L&M Fabrication & Mach., Inc. v Skanskaska USA Bldg. Inc.
2022 NY Slip Op 35128(U)
August 23, 2022
Supreme Court, Queens County
Docket Number: Index No. 715779/21
Judge: Leonard Livote
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE LEONARD LIVOTE IA Part 33
Justice

L & M FABRICATION & MACHINE, INC.
Plaintiff

Index Number 715779/21

- against -

Motion Date 11/9/21

Motion Seq. No. 1

SKANSKA USA BUILDING INC., SKANSKA USA CIVIL NORTHEAST INC., and WALSH CONSTRUCTION COMPANY II, individually and as Joint Venturers of SKANSKA WALSH DESIGN-BUILD JV
Defendants

x

FILED
8/25/2022
COUNTY CLERK
QUEENS COUNTY

The following numbered papers read on this motion by defendants to dismiss the first, third, and fourth causes of action pursuant to CPLR 3211(a)(1) and (a)(7) and to dismiss all causes of action arising out plaintiff's Change Order Request (COR) Nos. 68, 69, 70, 71, 72, 73, and 74 based on documentary evidence.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	EF 10 - 18
Answering Affidavits - Exhibits	EF 21 - 34
Reply Affidavits	EF 35

Upon the foregoing papers it is ordered that the motion is determined as follows:

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must accept the facts alleged by the plaintiff as true and liberally construe the complaint, according it the benefit of every possible favorable inference (*see Sokoloff v Harriman Estates Dev.*

Corp., 96 NY2d 406, 414 [2001]; *Benitez v Bella Operating LI Corp.*, 189 AD3d 970 [2d Dept 2020]). The role of the court is to determine only whether the facts as alleged fit within any cognizable legal theory (*see Bianco v Law Offices of Yuri Prakhin*, 189 AD3d 1326 [2d Dept 2020]). In general, when deciding a motion made pursuant to CPLR § 3211(a)(7), "[t]he court is limited to 'an examination of the pleadings to determine whether they state a cause of action'" (*Dolphin Holdings, Ltd. v Gander & White Shipping, Inc.*, 122 AD3d 901, 902 [2d Dept 2014], *quoting Miglino v Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342, 351 [2013]; *see Fedele v Qualified Pers. Residence Trust of Doris Rosen Margett*, 137 AD3d 965, 967 [2d Dept 2016]). Moreover, where documentary evidence definitively contradicts the plaintiff's factual allegations and conclusively disposes of the plaintiff's claim, dismissal pursuant to CPLR 3211(a)(1) is warranted (*see Berardino v Ochlan*, 2 AD3d 556, 557 [2d Dept 2003]).

Applying these principles to the case at bar, that branch of defendants' motion to dismiss all causes of action arising out plaintiff's COR Nos. 68, 69, 70, 71, 72, 73, and 74 on the basis of documentary evidence is denied. In support of their motion, defendants initially contend that plaintiff's claims against defendants are barred because plaintiff has already been paid in full for COR Nos. 69, 70, 71, 72, 73, and 74. Specifically, defendants submitted COR No. 6 dated May 5, 2021, which was executed after COR Nos. 69-74, in the amount of $108,000.00, that stated, in pertinent part,

> "[b]y executing this Change Order, Subcontractor/Seller attests that the Subcontract/Purchase Order adjustment provided herein is adequate and constitutes compensation in full for all costs, claims, markup, and expenses, direct or indirect, attributable to this or any other prior Change Orders. Subcontractor/Seller further attests that the Subcontract/Purchase Order Adjustment provided herein constitutes compensation in full for any Damages, costs, expenses, delays, acceleration, or loss of efficiency encountered by Subcontractor in the performance of the Work through the date of this Change Order, and for the performance of this and any prior Change Orders by or before the date of Substantial Completion."

In addition, defendant asserts that plaintiff subsequently accepted payment in the amount of $108,000.00, in accordance with COR No. 6. However, this documentary evidence does not conclusively dispose of plaintiff's quantum meruit, breach of contract, account stated, and unjust enrichment claims in this action. Notwithstanding the above language contained in COR No. 6, the document also states that the change order is a "reconciliation and full and final settlement of additional Structural Steel Detailing costs at the Central Hall . . . ." and "represents a final settlement, accordance, and satisfaction of any outstanding commercial issues, claims, damages, costs, delays, impacts, and expenses related to Structural Steel Detailing that have been asserted or not asserted by the Subcontractor against the Contractor as of the date of Execution of this Change order." Therefore, based on a careful review of the entirety of COR No. 6, it is unclear as to whether the parties intended it to act as a release of any payments due on all of plaintiff's previous change orders and, more specifically, COR Nos. 69-74.

Defendants additionally contend that the complaint must be dismissed because of lack of timely notice of COR Nos. 68-74, as required by Sections 17.3 and 17.5 of the subject Purchase Order (PO) between the parties. However, the various letters, emails, and internal notes submitted by defendants purporting to show that plaintiff failed to comply with these notice provisions do not constitute documentary evidence (*see e.g. Members of the Dekalb Ave. Condominium Assn. v Klein*, 172 AD3d 1196 [2d Dept 2020]; *Phoenix Grantor Trust v Exclusive Hospitality, LLC*, 172 AD3d 923 [2d Dept 2019]). It is well-settled that to qualify as documentary evidence, the evidence "must be unambiguous and of undisputed authenticity" (*Fontanetta v John Doe 1*, 73 AD3d 78, 86 [2d Dept 2010]; *see Flushing Sav. Bank, FSB v Siunykalimi*, 94 AD3d 807, 808 [2d Dept 2012]). "Neither affidavits, deposition testimony, nor letters are considered documentary evidence within the intendment of CPLR 3211(a)(1)" (*Granada Condominium III Assn. v Palomino*, 78 AD3d 996, 997 [2d Dept 2010]; *see Feldshteyn v Brighton Beach 2012, LLC*, 153 AD3d 670 [2d Dept 2017]; *Rodolico v Rubin & Licatesi, P.C.*, 114 AD3d 923 [2d Dept 2014]). The only documentary evidence submitted in support of defendants' motion was the PO and COR Nos. 6 and 68-74, which, standing alone, do not utterly refute plaintiff's allegations regarding the issue of notice or conclusively establish a defense as a matter of law.

That branch of defendants' motion seeking dismissal of the causes of action for quantum meruit, account stated, and unjust enrichment on the ground that a valid contract exists between the parties is also denied. Although the existence of a valid and enforceable contract governing a particular subject matter generally precludes recovery in quasi contract (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]), where, as here, there is a bona fide dispute as to the existence or enforceability of a contract, a plaintiff may proceed upon a theory of quasi contract as well as breach of contract, and will not be required to elect his or her remedies (*see Goldman v Simon Prop. Group, Inc.*, 58 AD3d 208 [2d Dept 2008]; *Old Salem Dev. Group, Ltd. v Town of Fishkill*, 301 AD2d 639 [2d Dept 2003]; *Parkash v Utilisave Corp.*, 295 AD2d 330 [2d Dept 2002]; *Sforza v Health Ins. Plan of Greater N.Y.*, 210 AD2d 214, 215 [2d Dept 1994]). Given that there is a dispute as to whether there was an enforceable agreement between the parties due to alleged "cardinal changes" to the work in relation to the subject construction project, and particularly at this early juncture in the litigation, plaintiff is entitled to proceed on both quasi contract and breach of contract theories.

Likewise, that branch of defendants' motion to dismiss the quantum meruit cause of action because there has been no "cardinal change" to the work is denied (*see e.g. Laquila Group, Inc. v Hunt Constr. Group, Inc.*, 44 Misc 3d 1203(A) [Sup Ct, Kings County 2014]). Plaintiff's quantum meruit claim is premised on the allegation that defendants' numerous and extensive changes in the scope of work on the subject construction project were so substantial that it amounts to a "cardinal change," thereby resulting in a breach and repudiation of the original PO between the parties. Based on a thorough review of the factual allegations of the complaint, the court concludes that plaintiff adequately stated a cause of action for quantum meruit on the basis of the cardinal change doctrine. Moreover, defendants failed to offer adequate documentary evidence that utterly refutes or conclusively disposes of these allegations.

Finally, that branch of defendants' motion to dismiss the cause of action on an account stated because it has been insufficiently pled is denied. An account stated is an agreement with respect to the correctness of the account items and balance due between parties to an account based upon prior transactions between them (*see Am. Express Centurion Bank v Gabay*, 94 AD3d 795 [2d Dept 2012], quoting *Fleetwood Agency, Inc. v Verde Elec. Corp.*, 85 AD3d 850 [2d Dept 2011]). Thus, to recover on an account stated, the plaintiff must prove that the defendant retained billing statements without rejecting them or objecting to them within a reasonable time (*see American Express Centurion Bank v Cutler*, 81 AD3d 761, 762 [2d Dept 2011]). Here, plaintiff alleged in the complaint that "[i]n the regular course of its business, L&M duly submitted its invoices, requisitions and change order requests for payment to SWJV for the Outstanding Balance. SWJV received the invoices, requisitions and change order requests, and failed to object to same within a reasonable amount of time." It is further alleged that "SWJV has accepted those invoices and requisitions as accurate and promised to pay same." Contrary to defendants' contention, these allegations, liberally construed, are sufficient to state a cause of action to recover on an account stated (*see Nouveau El. Indus., Inc. v Glendale Condominium Town & Tower Corp.*, 107 AD3d 965 [2d Dept 2013]).

Accordingly, the motion is denied.

Dated: August 23, 2022

J.S.C.