SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

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NORTH STAR MECHANICAL CORP.,

Plaintiff,

- v -

ROCKMORE CONTRACTING CORPORATION, J.S. HELD, THE HANOVER INSURANCE COMPANY, and THE CITY OF NEW YORK,

Defendants.

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INDEX NO. 654193/2019

MOTION DATE N/A, N/A

MOTION SEQ. NO. 006 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 006) 85, 86, 87, 88, 96, 98, 99, 100, 101, 102, 103, 104, 105, 114, 116, and 117

were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document numbers (Motion 007) 90, 91, 92, 93, 94, 97, 106, 107, 108, 109, 110, 111, 112, 113, 115, 118, and 119

were read on this motion to DISMISS.

LOUIS L. NOCK, J.

This action for breach of contract and related commercial torts arises out of a construction contract between plaintiff and defendant Rockmore Contracting Corporation ("Rockmore"). Defendant Hanover Insurance Company ("Hanover") is the surety of a construction bond issued in connection with the contract. Defendant City of New York (the "City") contracted with Rockmore to undertake the construction project at issue herein. Presently before the court are Rockmore's motion to dismiss certain causes of action in the amended complaint (Mot. Seq. No. 006), and the City's motion to dismiss the action. The motions are consolidated for disposition in accordance with the following memorandum decision.

Background[1]

The City owns the building known as the 122 Community Center, located at 150 First Avenue, New York, New York (the "Center"). Rockmore was hired through the City's Department of Design and Construction ("DDC") as general contractor, and Rockmore in turn subcontracted the HVAC work on the project to plaintiff (contract, NYSCEF Doc. No. 100). As relevant to the instant motions, the contract provides that

> The Owner may make changes in the Work by issuing Modifications to the Prime Contract. Upon receipt of such a Modification issued subsequent to the execution of the Subcontract Agreement, the Contractor shall promptly notify the Subcontractor of the Modification. Unless otherwise directed by the Contractor, the Subcontractor shall not thereafter order materials or perform Work that would be inconsistent with the changes made by the Modification to the Prime Contract.

(*Id.* § 5.1.)

Some time during February 2013, North Star alleges that representatives of the City and Rockmore asked it to prepare shop drawings and equipment orders for certain HVAC work outside the scope of the contract (the "out of contract work"). North Star claims that Noel Vaz, its representative, was assured that if the drawings were prepared, the City would award this extra HVAC work to North Star. In reliance on these representations, North Star prepared the requested documentation and obtained the necessary equipment, but the City instead awarded the out of contract work to a different subcontractor. This out of contract work is the subject of the second cause of action for unjust enrichment, third cause of action for quantum meruit, sixth cause of action for fraud, and the tenth and eleventh causes of action for breach of the express and implies warranties of good faith and fair dealing. While the allegations are unclear in the

[1] Unless otherwise stated, the following is taken from the amended complaint (NYSCEF Doc. No. 88) and is presumed true for purposes of deciding the motion.

complaint, plaintiff's opposition papers clarify that the out of contract work is also covered by the ninth cause of action for conversion.

Rockmore now moves to dismiss the above-cited causes of action against it and does not challenge the first cause of action for breach of contract and the fourth cause of action for an account stated. The City moves to dismiss the amended complaint in its entirety.

Standard of Review

"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]). "[The court] accept[s] the facts as alleged in the complaint as true, accord[ing] plaintiff the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory" (*id*. at 87-88). Ambiguous allegations must be resolved in plaintiff's favor (*JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). "The motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal citations omitted]). "[W]here ... the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration" (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

Discussion

Rockmore's Motion (Mot. Seq. No. 006)

The primary argument offered by Rockmore in favor of dismissing the above cited causes of action is that they are duplicative of the breach of contract and account stated claims, which Rockmore does not challenge. Rockmore references the change order process in the parties'

contract, and states that any claim for extra work is covered by this provision. The court does not read the provision as broadly as Rockmore. The contract provides a process by which the City, as owner, could make changes with Rockmore via the primary contract, and Rockmore would then notify plaintiff of them (contract, NYSCEF Doc. No. 100, § 5.1). This process is not what plaintiff alleges. The City did not propose a change order to Rockmore that Rockmore then passed to plaintiff. Plaintiff states that the subject work was out of contract, and that plaintiff took certain steps to prepare for work that it was promised, but that the City eventually gave to a different subcontractor. The unambiguous terms of the contract do not encompass these allegations, and the court may not vary them under the guise of interpretation (*Vermont Teddy Bear Co., Inc. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]). Because it is at least questionable whether the out of contract work is covered by the contract, plaintiff may plead quasi-contract claims such as unjust enrichment and quantum meruit in the alternative (*Loheac v Children's Corner Learning Ctr.*, 51 AD3d 476 [1st Dept 2008]).

Turning to the sixth cause of action for fraud, for the reasons stated above the court does not find it duplicative of the claim for breach of contract. Rockmore also argues that plaintiff fails to adequately plead scienter, a necessary element of a claim for fraud. "The element of scienter, that is, the requirement that the defendant knew of the falsity of the representation being made to the plaintiff, is, of course, the element most likely to be within the sole knowledge of the defendant and least amenable to direct proof" (*IKB Intern. S.A. v Morgan Stanley*, 142 AD3d 447, 450 [1st Dept 2016]). Here, with respect to Rockmore's alleged actual intent to defraud plaintiff regarding the out of contract work, plaintiff alleges that Rockmore and the City shared information provided by plaintiff in support of its bid for the out of contract work with another subcontractor (amended complaint, NYSCEF Doc. No. 88, ¶¶ 68, 75). At this stage, these

allegations are sufficient to show a "rational inference of actual knowledge" on Rockmore's part (*AIG Fin. Products Corp. v ICP Asset Mgt., LLC*, 108 AD3d 444, 446 [1st Dept 2013]).

The ninth cause of action for conversion, however, is a poor fit for plaintiff's allegations. To state a claim for conversion of property, a plaintiff must allege "(1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights" (*Core Dev. Group LLC v Spaho*, 199 AD3d 447 [1st Dept 2021]). The complaint does not allege that Rockmore is exercising dominion over funds or property that are rightfully plaintiffs. To the extent that plaintiff alleges that Rockmore profited from plaintiff's efforts to obtain the out of contract work, such allegations fit better into the rubric of unjust enrichment, which claim the court is allowing to proceed.

Finally, the tenth and eleventh claims for breach of express and implied warranties are either subsumed into the breach of contract claim, or, to the extent related to the out of contract work, not viable (*Murphy v American Home Products Corp.*, 58 NY2d 293, 304 [1983] ["No obligation can be implied, however, which would be inconsistent with other terms of the contractual relationship"]; *MBIA Ins. Corp. v Merrill Lynch*, 81 AD3d 419, 419-20 [1st Dept 2011] ["The cause of action for breach of the implied covenant of good faith and fair dealing cannot be maintained because it is premised on the same conduct that underlies the breach of contract cause of action and is intrinsically tied to the damages allegedly resulting from a breach of the contract"]).

Accordingly, Rockmore's motion is granted to the extent of dismissing the ninth, tenth, and eleventh cause of action, and otherwise denied.

The City's Motion (Mot. Seq. No. 007)

The City argues that plaintiff failed to file a notice of claim against it as required by both General Municipal Law and the New York City Administrative Code, requiring dismissal of the complaint. General Municipal Law § 50-i provides that a tort claim may not be presented against the City unless:

> (a) a notice of claim shall have been made and served upon the City . . . in compliance with section fifty-e of this article, (b) it shall appear by and as an allegation in the complaint or moving papers that at least thirty days have elapsed since the service of such notice . . . and (c) the action or special proceeding shall be commenced within one year and ninety days after the happening of the event upon which the claim is based.

(General Municipal Law § 50-i.) Similarly, the Administrative Code provides that "[i]n every action or special proceeding prosecuted or maintained against the city, the complaint . . . shall contain an allegation that at least thirty days have elapsed since the demand, claim or claims, upon which such action . . . is founded, were presented to the comptroller for adjustment, and that the comptroller has neglected or refused to make an adjustment or payment thereof" (Administrative Code § 7-201 [a]). The failure to timely file a notice of claim or a demand upon the Office of the Corporation Counsel or the Office of the City Comptroller, and to allege compliance with these requirements in the complaint, bars any action against the City (*Knox v New York City Bureau of Franchises*, 48 AD3d 756, 757 [2d Dept 2008]).

Here, plaintiff fails to allege that it complied with the notice requirements. The City argues that it has never received any demand or notice of claim, requiring dismissal of the complaint against the City. In opposition, plaintiff references a letter dated August 25, 2014, in which it alleges that it put Rockmore and the City on notice of its claims (NYSCEF Doc. No. 102). Initially, the court notes that this letter was sent from North Star to Rockmore, and there is no allegation that it was ever sent to North Star's contacts within the DDC. Even if plaintiff had

made such an allegation, the failure to file a notice of claim or a demand that fulfills the statutory and regulatory content requirements upon either the Corporation Counsel or the City Comptroller is insufficient notice (*EMD Constr. Corp. v New York City Dept. of Hous. Preserv. and Dev.*, 70 AD3d 893, 893 [2d Dept 2010] ["The complaint fails to allege that "at least thirty days ha[d] elapsed since the ... claim ... upon which [the] action ... is founded [had been] presented to the comptroller for adjustment"]; *Drakeford v Brooklyn Dist. Atty.*, 266 AD2d 134, 134 [1st Dept 1999] [dismissing complaint as "barred by plaintiff's failure to file a notice of claim prior to commencing this action"]). The City's motion is therefore granted, and the complaint against the City is dismissed. Because the failure to comply with the procedural requirements for commencing an action against the City is an independent ground of dismissal, the court declines to address whether the claims against the City also fail to state a cause of action.

Accordingly, it is hereby

ORDERED that the motion of defendant Rockmore Contracting Corporation to dismiss the second, third, sixth, ninth, tenth, and eleventh causes of action (Mot. Seq. No. 006) is granted to the extent of dismissing the ninth through eleventh causes of action against Rockmore, and otherwise denied; and it is further

ORDERED that Rockmore is directed to file an answer to the amended complaint within 20 days of service of a copy of this order with notice of entry; and it is further

ORDERED that the action against defendant the City of New York is severed; and it is further

ORDERED that the City's motion to dismiss the amended complaint as asserted against it is granted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of the City dismissing the action against it, with costs and disbursements to the City as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the action shall continue against the remaining defendants; and it is further

ORDERED that the parties are directed to appear for a preliminary conference at the Courthouse, 111 Centre Street, Room 1166, New York, New York, on August 21, 2024, at 10:00 AM. Prior to the conference, the parties shall meet and confer regarding discovery and, in lieu of appearing at the conference, may submit a proposed preliminary conference order, in a form that substantially conforms to the court's form Commercial Division Preliminary Conference Order located at https://ww2.nycourts.gov/courts/1jd/supctmanh/preliminary_conf_forms.shtml, to the Principal Court Attorney of this Part (Part 38) at ssyaggy@nycourts.gov.

This constitutes the decision and order of the court.

ENTER:

Louis L. Nock

7/16/2024
DATE

LOUIS L. NOCK, 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**