Level 5 Constr., Inc. v Skanska Ecco III 2 JV
2024 NY Slip Op 35624(U)
March 13, 2024
Supreme Court, Westchester County
Docket Number: Index No. 70587/2023
Judge: Linda S. Jamieson
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

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LEVEL 5 CONSTRUCTION, INC.,

Plaintiff,

-against-

SKANSKA ECCO III 2 JV, SKANSKA USA CIVIL NORTHEAST INC., E.C.C.O. III ENTERPRISES, INC., ZURICH AMERICAN INSURANCE COMPANY, LIBERTY MUTUAL INSURANCE COMPANY, FEDERAL INSURANCE COMPANY, THE CONTINENTAL INSURANCE COMPANY, and BERKSHIRE HATHAWAY SPECIALTY INSURANCE COMPANY,

Defendants.

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Index No. 70587/2023

DECISION AND ORDER

The following papers numbered 1 to 6 were read on the motion (seq. no. 1) by defendants Skanska Ecco III 2 JV ("SE3"), Skanska USA Civil Northeast, Inc. ("Skanska Civil"), E.C.C.O. III Enterprises, Inc. ("ECCO") (together with SE3 and Skanska Civil, the "JV Defendants"), Zurich American Insurance Company ("Zurich"), Liberty Mutual Insurance Company ("Liberty"), Federal Insurance Company ("Federal"), The Continental Insurance Company ("Continental"), and Berkshire Hathaway Specialty Insurance Company ("Berkshire Hathaway") (together with Zurich, Liberty, Federal, and Continental, the "Surety Defendants")[1] for

[1] The JV Defendants and the Surety Defendants are collectively referred to herein as "defendants."

an Order pursuant to CPLR §§ 3211(a)(1), (5) and (7) dismissing the Complaint of plaintiff Level 5 Construction, Inc. ("plaintiff"):

Papers	Numbered
Complaint	1
Notice of Motion, Affirmation and Exhibits	2
Memorandum of Law in Support	3
Affidavit and Exhibits in Opposition	4
Memorandum of Law in Opposition	5
Memorandum of Law in Reply	6

BACKGROUND

This action arises from a dispute concerning payment for construction services allegedly rendered by plaintiff in connection with a project to replace, rebuild and design Metro-North Railroad car shop facilities at the Harmon Shop facility located in Croton-On-Hudson (the "Project"). *See* NYSCEF Doc. No. 1 at ¶¶ 1-75.

Specifically, the Complaint alleges in relevant part that in October 2018, Skanska Civil and ECCO, which are joint venture partners, formed SE3 for the purpose of SE3 entering into a general contract to perform labor and construction services for Metro-North in connection with the Project (the "Metro-North Agreement"). *Id.* It further alleges that SE3 and the Surety

Defendants executed and delivered to Metro-North certain payment bonds in connection with the Project (collectively, the "Payment Bond"), which Payment Bond jointly and severally binds all parties thereto to pay all persons furnishing labor, materials and equipment for the Project. *Id.*

The Complaint also alleges that on November 13, 2020, SE3 entered into a subcontract with plaintiff (the "Subcontract"), by which plaintiff was retained to furnish, install, and perform a scope of work for the Project that was specifically set forth in the Subcontract. *Id.* The Complaint alleges that the Subcontract was subsequently modified and amplified by various change orders furnished by SE3 and plaintiff. *Id.*

It further alleges that despite encountering numerous unexpected difficulties with the Project that made plaintiff's work on the Subcontract far more time consuming and expensive than originally anticipated, SE3 made various representations to plaintiff that it would compensate plaintiff for all of its increased costs and expenses, thereby inducing plaintiff to continue work on the Project. *Id.* The Complaint alleges that after plaintiff had completed approximately 95 percent of the total work required on the Subcontract as amplified and modified by numerous change orders, on May 23, 2023, SE3 notified plaintiff that the Subcontract was being terminated. *Id.* It alleges that this termination was wrongful because, *inter alia*, SE3 refused to compensate plaintiff for labor and materials furnished pursuant to the Subcontract, and because SE3 had fraudulently induced plaintiff to continue working on the Project despite that SE3 had no intention of fully compensating plaintiff for such work. *Id.*

It further alleges that plaintiff suffered damages, *inter alia*, in the amount of $2,343,828.00 due to SE3's failure to pay plaintiff for amounts owed pursuant to the Subcontract, and that SE3's joint venture partners, Skanska Civil and ECCO, similarly failed and refused to compensate plaintiff for amounts jointly owed by the JV Defendants. *Id.* The Complaint additionally alleges that despite plaintiff's demand for payment of amounts owed pursuant to the Payment Bond, the Surety Defendants have repeatedly failed and refused to pay the sum of $2,343,828.00 that is owed and due to plaintiff. *Id.*

Based upon the foregoing general allegations as detailed in 75 paragraphs comprising the body of the Complaint, plaintiff asserts: (1) a first cause of action for breach of contract against the JV Defendants based upon the Subcontract; (2) a second cause of action for breach of contract against all defendants based upon the Payment Bond; (3) a third cause of action for breach of the implied covenant of good faith and fair dealing against the JV Defendants; (4) a fourth cause of action for quantum meruit against the JV Defendants; (5) a fifth cause of action for unjust enrichment against the JV Defendants; and (6) a sixth cause of action for fraud against the JV Defendants. *See* NYSCEF Doc. No. 1 at ¶¶ 76-114.

Defendants jointly move (seq. no. 1) for an Order pursuant to CPLR §§ 3211(a)(1), (5) and (7) dismissing the Complaint, arguing, *inter alia*, that plaintiff's breach of contract and fraud claims are barred by documentary evidence, fail to state a claim, and/or have been waived in writing, and that the quasi-contractual claims should be dismissed as duplicative of plaintiff's breach of contract claims. *See* NYSCEF Doc. Nos. 19-49. Plaintiff opposes the motion. *See* NYSCEF Doc. Nos. 57-72.

THE LEGAL STANDARD

It is well-settled that "[a] motion to dismiss a cause of action pursuant to CPLR 3211(a)(1) may be granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *BCI Constr., Inc. v Board of Educ., Washingtonville Cent. Sch. Dist.*, 203 AD3d 794, 795 (2d Dept 2022). "For the purpose of CPLR 3211(a)(1), judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence." *Oparaji v ABN Amro Mtge. Group, Inc.*, 202 AD3d 985, 986-987 (2d Dept 2022).

Regarding a motion to dismiss pursuant to CPLR § 3211(a)(7), it is well-established that "the complaint must be liberally construed, giving the plaintiff the benefit of every favorable inference." *Cunningham v Nolte*, 188 AD3d 806, 807 (2d Dept 2020), *citing Leon v Martinez*, 84 NY2d 83, 87-88 (1994). "Such a motion should be granted only where, even viewing the allegations as true, the plaintiff still cannot establish a cause of action." *Cunningham*, 188 AD3d at 807, *citing Hartman v Morganstern*, 28 AD3d 423, 424 (2d Dept 2006). "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).[2]

THE FIRST AND SECOND CAUSES OF ACTION

"The essential elements of a breach of contract cause of action are the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that

[2] To the extent that defendants' motion is made pursuant to CPLR § 3211(a)(5), that provision states in relevant part that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the cause of action may not be maintained because of . . . release."

[* 6]

contract, and resulting damages." *Blank v Petrosyants*, 203 AD3d 685, 688 (2d Dept 2022), *quoting Liberty Equity Restoration Corp. v Yun*, 160 AD3d 623, 626 (2d Dept 2018).

Having reviewed the parties' submissions, the Court finds that plaintiff in its first and second causes of action has stated valid claims for breach of contract, as it has alleged that despite plaintiff's performance of its obligations pursuant to the Subcontract, the JV Defendants materially breached the Subcontract by failing to pay plaintiff for labor and materials furnished in connection therewith, and that all defendants materially breached the Payment Bond by failing and refusing to pay plaintiff for such amounts owed in connection with plaintiff's work on the Project. *See* NYSCEF Doc. No. 1 at ¶¶ 1-75; 76-77; 78-82.

Moreover, the Court does not credit any of defendants' three principal arguments that these claims should be dismissed pursuant to CPLR §§ 3211(a)(1), (5) and/or (7). First, the Court does not agree with defendants' assertion that plaintiff has failed to state a claim for breach of contract in the first cause of action by failing to identify a provision of the Subcontract that was breached. Without opining as to whether plaintiff may ultimately prevail on the merits of this claim, the Court finds that plaintiff has adequately pleaded a breach of the Subcontract for purposes of defeating defendants' CPLR § 3211(a)(7) motion. Indeed, a review of the detailed allegations set forth in the body of the Complaint demonstrates that plaintiff has alleged: (1) the existence of the Subcontract between plaintiff and SE3 and the essential terms thereof, including plaintiff's scope of work required under the Subcontract; (2) the amount of compensation which plaintiff was entitled to receive under the Subcontract; (3) the change orders required under the Subcontract; (4) plaintiff's performance of its scope of work under the Subcontract; (5) SE3's material breach of the Subcontract by wrongfully terminating plaintiff and refusing to pay plaintiff for labor and materials furnished thereunder; and (6) the damages suffered by plaintiff as a direct result of SE3's breach of the Subcontract. *See* NYSCEF Doc. No. 1 at ¶¶ 26-67. Therefore, the Court agrees with plaintiff that it has adequately alleged a claim for breach of contract.[3]

Second, the Court does not credit defendants' contention that the first and second causes of action should be dismissed

[3] Strictly for purposes of this CPLR § 3211(a)(7) motion, the Court determines that plaintiff has validly stated claims against Skanska Civil and ECCO, as it has alleged that they are joint venture partners with SE3 in connection with the Subcontract. *See* NYSCEF Doc. No. 1 at ¶¶ 2-4; *see also* *Clarke v Sky Express, Inc.*, 118 AD3d 935, 935 (2d Dept 2014) (affirming the Supreme Court's denial of a CPLR § 3211[a][7] motion where plaintiff alleged that various defendants "were engaged in a joint venture and were jointly and severally liable" to plaintiff).

pursuant to CPLR §§ 3211(a)(1) and/or (5) because those claims are barred by the waiver language set forth in change orders one and two for the Subcontract, each of which provides in relevant part as follows:

> In exchange for the additional money and/or time (if any) reflected in this Change Order, Subcontractor waives any right to additional time or money for any Work associated with this Change Order, including any impact on unchanged work. This Change Order constitutes accord and satisfaction . . . . *See* NYSCEF Doc. Nos. 24, 25.

Although the broad waiver language set forth above may ultimately limit the damages, if any, to which plaintiff is entitled should it ultimately prevail on the merits of its breach of contract claims, the Court agrees with plaintiff that dismissal of the first two causes of action pursuant to CPLR §§ 3211(a)(1) or (5) is unwarranted. Specifically, because the allegations in the Complaint and the sworn affidavit of plaintiff's president, Christopher Black ("Black"), furnished in opposition to defendants' motion, reflect at the bare minimum issues of fact concerning whether the waiver language of change orders one and two included all of the additional work, labor and materials furnished by plaintiff pursuant to the Subcontract, dismissal of plaintiff's two breach of contract claims is inappropriate at this time and in this procedural context. *See* NYSCEF Doc. No. 1 at ¶¶ 26-67; 76-77; 78-82;

NYSCEF Doc. No. 57 at ¶¶ 14-26; *see also Homapour v Harounian*, 200 AD3d 575, 576 (1st Dept 2021) (stating that "waiver should not be found absent evidence from which a clear manifestation of intent to relinquish the right in question could be reasonably inferred" and noting that "[t]he burden of proving waiver rests with the party asserting it") (internal quotations omitted); *Orangetown Home Improvements, LLC v Kiernan*, 84 AD3d 902, 903-904 (2d Dept 2011) (affirming the Supreme Court's denial of defendants' CPLR § 3211 motion based upon an alleged signed waiver and holding that that "the factual allegations in the plaintiff's pleadings, affidavit, and accompanying exhibits, as to the parties' course of dealings, [and] the circumstances leading up to the execution of the release . . . establish that the defendants are not entitled to dismissal as a matter of law").

Third, the Court does not agree with defendants' argument that the first cause of action should be dismissed pursuant to CPLR § 3211(a)(1) based upon documentary evidence showing that the Subcontract was properly terminated. Fatal to defendants' contention is the fact that the letters and email correspondence furnished by defendants do not constitute "documentary evidence" within the meaning of CPLR § 3211(a)(1). *See* NYSCEF Doc. Nos. 44-48; *see also MJ Lilly Assoc., LLC v Ovis Creative, LLC*, 221

AD3d 805, 806 (2d Dept 2023) (stating that "letters, emails, and affidavits, do not meet the requirements for documentary evidence"), *citing Yan Ping Xu v Van Zwienen*, 212 AD3d 872, 874 (2d Dept 2023). Moreover, even if the Court were to consider defendants' submissions, the averments in Black's affidavit and the correspondence annexed thereto present triable issues of fact concerning SE3's termination of the Subcontract, such that dismissal of the first cause of action pursuant to CPLR § 3211(a)(1) is unwarranted. *See* NYSCEF Doc. No. 57 at ¶¶ 23-25; 27; 29-34; NYSCEF Doc. Nos. 65-70.

Accordingly, because plaintiff has stated valid claims for breach of contract and because the documentary evidence does not utterly refute the Complaint's allegations, the branches of defendants' motion seeking to dismiss the first and second causes of action pursuant to CPLR §§ 3211(a)(1), (5) and/or (7) are denied. *See Pinkesz Mut. Holdings, LLC v Pinkesz*, 198 AD3d 693, 697 (2d Dept 2021) (holding that the trial court "properly denied dismissal of [defendant's] cross claim alleging breach of contract . . . which was sufficiently pleaded"); *Ahmed Elkoulily, M.D., P.C. v New York State Catholic Healthplan, Inc.*, 153 AD3d 768, 770-771 (2d Dept 2017) (stating that the trial court erred in dismissing a breach of contract claim pursuant to CPLR § 3211[a][7] where the allegations "were sufficient to state a cause of action to recover damages for breach of contract”).

THE THIRD CAUSE OF ACTION

“The implied covenant of good faith and fair dealing is a pledge that neither party to the contract shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruit of the contract, even if the terms of the contract do not explicitly prohibit such conduct.” *East Ramapo Cent. Sch. Dist. v New York Schs. Ins. Reciprocal*, 199 AD3d 881, 884 (2d Dept 2021).

The Court does not agree with defendants’ argument that the third cause of action for breach of the implied covenant of good faith and fair dealing should be dismissed as duplicative of the first cause of action for breach of contract. Rather, it is well-settled that “where, as here, the cause of action to recover damages for breach of [contract] and the cause of action to recover damages for breach of the implied covenant of good faith and fair dealing allege different conduct on the part of the defendant and seek different categories and/or types of damages, the cause of action seeking damages for breach of the implied covenant of good faith and fair dealing should not be dismissed as ‘duplicative’ of the cause of action alleging breach of contract.” *East Ramapo Cent. Sch. Dist.*, 199 AD3d at

886; *accord 25 Bay Terrace Assoc., L.P. v Public Serv. Mut. Ins. Co.*, 194 AD3d 668, 672 (2d Dept 2021); *McBride v New York Prop. Ins. Underwriting Assn.*, 152 AD3d 505, 506 (2d Dept 2017); *Gutierrez v Government Empls. Ins. Co.*, 136 AD3d 975, 976 (2d Dept 2016).

As noted by plaintiff, the third cause of action is not merely duplicative of the first cause of action, and includes allegations that are separate and apart from those underlying the breach of contract claim. Specifically, it alleges, *inter alia*, that SE3 "failed to disclose the Undisclosed Specifications to [plaintiff] prior to [plaintiff] submitting its bid and signing the Subcontract," "induced [plaintiff] to continue to work on the Harmon Project . . . at cost far in excess of [plaintiff's] original Subcontract amount," and "acted in a malicious and intentionally deceptive manner" designed to "frustrat[e] the performance of [plaintiff] of its obligations under the Subcontract." *See* NYSCEF Doc. No. 1 at ¶¶ 83-99; *Cf.* NYSCEF Doc. No. 1 at ¶¶ 76-77. Furthermore, the Court notes that plaintiff seeks damages of $2,343,828.00 in connection with the first cause of action, while seeking distinct damages in the amount of $3,100,000.00 for its third cause of action. *See* NYSCEF Doc. No. 1 at ¶¶ 77, 99.

Therefore, because the third cause of action for breach of the implied covenant of good faith and fair dealing concerns "different conduct" and seeks "different categories and/or types of damages" from those in the first cause of action for breach of contract, the branch of defendants' motion seeking to dismiss the third cause of action pursuant to CPLR § 3211(a)(7) is denied. *See East Ramapo Cent. Sch. Dist.*, 199 AD3d at 885; *see also F & R Goldfish Corp. v Furleiter*, 210 AD3d 643, 646 (2d Dept 2022) (holding that "the cause of action alleging breach of the implied covenant of good faith and fair dealing was not duplicative of the breach of contract cause of action since it alleged that the defendants engaged in additional conduct to realize gains from the plaintiffs, while depriving the plaintiffs of the benefits of the parties' agreements"); *A.D.E. Sys., Inc. v Quietside Corp.*, 188 AD3d 762, 764 (2d Dept 2020) (finding that "[c]ontrary to the Supreme Court's determination, the cause of action to recover damages for breach of the covenant of good faith and fair dealing was not duplicative of the causes of action to recover damages for breach of contract, since it alleged that the defendants engaged in additional conduct to realize gains from the plaintiff, while depriving the plaintiff of the benefits of the parties' agreement").

THE FOURTH AND FIFTH CAUSES OF ACTION

With respect to the fourth cause of action for quantum meruit[4] and the fifth cause of action for unjust enrichment[5], the Court credits defendants' argument that these quasi-contract claims should be dismissed pursuant to CPLR §§ 3211(a)(1) and/or (7) because "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." *Inspirit Dev. & Constr., LLC v GMF 157 LP*, 203 AD3d 430, 431 (1st Dept 2023), *quoting Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 (1987).

A review of the Complaint reflects that plaintiff has unambiguously alleged the existence of a valid and enforceable contract, *i.e.*, the Subcontract, that governs the same subject matter as plaintiff's breach of contract claim, namely, plaintiff's performance of "the Level 5 Work Scope pursuant to the Undisclosed Specifications at the specific request of the JV

[4] "In order to succeed on a cause of action to recover in quantum meruit, the plaintiff must prove (1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they were rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services." *Gould v Decolator, Cohen & DiPrisco, LLP*, 197 AD3d 1242, 1243 (2d Dept 2021).

[5] "The elements of a cause of action to recover for unjust enrichment are (1) the defendant was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered." *Travelsavers Enters. v Analog Analytics, Inc.*, 149 AD3d 1003, 1006 (2d Dept 2017).

Parties," and seeks the same $2,343,828.00 in monetary damages for breach of the Subcontract in the first, fourth and fifth causes of action. *See* NYSCEF Doc. No. 1 at ¶¶ 101, 103, 105, 107; *Cf.* NYSCEF Doc. No. 1 at ¶¶ 76-77.

Therefore, the related branches of defendants' motion seeking to dismiss the fourth and fifth causes of action pursuant to CPLR §§ 3211(a)(1) and/or (7) are granted, and those claims are dismissed. *See Inspirit Dev. & Constr., LLC*, 203 AD3d at 431 (holding that "[t]he court properly dismissed the third cause of action for quantum meruit and the fourth for unjust enrichment" because "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter"); *Lam Pearl St. Hotel, LLC v Golden Pearl Constr. LLC*, 200 AD3d 521, 522 (1st Dept 2021) (affirming the dismissal of an unjust enrichment claim where "the parties' settlement agreement and termination agreement involved the same subject matter at issue" therein); *Concavage Mar. Constr., Inc. v Lou-Al-John Corp.*, 191 AD3d 843, 845 (2d Dept 2021) (noting that "[a]n unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim" and holding that "since it is undisputed that the plaintiff and [defendant] entered into a valid and enforceable contract for the repair of the seawall, the plaintiff is precluded from recovering on its unjust enrichment and quantum meruit causes of action").[6]

THE SIXTH CAUSE OF ACTION

With respect to plaintiff's sixth cause of action for fraud against the JV Defendants, which sounds in allegations of fraudulent omission and fraudulent inducement,[7] the Court does not credit defendants' contention that this claim should be dismissed pursuant to CPLR §§ 3211(a)(1) and/or (7) because plaintiff continued to accept benefits under the Subcontract and therefore ratified that contractual agreement.

Rather, for purposes of this CPLR § 3211 motion, the Court agrees with plaintiff that even if it allegedly "ratified" the Subcontract by continuing to perform and accept payments thereunder after it became aware of the alleged fraud, such ratification does not preclude plaintiff from seeking damages from the JV Defendants for fraudulently inducing plaintiff to enter into the Subcontract and fraudulently inducing plaintiff to continue to perform thereunder. *See* NYSCEF Doc. No. 1 at ¶¶

[6] Plaintiff's memorandum of law in opposition is silent regarding the fourth and fifth causes of action, thus tacitly conceding their dismissal. *See* NYSCEF Doc. No. 72.

[7] It is well-established that "[t]he elements of a cause of action alleging fraud in the inducement are representation of a material existing fact, falsity, scienter, reliance, and injury." *Urstadt Biddle Props., Inc. v Excelsior Realty Corp.*, 65 AD3d 1135, 1136-1137 (2d Dept 2009).

108-114; *see also Braddock v Braddock*, 60 AD3d 84, 94 (1st Dept 2009) (stating that "[w]hile an act ratifying a contract after the discovery of fraud in the inducement may defeat the right to challenge that contract, a plaintiff may still bring an action for damages for the fraud unless such a claim has been waived. Ratification of a contract after knowledge of fraud in the inducement thereof is no defense to an action for fraud and deceit unless there has been a waiver of the cause of action for damages itself"), *citing* 60A NY Jur. 2d, Fraud § 217 (internal quotations omitted); *Clearview Concrete Prods. Corp. v S. Charles Gherardi*, 88 AD2d 461, 466-67 (2d Dept 1982) (noting that "[a]ffirmance does not of itself, however, either waive recovery of fraud damages or deprive the victimized party of the ability to achieve compensation for the aftermath of the fraud, for the common-law fraud action proceeds upon affirmance of the contract") (internal citations omitted).

Therefore, the branch of defendants' motion seeking to dismiss the sixth cause of action pursuant to CPLR § 3211(a)(1) and/or (7) is denied.

CONCLUSION

Accordingly, based upon the foregoing, defendants' motion to dismiss the Complaint pursuant to CPLR §§ 3211(a)(1), (5) and (7) is granted to the extent that the fourth and fifth causes of action are dismissed pursuant to CPLR § 3211(a)(7), and defendants' motion is otherwise denied.

The foregoing constitutes the decision and order of the Court.[8]

Dated: White Plains, New York
March 13, 2024

HON. LINDA S. JAMIESON
Justice of the Supreme Court

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[8] All other arguments raised on this motion and all materials submitted by the parties in connection therewith have been considered by this Court, notwithstanding the specific absence of reference thereto.