

Skanska USA Bldg. Inc. v WSP USA Inc.
2022 NY Slip Op 32635(U)
August 3, 2022
Supreme Court, New York County
Docket Number: Index No. 650712/2022
Judge: Margaret Chan
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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SKANSKA USA BUILDING INC., SKANSKA USA CIVIL
NORTHEAST INC., AND WALSH CONSTRUCTION
COMPANY II, LLC, A JOINT VENTURE

Plaintiff,

- v -

WSP USA INC. F/K/A PARSONS BRINCKERHOFF, INC.
AND HELLMUTH, OBATA & KASSABAUM, P.C., A JOINT
VENTURE,

Defendants.

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INDEX NO. 650712/2022

MOTION DATE 04/25/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

HON. MARGARET CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 28, 29, 30, 31, 32

were read on this motion to/for

DISMISSAL

In this action concerning the design and building of the new LaGuardia Airport Central Terminal Building, plaintiff design/builder -- Skanska USA Building Inc., Skanska USA Civil Northeast Inc., and Walsh Construction Company II, LLC, a joint venture (SWJV), seeks, in part, to recover \$167,472,447 in damages allegedly caused by defendant designer -- WSP USA Inc. (f/k/a Parsons Brinckerhoff, Inc. and Hellmuth, Obata & Kassabaum, P.C., a joint venture [PB/HOK]), and SWJV's complaint alleges causes of action for breach of contract and professional malpractice. Defendant answered and asserted two counterclaims. SWJV now moves pursuant to CPLR 3211(a)(1), (a)(6), and (a)(7) to dismiss part of the first counterclaim and the second counterclaim. PB/HOK opposes the motion.

Background

In connection with the LaGuardia Airport Central Terminal Building Replacement Project ("Project"), PB/HOK, a joint venture consisting of two professional design firms, entered into a Design Agreement with SWJV dated May 20, 2014, under which PB/HOK agreed to provide design and construction administration services for the construction of the Project (NYSCEF # 8- Design Agreement). The Project consisted of multiple components, including a new Terminal B; a Central Hall; a new West Parking Garage with a pedestrian walkway connection between the new Terminal B and the new West Parking Garage; a new

Headhouse serving as an arrival and departures hall; a new central heating and refrigeration plant; new contiguous aircraft ramp areas; and new contiguous frontage roads and building and site utilities.

The Design Agreement also provided that, in the event of a dispute, “[a]ll claims, disputes or other matters in controversy between Designer/Builder and Designer relating to or arising out of the Project or the performance of this Agreement (“Disputes”) shall be resolved in accordance with the provisions of this Article 9” – entitled “Dispute Resolution” (*id.*). The process begins with the party seeking relief to give written notice of the basis for the claim first and then the parties are to attempt resolution of the claim through discussions at (i) the field level through representatives, and then (ii) with party executives (*id.*, §§ 9.3.2 and 9.3.3). And if these attempts fail, then the parties are to seek non-binding mediation” (*id.*, § 9.3.4). Finally, if mediation fails, then the dispute will go to litigation (*id.*).

At issue on this motion are the two counterclaims asserted in the PB/HOK’s answer. The first counterclaim for breach of contract seeks in excess of \$15,000,000 for “Additional Services” under § 3.16 of the Design Agreement.¹ PB/HOK alleges that PB/HOK was not compensated for the additional services it performed at SWJV’s direction (Unresolved Claims), which additional services are identified by 51 change orders in the counterclaims (NYSCEF # 6-Answer and Counterclaims, ¶¶ 171, 172). PB/HOK adds that its “efforts to exhaust dispute resolution terms of the [Design Agreement] have been frustrated by SWJV’s decision to unilaterally and prematurely terminate dispute resolution procedures and pursue this action [and that] [t]o the extent possible, all conditions precedent have occurred or been performed relating to the counterclaims” (*id.*, ¶¶ 174-175).

SWJV seeks to dismiss the majority of the first counterclaim on the ground that, excepting the CO-196 (Floodproofing Redesign) and CO-118 (Steel Connection Design) claims, the Unresolved Claims have not been subject to the non-binding mediation as required by the alternative resolution procedures under Article 9 of

¹ Section 3.16 of the Design Agreement provides:

Additional Services are services beyond the scope of the Design Phase Basic Services or the Post-Design Phase Basic Services, shall be provided by Designer and paid for as Additional Services in accordance with Section 6.4, and shall be performed by Designer in accordance with a mutually acceptable schedule

(NYSCEF # 8, § 3.16).

the Design Agreement. Indeed, SWJV's Regional Director, whose responsibilities include participating in claim resolution procedures between SWJV and PB/HOK, avers that except for CO-196 and CO-118, "PB/HOK has failed to comply with the Design Agreement's mandated alternative dispute resolution process with respect to each of the 'additional' service claims PB/HOK identifies in its counterclaims as 'Other Unresolved Change Claims'" (NYSCEF # 10—Farland Aff., ¶ 19). SWJV adds "[n]o act on the part of SWJV frustrated or hindered the timing or progression of PB/HOK's 'Unresolved Claims'" (*id.*, ¶¶ 21, 22).

In opposition, PB/HOK argues that, contrary to SWJV's position, the Unresolved Claims were part of the dispute resolution process in accordance with Article 9 of the Design Agreement, and that the process was not completed because SWJV began this action and refused to mediate the claims. Under these circumstances, PB/HOK argues that the first counterclaim should not be dismissed or, at the very least, should be stayed.

In support of its opposition, PB/HOK submits the affidavit of Jeannette Segal, its Senior Project Manager responsible for participating in the dispute resolution and mediation proceedings between the parties. Segal avers that SWJV has been on notice of each of the Unresolved Claims "for years" and notice was provided of these claims to SWJV separately between 2016 and 2019 "while they were discussed and negotiated at weekly meetings without resolution" (NYSCEF # 15-Aff. Jeannette Segal, ¶¶ 8, 9). The parties then participated in a mediation process that began in January 2020, and that as a condition to PB/HOK's participation, "the parties agreed that it would encompass all known issues and disputes between them to facilitate negotiations on a global basis and a global resolution of all known claims" (*id.*, ¶ 12). At an in-person session on December 16, 2021, the Unresolved Claims listed in the counterclaim were "specifically presented" to the mediator, but the sessions "were adjourned without resolution while the parties, with the assistance of the Mediator, evaluated the next steps in continuation of the global mediation process" (*id.*, ¶¶ 15, 16). "In February 2022 ... in the midst of those discussions, SWJV declared the mediation 'concluded' and refused to have any further discussions regarding the mediation with the [PB/HOK] or the Mediator" (*id.*, ¶ 17).

PB/HOK also submit a tolling agreement related to dispute resolution efforts which includes a list of issues subject to the tolling agreement and an amendment to the tolling agreement dated July 30, 2021, which specifically refers to "all unresolved claims of [PB/HOK] for Additional Services for the Project for which [PB/HOK] has provided written notice to SWJV to date" (NYSCEF #16-Tolling Agreement, at 13). In response, SWJV, through its project manager, argues that PB/HOK did not satisfy its obligations under the alternative resolution provisions of the Design Agreement by merely presenting the information to the mediator. The project manager asserts that there would be a documentary record of a demand for

mediation if the claims were not resolved during the field dispute resolution and senior executive dispute resolution process (NYSCEF # 21-Tyler Aff, ¶¶ 6,7). SWJV submits, as an example, a demand letter for mediation for the CO118 change work order request (NYSCEF # 22).

PB/HOK's second counterclaim is for unjust enrichment/quantum meruit (*id.* ¶¶ 179-183). SWJV argues that this counterclaim is precluded because the Design Agreement governs PB/HOK's right to recover for the Unresolved Claims. PB/HOK responds that at this early stage of the action, the counterclaim adequately pleads in the alternative to the breach of contract claim, a cause of action for unjust enrichment/quantum meruit. But, SWJV maintains that it did not waive PB/HOK's duty to participate in non-binding mediation by ending alternate dispute resolution of their claims.

Discussion

On a motion to dismiss pursuant to CPLR 3211 (a)(7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference," and "determine only whether the facts as alleged fit into any cognizable legal theory" (*Siegmund Strauss, Inc. v E. 149th Realty Corp.*, 104 AD3d 401, 403 [1st Dept 2013]). Significantly, "whether a plaintiff ... can ultimately establish its allegations is not taken into consideration in determining a motion to dismiss" (*Phillips S. Beach LLC v ZC Specialty Ins. Co.*, 55 AD3d 493, 497 [1st Dept 2008], *lv denied* 12 NY3d 713 [2009]). Additionally, "to withstand dismissal, a plaintiff may submit opposing affidavits which can be considered to amplify the pleadings" (*M& E 73-75, LLC v 57 Fusion LLC*, 189 AD3d 1, 5 (1st Dept 2020), *lv dismissed* 38 NY2d 1086 [2021]).

At the same time, "[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence, they are not presumed to be true or accorded every favorable inference" (*Morgenthau & Latham v Bank of New York Company, Inc.*, 305 AD2d 74, 78 [1st Dept 2003] [internal citation and quotation omitted]). However, dismissal based on documentary evidence may result "only when it has been shown that a material fact as claimed by the pleader is not a fact at all and no significant dispute exists regarding it" (*Acquista v New York Life Ins. Co.*, 285 AD2d 73, 76 [1st Dept 2001]), quoting, *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Moreover, "affidavits, which do no more than assert the inaccuracy of plaintiffs' allegations, may not be considered, in the context of a motion to dismiss, for the purpose of determining whether there is evidentiary support for the complaint ... and do not otherwise conclusively establish a defense to the asserted claims as a matter of law" (*Tsimerman v Janoff*, 40 AD3d 242, 242 [1st Dept 2007]).

At issue with regard to the first counterclaim is whether dismissal is appropriate based on PB/HOK's alleged failure to comply with the alternative dispute resolution procedures in the Design Agreement, which is a condition precedent to the right to bring an action (*see e.g. Archstone Dev. LLC v Renval Constr. LLC*, 156 AD3d 432 433 [1st Dept 2017] [affirming the dismissal of the breach of contract claim because the conditions precedent were not all met]; *MCC Dev. Corp. v Perla*, 81 AD3d 474, 474 [1st Dept 2011], *lv denied* 17 NY3d 715 [2011] [finding that the court properly dismissed the plaintiff's breach of contract claim because plaintiff did not comply with alternative dispute resolution provision -- a condition precedent to commencing litigation]).

Here, the first counterclaim alleges that PB/HOK's "efforts to exhaust dispute resolution terms of the [Design Agreement] have been frustrated by SWJV's decision to unilaterally and prematurely terminate dispute resolution procedures and pursue this action. [And] to the extent possible, all conditions precedent have occurred or been performed relating to the counterclaims" (*id.*, ¶¶ 174-175). Accepting the allegations in the first counterclaim as true and as amplified by the affidavit of its Senior Project Manager and the Tolling Agreement, PB/HOK has adequately alleged that the Unresolved Claims are subject to the dispute resolution process and efforts to mediate the claims were frustrated when SWJV ended the process (*see Project Cricket Acquisition, Inc. v FCP Investors VI, L.P.*, 2017 WL 2797468 [Sup Ct NY County 2017], *mod on other grounds*, 159 AD3d 600 [1st Dept], *lv denied* 32 NY3d 1080 [2018] [finding that plaintiff adequately alleged compliance with mediation provision of contract based on allegations and evidence that the subject matter of the claims were included in the mediation but that based on defendant's employees statements that mediation would be futile]; *see also VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 195 [1st Dept 2019][a party "should not be permitted to benefit from the nonexistence of any condition precedent where it is allege that [the party] frustrated or prevented the occurrence of the condition"]).

Next, insofar as SWJV relies on affidavits to contradict the allegations in the counterclaim, such affidavits, which do not constitute documentary evidence, are insufficient to establish a defense as a matter of law (*Fotanetta v Doe*, 73 AD3d 78, 86 [2d Dept 2010] [affidavits are not considered documentary evidence]). As for the Design Agreement, while Article 9 requires the submission to mediation prior to litigation, the agreement alone is insufficient to "utterly refute" allegations that PB/HOK's efforts to complete the dispute resolution process were frustrated by SWJV (*VXI Lux Holdco S.A.R.L.*, 171 AD3d at 193 [internal citation and quotation omitted]). Likewise, a document submitted by PB/HOK regarding the dispute resolution process as to other claims is not dispositive. Hence, the branch of SWJV's motion to dismiss parts of the first counterclaim is denied.

As to the second counterclaim for unjust enrichment/quantum meruit, while PB/HOK argues that a claim for unjust enrichment can be pleaded as an alternative to a breach of contract claim, this principle does not apply when, as here, there is no dispute that an express contract governs the claims at issue (*Aviv Constr., Inc. v Antiquarium, Ltd.*, 259 AD2d 445, 446 [1st Dept 1999] [the existence of an express contract related to the claim precludes the application of recovery in quantum meruit]). In this connection, section 3.16 of the Design Agreement defines the relationship between the parties and specifically addresses payment for Additional Services, like those at issue in the second counterclaim. Accordingly, the second counterclaim for unjust enrichment/quantum meruit must be dismissed.

Conclusion

In view of the above, it is

ORDERED that plaintiff SWJV's motion to dismiss is granted to the extent of dismissing the second counterclaim; and it is further

ORDERED that a preliminary conference will be held by telephone on September 8, 2022, at 11:30 am, with the call-in information to be provided by the court.

This constitutes the Decision and Order of the court.

8/3/2022
DATE


MARGARET CHAN, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE