SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

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CHRISTOPHER WARK, D/B/A WARK ENERGY CONSULTING,

Plaintiff,

- v -

CAMERON ENGINEERING & ASSOCIATES, L.L.P., and CAMERON ENGINEERING & ASSOCIATES OF NEW YORK, PLLC,

Defendants.

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INDEX NO. 651231/2020

MOTION DATE 03/18/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 002) 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, and 114

were read on this motion for SUMMARY JUDGMENT.

LOUIS L. NOCK, J.

Upon the foregoing documents, plaintiff's motion for summary judgment is granted in part, and defendants' cross-motion to dismiss the first, second, and third causes of action is denied, for the reasons set forth in the moving and reply papers (NYSCEF Doc. Nos. 77-78, 85, 112-114) and the exhibits attached thereto, in which the court concurs, as summarized herein.

Background:

In this action for breach of contract, plaintiff Christopher Wark, doing business as Wark Energy Consulting ("plaintiff"), alleges that defendants Cameron Engineering & Associates, L.L.P., and Cameron Engineering & Associates of New York, PLLC ("Cameron"), have failed to pay him for his consulting work on three separate projects, which the parties refer to as the Mendelson Lofts Project, the 95th Street Project, and the Hofstra Project.[1] These projects were

[1] Plaintiff describes himself as one who "provides energy and environmental modeling and analysis services related to construction and building projects . . . ." (Complaint ¶ 11.)

the subject of three separate agreements between the parties, signed and agreed to at separate times, beginning with the Hofstra Project on June 8, 2016 (Hofstra contract, NYSCEF Doc. No. 92), the 95th Street Project on December 6, 2016 (95th Street contract, NYSCEF Doc. No. 90), and the Mendelson Lofts Project on September 14, 2018 (Mendelson Lofts contract, NYSCEF Doc. No. 87). The Mendelson Lofts contract was later amended to include additional work (Mendelson Lofts amendment, NYSCEF Doc. No. 88). Plaintiff alleges that $500 from the Hofstra Project, $3,000 from the 95th Street Project, and $25,000 from the Mendelson Lofts Project remain invoiced and unpaid. Accordingly, he alleges three causes of action for Breach of Contract and for Breach of the Freelance Isn't Free Act ("FIFA"), codified at Administrative Code of the City of New York §§ 20-927, *et seq.*, one cause of action for each project.[2] Cameron, in emails to plaintiff from its partner and president Nicholas Kumbatovic (Kumbatovic EBT Tr, NYSCEF Doc. No. 82 at 9), and in Kumbatovic's deposition testimony, admitted that it owed but had not paid plaintiff (Kumbatovic EBT tr at 46-47; email dated 10/8/19, NYSCEF Doc. No. 95 at 8), had no problems with plaintiff's work (Kumbatovic EBT tr at 22-25, 30; Hofstra Project emails, NYSCEF Doc. No. 94), had not followed up with plaintiff to the extent

[2] FIFA defines the terms "Freelance worker" and "Hiring party" thus:

> Freelance worker. The term "freelance worker" means any natural person or any organization composed of no more than one natural person, whether or not incorporated or employing a trade name, that is hired or retained as an independent contractor by a hiring party to provide services in exchange for compensation. This term does not include:
>
> 1. Any person who, pursuant to the contract at issue, is a sales representative as defined in section 191-a of the labor law;
> 2. Any person engaged in the practice of law pursuant to the contract at issue and who is a member in good standing of the bar of the highest court of any state, possession, territory, commonwealth or the District of Columbia and who is not under any order of any court suspending, enjoining, restraining, disbarring or otherwise restricting such person in the practice of law; and
> 3. Any person who is a licensed medical professional.
>
> Hiring party. The term "hiring party" means any person who retains a freelance worker to provide any service, other than (i) the United States government, (ii) the state of New York, including any office, department, agency, authority or other body of the state including the legislature and the judiciary, (iii) the city, including any office, department, agency or other body of the city, (iv) any other local government, municipality or county or (v) any foreign government.

Cameron believed more work was necessary (Kumbatovic EBT tr at 20-25), and, in the case of the Mendelson Lofts Project, was withholding payment solely because Cameron had not been paid by the developer (Kumbatovic EBT tr at 26, 47-48).

Prior to commencing this action, plaintiff filed a complaint against Cameron with the New York City Department of Consumer Affairs ("DCA"), alleging primarily that he had not been paid for his work on the Mendelson Lofts Project, but also mentioning the $3,000 he was owed for the 95th Street Project (DCA complaint, NYSCEF Doc. No. 97). In its answer to the DCA complaint, Cameron agreed again that plaintiff had not been paid for his services; but argued that it was excused from payment until it had been paid by the developer on the project (answer to DCA complaint, NYSCEF Doc. No. 98). When Cameron refused to remit payment following the DCA complaint, plaintiff commenced the instant action.

Standard of Review:

Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof to warrant judgment as a matter of law (*Zuckerman v City of N.Y.*, 49 NY2d 557, 562 [1980]). "Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once a movant has met this burden, "the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial" (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]). "[I]t is insufficient to merely set forth averments of factual or legal conclusions" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014] [internal citation omitted], *lv denied* 24 NY3d 917 [2015]). Moreover, the reviewing court should accept the opposing party's evidence as true (*Hotopp*

Assocs., Ltd. v Victoria's Secret Stores, Inc., 256 AD2d 285, 286-287 [1st Dept 1998]), and give the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). Therefore, if there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Discussion:

Initially, plaintiff establishes a *prima facie* case for breach of contract. A breach of contract requires allegations of "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]). Here, plaintiff submits the three agreements, the proof in Kumbatovic's testimony (Kumbatovic EBT tr, NYSCEF Doc No. 82 at 20-26, 30, 46-48), the emails between the parties (Hofstra Project emails, NYSCEF Doc. No. 94; email dated 10/8/19, NYSCEF Doc. No. 95 at 8), and the answer to the DCA complaint (answer to DCA complaint, NYSCEF Doc. No. 98) that plaintiff adequately performed his obligations and Cameron has knowingly failed to pay, as well as the proof of his damages.

In opposition, Cameron fails to raise an issue of fact requiring trial. While Cameron seems to argue that it is not required to pay plaintiff until it is itself paid by the developers of each project, none of the agreements between the parties make plaintiff's compensation contingent on anything other than completing the requested work. Cameron argues that there are issues of fact regarding whether plaintiff completed his work on the Mendelson Lofts Project, but the terms of the agreement for that project are that plaintiff would deliver an initial report; "*Up to* (9) updates/additions to the . . . report"; and a final report (Mendelson Lofts contract, NYSCEF Doc. No. 87 at 3 [emphasis added]). The plain and ordinary meaning of the phrase "Up to" is not, as Cameron suggests, that plaintiff was required to create nine total updates or

additions to his initial report, but that the agreement would cover as many as nine updates or additions (*Edelman v Chubb Indem. Ins. Co.*, 41 AD3d 327 [1st Dept 2007] ["The court construed the plain and ordinary meaning of the unambiguous terms and conditions of the agreement"]). Moreover, as Cameron admits, it never asked plaintiff to provide further updates or additions to the report (Kumbatovic EBT tr at 20-25).

To the extent that Cameron argues that plaintiff waived the final invoice for the 95th Street Project, the affidavits provided as proof are hearsay (Amato aff., NYSCEF Doc. No. 107, ¶ 7; Gerage aff., NYSCEF Doc. No. 108, ¶ 4), and unsupported by any documentary evidence (*Candela v City of N.Y.*, 8 AD3d 45, 47 [1st Dept 2004] ["Although hearsay may be used to oppose a summary judgment motion, such evidence is insufficient to warrant denial of summary judgment where it is the only evidence submitted in opposition"] [internal quotation marks and citation omitted]). "A waiver, by definition, is the intentional relinquishment of a known right, it must be clear, unequivocal and deliberate" *Benedetto v Hyatt Corp.*, 203 AD3d 505 [1st Dept 2022]). Neither the affidavits offered by Cameron, nor the notation on the invoice by Cameron's Assistant Controller, are evidence of any such affirmative act by plaintiff (Gerage aff., NYSCEF Doc. No. 108, ¶ 5; cancelled invoice, NYSCEF Doc. No. 109).

Having established a claim for breach of contract, the court must determine the applicability of FIFA to plaintiff's claims. FIFA became effective on May 15, 2017 (Administrative Code of City of NY § 20-927 n 1; Local Law No. 140 (2016) of City of NY). It applies solely to "contracts entered into on or after the effective date" of FIFA (Local Law No. 140 § 2). Both the Hofstra Project and 95th Street Project are governed by contracts entered into prior to the effective date of FIFA – both, in 2016 (*see*, NYSCEF Doc. Nos. 90, 92) – and thus, FIFA does not apply to them. The Mendelson Lofts contract was entered into subsequent to

FIFA's effective date – in 2018 (*see*, NYSCEF Doc. No. 87) – and the record establishes that Cameron committed an unlawful payment practice as provided in FIFA, in that it failed to pay plaintiff for his work on the Mendelson Lofts Project when such payment was due (Administrative Code of City of NY § 20-929[a]). Cameron attempts to argue that not all of plaintiff's work was done within New York City; but offers only rank speculation that plaintiff did any work on the project outside of New York City.[3] Having established an unlawful payment practice, plaintiff is "entitled to an award for double damages, injunctive relief and other such remedies as may be appropriate" (Administrative Code of City of NY § 20-933[b][3]). Further, FIFA allows the recovery of reasonable costs and attorneys' fees (Administrative Code of City of NY § 20-933[b][1]).

Accordingly, it is hereby

ORDERED that the plaintiff's motion for summary judgment is granted in part as set forth herein, and defendants' cross-motion to dismiss the first, second, and third causes of action is denied; and it is further

[3] Cameron cites to *Turner v Sheppard Grain Enterprises, LLC* (68 Misc 3d 385 [Sup Ct NY County 2020]), for its assumption that FIFA has no application to work performed outside New York City. That court began its FIFA analysis by noting that "the law is ambiguous on this point" (*id.*, at 386). That court then found it necessary to draw a comparison from an unrelated New York City law – the New York City Human Rights Law ("NYCHRL") – as to which "the Court of Appeals adopted the impact requirement," i.e., a required finding that the subject conduct "had an 'impact' within the city [of New York]" (*id.*, at 388). The *Turner* court ultimately applied that standard to FIFA (*see, id.*), although, as noted, the Court of Appeals had adopted it in relation to a different city law (NYCHRL).

It is worth noting, however, that *Turner* involved parties who were non-residents of New York City (plaintiff was "a freelancer based out of state and doing work remotely from out of state for a [defendant] company . . . whose business is physically conducted outside the City [of New York]," *Turner*, 68 Misc 3d at 387); whereas the instant matter involves a New York City resident plaintiff and a New York City resident defendant (Cameron Engineering & Associates of New York, PLLC) (*see*, Complaint ¶¶ 6, 7). Thus, the local "impact requirement" which was adopted by the *Turner* court in *expansion* of FIFA's reach, seems unnecessary here, given the local resident status of the parties. Therefore, this court need not necessarily embrace the *Turner* court's holding in order to reach its more benign conclusion here, that FIFA applies to New York City resident parties, and especially since no genuine issue exists here regarding the locus of plaintiff's work – New York City.

ORDERED that the Clerk of the Court is directed to enter judgment in favor of the plaintiff and against the defendants, jointly and severally,[4] in the principal amount of $53,500.00, with interest on $3,000.00 of that amount at the statutory rate from April 28, 2018, on $50,000 of that amount at the statutory rate from December 12, 2018, and on $500.00 of that amount at the statutory rate from November 21, 2019,[5] and all through entry of judgment as calculated by the Clerk, and accruing thereafter on said principal amount at the statutory rate until satisfaction of judgment, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the issue of plaintiff's reasonable attorneys' fees pursuant to Administrative Code of the City of New York § 20-933(b)(1) is severed and set down for a further hearing before the undersigned; and it is further

ORDERED that the parties shall appear for said hearing in Room 1166, 111 Centre Street, New York, New York, on April 18, 2023, at 2:30 PM.

[4] Kumbatovic testified that the individual defendant entities are in fact merely separate offices of the same firm (Kumbatovic EBT tr, NYSCEF Doc. No. 82 at 9-10), and so they shall be held jointly liable (*e.g., Forum Ins. Co. v Texarkoma Transp. Co*., 229 AD2d 341, 342 [1st Dept 1996]).

[5] "Where such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date" (CPLR 5001[b]).

This constitutes the decision and order of the court.

ENTER:

3/16/2023
DATE

LOUIS L. NOCK, 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