

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.**

-----X
EASTFIELD GLASS CO., INC.,

Plaintiffs,

-against-

AVANTI SYSTEMS USA, INC.,

Defendants.
-----X

DECISION & ORDER
Index No. 54676/2015
Seq # 2 & 3

The following papers were read on the plaintiff's motion for summary judgment, pursuant to CPLR 3212, dismissing the defendant's second, third, fourth, eighth, seventeenth, and eighteenth affirmative defenses; and on the defendant's cross-motion seeking summary judgment, pursuant to CPLR 3212:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Affirmation/Affidavit/Exhibits A-H	1-11
Memorandum of Law in Support	12
Affirmation in Opposition/Exhibits A-J	13-23
Memorandum of Law in Opposition	24
Memorandum of Law in Reply/Affirmation/Affidavit/Exhibits A-V	25-49
Notice of Cross-Motion/Affirmation/Exhibits A-J	50-61
Memorandum of Law in Support of Cross-Motion	62
Reply Affirmation	63
Memorandum of Law in Reply	64

Based on the foregoing submissions the motion is granted in part and denied in part and the cross-motion is denied:

Factual and Procedural Background

This action arises out of a construction project, wherein the plaintiff, Eastfield Glass Co., Inc. ("Eastfield"), was retained by the general contractor, Barr & Barr, Inc., to provide glass products on the project. Eastfield then entered into a sub-contract with the defendant, Avanti Systems USA, Inc. ("Avanti"), to design and construct windows, door frames and a glass wall design on the project. Avanti submitted a proposal requiring a Eastfield to pay Avanti a \$71,531 deposit or 25% of the contract. Eastfield paid the 25% deposit and on October 22, 2014, issued a purchase order which referenced the proposal, for a total price of \$286,124.00. After the initial proposal and purchase order, Avanti requested an increase in the contract price and a revised proposal and change order was issued increasing the price of the contract by \$120,000.00.

Subsequently, Eastfield and Avanti started having issues with Eastfield claiming that Avanti delayed the project by failing to timely submit shop drawings for approval by the project architect and Avanti claiming that Eastfield failed to make timely payments on the project. Avanti emailed Eastfield on December 29, 2014, advising that it would not release any further material until it was paid and on December 30, 2014, Avanti sent a 48 Hour Notice to Cure Letter with increased pricing and a revised payment schedule because the glass manufacturer had substantially increased its price and further advising that payment must be received no later than January 5, 2015 or Avanti would pursue cancellation of the contract. On December 31, 2014, Jeff Jutkiewicz ("Jutkiewicz") of Eastfield responded that it was waiting on the general contractor to provide funds for the additional payments and requested a discussion of options. On January 2, 2015, Jutkiewicz again emailed Avanti advising that the general contractor would be paying and Eastfield would be sending

payment to Avanti on Monday. Jutkiewicz also advised Avanti of work that needed to be performed. Avanti responded that they were past that point and that as previously stated, there would be a very steep increase in price because the Forms and Surfaces prices had not been guaranteed and those prices were no longer valid. Jutkiewicz requested that Avanti contact Forms & Surfaces to request a hold in pricing until Wednesday and advised that Eastfield would send payment via FedEx on Monday.

However, Avanti alleges that Eastfield failed to make the payment and instead contacted the vendor directly. On January 20, 2015, Eastfield sent Avanti a letter informing it that it had been directed by the project owner and the construction manager to sever all ties with Avanti and undertake the work itself. Eastfield requested return of its deposit, less reasonable deductions for the submittals and manpower. On January 29, 2015, Avanti sent a letter advising Eastfield that it considered any and all contracts to be null and void and further advising Eastfield that the deposit was non-refundable and would cover shop drawing preparation, project management, and time lost for material preparation and restocking.

Eastfield files this action and now files that instant motion for summary judgment, pursuant to CPLR 3212, dismissing the defendant's second, third, fourth, eighth, seventeenth, and eighteenth affirmative defenses. Avanti's second affirmative defense asserts the doctrines of estoppel, laches, ratification, waiver and/or release; the third affirmative defense asserts that the claims are barred by documentary evidence; the fourth affirmative defense asserts that the claims are barred by the statute of frauds; the eighth affirmative defense asserts that the claims are barred in whole or in part by the parole evidence rule; the thirteenth affirmative defense asserts that claims are barred by the

doctrine of accord and satisfaction; the seventeenth affirmative defense asserts that the claims are barred in whole or in part by settlement and accord; and the eighteenth affirmative defense asserts that the claims are barred due to lack of standing. Avanti also now files a cross-motion seeking summary judgment on its claims, pursuant to CPLR 3212.

In support of the motion, the plaintiff relies on, among other things, the attorney's affirmation, Tom Lampron, Eastfield's President's affidavit, a copy of the proposal, the purchase order, a sample email, and copies of letters between the parties.

The Court has reviewed all of the affirmative defenses sought to be dismissed by Eastfield and now grants the motion with regard to some of the claims in the second affirmative defense and the fourth, eighth, thirteenth, seventeenth and eighteenth affirmative defenses. The plaintiff has established that these affirmative defenses are conclusory and the defendant has not substantiated these defenses with any proof. The defendant is required to produce evidentiary proof in admissible form establishing a triable issue of material fact, not mere conclusions, hope, unsubstantiated allegations or assertions (*see Zuckerman v. City of New York*, 49 NY2d 577; *Becher v. Feller*, 64 AD3d 672 [2d Dept 2009]).

With regard to estoppel in the second affirmative defense, while Avanti may be able to show that it was misled by Eastfield's conduct, it provided no evidence that it justifiably relied on the conduct to its disadvantage or that its reliance upon any misrepresentation caused a prejudicial change in its position, as required as an element. (*see First Union Nat. Bank v Tecklenburg*, 2 AD3d 575 [2d Dept 2003]). Avanti also provides no reasonable argument or evidence to support the laches claim in the second affirmative defense.

However, there are issues of fact with regard to the defenses of ratification, waiver and/or release.

Avanti's third affirmative defense asserts that the claims are barred by documentary evidence. There are issues of fact with regard to the terms and conditions of the agreement and whether or not each party fulfilled its requirements under the contract. The documentary evidence provides evidence to resolve these issues of fact. Therefore, the third affirmative defense is not dismissed.

With regard to the fourth affirmative defense, the Court finds no merit in Avanti's argument that it should be allowed to maintain the affirmative defense of the statute of frauds because Eastfield has not made an affirmative representation that it does not intend to assert that there is another contract other than the contract presented by the parties and the modification of such. Therefore, that affirmative defense is dismissed. Avanti's eighth affirmative defense is also dismissed for similar reasons. The parties have both referred to the contract and the modifications of the contract in their arguments and they have provided testimony regarding emails and conversations with regard to the issues involved with the contract. Neither party has asserted that there is antecedent or contemporaneous oral representations that would modify the written terms of their agreement. Therefore, the eighth affirmative defense is dismissed.

The defense of accord and satisfaction, the thirteenth affirmative defense, is the acceptance of a check in full satisfaction of a disputed unliquidated claim (*see Trans World Grocers Inc. v Sultana Crackers Inc.*, 257 AD2d 616 [2d Dept 1999]). "The party asserting the affirmative defense...must establish that there was a genuine dispute regarding an unliquidated claim between the parties which they mutually resolved through a new

contract discharging all or part of their obligations under the original contract" (*Id.*). This is not an assertion being made in this case and therefore, that defense is dismissed. Similar reasoning applies to the seventeenth affirmative defense of settlement and accord and therefore, that affirmative defense is also dismissed.

Avanti's eighteenth affirmative defense of lack of standing has already been addressed by this Court (Connolly, J.). Additionally, Avanti is not allowed in a summary judgment motion to simply state that it is preserving its right to assert the defense based on a search and a finding that no business entity was found. It must present admissible evidence to rebut the plaintiff's prima facie case requiring dismissal.

Avanti's motion for summary judgment

The Court (Lefkowitz, J.) so ordered a Trial Readiness Referee Report & Order dated November 17, 2016, directing the plaintiff to serve and file a Note of Issue and Certificate of Readiness within twenty days of the entry of the Order and directing summary judgment motions by any party to be filed within sixty days of the filing of the Note of Issue. There was no request for an extension of the requirement, nor was any extension of the time to file the motion granted. The plaintiff filed the Note of Issue on December 6, 2016, requiring the summary judgment motion to be filed within sixty days of that date. Avanti did not file its cross-motion until March 1, 2017, well after the sixty days.

Statutory time frames and court ordered time frames are not options, and are to be taken seriously by the parties (*see Miceli v. State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725 [2004]). The purported merit of the motion does not provide good cause for failing to file the motions timely (*Id.*; *see also Brill v City of New York*, 2 NY3d 648 [2004]; *State Farm*

Fire & Casualty v Parking Systems Valet Service, 48 AD3d 550 [2d Dept 2008]; *Dallal v Kantrowitz, Goldhamer & Graifman, P.C.*, 48 AD3d 508 [2d Dept 2008]). Also, “no excuse at all, or a perfunctory excuse, cannot be ‘good excuse’” *Brill v. City of New York*, 2 NY3d 648 [2004]).

The defendant argues that the cross-motion should be considered by the Court, because it is being made on nearly identical grounds as the plaintiff’s motion. “A court may [] entertain an untimely cross motion for summary judgment if the court is deciding a timely motion for summary judgment made on nearly identical grounds” (see *Paredes v 1668 Realty Associates, LLC*, 110 AD3d 700 [2d Dept. 2013]). However, in this case the issues raised in the defendants’ cross-motion, seeking summary judgment on its counterclaims, were not nearly identical to the issues raised in Eastfield’s summary judgment motion seeking dismissal of the Avanti’s affirmative defenses only (*Id.*; see also *Filannino v. Triborough Bridge and Tunnel Authority*, 34 AD3d 280 [1st Dept 2006]). Eastfield did not seek summary judgment of its Complaint or on Avanti’s counterclaims and therefore, the issues were not nearly identical. The motion was not timely filed and thus the Court will not consider same. McKinney’s Civil Practice L & R 3212.

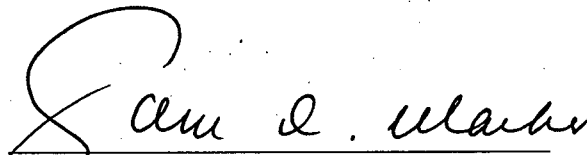
Furthermore, even if the motion was considered timely by the Court, there are issues of fact with regard to the requirements of the contract and whether the parties met their respective requirements. Accordingly, Eastfield’s motion is granted in part and denied in part and Avanti’s motion is denied.

All parties are directed to appear before the Settlement Conference Part on July 25, 2017 at 9:15 a.m. in Courtroom 1600. To the extent any relief requested in motion sequence 1 was not addressed by the Court, it is hereby deemed denied.

The foregoing is the Decision and Order of this Court..

Dated: White Plains, New York
June 30, 2017

1


HON. SAM D. WALKER, JSC