

Brownie Cos. of Long Is., LLC v Volmar Constr., Inc.

2023 NY Slip Op 32480(U)

July 20, 2023

Supreme Court, New York County

Docket Number: Index No. 450100/2021

Judge: Barry Ostrager

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

-----X	
BROWNIE COMPANIES OF LONG ISLAND, LLC,	INDEX NO. 450100/2021
Plaintiff,	MOTION DATE
- against -	MOTION SEQ. NO. 001
VOLMAR CONSTRUCTION, INC.,	
Defendant.	DECISION + ORDER ON MOTION
-----X	

HON. BARRY R. OSTRAGER

The Court heard oral argument via Microsoft Teams on July 19, 2023, on the motion by plaintiff Brownie Companies of Long Island, LLC (“Brownie”) for summary judgment in its favor pursuant to CPLR 3212 awarding Brownie a judgment against defendant Volmar Construction, Inc. (“Volmar”) in the sum of \$474,320.14 plus interest. The Court also heard argument at that time on Volmar’s cross-motion for partial summary judgment dismissing Brownie’s two quasi-contract causes of action, the Fourth and Fifth Causes of Action in the Complaint sounding in unjust enrichment and quantum meruit (see NYSCEF Doc. No. 1). In accordance with the July 19, 2023 transcript of proceedings, the motion and cross-motion are granted to the extent provided herein.

This action relates to another action also heard on July 19, 2023, entitled *Volmar Construction, Inc. v The City of New York*, Index No. 654645/2020. At issue in that action is a Contract between Volmar and The City pursuant to which The City retained Volmar to complete repairs on a substantial number of homes damaged during Hurricane Sandy. Volmar then retained Brownie as a subcontractor to provide structural services related to house lifting and moving pursuant to a November 5, 2015 Consulting Agreement between the parties (“the

Subcontract”, NYSCEF Doc. No. 88). The City approved the Subcontract for work on the designated homes during the period from November 5, 2015 through March 31, 2018. Brownie asserts here that it completed its work and submitted Certificates for Payment to Volmar (NYSCEF Doc. No. 91) and that The City paid Volmar for Brownie’s work, but Volmar still owes Brownie a balance of \$474,320.14 plus interest.

In accordance with the July 19, 2023 transcript of proceedings, the Court grants Brownie’s motion for summary judgment on Brownie’s Second Cause of Action for breach of contract. Plaintiff Brownie has established its right to summary judgment on liability and damages against defendant Volmar. It is undisputed that the parties have a written contract pursuant to which Brownie performed lift and foundation services to repair at least 75 homes damaged by Hurricane Sandy in accordance with a contract between Volmar and The City. It is also undisputed that Brownie invoiced Volmar for the services it performed and that Volmar paid Brownie a substantial sum, but not all of the money Brownie demanded.

Brownie claims it is still due \$474,320.14 plus interest from December 26, 2018, which is seven days after Volmar received its last large payment from The City before this suit was commenced. Brownie has established a *prima facie* case through an affidavit on personal knowledge from its Project Executive Daniel Marra (NYSCEF Doc. No. 87) and invoices. Volmar opposes, claiming that The City has yet to pay Volmar in full for services rendered, and Volmar suggests that some of the outstanding sums relate to Brownie’s work. Volmar claims that, at best, it owes Brownie \$103,551.32, but it offers no evidence that it ever disputed any of Brownie’s invoices before this motion was made.

But Volmar has not established, nor created triable issues of fact, that any of the money The City is holding back from Volmar is attributable to any deficiencies in Brownie’s work. At

oral argument, Volmar argued that Brownie may be responsible for some of liquidated damages The City intends to assess against Volmar pursuant to the Contract between those parties based on alleged delays in the completion of work. But as counsel for The City confirmed during oral argument, The City's expert report on liquidated damages does not directly blame Brownie for any of the delay damages The City intends to assess against Volmar. What is more, Volmar's Subcontract with Brownie does not contain a liquidated damages clause based on delay. It is also noteworthy that Brownie's work was completed in the first phase of the Project no later than 2018, and The City has paid, and continues to pay, Volmar millions of dollars since that time. At no point before this motion did Volmar dispute Brownie's invoices in any meaningful way.

Accordingly, the Court grants plaintiff summary judgment on its Second Cause of Action on liability and damages, and the Clerk is directed to enter judgment in favor of plaintiff Brownie Companies of Long Island, LLC, against defendant Volmar Construction, Inc., in the sum of \$474,320.14 plus interest at 9% per annum from December 26, 2018, as calculated by the Clerk of the Court. Plaintiff is directed to efile a Proposed Judgment and Bill of Costs directed to the County Clerk for the sum awarded plus interest, costs and disbursements as calculated by the Clerk of the Court.

Although the cross-motion by Volmar may be moot, the Court will render a determination to complete the record for any appeal. The Court grants Volmar's cross-motion to dismiss Brownie's two quasi-contract causes of action for unjust enrichment and *quantum meruit* (the Fourth and Fifth Causes of Action). Even though the cross-motion may technically be untimely, Volmar has preserved its argument in its Affirmative Defense, and the law is well established that quasi-contract claims for unjust enrichment and quantum meruit are barred by the existence of a fully enforceable written contract between the parties governing the same

subject matter. *See, e.g., Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 (1987).

Therefore, the dismissal of the Fourth and Fifth Causes of Action is appropriate at this time.

Dated: July 20, 2023


BARRY R. OSTRAGER, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE