

**Real Dependable Contr. Corp. v Fountain Gardens
Owners Corp**

2023 NY Slip Op 34304(U)

November 29, 2023

Supreme Court, New York County

Docket Number: Index No. 655900/2021

Judge: Nancy M. Bannon

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

PRESENT: HON. NANCY M. BANNON PART 42

Justice

-----X

REAL DEPENDABLE CONTRACTING CORP.,

Plaintiff,

- v -

FOUNTAIN GARDENS OWNERS CORP
and BRAUN MANAGEMENT INC.

Defendants.

-----X

INDEX NO. 655900/2021

MOTION DATE 11-29-23

MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 76, 77

were read on this motion to/for STRIKE AFFIRMATIVE DEFENSE.

In this breach of contract action, the plaintiff contractor seeks to recover \$212,655.00 from the defendants for construction and renovation work performed on the defendants' property at 4499 Henry Hudson Parkway, Bronx County, in 2016. The defendants dispute the extent and quality of work done and the amount owed on the parties' contract and accuse the plaintiff of attempting to bribe two of defendants' agents with cash to get payment on unapproved work. The plaintiff now moves pursuant to CPLR 3211(b) and CPLR 3013 to dismiss eleven of the defendants' fourteen affirmative defenses. The defendants oppose the motion. The motion is granted.

CPLR 3013 requires that all statements in a pleading be "sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transaction or occurrences, intended to be proved and the material elements of each cause of action or defense." CPLR 3018(b) defines affirmative defenses as "all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a proper pleading, such as arbitration and award, collateral estoppel, culpable conduct claimed in diminution of damages as set forth in Article 14A [contribution], discharge in bankruptcy, facts showing illegality either by statute or common law, fraud, infancy or other disability of the party defending, payment, release, res judicata, statute of frauds or statute of

limitations.” CPLR 3211(b) provides that a “party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit.” The burden is on the plaintiff to demonstrate that the defenses are without merit as a matter of law. See Granite State Ins. Co. v Transatlantic Reinsurance Co., 132 AD3d 479 (1st Dept. 2015); 534 East 11th Street Housing Dev. Fund v Hendrick, 90 AD3d 541 (1st Dept. 2011).

First, the court notes that the plaintiff seeks dismissal of all of the defendants’ affirmative defenses save for the fourth, seventh and tenth. Read together, those three affirmative defenses comprise the gravamen of the defense - that all change orders had to be approved, that plaintiff was paid all sums due under the contract and is not entitled to any additional amount for unapproved change orders, or any substandard work or work not performed. These three defenses repeat allegations and arguments made in the body of the answer, in Paragraphs 3, 5, 8, 12, 13, 14, 16, 19, 20, 22, 24, 26, 28, and 29. Several more of the purported affirmative defenses consist of pieces of the same argument – “calling a proposal a ‘change order’ does not give plaintiff any rights it is not entitled to under the contract” (sixth), “the work performed was not satisfactory” (eighth) and “plaintiff claims its change orders were performed as part of the contract” (ninth). In regard to the latter, by reciting an argument or allegation of the plaintiff, the defendants do not state a defense (CPLR 3211[b]). Indeed, they advance the plaintiff’s case.

As stated, the defendants maintain that the plaintiff’s agents attempted to bribe the defendants to get payment for unapproved, unfinished or substandard work. Some defenses seem to merely reference or restate this contention in whole or part – “claims are barred by plaintiff’s improper conduct” (third), “claims are barred by plaintiff’s conduct, including its attempt to give \$6,000 as a ‘holiday gift’ to defendant Braun Management” (fifth), and “plaintiff’s conduct estops it from any recovery” (eleventh). The defendants argue that these affirmative defenses should not be stricken as the alleged bribery is relevant to show that the plaintiff knew it was not entitled to payment for unapproved, unfinished or substandard work. The court finds this argument unpersuasive. These “defenses” are not, in fact, defenses but are more in the nature of allegations or denials, improperly pleaded as affirmative defenses. See CPLR 3018(b); CPLR 3211(b); Charnis v Shohef, 195 Misc 2d 188 (App Term, 2nd Dept. 2002). That is, if they were not pleaded as affirmative defenses they would not likely take anyone by surprise or raise issues of fact not previously alleged in a pleading. See CPLR 3018(b).

Furthermore, most of the affirmative defenses referenced above are also subject to dismissal since they are asserted in a conclusory manner without any detail. See CPLR 3013; Commr. of State Ins. Fund v Ramos, 63 AD3d 453 (1st Dept. 2009); Mfrs.Hanover Trust Co. v Restivo, 169 AD2d 413 (1st Dept. 1991). Three additional defenses must be dismissed for the same reason - “the claims are barred by the statute of frauds” (first), “barred by the parol evidence rule” (second), and “barred by accord and satisfaction” (thirteenth). These are not “sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transaction or occurrences, intended to be proved and the material elements of each cause of action or defense.” CPLR 3013.

In the twelfth affirmative defense, the defendants inexplicably state that “plaintiff’s attempt to obtain a fraudulent default judgment estops it from any recovery.” This affirmative defense fails to satisfy the specificity requirements of CPLR 3013 and does not state a defense, subjecting it to dismissal under CPLR 3211(b). Moreover, the defendants misstate and misrepresent the record in this case. That the court denied the plaintiff’s first motion for leave to enter a default judgment does not mean that the motion was “fraudulent” but only that it fell short of meeting the requirements of CPLR 3215, as is clearly stated in the court’s decision. Notably, the defendants thereafter stipulated with the plaintiff such that its late answer was accepted and the second default motion was withdrawn. Defendants never made any allegation concerning fraud in that process and they are cautioned against making unfounded accusations against any party or counsel.

Finally, the fourteenth affirmative defense states that the defendants “reserve their right to bring a claim against the plaintiff for improper workmanship or for any other reason since a compulsory counterclaim is not required under the CPLR.” This is not a defense (CPLR 3211[b]) but merely a recitation of the law of compulsory counterclaims. Notably, no counterclaim was ever asserted against the plaintiff.

The court has considered and rejected the defendants’ remaining contentions.

Accordingly, upon the foregoing papers and after oral argument, it is

ORDERED that the plaintiff’s motion is granted and the first, second, third, fifth, sixth, eighth, ninth, eleventh, twelfth, thirteenth and fourteenth affirmative defenses are stricken, and it is further

ORDERED that counsel shall appear for a status conference on December 7, 2023, at 12:30 p.m., as previously scheduled, and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

11/29/2023
DATE

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: