

Marjam Supply Co., Inc. v Deluxe Bldg. Constr., LLC
2022 NY Slip Op 32299(U)
July 15, 2022
Supreme Court, New York County
Docket Number: Index No. 155820/2019
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

-----X

MARJAM SUPPLY CO., INC.,

Plaintiff,

- v -

DELUXE BUILDING CONSTRUCTION, LLC, FRYDCO
CAPITAL GROUP, LLC, and JOHN DOES 1-10,

Defendants.

-----X

INDEX NO. 155820/2019

MOTION DATE 12/27/2021

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document numbers (Motion 003) 32, 33, 34, 35, and 37

were read on this motion to CONFIRM/DISAPPROVE AWARD/REPORT, etc.

By decision and order of this court, dated April 3, 2020 (NYSCEF Doc. No. 26), this court preliminarily granted the motion of defendant Deluxe Building Construction, LLC (“Deluxe”) (motion seq. no. 001), to dismiss the complaint to the extent of referring the question of personal jurisdiction to a Special Referee’s traverse hearing for determination. At this time, the court is called upon to confirm or disapprove the Special Referee’s determination that personal jurisdiction has, in fact, been obtained (*see*, NYSCEF Doc. No. 35).

Plaintiff, on its instant motion to confirm the Special Referee’s Report, also asks the court to require Deluxe to answer the complaint within 20 days (*see*, NYSCEF Doc. No. 33 ¶ 11). In response, Deluxe consents to confirmation; but objects to any additional direction from this court that Deluxe answer the complaint at this juncture, given the fact that the court’s April 3, 2020, Decision and Order merely held the balance of its then-pending motion to dismiss in abeyance pending the Special Referee’s findings (*see*, NYSCEF Doc. No. 37 ¶ 2). This court concurs with

Deluxe's position on this point, and will now proceed to determine the balance of Deluxe's motion to dismiss.

Background¹

In this action for breach of contract, plaintiff Marjam Supply Co., Inc. ("Marjam"), asserts nine causes of action in the complaint: breach of contract (first cause of action); book account (second cause of action); sale of goods (third cause of action); quantum meruit (fourth cause of action); account stated (fifth cause of action); unjust enrichment (sixth cause of action); breach of the Prompt Payment Act (seventh cause of action); alter ego (eighth cause of action); and violation of article 3-A of the Lien Law (ninth cause of action). Deluxe has moved to dismiss the second, third, fourth, fifth, sixth, seventh, and ninth causes of action based on documentary evidence and for failure to state a claim for which relief can be granted.

On June 1, 2018, Marjam and Deluxe entered into an agreement (the "Credit Agreement") for Marjam to provide Deluxe with certain building materials for use on their projects (NYSCEF Doc. No. 9). The Credit Agreement provides that "the undersigned [²] jointly and/or severally unconditionally and irrevocably guarantees the full and prompt payment of any indebtedness of [Deluxe], to MARJAM including finance/late charges in the amount of 2% per month. (*Id.*) If legal action was required to enforce payment of the amount due, "the undersigned jointly and severally guarantee[d] to be liable for all attorney's fees in the amount of 33% of the balance owed, including all costs and expenses incurred by MARJAM for such a situation" (*Id.*) In the event of Deluxe's non-payment, "MARJAM w[ould] be entitled to

¹ Given the lack of specificity provided in the complaint (NYSCEF Doc. No. 1) as to the precise theories of the several causes of action, this court understands them through the elucidation provided by plaintiff in its opposing memorandum of law (NYSCEF Doc. No. 12).

² The contractual reference to "undersigned," while not specifically defined in the Credit Agreement, is logically understood by the court to refer to Jacob Frydman, officer of Deluxe. *See* NYSCEF Doc. No. 9. The motion to dismiss interposes no argument based on clarity of the guaranty as signed.

payment from the undersigned or his heirs, without prior demand or notice and without proceeding against the applicant first” (*id.*).

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

CPLR 3211(a)(1) provides that a complaint may be dismissed if “a defense is founded upon documentary evidence.” A complaint may also be dismissed if “the pleading fails to state a cause of action” (CPLR 3211 [a] [7]). To bring a breach of contract action, a plaintiff must allege “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]). However, an additional claim that “repeats the same allegations as the cause of action

for breach of contract almost verbatim” should be dismissed (*Shear Enters., LLC v Cohen*, 189 AD3d 423, 425 [1st Dept 2020]).

With respect to the book account and sale of goods claims, Marjam alleges, respectively, that Deluxe has refused and continues to refuse to pay Marjam as agreed and that Deluxe has refused and still refuses to pay any or all of the amount it owes Marjam. These claims repeat Marjam’s breach of contract allegation – that Deluxe failed to fully compensate Marjam for goods and services provided – “almost verbatim” (*id.*). Accordingly, these claims are duplicative of Marjam’s breach of contract claim and must be dismissed.

With respect to the account stated claim, “[a]n essential element of an account stated is an agreement with respect to the amount of the balance due” (*Erdman Anthony & Assocs. v Barkstrom*, 298 AD2d 981, 981 [4th Dept], *rearg denied* 751 NYS2d 430 [4th Dept 2002]). “An account stated [also] assumes the existence of some indebtedness between the parties, or an express agreement to treat the statement as an account stated. It cannot be used to create liability where none otherwise exists” (*M. Paladino, Inc. v J. Lucchese & Son Contracting Corp.*, 247 AD2d 515, 516 [2d Dept 1998]).

Here, Marjam alleges that it remitted a statement of account between Marjam and Deluxe, to Deluxe – which Deluxe has not objected to – and that the balance on the account is now overdue (NYSCEF Doc. No. 14). However, “a claim for an account stated may not be utilized simply as another means to attempt to collect under a disputed contract” (*Martin H. Bauman Assoc. v H & M Intl. Transp.*, 171 AD2d 479, 485 [1st Dept 1991]). Since Marjam seeks the exact same relief in its account stated and breach of contract claims – \$114,992.32 plus continuing service charges and attorneys’ fees – its account stated claim is duplicative of its breach of contract claim and must be dismissed (NYSCEF Doc. No. 1 ¶ 7, 32).

With respect to the quantum meruit claim, a party must establish “(1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services” (*Caribbean Direct, Inc. v Dubset LLC*, 100 AD3d 510, 511 [1st Dept 2012]). With respect to the unjust enrichment claim, a party must show that “(1) the other party was enriched, (2) at that party’s expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered” (*Goel v Ramachandran*, 111 AD3d 783, 791 [2d Dept 2013] [internal citations omitted]). However, “[t]he 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]). Thus, the quantum meruit and unjust enrichment claims must be dismissed in the face of the parties’ written contract.

With respect to the breach of Prompt Payment Act claim (GBL 756). That Act provides that a construction contract is “a written or oral agreement for the construction, reconstruction, alteration, maintenance, moving or demolition of any building, structure or improvement, or relating to the excavation of or other development or improvement to land, and where the aggregate cost of the construction project including all labor, services, materials and equipment to be furnished, equals or exceeds one hundred fifty thousand dollars.” Here, Marjam alleges that Deluxe violated New York’s Prompt Payment Act by not paying for accepted billing per the agreed upon billing cycle. However, Marjam submitted an invoice for only \$114,992.32 from Deluxe, which neither “equals [n]or exceeds one hundred fifty thousand dollars,” nor is there a specific total value for the goods or services provided to Deluxe stipulated anywhere in the

Credit Agreement (GBL 756; NYSCEF Doc. Nos. 14, 9). Therefore, Deluxe did not violate New York's Prompt Payment Act.

Finally, regarding the Lien Law claim, Lien Law § 71 (3) (a) provides:

With respect to the trust of which an owner is trustee, "trust claims" means claims of contractors, subcontractors, architects, engineers, surveyors, laborers and materialmen arising out of the improvement, for which the owner is obligated, and also means any obligation of the owner incurred in connection with the improvement for a payment or expenditure defined as cost of improvement.

Marjam alleges this claim solely against the John Doe defendants (*see* NYSCEF Doc. No. 1 ¶¶ 44-49). Since this claim was not asserted against the movant – Deluxe – the portion of the motion seeking dismissal of this claim will be denied.

Accordingly, it is hereby

ORDERED that the plaintiff's motion to confirm the Special Referee's Report (NYSCEF Doc. No. 35) is granted; and it is further

ORDERED that the motion of defendant Deluxe Building Construction, LLC, f/k/a K.C. Construction and Building Supply, LLC, to dismiss the complaint is granted in part, and the second, third, fourth, fifth, sixth, and seventh causes of action are dismissed against said defendant; and it is further

ORDERED that the motion of defendant Deluxe Building Construction, LLC, f/k/a K.C. Construction and Building Supply, LLC, to dismiss the complaint is denied in part, and the ninth

cause of action is not dismissed against defendants John Does 1-10.

Louis L. Nock

<u>7/15/2022</u>			<u>LOUIS L. NOCK, J.S.C.</u>	
DATE				
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
			<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE