

AFL Constr. Co., Inc v Roosevelt Is. Operating Corp.
2022 NY Slip Op 31181(U)
April 8, 2022
Supreme Court, New York County
Docket Number: Index No. 656072/2021
Judge: Barry R. Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

Table with 2 columns: Case details (AFL CONSTRUCTION CO., INC., Plaintiff, - v -, ROOSEVELT ISLAND OPERATING CORPORATION, Defendant) and Motion details (INDEX NO. 656072/2021, MOTION DATE, MOTION SEQ. NO. 001). Includes DECISION + ORDER ON MOTION.

HON. BARRY R. OSTRAGER

On April 6, 2022, the Court held oral argument via Microsoft Teams on defendant’s pre-answer motion to dismiss plaintiff’s complaint pursuant to CPLR § 3211(a)(1), (5), and (7). The motion is resolved as follows.

Defendant Roosevelt Island Operating Corp. (“RIO”) is the owner of the historic Blackwell House, located at 500 Main Street, Roosevelt Island, New York 10044 (the “Project”). On August 1, 2017, following a competitive bidding process, defendant entered into a written contract with plaintiff AFL Construction Co., Inc. (“AFL”) for the Project’s restoration and construction. Plaintiff was to be paid \$1,465,200 to perform the construction work on the Project. Compl. ¶ 9. In December 2017, the Project’s architect executed a series of change orders allegedly increasing the scope of the work by \$575,479.83. Compl. ¶ 10. During the summer of 2018, defendant requested additional change orders, allegedly further increasing the scope of the work by \$233,685.72 and thereafter by \$246,175.37. Compl. ¶¶ 11–12.

Plaintiff claims that, in May of 2018, the Project’s scope of work had to be altered due to the failure of the Project’s architect to file certain required paperwork with the New York City Department of Buildings. Despite this change, plaintiff alleges it achieved substantial completion of the Project on or about October 12, 2018. Plaintiff claims that it provided additional labor,

materials, and work beyond the additional scope of the parties' agreement without receiving additional compensation as a result of the failure of the architect hired by defendant to file the required paperwork. Compl. at ¶¶23–24. Plaintiff asserts claims for breach of contract and unjust enrichment and seeks roughly \$917,883.64 in damages.

Defendant moved to dismiss plaintiff's complaint, arguing that plaintiff waived and released its right to bring the present suit by failing to comply with the contractual condition precedent contained in sections 27(b) and 36 of the Contract, which required notice of "any claim by [plaintiff] for extension of time, extra compensation, price increase or damages of any sort...."

Under CPLR § 3211(a)(7), this Court is tasked with determining whether, after affording the pleadings a liberal construction and accepting the allegations in the Amended Complaint as true, "the facts as alleged fit within any cognizable legal theory ... Under CPLR § 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" *Leon v. Martinez*, 84 NY2d 83, 87–88 (1994) (citations omitted). In resolving a pre-answer motion to dismiss based on a release pursuant to CPLR § 3211(a)(5), the plaintiff's allegations are to be treated as true, and where the plaintiff has submitted an affidavit in opposition to the motion, it must be construed in the same favorable light. *Ford v. Phillips*, 121 A.D.3d 1232, 1234–35 (3d Dept 2014).

The motion to dismiss the claim for breach of contract is denied. Defendant's documentary evidence does not conclusively rebut plaintiff's cause of action. Plaintiff submitted an affidavit based on personal knowledge attesting to the fact that notice was sent on twenty-four separate occasions during a period beginning May 2018 and ending prior to the Department of Building's labelling the Project completed on June 29, 2020. On the transcript of proceedings,

plaintiff pointed specifically to two notices sent on October 2, 2019 (NYSCEF Doc. No. 39) and November 4, 2019 (NYSCEF Doc. No. 40). Defendant does not dispute that defendant received from plaintiff multiple correspondence during the period between May 2018 and June 2020. Defendant asserts that these communications did not comply with the literal language of sections 27(b) and 36 of the Contract because the correspondence did not constitute “notices of claims” under the Contract. But it exalts form over substance to dismiss the breach of contract claim. The facts may show that defendant was surely on notice that plaintiff, by reporting on the work it was undertaking, was asserting a claim for payment and that plaintiff substantially complied with the notice provisions in the Contract.

Plaintiff cites to *Huff Enters. v. Triborough Bridge & Tunnel Auth.*, 191 A.D.2d 314 (1st Dept. 1993) for the proposition that, in certain circumstances, failure to give notice compliant in every technical respect of a contract has been excused in cases where there is an extensive record of timely written correspondence. *Id.* at 317. On the transcript of proceedings of April 6, 2022, defendant argued that *Huff Enters.* does not reflect the current state of the law. In any event, there are subsequent cases that recognize an exception to the rule of strict compliance with notice provisions in public works contracts in “situations where there is an extensive record of timely written correspondence and contact between the contractor and agency....” *Traveler Cas. And Sur. Co. v. Dormitory Authority-State of New York*, 735 F.Supp.2d 42, 76 (S.D.N.Y. Aug. 26, 2010), citing *G. De Vincentis & Son Const., Inc. v. City of Oneonta*, 304 A.D.2d 1006, 1008 (3d Dept. 2003). In addition, these cases all addressed the issue at the summary judgment stage, not at the pre-answer motion to dismiss stage of a case.

It is premature to dismiss the breach of contract claim at the pre-answer motion to dismiss stage because a dispute exists as to whether plaintiff's notices were sufficient to comply with the meaning, purpose, and intent of the Contract.

The motion to dismiss the claim for unjust enrichment is granted because the claim is duplicative of the breach of contract claim. It is black-letter law that the existence of a valid and enforceable written contract governing a particular subject matter precludes recovery of a quantum meruit claim (such as unjust enrichment) based on the same subject matter. *Blanchard v. Blanchard*, 201 N.Y. 134, 138 (1911). Here, it is undisputed that a contract exists between the parties. The damages sought in the unjust enrichment claim are the same damages sought in the breach of contract claim. Because a written contract exists, unjust enrichment cannot be pled in the alternative. Cf. Renk v. Renk, 188 A.D.3d 502, 504 (1st Dept. 2020) (sustaining a cause of action for unjust enrichment in the alternative because a bona fide dispute existed as to the existence of an alleged agreement).

Defendant shall file an Answer to the Complaint within twenty days.

A preliminary conference is scheduled for May 24, 2022, at 11:00 a.m. The parties must e-file a letter providing dial-in access for the conference no later than May 6, 2022. The parties are directed to meet and confer and complete the Preliminary Conference Order form with a Note of Issue deadline no later than 22 months after the date of the Order and interim deadlines agreed to by the parties, and e-file the Preliminary Conference Order with a request to So Order prior to the conference. If the proposed Preliminary Conference Order is acceptable, it will be So Ordered and no appearance will be necessary on May 24.

Accordingly, it is hereby

ORDERED that the motion to dismiss by defendants is denied as to Count One and granted as to Count Two, and that claim is severed and dismissed.

Dated: April 8, 2022

Barry R. Ostrager
BARRY R. OSTRAGER, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: