SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SHLOMO S. HAGLER** **PART** **17**

Justice

----------X

INDEX NO. 654637/2021

MOTION DATE N/A

MOTION SEQ. NO. 001

HOPE IDAHOSA, ADEYEMI SALISU, and RHOEL HENDERSON, Individually and On Behalf of All Putative Class Members,

Plaintiffs,

- v -

MFM CONTRACTING CORP. and NETWORK OF PATROLS, INC., Jointly and Severally,

Defendants.

DECISION + ORDER ON MOTION

----------X

MFM CONTRACTING CORP.,

Third-Party Plaintiff,

-against-

THE CITY OF NEW YORK, acting through the NEW YORK CITY DEPARTMENT OF DESIGN AND CONSTRUCTION,

Third-Party Defendant.

Third-Party
Index No. 595250/2022

----------X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 22, 23, 24, 25, 26, 27, 28, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46

were read on this motion to DISMISS.

Plaintiffs Hope Idahosa, Adeyemi Salisu, and Rhoel Henderson (collectively, plaintiffs), construction flaggers employed on public works projects, seek to recover unpaid prevailing wages and supplemental benefits on behalf of themselves and a putative class. Defendant/third-party plaintiff MFM Contracting Corp. (MFM) impleaded third-party defendant City of New York (the City), asserting causes of action for breach of contract, reformation based upon mutual mistake, and declaratory judgment. The City moves, pursuant to CPLR 3211 (a) (1), (2), and (7),

to dismiss the third-party complaint in its entirety. For the reasons set forth below, the motion is granted.

BACKGROUND

The following facts are taken from the third-party complaint. Plaintiffs allege that they were employed as pedestrian manager flagpersons or crossing guards on a public works contract (NY St Cts Elec Filing [NYSCEF] Doc No. 24, third-party complaint ¶ 8). MFM hired defendant Network of Patrols, Inc. to provide construction flagpersons on public works projects (*id.*). Plaintiffs also allege that they were underpaid prevailing wages and benefits for a period commencing on December 12, 2014 through the present (*id.*). The City entered into a contract with MFM to "furnish[] [] all labor, materials, and equipment, together with all work incidental thereto necessary or required for the Trunk Water Mains in West 30th Street between 10th Avenue and 9th Avenue, Etc., to Connect Shaft 26B to the Distribution System including Sewer, Water Main, Street Lighting and Traffic Work which is known as Contract No. MED598B" (*id.*, ¶ 6).

MFM alleges that it bid on and adhered to the City Highway Specifications issued by the New York City Department of Design and Construction (DDC), which were expressly made part of the contract documents (*id.*, ¶ 9). These specifications include, but are not limited to, section 6.52 CG Crossing Guard and Addendum #1, subsection Q, number 1 (*id.*, ¶ 10). According to MFM, the City Highway Specifications state, in pertinent part, that "[t]he Contractor is advised that until the Comptroller of the City of New York sets a prevailing wage rate for pedestrian flag persons or crossing guards, there are no prevailing wage rates for pedestrian manager flag persons or crossing guards" (*id.*, ¶ 11). MFM alleges that City Highway Specifications also state that a "prevailing wage was not required to be paid to a pedestrian flag person crossing guard

unless he or she was also (a) assigned the tasks of directing construction equipment as flagperson 'A' in Example #2, or (b) was performing any construction-related tasks" (*id.*, ¶¶ 16, 24).

MFM also alleges "to the extent there is a finding in the Action that MFM is liable to the Plaintiffs for underpayment of prevailing wages and benefits to such pedestrian flag persons or crossing guards, such underpayments and/or penalties are the responsibility of the City through the DDC" (*id.*, ¶ 12). MFM further claims that it is entitled to an equitable adjustment and/or reformation of the contract, and a declaratory judgment to the extent that there is a finding that the pedestrian manager flagpersons or crossing guards are to be paid prevailing wages (*id.*, ¶¶ 13, 14).

The third-party complaint sets forth three causes of action: (1) breach of contract/misrepresentation; (2) mutual mistake/reformation of contract; and (3) declaratory judgment (NYSCEF Doc No. 24, third-party complaint ¶¶ 15-22, 23-32, 33-39).

The Parties' Arguments

The City moves to dismiss the third-party complaint, arguing that MFM impermissibly seeks to shift the burden for its Labor Law violations, if any, to the City because the City failed to give adequate notice of the prevailing wages applicable to crossing guards on the project. The City further argues that contract clearly placed the obligation to pay employees prevailing wages on MFM, not the City (NYSCEF Doc No. 25, standard construction contract § 5.1). According to the City, MFM's contract required it to indemnify the City "against any and all claims . . . allegedly arising out of or in any way related to the operations of the Contractor and/or its Subcontractors in the performance of this Contract or from the Contractor's and/or its Subcontractor's failure to comply with any provisions of this Contract or of the Law" (*id.*, § 7.4).

In addition, the City contends that the third-party complaint fails to adequately plead fraud or negligent misrepresentation. With respect to MFM's mutual mistake/reformation claim, the City asserts that MFM fails to plead that the contract does not express the parties' intention. Finally, the City maintains that because MFM has an adequate remedy in the form of a breach of contract cause of action, the declaratory judgment cause of action fails. To the extent that MFM seeks an equitable adjustment or change order, MFM failed to exhaust administrative remedies. Under articles 25 and 27 of its contract, MFM was first required to seek a change order from DDC's Commissioner.

In opposition, MFM argues that the City has failed to establish a defense as a matter of law under CPLR 3211 (a) (1). Moreover, MFM contends that, based on the fact that the City affirmatively represented that workers performing crossing guard services were not entitled to prevailing wages, MFM has at least raised the possibility of a "claim over" sufficient to sustain the third-party complaint. MFM argues that the City affirmatively represented in its own contract documents that these workers were not entitled to prevailing wages.

As support, MFM submits an affidavit from William May (May), MFM's controller (NYSCEF Doc No. 38, May aff, ¶ 1). May avers that the City's bid book did not contain a minimum unit price for the crossing guard item or a set unit price for this item (*id.*, ¶ 7). May states that section 6.52 CG Crossing Guard, the crossing guard specification, does not indicate that crossing guards are entitled to prevailing wages (*id.*, ¶ 9). According to May, section 6.52 CG Crossing Guard indicates that the *only* workers performing crossing guard services who would be entitled to prevailing wages are those workers who are "also assigned the task of directing construction equipment (as per attached Example #2, worker acting as a flagperson

'A') or any laborer tasks" (*id.*; *see also* NYSCEF Doc No. 40). He further states that this is confirmed by section 6.52 CG.5, which provides:

> "[t]he contract price per person-hour shall cover all labor, materials, equipment, and insurance necessary to employ a uniformed full-time crossing guard, and equip him/her with safety vests, hard hats, and signaling devices, including all other incidental costs necessary to control or detour traffic, as shown on the Contract Drawings, the Examples #1 and #2 on pages 395 and 396 (excluding worker acting as a flagperson 'A' in Example #2, or as directed by the Engineer"

(*id.*, ¶ 11). The City issued Addendum No. 10 to the project's contract, which clarified that the New York City Comptroller had not established a prevailing wage rate for crossing guards (*id.*, ¶ 13; *see also* NYSCEF Doc No. 41). In reliance on the City's contract documents, MFM's bid included a unit price of $50.00 per hour for the 6.52 CG item, which, upon information and belief, is far below the prevailing wage rate for a laborer as set by the New York City Comptroller (*id.*, ¶¶ 15, 16; *see also* NYSCEF Doc No. 42). On July 15, 2019, the City's resident engineer, Peter Roloff, P.E., issued a memorandum concerning certain overrun quantities (*id.*, ¶ 21). The memorandum set forth that the unit price for the bid item 6.52 CG would be paid at a unit price of $35.00, which, upon information and belief, would be far below any prevailing wage for laborers (*id.*, ¶ 22; *see also* NYSCEF Doc No. 43).

MFM asserts that it was previously the subject of an investigation by the United States Department of Labor (USDOL) on a federally-funded Peck Slip project (NYSCEF Doc No. 30, Carbone affirmation ¶ 3). The USDOL alleged that MFM's subcontractor, Sam Schwartz Engineering, underpaid prevailing wages to workers performing flagperson duties (*id.*). MFM responded to the USDOL's investigation by filing a notice of claim against the City and subsequently an action against the City (*id.*, ¶ 4). In response, the City agreed to pay the entirety of the prevailing wage underpayments for which MFM was initially alleged to have been responsible (*id.*, ¶ 5). MFM claims that, by doing so, the City implicitly acknowledged that its

own contract specification was a mistake and that it was responsible for any underpayments (*id.*, ¶ 6).

MFM also maintains that it was not required to exhaust its administrative remedies. According to MFM, its claims do not fall within the scope of article 27 of its contract. Furthermore, MFM asserts that the gravamen of its claims is not fraud, but only breach of contract. Thus, it was not required to plead its claims with particularity.

At oral argument, MFM conceded that it was not seeking contractual indemnification from the City, but rather was seeking damages based upon a breach of contract (NYSCEF Doc No. 46, oral argument tr at 17-18).

DISCUSSION

"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]). 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 plaintiff[] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory'" (*Kolchins v Evolution Mkts., Inc.*, 31 NY3d 100, 105-106 [2018], quoting *Leon*, 84 NY2d at 87-88). However, "bare legal conclusions and inherently incredible facts are not entitled to preferential consideration" (*M & E 73-75 LLC v 57 Fusion LLC*, 189 AD3d 1, 5 [1st Dept 2020], *lv dismissed* 36 NY3d 1086 [2021]).

Dismissal is warranted pursuant to CPLR 3211 (a) (1) where the documentary evidence "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Fortis Fin. Servs. v Fimat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002] [internal quotation marks and citation omitted]). "A paper will qualify as 'documentary evidence' only if it satisfies the following criteria: (1) it is 'unambiguous'; (2) it is of 'undisputed authenticity'; and (3) its

contents are 'essentially undeniable'" (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019], quoting *Fontanetta v John Doe 1*, 73 AD3d 78, 86, 87 [2d Dept 2010]). Contracts constitute "documentary evidence" pursuant to CPLR 3211 (a) (1) (Siegel, New York Practice § 259 [6th ed 2018]).

Even affording the third-party complaint a liberal construction, as the court must (*Harrison v Golden Tree Homes*, 199 AD2d 205, 205 [1st Dept 1993]; *Taft v Shaffer Trucking*, 52 AD2d 255, 257 [4th Dept 1976], *appeal dismissed* 42 NY2d 974 [1977]; *Braun v City of New York*, 17 AD2d 264, 268 [1st Dept 1962]), it still fails to state a cause of action.

A. Breach of Contract/Misrepresentation (First Cause of Action)

The first cause of action alleges that:

> "MFM bid on and adhered to the City Highway Specifications which were part of the Contract, including but not limited to, Section 6.52 – Crossing Guard as well as Addendum #1, subsection Q, number 1 which specified that a prevailing wage was not required to be paid unless he she was also (a) assigned the tasks of directing construction equipment as flagperson 'A' in Example #2 or, (b) was performing any construction-related labor tasks"

(NYSCEF Doc No. 24, third-party complaint ¶ 16). MFM alleges that "[t]o the extent there is an adjudication that MFM is liable for any penalties or underpayments, these are the responsibility of the City . . . for reimbursement to MFM as, among other things, a change order, an equitable adjustment of the Contract, a knowing misrepresentation of fact or a breach of contract" (*id.*, ¶ 19).

To state a cause of action for breach of contract, a party must allege: (1) the parties entered into a valid agreement, (2) plaintiff performed, (3) defendant failed to perform, and (4) damages (*VisionChina Media Inc. v Shareholder Representative Servs., LLC*, 109 AD3d 49, 58 [1st Dept 2013]; *see also Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). The essential

terms of the parties' purported contract, including the specific provisions upon which liability is predicated, must be alleged (*Matter of Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]).

In this case, even giving the third-party complaint the benefit of every favorable inference, MFM fails to allege a breach by the City. MFM's contract requires it to "strictly comply with all applicable provisions of the Labor Law, as amended," and provides that its compliance was "a material term of this Contract" (NYSCEF Doc No. 25, standard construction contract § 37.01). Section 6.52 CG Crossing Guard states that "[i]f any worker performing services under this item is also assigned the task of directing construction equipment (as per attached Example #2, worker acting as a flagperson 'A') or any laborer tasks, then such worker shall be deemed to be subject to the provisions of Labor Law 220 Prevailing Wage Schedule and will not be paid for under this Item" (*id.*, Addendum No. 1 at A1-2n). The contract indicates that the New York City Comptroller had not established a prevailing wage rate for crossing guards on public works projects (*id.*, Addendum No. 10 at A10-1). By its terms, section 6.52 CG Crossing Guard governs payment only for those crossing guards who did not perform laborer tasks, which would entitle them to prevailing wages. Thus, the contract does not state that MFM was *only* obligated to pay prevailing wages if flagpersons or crossing guards were "(a) assigned the task of directing construction equipment as a flagperson 'A', or (b) was performing any construction-related labor tasks" (NYSCEF Doc No. 24, third-party complaint ¶ 16). In light of this language, MFM's claim is directly contradicted by the language of its contract.

Moreover, MFM's breach of contract claim, in which it attempts to shift the burden for its underpayment of prevailing wages to the City, is contrary to Labor Law § 220 and the public policy behind the statute. In *Brian Hoxie's Painting Co. v Cato-Meridian Cent. School Dist.* (76 NY2d 207, 212 [1990]), the Court of Appeals held that a contractor could not recover from a

school district the amount of additional wages and supplements it was required to pay to its employees. There, the school's advertising specifications did not contain any notice of the prevailing wage requirements (*id.* at 209). The Court held that "[a] private cause of action, which would have the effect of making the public entity financially responsible for the underpayment, is contrary to the unmistakable aim of the entire enforcement scheme to place all liability for violating the prevailing wage requirements upon the noncomplying contractor" (*id.* at 213). The Court further noted that "such shifting of the burden from the contractor to the public entity would directly contravene the basic objectives of the competitive bidding process 'to assure the prudent and *economical use of public moneys*' and 'to facilitate the acquisition of facilities and commodities of maximum quality at the *lowest possible cost*'" (*id.*, quoting General Municipal Law § 100-a [emphasis in original]).

In any event, the Court of Appeals has held that a party's commitment to pay prevailing wages under Labor Law § 220 binds it to pay those wages for all work that is ultimately deemed to be covered by the statute (*Ramos v SimplexGrinell LP*, 24 NY3d 143, 148 [2014]). As the Court of Appeals held,

> "An agreement to comply with a statute is an agreement to comply with it as correctly interpreted, whether or not the correct interpretation was known to the parties at the time of contracting. This is particularly clear where, as here, a contractual clause agreeing to comply is required by the statute itself"

(*id.*, citing Labor Law § 220 [2]). Therefore, even if the contract language was imprecise, MFM was required to comply with the Labor Law as correctly interpreted, and not as the parties may have misunderstood it.

Although MFM relies on *Matter of New York Ind. Contrs. Alliance v Liu* (43 Misc 3d 443 [Sup Ct, NY County 2013]), that case does not help it here. That case was an article 78

proceeding challenging the New York City Comptroller's decision to reclassify the trades of asphalt paver and concrete paver into one classification (*id.* at 465-470).

In sum, the City is entitled to dismissal of the first cause of action.

B. Mutual Mistake/Reformation (Second Cause of Action)

In its second cause of action, MFM alleges that:

> "[t]he parties believed by either mutual mistake of . . . MFM and . . . [the] City or by the mistake of . . . MFM and the fraud of . . . [the] City in concealing its knowledge otherwise, that the . . . City's Invitation to Bid Classifications and Specification 6.52 CG were true in stating that a prevailing wage was not required to be paid to a pedestrian manager flag person or cross guard unless he or she was also (a) assigned the task of directing construction equipment as a flagperson in Example #2, or (b) performing any construction related tasks"

(NYSCEF Doc No. 24, third-party complaint ¶ 24).

"In the proper circumstances, mutual mistake or fraud may furnish the basis for reforming a written agreement" (*Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]). "In a case of mutual mistake, the parties have reached an oral agreement and, unknown to either, the signed writing does not express that agreement" (*id.*). Reformation based upon unilateral mistake requires a showing that "the parties have reached agreement and, unknown to one party but known to the other (who has misled the first), the subsequent writing does not properly express that agreement" (*id.*). "Reformation is not granted for the purpose of alleviating a hard or oppressive bargain, but rather to restate the intended terms of an agreement when the writing that memorializes that agreement is at variance with the intent of both parties" (*George Backer Mgt. Corp. v Acme Quilting Co.*, 46 NY2d 211, 219 [1978]).

"The burden upon a party seeking reformation is a heavy one since it is presumed that a deliberately prepared and executed written instrument accurately reflects the true intention of the parties" (*Greater N.Y. Mut. Ins. Co. v United States Underwriters Ins. Co.*, 36 AD3d 441, 442-

443 [1st Dept 2007]). In light of the "'heavy presumption that a deliberately prepared and executed written instrument manifests the true intention of the parties, . . . [t]he proponent of reformation must show in no uncertain terms, not only that mistake or fraud exists, but exactly what was really agreed upon between the parties'" (*34-06 73, LLC v Seneca Ins. Co.*, 39 NY3d 44, 52 [2022], quoting *Chimart Assoc.*, 66 NY2d at 574). "Because the thrust of a reformation claim is that a writing does not set forth the actual agreement of the parties, generally neither the parol evidence rule nor the Statute of Frauds applies to bar proof, in the form of parol or extrinsic evidence, of the claimed agreement" (*Chimart Assoc.*, 66 NY2d at 573).

Here, MFM concedes, in opposition, that it is not asserting a claim for unilateral mistake based upon fraud. Rather, MFM only asserts a claim for reformation based upon mutual mistake (NYSCEF Doc No. 44 at 10, 25). However, MFM fails to allege that its contract with the City did not express the intention of either party (*see Stonebridge Capital, LLC v Nomura Intl. PLC*, 68 AD3d 546, 548 [1st Dept 2009], *lv dismissed* 15 NY3d 735 [2010]). In fact, the contract clearly indicates that any worker performing work under section 6.52 CG Crossing Guard was entitled to prevailing wages if the worker also performed laborer tasks (NYSCEF Doc No. 25, Addendum 1 at A1-2n). Even though MFM relies on the City's settlement with the USDOL, MFM only makes conclusory allegations that its contract did not express the parties' agreement. Notably, the City admitted no liability in response to the USDOL investigation relied upon by MFM (NYSCEF Doc No. 32 ¶ 1). The fact that the City may have subsequently issued different specifications does not show mutual mistake (NYSCEF Doc No. 35).

Additionally, MFM's allegations are insufficient to permit reformation based upon a mistake of law. "[W]here there is a mistake of law on one side, and either positive fraud on the other, or inequitable, unfair and deceptive conduct, which tends to confirm the mistake and

conceal the truth, it is the right and duty of equity to award relief" (*Greene v Smith*, 160 NY 533, 539-540 [1899] [internal quotation marks and citation omitted]). Assuming that MFM was mistaken about the law, it fails to allege fraudulent, inequitable, unfair or deceptive conduct on the part of the City. As indicated above, the City did not affirmatively represent that flagpersons or crossing guards were not entitled to prevailing wages (*see* NYSCEF Doc No. 24, third-party complaint ¶¶ 24, 25).

Accordingly, the second cause of action is dismissed.

C. Declaratory Judgment (Third Cause of Action)

MFM's third cause of action seeks a declaration "adjudging and declaring that the City's failure and refusal to reimburse Third-Party Plaintiff MFM for it and Network of Patrols, Inc.'s liability for pedestrian manager flag persons or crossing guard wage underpayments as determined in this action, was improper and that the City is now required to do so in the event that this Court holds and determines that the Plaintiffs are entitled to prevailing wages" (NYSCEF Doc No. 24, third-party complaint ¶ 39 [c]).

Pursuant to CPLR 3001, "[t]he supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." "It is well established that "[a] cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract" (*Apple Records v Capitol Records*, 137 AD2d 50, 54 [1st Dept 1998]; *accord Main Evaluations v State of New York*, 296 AD2d 852, 853 [4th Dept 2002], *appeal dismissed and lv dismissed* 98 NY2d 762 [2002]). Here, MFM's third cause of action is "unnecessary and inappropriate" because it has an "adequate, alternative remedy" in a cause of action for breach of

contract (*Apple Records*, 137 AD2d at 54; *see also Artech Info. Sys. v Tee*, 280 AD2d 117, 125 [1st Dept 2001]). This is so even though the court has found its breach of contract claim to be insufficient (*see Watson v Sony Music Entertainment*, 282 AD2d 222, 223 [1st Dept 2001]).

As such, the third cause of action must be dismissed.

D. Leave to Replead

Finally, the court denies MFM's request to replead its causes of action, made at oral argument (NYSCEF Doc No. 46, oral argument tr at 25). MFM does not indicate that it is able to cure the present deficiencies (*see Seven Seventeen Corp. v JP Morgan Chase & Co.*, 32 AD3d 802, 802 [1st Dept 2006]).

CONCLUSION

Accordingly, it is

ORDERED that the motion (sequence number 001) of third-party defendant City of New York to dismiss the third-party complaint is granted and the third-party complaint is severed and dismissed with costs and disbursements to said third-party defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

4/14/2023
DATE

SHLOMO S. HAGLER, J.S.C.

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