SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MELISSA CRANE **PART** 60M

Justice

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RCM TECHNOLOGIES INC.,

Plaintiff,

- v -

MARIC MECHANICAL, INC.,ALLIED WORLD ASSURANCE COMPANY (U.S.) INC.,SAFECO INSURANCE COMPANY OF AMERICA

Defendant.

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INDEX NO. 655299/2021

MOTION DATE 04/11/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 47, 48

were read on this motion to/for DISMISSAL.

INTRODUCTION

This contractual dispute arises from a construction project (the "Project") at Bronx Community College (the "BCC"). After the New York Power Authority (the "NYPA") engaged plaintiff, RCM Technologies Inc. ("RCM"), to assist with its Energy Services Program and the Project, RCM hired defendant Maric Mechanical, Inc. ("Maric") to complete various tasks, such as piping installation, for the Project on its behalf (NYSCEF Doc. No. 2, ¶ 7). RCM contends that defendants did not contribute their share of costs to defend NYPA's project-related claims in arbitration, as allegedly required in the defendants' underlying contracts (*id.*, ¶ 14).

FACTS AND RELEVANT BACKGROUND

The court derives the following facts from RCM's complaint unless indicated otherwise.

I. *The Project*

In 2008, RCM, an engineering and construction management firm, and the NYPA entered into a Master Service Agreement (the "MSA") (*id.*, ¶ 18). Pursuant to the MSA, RCM agreed to perform work on the Project to assist the NYPA with its Energy Services Program (*id.*, ¶ 6).

In late Fall 2010, the NYPA began assigning work to RCM (*id.*, ¶ 19). As a result, RCM hired Maric "to perform various tasks on its behalf" (*id.*, ¶ 7). In relation to the Project, "Maric was responsible for providing all labor, material, equipment, and services required," for using the aforementioned materials to construct piping structures according to the specifications RCM provided, and for "installing the hot water pipes on RCM's behalf" (*id.*, ¶ 21).

II. *The Subcontractor Agreement*

On April 8, 2011, RCM and Maric entered into a subcontractor agreement (the "Subcontractor Agreement") (*id.*, ¶ 20). Under the Subcontractor Agreement, Maric was required to perform work on the Project on RCM's behalf (*id.*, ¶ 7). The Subcontractor Agreement also provided for RCM's indemnification and defense in certain circumstances (*id.*, ¶ 37). Specifically, Maric was obligated to "indemnify [RCM] against any litigation that may arise 'out of the performance…by [Maric]'" (*id.*, ¶ 20). The indemnity provision in Article 10 provided:

> 10.1 Indemnity. To the fullest extent permitted by law, the Subcontractor agrees to defend indemnify and hold harmless the Contractor and the Authority, and their officers… from and against all claims, actions, suits, liabilities, losses, damages, costs and expenses, including without limitation, attorney's fees, resulting from injury or alleged injury to persons, including death resulting therefrom, that may arise or be alleged to have arisen, wholly or in part, out of the performance of this Agreement by the Subcontractor or its agents, including any Subcontractor Vendor. The Subcontractor, at its own expense, shall defend any legal actions brought against the Authority or the Contractor due to such claims, and pay the related costs and attorneys' fees and any judgements arising from such actions. (NYSCEF Doc. No. 36, pg. 18).

Section 20.1.4, as contained in the Supplementary Conditions portion of the Subcontractor Agreement (*id.*, pg. 93) effectively provides the same thing, but supersedes Section 10.1 in the event the two provisions conflict.

III. *The Dispute Over Work and Subsequent Arbitration Proceeding*

After the work for the Project was completed, "RCM and NYPA had a legal dispute" that resulted in RCM commencing an arbitration proceeding (filed as *RCM Technologies, Inc., v. New York Power Authority*, JAMS Reference Number: 1425024690) (the "Arbitration Proceeding") (*id.*, ¶¶ 11, 27). In late November 2017, the NYPA filed counterclaims against RCM in the Arbitration Proceeding (*id.*, ¶ 27). The counterclaims alleged that Maric's work on the Project, on RCM's behalf, was defective, did not comply with the approved drawings, created damage to

property other than the work itself, and resulted in ongoing dangerous conditions (*id.*, ¶ 28). The counterclaims also alleged that the "hot water piping and valves Maric had installed…were failing, due, in part, to Maric installing the wrong sized piping" (*id.*, ¶ 11).

IV. *The Joint Defense Agreement Between RCM and Maric*

After the NYPA interposed its counterclaim in the Arbitration Proceeding, RCM and Maric entered into a Joint Defense and Cooperation Agreement (the "JDCA") (NYSCEF Doc. No. 14). Section 4, styled as "Cooperation," stated:

> **4. Cooperation** - RCMT and Maric dispute NYPA's Counterclaims and agree to cooperate in defending the Counterclaims in the Arbitration. RCMT shall request that the Arbitrator itemize any award in favor of NYPA as either defective design and/or defective construction. RCMT shall be responsible for that portion of the award the arbitrator determines is the result of defective design. Maric shall be responsible for the portion of the award the arbitrator determines is the result of defective construction and shall, upon demand by RCMT and consistent with the Subcontract, be responsible for the proportional share of the defense costs incurred by RCMT in the defense of these defective construction claims.
> (*id.*, ¶ 4)

Section 5, styled as "Defense Costs and Retention of Experts on Alleged Defective Mechanical Work," provided:

> **5. Defense Costs and Retention of Experts on Alleged Defective Mechanical Work** - Each Party remains solely and exclusively responsible for its own defense to NYPA's Counterclaims and all costs incurred in its defense of these Counterclaims including, but not limited to, responsibility to retain and pay for expert services to address and defend against NYPA's allegations that the mechanical work was defective. RCMT shall be responsible for those expert services required to address and defend against any allegations by NYPA that the design utilized for the mechanical work performed was defective. Maric shall be responsible for those expert services required to address and defend against any allegations by NYPA that the construction services provided relative to the mechanical work performed was defective. Notwithstanding anything contained herein, Maric shall retain responsibility for all defense and indemnity obligations to RCMT under the Subcontract in the event the Arbitrator apportions liability to Maric based upon defective mechanical construction work.
> (*id.*, ¶ 5)

V. *The Arbitrator's Final Award*

At the Arbitration Proceeding's conclusion, the Arbitrator issued an award, dated April 15, 2020 (the "Final Award" or the "Amended Final Arbitration Award") (NYSCEF Doc. No. 42).

The Amended Final Arbitration Award held in favor of RCM and Maric, and ultimately dismissed the NYPA's counterclaims with prejudice (NYSCEF Doc. No. 2, ¶ 50).

DISCUSSION

Maric now moves, pre-answer and pursuant to CPLR 3211 (a)(1) and (a)(7), to dismiss the complaint in its entirety, and for an award of costs and disbursements related to this case (NYSCEF Doc. No. 7). RCM cross-moves, pursuant to CPLR 3212, for an order granting it partial summary judgment against Maric on the basis that: (a) Maric is liable on the first cause of action for contractual defense and indemnification; and/or, (b) pursuant to CPLR 3001, for an order declaring that Section 20.1.4 of the Supplemental Conditions of and Section 10.1 of the Subcontractor Agreement between RCMT and Maric are enforceable (NYSCEF Doc. No. 32).

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. [The court] accept[s] the facts as alleged in the complaint as true, [and] accord[s] plaintiff the benefit of every possible favorable inference" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citation omitted]). However, bare legal conclusions and "factual claims which are either inherently incredible or flatly contradicted by documentary evidence" are not accorded their most favorable intendment" (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995]). "[T]he 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]; *see also Water St. Leasehold LLC v Deloitte & Touche LLP*, 19 AD3d 183 [1st Dept 2005], *lv denied* 6 NY3d 706 [2006].) Dismissal under subsection (a)(1) is warranted where the documentary evidence "conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]).

I. *Maric's Motion to Dismiss (Motion Sequence No. 01)*

Maric's motion to dismiss the complaint is granted.

The parties agreed, in Section 4 of the JDCA, that Maric would be responsible for any portion of an award for "defective construction" (as opposed to defective design) and, if the construction was defective, "be responsible for the proportional share of defense costs incurred by RCMT in defense of" the arbitration counterclaims (NYSCEF Doc. No. 14, ¶ 4).

In Section 5 of JDCA, the parties agreed that "[e]ach Party remains solely and exclusively responsible for its own defense to NYPA's Counterclaims and all costs incurred in its defense of these Counterclaims including, but not limited to, responsibility to retain and pay for expert services to address and defend against NYPA's allegations that the mechanical work was defective" (NYSCEF Doc. No. 14, ¶ 4). That is, the parties agreed that RCM would be responsible for defending the design work, and Maric would be responsible for defending the construction work. They further agreed that Maric would indemnify RCM for all defense costs incurred in defending the Arbitration Proceeding if the arbitrator found Maric's construction work to be defective (*id.*, ¶ 5 ["Notwithstanding anything contained herein, Maric shall retain responsibility for all defense and indemnity obligations to RCMT under the Subcontract in the event the Arbitrator apportions liability to Maric based upon defective mechanical construction work."]).

Section 5 of the JDCA plainly modifies the parties' indemnification obligations under the Subcontractor Agreement for the purpose of jointly defending the NYPA's counterclaim in the underlying Arbitration Proceeding. This written modification is permitted under Section 12.9 of the Subcontractor Agreement (NYSCEF Doc. No. 10, pg. 25).

Read together, the Subcontract and the JDCA expressly indicate that the parties agreed, solely for the purposes of their joint defense in the arbitration, to absolve Maric's indemnification obligations to RCM under the Subcontractor Agreement, unless Maric was found at fault.

Ultimately, the arbitrator did not find that either the construction or design work was defective. Instead, and as explained in detail in the Final Award, the arbitrator determined that neither RCM's design, nor Maric's installation, caused the system's failure at the Project, and any failure was instead due to operator negligence or "poor plant operations" (NYSCEF Doc. No. 42, pgs. 26, 39).

Additionally, the arbitrator summarized these determinations in Section IV of the Final Award, titled "Amended Final Award On The Bronx Community College Project Claims," concluding that the "NYPA shall recover nothing from [RCMT] or [Maric]", that "[a]ny and all other claims between the parties are [denied]", and that the [Amended Final Arbitration Award supersedes the [prior] Final Award dated March 4, 2020" (NYSCEF Doc. No. 42, pgs. 40-41).

The arbitrator's conclusion, that the system's failure was neither RCM nor Maric's fault, and that it was instead due to operator negligence, did not apportion liability to Maric, and therefore did not trigger the defense and indemnity obligations contained in the JDCA.

Accordingly, Maric's motion to dismiss is granted and the complaint in this case is dismissed.

II. ***RCM's Cross-Motion for Partial Summary Judgment***

The court grants defendant's motion to dismiss the complaint in its entirety, rendering the cross-motion for partial summary judgment moot. In any event, RCM's cross-motion for summary judgment would be premature at this juncture, because issue has not been joined (*see SHG Resources, LLC v SYTR Real Estate Holdings LLC*, 201 AD3d 610 [1st Dept 2022]).

The court has considered the parties' remaining contentions and finds them unavailing.

Accordingly, it is

ORDERED that defendant Maric's motion to dismiss the complaint (MS 01) is granted in its entirety; and it is further

ADJUDGED, DECREED AND DECLARED that Maric need not reimburse RCM for its defense costs in the underlying arbitration; and it is further

ORDERED that plaintiff RCM's cross-motion is denied; and it is further

ORDERED that the clerk of the court is directed to mark this case as disposed.

7/5/2022
DATE

MELISSA CRANE, J.S.C.

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