SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **IAS MOTION 38EFM**

Justice

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AIR TECH LAB, INC.,

Plaintiff,

- v -

NEW YORK CITY HOUSING AUTHORITY, and JACOBS ENGINEERING NEW YORK INC.,

Defendants.

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INDEX NO. 654434/2018

MOTION DATE 10/24/2018, 10/25/2018

MOTION SEQ. NO. 001, 002

DECISION + ORDER ON MOTION

LOUIS L. NOCK, J.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 30, 34, 35, 36, 38, 42

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, 32, 33, 37, 39, 40, 41, 43

were read on this motion to/for DISMISS.

Upon the foregoing documents, the motions of defendant Jacobs Engineering New York, Inc. (motion seq. 001) and defendant the New York City Housing Authority (motion seq. 002) to dismiss the complaint are consolidated herein for decision and are each granted in part, in accord with the following memorandum decision and order.

Background

On or about April 29, 2015, plaintiff Air Tech Lab, Inc. ("Plaintiff") entered into an agreement (the "Contract") with defendant the New York City Housing Authority ("NYCHA") for Plaintiff to perform work consisting of, *inter alia*, asbestos abatement, cleaning and restoration of crawl spaces at various NYCHA developments in New York City in connection with the Superstorm Sandy recovery (the "Project") (complaint ¶ 5; NYSCEF Doc No 1).

Defendant Jacobs Engineering New York ("Jacobs") (together with NYCHA, the "Defendants") served as Construction Manager for the Project (*id.* ¶ 6). The initial contract price for the Agreement was $8,280,099.10, which was subsequently adjusted to approximately $14,400,000.00 (complaint ¶ 7; NYSCEF Doc No 1). Plaintiff alleges that it was "at all times in compliance with the Contract and duly, fully, and correctly performed its work on the Project as required by the Contract and pursuant to the direction and order of both NYCHA and Jacobs (*id.* ¶ 8), but that "NYCHA has failed to comply fully with its obligations under the aforesaid Contract, and Jacobs failed to perform its obligations in connection with the Contract" (*id.*). Plaintiff alleges that it is owed $3,538,286.92 for amounts due under the Contract.

Central to the dispute between the parties is a disagreement regarding billing for the re-insulation of pipe elbows at the Project. Plaintiff alleges that Jacobs, an "authorized agent" for NYCHA, "expressly approved for purposes of billing NYCHA," a fixed multiplier of 2 linear feet for every pipe elbow that Plaintiff re-insulated (Lainas affirmation in support ¶ 4; NYSCEF Doc No 32). Plaintiff also alleges that it submitted "daily reports of its completed pipe insulation quantities to Jacobs to be reviewed, approved and certified for accuracy," and "Jacobs did in fact approve and certify that [Plaintiff's] quantities were accurate, which confirm that this approved method of quantification of pipe elbows was in place" (*id.*). Neither Jacobs nor NYCHA have disputed that Jacobs approved the 2 to 1 multiplier or that Jacobs was an authorized agent of NYCHA.

NYCHA alleges that, during the fall of 2016 and the winter of 2017, its Office of the Inspector General (the "OIG") audited and investigated Plaintiff's work on the Contract and "discovered pervasive overbilling" by Plaintiff (Nahmias affirmation ¶ 4; NYSCEF Doc No 15). According to NYCHA, "the OIG's review of [Plaintiff's] billing indicated that [Plaintiff]

overbilled [NYCHA] for 50,000 linear feet of insulation the OIG alleges [Plaintiff] never installed" (*id.*). Based on the investigation, NYCHA withheld $1.5 million in future payments to Plaintiff pending completion of the investigation (*id.* ¶ 6). During the pendency of the investigation, on or about April 7, 2017, Plaintiff sent NYCHA a Verified Notice of Claim (the "Notice of Claim") to provide notice to NYCHA of the claims upon which this action is founded, in accordance with the Contract and New York Public Housing Law § 157 (*id.* ¶ 9). In June 2017, Plaintiff and NYCHA met with OIG staff to discuss the issues raised by the investigation (*id*. ¶ 9). After the meeting, Plaintiff submitted additional documentation regarding its claim to the OIG (*id*.). On or about September 15, 2017, Plaintiff sent a letter to the OIG demanding a conclusion to the investigation and a determination regarding the Plaintiff's billing under the Contract (*id.* ¶ 10). On or about October 2, 2017, Plaintiff filed an Article 78 Petition in the Supreme Court, New York County to compel NYCHA to complete the OIG's investigation (*id.* ¶ 11). Upon motion of NYCHA and an order of the court dated April 4, 2018, the Article 78 proceeding was dismissed (*id.*, exhibit 10; NYSCEF Doc No 25). The court held, in relevant part, that a "mandamus to compel may not be awarded to compel an act which involves the exercise of judgment or discretion. Clearly, the decision of how to conduct the investigation of petitioner's billing practices and when to conclude any such investigation is a matter of discretion and thus the remedy of mandamus does not lie" (*id.* [internal citation omitted]).

On or about July 21, 2018, Plaintiff sent NYCHA a Supplemental Verified Notice of Claim (the "Supplemental Notice of Claim") (*id.* ¶ 10). A portion of the claim set forth in the Supplemental Notice of Claim is for unbilled pipe re-insulation work in the amount of $1,021,785.00 (complaint, exhibit 2; NYSCEF Doc No 3). Plaintiff alleges that it did not bill this portion of the work because Jacobs instructed it not to bill the work during the pendency of the

OIG's investigation (Lainas affirmation ¶ 6, exhibit A; NYSCEF Doc Nos 32-33). After receiving the Supplemental Notice of Claim, NYCHA requested, by letter dated August 20, 2018, that Plaintiff "forward all documentation supporting [its] claims for unbilled amounts for completed work" to NYCHA (Nahmias affirmation ¶ 24, exhibit 11; NYSCEF Doc Nos 15, 26). Counsel for Plaintiff responded to this request by letter dated September 6, 2018, which attached a copy of the Supplemental Notice of Claim and several exhibits containing documents (*id.*, exhibit 12; NYSCEF Doc No 27). At oral argument on this motion, NYCHA's counsel indicated that the OIG had completed its investigation and concluded that Plaintiff had overbilled on the account, leading NYCHA to withhold $2.5 million in payments to Plaintiff (NYSCEF Doc No 42 at 25). Said counsel declined to provide a supplemental briefing in this motion practice, which the court invited, that would expound on the outcome of the OIG investigation (*id.* at 25-27).

Plaintiff commenced this action to collect $3,538,286.92 it alleges is owed for unpaid work completed pursuant to the Contract, including the unbilled work in the amount of $1,021,785.00 included in the Supplemental Notice of Claim. The Complaint asserts causes of action against NYCHA for breach of contract, *quantum meruit*, account stated, and unjust enrichment, and against Jacobs for breach of contract, *quantum meruit*, unjust enrichment, and "functional equivalent of privity/negligent misrepresentation."

Standard of Review

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 the plaintiff's favor (*see JF Capital Advisors, LLC v Lightstone*

Group, LLC, 25 NY3d 759, 764 [2015]). "The motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002][internal citations omitted]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*Cortlandt Street Recovery Corp. v Bonderman*, 31 NY3d 30, 38 [2018]), but 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* 552 US 1257 [2008]) and "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]).

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]). Affidavits and deposition testimony do not qualify as documentary evidence for the purposes of CPLR 3211 (a) (1) (*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 (*Kolchins v Evolution Mkts., Inc*., 31 NY3d 100, 106 [2008]) may be considered.

A. Jacobs Motion

Jacobs moves to dismiss the causes of action asserted against it on the grounds that no contract exists between it and Plaintiff (breach of contract), because Plaintiff provided no services to Jacobs (*quantum meruit* and unjust enrichment), and because no privity or privity-like relationship exists between it and Plaintiff (negligent misrepresentation). In opposition, Plaintiff asserts that Defendant is liable for breach of contract due to either the doctrine of implied warranty of authority or the doctrine of tortious misrepresentation and assurances of payment. In the alternative, Plaintiff argues that it has adequately stated a claim for negligent misrepresentation or that Jacobs is subject to liability for Plaintiff's claims under criteria established by the Court of Appeals in *Prudential Ins. Co. of Am. v. Dewey, Ballentine, Bushby, Palmer & Wood* (80 NY2d 377 [1992], *rearg denied* 81 NY2d 955 [1993]) for finding liability against a "non-privy" third party (Lainas affirmation, ¶ 22; NYSCEF Doc No 34).

As an initial matter, Plaintiff has abandoned its causes of action for *quantum meruit* and unjust enrichment against Jacobs. A plaintiff abandons a claim by failing to address in its opposition papers the defendant's arguments in support of a motion seeking dismissal of that claim (*Saidin v Negron*, 136 AD3d 458, 459 [1st Dept] ["Plaintiff abandoned his claim against the individual police officer by failing to oppose that part of the motion to dismiss the claim as against him"], *appeal dismissed* 28 NY3d 1069 [2016], *rearg denied* 28 NY3d 1168, *cert denied* 138 S Ct 108 [2017], *rehearing denied* 138 S Ct 725 [2018]; *Ng v NYU Langone Medical Ctr*., 157 AD3d 549, 550 [1st Dept 2018] ["Plaintifs failure to oppose so much of the motion as sought dismissal of the lack of informed consent claim, constituted an abandonment of the

claim"]). Plaintiff has, therefore, abandoned its causes of action for *quantum meruit* and unjust enrichment by failing to address Jacobs' arguments with respect to these causes of action. Moreover, Plaintiff fails to state a claim for either cause of action because Plaintiff does not allege that it provided any services to Jacobs, an essential element of both claims (*see Martin H. Bauman Associates, Inc. v. H & M Intern. Transport, Inc.*, 171 AD2d 479, 484 [1st Dept 1991]; *Joan Hansen & Co., Inc. v. Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 108 [1st Dept 2002]). Therefore, Plaintiff's causes of action for *quantum meruit* and unjust enrichment against Jacobs are dismissed.

To state a cause of action for breach of contract, a plaintiff must plead the existence of a contract between the parties, plaintiff's performance, the defendant's breach, and damages (*Belle Lighting LLC v Artisan Construction Partners LLC*, 178 AD3d 605, 606 [1st Dept 2019]). Although Plaintiff pleads that Jacobs is a party to the Contract (complaint ¶ 5; NYSCEF Doc No 1), documentary evidence before the court—the Contract itself—demonstrates that Jacobs is irrefutably not a party to the Contract. Plaintiff's cause of action for breach of contract, therefore, fails.

Plaintiff's assertion that the doctrines of "implied warranty of authority" and "tortious misrepresentation of authority and assurances of payment" redeem its otherwise deficient cause of action for breach of contract is incorrect, but it is nonetheless incumbent on this court to determine whether Plaintiff has stated an independent claim for either breach of the implied warranty of authority or for tortious misrepresentation of authority and assurances of payment because the motion must be denied "if from the pleadings' four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 West 232nd Owners*, 98 NY2d at 152).

The doctrines of implied warranty of authority and tortious misrepresentation of authority and assurances of payment are related theories of liability that are all predicated on a circumstance where one party incorrectly represents to another that it has authority to bind a third party. "Under the doctrine of implied warranty of authority, a person who purports to make a contract, representation, or conveyance to or with a third party on behalf of another person, lacking power to bind that person, gives an implied warranty of authority to the third party and is subject to liability to the third party for damages for loss caused by breach of that warranty, including loss of the benefit expected from performance by the principal" (*DePetris & Bachrach*, 71 AD3d 460, 461 [1st Dept 2010], citing Restatement [Third] of Agency § 6.10 [2006]). "Under the doctrine of tortious misrepresentation and assurances of payment, if the person who falsely claims to have power to bind another knows that the claim is untrue, the person has made a fraudulent misrepresentation and is subject to liability to those who, justifiably relying on the representation, suffer a loss as a consequence" (*id.*, citing Restatement (Third) of Agency § 7.01 [2006]).

Plaintiff's claims against Jacobs are predicated on the theory that Jacobs incorrectly represented to Plaintiff that he had the authority to bind NYCHA to the 2 to 1 multiplier for the purposes of billing and payment requisitions (*see*, Lainas affirmation ¶ 13 ["If it is ultimately found that Jacobs was not authorized as it claims, then Jacobs would be liable to Air Tech for breach of contract under the doctrine of implied warranty of authority, or alternatively, . . . on theories of negligent or tortious misrepresentation."). In relevant part, Plaintiff alleges that Jacobs was authorized to and did direct Plaintiff to perform work on the Project (complaint ¶¶ 54, 71; NYSCEF Doc No 1); failed to properly administer the Contract or acted beyond its authority (*id.* ¶ 56); that Plaintiff "performed its work on the Project pursuant to Jacobs'

directions and instructions, and in accordance with the terms of the Contract" (*id.* ¶ 72); and that Jacobs "set forth, agreed to, approved and/or confirmed" use of the 2 to 1 multiplier (*id.* ¶ 74), which Plaintiff relied on when preparing its requsitions for payment, to its detriment (*id.* ¶ 75-78). Taken together, and affording Plaintiff the benefit of every possible favorable inference, these allegations are sufficient to plead a cause of action for breach of the doctrine of implied warranty of authority, but they lack the knowledge element required to support a cause of action for breach of the doctrine of tortious misrepresentation of authority and assurances of payment. Accordingly, Plaintiff's cause of action for breach of contract is dismissed with leave to replead a cause of action for breach of the implied warranty of authority.

A claim for negligent misrepresentation "requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 180 [2011]). For the purposes of satisfying the first element of the claim, a special relationship "may be established by persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified" (*id*. at 180 [internal quotation omitted]). Alternatively, the first element of the cause of action may be satisfied where the plaintiff alleges "(1) an awareness by the maker of the statement that it is to be used for a particular purpose; (2) reliance by a known party on the statement in furtherance of that purpose; and (3) some conduct by the maker of the statement linking it to the relying party and evincing its understanding of that reliance" (*Prudential*, 80 NY2d at 384). The allegations set forth above with respect to the breach of implied warranty of authority are sufficient to allege that Jacobs mispresented "the method by

which [Plaintiff] was to measure the quantity of pipe insulation in accordance with the Contract" (complaint ¶ 74; NYSCEF Doc No 1), and to state a cause of action for negligent misrepresentation. With respect to the first element of the claim, the Contract specifically identifies Jacobs as its "agent to oversee and direct [Plaintiff's] performance of the Work under the Contract." As such, Jacobs had a duty to impart correct information to Plaintiff. The Contract documents, email communications between Plaintiff and Jacobs, and other documentary evidence submitted on the motion demonstrate that Jacobs was aware that Plaintiff would use the 2 to 1 multiplier for the purposes of billing and requisition and that Plaintiff did, in fact, rely on it. Plaintiff has also sufficiently pled that the representation was incorrect and that its reliance was reasonable due to Jacobs' designation as NYCHA's agent, satisfying the remaining elements of the claim. As such, Jacobs' motion is denied with respect to the cause of action for negligent misrepresentation.

B. NYCHA Motion

In the second motion, NYCHA moves to dismiss that portion of Plaintiff's cause of action for breach of contract that seeks damages for unbilled work in the amount of $1,021,785.00, on the ground that Plaintiff has waived this claim by not complying with Special Conditions Section 33 of the Contract. NYCHA also moves to dismiss in full the causes of action for *quantum meruit* and unjust enrichment on the ground that they are precluded by the existence of the Contract, and the cause of action for an account stated on the ground that Plaintiff has failed to state a *prima facie* cause of action. In opposition, Plaintiff asserts that it complied with Section 33 of the Contract or, in the alternative, it was excused as a matter of law, that *quantum meruit* and unjust enrichment may be pled in the alternative because a bona fide dispute exists

regarding the existence of a contract as it pertains to the 2 to 1 multiplier, and finally, Plaintiff contends that it has stated a *prima facie* cause of action for an account stated.

NYCHA first argues that Plaintiff has waived its breach of contract claim for the unbilled work in the amount of $1,021,785.33 because it failed to comply with the Special Conditions Section 33 of the Contract ("Section 33"). Section 33 sets forth the procedure for a contractor to make claims to NYCHA for extra work provided under the Contract, and provides, in relevant part, the following:

> If the Contractor claims that any instructions of the Authority . . . involve Extra Work entailing extra cost . . . the Contractor shall, within twenty (20) days after such claim shall have arisen, file with the Authority written notice of intention to make a claim for such extra cost or damages . . . . If the Authority shall deem it necessary for proper decision, upon any notice filed hereunder, to require additional data, depositions or verified statements, the Contractor must furnish the same within twenty (20) days after written demand therefor upon him/her. The time period within which the Contracting Officer shall decide the claim or notify the Contractor of the date by which the decision will be made, as set forth In Section 31(d) of HUD Form 5370 (as may be modified by ARTICLE I, Section 3(f)(1) of the Supplemental information), shall not commence until such time as the Contractor has furnished all such additional data and verified statements required by the Authority and, if so required by the Authority, all such depositions are complete.

(Nahmias affirmation, exhibit 2; NYSCEF Doc No 17). Failure to comply with conditions precedent of a contract "generally constitutes a waiver of claim" (*Schindler Elevator Corp. v Tully Constr. Co., Inc.*, 139 AD3d 930, 931 [2d Dept 2016]).

The request in question arose during the pendency of the OIG's investigation. As alleged by NYCHA, on or about June 21, 2018, Plaintiff submitted a Supplemental Notice of Claim to NYCHA, which included a claim for $1,021,785.33 for unbilled work. Then, by letter dated August 20, 2018, NYCHA requested that Plaintiff "forward all documentation supporting [Plaintiff's] claims for unbilled amounts for completed work" to NYCHA (*id.* ¶ 15). Counsel to Plaintiff responded to NYCHA's request by letter dated September 6, 2018, in which Plaintiff

objected to NYCHA's request on the grounds that NYCHA had breached the Contract by failing to render a decision on Plaintiff's claims within 60 days, demanded that NYCHA complete its investigation and render a decision on the claims, and argued that the documents requested were either already in NYCHA's possession or irrelevant to the OIG's investigation. A copy of Plaintiff's Supplemental Notice of Claim and various exhibits with documentation were attached to the September 6, 2018, letter.

The parties dispute whether Plaintiff's September 6, 2018, response was sufficient for the purposes of Section 33. In the alternative, Defendant argues that the condition precedent is excused as a matter of law because NYCHA breached the contract by failing to render a decision on Plaintiff's claim within 60 days as required by Section 31(d) of the General Conditions and Section 3(f) of the Special Conditions of the Contract or because NYCHA's Section 33 request was made in bad faith. Finally, Plaintiff argues that waiver of the claims due to non-compliance with the condition precedent would result in a "disproportionate forfeiture," and should therefore, be excused. It is the determination of this court that these issues present questions of fact which cannot be resolved on a motion to dismiss. Plaintiff's response to NYCHA's notably general request that it "forward all documentation supporting [Plaintiff's] claim for unbilled work" requires a factual inquiry into, *inter alia*, the nature of NYCHA's request, the substance of the response provided, what documentation Plaintiff had already provided to NYCHA, what documentation was available to Plaintiff, and so forth. Because this type of inquiry is not appropriate on a motion to dismiss, NYCHA's motion is denied with respect to the breach of contract cause of action.

NYCHA next moves to dismiss the causes of action for *quantum meruit* and unjust enrichment on the grounds that they are barred by the existence of an enforceable contract. It is

well established that a Plaintiff may not recover in *quantum meruit* or unjust enrichment where a contract governs the subject matter (*Centennial Elevator Indus., Inc. v New York City Hous. Auth.*, 129 AD3d 449, 450 [1st Dept 2015] ["Plaintiff may not recover in *quantum merit* or unjust enrichment given that the contract governs the subject matter."]). Here, there is no bona fide dispute regarding the existence of the Contract, and Plaintiff's allegations regarding the price for the re-insulation of pipe elbows must be evaluated within the context of that agreement. The causes of action for *quantum meruit* and unjust enrichment are, therefore, dismissed.

Finally, NYCHA moves to dismiss Plaintiff's claim for an account stated. "An account stated is an account, balanced and rendered, with an assent to the balance either express or implied" (*Abbot, Duncan & Wiener v Ragusa*, 214 AD2d 412, 413 [1st Dept 1995]). "[T]he very meaning of an account stated is that the parties have come together and agreed upon the balance of indebtedness . . . so that an action to recover the balance as upon an implied promise of payment may thenceforth be maintained" (*Herrick, Feinstein LLP v Stamm*, 297 AD2d 477, 478 [1st Dept 2002]). A cause of action for an account stated may be established by demonstrating either partial payment or retention of bills without objection (*see Morrison Cohen Singer and Weinstein, LLP v Waters*, 13 AD3d 51 [1st Dept 2004]), but "[t]here can be no account stated where no account was presented or where any dispute about the account is shown to have existed" (*Abbott, Duncan & Wiener & Ragusa*, *supra*).

In the matter currently before the court, the Complaint alleges that "Air Tech furnished invoices and statements of account to Defendants in the amount of $3,538,286.92," and "Defendants have received said invoices and statements of account and have failed to contest or refute same" (complaint ¶¶ 44-45; NYSCEF Doc No 1). The latter of these allegations is utterly refuted by the documentary evidence that demonstrates that the OIG conducted an audit of

Plaintiff's work and billing and withheld $1.5 million of any future payments to Plaintiff (Nahmias affirmation, exhibits 19-20), which Plaintiff does not dispute. In light of the ongoing audit, Plaintiff cannot demonstrate that NYCHA failed to refute or contest the invoices and statements of account presented, and NYCHA has conclusively established a defense as a matter of law (*see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d at 326 [dismissal under CPLR 3211(a)(1) is warranted "where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law"]).[1] Thus, the cause of action for account stated is dismissed.

Accordingly, it is

ORDERED that the motion to dismiss is granted in part, and the second, third, fourth, fifth, sixth, and seventh causes of action of the complaint are dismissed; and it is further

ORDERED that plaintiff is granted leave to serve and file an amended complaint in which the fifth cause of action is repleaded as a cause of action for breach of the implied warranty of authority; and it is further

ORDERED that the amended complaint shall be served and filed within 30 days after service on plaintiff's attorney of a copy of this order with notice of entry; and it is further

ORDERED that, in the event that plaintiff fails to serve and file an amended complaint in conformity with the deadline set forth herein, leave to replead shall be deemed denied; and it is further

[1] It is unclear whether Plaintiff also intended to interpose a cause of action for an account stated against Jacobs; but, to the extent that it has, that cause of action fails against Jacobs for reasons set forth herein as against NYCHA, and also because Plaintiff has not demonstrated that Jacobs was a party to the Contract or was otherwise billed for Plaintiff's work. Plaintiff has also waived any such claim by failing to address it in opposition to Jacobs' motion.

ORDERED that, within 20 days of service of an answer to the amended complaint or failure to file an amended complaint in conformity with the deadline set forth herein, the parties shall contact the Principal Court Attorney for the Court, Laurie K. Furdyna, Esq., at lfurdyna@nycourts.gov to arrange a telephonic preliminary conference with the court.

ENTER:

10/20/2020
DATE

LOUIS L. NOCK, J.S.C.

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