

Nick's Lobster v Land & Sea Constr. Corp.,
2022 NY Slip Op 30007(U)
January 3, 2022
Supreme Court, Kings County
Docket Number: Index No. 507180/2019
Judge: Debra Silber
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At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 3rd day of January, 2022.

P R E S E N T:

HON. DEBRA SILBER,

Justice.

-----X

NICK’S LOBSTER,

Plaintiff,

- against -

LAND AND SEA CONSTRUCTION CORP.,

Defendant.

-----X

DECISION & ORDER

Index No. 507180/2019

MS # 3 & 4

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) _____

33-42 43-58

Opposing Affidavits (Affirmations) _____

65-74 60-64

Reply Affidavits (Affirmations) _____

75-77

Upon the foregoing papers plaintiff Nick’s Lobster (plaintiff) moves, pursuant to CPLR 3212 (in motion sequence number three), for an order granting it summary judgment against defendant Land and Sea Construction Corp. (defendant). Defendant moves (in motion seq. no. four) for an order granting it summary judgment and dismissing the complaint in its entirety.

Background

Plaintiff is a domestic corporation, named Nick's Live Lobsters Inc. d/b/a Nick's Lobster House, and operates a fish market and restaurant at 2777 Flatbush Avenue, Brooklyn, New York (the Premises). Defendant is a domestic corporation which operates a construction business. Plaintiff claims it leases the Premises from the City of New York, but owns the building on the land.¹ The restaurant is on the water in Mill Basin, Brooklyn, NY, near the Marine Park Golf Course.

In 2015, plaintiff began exploring the possibility of installing a dock system at the Premises. In early 2017, plaintiff and defendant engaged in discussions concerning plaintiff's intent to install a dock system. On February 2, 2017, plaintiff entered into a contract with Blue Gate Consulting Corp., described by defendant as defendant's permitting and consulting affiliate (hereinafter "Blue Gate"). Blue Gate agreed to obtain all required permits for the dock, whether a permit had to be obtained from one or more of the following (per the contract): the New York State Department of Environmental Conservation (NYSDEC), the NYS Coastal Management Program (CMP), the U.S. Army Corps of Engineers (ACOE), the NYC Waterfront², and the NYC Department of Small Business Services (NYCSBS). The Blue Gate contract outlined certain payments anticipated, including: \$5,000 deposit, \$3,500 payment when permits are completed, and anticipated additional fees of \$200 to the NYSDEC, and other government filing fees. It also references \$4,000 to defendant. On the same day (February 2, 2017), plaintiff provided a check payable to defendant (not to Blue

¹ plaintiff does not submit a deed, lease, or any documentation regarding the ownership and leasing of the Premises.

² It is not known what agency the contract refers to with this reference.

Gate) in the amount of \$10,000.³ Thereafter, on or about April 6, 2017, Blue Gate Consulting Corp. submitted materials to the ACOE requesting authorization to install two (2) floating docks, five (5) finger floats, and four (4) mooring piles at the Premises. On May 8, 2017, ACOE emailed Ms. Jodi Tarshis (Ms. Tarshis) of Blue Gate Consulting Corp. requesting further information to evaluate the permit application.⁴

Subsequently, over a year after the execution of the Blue Gate Contract, and prior to the issuance of any permits, on March 22, 2018, plaintiff and defendant entered into a contract (construction contract) whereby defendant agreed to supply all labor, materials, and equipment to install “one (1) 250’ x 6’ main L shape float, six (6) 3’ x 20’ finger docks, sixteen (16) 12’ x 50’ finger and mooring piles, and one (1) 4’ x 22’ entrance ramp” (collectively, the dock system) at the Premises for a total sum of \$97,950, to be paid in four unequal payments.⁵ This contract expressly states that “owner to supply all necessary permits for proposed work prior to commencement of construction” [Doc 51 ¶6]. On the same day, plaintiff provided defendant a check for \$63,000. Prior to the execution of the construction contract, on March 15, 2018, defendant purportedly purchased certain materials to be used for construction of the dock system. On March 28, 2018, defendant made a second purchase of

³ The check is from an account maintained by MAC Electrical Contractor, Inc. Pursuant to the deposition testimony of Mr. Michael Cannizzo, plaintiff’s agent, MAC Electrical Contractor, Inc. serves as general contractor for plaintiff. As noted during the parties’ appearance before this court, there is no disputes relating to MAC Electrical Contractor, Inc. serving as plaintiff’s agent.

⁴ In addition to her undefined role with Blue Gate Consulting Corp., Ms. Tarshis also serves as defendant’s Vice President.

⁵ The payments were to be for the following amounts: 1) \$63,000, 2) \$12,600, 3) \$17,500, and 4) \$4,850.

materials. Defendant thereafter (at defendant's premises) constructed portions of the dock intended to be installed at the Premises.

On May 10, 2018, ACOE again emailed Ms. Tarshis of Blue Gate advising her of certain technical defects in the plans submitted with the application. On or about January 14, 2019, plaintiff and Blue Gate received a letter from ACOE advising that their email, dated May 10, 2018, had not been responded to, and that should the requested information not be received within 30 days, the application would be considered withdrawn. Plaintiff thereafter attempted to contact defendant but was unsuccessful. Subsequently, plaintiff sought to terminate the construction contract and recover the \$63,000 initial payment to defendant.

On April 2, 2019, plaintiff commenced this action with the filing of a summons and complaint. Plaintiff alleges that defendant failed to perform in accordance with the construction contract and refused to refund plaintiff's payment of \$63,000. Based upon these allegations, plaintiff asserts three causes of action 1) breach of contract, 2) unjust enrichment, and 3) breach of the implied covenant of good faith and fair dealing. Following service of the summons and complaint, plaintiff moved (in mot. seq. no. one) for default judgment against defendant. Defendant cross-moved (in mot. seq. no. two) for an order extending its time to answer. These motions were resolved by a court order, dated January 7, 2020, which denied plaintiff's motion for a default judgment and directed defendant to file an answer within 30 days of the order. On February 6, 2020, defendant filed its answer, denying the allegations in the complaint, and asserting various affirmative defenses. The parties now move in mot. seq. nos. three and four for summary judgment. On September 10, 2021, the attorneys for the parties appeared virtually before the court to be heard on the instant motions.

The Parties' Positions

Plaintiff's Summary Judgment Motion

Plaintiff argues that it is entitled to summary judgment on its claims for breach of contract and breach of the implied covenant of good faith and fair dealing. Supporting its position, plaintiff proffers the affidavit of its agent, Mr. Michael Cannizzo, the deposition transcript of defendant's agent, Mr. Peter Hancock, the construction contract with copies of the \$10,000 and \$63,000 checks made payable to defendant, and a letter from the ACOE with attached email correspondence between the ACOE and Ms. Tarshis. Plaintiff avers that the evidence demonstrates there are no issues of fact and establishes that defendant breached the contract and failed to act in good faith while performing its obligations.

Plaintiff contends defendant breached their contract when it failed to supply labor, material, and equipment for the installation of the dock system at the Premises. Plaintiff argues that there was a single agreement between the parties encompassing the acquisition of permits and construction of the dock system, that it (plaintiff) performed under this contract by providing a deposit of \$10,000 to defendant in February 2017, and a second payment for \$63,000 in March 2018. Plaintiff asserts that defendant breached the agreement when it failed to complete the construction and installation of the dock system. Plaintiff concedes the \$10,000 deposit was non-refundable pursuant to the terms of the contract but claims that defendant's failure to perform in accordance with the contract entitles plaintiff to recover the second payment of \$63,000.

Plaintiff also argues that defendant failed to exercise good faith and deal fairly in fulfilling the terms and promises of the contract by failing to acquire the necessary permits,

failing to notify plaintiff of issues relating to the permits, and failing to refund the payment of \$63,000. Plaintiff asserts that all parties understood that it was defendant's responsibility to acquire all necessary permits through its affiliated entity, Blue Gate. The evidence demonstrates that defendant and its affiliate failed to do so or otherwise provide notice to plaintiff of issues regarding the permits. Plaintiff maintains that such conduct constitutes a breach by defendant of the implied covenant of good faith and fair dealing, entitling it to damages in the amount of \$63,000.

In opposition, defendant proffers the Blue Gate contract, the deposition transcript of Mr. Cannizzo, and receipts for materials purchased. Defendant also presents the deposition transcript of Mr. Hancock, the construction contract, a copy of the \$10,000 check, and the ACOE letter. Defendant contends that plaintiff has failed to establish its prima facie case entitling it to summary judgment on both its breach of contract claim and its claim for breach of the implied covenant of good faith and fair dealing. Defendant argues that plaintiff improperly treats the Blue Gate Contract and the construction contract as a single agreement. Contrary to plaintiff's assertions, defendant maintains there are two separate agreements with different contractual duties and obligations between different parties. In this regard, defendant asserts that plaintiff's \$10,000 payment in February 2017 was in consideration of the Blue Gate contract and its \$63,000 payment made in March 2018 was an initial deposit for the construction contract. As a consequence, defendant maintains that plaintiff's \$63,000 is non-refundable pursuant to the construction contract.

Additionally, defendant insists that plaintiff is in material breach of its contractual obligations. Plaintiff, defendant claims, failed to cooperate with defendant in acquiring the

permits and improperly unilaterally terminated the contract. Defendant claims that plaintiff also failed to acknowledge that the initial timeline to complete the dock system was understood to be two to three years. Accordingly, defendant contends that plaintiff has failed to demonstrate its entitlement to summary judgment on its breach of contract claim.

With regard to plaintiff's claim for breach of the implied covenant of good faith and fair dealing, defendant maintains that plaintiff has not alleged sufficient facts demonstrating the existence of all material elements of the cause of action. Defendant argues that plaintiff must demonstrate that defendant either withheld the benefits of the contract or sought to prevent the performance of the contract. Defendant contends that plaintiff's claims that defendant and its affiliate failed to acquire the necessary permits and unreasonably failed to notify plaintiff of the issues concerning the permits is insufficient to demonstrate a breach of the implied covenant of good faith and fair dealing. Additionally, defendant argues that it did not unreasonably withhold the return of plaintiff's deposit, as it was used to purchase materials in furtherance of the contract. Therefore, defendant maintains that plaintiff's motion must be denied.

Defendant's Motion for Summary Judgment

Defendant argues that the complaint must be dismissed as it performed in accordance with the construction contract. Defendant contends that any damages sustained by plaintiff are a consequence of plaintiff's own material breach and that defendant remains ready, willing, and able to perform under the contract. Supporting its position, defendant proffers the affidavit of Ms. Tarshis, its Vice President, the Blue Gate contract, the construction

contract, the deposition transcripts of Mr. Cannizzo and Mr. Hancock, a copy of the \$10,000 check payable to defendant, receipts for materials purchased, and the ACOE letter.

Defendant maintains that plaintiff has failed to establish that there was a breach of contract by defendant. It contends the parties understood that the timeline to complete the dock system would be between two to three years. Further, the construction contract itself does not specify a completion date for the installation, and by its very terms, provides that defendant is not responsible for any delays in the completion of the project. Defendant contends it performed under the contract by using the \$63,000 furnished by plaintiff to purchase materials and pay for labor to begin the construction of the dock system. Defendant states that it expended approximately \$35,000 on materials and \$20,000 on labor. Accordingly, defendant argues that plaintiff cannot sustain its claim for breach of contract, as the evidence clearly establishes that defendant performed under the construction contract.

Defendant also argues that plaintiff's breach of contract claim must be dismissed due to plaintiff's failure to perform its contractual obligations. Defendant argues that plaintiff failed to provide the necessary permits and failed to work with defendant and Blue Gate Consulting Corp. in acquiring the necessary documents for the approval of the permits. Defendant asserts that plaintiff was aware of its obligation to acquire a letter from the City of New York, as the owner of the land constituting the Premises, and was copied on correspondence from the ACOE. Despite this knowledge and duty, defendant contends that plaintiff refused to supply these documents or to assist in procuring the permits. Defendant further contends that such conduct constituted a material breach of the contract by plaintiff,

thus discharging defendant from its contractual duties and barring plaintiff from recovering its payment.

Addressing the second cause of action for unjust enrichment, defendant argues that the claim is duplicative of plaintiff's breach of contract claim and must be dismissed, as a written contract controls the parties' relationship. Defendant urges that only where there are distinct and separate allegations from the terms of the contract, or there is a bona fide dispute concerning the existence of a contract, should a plaintiff be permitted to maintain a separate cause of action for unjust enrichment when there is also a breach of contract claim. Here, defendant states that neither of these exceptions apply, as there is no dispute that a contract exists between the parties which covers all of plaintiff's allegations, so this claim must be dismissed.

Defendant also argues, similar to its position on plaintiff's unjust enrichment claim, that a plaintiff may not claim a separate cause of action for breach of the implied covenant of good faith and fair dealing and for breach of contract. Defendant asserts that the evidence clearly demonstrates that plaintiff's claim for breach of contract is identical to its claim for breach of the implied covenant of good faith and fair dealing. Accordingly, defendant insists this claim must be likewise dismissed.

In opposition, plaintiff points to the affidavit of Mr. Cannizzo. Plaintiff urges the court to deny defendant's motion for summary judgment, arguing that there are technical defects in the moving papers and that defendant has failed to establish its prima facie case entitling it to summary judgment. Plaintiff concedes there are no issues of fact, but contends that contrary to defendant's position, the evidence demonstrates plaintiff's entitlement to

summary judgment. Plaintiff also argues that the Blue Gate contract is inappropriately put before the court, as it was disclosed subsequent to the filing of the note of issue. Plaintiff contests the veracity of the Blue Gate contract, asserting that the alleged signature of Mr. Cannizzo thereon is fraudulent. Plaintiff maintains that the competent evidence demonstrates that the only contract which ever existed with regard to the dock was the construction contract between plaintiff and defendant.

Further, plaintiff argues that the construction contract does not contain any terms which prevent its termination, but rather has a liquidated damages clause, which requires plaintiff to forfeit the \$10,000 deposit to defendant upon terminating the agreement. Plaintiff contends that defendant has failed to demonstrate that plaintiff has breached the construction contract by terminating it and demanding repayment of the \$63,000. It further contends that defendant's arguments concerning unjust enrichment and breach of the implied covenant of good faith and fair dealing are unavailing, as it is permitted to proceed under alternative causes of action. Plaintiff maintains that where there is a bona fide dispute as to the application of a contract, it will not be limited to only selecting a single theory of recovery. Plaintiff argues that as the construction contract fails to address early termination rights and impossibility of performance, its alternative theories for recovery are appropriate.

In reply, defendant reasserts various arguments presented in its initial moving papers concerning plaintiff's failure to establish that defendant breached the contract. Defendant rejects plaintiff's position that the Blue Gate contract was improperly disclosed or is fraudulent. Defendant argues that the Blue Gate contract was properly disclosed pursuant to post-EBT demands and that the veracity of the document is supported by the deposition

testimony and the affidavit of Mr. Cannizzo, as he attests to providing a payment of \$10,000 at the time of the execution of the Blue Gate contract [Doc 52 Pages 30, 32]. Defendant urges the court to deny plaintiff's motion and grant defendant summary judgment dismissing the complaint.

Oral Argument

On September 10, 2021, the parties appeared virtually before the court to present oral argument on the instant motions. During the course of the appearance, the parties principally presented the arguments contained in the moving papers. Defendant again emphasized that it complied with the contract, that it remains ready, willing, and able to perform, and that plaintiff failed to assist in acquiring a letter necessary for completion of the permits. Defendant's counsel also represented, in response to questioning from this Court, that it was defendant's responsibility to obtain all the permits (*see* Oral Argument, September 10, 2021, tr at 3, lines 10-13). Plaintiff asserted that the deposition testimony made clear that all dealings were between plaintiff and defendant, all payments were made to defendant, and that the parties understood that it was defendant's responsibility to procure the permits. The court also examined the proffered evidence, including the deposition transcripts and both contracts, and noted that the construction contract provided that prior to any work being performed, defendant was to receive the necessary permits (*see id.* at 15, lines 8-19; at 19, lines 10-13; at 20, lines 10-12; at 21, lines 8-11).

Discussion

On a motion for summary judgment the court's function is issue finding, not issue determination (*see Trio Asbestos Removal Corp. v Gabriel & Sciacca Certified Pub.*

Accountants, LLP, 164 AD3d 864, 865 [2d Dept 2018] [internal citations omitted]). “A party moving for summary judgment must demonstrate that ‘the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment’ in the moving party's favor” (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014], quoting CPLR 3212 [b]). “[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once the movant sets forth a prima facie case, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 557 [1980]).

Unjust Enrichment

To be entitled to summary judgment on an unjust enrichment claim, a plaintiff must establish that the defendant was enriched at the expense of plaintiff, and it is against equity and good conscience to permit the defendant to retain what is sought to be recovered (*see Mobarak v Mowad*, 117 AD3d 998, 1001 [2d Dept 2014]). While “causes of action for breach of contract and unjust enrichment may be pleaded alternatively” (*Auguston v Spry*, 282 AD2d 489, 491 [2d Dept 2001]), where these “causes of action are based upon the same facts and seek essentially identical damages,” summary judgment dismissing the duplicative unjust enrichment claim is appropriate (*Guzman v Ramos*, 191 AD3d 644, 652 [2d Dept 2021]). The Court of Appeals has commented that an unjust enrichment claim “is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized

tort, circumstances create an equitable obligation running from the defendant to the plaintiff. Typical cases are those in which the defendant, though guilty of no wrongdoing, has received money to which he or she is not entitled” (*Corsello v Verizon New York, Inc.*, 18 NY3d 777, 790 [2012] [internal citation omitted]). “Where the parties executed a valid and enforceable written contract governing a particular subject matter, recovery on a theory of unjust enrichment for events arising out of that subject matter is ordinarily precluded” (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]; *see also Concavage Mar. Constr., Inc. v Lou-Al-John Corp.*, 191 AD3d 843, 845 [2d Dept 2021]).

Here, defendant has demonstrated its entitlement to summary judgment dismissing plaintiff’s cause of action for unjust enrichment. Defendant has established its prima facie case by demonstrating there was a valid and enforceable written contract governing the subject matter of plaintiff’s allegations. Both the breach of contract claim, and the unjust enrichment claim are governed by the same facts and seek identical damages. Relying on the deposition testimony of Mr. Hancock and Mr. Cannizzo, the affidavit of Ms. Tarshis, and the contracts, defendant has established that the instant dispute is wholly governed by the written agreement detailing the rights and obligations of the parties.

Plaintiff has failed to rebut this prima facie showing and did not present competent evidence raising a genuine issue of fact as to whether its claim for unjust enrichment is distinct from its claim for breach of contract. Plaintiff’s arguments asserting that it may maintain alternative theories of recovery is unavailing, as the evidence unequivocally establishes that the two causes of action are based upon identical facts and the dispute is governed by written agreements.

Breach of Implied Covenant of Good Faith and Fair Dealing

“The implied covenant of good faith and fair dealing is a pledge that neither party to the contract shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruit of the contract, even if the terms of the contract do not explicitly prohibit such conduct” (*Gutierrez v Govt. Employees Ins. Co.*, 136 AD3d 975, 976 [2d Dept 2016]). “The implied covenant of good faith and fair dealing is breached when a party acts in a manner that would deprive the other party of the right to receive the benefits of their agreement” (*1357 Tarrytown Rd. Auto, LLC v Granite Properties, LLC*, 142 AD3d 976, 977 [2d Dept 2016]). “The implied covenant includes any promises which a reasonable promisee would be justified in understanding were included” (*id.*). Where the essential allegations and facts constituting a cause of action for breach of the implied covenant of good faith and fair dealing are also embodied in a breach of contract claim, the appropriate remedy is dismissal of the breach of implied covenant of good faith and fair dealing cause of action as duplicative of the breach of contract claim (*see Cortazar v Tomasino*, 150 AD3d 668, 670 [2d Dept 2017]; *see also Barker v Time Warner Cable, Inc.*, 83 AD3d 750, 752 [2d Dept 2011]); *Deer Park Enterprises, LLC v Ail Sys., Inc.*, 57 AD3d 711, 712 [2d Dept 2008]).

Here, the evidence demonstrates that plaintiff’s causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing are duplicative. The proffered depositions, affidavits, and contracts establish that defendant’s alleged misfeasance is wholly governed by the written contracts. Plaintiff’s arguments that defendant’s conduct thwarted the performance of the contract is improperly presented as a claim for breach of the implied covenant of good faith and fair dealing. The allegation that defendant failed to acquire

the necessary permits and improperly withheld repayment of plaintiff's funds are intrinsically tied to the damages plaintiff alleges resulted from the breach of contract. Accordingly, plaintiff's cause of action for breach of the implied covenant of good faith and fair dealing must be dismissed as duplicative.

Breach of Contract

To demonstrate entitlement to summary judgment on a breach of contract claim, a plaintiff must establish the existence of a contract, plaintiff's performance, defendant's breach of a contractual obligation, and damages resulting from the breach; to be entitled to dismissal, a defendant must establish the absence of one of these elements (*see generally Junger v John V. Dinan Assoc., Inc.*, 164 AD3d 1428,1430 [2d Dept 2018]). "The test on summary judgment is whether the issue is one of law or of fact . . . it is the responsibility of the court to interpret written instruments" (*Mallad Const. Corp. v County Fed. Sav. & Loan Ass'n*, 32 NY2d 285, 291 [1973]). "A written agreement that is complete, clear, and unambiguous on its face must be enforced to give effect to the meaning of its terms and the reasonable expectations of the parties, and the court should determine the intent of the parties from within the four corners of the contract without looking to extrinsic evidence to create ambiguities" (*Vivir of L I, Inc. v Ehrenkranz*, 127 AD3d 962, 963 [2d Dept 2015]). "A contract is considered to be clear and unambiguous where the language used 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'" (*Id.* at 964, quoting *Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 355 [1978]). "[W]hen the language employed is not free from ambiguity, or when it is equivocal and its interpretation depends upon the sense in which the

words were used, in view of the subject to which they relate, the relation of the parties and the surrounding circumstances properly applicable to it, the intent of the parties becomes a matter of inquiry, and the interpretation of the language used by them is a mixed question of law and fact” (*Lachs v Fid. & Cas. Co. of New York*, 306 NY 357, 364 [1954]).

“As a general rule, contracts remain separate unless their history and subject matter show them to be unified” (*Nancy Neale Enters. v Eventful Enters.*, 260 AD2d 453, 453 [2d Dept 1999]). However, where multiple agreements relate to a single transaction, and the performance of one agreement is conditioned on the completion of the other, in specific circumstances it is appropriate to treat the agreements as a single contract (*see generally Rudman v Cowles Communications, Inc.*, 30 NY2d 1, 13 [1972]). “In determining whether contracts are separable or entire, the primary standard is the intent manifested, viewed in the surrounding circumstances” (*Williams v Mobil Oil Corp.*, 83 AD2d 434, 439 [2d Dept 1981]). Where the parties to the agreement are, “for all practical purposes, the same entities” and the agreements were part “of the same transaction” the Appellate Division has found the contracts to be unified and entire (*Nancy Neale Enters.*, 260 AD2d at 453).

“Where a question of intention is determinable by written agreements, the question is one of law, appropriately decided . . . on a motion for summary judgment” (*Berghold v Kirschenbaum*, 287 AD2d 673, 673 [2d Dept 2001] [internal quotation marks and citations omitted]). “[W]here the intent must be determined by disputed evidence or inferences outside the written words of the instrument a question of fact is presented” (*Gallagher v Long Is. Plastic Surgical Group, P.C.*, 113 AD3d 652, 653 [2d Dept 2014] [internal quotation marks and citations omitted]). However, where the evidence submitted “unequivocally clarifies the

parties' intent" summary judgment is appropriate (*cf. Brook Shopping Ctrs. v Allied Stores Gen. Real Estate Co.*, 165 AD2d 854, 855 [2d Dept 1990]; *Federated Assoc. v Howard Johnson Co.*, 144 AD2d 531, 532 [2d Dept 1988]; *River Park Assoc. v Meyerbank Elec. Co.*, 116 AD2d 709, 710 [2d Dept 1986]).

The court finds that the present action is ripe for determination at the summary judgment stage, as the evidence proffered by both parties demonstrates that there are no genuine issues of material fact. As an initial matter, the Blue Gate contract and the construction contract cannot be treated as separate, independent agreements, but rather should be considered a single agreement. "Contracts remain separate unless their history and subject matter show them to be unified" (*131 Heartland Blvd. Corp. v. C.J. Jon Corp.*, 82 AD3d 1188, 1190 [2d Dept 2011], citing *Nancy Neale Enters*, 260 AD2d 453). Here, the proffered evidence establishes that the contracts must function as a single, unified agreement, based upon the intent of the parties at the time of execution, and the operation and purpose of the contracts. Mr. Hancock expressly testified that "[defendant] and Blue Gate *are one in the same*" (Hancock tr at 11, lines 2-3). He also testified that the construction contract was created pursuant to the conversations he and Mr. Cannizzo had at the time the Blue Gate contract was entered (*see id.* at 8, lines 12-24). Additionally, Ms. Tarshis, is a representative of both corporate entities, drafted the construction contract, and principally handled the permit application process (*see generally* Hancock tr at 8, 20, 25-26; *see also* NY St Cts Elec Filing [NYSCEF] Doc No. 57, ACOE Letter at 1; NYSCEF Doc No. 42, ACOE Letter with e-mails at 3-6). Ms. Tarshis also attested that the obligations embodied in the Blue Gate contract were the obligations of defendant. She stated that "[defendant] advised [plaintiff] that *the process*

*of obtaining permits, building and installing docks would take up to three years” and “[a]fter executing the [construction contract] and receiving [P]laintiff’s down payment in the amount of \$63,000, [defendant] purchased materials for this job, applied for required permits and started building the float and docks at its yard” (aff of Ms. Tarshis ¶¶ 9 & 11 [emphasis added]). Furthermore, Mr. Cannizzo attests that all his communications concerning the work to be performed were only with defendant, supporting the conclusion that the contracts were unified (see Cannizzo tr at 30-32, 51; aff of Mr. Cannizzo at ¶¶ 5 & 6). Additionally, it is undisputed that all payments were made to defendant (see aff of Ms. Tarshis ¶ 6; see also NYSCEF Doc No. 41, construction contract with checks, at 5 & 8). Thus, the unique circumstances presented here demonstrate that plaintiff and defendant both intended and understood the two contracts to operate as one unified, single agreement (see *131 Heartland Blvd. Corp. v C.J. Jon Corp.*, 82 AD3d at 1190) [Court held that evidence in record established “that the parties intended the two documents to be interdependent and to be read together”]).*

Turning to the alleged breach of the contract, plaintiff has established that defendant committed multiple breaches entitling plaintiff to summary judgment and damages in the amount of \$63,000.00. The contract required defendant to procure all necessary permits, to “supply all labor, material, and equipment to install [the dock system] per plans supplied by the NYS DEC, ACOE,” and to commence the construction work after all necessary permits were obtained (see NYSCEF Doc No. 50, Blue Gate Contract; NYSCEF Doc No. 51, construction contract at 1 & 2). The evidence clearly establishes that defendant failed to acquire the necessary permits, undertook construction without any approved plans from the

ACOE, and commenced the construction work prior to receiving the permits, resulting in the unnecessary expenditure of funds and the withholding of the \$63,000 deposit paid by plaintiff.

The evidence clearly establishes that it was defendant's obligation to acquire the necessary permits prior to performing the work. Although the contract states that the "owner [is] to supply all necessary permits," the evidence presented by the parties demonstrates that it was the understanding and intent of the parties that the contract obligated defendant to acquire the permits (*see* Hancock tr at 9, lines 10-15; at 11, lines 2-15; at 26, lines 6-9; Cannizzo tr at 38, lines 18-23; at 39, lines 3-7; *aff of* Ms. Tarshis ¶¶ 6, 9, & 11). Under the circumstances presented herein, defendant's contention that it was plaintiff's obligation to acquire the permits is a feigned issue of fact and is contrary to numerous admissions by both Mr. Hancock and Ms. Tarshis.

Defendant failed to comply with its contractual obligation to acquire the necessary permits. Both plaintiff and defendant present the January 2019 letter from the ACOE, delivered to Ms. Tarshis and to plaintiff. The letter states, in pertinent part:

"In an email to you and your agent, Tarshis of [Blue Gate Consulting Corp.], dated May 08, 2017, this office requested information necessary to properly evaluate the application. To this date, the requested information has not been received.

Please send this office the requested information in writing within thirty (30) days of the date of this letter. If the requested information is not received within this period, in accordance with Title 33 of the Code of Federal Regulations Part 325.2(d)(5), it will be understood that you no longer wish to undertake the proposed work and the application will be withdrawn" (NYSCEF Doc No. 57, ACOE Letter at 1; NYSCEF Doc No. 42, ACOE Letter with e-mails at 1).

The correspondence provided demonstrates that on May 10, 2018, the ACOE informed defendant that the application could not be considered due to defects in the schematics presented and required an updated narrative description of the work to be completed (*see* NYSCEF Doc No. 42, ACOE Letter with e-mails at 3). Mr. Cannizzo thereafter attempted to contact defendant concerning the permit application but received no response from defendant (*see* aff of Mr. Cannizzo, February 24, 2021, ¶¶ 7-8). Accordingly, defendant breached the contract by failing to provide revised drawings and an updated narrative in response to the ACOE's May 2018 email and January 2019 letter, thereby thwarting the issuance of a permit and resulting in the ACOE deeming the application withdrawn.

Defendant also breached the contract by commencing construction prior to receiving the necessary permits and plans approved by the ACOE. The contract explicitly required that the defendant was to delay construction until it received the permits, and that the dock system had to be in accordance with the plans approved by the ACOE (NYSCEF Doc No. 51, construction contract at 2, ¶ 6). As aforementioned, Mr. Hancock testified that he began constructing the dock system "within a few weeks" of the execution of the contract and receiving the payment of \$63,000 (*see* Hancock tr at 18, lines 4-5). Defendant performed this work with full knowledge that the necessary permits were not yet issued (*see generally id.* at 28, line 17 [Mr. Hancock acknowledged that work could not be completed on the dock system until the permit issue was resolved]). Furthermore, as demonstrated by the proffered ACOE letter, Mr. Hancock's deposition testimony, and Ms. Tarshis' affidavit, defendant began constructing portions of the dock system even though it knew ACOE-approved plans had not yet been received (*see* Mr. Hancock deposition tr at 18; *see also* aff of Ms. Tarshis ¶ 12).

Accordingly, under the circumstances presented herein, the court finds that the plaintiff is entitled to summary judgment on its breach of contract claim against the defendant. Correspondingly, that branch of defendant's motion seeking summary judgment dismissing said claim is denied.

Conclusions

The parties' remaining requests for relief, to the extent not specifically addressed herein, are denied. Accordingly, it is hereby

ORDERED that defendant's motion (mot. seq. no. four) is granted only to the extent that the causes of action sounding in unjust enrichment and breach of the implied covenant of good faith and fair dealing are hereby dismissed, and the remainder of defendant's motion is denied; and it is further

ORDERED that the branch of plaintiff's motion (mot. seq. no. three) which seeks summary judgment on its breach of contract claim against defendant is granted, and the remainder of the motion is denied; and it is further

ORDERED that plaintiff is directed to submit a proposed judgment, on notice pursuant to 22 NYCRR 202.48, for the sum \$63,000.00, with interest from April 2, 2019, the date this action was commenced, together with costs and disbursements.

This constitutes the decision and order of the court.

E N T E R,



Hon. Debra Silber, J.S.C.