Senate Bill No. 891, 2015 Regular Session). Plaintiff executed the subcontract in 2013, and there is no indication that either statute applied retroactively.

In *Galloway Corp. v S.B. Ballard Constr. Co.* (250 Va 493, 464 SE2d 349 [1995]), the Supreme Court of Virginia held that:

> "[I]n the absence of a clear and unambiguous statement of the parties' intent as to the meaning of the time of payment provision in a construction subcontract, an absolute 'pay when paid' defense is available to a general contractor only if it can establish by parol evidence that the parties mutually intended the contract to create such a defense"

(250 Va at 506, 464 SE2d at 357). Therefore, a pay-when-paid provision is a defense in breach of contract actions in Virginia. By contrast, in New York, a contract provision that "forces the subcontractor to assume the risk that the owner will fail to pay the general contractor is void and unenforceable as contrary to public policy set forth in the Lien Law § 34" (*West-Fair Elec. Contrs. v Aetna Cas. & Sur. Co.*, 87 NY2d 148, 158 [1995] [concluding that a provision that the owner pay the general contractor before the general contractor could remit payment to a subcontractor work was unenforceable]).

Despite this apparent conflict over pay-when-paid provisions, enforcement of the choice-of-law clause in the EnTech Subcontract is not repugnant to this State's public policy. New York's public policy against pay-when-paid contracts and the interplay with Lien Law § 34 is not "so fundamental that it should override the parties' choice of law" (*Welsbach Elec. Corp. v MasTec N. Am., Inc.*, 7 NY3d 624, 632 [2006] [enforcing a Florida choice-of-law clause to allow enforcement of a pay-when-paid contract to proceed]). Here, the court has disposed of plaintiff's fifth cause of action, that sought foreclosure of a public improvement lien (NYSCEF Doc No.

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additional costs in a contract executed prior to providing any labor, services, or materials is null and void." The pertinent portion of Virginia Code Annotated § 43-3 (C) reads, "[a] provision that waives or diminishes a … subcontractor's … lien rights in a contract executed prior to providing any labor, services, or materials is null and void."

194 at 65-66). Hence, the Lien Law is no longer an impediment. Further, plaintiff has not raised the question of whether the filing of a private mechanic's lien on real property under Lien Law § 3 is permissible in this instance, where plaintiff performed its pre-construction services to assist HRO in determining the amount in federal funds HRO could disburse to private homeowners who had applied for monetary assistance. Thus, where the Lien Law is not implicated and the contract contains an express condition precedent to payment, the court may "decline to apply [the holding in] *West-Fair*" (*Cives Corp. v Hunt Constr. Group, Inc.*, 91 AD3d 1178, 1179 [3d Dept 2012] [declining to preclude enforcement of a pay-when-paid provision contained in a subcontract where the subcontractor had no rights under the Lien Law]).

The prevention doctrine also does not bar enforcement of the pay-when-paid provision. The prevention doctrine is a "principle of contract law that if one party to a contract hinders, prevents or makes impossible performance by the other party, the latter's failure to perform will be excused" (*Rastek Constr. & Dev. Corp. v General Land Commercial Real Estate Co., LLC*, 294 Va 416, 426, 806 SE2d 740, 745 [2017] [internal quotation marks and citation omitted]). The preventing party's act or omission preventing the other contracting party from performing "'must be wrongful, and, accordingly, in excess of [the promisor's] legal rights'" (*Rastek Constr. & Dev. Corp.*, 294 Va at 427, 806 SE2d at 746, quoting *Whitt v Godwin*, 205 Va 797, 800-801, 139 SE2d 841, 844 [1965]). Similarly, in New York, "a party cannot insist upon a condition precedent, when its non-performance has been caused by himself" (*A.H.A. Gen. Constr. v New York City Hous. Auth.*, 92 NY2d 20, 31 [1998], *rearg denied* 92 NY2d 920 [1998] [internal quotation marks and citations omitted]; *Kooleraire Serv. & Installation Corp. v Board of Educ. of City of N.Y.*, 28 NY2d 101, 106 [1971] [stating that "a party to a contract cannot rely on the failure of another to perform a condition precedent where he has frustrated or prevented the

occurrence of the condition"]). The preventing party's misconduct must have impeded the other party's ability to comply (*see A.H.A. Gen. Constr.*, 92 NY2d at 31).

Here, plaintiff has not demonstrated how Dewberry's alleged misconduct contributed to the non-occurrence of a condition precedent to payment. Under section 3.4 of the EnTech Subcontract, plaintiff's completion of its services "in strict accordance" with the subcontract and the Dewberry Contract was a condition precedent to final payment. Dewberry confronted plaintiff about its flawed work product well before Dewberry ceased assigning plaintiff additional work. When plaintiff failed to correct those deficiencies promptly, Dewberry terminated the EnTech Subcontract. Plaintiff's reliance on Dewberry's initial approval of its form report did not excuse or exempt plaintiff from satisfying its continuing contractual obligation to ensure that its work met all subcontract requirements. Thus, defendants' insistence upon strict compliance with the performance provisions of the EntTech Subcontract was permissible (*see Rastek Constr. & Dev. Corp.*, 294 Va at 427, 806 SE2d at 746).

Nor has plaintiff established that defendants engaged in the type of wrongful and deliberate misconduct described in *Moore Bros. Co. v Brown & Root, Inc.* (207 F 3d 717 [4th Cir 2000]) so as to preclude application of the pay-when-paid defense. There, the Court determined that the general contractor, in conjunction with the project owner, intentionally misled lenders who had financed the construction of a private toll road by deleting specific illustrations of substantial design changes, that would normally warrant additional payments, from the prime contract, thereby underfunding the project (*id.* at 721 and 725). One of the deleted illustrations was a common design change in highway construction projects, and the general contractor was aware that the original design "was on the 'marginal end'" (*id.* at 721). Each subcontract contained a pay-when-paid provision (*id.* at 724). When the subcontractors sought additional payment for the design change, the general contractor denied payment on the ground that the

owner had not paid it (*id.* at 721). The Court, applying Virginia law, declined to enforce the pay-when-pay provisions in the subcontracts because the general contractor's "misrepresentations 'contributed materially'" to the owner's failure to pay (*id.* at 726). The conduct complained of in this action does not rise to the same level of deliberate misconduct in *Moore Bros. Co.* Finally, plaintiff has not challenged Frost's averment that Dewberry has not been paid for plaintiff's work. Therefore, because a condition remains outstanding, the court grants defendants' motion for summary judgment and dismisses the first cause of action.

B. Second Cause of Action for an Account Stated

In Virginia, "the mere rendering of an account by one party to another, is not sufficient to make an account stated" (*Robertson v Wright*, 58 Va [17 Gratt] 534, 541 [1867]). There must be "an actual statement and adjustment of account by the parties … an admission … of the correctness of the balance struck … or some other evidence to show that the party who is sought to be charged has, by his language or conduct, admitted the correctness of the account" (*id.*). To that end, a settlement as to the amount of an account may be "'presumed to be so from the circumstance of a party's retaining, for a long time, without objection, the account of the other party, which has been presented to him, showing a balance against him. By the settlement (or implied admission which is considered equivalent) it has become an ascertained debt'" (*Landfall Consulting, LLC v Virginia State Univ.*, 90 Va Cir 38, 53-54 [Cir Ct 2015], quoting *Ellison v Weintrob*, 139 Va 29, 34-35, 123 SE 512, 514 [1924]; *see also Buchanan v Higginbotham*, 123 Va 662, 667, 97 SE 340, 342 [1918] [stating that "where an account is rendered and is retained by the party to whom it is rendered, without objection, there arises a strong presumption of its correctness, and throws the burden of proving error therein upon the party who alleges such errors"]).

In New York, "[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 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]), or where partial payment has been made (*see Morrison Cohen Singer & Weinstein, LLP v Waters*, 13 AD3d 51, 52 [1st Dept 2004]). A 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]). Thus, there is no actual conflict of law on the account stated claim.

Because defendants objected to the unpaid invoices within a reasonable time, there is no account stated (*see Landfall Consulting, LLC*, 90 Va Cir at 55 [dismissing an account stated claim where the defendant objected to the invoice three months after receipt]). Although Bayat avers that the city approved the rates, plaintiff has furnished no evidence to support this contention. Meanwhile, the documents submitted in opposition show that there was no agreement. On March 7, 2014, Mario Salvador (Salvador), for plaintiff, forwarded invoice no. 13121-02 to Dewberry's Paul Dean (Dean) (NYSCEF Doc No. 124, Aly aff, exhibit Q at 2). Less than one hour later, Dean responded, "[t]his invoice is not using the correct unit rates in your subcontract. Please revise and resubmit" (*id.*). In an email dated March 12, 2014 to Bayat, Dean repeated that plaintiff "must bill at the rates in your contract" (*id.* at 1). With respect to invoice nos. 13121-03 and 13121-04, Frost wrote in a July 22, 2014 email that "Dean our project accountant/contracts manager had requested revised invoices (invoices based on the approved contract) on multiple contracts and we still have not received them. Please submit the corrected

invoices using the approved contract rates" (NYSCEF Doc No. 125, Aly aff, exhibit R at 1-2). Frost repeated his request for corrected invoices using the established contract rates in an August 8, 2014 email (NYSCEF Doc No. 126, Aly aff, exhibit S at 1). Frost testified that despite his requests for revised invoices, Dewberry "never got them" (NYSCEF Doc No. 41, affirmation of plaintiff's counsel, exhibit 9 [Frost tr] at 58). As such, there was no assent as to the amount, and defendants have established that an account stated was not created (*see Robertson*, 58 Va at 541-542 [concluding that there was a lack of evidence that an account stated had been created]; *Landfall Consulting, LLC*, 90 Va Cir at 55 [dismissing the account stated claim where the defendant objected to the invoice three months after receipt]). Application of New York law does not warrant a different result (*see Matthew Adam Props., Inc. v United House of Prayer for All People of the Church on the Rock of the Apostolic Faith*, 126 AD3d 599, 601 [1st Dept 2015] [dismissing an account stated claim because the defendants did not consent to the account]). Therefore, defendants' motion for summary judgment on the second cause of action is granted, and the second cause of action is dismissed.

C. Third Cause of Action for Quantum Meruit and Fourth Cause of Action for Unjust Enrichment

Plaintiff concedes that an express written contract covers plaintiff's claims (NYSCEF Doc No. 194 at 52-53). Dismissal is warranted under the laws of New York and Virginia. The existence of an enforceable written contract precludes recovery under a quasi-contract claim (*see Mongold*, 278 Va at 204 [stating that before a court may "award a quantum meruit recovery, the court must conclude that there is no enforceable express contract between the parties covering the same subject matter"]; *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]). Accordingly, the court dismisses the third and fourth causes of action.

D. Motion Sequence No. 003

In view of the foregoing, defendants' application for summary judgment dismissing so much of plaintiff's damages predicated upon higher unit rates that were never approved is denied as moot.

Accordingly, it is

ORDERED that plaintiffs' motion for summary judgment on the complaint (motion sequence no. 001) is denied; and it is further

ORDERED that defendants' motion for partial summary judgment on the issue of plaintiff's damages predicated upon higher unit rates (motion sequence no. 003) is denied as moot; and it is further

ORDERED that defendants' motion for summary judgment dismissing the complaint (motion sequence no. 004) is granted and the complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 10-15-2019

ENTER:

J.S.C.

HON. MELISSA A. CRANE
J.S.C.