STATE OF NEW YORK COURT OF CLAIMS

PRATOW CORPORATION,

Claimant,

DECISION AND ORDER

-v-

THE STATE OF NEW YORK,

Claim No. 124225
Motion No. M-87314

Defendant.

BEFORE: HON. STEPHEN J. MIGNANO
Judge of the Court of Claims

APPEARANCES: For Claimant:
PESKA & ASSOCIATES, P.C.
By: Adam M. Peska, Esq.

For Defendant:
ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL
By: Terrance K. DeRosa, Assistant Attorney General

The verified claim, filed April 16, 2014, alleges that defendant's Division of State Police breached its contract with claimant for the repair of state police vehicles by failing to pay for the work reflected on the attached 16 invoices. The invoices detail, in a fashion typical for automobile repair invoices, each item of work done, and the charge for each item. The claim appears substantively identical to claimant's notice of intention to file a claim, which was served on November 15, 2013. Claimant now moves for summary judgment, and defendant opposes. This is claimant's second pre-completion of discovery summary judgment motion, the first having been filed as a cross-motion pre-answer and denied on that ground by decision and order

dated September 9, 2014 (Peska Aff, Exh B).[1] In that same order, the court also denied defendant's motion to dismiss, finding that the claim was facially sufficient under Court of Claims Act § 11(b), and that any argument based on timeliness was premature (*id.*).

Defendant argues that the motion should be denied because it was filed before completion of discovery in violation of the court's prior order. The court's statement that "claimant can make its motion after the completion of discovery" did not preclude claimant from filing a second motion earlier. The court denied the first motion because issue had not yet been joined. That is no longer the case, and according to claimant, "all documentary evidence has now been exchanged" (Reply Affirmation, ¶ 5). Besides, although multiple summary judgment motions are discouraged, there is also no restriction in CPLR 3212 as to the number of motions a party may bring. Where, as here, the first decision denying the motion was not on the merits, and the second motion (unlike the first) is brought after the commencement of discovery, a second motion is entirely permissible (*see Newburgh Winnelson Co. v Baisch Mech., Inc.*, 30 AD3d 495, 496 [2d Dept 2006] [allowing second motion as it was not motion to renew or reargue prior motion]; *see also Piro v Macura*, 92 AD3d 658, 660 [2d Dept 2012], *lv dismissed*, 19 NY3d 1014 [2012]). Nor has defendant "offered an evidentiary basis to suggest that discovery might lead to relevant evidence" (*Lauriello v Gallotta*, 59 AD3d 497, 499 [2d Dept 2009]).

Turning to the merits of the motion, summary judgment is the procedural equivalent of a trial (*see Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). CPLR 3212(b) directs that "the motion shall be granted if, upon all the papers and proof submitted, the cause of action . . . shall be

---

[1] The court denied claimant's cross-motion without prejudice to re-filing the motion after completion of discovery.

established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." The moving party must make a *prima facie* showing of entitlement to judgment as a matter of law by tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the moving party fails, the court must deny the motion. If the moving party succeeds, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (*see id.*). The role of the court, therefore, on a motion for summary judgment is not to resolve material issues of fact, but to determine whether any such issues exist (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). If such material issues of fact exist, the motion for summary judgment must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

In support of its motion, claimant submits an affirmation by attorney Adam M. Peska ("Peska Aff"), an affidavit by the company's sole owner Stephanie Corritori ("Corritori Aff"), a copy of the contract, claimant's verified bill of particulars (Exh J), and other exhibits. The elements of breach of contract under New York law are "(1) the existence of a contract; (2) performance of the contract by the injured party; (3) breach by the other party; and (4) damages" resulting from the breach (*Goldman Sachs Lending Partners, LLC v High River Ltd. Partnership*, 34 Misc3d 1209(A) [Sup Ct NY Cty 2011]; *see Dee v Rakower*, 112 AD3d 204, 208-209 [2d Dept 2013]). "Contract interpretation is a question of law" and "[s]ummary judgment [. . .] should be granted where [. . .] the terms of the contract are clear and unambiguous" (*Goldman Sachs*, 34 Misc3d 1209(A); *see W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]

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

Claimant has tendered sufficient admissible evidence to show that the parties entered into contract C001402 "for automotive parts and repairs for vehicles assigned to NY State Police Troop K" (Peska Aff, Exh D). Defendant argues that the contract is inadmissible for lack of foundation because it is referred to only in the attorney's affirmation, which is "of no probative or evidentiary significance" (*Warrington v Ryder Truck Rental, Inc.*, 35 AD3d 455, 456 [2d Dept 2006]). However, claimant also attaches a July 10, 2014 email from a Contract Management Specialist for the New York State Police stating that "Pratow Corporation does have a valid contract with the New York State Police, contract C001402"(Exh E). This alone would be sufficient for the purpose of summary judgment, showing as it does a complete lack of dispute that the parties entered into a specific contract bearing the same number as the one claimant attaches to the motion, but claimant's proof is not so limited. The affidavit of claimant's owner, the verified claim, the verified bill of particulars and other attached documents, are replete with references to the parties' "contract" (Corritori Aff, Exhs A-C), which defendant refers to in its Tenth and Eleventh Affirmative Defenses as contract C001402, the same number as the contract submitted by claimant (Exh E [Answer]).

Claimant has also submitted sufficient admissible evidence to show that it performed its obligations under the contract, and that defendant breached. The affidavit of claimant's owner, the unpaid invoices attached to the claim and summarized by claimant's owner in her affidavit, and the verified claim establish that: claimant complied with the procedure agreed to by the parties for the submission and payment of invoices; claimant faxed the invoices to the State

Police on September 2, 2013; and that defendant has not paid them (*see* Corritori Aff, ¶¶ 1-2; Verified Claim [Exh A], ¶¶ 3-4). This demonstrates its prima facie entitlement to judgment as a matter of law for breach of contract (*see Yellow Book Sales & Distrib. Co., Inc. v Mantini*, 85 AD3d 1019, 1021 [2d Dept 2011] [affirming summary judgment based on submission of signed written contracts and regularly issued and unpaid invoices]; *see also Fleet Credit Corp. v Hutter & Co.*, 207 AD2d 380, 381 [2d Dept 1994] [affirming summary judgment based on affidavit, verified pleadings, leases and statements of account]).

In opposition, defendant first argues its defense that undisputed evidence requires dismissal of the claim as untimely per Court of Claims Act § 10(4):

> A claim for breach of contract [. . .] shall be filed and served upon the Attorney General within six months after the accrual of such claim, unless the claimant shall within such time serve upon the attorney general a written notice of intention to file a claim therefor in which event the claim shall be filed and served [. . .] within two years after such accrual.

Defendant contends that a claim for breach of contract based on non-payment accrues when the claimant had a legal right to demand payment. That is the law (*see Hahn Automotive Warehouse, Inc. v American Zurich Ins. Co.*, 18 NY3d 765, 770-771 [2012] [claim accrues when right to make demand for payment is complete]). Defendant asserts that any possible claim would have accrued when the work was completed, and not when the invoice was sent. Defendant points to the fact that some of the invoices sent in 2013 are for work that was completed in 2010 and 2011.[2] Claimant asserts that: the claim accrued on November 1, 2013,

---

[2] The invoices, initially sent to the State Police on September 2, 2013, are for work done on 10/5/11, 10/29/11, 11/15/11, 1/6/12, 1/20/12, 1/23/12, 2/10/12, 2/21/12, and 3/8/12, and for storage from 2/27/12 until 3/8/1[3].

subject contract, that claimant provided services under that contract, and that defendant had failed to make payment for those services. Indeed, defendant's opposition is supported only by an attorney's affirmation and not by an affidavit of anyone with knowledge of the facts. Accordingly, "these crucial facts [are] deemed admitted" (*Bell Atl. Yellow Pages Co. v Padded Wagon*, 292 AD2d 317, 318 [1st Dept 2002], *lv denied*, 98 NY2d 611 [2002] [affirming summary judgment for breach of contract]).

Claimant has also met its burden with respect to damages. The invoices identify the work that was completed, when it was completed, and the charges. The contract remained in effect, and according to claimant's owner, "in or around October of 2013, I was specifically advised by Phillip Illardo from K-AMI that payments would be forthcoming on the subject invoices," payment was withheld without explanation, and the State has collected insurance proceeds covering some of the amount due (Corritori Aff). By ignoring the invoices and the contractual process to negotiate the final payment, and by withholding payment without explanation then collecting insurance proceeds, defendant has waived any objection to the amounts charged by claimant (*see Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgmt., L.P.*, 7 NY3d 96, 104 [2006] [finding that waiver of contractual rights by abandonment " 'may be established by affirmative conduct or by failure to act so as to evince an intent not to claim a purported advantage' "] [citations omitted]). The Court of Appeals in *Fundamental Portfolio* commented that generally the issue of waiver is factual (*id.* at 105), but where, as here, there is no admissible evidence in opposition and the material facts supporting waiver are not disputed, the claimant has met its burden. Even if there were a viable objection remaining to be pursued, defendant has not submitted any admissible evidence or raised any disputed factual issues in regards to damages.

Defendant does point out that invoice numbers 1and 3 are substantively identical, so the second charge for $125 will be excluded from the total amount of damages.

Accordingly, Pratow Corporation's motion for summary judgment on Claim No. 124225 for Breach of Contract is granted, State of New York is adjudged liable to claimant for damages in the amount of $37,548.47 (the amount claimed less $125.00), plus statutory interest from September 2, 2013 (the date claimant faxed its invoices to defendant) until judgment is entered. In addition, to the extent claimant has paid a filing fee, it may be recovered pursuant to Court of Claims Act § 11-a(2). The Clerk of the Court is directed to enter judgment accordingly.

White Plains, New York
November 19, 2015

STEPHEN J. MIGNANO
Judge of the Court of Claims

Papers considered:

Notice of Motion, Affirmation and Exhibits
Affirmation in Opposition and Exhibit
Reply Affirmation