AMG Solutions LLC v Hudson Meridian Constr. Group, LLC
2023 NY Slip Op 34146(U)
November 20, 2023
Supreme Court, New York County
Docket Number: Index No. 159086/2017
Judge: Shlomo S. Hagler

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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AMG SOLUTIONS LLC,

Plaintiff,

- v -

HUDSON MERIDIAN CONSTRUCTION GROUP, LLC,WILLIAM I. COTE, WESTCHESTER FIRE INSURANCE COMPANY, JOHN DOE NO. 1 THROUGH JOHN DOE NO. 5, ABC CORP., DEF CORP., GHI CORP.

Defendant.

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INDEX NO. 159086/2017

MOTION DATE 03/09/2022

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

Defendant Hudson Meridian Construction Group, LLC ("Hudson Meridian") brings this motion for summary judgment against plaintiff AMG Solutions LLC ("AMG") seeking dismissal of AMG's breach of contract claim, Lien Law claims, and trust fund diversion claim, and seeking summary judgment against AMG on Hudson Meridian's counterclaim for costs.

FACTS

1. The Contract

Defendant Hudson Meridian is a construction management firm that was retained by CREF 546 West 44th Street, LLC ("the Owner") to build a luxury apartment building at that location. (Cote Feb. 28, 2022 Aff. [NYSCEF Doc. No. 119], ¶ 2). On June 26, 2014, a contract

between Hudson Meridian and plaintiff AMG ("the contract") was executed, providing that AMG would render subcontractor services to Hudson Meridian and perform work involving glass, metal, and woodwork. (Contract, Exhibit B to Cote Aff. [NYSCEF Doc. No. 124]). The contract was signed by Robert Schwartz, the Vice President of Hudson Meridian, acting as the agent of the Owner, and by Jesse Hammerman, AMG's Chief Financial Officer, on June 27, 2014. (*Id.*). The contract provided that in exchange for the work done, AMG would receive $2,450,000. (*Id.*). In addition, upon agreement of the parties, the contract price and scope of work could be adjusted. (*Id.*). Certain approved changes throughout AMG's work on the project increased the contract price by $34,000 for a new total of $2,484,000. (Cote Feb. 28, 2022 Aff. ¶¶ 14-15; Hammerman Dep. [NYSCEF Doc. No. 177] 145:23-146:11). The contract required AMG to submit to Hudson Meridian "an itemized application for payment operations" at least 10 days before the due date of each agreed-upon progress payment. (Contract, § 7.3). The contract also permitted Hudson Meridian to "withhold payment of an application for payment in whole or in part" for one or more specified reasons. (*Id.* § 7.7). While all interim requests or "requisitions" for payment were governed by Section 7.3 of the contract, the final payment (also referred to by the parties as "Requisition 21") was specifically governed by Section 7.11. (*Id.* §§ 7.3, 7.11).

2. AMG's Right to Final Payment

William Cote is the President of Hudson Meridian. (Cote Feb, 28, 2022 Aff. [NYSCEF Doc. No. 119], ¶ 1). Mr. Cote averred in a November 2017 affidavit that "[d]uring the course of the Project, AMG consistently and repeatedly failed to perform the work under the Subcontract in a timely manner, and failed to provide proper and/or complete materials for the Project" which "delayed the Project and imposed significant completion and remediation costs on Hudson Meridian." (Cote Nov. 30, 2017 Aff. [NYSCEF Doc. No. 181] ¶¶ 5, 8). As such, Mr. Cote stated

that Hudson Meridian sent AMG a notice of its default under the contract on or about September 21, 2016, and in October 2016, Hudson Meridian terminated AMG for cause after AMG "abandoned the Project." (*Id.* ¶¶ 6, 7). At his deposition, Mr. Cote testified that the reason AMG was terminated was "[a]bandonment of the site." (Cote Dep. [NYSCEF Doc. No. 189] at 33). When asked whether there was any work that was not completed by AMG at the time of its termination, Mr. Cote testified that there was a "fairly extensive open items list" of projects that were not completed. (*Id.*). Mr. Cote stated that on October 14, 2016, AMG made a demand under the contract for the "Final Payment" it deemed due in the amount of $143,227 because AMG claimed that its scope of work under the contract was completed. (Cote Feb. 28, 2022 Aff. ¶ 17).

AMG's Second Cause of Action for breach of contract arises out of Hudson Meridian's failure to pay the requested "Final Payment." (Defendants' Memorandum of Law in Support ("Memo") [NYSCEF Doc. No. 142] at 6). Mr. Cote stated in his affidavit that AMG simply had no right to final payment because it had not satisfied a condition precedent specified in the contract. (*Id.*; Cote Feb. 28, 2022 Aff. ¶ 18). The contract between the parties states that the final installment of the payment to the subcontractor will be paid *provided* AMG completes three requirements. (Contract, § 7.11). Section 7.11(b) provides as one of these requirements: "Architect and any construction lender's architect shall have certified as to the satisfactory completion of such work." (*Id.*). Mr. Cote averred that this requires AMG to obtain a certificate that the architect attests "to full and satisfactory completion of the work[,]" and that "the work has progressed as indicated on the application, the quality of AMG's work is in accordance with the Contract Documents, and AMG is entitled to payment" of the certified amount. (Cote Feb. 28, 2022 Aff. ¶¶ 18-19). Mr. Cote stated that AMG's request for final payment omitted this

certificate and therefore failed to comply with a "clear and unambiguous condition precedent to the right to payment[.]" (*Id.* ¶ 20). Mr. Cote further stated that when Hudson Meridian attempted to submit AMG's request for final payment to the Owner without the architect's certificate, the Owner rejected the request because the architect had not certified AMG's performance. (*Id.* ¶ 21).

The Owner retained CetraRuddy Architecture ("Cetra") to serve as the architect for the project. (Jameson Aff. [NYSCEF Doc. No. 196] ¶ 4). Jay Jameson, Vice President and Senior Development Manager of the Patrinely Group, LLC served as the "day-to-day manager" of the project. (*Id.* ¶¶ 1, 5). Hudson Meridian would request payment periodically to the Owner for completed work, and these requests for payment would include the payment applications of Hudson Meridian's subcontractors. (*Id.* ¶ 5). Hudson Meridian and representatives of the Architect met regularly regarding the status of the project where "Hudson Meridian's payment applications were either approved, rejected, or approved in part." (*Id.* ¶ 6). One such meeting occurred a few weeks after AMG submitted its request for Final Payment to Hudson Meridian. (*Id.* ¶ 8). At the meeting, which Mr. Jameson attended, "the portion of Hudson Meridian's request for payment which included AMG's request for Final Payment was rejected by Cetra and Patrinely Group, on behalf of ownership, on account of AMG's failure to complete its scope of work and its failure to cure defective work." (*Id.* ¶ 10).

Jesse Hammerman is the Chief Financial Officer of plaintiff AMG Solutions LLC. (Hammerman May 17, 2022 Aff. ¶ 1). Mr. Hammerman attested that AMG would periodically send in requisitions, and Hudson Meridian would review them with the Owner's architect, after which AMG would be paid if the work was approved. (*Id.* ¶ 25). AMG submitted 21 requisitions on the project, the first 20 of which were approved, and AMG was paid. (*Id.* ¶ 26). Mr.

Hammerman stated that AMG's work was mostly complete by August 2016. (*Id.* ¶ 28). The remaining items in AMG's scope of work provided for in Requisition 21 included "the purchase of material, the fabrication of and installation of mirrors, with a value of $20,000 out of a total of $216,000 for that work." (*Id.* ¶ 35). Requisition 21 was submitted to Hudson Meridian by Mr. Hammerman on October 14, 2016. (*Id.* ¶ 38). Mr. Hammerman attests that on October 25, 2016, "AMG's requisition No. 21 was rejected, without any explanation . . . Hudson stated that retainage would not be paid . . . due to unspecified open items. Hudson, however, did not say that retainage would not be paid because AMG did not obtain a signature from the architect." (*Id.* ¶ 41). Further, Mr. Hammerman attested that "[i]t was not AMG's responsibility to get approvals or sign-offs by the Project's architect. It was Hudson's responsibility to get the architect's approval, which it did when requisitions were approved." (*Id.* ¶ 39).

3. Defendants' Counterclaim for $43,120

Mr. Cote attested that "Hudson Meridian paid AMG for its work on the Project until it became clear that AMG was causing such extensive problems that Hudson Meridian served AMG with a notice of default in September 2016." (Cote Nov. 30, 2017 Aff. ¶ 13). Mr. Cote stated on behalf of Hudson Meridian that after AMG "abandoned" its work in October 2016, Hudson Meridian had to spend $186,347 to "complete AMG's scope of work" and "remediate defective work by AMG." (*Id.* ¶ 13; Cote Feb. 28, 2022 Aff. ¶¶ 25, 28). According to Mr. Cote, the work that remained to be finished included "install[ing] caulking where its metal work abutted the building," remediating broken glass that AMG installed at the entry of the premises, remediating plate glass, and "install[ing] clips at the metal storefront." (*Id.* ¶¶ 32, 36-38, 40-41). Mr. Cote also attested that Hudson Meridian is "contractually entitled to a credit of $64,275" for the costs to complete a game room and demo kitchen area that was originally within the scope of

AMG's work but was stipulated to be removed from the Contract's scope of work. (*Id.* ¶¶ 29-31).

Mr. Hammerman attested that those items specified by Hudson Meridian either were not covered by its insurance because the insurance "would not cover AMG's installed work that was damaged by others, such as the canopy glass, panels, a wood corner piece, glass railings, and metal end caps," or was not within AMG's original scope of work. (Hammerman Sep. 30, 2022 Aff. ¶ 5).

SUMMARY JUDGMENT STANDARD

"[T]he proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012]). "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], quoting *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]). Finally, evidence must be "construed in the light most favorable to the one moved against" (*Kershaw*, 114 AD3d at 82). 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

1. AMG's Breach of Contract Claim

Hudson Meridian argues that AMG's claim for final payment must be dismissed because a condition precedent to receiving payment set forth in the contract was not met. (Memo at 7). Hudson Meridian points to Section 7.11 of the Subcontract which states that AMG will receive final payment "provided… (b) Architect and any construction lender's architect shall have certified to the satisfactory completion of such work" to support its contention that, since the certificate of completion was never signed, AMG's right to payment never arose. (*Id.*; Contract, § 7.11). Hudson Meridian argues that the contract was clear in requiring the Architect's signature on the certificate of completion as a condition precedent to AMG receiving final payment, and since the certification was never received, the entirety of AMG's request for final payment "never came due and owing[.]" (Reply [NYSCEF Doc. No. 187] at 5).

In opposition, plaintiff AMG argues that Hudson Meridian "failed to establish that no genuine issues of [fact] exist that it did not hinder or impede the architect from certifying same." (Opposition ("Opp.") [NYSCEF Doc. No. 142] at 3). AMG argues that because Hudson Meridian failed to show that Hudson Meridian itself gave the architect the certificate on behalf of AMG, Hudson Meridian frustrated AMG's attempt at receiving final payment. Therefore, Hudson Meridian is precluded from relying on the failure of the condition precedent as a bar to payment. (*Id.* at 3-4). Moreover, AMG argues that "Hudson cites to no evidence that the architect did not certify that the work was complete." (*Id.* at 5).

"[W]hen parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms." (*W.W.W. Associates v*

Giancontieri, 77 NY2d 157, 162 [1990]). "A condition precedent is 'an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises.'" (*Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 690 [1995] (quoting Calamari and Perillo, Contracts § 11-2 [3d edition] at 438)). Express conditions in a contract must be "literally performed." (*Id.*). Language can be used to distinguish whether a contract imposes a condition precedent rather than just a promise. (*See id.* [Court found existence of a condition precedent because the parties to the agreement employed "the unmistakable language of condition," which include words or phrases such as 'if' or 'unless and until']).

Here, the contract's language uses the word "provided" to create a clear condition precedent to AMG's final payment. (*See* Contract, § 7.11). This means that before Hudson Meridian's obligation to pay AMG its final payment arises, AMG must have completed the three requirements enumerated after the word "provided" in the contract, one of which being obtaining a certification of satisfactory completion by the owner's architect. (*See id.*).

That the contract was silent regarding *which* party was responsible for ensuring the certification was put into the hands of the owner's architect is immaterial. The parties each argue that the other was responsible for getting the certification to Cetra, the architect on the project. (*See* Memo at 7; Opp. at 4). However, the parties do not dispute the fact that the certification was never *signed* by anyone from Cetra as was required by the contract. (Memo at 7; *see also* Ex. F to Cote Aff.). Jay Jameson, an employee of Cetra affirmed the following:

> During the project meeting I personally attended, the portion of Hudson Meridian's request for payment which included AMG's request for Final Payment was rejected by Cetra and Patrinely Group, on behalf of ownership, on account of AMG's failure to complete its scope of work and

> its failure to cure defective work . . . . The Architect thus refused to certify AMG's request for Final Payment and Hudson Meridian's corresponding request for payment was similarly denied.

Jameson Aff. ¶ 10.

Regardless of whose responsibility it was to submit the certificate to the architect, the fact remains that in the eyes of the owner's Architect, AMG did not satisfactorily complete its work. Per the terms of the contract, the Architect was not required to (and did not) sign off on work that, in its view, was not completed to its satisfaction (*See* Contract § 13.1 ["The Architect, the Engineer or Contractor shall have the authority at all times to inspect and reject work and materials which in any of their judgments do not conform with the Subcontract Documents"]). Without the architect's signature on the certificate, AMG's right to final payment from Hudson Meridian under the contract never arose.

Nor did Hudson Meridian "frustrate the purpose" of AMG's completion of its contract obligations. "In order to invoke the doctrine of frustration of purpose, the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense." (*Center for Specialty Care, Inc. v CSC Acquisition I* LLC, 185 AD3d 34, 42 [1st Dept 2020] [internal quotations omitted]). Moreover, a party cannot rely on the failure of the other party to perform a condition precedent "where he has frustrated or prevented the occurrence of the condition." (*Id.* at 41). There is no evidence that Hudson Meridian did anything to prevent the architect from certifying the satisfactory completion of AMG's work. In fact, as mentioned above, Mr. Jameson affirmed the fact that the owner and the architect received the certification along with AMG's request for final payment. (Jameson Aff. ¶ 10). The record supports Hudson Meridian's contention that it "tried to *facilitate* AMG's efforts to gain the Architect's

approval by transmitting [to AMG] the Architect's formal written objections to AMG's defective work." (Reply at 6; *see* Ex. G to Cote Aff.). However, the architect refused to certify AMG's work until AMG remedied all the defective work. As such, the doctrine of frustration of purpose does not apply here.

Alternatively, AMG argues that Hudson Meridian waived the condition precedent of the architect's certification. (Opp. at 7). However, the previous 20 requisitions were governed by a different provision in the contract than the final payment requisition, which was requisition 21. (*See* Contract §§ 7.3, 7.11). As such, the certification requirement cannot be deemed waived based on the dealings between the parties that occurred before the final payment request.

Inasmuch as the architect received the certificate and refused to sign it based on AMG's unfinished and defective work, there can be no genuine dispute that Hudson Meridian's obligation to pay AMG its final payment never arose. Moreover, AMG's frustration of purpose and waiver arguments are without merit as set forth above. Accordingly, defendant Hudson Meridian's motion for summary judgment to dismiss AMG's claim for breach of contract against it is granted.

2. Hudson Meridian's Counterclaims

In addition to its motion for summary judgment to dismiss AMG's breach of contract claim, Hudson Meridian also seeks summary judgment against AMG on Hudson Meridian's counterclaim for $43,120. (*See* Memo at 9). Although Hudson Meridian claims several items were in AMG's scope of work and left unfinished, Hudson Meridian offers support for only two such unfinished items.[1]

[1] As such, claims to all other items in AMG's work but left unfinished are deemed waived.

First, the parties dispute an area of the subject premises referred to as the "game room/demo kitchen." Hudson Meridian claims it was contractually entitled to remove items from AMG's scope of work, reallocate the work to other contractors, and charge AMG. Section 9.15 of the contract states:

> Contractor has the right to delete portions of the work from this Subcontract and award same to other contractors. The amount of the credit to this subcontract will be the actual cost of the work deleted as performed by other Subcontractors.

Contract § 9.15.

As stated above, "when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms." (*W.W.W. Associates, Inc.*, 77 NY2d at 162). Moreover, evidence "outside the four corners of the document" is generally inadmissible when the terms in the writing are unambiguous. (*Id.*). Here, the parties stipulated via email exchange to remove the demo kitchen/game room from the scope of AMG's work. (*See* Email Stipulation re Demo Kitchen, Ex. J to Cote Aff. [NYSCEF Doc. No. 130]). The Contract is unambiguous. Although it was removed from AMG's scope of work, the Contract allows Hudson Meridian to charge AMG for the "actual cost of the work deleted as performed by other subcontractors." (Contract § 9.15). The amount for the actual cost of the work is $64,275. (*See* Memo at 9). Per the unambiguous terms of the contract, Hudson Meridian is owed this amount by AMG despite the project having been removed from AMG's scope of work and completed by another subcontractor. Therefore, Hudson Meridian is entitled to $64,275 on its counterclaim.

The other disputed item on Hudson Meridian's list of unfinished items within AMG's scope of work is the repair of a glass canopy. It is undisputed that the parties agreed under the Contract that one of the items within AMG's scope of work would be to install a

glass canopy, that AMG did so, and that AMG was paid for it in a prior requisition. (*See* Opp. at 14, 21; Reply at 16). However, the parties dispute whether, when the glass canopy subsequently cracked, it was within AMG's scope of work to repair it. (*See* Opp. at 21; Reply at 16). AMG argues that it is not responsible for repairing the glass canopy when it broke "through no fault of AMG" because reinstallation was not within AMG's scope of work. (Opp. at 16-17). Hudson Meridian argues that the glass canopy came with a one-year guarantee requiring AMG to repair the glass if it breaks due to "defects in workmanship, materials, and equipment." (Reply at 16 [internal quotations omitted]). In opposition, AMG relies on the affidavit of Marek Grzyb who affirms that "something fell on it or something broke it, which was not the fault of AMG" (Grzyb Aff. [NYSCEF Doc. No. 149] ¶ 10). Given that there is a genuine issue of material fact as to what occurred with the glass canopy which would determine whether or not the repair would be within the scope of its one-year warranty, summary judgment is denied with respect to the cost to repair the glass canopy.

Similarly, the amount alleged in Hudson Meridian's counterclaim includes amounts "to remediate the defective caulking. . . to complete the storefront saddles . . . to remediate the stairwell glass . . . [and] to install clips at the storefront." (Memo at 9). As Hudson Meridian failed to proffer evidence that support recovery of these other items, summary judgment on the remainder of Hudson Meridian's counterclaim is denied with respect to all other allegedly unfinished items besides the game room/demo kitchen area.

3. AMG's Lien Law Claims

Hudson Meridian argues that AMG's Lien Law and trust fund diversion claims against it must be dismissed along with the breach of contract claim, stating, "Both claims are derivative of and subject to, *inter alia*, the existence of a judicially established claim to

payment." (Memo at 13). When a breach of contract cause of action must be dismissed, a "cause of action to foreclose [a] mechanic's lien must also be dismissed." (*Windjammer Homes, Inc. v Lieberman*, 278 AD2d 411 [2d Dept 2000]). Along with granting dismissal of AMG's breach of contract claim, it follows that the Lien Law and trust fund diversion claims must also be dismissed.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendant Hudson Meridian's motion for summary judgment is granted to the extent of dismissing AMG's breach of contract, Lien Law, and trust fund diversion claims against it; and it is further

ORDERED that Hudson Meridian's motion for summary judgment on its counterclaim is granted to the extent of finding AMG liable to Hudson Meridian under the contract in the amount of $64,275.

11/20/2023
DATE

SHLOMO S. HAGLER, J.S.C.

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