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

PRESENT: BERNARD J. FRIED Justice PART 60

E-FILE

American Curtainwall, Inc.,

PLAINTIFF

- v -

NTCD Construction Corp., et. al.,

DEFENDANTS

INDEX NO. #601894-2009

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for ____

RECEIVED
PAPERS NUMBERED
MAR 10 2010
MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits

Replying Affidavits

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the accompanying memorandum decision.

SO ORDERED

Dated: 3/8/10

J.S.C.
HON. BERNARD J. FRIED

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST [ ] REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 60

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E-FILE

AMERICAN CURTAINWALL, INC.,

Plaintiff,

Index No. 601894/09

-against-

NTD CONSTRUCTION CORP., and MUS 23 LLC; and MIDWEST CURTAINWALL, INC.; JOHN DOE and JANE DOE,

Defendants.

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APPEARANCES:

For Plaintiff:

Charles A. Singer
11 Middle Neck Road, Suite 310
Great Neck, New York 11021
(516) 482-0666

For Defendant NTD & MUS 23 LLC:

Mazur Carp Rubin & Schulman P.C.
1250 Broadway, 38th Floor
New York, New York 10001
(212) 686-7700

For Defendant Midwest Curtainwall, Inc.:

Lowenstein Sandler PC
65 Livingston Avenue
Roseland, NJ 07470
(973) 591-2500

Zaidman & Esrig, P.C.
10 S. Riverside Plaza
Suite 1020
Chicago, Illinois 60606
(312) 207-1332

FRIED, J.:

In this action for breach of contract and tortious interference with contract, defendant

01

Midwest Curtainwall, Inc. (Midwest) moves, pursuant to CPLR 3211 (a) (1) and (7), to dismiss all claims asserted as against it. Defendants NTD Construction Corp. (NTD) and MUS 23 LLC (MUS) cross-move, pursuant to CPLR 3211 (a) (7), for an order dismissing the second and third causes of action as against them.

This action arises out of a construction project. MUS was the owner of properties known as 950 2nd Avenue and 300 E. 23rd Street in New York City. MUS engaged NTD as the general contractor or construction manager for the erection of multistory buildings on each of the two properties. NTD awarded plaintiff American Curtainwall, Inc. (American) the curtainwall installation and supply contracts for the projects, and issued two letters of intent/notices to proceed (Letters of Intent), which, by their terms, were to be considered written contracts. In accordance with the Letters of Intent, NTD paid American 10% deposits of $456,500 on the 23rd Street project, and $375,000 on the 2nd Avenue project. In its counterclaim, NTD seeks return of the deposit and other monies paid to American due to American's alleged failure to earn the payments made.

American hired Midwest, an Ohio corporation in the business of designing, engineering, manufacturing, and delivering curtainwall and related products, to prepare shop drawings and supply American with the curtainwall for the projects. The contract between American and Midwest provided for a 10% down payment and "[a]n engineering payment equal to 5% of the Agreed Order Price ... within 30 days of the issuance of an 'approved' action or 'approved as noted' action on a Midwest project drawing submission." Notice of Cross Motion, Ex. C.

In October 2008, Midwest submitted drawings to American in connection with the 2nd Avenue project. In the complaint, American claims that those drawings were incomplete. However, on October 23, 2008, American submitted a payment application to NTD seeking payment for 100% of the scheduled value of the drawings ($186,700) and certifying to NTD that the work was completed. Muir Affirm., Ex. G.

On October 27, 2008, NTD notified American that all work on the 2nd Avenue was being put on hold pending a redesign. NTD and American negotiated the issue of payment for the work that had been performed to date on the 2nd Avenue project, including the issue of payment for the drawings. NTD acknowledged that the drawings by Midwest had been completed in October, and offered payment of $80,000. American accepted the offer, but contends that the $80,000 was intended to be payment to American for the work that American had performed on the project, not as payment for Midwest. At the time that American received the $80,000, it signed a Final Waiver and Release of Lien, which states that "all contractors, laborers, material-men and others furnishing labor, equipment or supplies in connection with this project on our behalf will be paid in full for their services and/or materials . . . . " *Id.*, Ex. P.

Midwest also submitted drawings for the 23rd Street project. American asserts in a letter to Midwest that American convinced the architect to agree to approve the drawings as noted, rather than to require resubmission, which meant that Midwest could be paid for them. Basil Affid., Ex. L. NTD paid American for those drawings sometime prior to December 2, 2008. Muir Affid., Ex. J. However, American did not pay Midwest for those drawings.

On January 27, 2009, Midwest e-mailed NTD, complaining that it had not been paid the 5% engineering payment for the 23rd Street project. Then, on April 22, 2009, Midwest sent American a demand letter, seeking monies for the shop drawings, for which American had been paid by NTD, for both projects. American forwarded the demand letter to NTD. Despite the dispute with Midwest, American and NTD executed the formal contract for the two projects on April 27, 2009.

By letter dated May 19, 2009, NTD terminated American's agreements for the projects. American protested NTD's failure to provide American with an opportunity to cure its default. NTD agreed to revoke the termination if American provided evidence that it had paid Midwest. American declined to do so, arguing that it was not obligated to pay Midwest.

American commenced this action seeking foreclosure of its mechanic's lien (first cause of action); damages for breach of contract against NTD (second cause of action); recovery in quantum meruit against NTD in the event that the contract is found to be unenforceable (third cause of action); and tortious interference with contract against Midwest (fourth cause of action).

NTD and MUS now seek to dismiss the second and third causes of action, and Midwest seeks to dismiss the fourth cause of action. The first cause of action and the counterclaims are not at issue in this motion.

In the second cause of action, American seeks a money judgment against NTD for $2,229,611.75. That amount represents $256,269.42, which is the subject of the mechanic's lien, as well as $1,554,645.10 as lost profits on the 23rd Street project, and $674,966.65 as lost profits on the 2nd Avenue project.

American contends that NTD breached the contract by terminating American without providing it with the 15-day period to cure, as required by the contract. It further maintains that it is entitled to recover lost profits, and that those losses are not speculative or precluded by the contract.

The contract provides that the contractor may terminate the subcontract if the subcontractor fails to perform in accordance with the subcontract, and fails to cure within 15 days after receiving written notice to correct a default or neglect. Contract § 7.2, Ex. M to Muir Affirm. Here, it is undisputed that NTD did not send American written notice providing for a 15-day cure period. Nevertheless, this failure does not result in a viable cause of action against NTD.

After NTD terminated American's contract, American protested the termination. NTD stated that it would reverse the termination if American demonstrated that it complied with the requirement to pay Midwest. American refused to do so, claiming that the money that American received from NTD was intended for American, and not for Midwest. Thus, American was given an opportunity to cure, but declined to do so. Under such circumstances, NTD's failure to provide written notice with a 15- day cure period is of no consequence, since such written notice would have been rejected in the same manner that NTD's offer to reverse the termination was.

In any event, American's attempt to recover lost profits is without basis. Both NTD and American waived any claim to consequential damages arising out of the contract, including those arising from termination. American maintains that lost profits do not constitute consequential damages, and are ascertainable. However, New York courts have

repeatedly stated that lost profits are consequential, rather than direct, damages. *Appliance Giant, Inc. v Columbia 90 Assoc., LLC*, 8 AD3d 932 (3d Dept 2004); *Brody Truck Rental v Country Wide Ins. Co.*, 277 AD2d 125 (1st Dept 2000). Unless such damages are contemplated by the parties to the contract, they are not recoverable in a breach of contract action. *Id.* Here, the contract specifically states that any rights to consequential damages are waived. Thus, American has no basis upon which to seek such damages, even if they are ascertainable.

In the third cause of action, American seeks to recover in quantum meruit, in the event that the contracts are not enforceable. Here, no one contends that the contracts are unenforceable. The subject of American's claims is governed by the contract between it and NTD. Therefore, it cannot recover under the theory of quantum meruit. *Clark-Fitzpatrick Inc. v Long Is. R.R. Co.*, 70 NY2d 382 (1987).

In the fourth cause of action, American seeks to recover damages based upon Midwest's alleged tortious interference with American's contract with NTD. This cause of action also fails.

Initially, American has not alleged facts to support its claim that Midwest interfered with its contract with NTD. Although Midwest e-mailed NTD in January 2009, that was not the cause of the termination, as evidenced by the fact that NTD entered into a formal contract with American in April 2009. In April, Midwest sent a demand letter to American, not to NTD. It was American that forwarded the letter to NTD. Since Midwest did not contact NTD, it cannot be charged with engaging in activity which interfered with the contract.

In any event, Midwest's relation with American was dependent upon American's contract with NTD. Therefore, any claim of tortious interference would have to fail, because Midwest, as a beneficiary of that contract, cannot tortiously interfere with it, absent factual allegations to support a finding of malice, fraud, or illegality. *Kassover v Prism Venture Partners, LLC*, 53 AD3d 444, 449-450 (1st Dept 2008). Here, even if Midwest had contacted NTD, Midwest was merely attempting to obtain payment. If, as American contends, Midwest were not entitled to payment, NTD would not have terminated the contract with American based upon Midwest's complaint that it was not paid. Rather, it would have agreed with American that no payment was due. The fact that NTD terminated American upon discovering that American had failed to pay Midwest merely demonstrates that NTD had intended that the $80,000 it paid to American would be used to compensate Midwest. Thus, American cannot show that Midwest acted with the necessary malice to support a claim for tortious interference. The facts alleged, instead, demonstrate that Midwest was acting in its own economic interest, to the extent that it acted. Such actions cannot support a claim for tortious interference in a relationship where Midwest is not a competitor of American, but was a beneficiary of the contract at issue. *Kassover v Prism Venture Partners, LLC*, 53 AD3d at 449-450; *Barrett v Toroyan*, 39 AD3d 366, 366-367 (1st Dept 2007).

Thus, both because there is no factual allegation to support a finding of malice, and because it was not Midwest's action that caused NTD to terminate American, any claim against Midwest for tortious interference cannot stand.

Accordingly, it is hereby

ORDERED that the motion of Midwest Curtainwall, Inc. is granted, and the

fourth cause of action is severed and dismissed as against it, and Clerk is directed to enter judgment in favor of this defendant, with costs and disbursements as taxed by the Clerk of the Court; and it is further

ORDERED that the cross motion of NTD Construction Corp. and MUS 23 LLC is granted and the second and third causes of action are severed and dismissed; and it is further

ORDERED that the remainder of the action shall continue.

Dated: [redacted] 3/8/10

ENTER:

J.S.C.

HON. BERNARD J. FRIED