

Framan Mech., Inc. v NYC Dept. of Env'tl. Protection
2020 NY Slip Op 30703(U)
February 27, 2020
Supreme Court, New York County
Docket Number: 655078/2018
Judge: Melissa A. Crane
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MELISSA ANNE CRANE
HON. MELISSA A. CRANE Justice
J.S.C. -----X

PART IAS MOTION 15EFM

INDEX NO. 655078/2018

FRAMAN MECHANICAL, INC.,
Plaintiff,

MOTION DATE 01/08/2019

MOTION SEQ. NO. 001

- v -

NYC DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Defendant.

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30 were read on this motion to/for DISMISS

This action for breach of contract, unjust enrichment and quantum meruit arises out of a 2013 contract for the replacement of equipment at a wastewater treatment plant. Defendant NYC Department of Environmental Protection (DEP) moves, pursuant to CPLR 3211 (a) (1) and (7), for an order dismissing the complaint. Plaintiff Framan Mechanical, Inc. opposes the application.

BACKGROUND

On March 4, 2013, DEP awarded contract no. BB-61, Registration No. 20131413846 (the Contract) for \$6,555,000 to plaintiff for the replacement of the main sewage pumps and related equipment at the Bowery Bay Wastewater Treatment Plant in Queens, New York (the Project) (New York St Cts Elec Filing [NYSCEF] Doc No. 7, affirmation of Jennifer Lerner [Lerner], exhibit 1 at 37; NYSCEF Doc No. 8, Lerner affirmation, exhibit 2 at 1).

Article 8.1 of the City's Standard Construction Contract (SCC) provides, in relevant part, that "[t]he Contractor shall commence Work on the date specified in a written notice signed by the Commissioner ... the Contractor shall thereafter prosecute the Work diligently, ... [and]

will assure its completion not later than the date specified herein, or on the date to which the time for completion may be extended” (NYSCEF Doc No. 7 at 62) (emphasis in original). By letter dated June 4, 2013, DEP issued an order directing plaintiff to commence work and to complete its work within 1,963 calendar days, or by October 18, 2018 (*id.* at 37). DEP later revised the date of completion twice: first to January 23, 2017 (*id.* at 38) and then to August 29, 2019 (*id.* at 32).

Article 48.1 of the SCC enumerates a number of grounds upon which DEP may exercise its right to declare a contractor in default (*id.* at 105). Pursuant to Article 48.2, DEP must furnish the contractor with the opportunity to be heard before finding that contractor in default (*id.* at 106). Article 49 discusses DEP’s right to declare a default. Significantly, Article 49.2 reads:

“The **Commissioner’s** determination that the **Contractor** is in default shall be conclusive, final and binding on the parties and such a finding shall preclude the **Contractor** from commencing a plenary action for any damages relating to the **Contract**. If the **Contractor** protests the determination of the **Commissioner**, the **Contractor** may commence a lawsuit in a court of competent jurisdiction of the State of New York under Article 78 of the New York City Civil Practice Law and Rules”

(*id.* at 106) (emphasis in original).

On March 22, 2017, DEP served plaintiff with a “Notice of Deficient Performance” and directed plaintiff to correct its performance so as to avoid a default under the Contract (NYSCEF Doc No. 8 at 28-29). Shortly thereafter, in accordance with Article 48.2 of the Contract, DEP offered plaintiff an opportunity to be heard before DEP’s chief contracting officer (ACCO) to “show cause” why plaintiff “should not be declared in default of Contract BB-61 ...” (NYSCEF *id.* at 20). The hearing was held before Elisa Velazquez (Velazquez), DEP’s ACCO and an assistant commissioner, on June 27, 2017 (*id.* at 96-213).

On November 20, 2017, Velazquez, acting for DEP's commissioner, declared plaintiff in default pursuant to Article 49 of the Contract (the Notice of Default) and cited the following as grounds for the declaration: (1) plaintiff's failure to commence work as required under Article 48.1.3; (2) plaintiff's refusal to proceed with its work as directed under Article 48.1.3; (3) plaintiff's reduction of its work force in violation of Article 48.1.4; (4) plaintiff's unreasonable delay in completing its work under Article 48.1.9; (5) a willful violation of Article 48.1.10; and (6) plaintiff's inability to complete the work within the time set by the Contract under Articles 48.1.11 and 48.1.12 (*id.* at 1). Plaintiff has filed a petition under Article 78 of the CPLR to vacate and annul the Notice of Default.

On February 16, 2018, plaintiff forwarded a letter to the New York City Comptroller (the Comptroller) in which it asserted a claim for \$866,187.72 in damages caused by a 75-week delay (NYSCEF Doc No. 7 at 13 and 29). In a separate letter dated October 11, 2018, plaintiff sought payment for requisition no. 49 for \$992.75, requisition no. 50 for \$180,636.75, and requisition no. 51 for \$33,883.41 from the Comptroller (*id.* at 157).

After the Comptroller failed to adjust or pay the claims, plaintiff commenced this action by filing a summons and complaint on October 12, 2018. The complaint, as amended on November 21, 2018, pleads the following four causes of action: (1) breach of contract for DEP's failure to pay requisition nos. requisition no. 49 through no. 51 in the amount of \$215,512.91 despite due demand; (2) breach of contract for DEP's failure to pay delay damages in the amount of \$386,175.90; (3) unjust enrichment; and (4) quantum meruit.

In lieu of serving an answer, DEP moves for dismissal on the ground that Article 49.2 bars the present action. Plaintiff, in opposition, argues that Article 49.2 is inapplicable, that the delays caused by DEP prevented plaintiff's own substantial performance under the Contract, and

that there has been no determination on its Article 78 proceeding titled *Matter of Framan Mech., Inc. v City of New York (Dept. of Env't. Protection)*, Sup Ct, NY County, index No. 155568/2018.

Shortly after DEP filed this motion, this court denied plaintiff's petition and dismissed the proceeding in a decision and judgment dated May 28, 2019 (*see Matter of Framan Mech., Inc. v City of New York (Dept. of Env't. Protection)*, 2019 NY Slip Op 31486[U], *15 [Sup Ct, NY County 2019]).

DISCUSSION

Dismissal under CPLR 3211 (a) (1) is warranted "only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). "To be considered 'documentary' under CPLR 3211 (a) (1), evidence must be unambiguous and of undisputed authenticity" (*Fontanetta v John Doe 1*, 73 AD3d 78, 86 [2d Dept 2010] [internal citation omitted]). In effect, "the paper's content must be 'essentially undeniable and . . . assuming the verity of [the paper] and the validity of its execution, will itself support the ground on which the motion is based" (*Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 432 [1st Dept 2014] [internal citation omitted]). As such, affidavits and deposition testimony do not qualify as documentary evidence (*see Lowenstern v Sherman Sq. Realty Corp.*, 143 AD3d 562, 562 [1st Dept 2016]; *Correa v Orient-Express Hotels, Inc.*, 84 AD3d 651, 651 [1st Dept 2011]), but judicial records, mortgages, deeds and contracts (*Fontanetta*, 73 AD3d at 84), and email and letter correspondence (*see Kolchins v Evolution Mkts, Inc.*, 31 NY3d 100, 106 [2008]) may be considered.

On a motion to dismiss brought under CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible

favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citations omitted]). Ambiguous allegations must be resolved in plaintiff’s favor (*see JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). The motion will be denied “if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). However, “the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts” (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]). A pleading consisting of “bare legal conclusions” is insufficient (*Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006], *affd* 9 NY3d 836 [2007], *cert denied sub nom. Spiegel v Rowland*, 552 US 1257 [2008]).

To sustain a cause of action for breach of contract, a plaintiff must prove the existence of a contract, plaintiff’s performance, the defendant’s breach, and damages (*see Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Because a written agreement must be construed according to the parties’ intent (*see Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]), the court must read the document as a whole to “to determine its purpose and intent” (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). 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).

Applying these principles here, the documentary evidence conclusively demonstrates that plaintiff cannot assert any claims for damages arising out of the Contract. Article 49.2 provides that once DEP's commissioner determines that a contractor is in default, that determination "shall be conclusive, final and binding on the parties and such a finding shall preclude the Contractor from commencing a plenary action for any damages relating to the Contract" (NYSCEF Doc No. 7 at 106) (emphasis removed). Here, Velazquez concluded that plaintiff was in default of the Contract and issued the Notice of Default. Under the clear, express terms set forth in Article 49.2, the only avenue by which plaintiff could have challenged the determination is in an Article 78 proceeding. Because plaintiff's Article 78 petition has been denied, plaintiff cannot maintain this action (*see Cal-Tran Assoc., Inc. v City of New York*, 43 AD3d 727, 727 [1st Dept 2007] [granting dismissal of the complaint where "[t]he construction contract entered into between plaintiff and the City unambiguously precluded plaintiff from commencing a plenary action for damages upon a determination by the City that plaintiff had defaulted under the contract"]; *Colonial Sur. Co. v New York City Hous. Auth.*, 2018 NY Slip Op 32096[U], *5-6 [Sup Ct, NY County 2018] [reasoning that the plaintiff was barred from bringing a plenary action for damages related to its contract with the defendant after the defendant had declared the plaintiff in default]). Particularly instructive is the determination in *Sound Beyond Elec. Corp. v City of New York* (2011 NY Slip Op 34307[U] [Sup Ct, NY County 2018], *affd* 100 AD3d 412 [1st Dept 2012]). There, the court concluded that the clear language found in Article 49.2, that, incidentally, involved the same provision at issue in *Cal-Tran Assoc., Inc.*, barred the plaintiff's claims for damages arising out the parties' contract, including any quasi-contract and delay damages claims, after the plaintiff had been declared in default (2011 NY Slip Op 34307[U], *6-7).

Further, even if the Contract did not preclude plaintiff from maintaining the quasi-contract claims, the third cause for unjust enrichment and the fourth cause of action for quantum meruit are dismissed for the additional reason that an enforceable, written agreement governs the parties' dispute. To state a claim for unjust enrichment, the "plaintiff must show that (1) the other party was enriched; (2) at that party's expense; and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered" (*Kramer v Greene*, 142 AD3d 438, 442 [1st Dept 2016] [internal quotation marks and citation omitted]). To prevail on a claim for quantum meruit, a plaintiff must show "(1) the performance of services in good faith; (2) the acceptance of the services by the person to whom they are rendered; (3) an expectation of compensation therefor; and (4) the reasonable value of the services" (*id.* [internal quotation marks and citations omitted]). Where "there is a bona fide dispute as to the existence of a contract, or where the contract does not cover the dispute at issue," a plaintiff may plead both breach of contract and quasi-contract as alternative theories of recovery (*Hochman v LaRea*, 14 AD3d 653, 654-655 [2d Dept 2005]). However, where a valid and enforceable written contract governing the subject matter exists, a plaintiff is precluded from recovery on a quasi-contract claim (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]). Although plaintiff contends that it is inequitable to permit DEP to benefit from its own actions in delaying the Project, plaintiff does not challenge that a valid agreement between the parties exists. Consequently, the third and fourth causes of action are precluded by the existence of the Contract.

The *Cal-Tran Assoc., Inc.* and *Sound Beyond Elec. Corp.* cases are akin to this case. There, the contracts entered into between the plaintiff and the City precluded plaintiff from

commencing plenary actions for damages. Similarly, in this case, absent a successful Article 78 challenge, plaintiff cannot maintain any claim for damages related to the Contract.

Nor is plaintiff's argument that DEP is precluded from terminating the Contract persuasive. Plaintiff cites *Endres Plumbing Corp. v Chapin Home for the Aging* (17 Misc 3d 1127[A], 2007 NY Slip Op 52171[U] [Sup Ct, Queens County 2007]) for the proposition that "[t]he substantial performance rule precludes contract termination ..." (2007 NY Slip Op 52171[U], *5, quoting *845 UN Ltd. Partnership v Flour City Architectural Metals, Inc.*, 28 AD3d 271, 272 [1st Dept 2006]). Plaintiff submits that DEP's actions prevented plaintiff from substantially performing its work, and, therefore, DEP cannot terminate the Contract. Plaintiff, though, ignores the fact that under Article 49.2, the propriety of the termination shall be determined in an Article 78 proceeding. Thus, whether plaintiff can assert a claim for damages related to the Contract, including any damages for delay, depended upon its success in the Article 78 proceeding which, as discussed above, it has not established.

Accordingly, it is

ORDERED that the motion of defendant NYC Department of Environmental Protection for an order dismissing the complaint is granted, and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant.

DATED: 2-27, 2020
New York, New York

ENTER:

MELISSA A. CRANE, J.S.C

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