Simmons Mach. Tool Corp. v Skanska Ecco III JV
2020 NY Slip Op 33480(U)
October 23, 2020
Supreme Court, New York County
Docket Number: 450784/2019
Judge: Jennifer G. Schecter

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JENNIFER G. SCHECTER **PART** IAS MOTION 54EFM

Justice

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SIMMONS MACHINE TOOL CORPORATION,

Plaintiff,

- v -

SKANSKA ECCO III JV A/K/A SKANSKA USA CIVIL NORTHEAST INC.,METRO-NORTH COMMUTER RAILROAD COMPANY,

Defendants.

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INDEX NO. 450784/2019

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14-22, 35, 38-52, 61-62, 65-66

were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 23-34, 36-37, 53-60, 63-65

were read on this motion to DISMISS.

Motion sequence numbers 001 and 002 are consolidated for disposition. Defendant Skanska USA Civil Northeast Inc. (Skanska) moves, pursuant to CPLR 3211(a)(1), to dismiss the complaint (Seq. 002). Defendant Metro-North Commuter Railroad Company (MNR) also moves to dismiss, pursuant to CPLR 3211(a)(1) and (7) (Seq. 001). Plaintiff Simmons Machine Tool Corporation (Simmons) opposes. The motions are granted.

Background

For purposes of this motion, the facts alleged in the complaint are assumed true. At issue are two custom "WS-04" wheel boring machines manufactured by plaintiff (the Machines) in connection with the replacement of railroad car shop facilities at the Metro-North Railroad Harmon Shop in Croton-On-Hudson, NY. In a 2013 Request for Proposal (Dkt. 17 [RFP Terms & Conditions]), MNR called for bids for design and construction

services for the Harmon Shop Replacement Program Phase-V, Stage 1, Contract No. 27044 (the Project). In September 2014, MNR entered into an agreement with Skanska for the latter party to supply labor and services for the Project (complaint ¶ 6; Dkt. 3 [MNR Agreement]). MNR contracted with non-party engineering firm AECOM to provide resident engineering and inspection services in connection with the Project (Dkt. 29 [AECOM Contract dated June 12, 2014]).

In May 2016, plaintiff and Skanska entered into a purchase agreement identified as No. PA025501-053R1, which was modified by Modification No. 001, dated February 6, 2018 (Dkt. 2 [Purchase Agreement, with MNR Agreement, Agreements]) (complaint ¶ 5). Pursuant to the Purchase Agreement, plaintiff manufactured and tested the two Machines. On November 5, 2018, MNR rejected the Machines by letter from AECOM (complaint ¶ 10; Dkt. 5 at 10 [Rejection Notice]), which stated:

> the two (2) Wheel Boring Machines, WS-04, manufactured by Simmens Machine Tool (SMT), are rejected by MNR. The SMT Wheel Boring Machines will not be accepted for installation on the Harmon Phase-V, Stage-1 project. The SMT Wheel Boring Machines have failed to perform in accordance with the Contract Specifications. Deficiencies are documented in the results of two (2) unsuccessful Factory Acceptance Tests (FATs) which were conducted by SMT, in the presence of MNR, in October, 2017, and again in May, 2018. Performance of the Wheel Boring machines during the two (2) FATs was erratic, unpredictable, and yielded values that exceeded the tolerances allowed by Contract. In addition to the two (2) formal FATs, two (2) informal factory visits were conducted by MNR in February, 2018 and again in March, 2018 to review SMT corrective actions. During the informal visits, SMT was unable to explain the precise cause(s) of the variances and exceedances which were observed during the FATs. SMT has been unable to rectify the problem(s) which is(are) causing the deficient results.

In early 2019, plaintiff served notices of claim on MTA and MNR and it subsequently commenced this suit (complaint ¶ 43; Dkt. 5 at 1-7). Simmons asserts the

following causes of action: (1) breach of the Purchase Agreement against Skanska; (2) breach of the MNR Agreement against MNR; and (3) tortious interference with contract against MNR. It maintains that Skanska owes $1,733,375 under the Purchase Agreement (complaint ¶¶ 11, 17). In connection with the second cause of action, plaintiff asserts that it is a third-party beneficiary under the MNR Agreement, or, alternatively, that Skanska assigned to plaintiff certain of its rights and responsibilities under that agreement (complaint ¶¶ 25-26). In connection with the third cause of action, plaintiff alleges that MNR tortiously interfered with Skanska's performance under the Purchase Agreement by wrongfully rejecting the Machines (complaint ¶¶ 35-40).

Defendants move to dismiss, urging that Simmons breached the Purchase Agreement because the Machines did not conform to agreed-upon specifications. They rely on Section 41 33 16.13 to Contract No. 27044 (Dkt. 28 [Specifications]), two reports from factory acceptance tests (FAT) that Simmons and Skanska conducted on the Machines and correspondence relating to the two FAT reports. The first FAT report, based on tests reportedly conducted in October 2017, was sent to MNR on November 10, 2017 (Dkt. 30 [First Results] at 3, 7). Based on the First Results, AECOM issued a submittal review to Skanska dated November 29, 2017, concluding that "Work May Not Proceed - Revise & Resubmit" (Dkt. 32 at 2 [First Review]). The First Review noted that "MNR did NOT approve shipment of this equipment. Shipment is pending satisfactory re-testing at the factory, witnessed by MNR" (*id.* at 2). In December 2017, Simmons proposed new testing criteria for the FAT (Dkt. 42 [December Letter]).

In May 2018, Simmons and Skanska conducted a second FAT, which failed the original testing criteria (Dkt. 31 [Second Results] at 4-50). Submittal review comments dated May 18, 2018 instructed plaintiff to "Proceed" and recommended the test criteria be revised (*id.* at 1). However, on July 9, 2018, AECOM communicated that the Second Results, and the accompanying comments, were not acceptable to MNR (Dkt. 33 [Second Review] at 2). An official notice of rejection followed several months later (Dkt. 5 at 10 [Rejection Notice]).

In opposition to the motion, Simmons submits an affidavit from its Project Manager Andrew Healey, who was actively involved in negotiations and performance of the Purchase Agreement (Dkt. 39 [Healy Aff.]). Healey avers that the Machines "indisputably perform their intended purpose and produce safe wheel borings" (*id.* ¶ 5). He asserts that "per industry custom and practice and the prior course of dealing" between the parties, the purpose of the Machines is satisfied if they are "capable of boring wheels to match the diameter of the corresponding axle." (*id.* ¶ 6). Any such match must account for "interference fit"—a difference in diameter between the wheel bore and a slightly larger axle that is necessary in order to safely mount a wheel onto the axle (*id.*). Healy attests that drawings provided by MNR "encourage the comprehensive management of all work piece components and processes to achieve the desired end result," which is a mountable wheel-and-axle set (*id.* ¶ 56).

Healey further explains that the Association of American Railroads Manual of Standards (AAR Manual) sets out the applicable industry standard (*id.* ¶ 8 & n 2). Under Rule 1.3.4 of the AAR Manual, an interference fit of 0.005 to 0.010 inches is generally

required to generate the necessary "mounting force" when a "wheel press" is used to mount the wheels onto the axle—that is, the axle must be 0.005 to 0.010 larger than the wheel bore (*id.* ¶¶ 9-10). A successful mount, or match between a wheel and an axle, is not evaluated by simply measuring diameter of the wheel bore and the axle, but by measuring the forces obtained during the wheel-mounting process (*id.*). Healey opines that the precision required by the contract would make wheels that are too smooth to safely mount onto the axles (*id.* ¶ 55 & nn 7-8). He points out that the "peaks and valleys" of the necessarily wavy surface range from 0.0001 to 0.0002 inches in height (*id.*. ¶ 30).

Healey contends that numerous variables outside Simmons' control affected the testing results and that the "mere reference to accuracy is too ambiguous in the industry" to refer to "cutting accuracy" as opposed to other characteristics, such as "location accuracy," and that the contract documents fail to specify how to measure cutting accuracy altogether (¶¶ 41-52).

Healey further states that MNR rejected the Machines in "bad faith." Specifically, he asserts that the AECOM representative who signed the Rejection Letter lacked the requisite expertise (*id.* ¶ 20). He also points to the signature of an AECOM representative on the First Results to "certify that the entire machine has been preliminarily inspected and accepted according to the customer specifications and is approved for shipment" (*id.* ¶ 21; Dkt. 30 [First Results] at 29). Healy also points to "older, rusty wheels" provided by MNR for testing that he alleges "did not comply with the contract and provided skewed test results" that were of "no relevance to the performance of the Machines" (Healey Aff. ¶ 31). He further attests that "Simmons conducted several tests on these older wheels and found

that the accuracy levels for them were erratic and unpredictable" (*id.* ¶ 32). Finally, he asserts that the Machines perform as intended—they are capable of successfully mounting wheels on to their corresponding axles, thereby fulfilling the purpose of the Purchase Agreement (*id.* ¶¶ 15-17).

Applicable Contracts and Project Documents

Paragraph 1 of the Purchase Agreement states:

> [Plaintiff] agrees to sell and deliver all of the materials … described in Appendix A, same to conform in all respects to all requirements of the [MNR Agreement] plans and specifications, including but not limited to requirements for submissions and approval of samples and shop-drawings or other submittals, testing and certifications, and inspection of any kind. … [Plaintiff] warrants that it has examined to its satisfaction all of the plans, specifications and Addenda to the fullest extent that [plaintiff] deems necessary to determine their applicability to the materials, quantities and delivery requirements. The effectiveness of this Agreement is and shall remain at all times subject to and conditioned upon [MNR's] approval and continued approval of [plaintiff] (Dkt. 2 at 3).

Paragraph 4, titled "Warranties," states as follows, in relevant part:

> [PLAINTIFF] EXPRESSLY WARRANTS THAT ALL GOODS AND ASSOCIATED SERVICES PURCHASED AND DELIVERED HEREUNDER: (a) SHALL BE OF GOOD QUALITY AND FREE FROM LATENT OR PATENT DEFECTS, (b) SHALL BE SAFE FOR THEIR SPECIFIED OR CUSTOMARY USE; (c) IF OF [PLAINTIFF]'S DESIGN, MEET ALL PERFORMANCE REQUIREMENTS AND BE FREE FROM DEFECTS IN DESIGN; AND (d) SHALL CONFORM TO THE SPECIFICATIONS STATED OR REFERENCED ON THE FACE HEREOF, OR ATTACHED TO THIS ORDER (*id.* at 4).

Appendix A to the Purchase Agreement obligates plaintiff to "factory test" the purchased equipment, including two "WS-04 Wheel Boring Machine with Loader WTC-

60" to conform to the Specifications (*id.* at 8). The Specifications were also made part of the MNR Agreement (*see* Dkt. 3 [MNR Agreement] at 8 ¶ 9 [defining contract to include "Technical Provisions"]; *id.* at 9 [defining Technical Provisions to include the "Technical Specifications" provided to Skanska]).

Part 2.01 of the Specifications, titled "Wheel Boring Machine," lays out the specifications for the equipment at issue (Dkt. 28 [Specifications] at 3-12). Subsection (D)(5), under the heading "General Requirements," states that "The boring mill shall be capable of meeting all of the requirements listed in the AAR Manual of Standards and Recommended Practices Wheel and Axle Manual" (*id.* at 4). Section 2.01(E)(3), states that "[f]or each wheel type, the boring machine shall produce the desired bore, concentricity, taper and finish within the tolerances listed in this Section and without degradation for a minimum of 24 number of consecutive wheels bored" (*id.* at 5). Section 2.01(H)(7), under the heading "Dimensions and Capacities," states as follows:

> 7. Boring mill shall be capable of achieving the following tolerances for all wheels:
>
> a. Accuracy: 0.0005 inch.
> b. Concentricity: 0.0005 inch.
> c. Taper: 0.0005 inch.
> d. TIR: 0.0005 inch.
> e. Repeatability: 0.0005 inch.

(*id.* at 12).

Part 3.03, of the Specifications, titled "Factory Testing," states that "Manufacturer shall perform a comprehensive operational test to the Wheel Boring Machine … in the presence of MNR Mechanical Department," with results to be reported to Skanska in the form of a "Test Report" (*id.* at 18). The test is required to "demonstrate that the wheel borer can successfully machine each of MNR's wheels within the production rates and tolerances

indicated herein" (*id.*). Finally, the section provides that "Wheels for the factory test will be made available by MNR" (*id.*).

The copy of the First Results submitted by defendants includes the FAT protocol, drafted with input by one or more of plaintiff's employees (*see* Dkt. 30 at 5, 29 [AJH stands for Andrew J. Healey]; *see also* Dkt. 2 [Purchase Agreement] at 10 [specifying that plaintiff will prepare a FAT "test document and submit it as part of submittals"]). Section 6.3 of the First Results, titled "Wheel Boring Record," includes as follows:

> 41 33 16.13 Section 2.01 H 7 Specified Tolerances for Wheel Bore
>
> a.) Accuracy/Repeatability: 0.0005 inch.
>
> b.) Concentricity / d.) TIR: 0.0005 inch.
>
> c.) Taper: 0.0005 inch.
>
> Accuracy and Repeatability will be established by setting a target wheel bore diameter located 1 inch from the back (inner) hub face and comparing that target to the actual post-probed bore diameter at the same location. ***The post-probed bore diameter reported by the WTC should not vary by more than 0.0005 inches from the target bore diameter.*** The post-probe bore measurement on the WTC will measure the diameter in two planes, 90 degrees apart, and will average the results. A hand measurement will be taken with an inside micrometer or bore gauge on at least one wheel to verify the accuracy of the post-probe dimension reported from the WTC. The hand measurement will be taken at the same locations used by the post-probe cycle on the WTC. ***The hand measurement and the post-probe bore diameter from the WTC should not vary by more than 0.0005 inches.***
>
> ***The repeatability will be established by boring a series of wheels provided by MNRR***. The following wheel types and quantities will be processed on each WTC60:
>
> • M2 - Qty. 4 Per Machine
> • BOM - Qty. 4 Per Machine

- M7 - Qty. 4 Per Machine
- MN1, MN2 - Qty. 1 Per Machine
- BL-20 - Qty. 4 Per Machine
- BL-14 - Qty. 4 Per Machine

(*id.* at 12-13 [emphasis added]). The protocol also includes "data sheets" for each wheel type (*id.* at 14).

While the Second Results (Dkt. 31) exclude the form that was included with the First Results, the document uses the "data sheet" pages for reporting the measurements achieved by the tests. The comments on the Second Results note that the "data appears to either meet or closely approach the project requirements" and that the measurements outside the specified range "tend to be very slight and potentially attributable to human and/or instrument error" (Dkt. 31 at 1). The comments suggest that "more frequent tool changes" may help with "conformity to the project requirements" (*id.*). The comments further assert that "the fine tolerances required by MNR are difficult for any manufacturer to achieve, and as a result should be interpreted as a goal to strive closely towards rather than an absolute requirement to determine disqualification" (*id.*) Finally, the comments note that "these wheels may still potentially be successfully matched with correspondingly sized axles to produce AAR conforming wheelsets," and that the Machines "should be further tested as part of a larger shop system field test after installation" (*id.*).

MNR's comments on the Second Review (Dkt. 33) state as follows:

> Status: Work May Not Proceed - Revise & Resubmit
>
> 1. 2nd FAT Results are NOT acceptable to MNR.
> 2. EOR review comments and approval are also NOT acceptable to MNR.
> 3. Submitted results exceed maximum specified contract tolerances for bore diameter accuracy, taper and repeatability (Spec 413316.13, Section 2.01, H-7):

- 8/16 Failed Results – BOM's tested on Machine 98SN on 05/08/18.
- 7/8 Failed Results - M7, M8 tested on Machine 98SN on 05/09/18.
- 4/4 Failed Results - M7, M8 tested on Machine 99SN on 05/09/18.
- 2/4 Failed Results - BL-20's tested on Machine 99SN on 05/09/18.
- 10/16 Failed Results - M2, M3A, M4, M6 tested on Machine 99SN on 05/10/18.

4. The number and frequency of failures also fails to meet the contract repeatability requirement (Spec 413316.13, Section 2.01, E-3).

Legal Standards

A motion to dismiss must be denied if the complaint sets forth a viable cause of action. Deficiencies in the pleading may even be remedied by proper affidavits (*see Amaro v Gani Realty Corp.*, 60 AD3d 491, 492 [1st Dept 2009]; *see also Leon v Martinez*, 84 NY2d 83, 88 [1994]). On a motion to dismiss, moreover, the facts alleged in the complaint are accepted as true, as are all reasonable inferences in plaintiff's favor that may be gleaned from them (*see Amaro*, 60 AD3d at 492; *Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003]). "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration" (*Skillgames*, 1 AD3d at 250). Under CPLR 3211(a)(1), a motion to dismiss will be granted if "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], citing *Leon*, 84 NY2d at 88 [1994]). Testing reports that meet this standard may be considered documentary evidence under CPLR 3211(a)(1) (*see Sempra Energy Trading Corp. v BP*

Products North America, Inc., 52 AD3d 350, 350 [1st Dept 2008] [report showing compliance with technical specifications conclusively established contractual conformity]).

The elements of a claim for breach of contract include "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Contracts "are construed in accord with the parties' intent," the best evidence of which is the language of the contract itself, read as a whole (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569, 572 [2002]). "Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*id.* at 569). Contractual language is unambiguous if it has "a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion" (*Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 355 [1978]; *see Perella Weinberg Partners LLC v Kramer*, 153 AD3d 443, 446 [1st Dept 2017] ["To be found ambiguous, a contract must be susceptible of more than one commercially reasonable interpretation"]).

Whether a contract is ambiguous "is a question of law to be resolved by the courts" (*W.W.W. Assocs., Inc. v Giancontieri*, 77 NY2d 157, 162 [1990]). Moreover, "provisions in a contract are not ambiguous merely because the parties interpret them differently" (*Mount Vernon Fire Ins. Co. v Creative Hous. Ltd.*, 88 NY2d 347, 352 [1996]). Extrinsic or parol evidence—outside the four corners of the document—is "admissible only if a court finds an ambiguity in the contract" (*Schron v Troutman Sanders LLP*, 20 NY3d

430, 436 [2013]). "A contract should not be interpreted to produce a result that is absurd, commercially unreasonable or contrary to the reasonable expectations of the parties" (*Matter of Lipper Holdings v Trident Holdings,* 1 AD3d 170, 171 [1st Dept 2003] [citations omitted]). Moreover, "[i]n construing a contract, one of a court's goals is to avoid an interpretation that would leave contractual clauses meaningless" (*Two Guys from Harrison-N.Y., Inc. v S.F.R. Realty Assoc.*, 63 NY2d 396, 403 [1984]). Accordingly, "conflicting contract provisions should be harmonized, if reasonably possible, so as not to leave any provision without force and effect" (*Isaacs v Westchester Wood Works, Inc.*, 278 AD2d 184, 185 [1st Dept 2000]).

Discussion

Defendants urge that the documentary evidence establishes that the Machines did not conform to the Specifications under the Purchase Agreement. In opposition, plaintiff argues that the Specifications are ambiguous or were simply misinterpreted, that plaintiff substantially performed and that defendants rejected the machines in bad faith, having failed to account for several technical factors in evaluating the test results or to give plaintiff enough chances to pass the tests. Plaintiff further argues that the industry custom is to avoid strict testing parameters altogether and, instead, consider whether mountable wheels are produced.

Parties are "free by apt and certain words to effectuate a purpose that performance of every term shall be a condition of recovery" (*Jacob & Youngs v Kent*, 230 NY 239, 243 [1921] [Cardozo, J.]). Here, plaintiff agreed that the Specifications were applicable to the Machines, that the Machines would conform to those Specifications and that plaintiff's

submittals would be subject to MNR's approval process. The "apt and certain words" of the Purchase Agreement rendered the Specifications material.

The documentary evidence conclusively establishes that all parties understood that the "Accuracy" and "Repeatability" standards in the Specifications expressly required the Machines to bore 24 consecutive wheels within the ±0.0005-inch range of the specified diameter. Indeed, plaintiff's December Letter acknowledged that it sought to modify the required Specifications by widening the tolerance range and allowing for some test failures (*see* Dkt. 42 [December Letter] at 1 ["(Plaintiff) has expressed concern about meeting the accuracy and repeatability requirement of 0.0005 inches over a total of 24 consecutive wheels as specified [in] sections 4133 16.13 Part 2.01 H7 and 4133 16.13 Part 2.01 E3 of the specification for the Machine[s]" (emphasis added)]). Plaintiff points to industry practice and the course of performance of other contracts in a conclusory fashion, without pointing to any contracts with similar specifications. Replacing the accuracy and repeatability provisions in the Specifications with an entirely different standard would render those provisions meaningless.

Forgiving compliance with them would rewrite the parties' bargain as well. Plaintiff asserts that the relevant criteria in the Specifications, which the Machines indisputably failed to meet in both FATs, were not material terms. But the Machines not only breached the express warranty that they would "CONFORM TO THE SPECIFICATIONS," but failed the criteria that plaintiff expressly warranted that it had "examined to its satisfaction … [to] the fullest extent that [it] deem[ed] necessary to determine their applicability" (Dkt. 2 at 3-4). Plaintiff cannot say that it "substantially performed" when it explicitly agreed

that the Specifications, including the accuracy tolerances, were applicable (*cf. Danann Realty Corp. v Harris*, 5 NY2d 317, 323 [1959] [plaintiff asserting that it reasonably relied on oral representations contrary to its own contractual representation that it had eschewed such reliance "is guilty of deliberately misrepresenting to the seller its true intention"]). Plaintiff cannot sue for breach of contract when the documentary evidence establishes that it was the breaching party.

Plaintiff next rejects the Specifications for a litany of technical reasons. But it was plaintiff's contractual obligation, prior to signing the Purchase Agreement, to examine and reject the Specifications if they were inapplicable, meaningless, counterproductive or downright impossible. Indeed, neither the impossibility doctrine nor the frustration of purpose doctrine applies absent an unanticipated intervening event (*see Kel Kim Corp. v Central Mkts.*, 70 NY2d 900, 902 [1987]) or change in circumstances (*see PPF Safeguard, LLC v BCR Safeguard Holding, LLC*, 85 AD3d 506, 508 [1st Dept 2011]). The specifically bargained-for and agreed-upon criteria cannot be excused or altered by the court.

Plaintiff further accuses MNR of rejecting the Machines in bad faith. Even assuming contractual privity between plaintiff and MNR, or a theory upon which plaintiff could hold Skanska liable for MNR's bad faith, the allegation cannot be used to override an express contractual term (*see Fesseha v TD Waterhouse Inv. Services, Inc.*, 305 AD2d 268, 268 [1st Dept 2003] ["the covenant of good faith and fair dealing … cannot be construed so broadly as effectively to nullify other express terms of a contract, or to create independent contractual rights"]). MNR's unwillingness to accept the non-compliant Machines, which Simmons' own tests and correspondence showed failed to meet the contractual

specifications, is not grounds for alleging "bad faith." Nor can plaintiff complain about "a limited number of wheels" in the absence of any contractual provision requiring MNR to send more than the 24 required for the FAT.

While plaintiff asserts that MNR supplied defective wheels in bad faith and wrongfully deprived plaintiff of opportunities to resubmit the Machines for testing, plaintiff failed to allege, in nonconclusory fashion, that the Machines would have passed with better-quality wheels or with additional tests (*see Kooleraire Serv. & Installation Corp. v Bd. of Ed. of City of New York*, 28 NY2d 101, 106 [1971] ["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"]). Simmons, moreover, used those wheels in its testing.

In the end, Simmons attacks the testing criteria that, by virtue of the contracts, it gave MNR the right to insist on. Plaintiff's assertions that AECOM waived the Specifications by signing the First Results are unsustainable in light of the First Review in which MNR rejected the shipment outright (*see* Dkt. 2 [Purchase Agreement] at 3 [agreeing to MNR submittal reviews]).

The causes of action asserted against MNR are also dismissed. Because plaintiff, not Skanska, failed to perform under the Purchase Agreement, MNR did not actionably interfere with Skanska's performance thereunder. And because the Specifications were no less binding under the MNR Agreement than the Purchase Agreement, plaintiff has no cause of action for breach of contract against MNR, even if plaintiff could establish privity

or its status as an intended beneficiary or assignee, issues that are unnecessary and need not be reached.

Conclusion

Because the documentary evidence conclusively establishes that the Machines failed to comply with the Specifications on at least two occasions, and plaintiff failed to sufficiently allege that it would have fully performed under either of the Agreements but for a contractual breach or tortious conduct of either defendant, the complaint is dismissed.

Accordingly, it is

ORDERED that the motions by defendants Skanska USA Civil Northeast Inc. and Metro-North Commuter Railroad Company to dismiss the complaint are granted, and the Clerk is directed to enter judgment dismissing the complaint with prejudice.

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10/23/2020
DATE

JENNIFER G. SCHECTER, J.S.C.

CHECK ONE: [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION

[X] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER