

M.S.T. Gen. Contr. Restoration, Inc. v New York City Hous. Auth.
2022 NY Slip Op 30733(U)
March 8, 2022
Supreme Court, New York County
Docket Number: Index No. 158154/2020
Judge: Louis L. Nock
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LOUIS L. NOCK PART 38M

Justice

M.S.T. GENERAL CONTRACTING RESTORATION, INC.,
Plaintiff,
MOTION DATE 12/14/2020
MOTION SEQ. NO. 001

- v -

NEW YORK CITY HOUSING AUTHORITY,
Defendant.
DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, and 39

were read on this motion for DISMISSAL

LOUIS L. NOCK, J.

Upon the foregoing documents, it is hereby ordered that defendant New York City Housing Authority's ("NYCHA") motion to dismiss the complaint pursuant to CPLR 3211 is granted, based upon the following memorandum decision.

Background

In this action for breach of a construction contract, plaintiff M.S.T. General Contracting Restoration, Inc. ("plaintiff"), asserts three causes of action: breach of contract (first cause of action); quantum meruit (second cause of action); and account stated (third cause of action).

NYCHA now moves to dismiss the complaint in its entirety based on documentary evidence and for failure to state a cause of action pursuant to CPLR 3211(a)(1) and (a)(7).

The Contract

Pursuant to a contract dated October 19, 2016, NYCHA hired plaintiff to perform certain fire escape restoration work at various NYCHA buildings located throughout New York City

(NYSCEF Doc. No. 7). Relevant to the instant motion, the contract provides that NYCHA may “by written order designated or indicated to be a change order, make changes in the work within the general scope of the contract,” including the “method and manner of performance of the work” (NYSCEF Doc. No. 8 at 10 of 19, General Conditions, § 29[a]). Any other order from NYCHA may be treated as a change order by plaintiff, provided that plaintiff gives written notice to NYCHA that it intends to treat the order as a change order (*id.*, § 29[b]). Except under those two circumstances, “no order, statement or conduct of [NYCHA] shall be treated as a change under this clause or entitle [plaintiff] to any equitable adjustment” (*id.*, § 29[c]). In order to obtain an adjustment, plaintiff must assert its right to same within 30 days of either receiving a written change order or giving notice to NYCHA that it intends to treat some order of NYCHA’s as a change order (*id.*, § 29[e]).

The contract further contemplates the issue of damages caused by delay, providing that plaintiff would not be terminated or charged with damages due to delay where “the delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of [plaintiff]” (*id.* at 411, § 32[b]). Some examples provided by the contract include Acts of God, acts of NYCHA in its sovereign or contractual capacity, acts of another contractor, various natural disasters, and quarantine restrictions (*id.*, § 32[b][1]). In such cases, plaintiff was required to notify NYCHA “in writing of the cause of the delay,” and, if NYCHA found it appropriate under the circumstances, “time for completing the work shall be extended by written modification to the contract” (*id.*, § 32[b][2]). NYCHA’s determination on an extension request is conclusive and binding on plaintiff, and plaintiff agreed “to make no claim or maintain any action against [NYCHA] for damages for suspension of or delay in the performance of this Contract occasioned by delays to or interruptions of the work, and agrees that any such claim

shall be fully compensated for by an extension of time to complete performance” (*id.* at 455, Special Conditions, § 58). “All losses or damages . . . for any unforeseen obstructions except as otherwise provided in the Contract, or difficulties that may be encountered in the prosecution of the same, or from the action of the elements, shall be fully borne by the Contractor.” (*id.* at 435, § 5[e]).

The Pandemic

In response to the coronavirus pandemic, NYCHA drafted emergency shut-down protocols to be followed if a contractor or NYCHA had to shut down a jobsite due to the pandemic (NYSCEF Doc. No. 10). The emergency shut-down protocols provided, *inter alia*, that during a shut-down “[a]ll parties are bound by their contracts with NYCHA and must respond as needed to site issues for site maintenance and incident response” (*id.*). On March 25, 2020, plaintiff informed NYCHA that it was shutting down work at its current project under the contract due to inability to obtain masks for its subcontractors, who were refusing to work without them in the small spaces required for fire escape restoration (NYSCEF Doc. No. 11). On April 6, 2020, plaintiff proposed that it would be able to complete the work by October 31, 2020 if they were able to resume work by May 15, 2020 and requested an extension of time from NYCHA accordingly (NYSCEF Doc. No. 12). At the same time, plaintiff submitted a notice of claim to NYCHA based on the shutdown of the project (NYSCEF Doc. No. 13). Plaintiff sought the additional time set forth in its request, as well as “costs associated with the shutdown estimated to be \$158,496.56 per month” (*id.* at 1). On April 29, 2022, NYCHA extended the completion deadline of the project to December 31, 2020 but did not make a decision on plaintiff’s claims for costs related to the shutdown (NYSCEF Doc. No. 14).

On May 14, 2020, a day before construction was to resume, plaintiff informed NYCHA that they would be unable to remobilize on time and proposed a new commencement date of June 1, 2020 and completion date of November 16, 2020 (NYSCEF Doc. No. 15). Plaintiff stated that it needed additional time to acquire sufficient personal protective equipment for its workers (*id.*). At the same time, plaintiff submitted a supplemental notice of claim repeating the request for another extension and renewing its claim for damages caused by the shutdown as set forth in its earlier notice of claim (NYSCEF Doc. No. 16). In response, NYCHA requested additional information regarding the calculation of plaintiff's damages (NYSCEF Doc. No. 17). NYCHA also denied plaintiff's request for a further extension, stating that NYCHA had not adequately explained why plaintiff was unable to meet its own proposed date to start construction again (*id.*). Plaintiff provided the additional documentation asked for and renewed its request for another extension (NYSCEF Doc. No. 18).

On September 22, 2020, NYCHA issued a finding of fact and decision related to plaintiff's notice and supplemental notice of claim (NYSCEF Doc. No. 19). NYCHA maintained its denial of the extension request, stating again that plaintiff had not sufficiently explained why it could not have acquired sufficient protective equipment during the initial shutdown in order to commence work again on May 15 (*id.*). Regarding the asserted extra costs, NYCHA stated that plaintiff had assumed the risk of delay damages caused by COVID-19 or due to the actions of third parties, and was in any event responsible under the contract for providing sufficient protective equipment for its workers (*id.*).

Plaintiff commenced this action by filing a summons with notice on October 2, 2020 (NYCSFE Doc. No. 1). NYCHA filed a demand for complaint (NYSCEF Doc. No. 3), and

plaintiff filed same on November 23, 2020 (NYSCEF Doc. No. 4). NYCHA appeared and now makes the instant pre-answer motion to dismiss.

Standard of Review

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction” (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). “[The court] accept[s] the facts as alleged in the complaint as true, accord[ing] plaintiffs the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory” (*Id.* at 87-88). Ambiguous allegations must be resolved in plaintiff’s favor (*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]). “[W]here ... the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration” (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

Discussion

Breach of Contract (First Cause of Action)

A breach of contract requires allegations of “the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages” (*Harris v. Seward Park Housing Corp.*, 79 AD3d 425 [1st Dept 2010]). Plaintiff alleges that it performed under the contract, but that NYCHA breached the contract by refusing to pay plaintiff its alleged delay damages. Plaintiff asserts that these damages were “incurred as a result of shutdowns during the Coronavirus Pandemic and other causes beyond the control of plaintiff and not within

the contemplation of the parties” (NYSCEF Doc. No. 21, ¶ 21). Plaintiff also, for the first time, alleges in its opposition papers that it has been damaged by NYCHA’s failure to timely determine its requests for delay damages.

As an initial matter, plaintiff has not stated a claim for breach of contract with respect to NYCHA’s alleged delay in deciding its notice and supplemental notice of claim. Assuming arguendo that such a claim is properly alleged, plaintiff fails to establish how this specific breach has damaged it. Damages are a necessary element of a claim for breach of contract (*Milan Music, Inc. v Emmel Communications Booking, Inc.*, 37 AD3d 206 [1st Dept 2007] [“Without a clear demonstration of damages, there can be no claim for breach of contract”]).

With regard to plaintiff’s damages for delay, the contract provides that plaintiff is responsible for such damages (NYSCEF Doc. No. 8, Special Conditions, § 5[e]). Indeed, plaintiff specifically agreed that in the event of a delay caused by Acts of God, government action, and/or quarantine restrictions, it would not make any claims for damages, maintain any action for same, and would be “fully compensated for by an extension of time to complete performance” (*id.*, General Conditions, § 32[b]; *id.*, Special Conditions, § 58). Plaintiff does not deny that it received such an extension. Plaintiff contends that the exculpatory clause should not be applied here, as neither party could have predicted or contemplated the coronavirus pandemic. However, the exculpatory clause specifically mentions quarantine restrictions and the sovereign acts of any governmental entity, both of which are alleged to have caused the delay in completing the work. It is settled law that such clauses are enforceable (*Kalisch-Jarcho, Inc. v City of New York*, 58 NY2d 377, 384, *motion to amend denied* 60 NY2d 645 [1983]). Plaintiff’s reliance on *Corinno Civetta Const. Corp. v City of New York* (67 NY2d 297, 309, *rearg denied* 68 NY2d 753 [1986]), and several decisions of the Appellate Division that cite it, to hold

otherwise, is unavailing. *Corinno Civetta Const. Corp.* expressly states that causes of delay written in the contract are covered by an exculpatory clause, and plaintiff does not sufficiently allege any of the other circumstances under which it would be able to recover in the face of such clause in this contract, such as bad faith, intentional abandonment of the contract, or delays caused by NYCHA's breach of the agreement).

Plaintiff also claims it is entitled to its delay damages as an equitable adjustment, on the grounds that the NYCHA protocol and the Governor's Executive Orders relating to the coronavirus pandemic altered the means and methods of plaintiff's work, and, therefore, constituted a change order. The contract requires, however, that where, as here, a purported change order is not identified as such, plaintiff must provide sufficient written notice that it intends to treat such directive as a change order (NYSCEF Doc. No. 8, General Conditions, § 29[b]). Absent such notice, no conduct by NYCHA constitutes a change order under the contract (*id.*, § 29[c]). Plaintiff does not allege that it complied with these procedures, and, therefore, there is no change order that would entitle plaintiff to an equitable adjustment.

Quantum Meruit (Second Cause of Action)

To state a claim for *quantum meruit*, plaintiff must show performance of services in good faith, acceptance of services by the person to whom they are rendered, expectation of compensation, and the reasonable value of the services rendered (*Fulbright & Jaworski, LLP v Carucci*, 63 AD3d 487 [1st Dept 2009]). The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]). Here, plaintiff does not dispute the validity of the contract between the parties; only NYCHA's decision that plaintiff is not entitled to its claimed delay damages

thereunder. As such, it cannot plead a cause of action for *quantum meruit* where its contract with NYCHA governs the parties' dispute. Moreover, the complaint is devoid of any allegations of work outside the scope of the contract that might otherwise form the basis of such a claim.

Account Stated (Third Cause of Action)

Plaintiff's second cause of action is for an account stated. An account stated claim requires proof that the parties came together and agreed on how much the defendant owes the plaintiff, allowing plaintiff to maintain an action for that amount (*Herrick, Feinstein LLP v. Stamm*, 297 AD2d 477, 478 [1st Dept 2002]). A claim for an account stated is duplicative of a claim for breach of contract where there is an enforceable contract between the parties (*e.g. Dubinsky v Levine*, 200 AD3d 574 [1st Dept 2021]). Put another way, "[a] claim for an account stated may not be utilized simply as another means to attempt to collect under a disputed contract" (*Sabre Intern. Sec., Ltd. v Vulcan Capital Mgt., Inc.*, 95 AD3d 434, 438 [1st Dept 2012]). Thus, for the same reason that plaintiff's *quantum meruit* claim fails, so too must the account stated claim fail.

Moreover, "the mere rendition of an account without an acceptance by the other party does not constitute an account stated And a contention that a transaction amounted to an account stated is without merit where no account was presented or any dispute about the account was shown to have existed" (*Waldman v Englishtown Sportswear, Ltd.*, 92 AD2d 833, 836 [1st Dept 1983]). Here, in its first response to plaintiff, NYCHA stated that it was expressly not agreeing "with respect to any claims asserted in [plaintiff's] April 6, 2020 notice of claim" (NYCSEF Doc. No. 14). Despite this clear disagreement regarding plaintiff's entitlement to its claims, plaintiff nevertheless asserts it is entitled to plead an account stated claim because NYCHA received its notice and supplemental notice of claim but did not finally decide them in a

timely fashion, and thus should not be allowed to object to them now. However, it cites no authority for this proposition.

Accordingly, it is hereby

ORDERED that the motion of defendant New York City Housing Authority to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant.

This will constitute the decision and order of the court.

ENTER:

Louis L. Nock

<u>3/8/2022</u>			<u>LOUIS L. NOCK, J.S.C.</u>	
DATE				
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
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