Summit Rest. Repairs & Sales, Inc. v New York City Dept. of Educ.
2020 NY Slip Op 33245(U)
September 30, 2020
Supreme Court, New York County
Docket Number: 651845/2012
Judge: Andrew Borrok

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK **PART** IAS MOTION 53EFM

Justice

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SUMMIT RESTAURANT REPAIRS & SALES, INC.,

Plaintiff,

- v -

NEW YORK CITY DEPARTMENT OF EDUCATION,

Defendant.

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INDEX NO. 651845/2012

MOTION DATE 01/30/2020, 01/30/2020

MOTION SEQ. NO. 007 008

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 382, 384, 393, 394, 395, 396, 397

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 383, 385, 386, 387, 388, 389, 390, 391, 392

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

Upon the foregoing documents, and for reasons set forth on the record (R. Portas, Ct. Reporter, 9/30/2020), the plaintiff's motion for summary judgment (seq. no. 007) is denied and the defendant's motion for summary judgment (seq. no. 008) is granted.

As stated on the record, pursuant to an order dated March 15, 2012 (the **2012 Order**) issued by the Hon. Richard Velasquez, the parties were directed to resolve any disputed items pursuant to the dispute resolution provisions of the parties' contract (NYSCEF Doc. No. 249; NYSCEF Doc. No. 311). In any event, and for the avoidance of doubt, even if the parties had not been So-

Ordered, the contract (NYSCEF Doc. No. 311) required the plaintiff to challenge any determination of the defendant with the Dispute Resolution Officer (**DRO**) prior to bringing any action. As such, Section 4.62 of the contract provided that this was a prerequisite to bringing any action, and, to the extent that the plaintiff seeks to recover for any claims in this action that were not raised before the DRO as required by Section 4.62 or because the contract was allegedly not properly terminated notwithstanding the 2012 Order which clearly contemplates the termination of the contract and a winding down of the plaintiff's services (which were, in fact, wound down by June as indicated on the record -- i.e., approximately 60 days later), those claims must be dismissed for failure to exhaust administrative remedies.

To the extent that the plaintiff has already brought claims to the DRO pursuant to Section 4.62, those claims must be dismissed because the DRO issued a conclusive, final and binding decision dated June 22, 2012 (NYSCEF Doc. No. 297), and the plaintiff's sole remedy to challenge the DRO's decision was via an Article 78 proceeding, which the plaintiff did and which action was discontinued with prejudice without any reservation of rights (NYCSEF Doc. No. 133). As is well-settled, a "stipulation of discontinuance with prejudice has the same preclusive effect as a judgment on the merits" (*Schwartzreich v EPC Carting Co.,* 246 AD2d 439, 441 [1st Dept 1998]).

Inasmuch as the plaintiff challenges the liquidated damages upheld by the DRO determination, the plaintiff cannot relitigate the issue of liquidated damages to the extent this was already addressed by the DRO and in the Article 78 proceeding which was discontinued with prejudice.

In any event, per the contract, to avoid a liquidated damages charge due to a manufacturing problem, the plaintiff had to submit a letter from the manufacturer stating that the parts were on order (NYSCEF Doc 311, § 2.10). Here, the plaintiff is not entitled to summary judgment because the record establishes that the plaintiff submitted fraudulent letters and that not all of the parts were unavailable. For example, the plaintiff submitted a backorder purportedly from Robert Munder of Hobart Service claiming that Summit's repair work was delayed because parts were on backorder, but according to Mr. Lopresti, a Hobbart Service manager, nothing about the letter was true. There was no Mr. Munder who worked for Hobbart and the parts were not on backorder:

> … the backorder letter … did not come from Hobbart Service, and there was no Hobart Service employee named Robert Munder. Also, as indicated in Ms. Brockmeyer's response, the parts references in the letter were not on backorder but were readily available.

(NYSCEF Doc. No. 388, ¶ 4).

Although liquidated damages and actual damages can be mutually exclusive when they are duplicative, here the damages provisions are plainly not duplicative (*North Hempstead v Sea Crest Constr. Corp*., 119 AD2d 744, 746 [2d Dept 1986]). The liquidated damages and the actual damages address two distinctly different categories of damages. The liquidated damages, which were set at $100/day when Summit failed to perform within the specified time limits, addressed delays in performance, and the actual damages provided for in Article II provided for damages in the event of early termination, amounting to the difference in the contract price for the uncompleted portion of the contract and the cost to the contracting entity of completing the contract. Per the terms of the contract, "[t]he rights and remedies of the entity hereunder ***shall be in addition to, and not in lieu of,*** any rights and remedies the entity has pursuant to this contract

or by operation of law" (NYSCEF Doc. No. 311, Art. II [emphasis added]). In other words, the defendant is not precluded from recovering liquidated damages because the contract also contains a clause allowing for the recovery of actual damages in the event of early termination.

Finally, to the extent that the plaintiff argues that the defendant waived the dispute resolution section of the contract, the argument fails. The dispute resolution section requires the plaintiff to challenge the defendant's determination prior to bringing a lawsuit. It does not require the defendant to go to the DRO if it imposes liquidated damages to corroborate such imposition of if it seeks to collect the same. The fact that the contract authorizes suit to be brought in state or federal court does not mean that an Article 78 proceeding is not the proper avenue for the plaintiff to challenge the DRO's determination. Rather, it underscores the fact that the defendant could bring suit for damages and where such suit may be brought.

The court has considered the plaintiff's remaining arguments and finds them unavailing.

Accordingly, it is

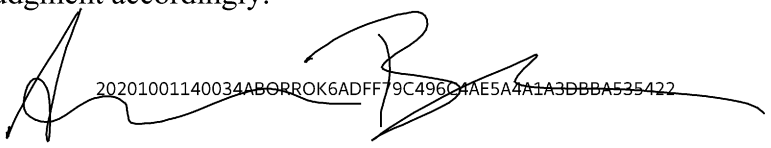
ORDERED that the plaintiff's motion for summary judgment (seq. no. 007) is denied; and it is further

ORDERED that the defendant's motion for summary judgment is granted, the complaint is dismissed and the defendant is directed to submit a proposed judgment on its counterclaim for liquidated damages within 14 days of this decision and order, on notice, and the plaintiff shall have

30 days from receipt of same to submit a proposed counter judgment and to go to the DRO with respect to any liquidated damage charges contained in such proposed judgment that were not previously brought before the DRO, and the parties should email Part 53 to notify the court of such proposed judgment and counter judgment when filed on NYSCEF; and it is further

ORDERED that the parties are directed to order a copy of the transcript and submit it to Part 53 to be So-Ordered; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.



9/30/2020
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED		DENIED	X GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE