

**East Empire Constr. Inc. v Borough Constr. Group
LLC**

2019 NY Slip Op 33284(U)

November 1, 2019

Supreme Court, New York County

Docket Number: 655963/2016

Judge: Barbara Jaffe

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

Justice

-----X

EAST EMPIRE CONSTRUCTION INC.,

Plaintiff,

- v -

INDEX NO. 655963/2016

MOTION DATE _____

MOTION SEQ. NO. 001

BOROUGH CONSTRUCTION GROUP LLC,952
COLUMBUS LLC, CPR MONEY LLC, JOHN DOE
NO.1 THROUGH JOHN DOE NO.5,

Defendants.

-----X

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 22- 58, 60-82, 85 were read on this motion for partial summary judgment.

By notice of motion, plaintiff moves pursuant to CPLR 3212 for an order granting partial summary judgment on the issue of liability as to plaintiff’s first, fourth, and fifth causes of action, and dismissing defendants’ eleventh affirmative defense. Defendants oppose.

I. UNDISPUTED BACKGROUND

On November 20, 2015, defendant Borough Construction Group, LLC retained plaintiff to perform certain work on a construction project taking place at 952 Columbus Avenue in Manhattan, owned by 952 Columbus LLC. As pertinent here, the subcontract provides, as to Borough’s remedies, that

[i]f the Subcontractor defaults or neglects to carry out the Work in accordance with this Agreement and fails within five working days after receipt of written notice from the Contractor to commence and continue correction of such default or neglect with diligence and promptness, the Contractor may, by appropriate Modification, and without prejudice to any other remedy the Contractor may have, make good such deficiencies and may deduct the reasonable cost thereof from the payments then or thereafter due the Subcontractor.

(NYSCEF 29).

Pursuant to section 7.2.1 of the subcontract, Borough may terminate it if plaintiff repeatedly fails or neglects to carry out its work and “fails within a ten-day period after receipt of written notice to commence and continue correction of such default or neglect with diligence and promptness . . .” If Borough so terminates, and if the unpaid balance of the subcontract sum exceeds the expense of finishing plaintiff’s work and other damages incurred by Borough and not expressly waived, the excess is paid to plaintiff. If the expenses and damages exceed the unpaid balance, plaintiff is to pay the difference to Borough. (NYSCEF 29).

The scope of work sheet, annexed to the subcontract, provides that if plaintiff fails to perform, plaintiff will be issued a seventy-two hour notice to cure, and if it fails to rectify and remedy the situation within that timeframe, the project’s owner will remove it from the project, and any costs and fees associated with its failure to perform will be back-charged and deducted from any monies owed to plaintiff. (NYSCEF 29).

In a construction bid form dated November 20, 2015, Borough and plaintiff agreed that the proposed completion date would be February 14, 2016. (NYSCEF 30).

By email dated March 29, 2016, plaintiff submitted to Borough a change order, and asked Borough to review and sign it so that plaintiff could proceed with the work. Borough wrote back that plaintiff should proceed with the work. (NYSCEF 41). The change order was signed by Borough on April 5, 2016. (NYSCEF 42).

After reviewing an AIA document prepared by Borough in response to the change order, plaintiff asked that revisions be made to the document as the change of order time would take 6 weeks, that it would not be completed by April 5, 2016, the date on the document, and that the change order would affect the sum, time and maximum price. Borough agreed to make the

changes. (NYSCEF 43).

The AIA document provides that the subcontract time will be increased by 42 days, although it also states that the date of substantial completion will therefore be April 23, 2016.

The document was signed on April 5, 2016. (NYSCEF 44).

By email dated May 3, 2016, plaintiff informed Borough that its work would be completed by July 16, 2016, which represented the original three-month schedule for the work plus the additional 42 days due to the change order. Borough did not object to it. (NYSCEF 45).

On May 6, 2016, plaintiff informed Borough that the stairs would be installed the following Monday and that it would provide Borough with a detailed timeline also on Monday. Borough replied that “Monday works for both.” (NYSCEF 46).

On May 10, 2016, Borough asked plaintiff for the timeline, and upon receipt of it, Borough rejected it as having told plaintiff that the work needed to be done by June 16. Plaintiff replied that it had told Borough that it would be done by July 16, not June 16. (NYSCEF 47).

The same day, and by letter dated May 9, 2016, Borough informed plaintiff that it was giving plaintiff notice of termination and that the subcontract “will be terminated in three business days from the date of this letter . . .” Borough alleged that plaintiff was in default of its contractual obligations by failing to provide sufficient manpower, failing to meet the schedule, safety regulations and qualified workmanship for the project, and by failing to respond or delaying a response to an expediter’s requests for crane usage, which was a task stipulated to in the subcontract, and which delayed the performance and completion of work. Borough thus directed that plaintiff “cease all work at the site immediately.” No mention is made therein of an opportunity for plaintiff to cure the alleged defaults. (NYSCEF 49).

The following day and in response to the letter, plaintiff emailed Borough to ask if it

should continue its work, to which Borough replied affirmatively and suggested that they meet to discuss plaintiff's schedule. Borough cancelled the termination notice that day. (NYSCEF 50).

On May 16, 2016, Borough emailed its third-party engineering consultant, Global Consultants LLC that there was a problem with the steel on the project, and that it needed to be addressed as soon as possible or Borough would get a stop work order. Global responded that Borough needed to remove all personnel from the project until the building could be stabilized and inspected, and that Global was putting a stop work order on the site until further notice. (NYSCEF 68).

On May 16, 2016, Borough sent to plaintiff the identical notice of termination letter as before, and again directed plaintiff to cease all work at the site immediately. (NYSCEF 51).

II. PERTINENT PORTIONS OF COMPLAINT (NYSCEF 1) AND ANSWER (NYSCEF 5)

In plaintiff's first cause of action, it alleges that it performed its obligations under the subcontract but that Borough breached it by wrongfully terminating plaintiff without good cause, failing to give plaintiff the appropriate notice and opportunity to cure any alleged defects, and failing to pay plaintiff. In the fourth cause of action, plaintiff contends that it furnished labor and materials to defendants in good faith and for their benefit and with the expectation that it would be paid, but that defendants failed to pay. And in the fifth cause of action, plaintiff contends that defendants have been unjustly enriched from the work performed by plaintiff.

As their eleventh affirmative defense, defendants maintain that plaintiff's claims are barred by its own material breach of the agreement, entitling defendants to, among others, offsets related to plaintiff's defective work, improper staffing, delays, and retention of materials for the project.

III. CONTENTIONS

A. Plaintiff (NYSCEF 54)

Plaintiff contends that defendants breached their agreement by failing to pay it for its work and terminating the subcontract wrongfully and in contravention of its procedures for termination. Having wrongfully terminated the agreement, defendants may not recover damages based on plaintiff's alleged non-performance of the subcontract. Nor may defendants recover offsets for plaintiff's alleged defective work as they failed to comply with section 3.4 of the subcontract by failing to provide the required written notice. Plaintiff further maintains that defendants waived the right to timely performance, especially as the delays were not plaintiff's fault.

Plaintiff argues that defendant 952 Columbus is liable for quantum meruit and unjust enrichment, despite the existence of a contract between plaintiff and Borough, as 952 Columbus made payments directly to plaintiff, thereby implicitly promising to pay for plaintiff's work.

B. Defendants (NYSCEF 81)

Defendants maintain that there are triable issues as to whether plaintiff performed under the subcontract, especially as its work was defective and created an unsafe and dangerous situation. They deny that they were required to provide an opportunity to cure, as plaintiff's defaults were repeated and could not have been cured in a few days, nor could it be trusted to cure them safely. Defendants also contend that they provided an opportunity to cure by issuing the first termination letter and then cancelling it after discussing the issue with plaintiff, and therefore gave plaintiff seven days to cure between the first and second termination letters.

Defendants deny that they have waived their rights to a setoff, distinguishing the cases cited by plaintiff. They also deny having waived their rights pursuant to section 3.4 of the

subcontract, again relying on the May 9th termination notice as providing the required notice and time to cure.

They observe that even if they waived their rights to an offset, they may nonetheless raise plaintiff's defective work as a defense to plaintiff's claim that it performed under the subcontract. Defendants argue that plaintiff may not recover from 952 Columbus absent evidence it performed work for 952 Columbus outside the scope of its subcontract with Borough.

IV. ANALYSIS

A. Breach of termination procedures

If a contract provides that a party must fulfill conditions precedent before it can terminate it, those conditions are enforceable and binding, and a party that fails to follow them may be held liable for breach of contract. (*Black Riv. Plumbing, Heating & A.C., Inc. v Bd. of Educ. Thousand Is. Cent. Sch. Dist.*, 175 AD3d 1051 [4th Dept 2019]). Thus, in *Black Riv. Plumbing*, where the parties' contract required defendants to give plaintiff seven days to cure any deficiencies before terminating the contract, and defendants failed to do so, the Court granted the plaintiff's motion for liability on its breach of contract claim.

Similarly, in *MCK Bldg. Assocs., Inc. v St. Lawrence Univ.*, the Court held that where the defendant's contract termination letter stated that it was based not only on the plaintiff's lack of performance and disregard of contractual obligations, but also on a specific provision of the agreement which required written notice of default, and as the letter provided no written notice but instead indicated that the contract had been terminated as of the letter's date, the defendant wrongfully terminated the contract. (301 AD2d 726 [3d Dept 2003], *lv dismissed* 99 NY2d 651 [2003]).

And in *New Image Constr., Inc. v TDR Enter., Inc.*, the Court found that the defendant's

termination of the contract was ineffective absent the required 14-day notice to cure and written notice of termination, both of which were contractual prerequisites to termination. (74 AD3d 680 [1st Dept 2010]).

Here, the parties' subcontract and scope of work sheet require both written notice to plaintiff and an opportunity for it to cure any alleged defaults before the subcontract may be terminated. Even assuming that Borough's 72-hour notice of termination was sufficient rather than the 10-day notice provided in the subcontract, the notice directed plaintiff to cease immediately all of its work on the project, thus failing to give it an opportunity to cure before the subcontract was terminated. Plaintiff thereby establishes, *prima facie*, that defendants breached their agreement by failing to comply with its proper termination provisions.

Given defendants' cancellation of the first notice of termination, they may not rely on it to argue that that notice provided time for plaintiff to cure its defaults until it issued its second termination letter seven days later. Rather, by cancelling the notice, defendants indicated that they did not intend to proceed with the termination. In any event, the first letter similarly fails to provide time to cure but rather directs plaintiff to cease all work immediately. (*See Mike Bldg. & Contr., Inc. v Just Homes, LLC*, 27 Misc3d 833 [Sup Ct, Kings County 2010] [termination letter which provided that contract would be terminated seven days after receipt of letter and that contractor was not to return to premises failed to provide opportunity to cure deficiency in performance, notwithstanding seven-day delay in effecting termination]).

To the extent that defendants argue that an emergency situation existed which negated the need to provide plaintiff time to cure any defaults, defendants issued the first termination letter without evidence that an emergency then existed. In any event, defendants cite no apposite authority for their claim that they did not have to provide time to cure if there was an emergency

or if plaintiff's defaults were repeated and/or could not be cured, and submit no evidence that plaintiff either repudiated the agreement or indicated that it could not cure its alleged defaults. (*See Genl. Supply & Constr. Co. v Goelet*, 241 NY 28 [1925] [even if owner justified in belief that contractor would continue to default in performance and would not finish work within reasonable time, owner still had to terminate contract according to its terms, and failure to do so was wrongful]; *cf. Kleinberg Elec., Inc. v E-J Elec. Installation Co.*, 111 AD3d 410 [1st Dept 2013] [plaintiff waived right to notice of termination as it repudiated subcontract by abandoning work]; *J. Petrocelli Constr., Inc. v Realm Elec. Contrs., Inc.*, 15 AD3d 444 [2d Dept 2005] [whether contractor liable for failure to comply with termination procedure depended on whether subcontractor had already repudiated contract]).

Defendants' claim that plaintiff's alleged breaches preclude its recovery for breach of contract is also unavailing. (*See New Image Constr., Inc.*, 74 AD3d at 681 [contractor granted judgment for payment due; termination of contract was ineffective due to failure to comply with termination procedures, regardless of whether termination based on plaintiff's failure to complete work diligently]; *Rebh v Lake George Ventures*, 223 AD2d 986 [3d Dept 1996] [defendants breached contract by failing to follow procedures for terminating plaintiff for substandard job performance before giving opportunity to cure, and argument that plaintiffs' breach precludes recovery rejected as alleged substandard job performance was situation to which cure provision applied]).

B. Defendants' waiver of certain damages

Given defendants' failure to terminate the subcontract properly, they are barred from seeking an offset based on plaintiff's alleged defaults, specifically, any expenses incurred by defendants for finishing plaintiff's work and other damages and costs and fees associated with

plaintiff's failure to perform, all of which depended on defendants' adherence to the notice, opportunity to cure, and termination procedures in the subcontract and scope of work sheet. (*See e.g., Paragon Restoration Group, Inc. v Cambridge Sq. Condominiums*, 42 AD3d 905 [4th Dept 2007] [as defendant terminated contract without complying with termination procedures, termination was deemed to be without cause and for convenience, and therefore counterclaim for offset for cost of completing project dismissed]; *Fruin-Colnon Corp. v Niagara Frontier Transp. Auth.*, 180 AD2d 222 [4th Dept 1992] ["defendant's wrongful termination of plaintiff for default (which deprived plaintiff of right to cure) is deemed to be a termination for the convenience of defendant" and thus defendant not entitled to reimbursement for payments made to others to complete plaintiff's work]).

Similarly, defendants failed to comply with section 3.4 of the subcontract, which requires five-days notice and an opportunity to cure before defendants may correct plaintiff's alleged deficiencies and "deduct the reasonable cost thereof" from payments due plaintiff. (*See Northeast Constr. Group, Inc. v Deconstruction, Inc.*, 16 AD3d 357 [1st Dept 2005], *lv denied* 5 NY3d 709 [2005] [dismissing contractor's counterclaims against subcontractor in which it asserted right to deduct amounts spent to remedy alleged defaults by subcontract, as contractor failed to give written notice as required before taking deductions]).

Defendants do not address plaintiff's argument that they waived the right to timely performance by agreeing to plaintiff's revised schedules and as the delays were not plaintiff's fault, other than by observing that there was no time-of-essence completion date in the parties' agreement, without explanation of the its relevance here. Thus, any damages sought by defendants based on plaintiff's alleged delays are dismissed.

C. Plaintiff's claims against 952 Columbus

A quasi-contract claim is precluded when there is a contract in existence covering the same claims at issue. (*See 22 Gramercy Park, LLC v Michael Haverland Architect., P.C.*, 170 AD3d 535 [1st Dept 2019] [unjust enrichment claim should have been dismissed as it arose out of subject matter covered by express contract]). Moreover, a subcontractor may not recover on a quasi-contract claim against an owner where the subcontractor has a contract with a general contractor, unless the owner expressly consents to pay for the subcontractor's work. (*Perma Pave Contr. Corp. v Paerdegat Boat and Racquet Club, Inc.*, 156 AD2d 550 [2d Dept 1989]).

While plaintiff establishes that 952 Columbus issued payments to it, there is no evidence that it thereby expressly consented to pay for plaintiff's work or induced plaintiff to believe that 952 Columbus would or had consented to pay for plaintiff's services, and thus plaintiff fails to establish that 952 Columbus may be held liable to it for unjust enrichment or quantum meruit. (*See J.P. Plumbing Corp. v Born to Build Constr. Corp.*, 137 AD3d 976 [2d Dept 2016] [plaintiff's unjust enrichment claim against owner dismissed as all business transactions were between plaintiff and contractor, and owner did nothing to induce plaintiff to believe it would pay for its services]; *Davis v CEC, Inc.*, 135 AD3d 1049 [3d Dept 2016], *lv denied* 27 NY3d 904 [2016] [unjust enrichment claim should have been dismissed as against owner where plaintiff did no work outside scope of subcontract and owner did not, by words or actions, assume contractor's obligation to pay]; *Sears Ready Mix, Ltd. v Lighthouse Marina, Inc.*, 127 AD3d 845 [2d Dept 2015] [subcontractor's claim against owner dismissed as plaintiff was hired by contractor and performed work for contractor]).

Plaintiff's reliance on *Vertical Progression, Inc. v Canyon-Johnson Urban Funds* is misplaced as there, the general contractor signed the subcontract as agent for the owner, a

circumstance not present here, and the owner directly paid the subcontractor. (126 AD3d 784 [2d Dept 2015]). Similarly, in *CPN Mech., Inc. v Madison Park Owner LLC*, the owner paid the plaintiffs directly with a two-party check showing the contractor as a co-payee. (94 AD3d 626 [1st Dept 2012]). Plaintiff submits no authority to support its claim that an owner's direct payment to a subcontractor, by itself, is sufficient.

V. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion is granted to the extent of: (1) granting it partial summary judgment on liability on its breach of contract claim against defendant Borough Construction Group, LLC, and (2) dismissing defendants' eleventh affirmative defense, and is denied as to its fourth and fifth causes of action as against defendant 952 Columbus LLC; it is further

ORDERED, that upon searching the record (CPLR 3212[c]) and for the reasons set forth above, plaintiff's fourth and fifth causes of action as against defendant 952 Columbus LLC are hereby severed and dismissed; and it is further

ORDERED, that the action is hereby referred to the Commercial Division Mediation Program, pursuant to the annexed order.

11/1/2019

DATE

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BARBARA JAFFE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE