At a Special Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Broome County Courthouse, 92 Court Street, Binghamton, New York on June 18th, 2019.

PRESENT: HON. FERRIS D. LEBOUS
JUSTICE, SUPREME COURT

STATE OF NEW YORK
SUPREME COURT :: BROOME COUNTY

CHENANGO FORKS CENTRAL SCHOOL DISTRICT,

DECISION & ORDER

Plaintiff,

Index No.: EFCA2018000790
RJI No.: 2018-1153

vs.

KEYSTONE ASSOCIATES ARCHITECTURAL ENGINEERS AND SURVEYORS, LLC, EVANS MECHANICAL INCORPORATED and SMITH MILLER ASSOCIATES CONSULTING, INC.

Defendants.

APPEARANCES:

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FERRIS D. LEBOUS, J.S.C.

This Decision and Order addresses four motions.

Defendant Keystone Associates Architectural Engineers and Surveyors, LLC (hereinafter "Keystone") moves for summary judgment dismissing the complaint and granting its counterclaim against plaintiff in the amount of $125,526.25.[1]

Defendant Evans Mechanical Incorporated (hereinafter "Evans") moves for summary judgment dismissing the complaint, dismissing all cross-claims against it, and granting its counterclaim against plaintiff in the amount of $48,824.85.

Defendant Smith Miller Associates Consulting, Inc. (hereinafter "Smith Miller") moves for summary judgment dismissing the complaint, dismissing all cross-claims, and granting its counterclaim against plaintiff in the amount of $37,921 to the extent it is not awarded as part of Keystone's counterclaim.

Plaintiff Chenango Forks Central School District (hereinafter "School District") opposes all the motions and cross-moves to amend the complaint to add a party defendant, namely Riordan Management Group, LLC ("Riordan").

[1]Keystone's amended answer contains a counterclaim seeking $125,526.25, but Keystone's moving papers seek summary judgment on a counterclaim of $191,541.26 (Hulslander Affirmation dated April 22, 2019, ¶ ¶ 35-36).

BACKGROUND

In 2014, plaintiff School District began work on a district-wide multi-million dollar renovation project involving multiple buildings called the "2016 Academic and Safety Initiative Project". At issue here is that portion of the construction to renovate the high school building science wing including student lab tables in the middle of the science classrooms (hereinafter "the Project"). The court will not repeat the full history of this matter but suffice it to say that there were various phases typical of a large construction project including a schematic design phase, design development phase, and a construction phase all of which included various contracts, addendums, meetings, minutes, emails, punch lists, etc. each of which are set forth in detail in the motion papers.

For purposes here, the parties and non-parties that are involved include the plaintiff School District as Project Owner. Plaintiff's lead representative on the Project was Lloyd L. Peck, Ed.D, superintendent of the School District. Plaintiff hired non-party Riordan as the School District's construction manager on the Project.

Plaintiff hired Keystone as the architect for the Project. Keystone's representative was originally Adam Krager, but he left that firm in September 2015 after which Kenneth R. Gay, II, a registered architect, became Keystone's Project representative.

Keystone hired Smith Miller as a sub-consultant for the Project to provide engineering services including mechanical, electrical, and plumbing drawings to be incorporated into Keystone's architectural drawings to form full sets of drawings for the Project. Smith Miller's

representative was Charles C. Smith, P.E., a registered professional engineer and co-founder of Smith Miller, who was involved in the Project during the pre-construction phase.

Plaintiff hired Evans as the prime plumbing contractor on the Project. Evans' obligations included installing gas and water lines and fixtures in the science lab. Evans' representative on this Project was Raymond Millard.

The parties agree that during the early phases of design in 2014, plaintiff requested that the student lab tables in the chemistry science rooms be equipped with water, gas and electric at each student lab table. On March 27, 2015 the parties agreed that sinks would no longer be provided at each student table (Plaintiff's Exhibit J at 10; Hillis Affidavit, ¶ 16; Peck Aff dated June 10, 2019, ¶ 38).

In September 2017, teachers returned to prepare for the new school year and were surprised to find no gas and electric at the student lab tables. This omission was the subject of numerous meetings and emails between the various parties, but they were unable to resolve their differences and this litigation ensued. In short, the parties sharply dispute whether gas and electric lines were supposed to be in each student lab table.

On March 23, 2018, plaintiff School District filed this summons and complaint alleging breach of contract and negligence regarding the omission of gas and electric at each student lab table in the science classrooms and seeking $750,000 in damages.

On April 23, 2018, defendant Evans interposed an answer with cross-claims against Keystone and Smith Miller and a counterclaim against plaintiff for approved but unpaid work of $48,824.85.

On May 16, 2018, defendant Smith Miller interposed its answer with cross-claims against Keystone and Evans and a counterclaim against plaintiff for approved but unpaid work in the amount of $37,921.

On July 27, 2018, defendant Keystone interposed its amended answer with cross-claims against Evans and Smith Miller and counterclaim against plaintiff for approved but unpaid work of $125,526.25.

The court held a preliminary conference on February 5, 2019. These motions followed.

DISCUSSION

I. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

On a motion for summary judgment, the moving party must present evidentiary facts demonstrating the absence of any material issue of fact thereby establishing the party's right to judgment as a matter of law, while the opposing party must "[p]roduce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action [citation omitted]" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The court must accept the non-moving party's evidence as true and grant it every favorable inference (*Hourigan v McGarry*, 106 AD2d 845 [3d Dept 1984], *lv dismissed* 65 NY2d 637 [1985]).

A. **Breach of Contract**

All three defendants argue that they are entitled to summary judgment dismissing plaintiff's breach of contract cause of action because the School District signed off on three separate occasions on clear and unambiguous drawings which did not include gas, water or electric at the student lab tables and, in doing so, the School District waived any related claim.

It is well-settled that the elements of a successful breach of contract claim include as follows: (1) the existence of a contract; (2) plaintiff's performance under the contract; (3) defendant's breach of contract; and (4) resulting damages (*Torok v Moore's Flatwork & Founds., LLC*, 106 AD3d 1421 [3d Dept 2013]). To the extent allegations here include an architect, Keystone, the analysis is properly one of contract (*Dormitory Auth. of the State of N.Y. v Samson Constr. Co.*, 30 NY3d 704 [2018]). Also relevant is the often-stated principle that construction contractors may rely upon design plans and specifications unless they are so apparently defective as to place a contractor of ordinary prudence on notice that the project, if completed to plan, is potentially dangerous (*Pioli v Town of Kirkwood*, 117 AD2d 954, 955 [3d Dept 1986], *lv denied* 68 NY2d 601 [1986]).

As noted, common to the three defense motions for summary judgment dismissing this first cause of action for breach of contract is that plaintiff School District signed and approved - on three separate occasions - design drawings that did not contain gas and electric at the student lab tables. The three sets of drawings that defendants assert are unambiguous as not containing any gas or electric at the student lab tables are as follows:

1. a set of schematic drawings signed off on by Dr. Peck on March 16, 2015 (Gay Aff, Ex 3);

2. a set of "final Design Development Documents" signed off on by Dr. Peck on May 19, 2015 (Gay Aff, Ex 4); and

3. a set of state education department drawings signed off on by Dr. Peck on November 19, 2015 (Gay Aff, Ex 5).

(Affidavit of Kenneth R. Gay, II, sworn to April 22, 2019).

Keystone submits the affidavit of Kenneth Gay, licensed architect, and Keystone representative on this Project. Gay avers to a reasonable degree of certainty in the field of architecture that the three sets of drawings issued by Keystone and listed above are unambiguous drawings that did not depict or call for gas or electric at the student lab tables, that each drawing was accepted by plaintiff via Peck's signature, and that there is no State requirement requiring either gas and electric at science tables (Gay Aff, ¶ 41).

Evans submits the affidavit of Raymond Millard, its manager on this Project. First, Millard avers that Evans had no involvement in the Project design and simply relied on the finished design documents. Further, Millard avers that the plumbing design drawings did not show any water, gas or electric at the student lab tables (Millard Affidavit sworn to April 25, 2019, ¶ ¶ 6-8). Millard also avers that Evans had no involvement in the design of the Project.

Smith Miller submits the affidavit of Charles C. Smith, P.E., a registered engineer and co-founder of Smith Miller. Smith avers that "Smith Miller was never apprised that the plaintiff desired gas and water to be installed at every student table in the science classrooms, and the drawings at all times were unambiguous and reflected gas and water to be piped to the instructor table and ADA student tables, but NOT to the island tables" (Smith Aff, ¶¶ 28-30, 41). Smith

avers to a reasonable degree of certainty in the field of engineering that the drawings prepared by Smith Miller complied with what was communicated by Keystone and/or plaintiff and were approved and accepted by plaintiff on its own and by and through its construction manager Riordan (Smith Aff, ¶ 42).

The court finds that the defendants have made a prima facie showing of entitlement to judgment as a matter of law based upon the affidavits of Gay, Millard and Smith, establishing that the three drawings approved by plaintiff were unambiguous in not including gas or electric at the student lab tables (*Brushton-Moira Cent. School Dist. v Thomas Assoc.*, 91 NY2d 256 [1998]).[2] Additionally, defendant Evans established that the design plan and specifications were not so apparently defective as to place them as a contractor on notice that the plans were potentially dangerous. The court further finds plaintiff School District's signature on each of the three sets of drawings constitutes an acceptance of those drawings (*Infilco Degremont v Carland Constr. Co.*, 180 AD2d 538 [1st Dept 1992]). Additionally, the court finds that plaintiff accepted the work by way of AIA payments applications that were reviewed and approved by plaintiff's construction manager, Riordan (Millard Aff sworn to April 25, 2019, ¶ 19, Ex 6).

Thus, the burden has shifted to plaintiff as the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. More specifically, plaintiff's burden is to come forward with

[2]Evans also submits the affidavit of Cynthia Transue, owner of Riordan, plaintiff's construction manager on the Project. Transue also avers the drawings are unambiguous (Transue Affidavit, ¶ 5). The court accepts the affidavit over the objection of plaintiff but given defendants' other proof did not rely on the Transue affidavit.

evidentiary proof in admissible form that raises a question of fact as to whether the three approved drawings were not unambiguous and showed gas or electric at the student lab tables and were not so apparently defective.

Plaintiff's opposition is two-fold. First, plaintiff submits an affidavit from Adam Krager, a former Keystone employee, who was originally Keystone's project designer for this Project. Krager avers that he assisted in the flow of information between plaintiff and defendant Smith Miller before leaving Keystone in 2015. Krager recites his involvement in pre-construction meetings and recalls plaintiff's express desire for gas, water and electric at the student lab tables. Second, plaintiff argues that various other proof including meeting minutes, emails, and punch lists also corroborate plaintiff's position that it believed that gas and electric was supposed to be at each student lab table.

Defendants argue that expert proof is required to rebut defendants' expert proof (the affidavits of architect Gay and engineer Smith that the subject drawings do not contain gas and electric at the student lab tables) and that Krager does not qualify as an expert. The court finds that expert testimony is required to rebut defendant's expert testimony that the three drawings signed by plaintiff are unambiguous as not showing gas or electric at the student lab tables (*Columbus v Smith & Mahoney,* 259 AD2d 857, 858 [3d Dept 1999]).

Plaintiff argues that Krager qualifies as an expert due to his involvement in the Project, but the court disagrees. Krager does not present any expert qualifications other than he was "project designer" and there is no representation that he is a certified architect or licensed

engineer qualified to read the design drawings. As such, plaintiff's failure to submit expert testimony renders plaintiff's opposition legally insufficient (*Brushton-Moira Central School District*, 91 NY2d 256). In and of itself, plaintiff's failure to oppose these motions with expert proof is a basis for granting defendants' motions.

Parenthetically, however, even if the court were to have found that expert proof was not required or that Krager qualified as an expert, the court finds Krager's affidavit is insufficient to meet plaintiff's burden in opposition. Quite simply, Krager offers no opinion on the substance of the three drawings or even argues that the drawings show gas or electric lines at the student lab tables. Thus, Krager's affidavit is insufficient as a matter of law to rebut the defendants' experts' conclusions that all three drawings were unambiguous and not defective.

To the extent that Krager recalls that plaintiff desired gas, water and electric at each student table during his tenure at Keystone the court finds these recollections as insufficient to raise questions of fact. Krager left Keystone in September 2015. Krager's departure was before there were additional designs plans (Gay Aff sworn to June 14, 2019, ¶ 1) and a year before Evans was even the successful bidder on the Project (Millard Aff sworn to June 17, 2019, ¶ 3). Thus, while the court accepts Krager's recollections of plaintiff's desires during the design phase, those recollections have no relevancy to the drawings that were completed after his departure from Keystone. Accordingly, Krager's affidavit does not contradict defendants' proof that the three drawings were unambiguous as not containing gas or electric at the student lab tables or somehow defective (*Pioli*, 117 AD2d 954).

The court now turns to plaintiff's remaining arguments in opposition. Plaintiff argues that Keystone's motion for summary judgment must be denied because the plaintiff-Keystone contract contains a no waiver clause. More specifically, the contract states:

> [n]o waiver of any breach of any condition of the Amendment shall be binding unless in writing and signed by the party waiving said breach. No such waiver shall in any way affect any other term or condition of this Amendment or constitute a cause or excuse for a repetition of such or any other breach unless the waiver shall include the same.

(Hulslander Aff dated April 22, 2019, Ex M [p 18]).

Plaintiff argues that Peck's signature on the three drawings does not constitute a waiver or, at the least, there is a question of fact regarding the issue of waiver. In support of its argument, plaintiff points to the two Certificates of Substantial Completion for Evans' work in which it expressly excluded the gas and electric issue (Pl Ex V).

While the issue of waiver typically presents a question of fact, if the facts establish a knowing, voluntary, and intentional abandonment of an alleged right then waiver may be determined as a matter of law (*AXA Global Risks U.S. Ins. Co.*, 302 AD2d 844 [3d Dept 2003]). Here, the court finds that plaintiff's act of signing off on the three drawings, signing off on punch lists, and approving payments all equate to a knowing, voluntary, and intentional abandonment of any objection to the content of the design drawings. To find to the contrary would place architects, engineers, and construction contractors in the untenable position of never having a final set of approved design drawings or completed punch list of work.

Plaintiff also argues that minutes from various meetings both before and after construction containing references to water, gas and electric at each student lab table show that there is an issue of fact as to whether *the plans* called for gas and electric at each table. To the extent that the meetings were part of the design phase and pre-date the signed drawings, the court finds those minutes lack probative value. To the extent that the meetings post-dating construction establish that certain plaintiff representatives may have *believed* that gas and electric were still included in the design, plaintiff's belief does not supersede the final design drawings approved by plaintiff on its own and by and through its construction manager.

Likewise, plaintiff also argues that various emails exchanged between the parties show that there is an issue of fact as to whether the plans called for gas at each student table. The court finds these emails do not equate to evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. Quite simply, the emails cannot be used to cast doubt on the drawings. The court finds that to the extent these emails contain references to documentary evidence such as the drawings, the best evidence of those drawings are the drawings themselves (*Greenfield v Philles Records,* 98 NY2d 562, 569 [2002]).

Even accepting plaintiff's argument that the minutes and emails establish that plaintiff School District intended gas and electric at each student table, plaintiff's intention does not equate to evidentiary proof that the drawings were unambiguous as not containing gas and electric and that plaintiff on its own and through its construction manager signed off on said drawings.

Plaintiff also argues that Evans' own base bid documents raise questions of fact because the bid contains 26 gas turrets in the science wing. This argument, however, is made by counsel and again notable for the lack of expert testimony that those 26 turrets were supposed to be at the student tables. In any event, Evans' reply papers demonstrate that while the bid did contain 26 gas turrets, said turrets were not located at the student lab tables (Millard Aff sworn to June 17, 2019, ¶ 8).

Plaintiff makes a final attempt to avoid summary judgment by arguing that further discovery is needed. Plaintiff does not, however, adequately explain what missing document and/or testimony could be uncovered to override the finality of the unambiguous signed drawings. The court finds that plaintiff has offered only speculation about what future discovery would reveal which is insufficient to support a finding that further discovery is warranted (*Ivory Dev., LLC v Roe*, 135 AD3d 1216, 1223-1224 [3d Dept 2016]; *2 N. Street Corp. v Getty Saugerties Corp.*, 68 AD3d 1392, 1396 [3d Dept 2009*], lv denied* 14 NY3d 706 [2010]).

In sum, the court has no doubt that teachers and/or various school administrators believed or even intended that the student lab tables would include gas and electric. However, the court is equally convinced that the final drawings did not reflect that belief and were approved by plaintiff and plaintiff's construction manager. Quite simply, these defendants are not telepathic and, as such, are not responsible for the failure of plaintiff to communicate with defendants and/or its own construction manager.

In view of the foregoing, the court finds that plaintiff School District has failed to meet its burden in opposing defendants' motions for summary judgment and that the first cause of action for breach of contract must be dismissed.

B. Negligence cause of action

Plaintiff also alleges a negligence cause of action against the defendants. It is well-settled that "[a] simple breach of contract claim is not to be considered a tort unless a legal duty independent of the contract itself has been violated..." (*Clark–Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]). Here, plaintiff has not demonstrated any special relationship or legal duty aside from the contractual relationships at issue (*Scott v KeyCorp*, 247 AD2d 722, 725 [3d Dept 1998]). Thus, the court finds that the negligence claim is based upon the same alleged wrongful conduct as the breach of contract claim, rendering the negligence claim duplicative (*Heffez v L & G Gen. Constr., Inc.*, 56 AD3d 526, 527 [2d Dept 2008]). Therefore, defendants' motions for summary judgment dismissing the negligence cause of action must be granted as well.

In view of the foregoing, defendants' respective motions for summary judgment dismissing the complaint and any cross-claims are granted. Plaintiff's cross-motion to amend the complaint to add a party defendant is denied as moot.

II. COUNTERCLAIMS

Defendants also move for summary judgment on their respective counterclaims. For its part, Keystone seeks $125,526.25 on its counterclaim based upon outstanding invoices

(Keystone's amended answer with counterclaim, ¶ 28; Gay Aff sworn to April 22, 2019, Ex 12). Evans claims it is due $48,824.85 plus interest of $5,492.85 from October 2017 through August 30, 2019 (Millard Aff sworn to April 25, 2019, ¶ 25, Ex 6). Smith Miller submits it is owed $37,921 (Charles C. Smith, P.E. ¶¶ 44-46, Ex 12).

Plaintiff did not submit any written opposition to the counterclaims. Accordingly, absent any opposition, the court finds that each defendant is entitled to summary judgment on its stated counterclaims.

That said, the court finds questions exist regarding the amounts due. For instance, Keystone's amended answer contains a counterclaim seeking $125,526.25 (Keystone's amended answer with counterclaim, ¶ 28), but Keystone's moving papers seek summary judgment on a counterclaim of $191,541.26 (Hulslander Affirmation dated April 22, 2019, ¶ ¶ 35-36). The court cannot ascertain from this record the reason for the difference in the amounts due. Smith Miller's counterclaim seeks $37,921 to the extent it is not awarded as part of Keystone's counterclaim. The court cannot determine from the papers whether the Smith Miller damages are included in the Keystone counterclaim. With respect to Evans, although various AIA payment applications are annexed to its moving papers, the applications date back years and some of the amounts unpaid are not clear to the court from this record. The court will hold an inquest on notice to counsel to ascertain the amounts due under the respective counterclaims. The court will contact counsel to schedule an attorney conference for purposes of scheduling the inquest.

CONCLUSION

Based upon the foregoing, the court finds as follows:

1. Defendant Keystone's motion for summary judgment dismissing the complaint and all cross-claims is granted;

2. Defendant Keystone is granted judgment on its counterclaim in an amount to be determined following an inquest;

3. Defendant Evans' motion for summary judgment dismissing the complaint and all cross-claims against it is granted;

4. Defendant Evans is granted judgment on its counterclaim in an amount to be determined following an inquest;

5. Defendant Smith Miller's motion for summary judgment dismissing the complaint and all cross-claims is granted;

6. Defendant Smith Miller is granted judgment on its counterclaim in an amount to be determined following an inquest; and

7. Plaintiff's cross-motion to amend the complaint to add a party defendant is denied.

This constitutes the decision and order of the court.

Dated: July 16, 2019
Binghamton, New York

HON. FERRIS D. LEBOUS

All papers submitted in connection with this motion and the Decision and Order have been electronically filed with the Broome County Clerk through the NYSCEF System:

Keystone
Notice of Motion dated April 22, 2019;
Affirmation of Kevin E. Hulslander, Esq. dated April 22, 2019 with exhibits;
Affidavit of Kenneth R. Gay, II sworn to April 22, 2019 with exhibits;
Memorandum of Law dated April 22, 2019;
Affirmation of Kevin E. Hulslander, Esq. dated June 13, 2019 in opposition to cross-motion;
Reply Affidavit of Kenneth R. Gay, II sworn to June 14, 2019; and
Affirmation of Kevin E. Hulslander, Esq. dated June 17, 2019 in further support of motion.

Evans
Notice of Motion for Summary Judgement dated April 25, 2019;
Affirmation of Alan J. Pope, Esq. dated April 25, 2019 with exhibits;
Affidavit of Raymond Millard sworn to April 25, 2019 with exhibits;
Memorandum of Law dated April 25, 2019;
Affidavit of Cynthia Transue sworn to June 5, 2019;
Letter from Alan Pope, Esq. dated June 10, 2019;
Attorney Affidavit of Alan J. Pope, Esq. sworn to June 13, 2019; and
Reply Affidavit of Raymond Millard sworn to June 17, 2019.

Smith Miller
Notice of Motion dated April 26, 2019;
Attorney Affirmation of Stanley J. Tartaglia, Jr. dated April 26, 2019 with exhibits;
Affidavit of Charles C. Smith, P.E. sworn to April 24, 2019 with exhibits;
Memorandum of Law undated;
Affirmation in Opposition of Stanley J. Tartaglia, Jr. dated June 14, 2019; and
Attorney Reply Affirmation of Stanley J. Tartaglia, Jr. dated June 17, 2019.

Plaintiff
Notice of [Cross] Motion dated June 7, 2019;
Affirmation of Ronnie White, Jr., Esq. in support undated with exhibits;
Affidavit of Adam Krager sworn to June 6, 2019;
Letter from Ronnie White, Jr. dated June 7, 2019;
Affidavit of Ronnie White, Jr., Esq. in opposition sworn to June 11, 2019;
Affidavit of Lloyd L. Peck, Ed.D sworn to June 10, 2019;
Affidavit of Lloyd L. Peck, Ed.D sworn to June 11, 2019;
Affidavit of Joseph Roosa sworn to June 11, 2019;
Affidavit of John Hillis sworn to June 12, 2019;
Memorandum of Law in Opposition (Keystone) dated June 11, 2019;
Memorandum of Law in Opposition (Evans) dated June 11, 2019; and
Memorandum of Law in Opposition (Smith Miller) dated June 11, 2019.