

**Brighton Bldr. LLC. v Bedford Landscape  
Contrs., LLC**

2023 NY Slip Op 33636(U)

October 10, 2023

Supreme Court, Kings County

Docket Number: Index No. 510225/2023

Judge: Leon Ruchelsman

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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BRIGHTON BUILDER LLC.,

Plaintiff,

Decision and order

- against -

Index No. 510225/2023

BEDFORD LANDSCAPE CONTRACTORS, LLC,  
LEV FELDMAN, and PLAY SOLUTIONS, INC.,

Defendants,

October 10, 2023

-----x  
PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #1

The defendant Bedford Landscape Contractors LLC has moved pursuant to CPLR §3211 seeking to dismiss the complaint. The plaintiff has opposed the motion. Papers were submitted by the parties and after reviewing all the arguments this court now makes the following determination.

According to the complaint, on October 15, 2020 the defendant Bedford, a construction company hired by the City of New York to perform various work throughout the city, hired the plaintiff as a subcontractor. Some payments were made to the plaintiff, however, the plaintiff asserts they are still owed \$662,695.17 for work performed. The plaintiff has asserted causes of action for breach of contract, quantum meruit, conversion, breach of fiduciary duty, breach of good faith and fair dealing and the faithless servant doctrine. The defendant has now moved seeking to dismiss the complaint arguing the plaintiff has failed to allege any cause of action. As noted, the plaintiff opposes the motion.

Conclusions of Law

It is well settled that upon a motion to dismiss the court must determine, accepting the allegations of the complaint as true, whether the party can succeed upon any reasonable view of those facts (Ripa v. Petrosyants, 203 AD3d 768, 160 NYS3d 658 [2d Dept., 2022]). Further, all the allegations in the complaint are deemed true and all reasonable inferences may be drawn in favor of the plaintiff (BT Holdings, LLC v. Village of Chester, 189 AD3d 754, 137 NYS2d 458 [2d Dept., 2020]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, Redwood Property Holdings, LLC v. Christopher, 211 AD3d 758, 177 NYS3d 895 [2d Dept., 2022]).

The complaint alleges the plaintiff entered into "several subcontractor agreements" to furnish labor and materials and has not been paid for some of the work performed (see, Verified Complaint, ¶16 [NYSCEF Doc. No. 1]). Thus, in order for a valid contract to exist there must be mutual assent, commonly defined as a meeting of the minds (Express Industries and Terminal Corp., v. New York State Department of Transportation, 93 NY2d 584, 693 NYS2d 857 [1999]). Such mutual assent must sufficiently demonstrate that the parties have agreed to all essential terms

(id).

The defendant admits that they did hire the plaintiff for some work. Thus, defendant asserts that "Bedford did utilize Plaintiff on a limited basis to source labor for certain discrete elements of certain playgrounds on the Projects, and it paid Plaintiff for those limited logistics and consulting services as and when performed" (see, Reply Memorandum, pages 1,2 [NYSCEF Doc. No. 22]). However, the defendant argues the scope of the work sought by the plaintiff was never agreed to by the defendants and the contracts submitted were never signed. While that is surely true, the defendant has admitted to hiring and paying the plaintiff for some work performed based upon those unsigned contracts. Thus, there are questions of fact, which cannot be decided at this time, the extent to which, if any, further agreements were entered into between the parties. The defendant's mere denial that no further contracts were entered into is not a basis to conclude there are no viable causes of action. Surely, the plaintiff should be afforded an opportunity to pursue its claim that it performed more work and should be compensated accordingly. Discovery will undoubtedly serve to verify the existence of these claims. Therefore, based on the foregoing, the motion seeking to dismiss the first cause of action is denied.

Turning to the cause of action for quantum meruit, it is

well settled that a plaintiff may file an action for quantum meruit as an alternative to a breach of contract claim (see, Thompson v. Horowitz, 141 AD3d 642, 37 NYS3d 266 [2d Dept., 2016]). "To be entitled to recover damages under the theory of quantum meruit, a plaintiff must establish: "(1) the performance of services in good faith, (2) the acceptance of services by the person or persons to whom they are rendered, (3) the expectation of compensation therefor, and (4) the reasonable value of the services rendered" (F and M General Contracting v. Oncel, 132 AD3d 946, 18 NYS3d 678 [2d Dept., 2015]). Notwithstanding, it is well settled that a subcontractor that performed construction work under an express contract with a general contractor or another subcontractor cannot recover damages on a theory of quantum meruit since an express contract governs the work involved (see, R & B Design Concepts Inc., v. Mwenger Construction Company Inc., 153 AD3d 864, 60 NYS3d 364 [2d Dept., 2017]).

Since the plaintiff has asserted that other contracts were relied upon by the parties and that those very contracts govern the work performed in this case, the quantum meruit cause of action is improper. Consequently, the motion seeking to dismiss this cause of action is granted.

Turning to the motion seeking to dismiss the conversion claim, where a conversion claim arises from the same

circumstances as the breach of contract claim then such conversion claim is duplicative. (Connecticut New York Lighting Company v. Manos Business Management Company Inc., 171 AD3d 698, 98 NYS3d 101 [2d Dept., 2019]). "To determine whether a conversion claim is duplicative, courts look both to the material facts upon which each claim is based and to the alleged injuries for which damages are sought" (Medequa LLC v. O'Neill and Partners LLC, 2022 WL 2916475 [S.D.N.Y. 2022]). In this case the breach of contract claim essentially asserts the defendant owes the plaintiff money for work performed. The conversion claim asserts the defendant was paid from the general contractor in which it worked on behalf of the City of New York and failed to forward the payments to plaintiff. Thus, the conversion claim relies upon the same facts as the breach of contract claim and seeks the same damages. Therefore, "if Plaintiff were to recover on each claim, it 'would in effect be paid twice'" (id).

The plaintiff argues that since Bedford has been paid by the general contractor they are holding the funds in trust for the plaintiff pursuant to Lien Law §70. However, both claims, namely the breach of contract and the conversion claim, at their core, seek the funds to which the plaintiff claims they are entitled for work performed. Thus, the plaintiff has essentially failed to present any basis for distinguishing between the two claims. Consequently, the conversion claim is duplicative of the breach

of contract claim and the motion seeking to dismiss both conversion claims is granted.

Next, the claim for punitive damages is improper. Punitive damages are not recoverable in an ordinary breach of contract case (see, Rocanova v. Equitable Life Assurance Society of U.S., 83 NY2d 604, 612 NYS2d 339 [1994]). There are no allegations the breach of contract alleged is of such a degree as to involve a "fraud evincing a 'high degree of moral turpitude' and demonstrating 'such wanton dishonesty as to imply a criminal indifference to civil obligations'" (id) that such punitive damages may be appropriate. Therefore, the motion seeking to dismiss any claims for punitive damages is granted.

Concerning the next cause of action alleging a breach of fiduciary duty, it is well settled that when a claim for breach of a fiduciary duty is merely duplicative of a breach of contract claim where they are based on the same facts and seek the same damage then the breach of fiduciary claim cannot stand (Pacella v. Town of Newburgh Volunteer Ambulance Corps, Inc., 164 AD3d 809, 83 NYS3d 246 [2d Dept., 2018]). In this case the cause of action alleging any breach of a fiduciary duty is identical to the breach of contract claim, namely that the defendants failed to pay them for work performed. Consequently, the cause of action alleging a breach of fiduciary is dismissed. Likewise, the cause of action for a breach of the duty of good faith and

fair dealing is duplicative of the breach of contract claim (see, MDRN Intelligence Living Wolfhome v. Hartford Financial Services Group Inc., 216 AD3d 409, 189 NYS3d 89 [1<sup>st</sup> Dept., 2023]).

Therefore, the cause of action alleging a breach of good faith and fair dealing is dismissed.

Lastly, concerning the cause of action asserting defendant Feldman was a faithless servant, that doctrine states that an agent who owes a duty of fidelity to a principal and is faithless in that duty thereby forfeits compensation due (see, Phansalkar v. Anderson Weinroth & Company L.P., 344 F3d 184 [2d Cir. 2003]). Further, pursuant to the doctrine the employer is entitled to a return of any compensation paid to an employee during the period of her disloyalty (CARCO GROUP, Inc., v. Maconachy, 718 F3d 72 [2d Cir. 2013], see, also, Torres v. Gristede's Operating Corp., 628 F.Supp2d 447 [S.D.N.Y. 2008]). This doctrine has no applicability in this case where the plaintiff asserts they have not been by the defendant. Therefore, this cause of action is dismissed. Thus, all causes of action are dismissed except the breach of contract action.

So ordered.

ENTER:

DATED: October 10, 2023  
Brooklyn N.Y.

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Hon. Leon Ruchelsman  
JSC

