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Laquila Group, Inc. v Hunt Constr. Group, Inc.
2014 NY Slip Op 51007(U)
Decided on June 25, 2014
Supreme Court, Kings County
Demarest, J.
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Decided on June 25, 2014

Supreme Court, Kings County

The Laquila Group, Inc., Plaintiff,

against

Hunt Construction Group, Inc., Defendant.

502732/13

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The following e-filed papers read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/

Petition/Cross Motion and

Affidavits (Affirmations) and Exhibits Annexed*4, 6-37*

Opposing Affidavits (Affirmations) and Exhibits Annexed*42-60*

Reply Affidavits (Affirmations)Affidavit (Affirmation)

Other Papers *Memoranda of Law38, 41, 62*Hunt Construction Group, Inc. (defendant) moves for an order, pursuant to CPLR 3211 (a) (1), (5) and (7), dismissing the complaint of the Laquila Group, Inc. (plaintiff).

Background

(1)

Defendant acted as general contractor for construction of the Barclays Center arena in Atlantic Yards, Brooklyn (the Project). Defendant retained plaintiff as a subcontractor to perform excavation and foundation work for the Project. The parties executed a contract whereby plaintiff would perform such work for $27.5 million (the Subcontract). The Subcontract specified that time was of the essence in plaintiff's work, and pressure to finish the Project expediently apparently existed due to the scheduling of events on or around its completion date.

Article 8 of the Subcontract, which governed change orders, stated, among other things, that "[i]n no event shall Subcontractor [plaintiff] proceed with changed Work without a Change Order issued pursuant to this Article 8 and Contractor [defendant] shall not be liable for any additional costs incurred or delays encountered in the performance of such changed Work without such a written Change Order." Paragraph 30 (b) contained a merger clause and also stated that "any claims against Contractor, irrespective of an alleged breach by Contractor of the Contract Documents, shall be based, nonetheless, upon this Subcontract and the Price, and shall in no event be based upon an

asserted fair and reasonable value of the Work performed." The subsequent paragraph barred modification or waiver of any of the Subcontract's terms without a writing signed by an officer of the waiving party, and it stressed that "[t]his provision may not be waived orally by Contractor."

To receive progress payments, plaintiff submitted monthly payment applications to defendant, which included a form numbered SF-320, titled "STATEMENT OF SUBCONTRACTOR TO HUNT CONSTRUCTION GROUP," (SF-320) and a form numbered SF-330, titled "AFFIDAVIT AND PARTIAL WAIVER OF CLAIMS AND LIENS," (SF-330). The SF-320 forms contained the representation, "No other monies are claimed to be or are due from Hunt Construction group except as listed on the reverse [*2]side hereof." The SF-330 forms waived rights to assert liens and stated,

"In addition, for and in consideration of the amounts and sums received, the undersigned hereby waives, releases and relinquishes any and all claims, rights or causes of action whatsoever arising out of or in the course of the work performed on the above-mentioned project, contract or event transpiring prior to the date hereof, excepting the right to receive payment for work performed and properly completed and retainage, if any, after the date of the above-mentioned payment application or invoices."

Plaintiff apparently executed and submitted both of these forms every month from the beginning of its work through March 2013.

The Project experienced various complications, which resulted in the parties entering into numerous change orders. These change orders addressed and often provided additional compensation for, among other issues: work-sequence alterations; additional support-of-excavation design and engineering; the need for using personal protective equipment and installing a concrete cap in one area of the site due to the presence of volatile organic compounds; creating extraction wells to remove perched water; resolving site flooding; removing an underground oil tank and other debris discovered; additional design, engineering, excavation and foundation work for the installation of a Consolidated Edison vault; disposing of soil contaminated with vials filled with arsenic; removing and replacing a footing; and various premium time and strategic overtime expenses incurred to keep the Project on schedule. Each change order contained the clause, "Acceptance of this Change Order constitutes a waiver of any claim, additional compensation and time what so ever [sic] in relationship to the items covered under this Change Order."

The Project was largely complete by September 2012. Plaintiff submitted to defendant, in January 2013, a claim letter seeking a Subcontract adjustment awarding it compensation for additional incurred costs of $10,870,534.34, "not including hardship costs over $1,000,000," and labor-related costs of $210,000. Plaintiff emphasized that it had experienced a "7.4 month delay" in completing its work and that this delay, and its additional expenses, resulted from site conditions and changes beyond its control. Plaintiff claims that defendant gave notice that it would not pay the additional costs reflected by this claim.[FN1]

(2)

Plaintiff commenced this action on May 23, 2013 and alleged causes of action for fraudulent inducement, cardinal change of contract, quantum meruit, unjust enrichment [*3]and, in the alternative, breach of contract. Plaintiff alleged that defendant represented that an Economic Recovery Project Labor Agreement (the ERPLA) would reduce the Project's labor costs and that plaintiff relied on this in generating its Project estimate. Plaintiff contended that defendant knew, when it made that representation, that the ERPLA would not be in effect by the start of plaintiff's work. Defendant also, plaintiff alleged, misrepresented the Project's sequence of work, the timing of the site's readiness for plaintiff's work and defendant's obtaining of permits, the number of needed ramps into the excavation and the condition of the site, specifically by failing to notify plaintiff of the presence of volatile organic compounds, an underground oil tank and arsenic contamination. Plaintiff asserted that defendant failed to provide sufficient information concerning underground transit lines and a storm drain, as well as designs for a Consolidated Edison vault.

Plaintiff also claimed that defendant refused to drill relief wells in an area of the site that had previously been a gasoline station, even though it knew of the likelihood that the area would contain petroleum contamination, and that this delayed plaintiff's work. Defendant, plaintiff alleged, "intentionally attempted to cause the default of [plaintiff] in bad faith," by compelling plaintiff to demolish and replace a large concrete footing, despite its approval by the Project engineer. Defendant's work out of prescribed sequence, plaintiff claimed, caused additional delays and costs.

Plaintiff asserted that defendant acknowledged the costs of the delay in implementing the ERPLA and assured plaintiff that a coordinate change order would issue, but that it then refused to follow through. Similarly, plaintiff alleged that defendant had agreed to furnish change orders for other alterations to, and accelerations of, plaintiff's work, but subsequently refused to process or pay

such change orders. Defendant also, plaintiff contended, failed to provide proper engineering services and removal of excavation materials.

Plaintiff claimed that defendant made the above misrepresentations in order to induce plaintiff to continue its work, that plaintiff relied on them and that it consequently suffered damages, whereas defendant received benefit. It also claimed that defendant's actions constituted abandonment of, or cardinal change to, the Subcontract and that the Subcontract, if not premised on intentional misrepresentations, was based on mutual mistakes of fact. Plaintiff asserted that the fair value of its work was $48,403,060 [FN2] and that $11,275,222 of that amount remains unpaid. Finally, plaintiff contended, in the alternative, that such additional sums were contractually due. ***(3)***

Defendant now moves for an order, pursuant to CPLR 3211 (a) (1), (5) and (7), dismissing the complaint. It first argues that plaintiff waived all potential project-related [*4]legal claims by its repeated execution and submission of forms SF-320 and SF-330 through March 2013. Each submission, defendant urges, represented that no other payments or remuneration remained due to plaintiff. Furthermore, defendant contends that each payment constituted an accord and satisfaction and that plaintiff waived all claims against defendant except as related to future work and retainage. Each submission, defendant argues, also constituted an opportunity for plaintiff to reserve its right to pursue specific claims: an opportunity, defendant urges, that plaintiff utilized in its January and February 2011 submissions by reserving certain claims. Defendant stresses that plaintiff's final application, submitted well after the Project's September 2012 completion, reserved no claims.

Defendant further argues that each change order executed by plaintiff waived related claims. The vast majority of plaintiff's claimed bases for additional costs, defendant urges, were the subject of change orders that awarded plaintiff additional payments.

Turning to some of plaintiff's specific claims, defendant contends that the Subcontract's terms bar plaintiff's claim as to additional costs incurred because of the ERPLA delay, as the Subcontract simply required plaintiff to compensate laborers in accordance with the prevailing union wage. Plaintiff, defendant argues, should have been aware that the ERPLA was not yet in effect, as the ERPLA copy included with the Subcontract was not executed. Defendant urges that the Subcontract specified that plaintiff would have to construct and maintain two ramps into the excavation, as well as "all other ramps necessary to support Subcontractor's excavation and early foundation activities," and that plaintiff may thus not claim surprise at the necessity of multiple ramps. Plaintiff also cannot support an allegation that defendant failed to provide required engineering services, defendant argues, as the Subcontract specified that plaintiff bore responsibility for any engineering

services related to its work and for the adequacy of its work generally.

Defendant asserts that plaintiff's claims sounding in quantum meruit and unjust enrichment constitute admissions that it has no valid claim under the Subcontract. Defendant further argues that the Subcontract's terms explicitly preclude any quantum meruit claim and that the very existence of a valid contract between plaintiff and defendant precludes all quasi-contractual claims. Defendant additionally contends that plaintiff's cardinal-change claim must be dismissed, as all project changes "were discrete and within the general scope of the Subcontract work as reflected in the successive Change Orders" and thus not alterations to the essence of the work contracted for. Finally, defendant argues that plaintiff's alternative claim for breach of contract must fail as plaintiff does not allege that any payment applications went unpaid and as the Subcontract's releases bar any recovery beyond the Subcontract sum.

Defendant supports its motion with the affidavit of Brian King (King), its Project construction manager. King states that defendant has paid all sums due plaintiff under the [*5]Subcontract and that plaintiff does not allege that any payment applications have been rejected. He reiterates that plaintiff's monthly payment applications, including the last application in March 2013, contained claim waivers and representations that no additional payments were due and additionally provided opportunities to reserve specific claims, which plaintiff did on two occasions. King also recounts that most of the changes plaintiff identifies as incurring additional costs were resolved through change orders that included explicit waivers of subsequent related claims. King asserts that the owner's ability to obtain proper permitting depended on plaintiff's furnishing of its support-of-excavation design and engineering drawings. He further explains that the Subcontract provided for an allowance of 1400 "premium time" hours, to be used at the discretion of defendant or the owner, which were then drawn down and expanded by change orders accounting for accelerations and changes of sequence in the construction.

King states that defendant never promised a change order based on plaintiff's work before the ERPLA's execution, but did request an accommodation from the owner, although such change was never issued. He stresses that the Subcontract required plaintiff to build at least two temporary ramps into the excavation, as well as all other ramps necessary for excavation and foundation work, and that the Subcontract required plaintiff to perform any engineering needed for its work. King points out that plaintiff explicitly represented, in executing the Subcontract, that it was not relying on any representations by, or opinions of, defendant and also that the Subcontract expressly displaced any prior understandings or agreements.

(4)

Plaintiff, in opposition, alleges that, despite the Subcontract's requirement of written approval of all change order work, plaintiff and defendant established a routine, due to the expedited nature of the project, whereby plaintiff would perform modified work while the change orders for such work were still pending. It also contends that defendant required it to submit monthly payment applications through its electronic "Textura Payment Management System" and that applying for payment required plaintiff to submit form SF-320, which stated that no other payments were due, "except as listed on the reverse side hereof." Plaintiff then explains that the electronic payment system did not allow for claims to be written on the reverse side of the form. It argues that the payment application form "became simply an acknowledgment by [plaintiff] of its payment receipt for the amount of the Project Subcontract work and for the amount of the change order that had, up to the date of the [application], been approved by [defendant]."

Plaintiff urges that factual issues remain concerning the effect of the payment application forms and whether plaintiff properly reserved claims. It contends that its claim for additional costs due to the ERPLA's delay was eventually approved in August 2013, after plaintiff had commenced this action. Plaintiff contends that the parties' conduct indicated recognition of the fact that additional claims existed and demonstrated that the forms submitted with each payment application did not effectively release all [*6]claims. Plaintiff never, it urges, indicated an intent to waive its previously asserted claims against defendant. Plaintiff also argues that King's representations do not constitute documentary evidence suitable for supporting a CPLR 3211 (a) (1) dismissal motion. Plaintiff contends that oral instructions to perform additional work waived the Subcontract's terms requiring written authorization.

Plaintiff reiterates the alleged misrepresentations that it claims defendant used to induce plaintiff to enter into the Subcontract. Plaintiff also claims that the "massive amount of change order work," which increased the Subcontract sum by $11,275,222, represents a cardinal change under relevant case law, entitling it to quantum meruit compensation. Finally, plaintiff contends that, as the Subcontract's validity is called into question by the fraudulent-inducement and cardinal-change claims, it properly asserted both breach-of-contract and quasi-contractual claims.

Plaintiff supports its opposition with the affidavit of Joseph Sorena (Sorena), its project manager. He explains that form SF-320 had to be submitted electronically and that no method

existed of reserving claims on the reverse side. Sorena urges that defendant's August 2013 provision of a change order for $201,368, in response to plaintiff's August 2010 request for such a change order due to the ERPLA delay, indicates an admission that plaintiff had valid claims for additional costs that were not barred by the purported waivers. Plaintiff and defendant, Sorena states, "agreed that the terms of the contract as to change orders, extra costs and claims could not be followed, because the alternative was that the project could not be built because [defendant] could not process the paperwork fast enough." Instead, he explains, the parties established an alternative method of reserving claims, even though concurrent payment applications indicated no reserved claims.

Because payment encompassing changed work required both submission of the payment application and written change orders, Sorena explains that the parties made "other arrangements" for the project to continue. He claims that e-mails regarding change orders indicated that plaintiff would perform the work contemplated by change order requests before such change orders had been issued, but in expectation of future payment. Thus, he asserts that neither party "believed that the language of [SF-330] was anything more than an acknowledgment of receipt of payment for the approved contract work and approved change orders to that date." Sorena states that he met with specific officers of defendant, not King, who purportedly recognized plaintiff's claims as legitimate.

Sorena explains that the dispute over the removal and replacement of a footing resulted in the creation of an alternative waiver form, with which plaintiff reserved footing-related claims, but that plaintiff continued to submit other electronic payment applications with waivers and no reservation of rights. He states that plaintiff also dealt with two other unusual claims in this manner: a dispute over a purportedly improper retainage and liens filed by one of plaintiff's vendors. These claims were dealt with differently than other additional work and costs, Sorena states, because it "was not [*7]initially received by Hunt as a standard change order type claim." Sorena recounts that plaintiff demanded, in 2011, payments for additional costs incurred by the various delays and unexpected problems, which eventually led to its January 2013 formal claim letter. Sorena also recounts that plaintiff made a separate "Hardship Claim" for decreased productivity that resulted because of the sequence alterations that forced its laborers to work underneath structural steel that was being erected. He indicates that plaintiff completed its work and then provided necessary paperwork "with the understanding that the claims and change orders would be amicably resolved and processed," but that defendant subsequently informed plaintiff that it would not issue change orders or resolve the outstanding claims. Sorena reiterates that defendant had assured plaintiff that all legitimate claims would be paid in order to keep plaintiff's work proceeding in the face of changes and problems, and he alleges that defendant knew of the falsity of those representations and that

plaintiff would rely on them.

Plaintiff also supports its opposition with the affidavit of Angelo Sisca (Sisca), its chief operating officer. He reiterates the facts underlying the action and that time was of the essence in construction, as concerts and other events were already scheduled for the arena's opening. He explains that the ERPLA-related change order, though issued in August 2013, has never been paid. He urges that numerous problems necessitating change orders developed early in the Project and that, had the work not proceeded, the entire Project would have been delayed. Sisca states that each monthly payment application required execution of forms SF-320 and SF-330 and that defendant informed plaintiff that any changes to the forms would result in a total halt of payment. Sisca, like Sorena, explains that, due to the issues of obtaining change orders sufficiently quickly to keep work on schedule, the parties agreed to adopt an alternative system for change orders, whereby plaintiff would simply perform the work with necessary changes and submit a claim to defendant, which would issue an appropriate change order. He recounts that he personally negotiated change orders with defendant's project executive and project manager. King, Sisca explains, primarily dealt with project scheduling and "was *not* privy to many of the meetings, discussions and negotiations."

Sisca, like Sorena, stresses that plaintiff reserved claims in a distinct manner for three particularly unusual issues. Despite this, Sisca explains, plaintiff continued to submit SF-320s with no reservations, as they "could not be changed in any fashion or withheld." Plaintiff did not reserve other claims, he states, because they could not be billed for until a change order had been processed. Defendant's project executive, Sisca urges, had acknowledged that change-order requests and related claims were still pending, despite plaintiff's submission of the payment-application forms. Furthermore, Sisca alleges that the "Hardship Claim" was acknowledged by defendant's employees and assigned a pending-change-order number.

Sisca explains that plaintiff's other claims concerned costs not covered by issued change orders, but still resulting from the delays and changes, such as additional [*8]equipment-rental charges. He states that defendant's assertion that issued change orders covered these costs "is completely inconsistent with the understanding of the parties at the site and the statements made by the Hunt Project Manager . . . and the Hunt Project Executive . . . to me personally." He relates that discussions and revisions of these claims occurred throughout 2012, including a request by defendant for a formal reformatting of the claim and defendant's making of a settlement offer. Despite this, he states that, in early 2013, defendant told plaintiff that it would make no additional payments.

(5)

Defendant, in reply, argues that discussions between the parties could not have modified or waived the Subcontract's terms, as the Subcontract explicitly barred oral modifications and waivers. General Obligations Law § 15-301 (1), defendant urges, requires enforcing such contractual terms. Defendant contends that the parties' conduct demonstrated no modification or waiver of the Subcontract's terms, as plaintiff properly reserved specific claims in its January and February 2011 payment applications. These reservations, defendant argues, also demonstrate that no feature of the electronic payment application system prevented plaintiff from reserving claims. Defendant urges that the documents plaintiff submits as evidence cannot demonstrate a modification or waiver through course of conduct, as none of the included documents was actually executed by defendant.

Defendant argues that the requirement of waivers and releases before payment is standard in the construction industry and does not impugn the efficacy of such agreements. No oral agreements or course of conduct, defendant urges, established that such waivers would be treated as mere receipts. Defendant reiterates that, where plaintiff specifically reserved claims, the waivers submitted with its payment applications did not waive plaintiff's rights to pursue those claims and plaintiff was subsequently compensated for them.

Defendant contends that plaintiff failed to plead a fraudulent-inducement cause of action, as promises of future action, such as the representations that plaintiff alleges led it to execute the Subcontract, cannot underlie such a claim. Furthermore, defendant urges that plaintiff was aware of the Project conditions by the time it signed Change Order 1, which functioned as a comprehensive new Subcontract, in April 2010. Change Orders 1 and 3, defendant alleges, reflected the modified sequence of work that plaintiff actually performed, and thus the alleged misrepresentation of work sequence does not support a claim of fraudulent inducement. Similarly, defendant reiterates that the permitting process depended on plaintiff's furnishing of required engineering work and that plaintiff knew, when it executed the April 2010 Subcontract, that the ERPLA was not yet effective. Because plaintiff continued performance under the Subcontract and, accordingly, received its benefits, defendant urges that plaintiff is now barred from [*9]seeking rescission via fraudulent inducement.

As plaintiff's fraudulent-inducement claim cannot succeed in voiding the Subcontract, defendant contends that the quasi-contractual claims, quantum meruit and unjust enrichment, must fail. Defendant also reiterates that plaintiff, by the Subcontract's terms, explicitly waived any right

to make a quantum meruit claim. Finally, defendant argues that the various waivers and releases bar plaintiff's cardinal-change claim and that, in any case, the essence of the Subcontract and the Project remained consistent. Defendant urges that plaintiff cannot create questions of a cardinal change simply by asserting that defendant still owes it a large amount.

Discussion

The Claim Releases

Defendant's primary argument on this motion is that the payment application forms and the change orders that plaintiff executed contained claim releases that waived plaintiff's right to bring the claims asserted herein. CPLR 3211 (a) (5) permits dismissal if an action cannot be maintained due to a release, and, generally, a valid, signed release acts to bar any claim that the release encompassed (*Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 17 NY3d 269, 276 [2011]; *Matter of Boatwright*, 114 AD3d 856, 858 [2014]; *Rivera v Wyckoff Hgts. Med. Ctr.*, 113 AD3d 667, 670-671 [2014]). Nonetheless, a general release will not be read as applying to claims the parties did not intend to waive, and the scope of a release will thus be interpreted with consideration of its purpose and context (*see Rivera*, 113 AD3d at 671; *Burnside 711 LLC v Amerada Hess Corp.*, 109 AD3d 860, 861 [2013]; *Orangetown Home Improvements, LLC v Kiernan*, 84 AD3d 902, 903-904 [2011] [holding that a release is not an absolute defense "when the evidence in the record including, inter alia, the circumstances surrounding the release, as well as the parties' course of dealings, evinces that the parties' intentions were not reflected in the general terms of the release"]; *Eaton Elec., Inc. v Dormitory Auth. of State of NY*, 48 AD3d 619, 624 [2008]).

Here, plaintiff argues that, as the releases appeared on forms required for payment, the forms acted only as receipts and did not convey a true intent by the parties to waive all claims. Furthermore, plaintiff urges that it and defendant had, to accommodate the Project's deadlines, established a practice of performing necessary changes prior to the execution of applicable change orders with the understanding that plaintiff would, eventually, receive appropriate additional remuneration. The Appellate Division has, in factually similar cases, found questions of fact concerning the intent of parties executing purported releases and the applicable scope of such agreements (*see Orangetown Home Improvements, LLC*, 84 AD3d at 903-904; *Penava Mech. Corp. v Afgo Mech. Servs., Inc.*, 71 AD3d 493, 495 [2010]; *Spectrum Painting Contrs., Inc. v Kreisler Borg Florman Gen. Constr. Co., Inc.*, 64 AD3d 565, 578 [2009] ["the trade contractors were

contractually [*10]required to submit these forms as a condition precedent to their entitlement to and receipt of progress payments() (t)he circumstances surrounding the execution of these documents reveal an issue of fact regarding whether the documents constituted mere receipts for payment actually received"]; *E-J Elec. Installation Co. v Brooklyn Historical Socy.*, 43 AD3d 642, 643-644 [2007]; *see also American Architectural, Inc. v Marino*, 34 Misc 3d 194, 208-209 [Sup Ct, Kings County 2011], *affd in part and revd in part on other grounds* 109 AD3d 773 [2013]; *Axion Constr. & Dev. LLC v Kit Constr. Co., Inc.*, 30 Misc 3d 1235(A), 2011 NY Slip Op 50364, *6 [Sup Ct, Kings County 2011]). Similarly, plaintiff herein raises questions as to whether the parties' conduct indicated that the waivers it executed were not intended to bar the claims it asserted herein. Consequently, dismissal pursuant to the various releases must be denied.

Dismissal Under CPLR 3211 (a) (1) And 3211 (a) (7)

A movant seeking dismissal under CPLR 3211 (a) (1) must show that "the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Cives Corp. v George A. Fuller Co., Inc.*, 97 AD3d 713, 714 [2012]; *see also Galvan v 9519 Third Ave. Rest. Corp.*, 74 AD3d 743, 743-744 [2010]). To be "documentary," evidence " must be unambiguous and of undisputed authenticity'" (*Rabos v R & R Bagels & Bakery, Inc.*, 100 AD3d 849, 851 [2012], quoting *Fontanetta v John Doe 1*, 73 AD3d 78, 86 [2010]).

A defendant's dismissal motion under CPLR 3211 (a) (7) requires determining whether the plaintiff has *stated* a cause of action, but "[i]f the court considers evidentiary material, the criterion then becomes whether the proponent of the pleading *has* a cause of action" (*Sokol v Leader*, 74 AD3d 1180, 1181-1182 [2010] [emphasis added], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Dismissal results only if the movant demonstrates conclusively that the plaintiff has no cause of action, or that "a material fact as claimed by the pleader to be one is not a fact at all" (*Sokol*, 74 AD3d at 1182, quoting *Guggenheimer*, 43 NY2d at 275; *see also Lawrence v Graubard Miller*, 11 NY3d 588, 595 [2008]). A court considering a dismissal motion on the basis of failure to state a claim generally must accept the facts alleged in the complaint as true and make any possible favorable inferences for the plaintiff (*Sokol*, 74 AD3d at 1181).

Fraudulent Inducement, Cardinal Change And Quasi

Contractual Claims

Generally, a party may not maintain causes of action for quantum meruit or unjust enrichment if a valid, enforceable contract governs the same subject matter (*Cox v NAP Constr. Co., Inc.*, 10 NY3d 592, 607 [2008], citing *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]; *Goldman & Assoc., LLP v Golden*, 115 AD3d 911, 913 [2014]; *Scott v Fields*, 92 AD3d 666, 669 [2012]). Accordingly, the viability of plaintiff's quantum meruit and unjust-enrichment claims depends on whether its fraudulent-[*11]inducement and cardinal-change claims present a possibility of invalidating the Subcontract.

"To sustain a claim for fraudulent inducement, there must be a knowing misrepresentation of material fact, which is intended to deceive another party and to induce them to act upon it, causing injury" (*Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 70 [2002]; *see also Jo Ann Homes at Bellmore v Dworetz*, 25 NY2d 112, 118-119 [1969]). CPLR 3016 (b) requires that a plaintiff plead the circumstances of a purported fraud "in detail," and case law indicates that this includes the specific time and place of a purported misrepresentation (*Nanomedicon, LLC v Research Found. of State Univ. of NY*, 112 AD3d 594, 598 [2013]; *Orchid Constr. Corp. v Gottbetter*, 89 AD3d 708, 710 [2011]; *Moore v Liberty Power Corp., LLC*, 72 AD3d 660, 661 [2010], *lv denied* 14 NY3d 713 [2010]). Furthermore, a defendant's mere lack of purported intent to perform under the terms of a contract will not support a fraudulent-inducement claim (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]; *Fromowitz v W. Park Assoc., Inc.*, 106 AD3d 950, 951 [2013]; *Refreshment Mgt. Servs., Corp. v Complete Off. Supply Warehouse Corp.*, 89 AD3d 913, 914 [2011]).

Here, plaintiff fails to plead fraudulent inducement with the specificity required by CPLR 3016 (b). It asserts that defendant misrepresented that the ERPLA would govern labor costs for the Project's duration, that the work would be performed in a sequence different from what actually occurred, that defendant would timely obtain necessary permits and that only one ramp would be needed. Plaintiff further claims that defendant failed to notify it of volatile organic compounds and arsenic that would be found on the site and the consequent need for workers to use personal protective equipment and also did not provide information concerning transportation lines, storm drains or an underground tank. Plaintiff does not identify, however, who purportedly made these representations or the time and place of their alleged making. Additionally, plaintiff fails to allege that defendant knew that more than one ramp would be required, of the presence of volatile organic compounds and arsenic or of the need for personal protective equipment. Regarding information concerning transportation lines, storm drains and the underground tank, plaintiff asserted only that defendant "knew or should have known" of their existence. To the extent that these purported

misrepresentations occurred in the actual terms of the Subcontract, and plaintiff's claim is simply that defendant did not intend to abide thereby, they cannot survive, (*see Fromowitz*, 106 AD3d at 951). Finally, plaintiff is precluded from seeking to invalidate the Subcontract under a theory of fraudulent inducement, as it continued performing under, and accepted the benefits of, that agreement long after it became aware of the purported misrepresentations (*see Lawrence v Kennedy*, 113 AD3d 731, 732-733 [2014]). Consequently, plaintiff's fraudulent-inducement claim must be dismissed pursuant to CPLR 3211 (a) (7).

Quasi-contractual recovery may also be appropriate, however, in the face of a "cardinal change," effecting an alteration to the essence of a contract sufficient to [*12]constitute an intentional abandonment of the original contract (*see e.g., Crane-Hogan Structural Sys., Inc. v State of New York*, 88 AD3d 1258, 1260-1261 [2011], *rearg denied* 92 AD3d 1267 [2012] [new plans for replacement of bridge originally to have been repaired pursuant to contract acknowledged to constitute cardinal change]; *Douglas Constr. of Fulton County v Marcais*, 239 AD2d 803, 803-804 [1997]; *Costanza Constr. Corp. v City of Rochester*, 147 AD2d 929, 929 [1989], *appeal dismissed* 74 NY2d 714 [1989], *appeal dismissed* 83 NY2d 950 [1994], *rearg denied* 84 NY2d 851 [1994] [extent of rock excavation six times that anticipated held not to constitute cardinal change]). Whether there has been a cardinal change sufficient to invalidate a contract is generally a question of fact, to be decided by the factfinder (*see Bovis Lend Lease LMB v GCT Venture*, 6 AD3d 228, 229 [2004] [finding factual questions "whether (construction) delays were so unreasonable that they constituted an intentional abandonment of the contract" so as to render unenforceable a no-damages-for-delay clause in the contract]; *see also Plato Gen. Constr. Corp./EMCO Tech Constr. Corp., JV. LLC v Dormitory Auth. of State of NY*, 21 Misc 3d 1138(A), 2008 NY Slip Op 52416(U), *11 [Sup Ct, Kings County 2008]).

Here, plaintiff has pleaded that the scope and extent of changes made to the Project, resulting in additional costs of nearly half the Subcontract price, constituted a cardinal change to the contract that could justify treating it as abandoned and granting recovery in quasi contract. Although defendant has submitted evidence that many of the costs incurred by plaintiff were compensated in agreed change orders, plaintiff's allegations are not conclusively refuted by documentary evidence sufficient to conclude that plaintiff has no claim as a matter of law. Accordingly, defendant's motion must be denied as to the cardinal-change claim.

As the plaintiff's surviving cardinal-change claim preserves the possibility of quasi-contractual recovery, dismissal must also be denied as to plaintiff's quantum meruit and unjust-enrichment

claims. Defendant's reliance on a clause in the Subcontract specifically barring quantum meruit claims is misplaced, since the finding of an absence of a valid, enforceable contract, a prerequisite to quantum meruit recovery, would inherently render that clause unenforceable, along with the remainder of the Subcontract.

Breach Of Contract

A breach-of-contract claim requires showing a contract between the plaintiff and the defendant, that the plaintiff performed under the contract's terms, that the defendant did not perform and that damages resulted to the plaintiff (*Dee v Rakower*, 112 AD3d 204, 208-209 [2013]; *Brualdi v IBERIA, Lineas Aereas de España, S.A.*, 79 AD3d 959, 960 [2010]).General Obligations Law § 15-301 (1) states, in relevant part, that "[a] written agreement . . . which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is sought." Section 15-301 (1), however, "nullifies only executory' oral modification," and partial performance of an oral modification, [*13]inconsistent with other causes, may prove the modification's validity (*Rose v Spa Realty Assoc.*, 42 NY2d 338, 343-344 [1977]; *see also Hannigan v Hannigan*, 104 AD3d 732, 736 [2013], *lv denied* 21 NY3d 858 [2013]; *Parker v Navarra*, 102 AD3d 935, 936 [2013]; *Sudit v Schapiro*, 57 AD3d 968, 968-969 [2008]). Furthermore, if a plaintiff has detrimentally relied on an oral modification, the doctrine of equitable estoppel will preclude a defendant from raising a clause barring oral modification and § 15-301 (1) in defense (*Rose*, 42 NY2d at 344; *Parker*, 102 AD3d at 936; *Sudit*, 57 AD3d at 968-969).

Here, plaintiff essentially alleges that it and defendant orally modified the Subcontract's terms, in order to comply with the Project schedule, to create an alternative method of payment for necessary changes in plaintiff's work, whereby it would perform the work as needed and subsequently apply for appropriate remuneration. Plaintiff also pleads that it performed changed work before the issuance of change orders based on this modification and detrimentally relied upon it by incurring additional costs and expecting commensurate payment. Hence, plaintiff has adequately pleaded a breach-of-contract cause of action based upon an alleged oral modification of the Subcontract. Defendant has failed to demonstrate the absence of a valid claim with any documentary evidence and has not challenged the accuracy of plaintiff's allegations regarding purported oral modifications, instead relying on the effect of the no-oral-modification clause. Additionally, the attachment of the ERPLA, already executed by some union representatives, to the Subcontract and defendant's apparent issuance of a change order in response to plaintiff's claimed ERPLA-delay expenses, raise factual issues that preclude dismissal of the ERPLA-related claims.

Consequently, plaintiff's breach-of-contract claim must survive. Accordingly, it is

ORDERED that defendant's motion for dismissal of plaintiff's claims, pursuant to CPLR 3211 (a) (1), (5) and (7), is granted as to the fraudulent-inducement claim and is otherwise denied. Defendant shall serve and file its answer within 20 days hereof. All parties are to appear for a preliminary conference on September 10, 2014.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

Footnotes

Footnote 1: Plaintiff posits that this rejection occurred via a February 11, 2013 letter and defendant does not dispute this assertion. Plaintiff's project manager, Joseph Sorena, states that the letter is attached to his affidavit in opposition to defendant's motion herein as exhibit O, but no such exhibit was included or filed via the Courts Electronic Filing system.

Footnote 2: Plaintiff asserted, in another paragraph of its complaint, that the fair value was $48,702,760.

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