CAC/BHL Joint Venture, LLC v Tishman Constr. Corp. of N.Y.
2022 NY Slip Op 31718(U)
May 25, 2022
Supreme Court, New York County
Docket Number: Index No. 651705/2021
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

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CAC/BHL JOINT VENTURE, LLC,

Plaintiff,

- v -

TISHMAN CONSTRUCTION CORPORATION OF NEW YORK,

Defendant.

---X

INDEX NO.	651705/2021
MOTION DATE	
MOTION SEQ. NO.	004

DECISION + ORDER ON MOTION

HON. BARRY R. OSTRAGER

The Court heard oral argument on May 25, 2022 via Microsoft Teams on the motion by defendant Tishman Construction Corporation of New York ("Tishman") to dismiss the Amended Complaint in its entirety pursuant to CPLR 3211(a)(1) and (7). In accordance with the May 25, 2022 transcript of proceedings, the motion is granted in part and denied in part as follows.

Plaintiff CAC/BHL Joint Venture LLC ("CAC") entered into four Subcontracts with Tishman to complete certain work related to Tishman's Contract with the City pursuant to the Build-It-Back Program to rebuild various homes damaged or destroyed during Hurricane Sandy (NYSCEF Doc. Nos. 17-21). Before signing the Subcontracts, CAC asserts it made certain price concessions to secure the Subcontracts while still maintaining a reasonable profit margin. Because of alleged issues related to the Contract between Tishman and the City, the City reduced the scope of work in its Contract with Tishman, and Tishman allegedly delayed unreasonably in reducing CAC's scope of work and the Subcontract Price until after CAC had incurred costs for labor and materials related to the omitted work. CAC commenced this action for money damages, asserting in the Amended Complaint claims for breach of contract, *quantum meruit,* and unjust enrichment (NYSCEF Doc. No. 32).

In accordance with the May 25, 2022 transcript of proceedings, the Court denies dismissal of the First Cause of Action sounding in breach of contract. 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). Because CAC is not relying on pre-contract assurances, the integration/merger clause in Section 44 has no application. Instead, CAC appears to rely on Section 65 of the Subcontract entitled "Owner Omitted Work." Tishman argues that Section 65 bars CAC's claim because it expressly permits a reduction in the scope of work where, as here, the City reduced the scope of work under the Tishman Contract. But construing the pleadings liberally and considering Section 65 in its entirety and in the context of the Subcontract as a whole, the Court finds that plaintiff has stated a cause of action and the documentary evidence fails to establish a defense as a matter of law.

Section 65 does allow certain modifications in the scope of work, but it also provides for compensation to the Subcontractor (here plaintiff CAC) where the Subcontractor has purchased materials and equipment for the job before the work is omitted. That is precisely what plaintiff has alleged in Paragraphs 24 and 28 of the Amended Complaint. Plaintiff in its opposition papers points to costs incurred not only for materials but also for labor commitments before the scope of work was reduced. Plaintiff further argues that, because Tishman did not proceed expeditiously and comply with its own obligations under the City Contract, the reduction in the scope of work did not occur until CAC had necessarily incurred the costs. In light of the "Time of the Essence" clause in Article 3 of the Contract between Tishman and the City, which is incorporated by

reference into the Subcontracts, plaintiff's claim survives dismissal at the pleading stage and discovery on the claim shall proceed. In light of this finding, the Court need not address plaintiff's objections to the bidding process, which have been more specifically raised in the Complaint filed under Index No. 651706/21 and are better determined in that context.

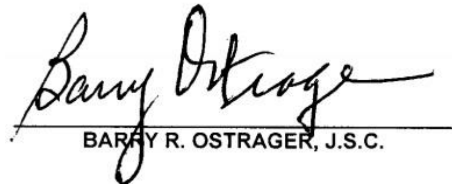
The Court dismisses the quasi-contract contract claims alleged in the alternative. The law is well-established that quasi-contract claims are barred by the existence of a written contract. *See, e.g., Lantau Holdings Ltd. v. General Pacific Group Ltd.,* 163 A.D.3d 407, 407 (1st Dep't 2018) ("The existence of a valid and enforceable contract governing the relevant subject matter precludes recovery in quasi-contract for events arising out of the same subject matter.").

Plaintiff argues that the change in the scope of work was so substantial that it amounts to a "cardinal change" that renders the written Subcontracts unenforceable or that, at a minimum, raises issues of fact related to the cardinal change doctrine. Since both the Subcontracts and the prime Contract directly address changes in the scope of work and related issues of proper compensation, plaintiff's remedy likely lies in the terms of the written Subcontracts and not in quasi-contract theories. Further, it appears that plaintiff continued to perform and is not really seeking a release from all the Subcontract terms, which would be the result if a cardinal change were established. Rather, plaintiff appears to be seeking what it claims is proper compensation for the work performed and the costs incurred under the Subcontracts. However, the Court declines at this pre-answer motion to dismiss stage of the case to make a definitive finding on plaintiff's cardinal change claim. Although plaintiff has cited no First Department authority to support this fact-intensive contention, plaintiff may conduct discovery on this issue and make an appropriate motion at an appropriate time. Thus, the *quantum meruit* claim is dismissed without prejudice.

The Court also dismisses the unjust enrichment claim for similar reasons and because plaintiff has not sufficiently alleged that Tishman was unjustly enriched where, as here, Tishman reduced plaintiff's scope of work based on the City's reduction of Tishman's scope of work and its Contract price.

Defendant Tishman shall Answer the remaining claims in the Amended Complaint within twenty days. The parties shall thereafter meet and confer to agree upon a Preliminary Conference Order using the form available on the Part 61 website that addresses relevant discovery under this action as consolidated with other pending actions (see Decision and Order on mot. seq. 005, NYSCEF Doc. No. 72). The Proposed Preliminary Conference Order shall be efiled by June 27, 2022 with a cover letter setting forth a dial-in number for the Preliminary Conference. The Preliminary Conference is scheduled for July 13, 2022 at 10:30 a.m.

Dated: May 25, 2022



BARRY R. OSTRAGER, J.S.C.

CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION	
	[ ] GRANTED	[ ] DENIED	[X] GRANTED IN PART	[X] OTHER
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER	
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